

## ARTICLES

### PROPERTY'S CEILING: STATE COURTS AND THE EXPANSION OF TAKINGS CLAUSE PROPERTY

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## INTRODUCTION

THE Federal Constitution and nearly all state constitutions contain takings clauses, which require the payment of just compensation when government takes “property” for public use.<sup>1</sup> Paradoxically, the term “property” has received less attention than the rest of the words in these takings clauses,<sup>2</sup> though it is generally agreed that state property law—and typically, the judge-made common law of the state—define the range of interests that qualify for constitutional protection.<sup>3</sup> To the extent that scholars have considered external limits on this range of interests, they have focused on the threat posed by state courts trying to contract the coverage by narrowing what counts as a property interest, and argued about the different ways that federal courts should evaluate these attempts to circumvent constitutional protection.<sup>4</sup> Little attention

<sup>1</sup> U.S. Const. amend. V; e.g., Cal. Const. art. I, § 19(a); Ill. Const. art. I, § 15; Mass. Const. pt. I, art. X; N.Y. Const. art. I, § 7; Tex. Const. art. I, § 17. Only North Carolina currently lacks a takings clause (though it has a due process clause); one is under consideration. N.C. Const. art. I, § 19; H.R. 3, 2015 Gen. Assemb., 2015 Sess. (N.C. 2015).

<sup>2</sup> See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 891, 934–42 (2000) (observing that “the threshold requirement that a claimant have ‘private property’ has received less attention” than other parts of the Takings Clause); Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1523 n.277 (1990) (“[T]he question of what property means in the takings context has not been rigorously analyzed by scholars and judges—despite the fact that it would seem central to any formulation of a coherent takings doctrine.”). See generally D. Benjamin Barros, Note, *Defining “Property” in the Just Compensation Clause*, 63 Fordham L. Rev. 1853 (1995) (discussing the Supreme Court’s failure to define “property” in the takings clause context, and arguing that state property law should control). Some more recent interventions have attempted to reconcile the disparate treatments of “property” in the Fifth and Fourteenth Amendments. See generally Tom W. Bell, “Property” in the Constitution: The View from the Third Amendment, 20 Wm. & Mary Bill Rts. J. 1243 (2012) (analyzing the Third Amendment to provide guidance on this issue); James Y. Stern, *Property’s Constitution*, 101 Calif. L. Rev. 277 (2013) (arguing that property should have a consistent meaning in the Constitution, but the Fourteenth Amendment’s protection from deprivations and the Fifth Amendment’s protection from takings lead to differences in coverage). Largely because of the nature of the case study utilized, this Article limits itself to the word “property” in takings clauses.

<sup>3</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

<sup>4</sup> Much of “judicial takings” scholarship, for example, deals with how federal courts should respond to state legislatures and courts narrowing the definition of property to escape constitutional scrutiny for their actions. See generally Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 Cornell L. Rev. 305 (2012) (analyzing

has been paid, however, to how state courts expand the coverage of protected property, let alone the consequences of that capability. The few works that exist suggest that recognizing new common law property rights as constitutional property is a dangerous possibility because it could make more regulations and legislation into takings.<sup>5</sup> By and large, scholars treat property expansion as a purely theoretical problem.<sup>6</sup>

This Article challenges that view. It provides a new history from previously untapped sources within takings law, using them to argue that state-court property innovation is a long-standing piece of the American property system and one that sheds light on existing theories of institutional choice in property law.<sup>7</sup> Since at least 1850, state courts have ex-

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when courts should proceed with a judicial takings remedy, as opposed to utilizing a due process framework); Thompson, *supra* note 2 (discussing risks and benefits of federal courts assuming oversight over state court rulings on property).

<sup>5</sup> See Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 *Marq. L. Rev.* 9, 19 (1997) (“[I]s segmentation a useful or wise part of takings law? I think not.”); Merrill, *supra* note 2, at 899 (describing the “danger” of recognizing too many fragmentary interests as constitutional property); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1667, 1676–77 (1988) (describing the too-much-property problem as “conceptual severance” of property into smaller bits, including division of property into functions or easements).

<sup>6</sup> See, e.g., David A. Dana & Thomas W. Merrill, *Property: Takings* 64–65 (2002) (using hypothetical examples of property expansion rather than any real-world cases). But see Merrill, *supra* note 2, at 900 (arguing that at least one Supreme Court case has engaged in an “egregious form of conceptual severance,” though not because it recognized a state’s effort to expand the coverage of property).

<sup>7</sup> The cases discussed in this Article’s case study have never been used to illustrate a change in the conception of constitutional property. To the contrary, the origins of the constitutional property created as a result of these cases—the “right of access”—have been described as a mystery. See *Bacich v. Bd. Of Control*, 144 P.2d 818, 823 (Cal. 1943) (“right of access”); *D’Arago v. State Rds. Comm’n*, 180 A.2d 488, 490 (Md. 1962); *State ex rel. State Highway Comm’n v. Danfelter*, 384 P.2d 241, 243 (N.M. 1963) (“The ‘right of access’ is apparently judge-made, the exact origin of which is difficult to determine.”). A handful of articles have used some of the street grade cases for other purposes. A few scholars have discussed them in service of discussions about modern roadway law. See, e.g., Frank M. Covey, Jr., *Frontage Roads: To Compensate or Not to Compensate*, 56 *Nw. U. L. Rev.* 587 (1961); William B. Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 *Tex. L. Rev.* 733, 757–60 (1969); Michael L. Stokes, *Access Management: Balancing Public and Private Rights in the Modern “Commons” of the Roadway*, 60 *Clev. St. L. Rev.* 585, 592–603 (2012). Some of the early grading cases—which declined to compensate for serious damages to property—have been invoked by authors to show either the capture of the state by business or the increasing control of the state over public property. See Morton J. Horwitz, *The Transformation of American Law, 1780–1860*, at 70–74 (1977); William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* 128–31 (1996). Professor Robert Brauneis has discussed some of the cases to consider the creation of a private right of action (and remedy) under constitutions. Robert Brauneis, *The First*

panded the range of property rights that qualify for protection from uncompensated expropriation,<sup>8</sup> recognizing new forms of constitutional property to hold state and local legislatures accountable for damages to or devaluations of land when existing law leaves individuals without redress.<sup>9</sup> This Article uncovers that missing narrative, explaining how state courts, in particular, have played a critical role in takings jurisprudence by enlarging the scope of constitutional property. It thus provides new insights on the theoretical puzzles associated with property expansion and enables new reasoning about how it should be permitted or constrained.

The history of constitutional property innovation adds to three existing strands of property scholarship. First, it provides a new historical account from within takings law, describing a tectonic shift in the conception of constitutional property that many scholars have overlooked.<sup>10</sup>

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Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 128–30 (1999).

<sup>8</sup>The Fourteenth Amendment—which made the Bill of Rights applicable against the states—was not passed until 1868, and the Federal Takings Clause was not clearly incorporated against the states until 1897. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236–39 (1897). As a result, most decisions before that date rely on the takings clauses of state constitutions—though later decisions interpreting the Federal Constitution do not distinguish between the “right of access” as state constitutional property versus federal constitutional property. See *infra* Subsection I.D.3.

<sup>9</sup>I do not assert that this Article makes a valid originalist claim about the Takings Clause of the Fifth Amendment, although many scholars have been willing to use nineteenth-century state-court cases in that way. See, e.g., Nicole Stelle Garnett, “No Taking Without a Touching?” Questions from an Armchair Originalist, 45 San Diego L. Rev. 761, 773–74 (2008). I share Professor Garnett’s skepticism about using cases from the late nineteenth century as proof of original intent, but I do think they can be probative of questions about the wisdom of takings rules and the precedents for modern actions. On the other hand, several of the cases I use in this study *were* decided before the passage of the Fourteenth Amendment in 1868, which some scholars have suggested can support originalist arguments about the Takings Clause as applied to the state and local governments by that Amendment. See, e.g., Michael B. Rappaport, Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May, 45 San Diego L. Rev. 729, 731 (2008).

<sup>10</sup>An interesting student piece that focuses on the history of the elevated railroad cases in New York State hints at the idea that a new conception of property had something to do with nineteenth-century changes in takings law. Elizabeth Arens, Note, The Elevated Railroad Cases: Private Property and Mass Transit in Gilded Age New York, 61 N.Y.U. Ann. Surv. Am. L. 629 (2006). Arens discusses the use of easements of light, air, and access by a New York court in *Story v. N.Y. Elevated R.R. Co.*, 90 N.Y. 122 (1882), to find that constructing a street railroad was a “taking” of those easements under the New York Constitution. Arens ultimately uses the cases for a different purpose, arguing that courts were “reconsidering the

Second, it challenges the dominant view that property innovation is either too costly to undertake or a threat to the entire regulatory state, pointing out potential benefits of this understudied piece of takings jurisprudence.<sup>11</sup> Finally, and most importantly, this Article challenges key tenets of the “legislative preference” school of property law, and in particular, the work of Professors Thomas Merrill and Henry Smith. Merrill and Smith have argued that property rights take a limited number of standardized forms and that changes to this menu of rights are and should be made by legislatures, in keeping with the systemic goal of property regimes to reduce costs to parties who must assess and respect the rights of owners.<sup>12</sup> However, this history shows that courts have spent a century creating new property rights in takings law, meaning that the bedrock of legislative preference theory is missing a piece. This Article thus explores how the history of state-court property innovation confronts the legislative preference theory. It examines how history reinforces some of the fears Merrill and Smith have about the high costs of common law changes to property rules, but it also uses the history to reveal why courts’ creation of new property rights in takings law happens and why it might be desirable in some instances.

To illustrate the history of constitutional property innovation, this Article analyzes a case study from its earliest use: the “street grade cases.” Over the course of the nineteenth and early twentieth centuries, thousands of local governments vertically shifted roads up or down to level them, ease transport, or clear blight, often burying neighboring land and buildings or leaving them tens of feet in midair (quite literally on cliffs). State and local governments claimed that because they had merely built up or dug down the street itself—their own property—without touching the adjoining land, they could not be liable for the resulting devaluation to neighboring land and buildings, nor for the reconstruction costs necessary to make the structures livable.

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early nineteenth-century judiciary’s priority of development over individual property rights.” Arens, *supra*, at 631.

<sup>11</sup> This Article limits itself to explaining the benefits of court intervention in the cases that are the subject of its study. It does not delve deeply into analyzing whether any particular claims of new property rights might succeed, but it does conclude by noting a few contexts—for example, drone proliferation and new forms of energy—where technological disruption similar in scale to street regrading may call for court intervention.

<sup>12</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *Yale L.J.* 1, 58–68 (2000).

Litigants battled to receive damages for these devastating events, spawning well over a hundred years of judicial opinions, legislation, state constitutional revision, and public outcry. As this account reveals, state courts played a critical role in obtaining compensation for the individuals who suffered through these regrades. State courts invented a new form of property right—the right of access, providing individuals the right to maintain a means of entry and exit to the public street—that became “property” taken by the legislative actions authorizing regrades.<sup>13</sup> This innovation also catalyzed a series of political responses, in which courts and other state actors came to agree that affected owners should be compensated for damages. The legal changes wrought by these conflicts thus provide key insights on the development of takings law that courts and scholars have missed: the unique position and important function of state courts to define novel property interests that become subject to takings provisions.

This Article proceeds in three parts. Part I begins with the history behind state-court property innovation. It tells the story of the street grade cases, how courts first used and developed their authority to create new property rights, and the fallout from the decisions that recognized the “right of access” as a compensable interest under the takings clauses of constitutions. Part II explores the lessons that emerge from this history. The street grade cases indicate the worrisome potential for overbroad or ever-expanding constitutional property rights to inflict extraordinary administrative costs and freeze beneficial regulatory interventions. However, these cases also demonstrate how courts responded to a serious legislative failure and how court decisions helped initiate and perpetuate normative change. Part III thus considers how the street grade history undercuts some of the arguments for legislative preference in property law. It highlights the need for renewed scholarly attention to institutional choice in property law, and in particular, how doctrinal constraints or other limitations might preserve the beneficial role courts can

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<sup>13</sup> This Article focuses on the creation of the right of access, though some courts innovated other ways to address the regrade problems that spread less widely. See, e.g., *Vanderlip v. City of Grand Rapids*, 41 N.W. 677, 681 (Mich. 1889) (treating a de minimis displacement of earth onto the street as a per se taking); *Broadwell v. City of Kan.*, 75 Mo. 213, 218 (1881) (same); *Mosier v. Or. R.R. & Navigation Co.*, 64 P. 453, 454 (Or. 1901) (treating deprivation of lateral supporting soil as a taking); *Stearns' Ex'r v. City of Richmond*, 14 S.E. 847, 849 (Va. 1892) (same).

play in the takings system while minimizing the risks and high costs associated with court-created property rights.

#### I. THE BEGINNING OF STATE COURT PROPERTY INNOVATION: THE STREET GRADE CASES

During the course of the nineteenth and early twentieth centuries, one of the most significant problems in property law was presented by a new urban challenge: street regrading. Local governments believed that leveling the hills and filling in the lowlands would bring a variety of improvements to health, transportation, and urban life. One problem, however, was that many individuals owned land, homes, and businesses along the existing hills and valleys. The process of regrading generated substantial conflict between local governments and residents whose homes were left significantly devalued, sometimes atop cliffs, as in the photograph reproduced below.

**Figure 1, Hotel and Apartments During Regrade, Seattle, 1914<sup>14</sup>**



<sup>14</sup> Photograph: Ross Shire Hotel [6th & Marion], Seattle Mun. Archives Photograph Collection, Eng'g Dep't Photographic Negatives, Rec. Series 2613-07, Orig. No. 2388, Item No. 242 (June 24, 1914), <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?s1=regrade&S2=&S3=&l=100&Sect7=THUMBON&Sect6=HITOFF&Sect5=PHOT1&Sect4=AND&Sect3=PLURON&d=PHO2&p=1&u=%2F~public%2Fphot1.htm&r=12&f=G> [https://perma.cc/8KT9-C8TM]. This picture is an illustration of the sorts of landscapes regrading produced. The Seattle grading is best documented because it occurred after cameras were popularized. While there were disputes over grading in Seattle, many homeowners willingly paid to drop to the new street level. See William H. Wilson, Shaper of Seattle: Reginald Heber Thompson's Pacific Northwest 91–95 (2009).

This level of interference with the landscape was new to Americans at this time. Though grading and paving was common from Roman times onward, changing the original grade for convenience required a combination of vision and enormous infrastructural investment. It also tested the bounds of the law. Regrades rarely “took” the property of an individual outright—instead, the regrades negatively affected the property by reducing its accessibility and its value.

The regrade cases are significant for several reasons, though only one is focused on here. For one thing, they form a very early, cohesive body of case law on nontrespassory takings; the street grade cases were some of the first to hold that compensation was required when legislative actions affected either the value of land or the full enjoyment of property rights, but did not physically touch or take the land itself.<sup>15</sup> As such, the cases were an important step on the way to regulatory takings, the body of case law holding that certain regulations that “go too far” will trigger constitutional compensation requirements.<sup>16</sup> The street grade cases also reflect nineteenth- and twentieth-century changes in the theory of property: They were an extremely early example of courts thinking of property as a “bundle of rights,” rather than a physical thing.<sup>17</sup> Most importantly for our purposes, however, the street grade cases demonstrate the circumstances surrounding early state-court expansion of the sorts of interests that qualify as constitutional property. It is this aspect of the street grade cases that forms the foundation for this Article.

<sup>15</sup> See William B. Stoebuck, *Nontrespassory Takings in Eminent Domain* 21–25 (1977).

<sup>16</sup> See Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 *Utah L. Rev.* 1211, 1250–53. Kobach also argues that several water rights cases and cases finding deprivations of use rights may have predated even the street grade cases in requiring damages for devaluation. In my view, those cases are distinguishable from the street grade cases. The cases he cites involved the *physical* diversion of the water in which the plaintiff had use rights, the direct removal of a storefront depriving an individual of a lease, and legislative authorization of actions that flooded or permitted animals to graze on land. See *id.* at 1234–50. The street grade cases, in contrast, concerned the bare devaluation of property without any physical touching or appropriation. It is true, however, that there was a physical injury to a property right—the right of access. Grade changes physically interrupted that right, and did not merely regulate it.

<sup>17</sup> For discussions of the rise of the bundle concept, especially over the twentieth century, see Eric R. Claeys, *Bundle-of-Sticks Notions in Legal and Economic Scholarship*, 8 *Econ. J. Watch* 205, 211 (2011); J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 *UCLA L. Rev.* 711, 712 (1996); Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 *Vand. L. Rev.* 869, 877–80 (2013).



This Part tells in new detail and with new historical evidence how innovative conceptions of constitutional property developed in the street grade cases. It begins with a brief technological overview of the regrading process, gathered from multiple disaggregated sources in city histories. Section B describes the early rulings in which courts held that regrades did not take property, in part because courts and litigants failed to identify the right or property that was taken. Section C discusses the legal recognition by state courts of a “right of access” or “easement of access” that qualified as constitutional property. The final Section identifies the aftermath of that shift.

### *A. Background: Land Making and Land Breaking*

It is difficult to overestimate the breadth and impact of street regrading over the course of the nineteenth and early twentieth centuries. From Massachusetts to Washington, advances in transportation and engineering led urban leaders to vertically shift streets tens or even hundreds of feet. Street regrading controversies led to an uncountable number of local political efforts (and associated local news coverage),<sup>18</sup> fifteen state constitutional revisions,<sup>19</sup> and at least four visits to the U.S. Supreme

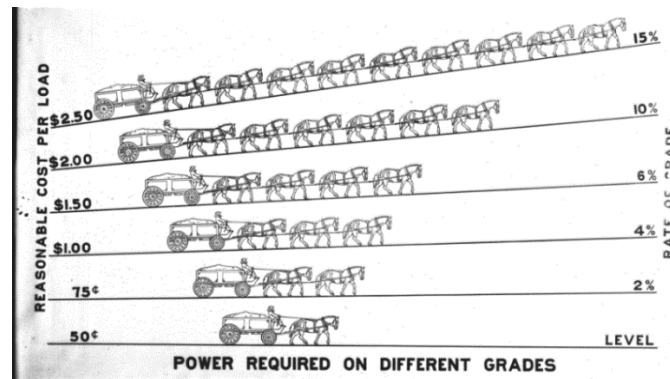
<sup>18</sup> E.g., *The Ferry Street War*, *Trenton Sunday Times Advertiser*, June 19, 1892, at 1; *The Flooded District*, *Sun* (Balt.), Oct. 21, 1874, at 4; *Four Ranches Are Involved in Trade*, *Sunday Oregonian* (Portland, Ore.), July 18, 1915, at 12; *Grade of the Streets*, *Chic. Daily Trib.*, Apr. 16, 1857, at 1; *Work Begins on Monday*, *Augusta Chron.* (Ga.), Mar. 30, 1902, at 6.

<sup>19</sup> Compare Ala. Const. of 1875, art. I, § 24, with Ala. Const. of 1868, art. I, § 25 (expanding the language of the takings clause); Ark. Const. of 1874, art. II, § 22, with Ark. Const. of 1836, art. II, § 10 (creating a separate and more detailed clause for takings); Cal. Const. of 1879, art. I, § 14, with Cal. Const. of 1849, art. I, § 8 (creating a separate and more detailed clause for takings); Ga. Const. of 1877, art. I, § 3, with Ga. Const. of 1868, art. I, § 3 (adding language strengthening rights of property holders); Ill. Const. of 1870, art. II, § 13, with Ill. Const. of 1848, art. XIII, § 8 (creating a separate and more detailed clause for takings); Ky. Const. of 1891, § 242, with Ky. Const. of 1850, art. XIII, § 14 (creating a separate and more detailed clause for takings); La. Const. of 1879, art. 6, with La. Const. of 1868, tit. I (adding a clause granting due process for takings); Minn. Const. art. I, § 13 (amended 1896), with Minn. Const. of 1857, art. I, § 13 (adding “destroyed or damaged” to the takings clause); Miss. Const. of 1890, art. III, § 17, with Miss. Const. of 1868, art. I, § 10 (adding more detail to the takings clause); Mo. Const. of 1875, art. II, § 21, with Mo. Const. of 1865, art. I, § 16 (creating a separate and more detailed takings clause); Neb. Const. of 1875, art. I, § 21, with Neb. Const. of 1866, art. I, § 13 (adding “damaged” to compensation for the takings clause); Pa. Const. of 1874, art. I, § 10, with Pa. Const. of 1838, art. IX, § 9 (adding more detail to the takings clause); Tex. Const. of 1876, art. I, § 17, with Tex. Const. of 1869, art. I, § 14 (creating a separate and more detailed takings clause); Va. Const. of 1902, art. IV, § 58, with

Court.<sup>20</sup> It is hard to imagine a modern analog.

Streets were regraded for many different reasons. Sometimes municipalities raised and lowered streets to reduce standing water, minimize flood risks, or improve sewers.<sup>21</sup> In other circumstances, regrades were undertaken to remove undesirable neighborhoods that had grown up (probably because the land was cheaper as a result of the inconvenient access to the hilltop).<sup>22</sup> Still, transportation improvements were probably the main driver of change. Both railroads and horse-drawn transportation benefitted from level streets, free of hills and valleys. The following image, taken from the city of Seattle's engineering department records from 1913, best illustrates the cost savings associated with flatter grades.

Figure 2, Cost Savings with Different Grades, 1913<sup>23</sup>



Va. Const. of 1870, art. V, § 14 (adding damage consideration to the takings clause); W. Va. Const. of 1872, art. III, § 9, with W. Va. Const. of 1863, art. II, § 6 (adding property damage consideration to the takings clause). Several new states also adopted provisions that covered regrading in their first constitutions. See Colo. Const. of 1876, art. II, § 15; Mont. Const. of 1889, art. III, § 14; N.D. Const. of 1889, art. I, § 14; S.D. Const. of 1889, art. VI, § 13; Utah Const. of 1895, art. I, § 22; Wash. Const. of 1889, art. I, § 16.

<sup>20</sup> *Chicago v. Taylor*, 125 U.S. 161, 162 (1888); *Transp. Co. v. Chicago*, 99 U.S. 635, 645 (1878); *Smith v. Corp. of Wash.*, 61 U.S. (20 How.) 135, 142, 148 (1857); *Goszler v. Corp. of Georgetown*, 19 U.S. (6 Wheat.) 593, 594–96 (1821).

<sup>21</sup> Donald L. Miller, *City of the Century: The Epic of Chicago and the Making of America* 125 (1996); see Sam Bass Warner, Jr., *Streetcar Suburbs: The Process of Growth in Boston, 1870–1900*, at 140 (2d ed. 1978).

<sup>22</sup> Matthew Klinge, *Emerald City: An Environmental History of Seattle* 95 (2007).

<sup>23</sup> Photograph: Power Required on Different Grades-Cost Per Load (Graph), Seattle Mun. Archives Photograph Collection, Eng'g Dep't Photographic Negatives, Rec. Series 2613-07, Orig. No. 2195 (Nov. 12, 1913), <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?s1=82&S2=&S3=&l=100&Sect7=THUMBON&Sect6=HITOFF&Sect5=PHOT1&Sect4=AND&Sect3=PLURON&d=PHO2&p=1&u=%2F~public%2Fphot1.htm&r=1&f=G> [https://perma.cc/SU5S-N647].

Procedures for beginning, financing, and accomplishing regrades varied widely. State or local legislatures were almost always involved in initiating regrades, passing enabling legislation, or collecting assessments to fund them.<sup>24</sup> The technology used for these massive civil engineering projects changed over time. New England cities like Boston took on some of the earliest regrading projects, armed only with manpower, shovels, and carts to haul dirt away.<sup>25</sup> These moderate efforts paled in comparison to some of the bigger regrades undertaken in “newer” cities like Chicago and Seattle. Chicago engineers regraded streets piecemeal, raising and moving buildings to newly graded streets and sidewalks with hydraulics, jackscrews, and hundreds of men simultaneously moving levers.<sup>26</sup> Seattle took a far more grandiose approach. Using new sluicing technology, workers aimed giant hoses at the hills and washed them into Elliott Bay.<sup>27</sup> Over the course of a few years, nearly twenty million cubic yards of land were removed to level Seattle’s streets.<sup>28</sup> Unsurprisingly, given this scale, houses and other buildings needed to drop significant distances to come down to the new street level—as much as ninety-two feet, in at least one instance.<sup>29</sup>

### *B. The Early Rule: Regrades Take No Property*

For most of the nineteenth century, owners of property alongside regraded streets lacked constitutional claims for damages in most U.S. jurisdictions because they failed to identify a property interest that had been taken. The earliest American case to take up a damages claim for street grading was *Callender v. Marsh*, an 1823 Massachusetts decision.<sup>30</sup> Unfortunately, all the records relating to *Callender* have been

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<sup>24</sup> For discussions of initiation and financing issues in different cities, see, for example, Klinge, *supra* note 22, at 99; Wilson, *supra* note 14, at 95; The Supervisors, Report of the Mission-Street Commission, *Daily Evening Bull. (S.F.)*, Sept. 24, 1889, at 1.

<sup>25</sup> Nancy S. Seasholes, *Gaining Ground: A History of Landmaking in Boston* 67–69 (2003).

<sup>26</sup> See *Raising an Iron Block of Buildings*, *Chi. Trib.*, Nov. 20, 1865, at 4.

<sup>27</sup> Wilson, *supra* note 14, at 91; see Photograph: Denny Hill Neighborhood Regrade Showing Sluicing Activity With Hydraulic Giant (Otto T. Frasch), Seattle Photograph Collection, Univ. of Wash. Libr. Special Collections, Negative No. UW6018 (n.d.) <http://digitalcollections.lib.washington.edu/cdm/singleitem/collection/seattle/id/202/rec/27> [<https://perma.cc/3UGM-LQPK>].

<sup>28</sup> Wilson, *supra* note 14, at 91, 106.

<sup>29</sup> *Id.* at 102.

<sup>30</sup> *Callender v. Marsh*, 18 Mass. (1 Pick.) 418 (1823).

lost.<sup>31</sup> It is likely that the plaintiff was William Callender and the defendant Ephraim Marsh, the closest thing the 1820s had to a real estate developer.<sup>32</sup> No direct legislative action authorized the street grading project in front of Callender's home, although the town government appointed a streets committee and approved various work orders for the individuals who worked on the dig.<sup>33</sup> The stated objective of the dig was "to reduce the slope, which was so steep as to render it difficult to pass up and down the streets with carts and carriages."<sup>34</sup>

The digging down in front of Callender's property appears to have been devastating. The opinion says cryptically that the act "lay bare the foundation walls of the house, and endanger its falling; in consequence of which the plaintiff was obliged, at great expense, to build up new walls, and otherwise secure the house, and render it safe and convenient of access, as before."<sup>35</sup> While it is unclear how many feet of the foundation were exposed, it was apparently significant. Callender, who lived in the house for twenty years, ended up moving.<sup>36</sup>

Callender brought a number of claims,<sup>37</sup> but most importantly, he was the first to claim the grade change constituted a taking of property under

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<sup>31</sup> E-mail from Elizabeth Bouvier, Head of Archives, Mass. Supreme Judicial Court, to author (May 12, 2015, 13:52 EST) (on file with author).

<sup>32</sup> Contemporary selectmen's records describe a "Mr. Ephraim Marsh" tasked with repair of streets, drains, and sidewalks. See 39 Records Relating to the Early History of Boston 173, 226 (1909). Ephraim Marsh later built numerous homes in Boston, Susan Southworth & Michael Southworth, AIA Guide to Boston 11 (3d ed. 2008), and became famous for his development of the city's Bay Village area, see Bay Village, City of Boston.gov, <http://www.cityofboston.gov/neighborhoods/bayvillage.asp> [<https://perma.cc/E5LD-7SVX>].

<sup>33</sup> *Callender*, 18 Mass. (1 Pick.) at 419.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 418.

<sup>36</sup> City directories show that a William Callender left his home on Middle Street in Boston in 1822. The Boston Directory 60 (Boston, John H.A. Frost & Charles Stimpson, Jr. 1822) (showing William Callender on Adams Street). Directories for 1818 show him on Middle Street, and 1820 and 1821 on "Mill-pond street." The Boston Directory 57 (Boston, E. Cotton 1818); The Boston Directory 57 (Boston, John H.A. Frost & Charles Stimpson, Jr. 1820); The Boston Directory 61 (Boston, John H.A. Frost & Charles Stimpson, Jr. 1821). Mill-pond street was a cross street, Bos. Mun. Printing Office, A Record of the Streets, Alleys, Places, Etc. in the City of Boston 246 (1902)—it seems likely Callender could have been on the corner of Middle and Mill-pond, then relocated to Adams Street after Marsh's grading.

<sup>37</sup> One of Callender's major claims was that the surveyor had exceeded his statutory authority by altering, rather than merely repairing or amending the street. *Callender*, 18 Mass. (1 Pick.) at 420–21. That is probably why Callender sued the actual surveyor, rather than the employer; because one of the primary issues was Marsh's authority to dig, if the statute was

a constitutional provision. Callender's takings claim was premised on the taking of an unspecified "incorporeal right."<sup>38</sup> In response, Marsh's counsel argued that if obliged to pay for damage to property and its incident rights every time a street was graded, "the public might be obliged to pay several times over for the same land."<sup>39</sup> This point made a big impression. At oral argument, one of the judges suggested "that a purchaser of land bounding on a street calculated on the chance of the street's being raised or lowered."<sup>40</sup> Callender's counsel actually ceded the point, but observed that "the purchaser calculated on its being done in a legal manner."<sup>41</sup>

This concession—that what mattered was not the nature of the right taken nor the extent of the taking, but instead the lawfulness of the government act—doomed Callender's case. By ceding a distinction between municipal agents acting lawfully and unlawfully, Callender played right into an ongoing line of controversy in the British courts respecting street grading—a controversy that was being resolved squarely against affected landowners. In *Leader v. Moxton*,<sup>42</sup> decided in 1773, the plaintiff's doors and windows were buried by a six foot regrade, and British courts held that injuries from street grading could entitle the landowner to a remedy.<sup>43</sup> Lord Blackstone observed that "it [was not] consistent with common sense" that a resident would have no damages for having "her

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construed to provide him such authority, then the residual claim was that the statute must violate the state constitution. See *id.* at 428. The court effectively treated the city as a party to the litigation. Later litigants would usually sue the municipal corporation. See cases cited *infra* notes 74, 79, 80, and 99.

<sup>38</sup> *Id.* at 422. Callender also claimed there had been a taking of his soil, which he claimed extended to the "middle of the street" and in which the public had only an easement. *Id.* at 425. The court rejected that claim. *Id.* at 430–32.

<sup>39</sup> *Id.* at 424.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 425.

<sup>42</sup> (1773) 95 Eng. Rep. 1157 (KB). For convenience, I refer to this case in the text as *Leader v. Moxton* rather than *Leader v. Moxon*, as it was cited in the *Callender* case and others. See, e.g., *Callender*, 18 Mass. (1 Pick.) at 425. It is unclear whether the reporter mistakenly entered a "t," or whether subsequent commentators erroneously dropped it.

<sup>43</sup> The first action, brought in King's Bench, concerned whether a writ would lie in Common Pleas for the street grading injury. *Leader*, 95 Eng. Rep. 1157. In the second decision (pursuant to the writ), the Court of Common Pleas held that "had Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose, and given an equivalent for the loss that individuals might have sustained thereby." *Leader v. Moxton* (1773) 96 Eng. Rep. 546, 547 (CP). The Court also reaffirmed that its jurisdiction was proper because it could "decide upon the property of the subject." *Id.*

houses buried, and the lights and free passage of her houses obstructed and hindered.”<sup>44</sup> Nevertheless, just a few years later, in the 1792 case of *British Cast Plate Manufacturers v. Meredith*, the King’s Bench reversed course.<sup>45</sup> This time, an individual’s gateway had been buried somewhere between two and four feet, enough that carts could no longer clear the entrance.<sup>46</sup> Plaintiff’s counsel relied on *Leader*, but in this instance, Lord Kenyon said he “doubt[ed] the accuracy of the report” in *Leader* because “[i]f this action could be maintained, every Turnpike Act, Paving Act, and Navigation Act, would give rise to an infinity of actions.”<sup>47</sup> Accordingly, Lord Kenyon limited *Leader* by interpreting it to hold that the commissioners in that case were liable because they had exceeded their power by acting maliciously, not just because they had buried or damaged the landowner.<sup>48</sup> Lord Kenyon’s interpretation was followed in subsequent cases.<sup>49</sup>

The *Callender* court followed Lord Kenyon’s approach, using language that proved influential in later cases. Only a few astute contemporaries observed that both the federal and state governments in America were subject to written constitutional protections for property, unlike Parliament in Britain—a fact that might have distinguished the British cases from the American ones.<sup>50</sup> At the time, it was an open question whether Parliament could take property without compensation; in Massachusetts, it was clearly prohibited.<sup>51</sup> Nevertheless, like Lord Kenyon, the Massachusetts court noted that “if [the] action can be sustained, it will put a check to all improvements in our highways.”<sup>52</sup> The opinion thus expressly threatened courts with the prospect that finding regrades to be takings of property could slow legislatively authorized develop-

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<sup>44</sup> *Leader*, 95 Eng. Rep. at 1160.

<sup>45</sup> (1792) 100 Eng. Rep. 1306, 1306 (KB).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1307.

<sup>48</sup> *Id.* Another justice compared burying a home to destroying a house in defense of the kingdom—though the exigency in the case of a street regrade remained unspecified. See *id.*

<sup>49</sup> For English cases accepting the narrow view of *Leader*, see *Boulton v. Crowther* (1824) 107 Eng. Rep. 544, 544 (KB); *Sutton v. Clarke* (1815) 128 Eng. Rep. 943, 943 (CP).

<sup>50</sup> *Crawford v. Delaware*, 7 Ohio St. 460, 467–68 (1857); John Lewis, *A Treatise on the Law of Eminent Domain in the United States* 107 (1888).

<sup>51</sup> See Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 Colum. L. Rev. 596, 598 n.15 (1942); William Michael Treanor, *Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 697 n.9, 701 (1985).

<sup>52</sup> *Callender*, 18 Mass. (1 Pick.) at 423.

ment. In addition, the court likened the digging down of a street to the building of a fort or schoolhouse on public land: Though the new use might reduce the value of a neighboring lot, the possibility of change should have been factored into the price paid at the outset.<sup>53</sup> As for the injuries to the landowner, those were just *damnum sine injuria* or *damnum absque injuria*—loss without injury.<sup>54</sup>

The holdings in *Callender* were adopted by many other courts, which followed Massachusetts in holding that regrades did not take any property.<sup>55</sup> This meant that in many states, effectively, only grade changes that were “malicious” or “wanton” (and thus outside the legislative power or unauthorized by law)—a fairly high bar—could provide affected landowners with a cause of action, no matter the amount of the injury.<sup>56</sup> Notably, even if the regrading caused direct damage to property—such as shrubs, soil, or other land falling—many courts would still find the damages consequential.<sup>57</sup> This included buildings’ walls literally cracking and falling into the street on account of the loss of the street’s packed dirt: Courts would find that the affected landowner had effectively caused that himself, by the downward pressure of the buildings. If the

<sup>53</sup> *Id.* at 432.

<sup>54</sup> The losses were *damnum sine injuria* in part because they were considered consequential and remote. *Id.* at 430–32. The idea that consequential damages to property are not the responsibility of the legislature was a key holding from *Callender*, although it has little to do with the threshold inquiry of whether property was at stake. For further discussion of the difference between direct and consequential damages, and the foundation of that difference in tort law, see Brauneis, *supra* note 7, at 85–93.

<sup>55</sup> E.g., *Dorman v. City of Jacksonville*, 13 Fla. 538, 548 (1869); *City of St. Louis v. Gurno*, 12 Mo. 414, 422 (1849); *Rowe v. Addison*, 34 N.H. 306, 313 (1857); *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N.Y. 195, 206 (1850); *Green v. Borough of Reading*, 9 Watts 382, 384 (Pa. 1840); For even more cases following *Callender*, see *City of Pontiac v. Carter*, 32 Mich. 164, 166–67 (1875); *Lewis*, *supra* note 50, at 111–12 n.1. A few other courts reached the same conclusion, although without citing *Callender*. *Fellowes v. City of New Haven*, 44 Conn. 240, 240 (1876); *Keasy v. City of Louisville*, 34 Ky. (4 Dana) 154, 155–56 (1836) (street raised three feet); *Humes v. Mayor of Knoxville*, 20 Tenn. (1 Hum.) 403, 408 (1839).

<sup>56</sup> *Smith v. Corp. of Wash.*, 61 U.S. (20 How.) 135, 142, 148 (1857); see *Simmons v. City of Camden*, 26 Ark. 276, 277, 279 (1870) (giving no compensation where the city made “an embankment in front of said lot, six or seven feet high, whereby all access to the buildings from the street was cut off and prevented, and the said premises greatly depreciated in value”); cf. *Burritt v. City of New Haven*, 42 Conn. 174, 176, 180 (1875) (finding that the constitution did not require compensation from the city for construction of a fifteen-foot embankment in front of plaintiff’s home that required her to raise the house ten feet at the cost of \$3,000, though the railroad’s charter required payment of damages).

<sup>57</sup> E.g., *Radcliff's Ex'rs*, 4 N.Y. at 196, 203.

injury from grading was “due to the weight of the [plaintiff’s] wall resting upon the earth after the excavation was made, then the [municipality] was not liable for that.”<sup>58</sup>

Even the Supreme Court cited the no-taking rule in *Callender* approvingly in its capacity as the highest appellate court governing matters in the District of Columbia.<sup>59</sup> In the underlying case, municipal officials destroyed a bunch of trees and a wall in the process of regrading K Street, necessitating multiple repairs to bring Ann Smith’s buildings and property back into contact with the street.<sup>60</sup> Perhaps because of *Callender*, Smith seems primarily to have claimed that the regrade was unlawful, or not performed in good faith, and thus beyond the congressionally authorized power of the municipal corporation.<sup>61</sup> However, she also vaguely alleged a takings claim (presumably under the Federal Constitution), again, without precisely identifying the property right taken. The defendant asserted that Smith was trying to claim the taking of

a right . . . to build a house on the top of a hill . . . ; a right to keep a nuisance; to insist on an impracticable grade of a public street; to destroy the value of all the surrounding lots of ground, in order that she may have more convenient access to the house so built. But if, in any

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<sup>58</sup> *Transp. Co. v. Chicago*, 99 U.S. 635, 645 (1878). At this time, an action would not even lie against a neighbor for digging in his own lot so as to cause a neighboring house to fall down; individuals who built too close to another lot were considered to have assumed the risk. See *Thurston v. Hancock*, 12 Mass. (11 Tyng) 220, 228, 235 (1815); *Lasala v. Holbrook*, 4 Paige Ch. 169, 172–73 (N.Y. Ch. 1833). Neighbors would be liable, however, for removing the support of the soil—in other words, for digging down their property in a way that caused damage to the soil and structures of the adjoining proprietor. It is not clear why the government was subject to different rules—liable neither for lost soil nor damaged structures. See *Lewis*, supra note 50, at 129 & n.2.

<sup>59</sup> *Smith*, 61 U.S. at 149. The Court also considered two regrade cases on appeal from lower federal courts, although it was applying Illinois law when it did so. See *Chicago v. Taylor*, 125 U.S. 161, 162 (1888); *Transp. Co.*, 99 U.S. at 641. The reason for federal jurisdiction in those cases is extremely unclear; both were brought in Illinois federal courts but decided pursuant to the state constitution, without written opinion from the lower tribunals or clarification of what the federal question was. Though jurisdictional rules for federal courts have changed over time, see F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 Ala. L. Rev. 895, 908 (2009), it is very unclear from these opinions why jurisdiction was proper.

<sup>60</sup> *Smith*, 61 U.S. at 146.

<sup>61</sup> See *id.* at 141–43; *Smith v. Washington*, 22 F. Cas. 698, 698 (C.C.D.D.C. 1856).



case, such right . . . could be maintained, certainly it does not exist in the city of Washington . . . .<sup>62</sup>

The Court cited *Callender* and confirmed the lawfulness of the regrade and the failure of all of Smith's claims, notwithstanding the fact that she had built in reliance on the existing grade some twenty years earlier.<sup>63</sup> The Court was uncharacteristically harsh toward poor Ann Smith: "[O]ne cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of that of the public."<sup>64</sup>

Not every court so mocked the litigant challenging a regrade as an unconstitutional taking of property.<sup>65</sup> The Pennsylvania Supreme Court was sympathetic to the plight of individuals left stranded atop hills on account of regrades. In *O'Connor v. Pittsburgh*, the affected property was a huge and expensive twenty-year-old Roman Catholic cathedral.<sup>66</sup> A regrade had left it on top of a mound at least a whopping seventeen feet in the air.<sup>67</sup> Witnesses testified that the cathedral would either have to be torn down or sustained with retaining walls;<sup>68</sup> a jury found nearly \$4,000 in damages, even taking into account the possible increase in the property's value after regrading.<sup>69</sup>

In what might be the most gloomy majority opinion ever written, the chief justice of the Pennsylvania Supreme Court, John Bannister Gilbert, invalidated the jury verdict, opening his opinion reaffirming the no-taking rule with this: "We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered none."<sup>70</sup> Chief Justice Gilbert wrote that only the legislature could provide the church with a cause

<sup>62</sup> *Smith*, 61 U.S. at 146.

<sup>63</sup> *Id.* at 136, 149.

<sup>64</sup> *Id.* at 148.

<sup>65</sup> See, e.g., *O'Connor v. Pittsburgh*, 18 Pa. 187, 189–90 (1851).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 187–88. Cathedral lore claims thirty feet. St. Paul Cathedral, Catholic Diocese of Pittsburgh, <http://diopitt.org/parishes/saint-paul-cathedral> [<https://perma.cc/B5U9-25A3>].

<sup>68</sup> As it happens, the parishioners decided to tear the church down for safety reasons. However, it was then destroyed in a fire—ominously, four months after the *O'Connor* decision. See St. Paul Cathedral, *supra* note 67.

<sup>69</sup> *O'Connor*, 18 Pa. at 188.

<sup>70</sup> *Id.* at 189.

of action for damage and injury because no property had been taken.<sup>71</sup> Still, he had some choice words for the Pittsburgh legislators:

No property was taken in this instance; but the cutting down of the street consequent on the reduction of its grade, left the building useless, and the ground on which it stood worth no more than the expense of sinking the surface of it to the common level. The loss to the congregation is a total one, while the gain to holders of property in the neighborhood, is immense. The legislature that incorporated the city, never dreamt that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable.<sup>72</sup>

*C. Courts Find New Constitutional Property: The Rise of the Right of Access*

As court after court began following the no-taking rule, one jurisdiction took a different path: Ohio. The first case to accept a change in grade as an unconstitutional taking was in 1849, in *McCombs v. Town Council of Akron*.<sup>73</sup> In *McCombs*, as in many of the prior cases, the property owner, aggrieved by a change in grade, had sued. Earlier Ohio cases found that municipalities could be liable for malicious and unlawful acts injuring property, including street grading projects.<sup>74</sup> Now, in *McCombs*, the Ohio court found that even though the city had acted properly and within its powers, it was liable for damages caused by re-grading. The court observed that “if a municipal corporation, for the good of all within its limits, see [sic] proper to cut down a street, it is nothing more than right that an injury there done to a single individual, should be shared by all.”<sup>75</sup> Nevertheless, the court did not mention the state or federal constitutions or any “right of access” in the opinion a

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<sup>71</sup> Id. at 190.

<sup>72</sup> Id.

<sup>73</sup> 15 Ohio 474 (1846). After remand, when the case returned to the Ohio Supreme Court, “*McCombs*” had become “*McComb*.” *Town Council of Akron v. McComb*, 18 Ohio 229 (1849). I use “*McCombs*” for convenience.

<sup>74</sup> See *Rhodes v. City of Cleveland*, 10 Ohio 159, 161–62 (1840); *Hickox v. City of Cleveland*, 8 Ohio 543, 545 (1838); *Goodloe v. City of Cincinnati*, 4 Ohio 500, 514 (1831).

<sup>75</sup> *McCombs*, 15 Ohio at 480.

single time.<sup>76</sup> The opinion rested on broad equitable notions of fairness and justice.<sup>77</sup>

*McCombs* was immediately controversial because it contradicted the no-taking rule in *Callender*. New York's highest court reaffirmed its commitment to the *Callender* no-taking rule in 1850,<sup>78</sup> observing that *McCombs* was "in conflict with many decisions, and cannot be law beyond the state of Ohio."<sup>79</sup> Other courts were more sympathetic to Ohio's approach, but at first declined to follow it because of the older authority to the contrary. In 1853, for example, the Iowa Supreme Court observed that it believed the Ohio ruling was "right according to our views of justice," though it followed the rule of other jurisdictions it claimed to respect equally.<sup>80</sup> Still, at least in the first few years, no state changed its view of whether property had been taken on account of *McCombs*.

Wisconsin, however, came close to following Ohio, and dicta in a Wisconsin Supreme Court opinion laid the foundation for the constitutional property revolution.<sup>81</sup> The authoring justice took up the new theoretical issues raised by *McCombs*: (1) "Is the constitutional inhibition restricted to the actual, manual taking and appropriation of the constituent material of the property to the public use?", or (2) "[D]oes it extend to all the natural rights, incidents and uses of the property as nature dis-

<sup>76</sup> The author of the *McCombs* opinion evidently had an agenda, though it may not have been the constitutional property revolution he effectively caused. He described the rise of corporations as follows: "A sort of transcendentalism which enveloped both the courts and the profession in a mist growing out of the airy nothingness of the subject matter, enabled corporations, like the pestilence which walketh unseen, to do their mischief and escape the responsibility." Id.

<sup>77</sup> Lewis, *supra* note 50, at 116.

<sup>78</sup> The rule was originally adopted in *Wilson v. Mayor of New York*, 1 Denio 595, 598 (N.Y. Sup. Ct. 1845).

<sup>79</sup> *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N.Y. 195, 205 (1850). See also *Fellowes v. City of New Haven*, 44 Conn. 240, 257 (1876) ("[E]ven in Ohio the law is so that if the petitioner was suing in their courts he probably could not recover."); *Snyder v. President of Rockport*, 6 Ind. 237, 241 (1855) (rejecting Ohio cases and citing *Radcliff's Ex'rs*); *Hill v. City of Boston*, 122 Mass. 344, 378 (1877) (noting that *McCombs* represented "a conclusion inconsistent with the decisions of the Supreme Court of the United States, of this court, and of the courts of about every other state in which the question has arisen"); *City of Pontiac v. Carter*, 32 Mich. 164, 170 (1875) ("This examination of the cases relied upon by the plaintiff shows very plainly that those in the state of Ohio stand substantially alone.").

<sup>80</sup> *Creal v. City of Keokuk*, 4 Greene 47, 53 (Iowa 1853). Similarly, the Wisconsin Supreme Court observed "much justice and equity in the principle of the Ohio cases." *Alexander v. City of Milwaukee*, 16 Wis. 264, 274 (1862).

<sup>81</sup> *Goodall v. City of Milwaukee*, 5 Wis. 32, 45–46 (1856).

posed, fixed and adapted them?”<sup>82</sup> The Wisconsin court suggested that compensation might be appropriate for deprivations of the “right of access to my lot, in the situation in which it was placed by nature, over adjacent soil, as much my right to the enjoyment of my own lot, as is the right of lateral support and protection[.]”<sup>83</sup> However, the case was ultimately disposed of on other grounds.<sup>84</sup>

The next Ohio case adopted the Wisconsin court’s rationale (although without direct citation). In *Crawford v. Village of Delaware*, authorities leveled a sloped street such that the defendant’s lot was “six or seven feet” over street level.<sup>85</sup> Noting its dispute with other courts, the Ohio Supreme Court upheld *McCombs*, interpreting it to “recognize[] a private right in a lot owner, to the use of a street abutting on his lot, where he has made erections with a view to the established grade of the street.”<sup>86</sup> If that right was “materially invaded by a new grade, made under legislative authority, there exists a constitutional obligation to make compensation, so far as such right is materially injured or impaired.”<sup>87</sup> Though the city had operated entirely within its authority and within its own property to devalue the nearby homes, the *Crawford* court found the abutting owners entitled to a constitutional takings claim.

*Crawford* thus represented a new step in takings jurisprudence. It both recognized a new form of property—the right of access—and held that this property was taken by the legislative act authorizing the regrade. This conceptual jump required a few analogies by the *Crawford* court. The court compared the taking of an incorporeal right to the actual physical appropriation of a structure on the land: “It is as positive and substantial an injury to private property, and as direct an invasion of private right, incident to a lot, as if the erections upon the lot were taken for public use.”<sup>88</sup> The court also compared the taking of an incorporeal right of access to a classic property dispute between neighbors. If the western neighbor purchased a private path across the eastern neighbor’s lot and erected buildings along that path, the eastern neighbor could not dig out

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<sup>82</sup> Id. at 39.

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> 7 Ohio St. 460, 460 (1857).

<sup>86</sup> Id. at 466.

<sup>87</sup> Id.

<sup>88</sup> Id. at 470–71.

the path or erect a wall without paying for the damages.<sup>89</sup> The Ohio Supreme Court held that municipal interferences with the access right were the same: “[S]uch right of property could not be materially impaired or destroyed without compensation.”<sup>90</sup> The affront to *Callender* was even more obvious here than it had been in *McCombs*: The justices wrote that when a street is built up or lowered “by the alteration of a grade, the private rights of the owner, inherent in and incident to the erections upon the lot, are invaded, and no curt phrase, like *damnum absque injuria*, can conceal the invasion or the substantial injury.”<sup>91</sup>

#### *D. Responses to the New Constitutional Property*

##### *1. Spread to Other States*

The idea that regrades constituted a taking of a “right of access” belonging to the owner of the adjoining property began to catch on. Kentucky soon followed Ohio. In *City of Louisville v. Louisville Rolling Mill Co.*, the city opted to fill the street by twelve feet, which would have completely obstructed the gate of the plaintiff’s mill.<sup>92</sup> The Kentucky Supreme Court found that the destruction of the property owner’s “easement of access” required compensation.<sup>93</sup> By the end of the nineteenth century, Kansas, Michigan, Minnesota, and Mississippi courts had also held that there was a “right of access” and that the right was compensable when taken, pursuant to the constitutions of those states.<sup>94</sup>

<sup>89</sup> *Id.* at 468.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 470.

<sup>92</sup> 66 Ky. (3 Bush) 416, 421–22 (1867).

<sup>93</sup> *Id.* at 429–30. Though the right taken was still a “right of access,” the Kentucky court tried to portray its decision (dubiously) as consistent with the old rule, because in its earlier cases, the magnitude of the injury to private rights had been smaller. *Id.* at 426–27. The Kentucky court reaffirmed the compensation requirement for destruction of the right of access in *Elizabethtown, Lexington & Big Sandy Railroad Co. v. Combs*, 73 Ky. (10 Bush) 382, 389 (1874) (“The private right of the lot-owner in the adjacent street being conceded to be property, such appropriation or obstruction of the street as deprives him of its reasonable use deprives him to that extent of his property, and no reason is perceived why this species of property can be taken without just compensation rather than any other.”).

<sup>94</sup> *Cent. Branch Union Pac. R.R. Co. v. Twine*, 23 Kan. 585, 595 (1880); *Vanderlip v. City of Grand Rapids*, 41 N.W. 677, 681 (Mich. 1889); *Adams v. Chi., Burlington & N. R.R. Co.*, 39 N.W. 629, 634 (Minn. 1888); *Theobald v. Louisville, New Orleans & Tex. Ry. Co.*, 6 So. 230, 231 (Miss. 1889). But see *Garrett v. Lake Roland Elevated Ry. Co.*, 29 A. 830, 831–33 (Md. 1894) (strongly criticizing these cases).

Of course, other social and technological changes may have contributed to the spread of the right of access as constitutional property. Just as the Ohio cases were being decided, steam railroads exploded onto the scene, and many municipalities appear to have used their existing roadways to create new miles of track (rather than acquire new land).<sup>95</sup> In 1840, there were just under 3,000 total miles of railroad track in the United States.<sup>96</sup> By 1890, there were over 160,000 miles.<sup>97</sup> The right of access could be invoked in cases about railroads as well as cases about grading, thus presenting courts with a way to recognize causes of actions for owners deleteriously affected by all sorts of street obstructions, whether dirt or steam-powered.<sup>98</sup> Many state courts would continue spreading the right of access as constitutional property well into the twentieth century, in decisions made under both the federal and state constitutions.<sup>99</sup>

By creating the “right of access,” that is, the right to have means of entry and exit to the street, and holding that it could be taken by an otherwise legal regrade, early state courts set into motion a new legal movement to provide damages to those whose property was devalued by changes in the level of the street. Called to action by rulings affirming or denying the existence of a constitutional claim, other political players would begin to slow down regrades. Nevertheless, courts continued to play an important role in defining the property rights that would trigger

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<sup>95</sup> These conversions of roads to railroads were challenged in a number of instances. See cases cited *infra* note 98.

<sup>96</sup> Rand McNally & Co., *Miles of Railroad in the United States, 1830–1893*, in *Atlas of the World* 364, 364 (Chicago, Rand McNally & Co. 1897).

<sup>97</sup> *Id.*

<sup>98</sup> New York’s approach was to leave the harsh no-compensation-for-grading rulings intact, but hold that when the street was converted into an elevated railroad, it was a new appropriation because of the new use. *Lohr v. Metro. Elevated R.R. Co.*, 10 N.E. 528, 533 (N.Y. 1887); *Thompson v. Manhattan Ry. Co.*, 6 N.Y.S. 929, 929 (Com. Pl. 1889), modified, 8 N.Y.S. 641 (Com. Pl. 1890), *aff’d*, 29 N.E. 264 (N.Y. 1891). See also *Foster Lumber Co. v. Ark. Valley & W. Ry. Co.*, 100 P. 1110, 1114 (Okla. 1909) (distinguishing between “legitimate street use[s],” those open to all members of the public, and street railroads and railroads, which are dedicated to private corporations).

<sup>99</sup> E.g., *State ex rel. Morrison v. Thelberg*, 350 P.2d 988, 991 (Ariz. 1960); *Liddick v. City of Council Bluffs*, 5 N.W.2d 361, 379 (Iowa 1942); *Bourg v. Mfrs. Ry. Co.*, 245 S.W. 43, 44 (Mo. 1922); *White v. S. Ry. Co.*, 140 S.E. 560, 564 (S.C. 1927); *Coyne v. City of Memphis*, 102 S.W. 355, 361–62 (Tenn. 1907). New York is a notable outlier. See *Sauer v. City of New York*, 83 N.Y.S. 27, 28 (Sup. Ct. 1903), *aff’d*, 85 N.Y.S. 636 (App. Div. 1904), *aff’d*, 72 N.E. 579 (N.Y. 1904), *aff’d*, 206 U.S. 536 (1907). Damages for changes in grade were eventually awarded by statute. See N.Y. High. Law § 197 (Consol. 2014).

compensation requirements when taken or impaired. It is to these developments that the next Subsection turns.

## *2. Catalyzing Political Responses: Legislation and Constitutional Change*

The street grade decisions also catalyzed political action.<sup>100</sup> Although state and local legislative history is extremely scarce from this period, some evidence does show that state and local legislators in a few areas were aware of the Ohio cases and considered them in deciding whether to authorize the payment of damages to abutting owners.<sup>101</sup> Even in states where the courts at first rejected the right of access, they often pointed to the perceived justice of the Ohio cases and called on the legislatures to act to remedy the injustice of their own rulings.<sup>102</sup> Legislatures responded. In 1860, it appears that only five states had laws (or contained cities with laws) that could be interpreted to require compensation for changes in grade;<sup>103</sup> by 1888, this increased to eleven;<sup>104</sup> by 1900, sixteen;<sup>105</sup> and by 1909, twenty.<sup>106</sup>

It is worth noting, however, that there were reasons to prefer having courts recognize constitutional property, instead of relying on legislation to provide for damages. Compensation statutes were not always the palliative measures that landowners might have wanted. Of primary concern, while the recognition of constitutional claims would have permanence, statutes could be repealed. One New Haven landowner found this out the hard way when a Connecticut statute compensating for grade changes was repealed after six months (leaving him to try out litigation

<sup>100</sup> Cf. Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 *Geo. L.J.* 1383 (2014) (describing similar interplay between courts and legislatures in responding to challenges posed by predatory consumer credit practices).

<sup>101</sup> See *Congress Avenue Grades*, *New Haven Evening Reg.*, (Conn.) Feb. 21, 1881, at 1.

<sup>102</sup> See 2 Philip Nichols, *The Law of Eminent Domain* § 307, at 817 (2d ed. 1917) ("In many of the decisions in which this rule was applied the courts expressed regret over the harshness of the result, and sought some means to reach a different conclusion . . .").

<sup>103</sup> Only the states of New Hampshire and Massachusetts and the cities of Milwaukee, New York City, and Philadelphia seem to have had statutes providing for compensation for grade changes prior to 1860. See Lewis, *supra* note 50, §§ 207–18, at 285–92.

<sup>104</sup> See *id.*

<sup>105</sup> 1 John Lewis, *A Treatise on the Law of Eminent Domain* §§ 206b–18, at 496–508 (2d ed. 1900).

<sup>106</sup> 1 John Lewis, *A Treatise on the Law of Eminent Domain in the United States* §§ 316–36, at 600–16 (3d ed. 1909).

for recompense).<sup>107</sup> The reason: The legislature thought it best not to give an avenue for damages “in the majority of cases.”<sup>108</sup>

Of course, though some statutes did provide compensation for some people affected by regrades, not all legislatures were as beneficent. So, for residents of states and cities without regrade-damages legislation or courts willing to change their state’s no-taking rule, state constitutional change appears to have offered another answer. As many historians have noted, the nineteenth century hosted a spree of state constitution making. In the face of widespread demographic and political change, it was ordinary practice for states to undertake state constitutional revisions through constitutional conventions.<sup>109</sup> During several of these conventions, amendments to address regrading problems came up.

State constitutional changes helped accelerate the process of compensation for regrades, though without interpretation by courts, this was usually not enough. There has been remarkably little work on the constitutional changes to takings clauses in the late nineteenth century;<sup>110</sup> accordingly, an original history of these provisions and the motivations that led to them is necessary. Illinois was home to the first constitution revised explicitly to provide compensation for regrades. In 1870, the state’s constitutional convention took up a suggestion from the Committee on Bill of Rights providing that “property shall not be taken *or damaged* for public use without just compensation.”<sup>111</sup> To contemporaries, it was natural that Illinois moved first to constitutionally require payment for regrades. The entire city of Chicago was raised by as much as ten feet beginning in about 1855 to address sewage drainage problems,<sup>112</sup> occasioning some of the most “serious injuries” from regrading to that date.<sup>113</sup> A Chicago newspaper hyperbolically remarked that people were so used to the uprooting and moving of houses that a family had been

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<sup>107</sup> Healey v. City of New Haven, 49 Conn. 394, 394 (1881).

<sup>108</sup> Congress Avenue Grades, *supra* note 101, at 1.

<sup>109</sup> See G. Alan Tarr, Understanding State Constitutions 94–98 (1998).

<sup>110</sup> There are two notable exceptions that provide some history of the state constitutional changes. See Brauneis, *supra* note 7, at 115–20; Stokes, *supra* note 7, at 601–02.

<sup>111</sup> 2 Debates and Proceedings of the Constitutional Convention of the State of Illinois 1575 (Springfield, E.L. Merrit & Bro. 1870) [hereinafter Illinois Convention] (emphasis added).

<sup>112</sup> Miller, *supra* note 21, at 125; Ron Grossman, Civic Uplift: Raising Chicago Out of the Mud, Chi. Trib., Nov. 22, 2015, at 29.

<sup>113</sup> Nichols, *supra* note 102, § 311, at 844.



seen eating dinner inside a house moving down the street.<sup>114</sup> Landowners were expected to bear the cost of accommodating their own structures, and many protested by leaving their houses in the holes left behind after the rest of the street moved to the new level.<sup>115</sup> Because Illinois and Chicago provided no statutes authorizing damages, “the people of that city was focussed [sic] upon the hardship of the rule [that there was no liability for the consequential damages of public improvements] by a number of especially striking examples.”<sup>116</sup>

The “or damaged” provision considered by the convention was expressly designed to address the problem of street grading. One representative summed up its effect thusly:

The courts have decided that cities, in their grading, may cut down lots so as to almost ruin men and subject them to enormous expense, or they may raise the grade of streets so as to cause water to run upon lots, and make property comparatively worthless, but that that is a damage for which lot-owners are entitled to no compensation. That seems the settled law of the land; so decided in several States, and by the supreme court of the United States. They say it is not taking property, but is an incidental damage which lot-owners must sustain, by reason of those public improvements, and for which they are entitled to no compensation. As I understand this article, it will require compensation to be made for those damages which necessarily and naturally arise to a party in consequence of these public improvements.<sup>117</sup>

Another representative described the provision as designed to cover situations when “property is not immediately taken . . . , but by reason of . . . a street being leveled or graded up . . . property is injured.”<sup>118</sup> A third described how, by the construction of embankments and roadways,

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<sup>114</sup> Local Department, Chi. Trib., Apr. 18, 1856, at 3. Another delightful example from Chicago during that period warned ladies of “sidewalk oglers” lurking in the not-yet-raised sections of the city sidewalks. Miller, *supra* note 21, at 125.

<sup>115</sup> Miller, *supra* note 21, at 125.

<sup>116</sup> Nichols, *supra* note 102, § 311, at 844.

<sup>117</sup> Illinois Convention, *supra* note 111, at 1577 (statement of Mr. Underwood).

<sup>118</sup> *Id.* at 1578 (statement of Mr. Wall). That representative observed that “a similar provision exist[ed] in England.” *Id.* He was speaking of the Lands Clauses Consolidation Act, which provided compensation for property “injuriously affected” by public works. In England, courts were inconsistent about whether the acts provided a remedy in circumstances that would not have required compensation at common law. Brauneis, *supra* note 7, at 116–26 & nn. 256–262, 279; see *City of Denver v. Bayer*, 2 P. 6, 11 (Colo. 1883).

property had been left “of no earthly use or value whatever.” The streets had been graded so as to “virtually destroy” abutting land, leaving owners “reduced to beggary.”<sup>119</sup>

Not all delegates were in agreement about constitutionalizing protection against street grading injuries. A representative from Adams, Illinois, described how his city was “on a hill—an immense bluff.”<sup>120</sup> If the proposed change passed, “we could not open these public highways, and leave high bluffs on either side, without paying for so removing every inch of dirt.”<sup>121</sup> Another delegate described the words “or damaged” as a “wild innovation—an untried, and I fear, dangerous experiment,” one that could bring the raising of Chicago’s streets to a halt.<sup>122</sup> A proponent of the provision parried, observing that “[i]f Chicago cannot improve her streets without requiring a few individuals to bear all the expenses of the improvement, why, Chicago ought to wait until she is able to improve its streets.”<sup>123</sup> The new provision containing “or damaged” carried, 40–11.<sup>124</sup>

By 1880, West Virginia, Pennsylvania, Arkansas, Alabama, Missouri, Nebraska, Colorado, Texas, Georgia, California, and Louisiana had modified their constitutions to contain an “or damaged” provision.<sup>125</sup>

<sup>119</sup> Illinois Convention, *supra* note 111, at 1579 (statement of Mr. Church).

<sup>120</sup> *Id.* (statement of Mr. Skinner).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1583 (statement of Mr. Medill).

<sup>123</sup> *Id.* (statement of Mr. Springer).

<sup>124</sup> *Id.* at 1585.

<sup>125</sup> Carl H. Davis, *Constitutional Provisions Against Damaging Private Property*, 8 Va. L. Reg. 525, 527 (1902); compare Ala. Const. of 1875, art. XIV, § 7 (providing that “[m]unicipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed”), with Ala. Const. of 1868, art. I, § 25 (providing only “[t]hat private property shall not be taken or applied for public use”); Ark. Const. of 1874, art. II, § 22 (providing that “private property shall not be taken, appropriated or damaged for public use”), with Ark. Const. of 1836, art. II, § 10 (protecting only against deprivations of property); Cal. Const. of 1879, art. I, § 14 (providing that “[p]rivate property shall not be taken or damaged for public use”), with Cal. Const. of 1849, art. I, § 8 (protecting only against deprivations of property); Ga. Const. of 1877, art. I, § 3, para. 1 (providing that “[p]rivate property shall not be taken, or damaged, for public purposes”), with Ga. Const. of 1868, art. I, §§ 1, 3 (noting “duty of government” to protect “person and property” and prohibiting deprivations of property); La. Const. of 1879, art. 156 (providing that “[p]rivate property shall not be taken nor damaged, for public purposes”), with La. Const. of 1868 (containing no similar protection for property); Mo. Const. of 1875, art. II, § 21 (providing that “private property shall not be taken or damaged for public use”), with Mo. Const. of 1865, art. I, § 16 (providing that “no private property ought to be taken or applied to public use”); Neb. Const. of 1875, art. I, § 21

The debate was only slightly less vigorous than it had been in Illinois. In California, for example, a representative proposed adding “or damaged” to the takings clause during the convention.<sup>126</sup> He invoked the story of Second Street in San Francisco, where legislators authorized a regrade, “which left the houses on either side high in the air, and wholly inaccessible. [The cut-through street] was destroyed, although none of it was taken or moved away.”<sup>127</sup> Another observed that the “houses on either side [there were] in absolute danger of sliding off into the street below.”<sup>128</sup> Detractors again pointed out the dangerousness of the provision, and mocked the citation to the new Illinois and Missouri Constitutions, observing that more time was needed to understand the effects.<sup>129</sup> However, the Second Street story carried the day; California’s amendment adding “or damaged” passed 62–28.<sup>130</sup>

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(providing that “[t]he property of no person shall be taken or damaged for public use”), with Neb. Const. of 1866, art. I, § 13 (providing that “[t]he property of no person shall be taken for public use”); Pa. Const. of 1874, art. XVI, § 8 (providing that “[m]unicipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed”), with Pa. Const. of 1838, art. VII, § 4 (providing that “[t]he legislature shall not invest any corporate body or individual with the privilege of taking private property for public use”); Tex. Const. of 1876, art. I, § 17 (providing that “[n]o person’s property shall be taken, damaged, or destroyed for or applied to public use”), with Tex. Const. of 1869, art. I, § 14 (providing that “no person’s property shall be taken or applied to public use”); W. Va. Const. of 1872, art. III, § 9 (providing that “[p]rivate property shall not be taken or damaged for public use”), with W. Va. Const. of 1863, art. II, § 6 (providing that “[p]rivate property shall not be taken for public use”).

<sup>126</sup> 3 Debates and Proceedings of the Constitutional Convention of the State of California 1190 (Sacramento, J.D. Young 1881) (statement of Mr. Hager).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (statement of Mr. Estee).

<sup>129</sup> Take this sarcastic remark: “If it comes all the way from Pike[, Missouri], it must be good.” *Id.* (statement of Mr. Wilson). Mr. Wilson also observed that the new provisions in the constitutions were “untried experiments. They do not know whether they will work well or not. They are simply trying the experiment.” *Id.* He urged the committee to wait, leaving it to “[their] children” to evaluate the efficacy of the new language, rather than making California an early adopter. *Id.*

<sup>130</sup> *Id.* (statement of the President of the convention).

**Figure 3, Second Street Cut, San Francisco, 1869**<sup>131</sup>

By 1902, four more states amended their takings clauses to include compensation for property “taken or damaged.”<sup>132</sup> Indeed, new states preferred the “taken or damaged” framework. With only one exception,<sup>133</sup> every state that entered the union after 1870—the date that Illinois changed its constitution—included “or damaged” in its takings clause.<sup>134</sup>

<sup>131</sup> Photograph: Cutting Through 2nd St. in 1869, S.F. Hist. Photograph Collection, S.F. Pub. Libr., Photo ID No. AAB-5743, Neg. No. 3834, <http://sflib1.sfpl.org:82/record=b1010689> [<https://perma.cc/B5U9-25A3>].

<sup>132</sup> Compare Ky. Const. of 1891, § 242 (requiring compensation for property “taken, injured or destroyed”), with Ky. Const. of 1850, art. XIII, § 14 (providing “nor shall any man’s property be taken or applied to public use”); Minn. Const. art. I, § 13 (amended 1896) (providing that “[p]rivate property shall not be taken, destroyed or damaged for public use”), with Minn. Const. of 1857, art. I, § 13 (providing that “[p]rivate property shall not be taken for public use”); Miss. Const. of 1890, art. III, § 17 (providing that “[p]rivate property shall not be taken or damaged for public use”), with Miss. Const. of 1868, art. I, § 10 (providing that “[p]rivate property shall not be taken for public use”); Va. Const. of 1902, art. IV, § 58 (prohibiting passage of laws “whereby private property shall be taken or damaged for public uses”), with Va. Const. of 1870, art. V, § 14 (prohibiting passage of laws “whereby private property shall be taken for public uses”).

<sup>133</sup> Brauneis, *supra* note 7, at 120 n.272.

<sup>134</sup> *Id.* at 119–20; see Colo. Const. of 1876, art. II, § 15; Mont. Const. of 1889, art. III, § 14; N.D. Const. of 1889, art. I, § 14; S.D. Const. of 1889, art. VI, § 13; Utah Const. of 1895, art. I, § 22; Wash. Const. of 1889, art. I, § 16.

However, the work was not done with the approval of these constitutional provisions. State courts continued to play an integral role because the definition of constitutional property remained disputed. Despite the legislative history, one of the key questions about the scope of the “taken or damaged” provisions was whether the new constitutional provisions covered the classic regrade scenario—land left on a cliff or feet under the new street—or still necessitated some immediate physical occupation or physical damage to the land or a building. For example, litigants in Illinois courts interpreting “or damaged” at first still claimed that the law required an actual invasion or direct physical injury to land or buildings for the compensation requirement to come into effect.<sup>135</sup> According to them, an injury to some “right of access” was still insufficient; only injury to the thing itself would be compensable.

Thus, to provide compensation, the constitutional changes would still require recognition of new constitutional property: If “property” in the takings clauses was conceived to include the right of access in addition to the thing itself, then damage to that right short of damage to the soil or structures could trigger the new compensation provisions. Early treatise writers observed that “the narrow meaning which judicial decisions had placed upon the word ‘property’” was preventing the constitutional provisions from being given full force.<sup>136</sup> Thus, it was only when state

<sup>135</sup> *City of Chicago v. Rumsey*, 87 Ill. 348, 360 (1877). See also *City Council of Montgomery v. Townsend*, 2 So. 155, 157–61 (Ala. 1887) (containing plaintiff’s arguments that it was “not the intent and operation” of the new provision “to infringe the existing rule as to the liability of the city for grading, altering, or improving the streets further than is essential to the protection of private property”). Note that these were arguments presented by the litigants, not the holdings of the courts. But see *Werth v. City of Springfield*, 78 Mo. 107, 110 (1883) (finding that constitutional change overruled the common law rule forbidding damages from grading injuries); *Burlington & Mo. R.R. Co. v. Reinhackle*, 18 N.W. 69, 70 (Neb. 1883) (same).

<sup>136</sup> 2 John F. Dillon, *Commentaries on the Law of Municipal Corporations* § 587b, at 685–86 (Boston, Little, Brown & Co., 4th ed. 1890) (“[Courts] overlooked the fact that an easement or an incorporeal right annexed to land is as much property as the right to the land itself. . . . Property is that congeries of rights secured by law . . . [A]n abutting owner’s right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. The same may be predicated of other easements or rights annexed to the ownership of the lot itself. When he is deprived of such right of access or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property. When such right is directly, specially and injuriously, affected by public improvement his property is damaged.”) See also Lewis, *supra* note 105, §§ 233–34, at 551 (noting that “any interference with any private right appurtenant to property” should be compensable, if not as a taking, as a damaging); Note, *Legislative Authorization of Nuisances*, 19

courts adopted an expanded model of constitutional property that the new constitutional changes worked their intended effect.

Illinois was first and undid its earlier precedent in a later street-leveling case: In considering whether construction of a viaduct such that an owner had to build stairs to access the street was a taking, the court observed that “if by property is meant the right of user [sic], enjoyment and disposition of the lot and buildings, then it is evident there has been a direct physical interference with appellant’s property.”<sup>137</sup> Colorado soon followed:

[M]any things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible. . . .

No good reason is observed for discriminating against the easement in a street connected with the lot of an abutting owner. We are disposed to say that it is property within the meaning of our constitution; and any interference therewith which results in injury to the realty must, with the exceptions hereinafter stated, be justly compensated if in such a case there be no technical taking.<sup>138</sup>

Nebraska was next, and in expanding its definition of property to include property rights like the right of access, its highest court explicitly invoked the old Ohio cases about the proper scope of constitutional property.<sup>139</sup> Soon after, more courts began accepting access rights as constitutional property in street grading cases to permit claims for damages from grading and other actions that devalued, but did not physically take or damage land itself.<sup>140</sup> All told, whether by catalyzing legislative

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Harv. L. Rev. 127, 128 (1905) (suggesting that “[t]he idea of property on which [then-recent] cases proceed would lead to the conclusion that any material abridgment of rightful user is the taking of property”).

<sup>137</sup> *Rigney v. City of Chicago*, 102 Ill. 64, 78 (1881). Professor Robert Brauneis provides an overview of some of the latent ambiguities and inconsistencies in the *Rigney* opinion. See Brauneis, *supra* note 7, at 130–32.

<sup>138</sup> *City of Denver v. Bayer*, 2 P. 6, 7 (Colo. 1883).

<sup>139</sup> *Burlington & Mo. R.R. Co.*, 18 N.W. at 70; see *City of Omaha v. Kramer*, 41 N.W. 295, 296 (Neb. 1889).

<sup>140</sup> E.g., *Town of Avondale v. McFarland*, 13 So. 504, 505 (Ala. 1893) (adopting the opinion of Justice Somerville in *City Council of Montgomery v. Maddox*, 7 So. 433, 436 (Ala. 1890)); *Hot Springs R.R. Co. v. Williamson*, 45 Ark. 429, 437–39 (1885); *Little Rock, M. R. & T. Ry. Co. v. Shelton*, 45 Ark. 446, 446 (1885); *Brown v. City of Seattle*, 31 P. 313, 314 (Wash. 1892); see also Lewis, *supra* note 105, § 235, at 554 (describing how states had be-

change or expanding the definition of property, state courts played an integral role in obtaining compensation for individuals affected by re-grades.

### 3. *Postscript: Property Innovation in a Federalist System*

As the cases cited in the preceding Subsections indicate, many of the street grade cases were brought under state constitutional takings clauses.<sup>141</sup> Even in most of the Supreme Court cases, the Court applied state constitutional law. Two of these federal cases that took up street grading were decided as a matter of the state's common law of property,<sup>142</sup> and in one, the Supreme Court accepted for constitutional purposes the Illinois court's recognition of "a right of access by way of the streets, which cannot be taken away or materially impaired by the city, without incurring legal liability to the extent of the damages thereby occasioned."<sup>143</sup> The Court thus affirmed the Illinois court's ruling that deprivation of an access right without compensation was a taking. Nevertheless, thirty years earlier, in *Smith v. Corp. of Washington*, arguably the only case decided under the Federal Constitution, the Court found that a regrade did not take any property.<sup>144</sup> Is there any reason to believe that the right

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gun interpreting constitutional "damaging" provisions with respect to disturbances of rights rather than land itself).

<sup>141</sup> This is not surprising. The Fourteenth Amendment was passed in 1868, and its first section is interpreted to apply the guarantees of the Bill of Rights against state and local governments. U.S. Const. amend. XIV, § 1. The compensation requirement under the Takings Clause of the Fifth Amendment was not clearly incorporated against state and local governments until 1897. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236–39 (1897).

<sup>142</sup> *City of Chicago v. Taylor*, 125 U.S. 161, 165 (1888); *Transp. Co. v. City of Chicago*, 99 U.S. 635, 643–45 (1878). As stated above, the basis for federal jurisdiction was extremely unclear. See *supra* note 59. All of the Court's decisions on grading were issued before *Erie R.R. Co. v. Tompkins* pronounced the nonexistence of "federal general common law" and thus required federal courts to respect the decisions of a state's highest court in all matters not governed by the Constitution or an act of Congress, 304 U.S. 64, 78 (1938), but even prior to *Erie* state rules of property were considered matters of local law rather than general law, see Ernest A. Young, A General Defense of *Erie Railroad Co. v. Tompkins*, 10 J.L. Econ. & Pol'y 17, 29 n.70 (2013).

<sup>143</sup> *Taylor*, 125 U.S. at 167–68 (quoting *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379, 397 (1882) (internal quotation marks omitted)). The Court declined to question the wisdom of the constitutional change or its effect on municipal improvements, noting that such concerns were properly addressed "to the people of the State." *Id.* at 170.

<sup>144</sup> 61 U.S. (10 How.) 135, 148 (1857).

of access was only state constitutional property, and not federal constitutional property?

There is no reason to think that the street grade cases were so limited. In *Smith*, the plaintiff had not asserted the taking of an access right, so that case is of limited help in determining whether the Court would have rejected the claim had it been raised.<sup>145</sup> And as a descriptive matter, multiple state and federal courts since *Smith* have interpreted the Federal Takings Clause to apply to access rights.<sup>146</sup> No case has held that access rights recognized as property by state law should not qualify for federal protection.

## II. THE NEGLECTED LESSONS FROM THE STREET GRADE CASES

The street grade cases tee up a question: What lessons can be learned from the creation of the right of access by courts, particularly in light of existing property theory? This Part takes that up. It begins by explaining the dominant institutional choice paradigm in property law—which holds that legislatures are and should be the institutions that make changes in the number and types of recognized property rights—and how the history of the right of access might reinforce that theory. Then, it pivots to the many reasons why legislatures could not necessarily be trusted to fairly allocate rights during the regrades, as revealed by the original sources. From that history, this Part concludes that, while there may be good reasons to prefer that legislatures allocate and define property interests as a general matter, courts may play a valuable and neglected role in creating constitutional property interests when political processes have failed.

### *A. Legislative Preference in the Law of Property*

Before further discussing the role of courts in the street grade cases, it is necessary to explain the dominant framework for evaluating institutional choice in property law. In an influential article, Professors Thomas Merrill and Henry Smith seek to explain why property interests, unlike contract interests, are generally enforceable only when they conform to a limited number of standardized forms and types.<sup>147</sup> Merrill and

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<sup>145</sup> *Id.* at 140–45.

<sup>146</sup> See sources cited *supra* note 99.

<sup>147</sup> Merrill & Smith, *supra* note 12, at 3.



Smith argue that the standardization of forms makes sense because of property's *in rem* nature: Because a property interest is good against the world, standardization minimizes information costs and measurement costs to third parties.<sup>148</sup> From this principle, Merrill and Smith build out an institutional choice argument, contending that any changes to the standardized set of property interests should be made by legislatures. As Merrill and Smith suggest, legislative rule making may offer greater hope of clarity, prospectivity, and stability than judicial rule making. It may also lower the administrative costs of a property system and permit lower-cost information gathering than attempting to tease out property rules from case law.<sup>149</sup>

Merrill and Smith's work indicates that when courts define new constitutional property interests—like the right of access—too broadly or too frequently, both public entities and private parties may have significant difficulty predicting whether an action creates constitutional liability. New rights can be defined in too many cases or too ambiguously, which will require later interventions to narrow the circumstances where the right at issue can be held taken.<sup>150</sup> This may induce underinvestment, whether by individuals afraid to invest in their land, or by a government loath to risk liability by undertaking otherwise desirable public projects. In that regard, the common law can be a blunt tool for making and allocating new sorts of property rights.

Some of the regrade history bears out Merrill and Smith's concerns about courts creating novel property interests. The later history of the right of access acts as a cautionary tale, reinforcing fears about just how costly court-made property interests can be. Regrade cases slowed and stopped because the regrades themselves largely stopped; the advantages of lowering or raising a street ten or more feet were likely lessened as

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<sup>148</sup> *Id.* at 8.

<sup>149</sup> See *id.* at 61.

<sup>150</sup> Some common law history suggests that the creation of overbroad, unpredictable rights is not altogether uncommon. One court has suggested that “the right . . . to be free from nuisance” is a compensable property right. *Talcott Bros. v. City of Des Moines*, 109 N.W. 311, 315 (Iowa 1906) (“The right to light, air, of access, to be free from nuisance, etc., as well as the right of lateral support, are property rights, and it follows as matter of course that he who deprives the owner thereof in any degree is guilty of a taking.”); see also *Yale Univ. v. City of New Haven*, 134 A. 268, 272 (Conn. 1926) (suggesting in dicta that a right of view might belong to abutting owners). Yet another suggested that abutters of public property might have a constitutional property right to prevent the destruction of shade trees. *Skinner v. Buchanan*, 142 A. 72, 74 (Vt. 1928).

horses were replaced with automobiles. However, the right of access went on to cause significant trouble. Because the regrade decisions referred broadly to a “right of access,” later litigants sought to claim that many other sorts of government actions interfered with access rights. Some tried to use the “right of access” in the post-World War II era to thwart conversions of roads into limited-access highways, on the grounds that they decreased the abutting owner’s access (and reduced the chance vehicular traffic could stop by businesses).<sup>151</sup> Others complained that one-way streets and cul-de-sacs took the right of access, because they made the route into and away from the home or business less direct and more circuitous.<sup>152</sup> Invocations of access as constitutional property were used to challenge government actions even where major health or safety risks were involved. Several cases, for example, involved gas stations with double driveways, located on street corners; driveways near intersections have been proven to cause a greater number of accidents with both other vehicles and pedestrians.<sup>153</sup> When legislatures began requiring driveways to be located a certain distance from the intersection, or when they revoked permitting for one of multiple entryways, gas station proprietors would often challenge those regulations as a taking of the access right.<sup>154</sup>

Courts responded to these uncertainties by trying to narrow what constituted takings of access rights, generally by explaining that the property right was a right of “reasonable access” and finding that only unreasonable interferences with access would trigger compensation requirements.<sup>155</sup> Still, this judicial intervention led to wildly inconsistent results. In the gas station cases, for example, courts in the District of Columbia and Virginia both recognized that compensation was required only for unreasonable interferences with access rights, but they reached completely opposite results about the constitutionality of closing one of multiple driveways, where the driveway closed was on the busiest street. The D.C. court found it a taking pursuant to the Federal Constitution, and the Virginia court found that sort of closure constitutional under

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<sup>151</sup> Stoebeck, *supra* note 7, at 740–41. For further discussions of the evolution of the right of access in the automobile age, see Stoebeck, *supra* note 15, at 21–28; Stoebeck, *supra* note 7, at 738–63; Stokes, *supra* note 7, at 588–90.

<sup>152</sup> Stoebeck, *supra* note 7, at 744–46, 755–57.

<sup>153</sup> Stokes, *supra* note 7, at 588–89.

<sup>154</sup> *Id.* at 604–06.

<sup>155</sup> Stoebeck, *supra* note 7, at 742 & n.24, 745–46.

both the state and federal constitutions.<sup>156</sup> Courts could perhaps have defined the right of access more narrowly to cover only regrades—say, the right to have a usable means of entry to an established road—but they did not do so. Perhaps such a suggestion can be made only in hindsight. Regardless, the breadth of the right of access did generate significant litigation and confusion later, once regrades were over.<sup>157</sup>

These uncertainties generated by courts proliferating property rights would seem to skyrocket what takings theorists call “settlement costs”—the total “dollar value of the time, effort, and resources which would be required” to settle or litigate all compensation claims in court, as well as those of all similarly situated property owners.<sup>158</sup> Utilitarian theories of takings argue that when the government engages in what is arguably a taking, it must either (1) pay these settlement costs associated with giving compensation; or (2) endure “demoralization costs” associated with avoiding compensation, which include the “dollar value necessary to offset disutilities” that accrue specifically to those who receive no compensation and their sympathizers, as well as the dollar value of the lost future production of these and other observers caused by the resulting reduced incentives or social unrest.<sup>159</sup> For efficiency purposes, government actors should decide whether to compensate based on which of

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<sup>156</sup> Compare *Brownlow v. O'Donoghue Bros.*, 276 F. 636, 638 (D.C. Cir. 1921) (holding that a filling station proprietor's “right to access to and from Fourteenth street is a property right” that could not be taken without compensation), with *Wood v. City of Richmond*, 138 S.E. 560, 562 (Va. 1927) (acknowledging that a filling station owner forced to close one driveway “has an easement in the public road which amounts to a property right” but that “this right is subordinate to the right of the municipality, derived by legislative authority, to so control the use of the streets as to promote the safety, comfort, health, and general welfare of the public”).

<sup>157</sup> Of course, it is possible that responses by other state and municipal actors to new technological and social changes will still generate these sorts of subsequent costs. A legislative act providing procedures for damages specifically for regrades may result in minimal subsequent confusion. However, the constitutional changes that resulted in the “taken or damaged” language in many state constitutions led to just as much subsequent litigation about what was meant by both “property” and “damaged.” See, e.g., *Henderson v. City of Columbus*, 827 N.W.2d 486, 493–94 (Neb. 2013) (discussing court-made limitations on state constitutional takings or damagings, though these limitations were generally flowing from the “public use” requirement); *Steele v. City of Houston*, 603 S.W.2d 786, 790 (Tex. 1980) (discussing how “damaged” in the Texas Constitution recognizes a broader set of injuries than does the Federal Constitution, but how courts have limited their interpretation of that term to damages arising out of public works or takings otherwise clearly for public use).

<sup>158</sup> Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165, 1214 (1967).

<sup>159</sup> *Id.*

these two costs is lower. In other words, if demoralization far exceeds the costs of settlement, the government should pay the costs of settling (including compensation awards). On the other hand, compensation should not be paid when settlement costs exceed demoralization costs; because the costs of settling are so high, it is more efficient for government to endure the anger, frustration, and lost production that occur as a result of the failure to compensate.

Unless the administrative costs of expanding constitutional property can be appropriately cabined—both by making the property easier to identify and by limiting the number of circumstances where such rights can be claimed taken—settlement costs may be astronomical. A utilitarian calculus might suggest that compensation should never be ordered in these circumstances, because it will always be safer to endure demoralization. The regrade cases bear out the risk of high settlement costs: Settlement costs include the information costs that result from unpredictability,<sup>160</sup> and third parties no doubt struggled to identify whether a right of access would be affected by any given action in later years. Given this level of uncertainty, governments and individuals had to incur serious costs to make informed decisions about their actions, with the resulting losses from these arrangements falling on the public as a whole. Of course, some factors may mitigate the potentially enormous settlement costs of expanding property rights. For example, though the right of access became very widespread, not every right will catch on in so many jurisdictions, perhaps limiting total efficiency losses and administrative costs.<sup>161</sup> However, administrative costs are a serious problem facing proponents of the virtues of state court property expansion. The social costs of expanding constitutional property are potentially devastatingly high.

A final, yet significant problem imposed by the prospect of judicial property expansion is the difficulty associated with undoing a common

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<sup>160</sup> Cf. Merrill & Smith, *supra* note 12, at 53–54 (discussing the high information costs third parties incur to ascertain the nature and number of proliferating property rights).

<sup>161</sup> Other court-generated rights which will be discussed elsewhere in this Article, like the right of “visibility,” failed to take off in the same way—although the residents of the states where such a right is recognized are stuck with it, unless they can limit the scope of the right with artful argumentation. For an example of such a legal argument, see *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 139 P.3d 119, 125–126 (Cal. 2006), as modified on denial of reh’g, No. S132619, 2006 Cal. LEXIS 12176 (Cal. Oct. 11, 2006) (limiting the situations where courts should find a taking of a “right of visibility”).

law decision that retroactively and prospectively confers a constitutional right. If a state court's decision to recognize a constitutionally protected property right plainly leads to inefficient or undesirable results, it is unclear how any other state institution could directly undo that decision. State legislatures, federal courts, and even subsequent state court panels each have dubious authority to reverse a state court decision conferring a property interest. Judicial review means that determinations of the existence of property interests will ultimately fall to the state judiciary,<sup>162</sup> so legislatures will likely have limited authority to negate what the courts have declared. Federal courts may also lack authority to intervene in property expansion by application of federal law. If state courts decide that something is constitutional property solely as a matter of state constitutional law, federal constitutional law has nothing to say because federal courts lack jurisdiction to review state court determinations of state law that rest on "adequate and independent state grounds."<sup>163</sup> Even where federal constitutional law is involved,<sup>164</sup> it is generally accepted that state law controls the meaning of the term "property," tying the hands of federal tribunals.<sup>165</sup> Finally, by operation of "judicial takings" doctrine, the state courts themselves may be prevented by constitutional takings clauses or due process clauses from eliminating without compensation what other judges have previously declared to be property, if their earlier opinions "established" those rights.<sup>166</sup> The takings clauses of

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<sup>162</sup> The judiciary may be deferential to legislative judgments. According to Merrill and Smith, "[t]here are no significant examples of judicial abolition of existing forms of property" declared or made by the legislature. See Merrill & Smith, *supra* note 12, at 20. I have also not found any evidence of the opposite: legislatures attempting to undo property recognized as such by the judiciary.

<sup>163</sup> See *Michigan v. Long*, 463 U.S. 1032, 1037–42 (1983).

<sup>164</sup> Prudential considerations may lead litigants to rely on federal takings claims in state or federal courts, whether because of risk aversion, litigation strategy, or the threat of claim preclusion. Two Supreme Court cases are generally read to indicate that litigants must ripen federal takings claims in state courts and that resolution of the takings issues in state court may preclude relitigation of the same issues in federal court under federal law. *San Remo Hotel v. City and Cty. of San Francisco*, 545 U.S. 323, 338 (2005); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985).

<sup>165</sup> The Supreme Court has long held that property interests "are not created by the Constitution," and instead are "created . . . by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

<sup>166</sup> The case of *Muhlker v. New York & Harlem Railroad Co.* debated whether the New York courts could properly limit or negate the easements of light and air then recognized under New York law regarding elevated railroads, although the ultimate ground of decision was on the basis of the Contracts Clause. 197 U.S. 544, 570 (1905). The contours of so-

state and federal constitutions prohibit legislatures and courts from defining property too narrowly, but it is unclear how any institution could undo an overly broad definition made up by a court. Property expansion may thus be a one-way ratchet: Why give the courts, of all institutions, the authority to expand constitutional property, if these are the attendant problems?

### *B. Legislative Malfunctions and Court Intervention*

Despite the many advantages of relying on legislatures, rather than courts, to define and allocate property rights, these advantages appear to fade when the legislature malfunctions—either because it is improperly influenced and thus not acting toward a socially desirable end, or because it fails to act altogether out of political inertia. Once these deficiencies in the political process are present, the institutional advantages of legislative property creation are seriously reduced or eliminated.<sup>167</sup> Significantly, the regrade history suggests that problems with the legislative process were widespread in those circumstances, weakening the argument against judicial property expansion in all instances and directly challenging the legislative preference theory.

Generally speaking, legislative processes can be improperly influenced in one of two distinct ways: undue minoritarian bias or unfair majoritarian bias.<sup>168</sup> Minoritarian biases are the province of interest group analysis, a branch of public choice theory in political science; they are present when the legislature has been captured by some powerful minority group.<sup>169</sup> Majoritarian biases present the opposite problem: the “tyr-

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called “judicial takings” have received much attention in recent years. See, e.g., Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 *Yale L.J. F.* 247 (2011); Thompson, *supra* note 2; Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 *Utah L. Rev.* 379.

<sup>167</sup> See Merrill & Smith, *supra* note 12, at 66–68.

<sup>168</sup> See Neil K. Komisar, *Law’s Limits: Rule of Law and the Supply and Demand of Rights* 22 (2001).

<sup>169</sup> Scholars have convincingly shown that courts may be just as susceptible to the same interest group influence as legislatures. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *Yale L.J.* 31, 67–68 (1991); Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 *Harv. J.L. & Pub. Pol’y* 219, 229–30 (1997). Nevertheless, interest group theories are a dominant justification for judges intervening in takings disputes. See Saul Levmore, *Just Compensation and Just Politics*, 22 *Conn. L. Rev.* 285, 308–11 (1990); Saul Levmore, *Takings, Torts, and Special Interests*, 77 *Va. L. Rev.* 1333, 1355–60 (1991).

anny of the majority,”<sup>170</sup> present when the majority targets single individuals or small groups of individuals for unfair, arbitrary, or particularly harsh treatment. As the history shows, both sorts of biases were present in different regrade scenarios.

Interest group influence was rampant in many regrading stories. Legislatures often initiated regrades at the behest of powerful business lobbies or individual speculators who believed property values would increase on account of the regrades. Usually, these individuals or groups convinced municipal governments to undertake the regrading project for their own personal gain.<sup>171</sup> True, some evidence suggests that property values in regrade districts did sometimes increase, in which case finding a taking would not have made much of a practical difference; if fair market value went up for all properties affected by a regrade, even if some aggrieved owner succeeded in initiating a constitutional action, there would be no decline in value and hence no compensation.<sup>172</sup> However, anecdotal evidence suggests that owners were just as likely to be worse off after regrades.<sup>173</sup> Houses in one neighborhood in San Francisco, where one speculator forced through a regrade, were so reduced in value that many owners cut their losses and sold to any willing buyer for low prices, leaving the area “a new slum, a place of precarious sandy cliffs, deep sandy cuttings, solitary ancient houses and butt ends of streets.”<sup>174</sup>

The costs of regrades usually fell disproportionately on the urban poor, those least likely to succeed under an interest group model of politics. Though it is difficult to tell the wealth of the plaintiff from any given case, subsequent histories of landscape development have exposed

<sup>170</sup> Komesar, *supra* note 168, at 22.

<sup>171</sup> One abutting owner with dreams of skyrocketing property values got himself elected to the San Francisco assembly, where he pushed through a sixty-foot regrade that ultimately did not increase local property prices, leaving most of the owners without remedy and forcing most of the neighborhood to relocate (in spite of one concession, a bridge constructed between neighbors that used to be across the street from one another). John S. Hittell, *A History of the City of San Francisco and Incidentally of the State of California* 379–80 (San Francisco, A.L. Bancroft & Co. 1878).

<sup>172</sup> Big Street Work Done in Seattle, *Morning Oregonian* (Portland, Ore.), Oct. 9, 1906, at 6 (“Property values [in Seattle’s regrade districts] have more than doubled . . .”).

<sup>173</sup> E.g., Charles Lockwood, *A History of Ever-Changing Rincon Hill*, SPUR, Jan. 1, 2003, <http://www.spur.org/publications/article/2003-01-01/history-ever-changing-rincon-hill> [<https://perma.cc/YE2X-JWL4>].

<sup>174</sup> Peter Booth Wiley, *National Trust Guide/San Francisco: America’s Guide for Architecture and History Travelers* 31 (2000).

that many areas targeted for regrades were inhabited by city undesirables.<sup>175</sup> In Boston, for example, hills were cleared for commercial interests while Irish families with nowhere to go held on “until the roofs were taken off, and their rooms laid open to the city.”<sup>176</sup> The same was true in other urban areas. One resident of a Seattle slum told a newspaper to tell other Seattleites that “[w]e people who live in your regrade districts here in Seattle are martyrs”<sup>177</sup>—in part because even before any digging took place, landlords declined to improve housing “because of the hope (or fear) that another regrade would soon take place.”<sup>178</sup> True, renters would likely not have seen any compensation had it been given to their landlords,<sup>179</sup> but the costs of regrades nevertheless fell on renters, making the regrades similar to very early urban renewal projects.<sup>180</sup> Evidence suggests legislatures tend to be less sensitive to the concerns of “political outsiders, including racial minorities and the poor, who are not attached to cohesive communities.”<sup>181</sup> One might speculate that though the politically important or wealthy might have been able to pressure the legislature to provide a cause of action for damages, the urban poor displaced by regrades had no such opportunity. And even if unable to push through legislation, politically powerful individuals could strike deals: There is clear evidence from Seattle that at least one rich business was able to negotiate with politicians and engineers for a favorable relocation subsidy.<sup>182</sup> Court decisions expanding constitutional property rights may have thus offered a better chance for political out-

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<sup>175</sup> Lawrence W. Kennedy, *Planning the City Upon a Hill: Boston Since 1630*, at 58 (1992); Klinge, *supra* note 22, at 96, 112; William B. Moyer, *A City (Only Partly) on a Hill: Terrain and Land Use in Pre-Twentieth-Century Boston*, in *Remaking Boston: An Environmental History of the City and Its Surroundings* 127, 138–39 (Anthony N. Penna & Conrad Edick Wright eds., 2009); see Miller, *supra* note 21, at 125.

<sup>176</sup> Kennedy, *supra* note 175, at 58 (internal quotation marks omitted).

<sup>177</sup> *Washing Seattle’s Big Hills Into the Sea*, *Seattle Post-Intelligencer* (Wash.), Apr. 8, 1909, at 3.

<sup>178</sup> V.V. Tarbill, *Mountain-Moving in Seattle*, 8 *Harv. Bus. Rev.* 482, 486 (1930).

<sup>179</sup> Cf. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 *Mich. L. Rev.* 101, 106–07 (2006) (noting that unlike owners, residential tenants are typically not candidates for receiving compensation from use of eminent domain); Michelman, *supra* note 158, at 1254–55 (observing that “by the generally received doctrines, tenants are not constitutionally entitled to anything,” and that this prediction was borne out by urban development programs).

<sup>180</sup> Kennedy, *supra* note 175, at 59.

<sup>181</sup> Garnett, *supra* note 179, at 120.

<sup>182</sup> Klinge, *supra* note 22, at 114.



siders to circumvent unsympathetic legislators and obtain redress through takings law.<sup>183</sup>

There is evidence of majoritarian biases in the regrade cases, too. History suggests that some people and neighborhoods were singled out to bear burdens over and over again, with their complaints for reprieve falling on deaf ears. Certain owners suffered through consecutive regrades over a period of years, forced to bear the cost of adjusting each time. The story behind *Healey v. City of New Haven* furnishes an example, although the case was resolved in the plaintiff's favor on nonconstitutional grounds.<sup>184</sup> Healey built a business on the underpopulated Congress Avenue in 1861 and constructed sidewalks out front. In 1867, the city raised the street several feet, and Healey dutifully elevated his building and reconstructed the sidewalk.<sup>185</sup> In 1874, New Haven again raised the grade by several feet, this time necessitating thousands of dollars of improvements and interrupting Healey's business.<sup>186</sup> One local official described what had happened to Healey as "outrageous" and another called it "shystery."<sup>187</sup> Other legislators pointed out that Connecticut common law did not require payment of damages to abutting owners without a trespass, so they were doing all that was legally required.<sup>188</sup> Stories of successive regrades were not at all uncommon, suggesting serious legislative failures to take into account the damages to individuals suffering through repeated losses.<sup>189</sup>

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<sup>183</sup> Cf. Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 *Idaho L. Rev.* 11, 73 (2003) (noting James Madison's fear that a small number of voters might successfully twist the legislative process to their advantage using superior resources and organization). It is worth noting that during the same period as the regrade litigation, many state judges came to be elected, rather than appointed. See generally Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 *Am. J. Legal Hist.* 190 (1993) (accounting for the rise of elected judges in many states in the antebellum period). Particularly in light of that fact, this Article should not be read to suggest that judges were more neutral or immune to political processes; instead, it suggests with historical evidence that the overlapping authority of courts in this space sometimes enabled litigants to be successful in court even when they could not successfully lobby legislators.

<sup>184</sup> 47 *Conn.* 305, 310 (1879).

<sup>185</sup> *Id.* at 306–07.

<sup>186</sup> *Congress Avenue Grades*, *supra* note 101, at 1.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See, e.g., *Injustice to Remove Hump: No Necessity to Again Regrade Fayette Street*, *Balt. Am.*, Apr. 29, 1905, at 16.

Much takings theory suggests that courts should intervene to protect against both majoritarian and minoritarian process malfunctions. Courts should protect “politically powerless individuals and groups from the predations of special interest groups that are able to commandeer the legislature to their own ends,”<sup>190</sup> and they should scrutinize decisions that target individuals or small groups, because they are unlikely to receive fair treatment at the hands of majorities.<sup>191</sup> As the regrade history shows, constitutional property creation offered a fix for the inequities resulting from both types of problems. Courts used the creation of a constitutional property interest to intervene on behalf of individual landowners where takings theories would suggest they should. And while the social costs of judicial property creation remain significant, they may be less worrisome in circumstances where the political process is failing and the fairness, efficiency, or social utility of any piece of legislation is in doubt.

In addition to intervening when legislatures are improperly influenced, courts may also serve a valuable role in constitutional property law when legislatures are simply inert. The street grade cases provide evidence of this sort of failure, too. Street grading challenged the bounds of the existing conception of constitutional property: States and municipalities were radically changing the landscape, presenting new questions about the scope and nature of private rights and whether the cost of adaptation should be borne by the public or by private citizens. Courts addressed that question head-on when legislatures would not. In at least one documented instance, legislators considered their obligations to property owners to be determined by the common law;<sup>192</sup> without courts holding that uncompensated regrades violated takings clauses, it is unclear how quickly the idea that regrades were unfair would have spread. Even where state courts declined to protect landowners through property creation, they often mentioned the wisdom of compensating for grade

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<sup>190</sup> Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 *Rutgers L. Rev.* 243, 245–46 (1993).

<sup>191</sup> See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 877 (1995) (discussing various process theories of the judicial role in enforcing the Takings Clause).

<sup>192</sup> See, e.g., *Congress Avenue Grades*, *supra* note 101, at 1.

changes and invited legislatures to act.<sup>193</sup> Several legislatures responded to this call, passing laws in the aftermath of decisions adverse to abutting owners.<sup>194</sup> There is also some evidence that legislatures and constitutional conventions waited to see the effect that recognition of the right of access would have on municipal improvements.<sup>195</sup> By initiating that change, state courts led a charge that trickled across the states through multiple institutional channels, permitting different approaches to be tested in different jurisdictions.<sup>196</sup> Eventually, popular opinion and the weight of judicial authority both came out in favor of compensating for grade changes.<sup>197</sup> Today, it appears that nearly every state requires damages for grade changes either by common law or by statute.<sup>198</sup>

<sup>193</sup> See Nichols, *supra* note 102, § 307, at 817 (“In many of the decisions in which this rule [of not compensating for damage from regrades] was applied the courts expressed regret over the harshness of the result, and sought some means to reach a different conclusion.”).

<sup>194</sup> *United States v. Alexander*, 148 U.S. 186, 192 (1893); *Eaton v. Bos., C. & Montreal R.R.*, 51 N.H. 504, 533–34 (1872).

<sup>195</sup> See Illinois Convention, *supra* note 111, at 1583 (statement of Mr. Medill).

<sup>196</sup> Cf. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *Yale L.J.* 203, 205 (2004) (defending the lack of uniformity in state law rules regarding takings). The process of constitutional property innovation was slow, but it also reflected one of federalism’s oft-invoked strengths: the ability for states to act as “laboratories.” See James A. Gardner, *The “States-As-Laboratories” Metaphor in State Constitutional Law*, 30 *Val. U. L. Rev.* 475 (1996). The right of access spread horizontally, but not uniformly, permitting a variety of solutions to be tested in different states. Michael G. Colantuono, *Comment, The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 *Calif. L. Rev.* 1473, 1474 (1987) (“[S]tate constitutions can strengthen federalism by allowing the states to articulate, and live by, standards that suit their different needs.”).

<sup>197</sup> There is robust literature on the relationship between changed popular opinion and judicial constitutional interpretation. See, e.g., Barry Friedman, *Mediated Popular Constitutionalism*, 101 *Mich. L. Rev.* 2596, 2598 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *Ind. L.J.* 1, 24 (2003); Robert C. Post, *The Supreme Court 2002 Term, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4, 108 (2003). It seems unlikely that there was any coherent popular movement either nationally or in any given state to oppose the regrades. Nevertheless, the idea that constitutional culture is in a dialectical relationship with constitutional interpretation has remained almost astonishingly absent from takings scholarship; the street grade cases thus suggest closer attention is needed to the interaction between democratic discourse and popular change in this area. But see Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property*, 34 *Fordham Urb. L.J.* 613, 647 (2007) (applying social movement theory to determinations of public use requirement in Takings Clause).

<sup>198</sup> See, e.g., *Iowa Code Ann.* § 364.15 (West 2015); 26 *Pa. Stat. and Cons. Stat. Ann.* § 714 (West 2006); *Wis. Stat.* § 32.18 (2015).

By recognizing the right of access, courts played an important role in shifting the playing field when political failures left landowners susceptible to capricious treatment by the legislative branch. Armed with a property right, individual landowners affected by regrades could demand satisfaction for those regrades that necessitated demolition or failed to improve local property values. It should be noted that court battles were not the only way that individuals affected by regrades signaled their dissatisfaction with regrades to the political branches. Long-held theories suggest that when people are unhappy with how state and local governments are behaving, they should organize or leave, taking their tax dollars with them.<sup>199</sup> In the regrade cases, curiously, affected owners protested merely by staying put; the laws removed access to the street, but they did not require owners to abandon the property or eventually move the structure down to the new street level. So, in places like Seattle, some residents engaged in their own form of resistance: They refused to abandon their homes atop what became known as “spite mounds,” a powerful symbol to visitors and legislators of unhappiness with the regrades.<sup>200</sup> A few homeowners persisted in sitting atop the hills in the long term. Today, their front doors sit on grass-covered mounds still feet over the streets.

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<sup>199</sup> For examples of the special political constraints on local legislatures behaving badly, see Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 *UCLA L. Rev.* 1681, 1687–88 (2007). For exit and voice as constraints on bad behavior more generally, see Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 4 (1970).

<sup>200</sup> *Denny Hill Humps Will Be Removed*, *Seattle Post-Intelligencer* (Wash.), Oct. 2, 1910, at 1. Apparently two of the “spite mounds” were actually owned by a gentleman who was merely out of town, involved in the Alaska gold rush. *Id.*

**Figure 4, Seattle Spite Mounds, 1909-1910<sup>201</sup>**



Copyright, 1911, by Asahel Curtis.

THE LEVELING OF THE HILLS TO MAKE SEATTLE



<sup>201</sup> Photograph: Neighborhood North from Pike Street During the Denny Hill Regrade (Curtiss Parker), Seattle Photograph Collection, Curtis Parker Photographs of the Denny Regrade Collection, Univ. of Wash. Libr., Special Collections, Neg. No. UW24146z (1909), <http://digitalcollections.lib.washington.edu/cdm/ref/collection/seattle/id/1066> [<https://perma.cc/9FTB-GBQT>]; Photograph: Denny Hill Regrade, ca. 1910 (Asahel Curtis), Seattle Photograph Collection, Univ. of Wash. Libr., Special Collections, Neg. No. UW4812 (1910), <http://digitalcollections.lib.washington.edu/cdm/ref/collection/seattle/id/1543> [<https://perma.cc/T9TZ-878X>].

**Figure 5, House at 1516 Melrose, Former Spite Mound, 2015<sup>202</sup>**

### III. WHAT JUDICIAL PROPERTY EXPANSION MEANS FOR PROPERTY THEORY

What should we learn from the street grade case study? This history takes us beyond theorizing about the potential costs of judicial property innovation in the abstract, demonstrating the real consequences of this poorly understood part of the constitutional law of property. State courts offered a real solution to a catastrophic problem in property law; by creating a new property right and granting it constitutional status, they provided abutting owners with damages when legislatures acted to demolish homes and businesses without any payment. Judicial decisions on that

<sup>202</sup> Melrose Ave., Seattle, Wash., Google Earth (last visited Aug. 21, 2016), [https://www.google.com/maps/place/1516+Melrose+Ave,+Seattle,+WA+98122/@47.61449,-122.3279177,3a,75y,83h,90t/data=!3m7!1e1!3m5!1sh8iy3153Br4mOzPqcdnCTw!2e0!6s%2F%2Fgeo1.ggpht.com%2Fcbk%3Fpanoid%3Dh8iy3153Br4mOzPqcdnCTw%26output%3Dthumbnail%26cb\\_client%3Dsearch.TACTILE.gps%26thumb%3D2%26w%3D392%26h%3D106%26yaw%3D83.547409%26pitch%3D0!7i13312!8i6656!4m2!3m1!1s0x54906acad88a652f:0x9121885a2852b13d!6m1!1e1](https://www.google.com/maps/place/1516+Melrose+Ave,+Seattle,+WA+98122/@47.61449,-122.3279177,3a,75y,83h,90t/data=!3m7!1e1!3m5!1sh8iy3153Br4mOzPqcdnCTw!2e0!6s%2F%2Fgeo1.ggpht.com%2Fcbk%3Fpanoid%3Dh8iy3153Br4mOzPqcdnCTw%26output%3Dthumbnail%26cb_client%3Dsearch.TACTILE.gps%26thumb%3D2%26w%3D392%26h%3D106%26yaw%3D83.547409%26pitch%3D0!7i13312!8i6656!4m2!3m1!1s0x54906acad88a652f:0x9121885a2852b13d!6m1!1e1) [https://perma.cc/JRG6-M3NQ].

front also catalyzed a series of revisions, both constitutional and legislative, that had the effect of requiring compensation for regrading injuries. This important interplay between courts and legislatures demonstrates the hitherto ignored role that courts play in innovating within property law.

As this Article has shown through the regrade story, courts have a long history of expanding the coverage of constitutional property under both state and federal constitutions. This Part examines what this descriptive, corrective account means for property theory more broadly. In particular, the regrade history questions at least two tenets of Merrill and Smith's institutional choice analysis that prefers legislatures to make changes to the number and type of enforceable property interests: first, the claim that the risk of political failure is low when it comes to changes in property interests; and second, the claim that common law changes must necessarily be a high-cost vehicle for changing the set of enforceable interests.

#### *A. The Frequency of Political Failure in Property Law*

Merrill and Smith defend legislative preference in property law in part because they assess the risk of political failure to be low: According to them, the creation and allocation of new property interests is a less politically fraught decision than others, so legislatures can be more trusted to act in this space than they may be in other contexts.<sup>203</sup> Clearly, the regrade history calls that assertion into question: Deciding whether landowners had a compensable right of access or no right at all was a politically sensitive, highly impactful decision. And as discussed below, there are many more examples from takings law where courts have perceived political failure in takings cases, scrutinizing legislative actions and creating new property interests in response—suggesting that Merrill and Smith may have underestimated the risk of political failure in this context.

Courts have intervened to create many enforceable constitutional property rights over the years, often explicitly because of feared deficiencies in the legislative process. In that regard, the regrade cases were

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<sup>203</sup> In their words, "With respect to changes in property rights, . . . legislative failures are less pronounced than may be the case in other contexts." Merrill & Smith, *supra* note 12, at 68.

not isolated incidents. The right of access was only the first new property right that state courts awarded constitutional status. Courts started compensating for takings of other rights and easements from the late nineteenth century onward, telling us a great deal about the role of courts in constitutional property creation in the American legal system. An owner's rights to the light and air over the street,<sup>204</sup> the right of lateral support from government property,<sup>205</sup> the right of ventilation,<sup>206</sup> the right to extract rock and stone,<sup>207</sup> and the right to be viewed by passers-by or the "right to see and to be seen"<sup>208</sup> were all accepted as valid constitutional property by various state courts. Lower federal courts have intermittently interpreted state law to provide separate rights relating to water, minerals, or grazing as constitutional property.<sup>209</sup> Many of these rights were created to provide landowners compensation for the encroachment of some new technology deployed for public purposes, or its after-effects—for example, elevated railways blocking up roads.<sup>210</sup> Perhaps the most famous right that became constitutional property was the right to mine coal so as to cause the surface to cave in, made famous in the foundational regulatory takings case of *Pennsylvania Coal Co. v. Mahon*.<sup>211</sup> Because that right was recognized as a separate estate in land by the Pennsylvania state courts,<sup>212</sup> Justice Holmes held that its destruc-

<sup>204</sup> *Adams v. Chi., Burlington & N. R.R. Co.*, 39 N.W. 629, 633–34 (Minn. 1888); see *Fleming v. Elgin, Joilet & E. Ry. Co.*, 114 N.E. 187, 189–90 (Ill. 1916); *Barnett v. Johnson*, 15 N.J. Eq. 481, 490–91 (N.J. 1863). American courts did reject the related "ancient lights" doctrine in nearly every other context, especially against private parties building on their own lots so as to obstruct a neighbor's sunlight. See Sara C. Bronin, *Solar Rights*, 89 B.U. L. Rev. 1217, 1259 (2009).

<sup>205</sup> *Sanders v. State Highway Comm'n*, 508 P.2d 981, 989 (Kan. 1973); *Stearns' Ex'r v. City of Richmond*, 14 S.E. 847, 848 (Va. 1892).

<sup>206</sup> *Dill v. School Bd.*, 20 A. 739, 743 (N.J. Ch. 1890).

<sup>207</sup> *Ex parte Kelso*, 82 P. 241, 241 (Cal. 1905).

<sup>208</sup> *Kelbro, Inc. v. Myrick*, 30 A.2d 527, 530 (Vt. 1943).

<sup>209</sup> *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir. 1991) ("[M]ineral rights are clearly property subject to the taking clause of the Fifth Amendment."); *McDonald v. Bd. of Miss. Levee Comm'rs*, 832 F.2d 901, 904 (5th Cir. 1987) (finding taking of grazing rights); *Fallini v. United States*, 31 Fed. Cl. 53, 57 (Fed. Cl. 1994), vacated, 56 F.3d 1378 (Fed. Cir. 1995) (denying a property right to water).

<sup>210</sup> See Arens, *supra* note 10, at 630.

<sup>211</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 394 (1922).

<sup>212</sup> See *id.* at 414 (noting that Pennsylvania recognizes the right of support "as an estate in land"); *Charnetski v. Miner's Mills Coal Mining Co.*, 113 A. 683, 684 (Pa. 1921) (recognizing that under Pennsylvania law, "three estates may exist in land—the surface, the coal, and the right of support"); Hugh G. Montgomery, *The Development of the Right of Subadjacent Support and the "Third Estate" in Pennsylvania*, 25 Temp. L.Q. 1, 7–9 (1951). The fascinat-



tion by a regulation prohibiting mining under houses triggered the Federal Takings Clause.<sup>213</sup> In short, constitutional property creation has occurred with some frequency in state law. While there is scant space to examine the political context of each of these innovations, the prevalence of court intervention does suggest that political failure—or at least, perceived political failure—might not be as rare in the property context as Merrill and Smith think.

Of course, courts do not always intervene to create and distribute novel property rights between the public and individuals in takings cases. In fact, it appears that courts often defer to legislatures without the problems witnessed in the regrade cases. So, for example, when airplanes called into question the rights of individual owners to object to overflights, it was courts and legislatures working together—through the rules governing aviation easements and through significant regulation of airspace—that distributed property rights and attendant obligations.<sup>214</sup> When technology enabled individual landowners to build skyscrapers, legislators used zoning laws to distribute the right to build and balance this against possible rights to fresh air or natural light. Courts deferred to legislative judgments about height limits and permitting, rather than recognizing easements or other rights as constitutional property worthy of protection from legislative redistribution.<sup>215</sup>

Contrasting these two sets of cases, courts appear particularly suspicious of the legislative process when a new technology is being used to construct a public work that differentially harms members of the public. In the case of regrades, unlike the skyscraper example, the government was inflicting the externality itself through use of the technology, rather than distributing the externality of a new technology between other par-

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ing history of the support estate is too long to discuss here, but one reason why it became a separate estate was that mining companies leaving the business failed to transfer the right either with the coal or to the surface owner; treating it as its own estate allowed it to be possessed by a third individual in order to resolve the title issue. See *Penman v. Jones*, 100 A. 1043, 1046 (Pa. 1917); *Graff Furnace Co. v. Scranton Coal Co.*, 91 A. 508, 509 (Pa. 1914).

<sup>213</sup> *Pa. Coal Co.*, 260 U.S. at 414.

<sup>214</sup> See Troy A. Rule, *Airspace in an Age of Drones*, 95 B.U. L. Rev. 155, 179–80 (2015). As Professor Rule's account suggests, there remains a surprising lack of clarity under this regime.

<sup>215</sup> Owners of lots adjoining commercial buildings—either tall or wide—valiantly tried to seek common law easements in courts that would effectively nullify the legislative permissions for skyscrapers and business blocks. See, e.g., *Miller v. Hoeschler*, 105 N.W. 790, 791–92 (Wis. 1905). They were unsuccessful.

ties through regulation. Court scrutiny of the relevant interests may appear all the more important when the government awards a right to itself, rather than merely awarding a right to *A* instead of to *B*. Moreover, there was a difference in harm between the regrade cases and the aviation cases. The regrade cases directly impacted a few property owners with extensive losses. The aviation cases affected a large number of owners with fairly mild harms—the nuisance of airplane noise hundreds of feet overhead.<sup>216</sup> So, one possibility is this: When the government, in unclear circumstances, awards itself a property right to the serious detriment of some property owners, courts are likely to review that decision carefully for political deficiencies and use the power to create new forms of property to correct a perceived injustice.

Courts also appear sensitive to how the distribution of benefits and burdens reflects a functional or dysfunctional political process. The circumstances of some property innovations, and especially the regrade cases, presented a particular threat to a fair political process: When a few stakeholders have a lot to gain, the average member of the public has comparatively little to gain, and a small group of individual landowners have a lot to lose, majoritarian or minoritarian biases may be more likely to influence political proceedings.<sup>217</sup> Majoritarian bias, because the average voting member of the public benefits, but perhaps not proportionally to the few individuals whose land ownership is adversely affected; minoritarian bias, because some individuals who would gain disproportionately may care enough to invest time and resources in capturing the legislative vote. The legislature's incentives are aligned with either the powerful interest group or the apathetic majority. Legislatures might thus be particularly unlikely to voluntarily recognize and compensate the few affected individuals for new property rights raised by technological advances in these instances.

The history of constitutional property innovation thus suggests that court scrutiny of the property interests at stake may be especially likely in one of two scenarios: (1) when the legislature is engaged in self-dealing, awarding itself the ability to do something against individual

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<sup>216</sup> See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Va. L. Rev. 965, 1026 (2004).

<sup>217</sup> Cf. Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 Mich. L. Rev. 657, 668 n.28, 684 (1988) (defining majoritarian and minoritarian bias and explaining political circumstances giving rise to both).

members of the public who stand to lose significantly; or (2) when the distribution of benefits and burdens by the allocation of a new property interest raises a serious risk of process failure. Courts often appear suspicious of the legislative process in these circumstances. History alone cannot provide a definitive answer to whether court intervention is desirable given its costs, nor does it establish whether all the sorts of constitutional property rights created by courts are normatively defensible.<sup>218</sup> However, at a minimum, the regrade history and its analogs call into question the assertion that changes to property rights are inherently less susceptible to political malfunctions. To the contrary, history shows that courts have often created property interests in response to perceived political failures, a development that the institutional choice analysis begun by Merrill and Smith does not yet sufficiently explain.

### *B. Doctrinal Limitations on Constitutional Property Innovation*

In addition to their arguments about the infrequency of political failure, Merrill and Smith also argue that legislatures are the proper sites for changes to the menu of property rights because legislative rule changes lower information costs and measurement costs for third parties.<sup>219</sup> This makes sense: A range of parties, from title insurers to property owners, are likely to be more aware of a legislated property right than a right that arises in a particular common law case between two unknown parties. Still, while Merrill and Smith account for the many reasons why legislative actions may be a lower-cost, clearer form of rule making, they also understate some of the ways that doctrinal limitations could attractively lower the costs of courts innovating or recognizing new property rights.<sup>220</sup> This Section offers some preliminary thoughts about both existing and hypothetical doctrinal constraints on constitutional property creation that could mitigate the costs of judicial action while preserving flexibility for courts to respond if merited. First, this Section discusses the viability of a constraint on property making floated by others: a

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<sup>218</sup> See cases cited *supra* note 150. The right to prevent the cutting down of shade trees in a nearby park, for example, seems especially problematic as a normative matter—and it is difficult to imagine as a case of political failure.

<sup>219</sup> Merrill & Smith, *supra* note 12, at 61.

<sup>220</sup> In trying to fit equitable servitudes into their explanation of the *numerus clausus*, Merrill and Smith do mention doctrinal constraints as a limitation on the power of courts to infer them. See *id.* at 16–17. Doctrinal constraints do not come up in their institutional choice analysis. *Id.* at 58–68.

comprehensive definition of constitutional property, particularly one furnished by federal law. Second, it explores what factors courts used to recognize novel property interests in the street grade cases, and it examines whether those rulings provide any indication that judges are lowering the costs of common law rule making by self-imposing constraints on property innovation as a matter of substantive state law.

### *1. A Federal Definition of Constitutional Property?*

Theorists have occasionally floated the idea that a federal definition of constitutional property incorporating only some state law property interests might prevent the threats and high costs associated with property expansion by courts.<sup>221</sup> This might seem like a desirable form of federal oversight for state property innovation: Only a subset of the property defined by states will qualify for federal protection. However, a unique federal definition of constitutional property is both a nonobvious proposition and one that would likely be of limited assistance.

There is nothing remotely close to a definition of federal constitutional property in Supreme Court case law, but several precedents have suggested that the Supreme Court may not incorporate what constitutes Takings Clause property wholesale from state law as a matter of actual practice. The Court has held that “rights” are not compensable property interests and that the “parcel as a whole” is the relevant property interest for federal constitutional takings.<sup>222</sup> In other words, “where an owner

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<sup>221</sup> Dana & Merrill, *supra* note 6, at 63; Merrill, *supra* note 2, at 893 (suggesting a “patterning definition” of property wherein state law defines interests that federal law recognizes as property); see Richard J. Lazarus, Putting the Correct “Spin” on *Lucas*, 45 *Stan. L. Rev.* 1411, 1429–30 (1993) (suggesting the Supreme Court might adopt “a normative view of what private property must be” in the Federal Constitution); Timothy M. Mulvaney, Foreground Principles, 20 *Geo. Mason L. Rev.* 837, 840–41, 841 n.16 (2013) (discussing this “normativist” viewpoint that philosophy might provide to the federal definition of property); Jeremy Paul, The Hidden Structure of Takings Law, 64 *S. Cal. L. Rev.* 1393, 1404–05 (1991) (discussing “physicalist” and “market” models of the sorts of interests takings provisions protect); see also Laura E. Allen, Note, Defining Private Property Interests in America’s New Economic Reality: The Case for the Primacy of Federal Law in Takings Litigation, 31 *J.L. & Com.* 225, 226 (2012–2013) (discussing different circuits’ approaches to recognizing Fifth Amendment property). A fascinating possibility was raised in a 1954 article, which suggested that “novel property rights”—like the right of access—“do not fall within the area of federal protection” (though no support was offered for that contention). Robert Kratovil & Frank J. Harrison, Jr., Eminent Domain—Policy and Concept, 42 *Calif. L. Rev.* 596, 632 (1954).

<sup>222</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31, 130 n.27 (1978).

possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”<sup>223</sup> In *Keystone Bituminous Coal Ass’n v. DeBenedictis*, the Court directly confronted whether it should treat a right clearly conferred by state law as constitutional property.<sup>224</sup> A regulatory act prohibited coal mining that would cause houses on the surface to cave in, even though the coal companies owned the right to cause such subsidence as part of the “support estate” owned alongside their mineral estate.<sup>225</sup> The support estate was recognized as a separate property interest by Pennsylvania law, and indeed, had been held to be federal constitutional property by the Court some decades earlier.<sup>226</sup> However, in *Keystone*, the Court revisited that conclusion, holding that

the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface. Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden . . . place[d] on the support estate does not constitute a taking.<sup>227</sup>

One reading of this passage is this: Though state law arguably characterized the coal company’s right to cause subsidence as a separate property interest, the Court held that the right was not constitutional property for federal purposes.<sup>228</sup>

Despite appearances, Supreme Court case law is not so consistent on this point. Notwithstanding the “rights” versus “bundles” language in *Keystone* and other decisions, the Court has held in the years since *Keystone* that the deprivation of a right created by state law *can* be compensable under the Takings Clause. Both the “right to exclude” and the “right to pass on property” at death have been held to be state law inter-

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<sup>223</sup> *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).

<sup>224</sup> 480 U.S. 470 (1987).

<sup>225</sup> See *id.* at 500–01.

<sup>226</sup> *Pa. Coal Co.*, 260 U.S. at 408.

<sup>227</sup> 480 U.S. at 500–01.

<sup>228</sup> *Id.* In my view, this reading of *Keystone* is erroneous and dangerous. The original district court decision was that the regulation did not actually take the support estate, because other rights associated with it—the right to interfere with wells and dig ventilation shafts, for example—were unaffected. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 581 F. Supp. 511, 519 (W.D. Pa. 1984). This seems to me a much stronger footing for holding that the regulation did not violate the Constitution.

ests that, if interfered with, can trigger the compensation requirement.<sup>229</sup> Importantly, the Court has never stated that an interest found compensable under the rulings of a state's highest court does not qualify for federal protection.<sup>230</sup> And even as lower courts have struggled to decide whether they should defer to state law or interpret the Federal Constitution to apply only to certain state property interests, the Court has never signaled its likelihood to break from the idea that state law defines federal constitutional property.<sup>231</sup> Even the *Keystone* ruling above cited "Pennsylvania law," rather than federal law, for the determination that the right taken by the regulation was not really a separate compensable interest.<sup>232</sup>

Moreover, there are two critical problems with using a proposed federal definition of property to cabin state-court property expansion. First, neither scholars nor courts have yet given any reason why federal constitutional property should be defined more narrowly than state constitutional property, either as a historical or theoretical matter.<sup>233</sup> To be sure,

<sup>229</sup> *Hodel v. Irving*, 481 U.S. 704, 716 (1987). Most peculiarly, six of the seven Justices in the majority wrote or joined in two one-paragraph concurrences—three to note their belief that *Hodel* did not affect the holding in *Andrus v. Allard*, 444 U.S. 51 (1979), about "strands" and bundles; and three to note that *Hodel* effectively limited *Andrus* to its facts. *Hodel*, 481 U.S. at 718 (Brennan, Marshall & Blackmun, JJs., concurring); *id.* at 719 (Scalia & Powell, JJs. & Rehnquist, C.J., concurring). See also *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (compensating for destruction of "right to exclude" before *Keystone*); *Moore v. City of E. Cleveland*, 431 U.S. 494, 520–21 (1977) (Stevens, J., concurring in the judgment) (arguing that an ordinance depriving the "fundamental right . . . of an owner to decide who may reside on his or her property" should trigger the Takings Clause).

<sup>230</sup> Some opinions outside the majority have ventured into the abyss. See, e.g., *E. Enterprises v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment) (noting that the challenged regulation did not take "an identified property interest" but rather imposed a requirement to act); *id.* at 554 (Breyer, J., dissenting) (noting that takings generally require "a specific interest in physical or intellectual property"). See generally Merrill, *supra* note 2, at 895–907 (summarizing twists and turns in the Court's apparent definitions of property for takings purposes).

<sup>231</sup> Compare *Vandevere v. Lloyd*, 644 F.3d 957, 964 (9th Cir. 2011) ("Again, the Court's two-step method of analysis suggests that state law governs the demarcation of a property right, while federal law governs the manner in which the state must respect a right so defined."), with *Hoffman v. City of Warwick*, 909 F.2d 608, 615 (1st Cir. 1990) ("That the property interest allegedly protected by the federal Due Process and Takings Clauses arises from state law does not mean that the state has the final say as to whether that interest is a property right for federal constitutional purposes.").

<sup>232</sup> *Keystone*, 480 U.S. at 500.

<sup>233</sup> Almost no early sources, either relating to the federal or state constitutions, shed light on the meaning of "property." See William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 599–600 (1972) ("Down to the time when the United States

many state courts interpret provisions of their state constitutions differently and more broadly than identical provisions of the Federal Constitution.<sup>234</sup> Some state courts have even interpreted their takings clauses differently, particularly when it comes to what counts as “public use”; they find that a narrower range of government objectives qualify as public uses than the Supreme Court has held meet the public use requirement of the Federal Constitution.<sup>235</sup> While full treatment of the wisdom of state constitutional divergence from federal constitutional law either broadly or in this instance is beyond the scope of this Article, there is no readily apparent basis for defining property in the Federal Constitution more narrowly than in state constitutions. Most of the typical reasons used to justify differences between state and federal constitutional law—differences in the texts, state constitutional history, or the Supreme Court declining to protect some right<sup>236</sup>—are not clearly present with respect to the definition of property in these identical constitutional provisions.<sup>237</sup> To the contrary, the Federal Constitution actively *depends* on state law to provide content for the federal term, suggesting they are linked.

Even assuming that federal and state constitutional property could or should be defined differently, a federal definition also does nothing when state courts find a right exists and has been taken as a matter of state constitutional law. Though a version of “Beltway Syndrome” may lead litigants to rely on federal claims and federal courts rather than state

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and early state constitutions were adopted, the few writings there were on eminent domain spoke of the taking of ‘property.’ Never, in these sources . . . was there any attempt to describe or define what was meant by ‘property.’” (footnote omitted).

<sup>234</sup> For an overview of some broader interpretations of state constitutional provisions and the issues raised by state constitutionalism, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 Penn St. L. Rev. 1007 (2011); and Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147 (1993).

<sup>235</sup> See, e.g., *Wayne Cty. v. Hathcock*, 684 N.W.2d 765, 783 (Mich. 2004); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1136 (Ohio 2006).

<sup>236</sup> Robert F. Williams, *State Constitutional Law: Cases and Materials* 316 (2d ed. 1993).

<sup>237</sup> It might be true, however, that the state precedents predating the rise of federal takings law could be used to distinguish state constitutional property from federal constitutional property, if federal courts were to reject a state-created interest as constitutional property under federal law.

law and state forums,<sup>238</sup> state courts presented with the opportunity to innovate under state constitutional law might still do so.

To be sure, nothing would prevent the proposed federal definitions from being incorporated into both federal and state constitutional law. In an article separate from the one co-authored with Henry Smith, Thomas Merrill has proposed a definition that, though couched in federal law, could apply equally to state constitutional property; Merrill would protect as constitutional property only discrete property rights, those specific interests in an asset that permit the owner to object to interference or encroachment and that are frequently exchanged.<sup>239</sup> The discreteness requirement helps to alleviate the most serious problems associated with constitutional property expansion: overbreadth, high administrative costs, and unlimited threats to the regulatory state. The tests that the Supreme Court has tended to endorse in the takings context all aim to reduce these same risks. For example, the Supreme Court has ruled that both a 100% diminution in land's value by a regulation and a de minimis physical invasion of property are per se takings.<sup>240</sup> These tests have the effect of reducing the administrative costs of ascertaining whether an act is a taking and permitting most regulations to pass constitutional muster.

Unfortunately, even if proposals like Merrill's for a federal definition of property could be extended as a matter of both state and federal law, they are perhaps unlikely to be implemented as a practical matter for two reasons. First, collective action on behalf of all fifty states and all federal courts to adopt a single definition is unlikely—particularly when the justifications for that definition are primarily driven by economic analysis, rather than jurisprudence. Second, several states have already begun defining “property” as a matter of state constitutional law, with varying degrees of specificity.<sup>241</sup> Accordingly, a more flexible solution that aris-

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<sup>238</sup> See Robert C. Ellickson, Panel I: Liberty, Property, and Environmental Ethics, 21 *Ecology L.Q.* 397 (1994) (establishing the concept of “Beltway Syndrome” as the idea “that our nation has but one important government, the one here in Washington D.C.”).

<sup>239</sup> See Dana & Merrill, *supra* note 6, at 68–81. Professors Merrill and Dana would recognize as federal constitutional property (1) discrete assets that (2) carry the right to exclude and (3) are exchangeable on markets. *Id.*

<sup>240</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

<sup>241</sup> See, e.g., *Vanek v. State, Bd. Of Fisheries*, 193 P.3d 283, 289–90 (Alaska 2008); *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1296–97 (Miss. 1994); *N.H. Health Care Ass'n v. Governor*, 13 A.3d 145, 161–62 (N.H. 2011). For other, vaguer discussions of constitutional property as a matter of state law, see *Goodyear Farms v. United States*, 241



es out of preexisting state law may be a more tolerable intervention to limit judicial property expansion than a new federal definition of property to be incorporated wholesale.

## 2. *Substantive State Law Limitations on Constitutional Property?*

Is there any hope that courts will self-impose limitations on constitutional property as a matter of substantive state law, thus limiting the property interests that could be created in any given takings case?<sup>242</sup> In the street grade cases, courts treated an owner's reasonable reliance on the existence of a property right as a critical piece of the inquiry into the right's actual existence. There are reasons to believe that in the courts' view, the reasonable reliance requirement appropriately struck the balance between a purely deferential view of property—that property is whatever courts or legislatures say it is—and the view that property has some existential content. Courts taking up the “right of access” held that, by establishing streets and permitting owners to build in reliance on the established grade, owners could reasonably rely on a property right to prevent the public officials from later obstructing their driveways. On the other hand, had courts taken up a “right to build,” it might not have

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F.2d 484, 486 (9th Cir. 1957) (“Easements for ditches, for flow of water thereon and the right to payment therefor must be compensated if the evidence show these exist.”); *Lynn v. United States*, 110 F.2d 586, 589 (5th Cir. 1940) (“An easement is property which when taken must be compensated, if in itself valuable.”); *Donnell v. United States*, 834 F. Supp. 19, 24, 26 (D. Me. 1993); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 316 (Iowa 1998) (“Easements are property interests subject to the just compensation requirements of the Fifth Amendment to the Federal Constitution.”); *State v. Chambers Inv. Co.*, 595 So. 2d 598, 602 (La. 1992) (“The courts are not always explicit about it; but impliedly, if not expressly, they recognize street access, riparian rights, easements and servitudes, restrictive covenants, and lateral support as forms of property.” (emphasis omitted)); *Single v. State*, 59 N.Y.S.2d 536, 538 (N.Y. Ct. Cl. 1946) (“As an abutting owner [the plaintiff] is entitled to the use and enjoyment of the street and of the space above its surface and this easement is property within the meaning of the Constitution of which claimant has been deprived and for which he is entitled to compensation.”), aff'd, 68 N.Y.S.2d 745 (N.Y. App. Div. 1947), aff'd, 76 N.E.2d 326 (N.Y. 1947).

<sup>242</sup> I use “courts” rather than “state courts” because even federal courts might be justified in recognizing the existence of new rights, so long as it is pursuant to state law. Cf. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 726 (2010) (observing that “federal courts must often decide what state property rights exist in nontakings contexts”); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 315 (1st Cir. 2005) (noting that because “there is no definitive state court judgment on this issue, it is possible that the information sought to be disclosed could potentially represent a valid property interest for Takings Clause purposes”).

been reasonable for owners to rely on the right to build just any structure, given the prevalence and long history of court decisions upholding zoning restrictions and height limits.<sup>243</sup> In the street grade decisions, reasonable reliance entailed an examination of existing law and the reasonable expectations flowing from it.<sup>244</sup> If new rights must have a source in preexisting law or must arise from the conduct and expectations of the parties, then reasonable reliance could act as a substantive limitation on courts spinning out an infinite list of property rights.

Although positive law did not specifically confer on owners the right of access to the street as it came to be used in the regrade cases, background law did give owners and the government some reasons to suspect that such a right might exist. The courts of several states recognized a riparian individual's right to access water, a right the individual could use to object to the construction of streets or wharves blocking that access.<sup>245</sup> Additionally, the courts of other states recognized that individuals might be entitled to compensation if a road was closed, cutting off their access to the road network at large.<sup>246</sup> Taken together, these deci-

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<sup>243</sup> See, e.g., *Welch v. Swasey*, 214 U.S. 91, 103–04 (1909) (rejecting a Boston resident's claim that "a general restriction of height as low as eighty or one hundred feet . . . [was] an unreasonable infringement upon his rights of property").

<sup>244</sup> Cf. Paul, *supra* note 221, at 1415 (suggesting that a "substantive theory of property is needed to point the way toward meaningful limits on sovereign power and thereby give strength to the practice of judicial review").

<sup>245</sup> In the first case, *City of Pittsburgh v. Scott*, 1 Pa. 309, 317 (1845), the Supreme Court of Pennsylvania suggested that a riparian owner might have a takings action for deprivation of the "right to a landing" caused by the laying out of a street and public wharf between the water and his property, but ultimately found that the landowner had failed to avail himself of legislative damages provisions. In *Bell v. Gough*, 23 N.J.L. 624, 676 (1852), the New Jersey court recapitulated that deprivation of the "riparian right to the use of the water for all purposes draws to it a remedial right of redress or compensation," but ultimately invalidated the potentially offensive act as a "private" taking. See *id.* at 681. I have found no case predating *Crawford v. Village of Delaware*, 7 Ohio St. 460 (1857) that actually found a water right "taken" by street construction, however.

<sup>246</sup> See *Livingston v. Mayor & City of New York*, 8 Wend. 85, 99 (N.Y. 1831); *In re Lewis Street*, 2 Wend. 472 (N.Y. 1829). For more information on the "estoppel in pais" doctrine, which as applied to streets covers the authority of a legislature to change the use of public property once dedicated, see *City of Cincinnati v. White's Lessee*, 31 U.S. 431, 438 (1832). A few cases from Kentucky did contain broad dicta about the just compensation required for destruction of private "rights of access." *Lexington & Ohio R.R. Co. v. Applegate*, 38 Ky. (8 Dana) 289, 295 (1839) ("[Y]et where individuals have peculiar rights in a street . . . it may be unconstitutional to discontinue it, close it up, or appropriate it to any purpose incompatible with its original dedication, without their consent, or a just compensation to them."); see *Transylvania Univ. v. City of Lexington*, 42 Ky. (3 B. Mon.) 25, 27–28 (1842). However, these cases both held the offending action not to be a taking of any access rights. *Lexington*

sions gave some indication that once established, public transportation networks confer rights on adjacent landowners to object to changes and diversions.

In addition to these formal legal precedents, courts also treated the average person's expectations as significant.<sup>247</sup> One of the earliest Ohio cases to require compensation did so in part by holding that individuals "have a right to rely upon the continuance of the grade with reference to which he made his improvements."<sup>248</sup> Individuals "built on the faith" that the property would be accessible.<sup>249</sup> The construction of mountains on the road, or the complete excavation of the roadway, interfered with those reasonable expectations.<sup>250</sup> Some courts conferred legal status on the expectations of parties by finding that the right of access was an implied easement limiting the government's use of the street.<sup>251</sup> Implied

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& *Ohio R.R. Co.*, 38 Ky. (8 Dana) at 298 ("The purchasers of property on Main street, as on every other street, took their respective lots of ground subject to all the contingencies that might arise to it and to the use of it, from all the uses which might ever be made of the street as a public way, consistently with the objects of its original dedication."); *Transylvania Univ.*, 42 Ky. (3 B. Mon.) at 29 (finding that street closing was "provisional" so consent of or compensation to affected parties did not matter in any event).

<sup>247</sup> Another way of expressing reliance may be stating that the rights are "vested." See Kobach, *supra* note 16, at 1291. I use the term reliance because the street grade cases never described the access right as vested, though they certainly examined whether the owner had "exercised, consummated, or realized the right in question." *Id.* Along with Kobach and others, Bruce Ackerman has suggested that demonstrated reliance may be important to the takings equation. Bruce A. Ackerman, *Private Property and the Constitution* 158–62 (1977).

<sup>248</sup> *Crawford*, 7 Ohio St. at 462.

<sup>249</sup> *Pence v. Bryant*, 46 S.E. 275, 278 (W. Va. 1903).

<sup>250</sup> See *City of Louisville v. Louisville Rolling Mill Co.*, 66 Ky. (3 Bush) 416, 428–29 (1867); *Goodall v. City of Milwaukee*, 5 Wis. 32, 52 (1856).

<sup>251</sup> See, e.g., *Clayton Cty. v. Billups E. Petroleum Co.*, 123 S.E.2d 187, 189–90 (Ga. Ct. App. 1961); *Liddick v. City of Council Bluffs*, 5 N.W.2d 361, 375 (Iowa 1942); *McNulta v. Ralston*, 3 Ohio Cir. Dec. 163, 164–65 (Ohio Cir. Ct. 1891); *Knox Cty. v. Lemarr*, 97 S.W.2d 659, 660 (Tenn. Ct. App. 1936); *DuPuy v. City of Waco*, 396 S.W.2d 103, 109 (Tex. 1965). An easement is a nonpossessory interest in land that conveys the right to use (or prevent use of) the burdened parcel to the benefitted party at the expense of the burdened party's right to use his property without restriction. The benefitted party or parcel is called "dominant" and the burdened "servient." 4 Richard R. Powell, *Powell on Real Property* § 34.01[1] (Michael Allan Wolf ed., 2000); see also Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* 972 (2007) (describing basic features of easements). Implied easements are subject to some limitations. Like all servitudes, they must "touch and concern" the land and they cannot be "in gross" (for the benefit of a specific person, rather than the land). See Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. Legal Stud. 139, 139 n.2, 140 (1978). To satisfy the requirements to create an easement by implication, they must also be apparent and necessary to the enjoyment of the premises. Jesse Dukeminier et

easements are rights to uses of another's land when those uses have been "apparent, continuous, and reasonably necessary to the enjoyment of the premises."<sup>252</sup> Recognizing an abutting owner with an implied easement in the street simply conferred legal status on the expectations that had arisen from prior conduct; the easement derived from the necessity of access and the owner's preexisting use of the access right.

Existing Supreme Court law supports the idea that the Federal Constitution might protect an owner's justifiable reliance on and expectations of continued possession of a property right. True, Justice Holmes once suggested in an early case that "the practical commercial advantages of the expectation that a street would remain open" should be distinguished from a property right.<sup>253</sup> However, more recent cases suggest that "background principles of the State's law of property," including common "understandings," provide limitations on an individual's title;<sup>254</sup> conversely, governments are prohibited from eliminating "an established right of private property" without paying compensation.<sup>255</sup> What makes a right "established" is an open question.<sup>256</sup> The Court has suggested that courts should examine "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land."<sup>257</sup> It has also stated that, in deciding whether to protect a property right, the history and significance of the right may be material. So, for example, the Supreme Court has held that both the "right to exclude"<sup>258</sup> and the "right to pass on valuable property to one's heirs"<sup>259</sup> are protected from destruction, on the basis of history and widespread acceptance of those rights as integral and expected parts of property ownership.

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al., Property 831 (8th ed. 2014); see also *Campbell v. Great Miami Aerie No. 2309, Fraternal Order of Eagles*, 472 N.E.2d 711, 713 (Ohio 1984) (applying these factors).

<sup>252</sup> Recent Cases, Easements—Modes of Acquisition: Implied Grant—Right to Water Pumped by Gasoline Engine on Adjoining Land, 28 Harv. L. Rev. 317, 323 (1915); see Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177, 1244 (1982).

<sup>253</sup> *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544, 573 (1905) (Holmes, J., dissenting).

<sup>254</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027, 1029 (1992).

<sup>255</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 714–16 (2010).

<sup>256</sup> For discussion of the oddities of the "established right" test, see Maureen E. Brady, *Defining "Navigability": Balancing State-Court Flexibility and Private Rights in Waterways*, 36 *Cardozo L. Rev.* 1415, 1443–47 (2015).

<sup>257</sup> *Lucas*, 505 U.S. at 1016–17 n.7.

<sup>258</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

<sup>259</sup> *Hodel v. Irving*, 481 U.S. 704, 715 (1987).

Why should we think that judges would refrain from abusing a reasonable reliance requirement, finding reliance or reasonable expectations where there should be none? For one thing, there are constraints on the judiciary internal to state law. The principle of *stare decisis* has often prevented judges from altering property rights too wildly,<sup>260</sup> and several states have lines of decisions that presume the constitutionality of state and local legislation.<sup>261</sup> These limitations may lead judges to refrain from creating new constitutional property rights and then finding them taken in all but extreme instances.

Nevertheless, despite some cautious optimism that judges may self-impose substantive limitations on property innovation, this case study cannot provide a definitive or reassuring answer as to the best standard. Reasonable reliance is a somewhat circular concept, and while, with hindsight, the right of access looks inevitable, it may not have seemed so at the time. The best way forward would be to gain a better understanding of how state courts have been defining constitutional property under state law: according to what substantive metrics, in what circumstances, and according to what limitations? Hopefully, future work by historians and property theorists will begin to answer these questions, permitting better analyses of whether the emergent doctrinal constraints can or do attractively reduce the costs of constitutional property innovation by courts in takings law.

#### CONCLUSION

As this Article has shown, state courts have played an important and neglected role in takings law by expanding what qualifies as constitutional property to address perceived unfairness and inequity. This account contradicts the dominant narrative in takings scholarship, which treats property expansion as either a purely theoretical possibility or too dangerous to entertain. To be sure, concerns about property innovation are not without foundation. Still, this Article has endeavored to show its positive attributes, and it has highlighted the need for institutional choice theorists to pay more attention to the role that state courts play in defining property's content for constitutional purposes.

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<sup>260</sup> Stephanie Stern, *Protecting Property Through Politics: State Legislative Checks and Judicial Takings*, 97 *Minn. L. Rev.* 2176, 2189–91 (2013).

<sup>261</sup> E.g., *Grand Forks-Traill Water Users, Inc. v. Hjelle*, 413 N.W.2d 344, 346 (N.D. 1987).

The street grade litigation consists of an extraordinary set of cases from an extraordinary time of American urban change. Yet these cases are not unrepresentative. New technology and changing norms often call into question the limits of private property against public use and control of a resource. The past five years provide many examples. The prospect of drones buzzing outside the window is no longer futuristic, and many questions are being raised about the boundary between private ownership and public use of the airspace over land.<sup>262</sup> As traditional forms of fuel increase in expense, residents seeking permission to use solar panels are running into state or municipal prohibitions;<sup>263</sup> a lingering question in many states is whether property owners have solar easements, or rights to use the sunshine that naturally falls on their property.<sup>264</sup> The meaning of property—and its attendant ability to confer control and exclusivity on its owner—will always be debated and fluid, particularly when the owners seek to enforce property's guarantees against the government and the public at large. Wherever one thinks the line should be drawn in any particular instance, it is reasonable to think that—if history is any indication—state courts will be a forum for finding the answer.

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<sup>262</sup> See generally Rule, *supra* note 214 (discussing the many property law issues associated with drone proliferation).

<sup>263</sup> Evan Halper, Rules Prevent Solar Panels in Many States with Abundant Sunlight, *L.A. Times* (Aug. 9, 2014), <http://www.latimes.com/nation/la-na-no-solar-20140810-story.html> [<https://perma.cc/DSP3-Q9RX>].

<sup>264</sup> See Bronin, *supra* note 204, at 1226. Notably, many state courts rejected easements for sunlight back in the nineteenth century to spur urban development; perhaps solar rights are following a longer trajectory than the access cases. See *id.* at 1259–60.