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## A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective

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# A FRAMEWORK FOR UNDERSTANDING PROPERTY REGULATION AND LAND USE CONTROL FROM A DYNAMIC PERSPECTIVE

*Donald J. Kochan\**

*Our land use control system operates across a variety of multidimensional and dynamic categories. Learning to navigate within and between these categories requires an appreciation for their interconnected, dynamic, and textured components and an awareness of alternative mechanisms for achieving one’s land use control preferences and one’s desired ends. Whether seeking to minimize controls as a property owner or attempting to place controls on the land uses of another, one should take time to understand the full ecology of the system. This Article looks at four broad categories of control: (1) no controls, or the state of nature; (2) judicial land use controls and initial assignments based on inherent rights and obligations arising as intrinsic to the system; (3) private land use controls that can achieve alterations in the initial assignments of rights and obligations through voluntary transfers; and (4) public land use controls, including legislative and regulatory means to force adjustments to initial assignments. The Article posits that players in the land use control game must assess their options in each category and appreciate the ability, and sometimes the necessity, to move between these four categories. Developing an understanding of the system through a conceptual framework this Article calls the “Dynamic Circle of Land Use Controls,” better situates one to see all of the system’s parts and, more importantly, to strategically plan one’s route through the system to achieve a desired result. After explaining the options and the framework, this Article provides two concrete, illustrative examples for applying the framework: dueling neighbors over the right to paint a house pink and competitive resource extractors (owners of coal and coal bed methane) with complex deeds and nearly unresolvable conflicts in developing their assets.*

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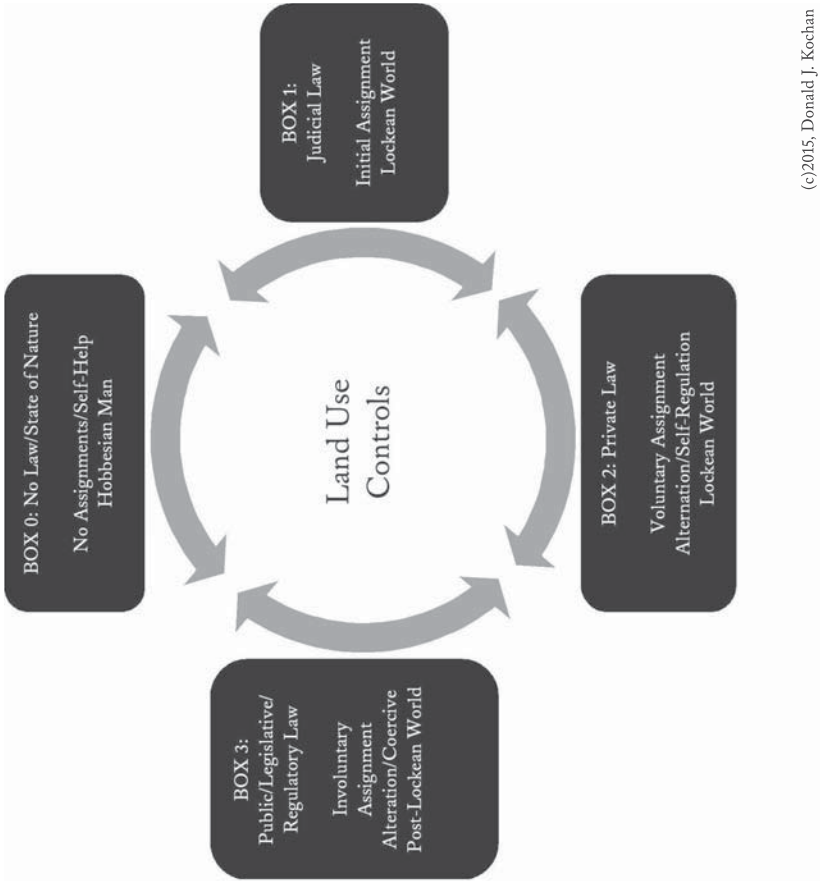
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## INTRODUCTION

Land is ubiquitous and so are the concerns for controlling its use. However, too often we fail to see the dynamic interactions between different avenues that individuals may follow in pursuit of their own land use preferences. When we do not have a birds-eye understanding of the system and the choices within it, we lose a full understanding of and appreciation for how we might use the law and legal mechanisms for property rights' adjustments to achieve land use objectives. As such, we miss opportunities to access these alternative paths, or we fail to fully appreciate the interconnectivity of different land use control mechanisms that might be utilized.

The framework presented in this Article, together with its illustration in what I call the "Land Use Dynamic Circle," aims to provide a useful perspective for all who wish to understand the system—including lawyers, judges, planners, property owners, agency officials, civil engineers, activists, and anyone else engaged with or interested in the control and regulation of property and land use. The framework in this Article presents four principal, broadly-defined decision points where property rights are defined, assigned, and/or altered, and where land use controls are chosen. The four decision points are: (1) The State of Nature; (2) The Judicial (or Initial Assignment) Stage; (3) The Private (or Voluntary Assignment-Alteration) Stage; and (4) The Public (or Coercive Assignment-Alteration) Stage. To best understand these relationships, consider Figure 1, which this Article will refer to as the "Dynamic Circle of Land Use Control Mechanisms in Property Law" (Land Use Dynamic Circle).

FIGURE 1. THE DYNAMIC CIRCLE OF LAND USE CONTROL MECHANISMS IN PROPERTY LAW



It is vital to develop a dynamic understanding of the land use control system as one with moving, interconnected, multidirectional, evolving, and adaptive parts.<sup>1</sup> The framework presented in this Article is designed to help achieve that understanding.<sup>2</sup>

At their core, land use controls are used to satisfy individual and community preferences about land use.<sup>3</sup> Land use controls are limitations upon uses of property that might otherwise be made absent the control. Broadly defined, land use controls are limitations on the use of land recognized by society and enforced by its legal systems that take land use out of the state of nature and into the civilized world.

If we take this very broad view of land use controls, then three categories of control become evident in the modern legal system.<sup>4</sup> These categories include: (1) common law—sometimes termed “foundational” or “inherent”—limitations on how one can use her property, principally recognizing the initial assignments of rights between and imposed upon parties in our liberal system (usually involving default rules against which bargaining can occur and from which adjustments can be voluntarily made); (2) private consensual agreements that voluntarily adjust the initial assignments; and (3) public, or “legislative” or “regulatory”, land use controls that involve state imposition of rules upon individuals about what they can and cannot do with their land, usually through mandatory rules. Public controls include permission-based rules, in which permits are required before certain land uses will be authorized and allowed. This category also includes zoning and planning rules.<sup>5</sup> Public land use controls might also take the form of direct commands for action or inaction, enforced by coercive power and violation of which comes with some public sanctions, including fines or imprisonment.<sup>6</sup>

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1. For fascinating work on dynamic systems, see generally J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996).

2. Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVIL. L. 441, 460 (2007) (inviting readers to take “steps to an ecology of the land use regulatory system”).

3. *Id.* at 496 (“the land use regulatory system is not a self-contained legal system that shapes land use, but is instead a medium of various forces in society”).

4. *Id.* at 472-73 (describing various types of land use controls, particularly detailing examples of a wide spectrum of public land use control mechanisms).

5. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION* LAW 40-55 (3d ed. 2013) (discussing history of zoning controls, planning, and related rules); Arnold, *supra* note 2, at 464-65 (discussing land use planning as a type of public land use control mechanism).

6. JUERGENSMEYER & ROBERTS, *supra* note 5, at 40-41 (briefly describing pre-20th century land use controls).

If we categorize land use controls in this way, we can begin to evaluate the process and merits of accessing each type of land use control. We can understand that unless the parties are acting in a state of nature, with no land use controls, some legal assignment of rights or recognition of rights and limitations likely exists, and may be subject to adjustment.

Part I of this Article explains some core elements and objectives of the land use control system, emphasizing its dynamic character. Part II focuses on the primary categories of land use controls, from the state of nature (and its absence of controls) to the highest level of government regulations and public land use controls. It begins by drawing on a dichotomy articulated by Richard Epstein and explains the tensions inherent between the “Hobbesian Man” in a state of nature, the necessity of a “Lockean World” to a functioning system of private property and land use in the liberal systems of governance, and the development of common law in the United States and like jurisdictions to set the initial rules in that system. Part II then discusses private adjustments to initial assignments of rights and societal (or public, coercion-based) adjustments as options for achieving land use preferences. Part III describes the movement and navigational components of the framework using the Land Use Dynamic Circle, taking the reader step-by-step through the “boxes”—or categories, options, and decision points—of potential control mechanisms. This Part is designed to explain the usage of the framework as both an explanatory reference guide and a strategic planning tool. Part IV runs two land use conflict examples through the dynamic circle to get a sense of its operation and utility.

One goal of this Article is to study and explore the interactive state of property with other interconnected elements of the legal system. While admitting that land use controls are not exclusively the province of property law and an issue of property rights,<sup>7</sup> this Article nonetheless focuses on the connections with property associated with the somewhat broader field of law known as “land use.” This Article will use land use “controls” as the term for its broad focus precisely because that term captures inherent limitations and voluntary limitations (or “bottom-up” types of controls), as well as government “regulation” or what might be called “interventionist,” “coercive,” or “top-down” methods of controls.<sup>8</sup>

This Article will not traverse through the weeds of specific land use controls, nor deal in detail with specific control decisions. Instead, it will

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7. Arnold, *supra* note 2, at 448-50 (explaining that land is too distinct to be treated as essentially a component of another field of law such as property, constitutional law, or environmental law).

8. *Id.* at 450 (“Private arrangements, community custom and practices, and judge-created common law define property, whereas government policy—more than any other source—defines land use regulation.”).

hover over the system, looking down upon it to see the whole and, like the Nazca lines in the desert of Southern Peru, reveal a picture of the intricately-designed system that is not observable when simply walking along the ground.<sup>9</sup> From this vantage point, we can see all the paths in the maze. We can begin to appreciate the distinctive structure and architecture of the system of land use controls.<sup>10</sup> As Tony Arnold has stressed, we “must first understand land use regulation and decision making *as a system*” if it is to be comprehended and thereafter improved.<sup>11</sup> The goal of this Article is to instill a view from above that will serve as a useful mental map that one can call on when assessing a discrete land use control problem and more effectively traverse the maze and the weeds.

## I. THE DYNAMIC LAND USE CONTROL SYSTEM IN THE UNITED STATES

The regulation of land use has been a necessary component of almost all communities and legal systems known to man.<sup>12</sup> In liberal systems of governance, land use controls have existed in their most basic form since the beginnings of the common law and the establishment of systems of tradable private property rights.<sup>13</sup>

While some forms of land use restrictions date back to before the founding of the United States,<sup>14</sup> the complexity of land use regulation has

9. See TIME-LIFE BOOKS, MYSTERIES OF THE UNKNOWN: INSIDE THE WORLD OF THE STRANGE AND UNEXPLAINED (2014). See also <http://www.nascaperu.com/es/turismo-peru-nasca/lineas-de-nasca-peru> (last visited Sept. 15, 2014) (“Lo asombroso es que estas líneas solamente pueden ser observadas en su integridad desde el aire, al sobrevolar el desierto, lo cual ha despertado grandes preguntas sobre las intenciones y habilidades de sus constructores.”).

10. Arnold, *supra* note 2, at 445 (discussing the distinctive nature of land use law and policy and stressing that “[u]nderstanding any system requires studying its structure and its own terms”).

11. *Id.* at 459 (emphasis added).

12. JUERGENSMEYER & ROBERTS, *supra* note 5, at 1 (stating that “governmental and private regulation of the use of land can be found in virtually all legal systems and societies since the beginning of history.”).

13. *Id.* (discussing the origins of modern land use law); Andrew Tutt, *Blightened Scrutiny*, 47 U.C. DAVIS L. REV. 1807, 1822-23 (2014) (“Arguments over land-use regulation have been around as long as there have been cities, and the parabolic sweep from total prohibition to breathtaking judicial deference tracks America’s increasing urbanization and suburbanization over the last century.”); see also Denis Binder, *Looking Back to the Future: A Curmudgeon’s Guide to the Future of Environmental Law*, 46 AKRON L. REV. 993 (2013) (explaining that it requires an understanding of at least 350 years of history and legal evolution to understand modern environmental land use controls, for example).

14. JUERGENSMEYER & ROBERTS, *supra* note 5, at 40 (stating that “[l]and use regulations date back to colonial America, and earlier.”).

grown,<sup>15</sup> as has the role for state-based legislative and regulatory controls on the uses of property beyond original common law limitations or the enforcement of private agreements.<sup>16</sup> Beginning with zoning movements in the 1920s, continuing with the progressive agenda of the New Deal era and beyond, and ending the last quarter of twentieth century with an “astounding” expansion “in importance and scope of land use regulatory law,” land use law has become a dominant field and one which is expected to continue to “accelerate” in growth in the near future.<sup>17</sup> This evolution has added to the dynamic nature of the system and expanded the potential points at which controls can be instituted on land uses; it has also proliferated the types of limitations (in character and degree) that can be imposed or authorizations that can be required.<sup>18</sup> The field has evolved with time but also with multiple and diverse (and sometimes themselves evolving) inputs.<sup>19</sup> This is true in part because there is a broad tapestry of interested stakehold-

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15. Adam J. Macleod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 55 (2012) (“Land use regulation has become increasingly complex over the last several decades.”).

16. John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 850 (2006). Nolon describes the breadth of the system:

Under the modern American land use system, land ownership is held subject to the regulations of federal, state, and local governments. According to the U.S. Census Bureau, there are about 39,000 governments that have or can be given authority to regulate private land use. In some areas, land developers must receive a permit to build near wetlands from the U.S. Army Corps of Engineers, the state department of environmental protection, and a local wetlands commission or planning board. In others, developers must comply with local erosion control regulations, meet state water quality standards, and comply with federal stormwater regulations. Other examples of overlapping regulations that protect watersheds, habitats, surface waters, and other resources abound.

*Id.*

17. JUERGENSMEYER & ROBERTS, *supra* note 5, at 1; *see also id.* at 40 (reaffirming that “public and private land use controls have a long history in Anglo/American law, dating back to at least Elizabethan times. Modern public controls . . . date back to the early 20th century.”).

18. Nolon, *supra* note 16, at 821-22 (discussing evolution of land use controls from common law to local regulatory controls and providing examples of how “states retained the power to define and limit property rights” and then empowered local governments to use additional power to control land development).

19. Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1011 (1996) (discussing interest group influence in the formation of land use controls and that change in land use laws is often a “culmination of the efforts of diverse, often contending, interest groups over many years”).



ers involved in land use policies<sup>20</sup>—from land owners, land users, businesses, and regulators to lawyers, economists, engineers, environmentalists, and other public policy advocates to name a few.<sup>21</sup>

There is no precise way to explain what the current and still evolving land use control system entails, and it includes a complex mix of market-oriented mechanisms and interventionist-regulatory approaches.<sup>22</sup> It is multifaceted, or what Arnold calls “irritatingly evasive of conceptually neat explanations.”<sup>23</sup> That multidimensional complexity is, in fact, why we must understand the menu of options available to each individual involved with land use preferences or land use control authority and decision-making power.

The system has developed a mix of boundaries and filters, both by constraining how far the government can go in imposing limitations on land uses—including the Takings Clause and other means of both limiting power or requiring compensation systems for cutting away at private property concerns—and by establishing baseline and automatic limitations on uses of private property, which explain things that owners never had the right to do in the first place, regardless of whether the government has chosen to implement top-down regulations.<sup>24</sup> Section II(B) discusses these inherent limitations on initial assignments and judicial land use controls. Thus, our American system establishes limits at both extremes—allowing no room for absolute governmental power but also not allowing for anarchical, purely selfish private action.

Within the choices made in our system, the law must necessarily strike the right balance and rest its rules somewhere along what I call the “Autonomy-Utility Spectrum.” We neither respect rules based on absolute autonomy nor do we allow rules based on absolute utility to emerge and dictate our property regime or shape our governance of land uses. We do not allow one man to use his property in a manner that imposes unacceptable negative

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20. Arnold, *supra* note 2, at 462 (claiming that “How land is used in the United States is the result of countless decisions by individuals, entities, communities, and governmental bodies, as well as the operation of complex, multi-faceted social forces”).

21. JUERGENSMEYER & ROBERTS, *supra* note 5, at 9 (noting that the “interdisciplinary nature of land use law is increasingly important,” and discussing various consumers of, and contributors to, land use law as including economists and engineers).

22. Arnold, *supra* note 2, at 483-84 (“decisions about land uses in our society affect who receives certain kinds of resources in society, . . . Nonetheless, the land use regulatory system is not primarily a distributive system. It is not merely a market of free exchange. Nor is it a top-down centralized provider of goods and services.”).

23. *Id.* at 484.

24. *Id.* at 479 (stating that “social norms and legal doctrines concerning private real property rights limit the potential scope of land use regulation and guarantee property owners certain freedoms,” and proceeding to give examples of such limitations).

externalities on another; nor do we give the government the absolute power to decide which property uses are “best” or serve the highest utility.

Thus, for example, the government is not allowed to take my “under-utilized” garage and give it to a mechanic who can start a business in it, employ people, serve the public, and all around add more utility to society than I presently do by simply storing my Christmas lights in it. Yet, the law may develop to limit what I can store in my garage or even what kinds of lights I can hang on my house during the holidays. Similarly, we (theoretically) do not allow the government to take my home because it decides that putting a shopping mall in that spot will bring more utility (including tax revenue) to the community. Yet, once I open a shopping mall on my property, the government might be able to set rules as to who I can exclude and who I must allow to shop on my property.

Most of the time, society, through its laws and lawmaking bodies, chooses a point between the two poles of absolute autonomy and absolute utility at which to govern.<sup>25</sup> We must remember that property and land use laws are developed by, and struggle with, a variety of approaches across the spectrum between autonomy and utility and between individualism and other, countervailing societal values.

For example, we place a high premium on the right to exclude others in our private property rights system,<sup>26</sup> yet we understand there must be limits—and even the common law imposes inherent limitations—on even that foundational right. One’s “right in his real property of course is not absolute.”<sup>27</sup> Beyond those initial, inherent, and automatic limitations, we are

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25. See Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 J. CORP. L. 519, 534-35 (2002) (discussing needs to make welfare judgments in initial allocation of land uses, including in legislative policies and land use planning).

26. See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wis. 1997) (“Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to ‘self-help’ remedies.”); see also *College Sav. Bank v. Fla. Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) (“Property depends upon exclusion by law from interference.”); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others”); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (“An essential element of individual property is the legal right to exclude others from enjoying it.”).

27. *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971) (discussing the maxim *sic utere tuo ut alienum non laedas* and explaining that “[a]lthough hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet.”).

succinctly reminded in the case of *State v. Shack* that “[p]roperty rights serve human values. They are recognized to that end, and are limited by it.”<sup>28</sup> These values open the door to controls beyond what might be the minimum necessary requirements for a functioning liberal system of governance.

Similarly, takings jurisprudence illuminates the delicate balance between valid and invalid governmental actions, especially when juxtaposed against the obligation to respect and preserve private property rights. In *Pennsylvania Coal Co. v. Mahon*, for example, Justice Holmes famously explained, “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>29</sup> Yet, at the same time, at some point along the spectrum the government has hit the limit beyond which it cannot act without compensating. Thus, Holmes continues in *Pennsylvania Coal* with the now infamous “too far” passage: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>30</sup> If the government wants to impose burdensome regulation, then it must compensate the regulated entity for the diminished value of their property from the constraints on use that went “too far.”

The line between acceptable and unacceptable restrictions on land use, or between compensable and non-compensable actions, is incapable of precise definition, but there is a struggle to find that line. As Charles Haar stated, “land-use law in the different states and municipalities proceeds on even course, between contending, but certainly not overwhelming, waves of ‘too far’ or ‘not far enough.’”<sup>31</sup> We must concede that it is difficult in the land use context to create bright lines for acceptable and unacceptable be-

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28. *Id.* at 372; see also Arnold, *supra* note 2, at 472 (“the legal authority to regulate land use rests in context specific determinations about the propriety of particular land uses in particular places, as defined by social needs and desires.”).

29. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

30. *Id.* at 415.

31. Haar, *supra* note 19, at 1014. Arnold describes it in the following manner, explaining that the competing concerns pervade decisionmaking:

The nature of planning, zoning, and discretionary permitting is about finding an appropriate mix of landowner freedom and boundaries, within a government decision making framework that gives regulators both power and limits. The system neither imposes stringent, unyielding restrictions on land use nor guarantees interest-holders in land unfettered freedom to use their land in any way they wish. Regulators have both broad authority to regulate and numerous limits on their powers. Interest-holders in land have both considerable freedom to possess, use, manage, and develop their lands, while also facing restrictions on their uses and requirements of government approval for many kinds of development or use of land.

Arnold, *supra* note 2, at 479.

haviors.<sup>32</sup> The words that the U.S. Supreme Court used to describe this difficulty in relation to zoning deserve broader application to almost all land use decisions. In *Village of Euclid v. Amber Realty Co.*, regarding zoning and the police power, the Court tells us that “[t]he line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.”<sup>33</sup> This imprecision pervades many if not most land use control decisions.

In this light, it is important that interested individuals not make reflexive judgments or take bright line positions when analyzing land use controls—regulation of land use or no regulation of land use, pro-growth or anti-growth.<sup>34</sup> For example, the fact remains that sometimes land use controls, including those imposed upon individuals through government regulation, actually have positive effects on property values.<sup>35</sup> The fact that I cannot open a convenience store on my suburban residential lot is a restriction on my use of my property. The residential zoning law takes away one of the interests I might otherwise have in my bundle. But the fact that my neighbor also cannot open a convenience store might very well create a net benefit for me because it increases the value of my home. A prospective buyer will be willing to pay more for my house knowing that there will never be a convenience store built next door to it. Now, the zoning laws may or may not be the most effective or efficient way to achieve this result, but they are often justified along these lines. At the very least, this example illustrates that there are not automatic and easy answers as to whether one particular control is all good or all bad.

Finally, the dynamism in the land use control system and between the varying mechanisms for obtaining what one desires reflects the competitive

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32. Arnold, *supra* note 2, at 499 (“[T]he land use regulatory system contains processes of regulation: processes of defining permissible, conditionally permissible, impermissible, and mandatory land use activities.”).

33. 272 U.S. 365, 387 (1926).

34. William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105, 106 (2006) (explaining that “[l]and-use regulations can affect the market value of property in a variety of ways . . . are complex and can easily be misunderstood or misinterpreted”); for a discussion of the apparent tendency for groups supporting or opposing land use policies to take extreme positions at the far ends of opposite poles, see Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning and Judicial Review*, 94 MARQ. L. REV. 1, 57-58 (2010) (explaining that in some communities, “mechanics of local growth politics have generated a polarized political discourse that requires both advocates and opponents of proposed growth policies to assert that they alone speak for the public interest, using the starkest possible rhetoric to bolster their own position”).

35. Jaeger, *supra* note 34, at 106 (explaining that “it has been assumed that land-use regulations invariably reduce property values when, in fact, they often have positive effects”).

nature of humans.<sup>36</sup> We should not be surprised that these competitive and self-interested tendencies, evident in the natural condition and in the state of nature from which law helps us escape, remain in the legal battles over choice of control mechanisms and in the bargaining processes between rival owners or interests.<sup>37</sup> Individuals, interest groups, and governments are all both offensive and defensive forces in the struggle over where to set land use controls.<sup>38</sup> The next Part begins to summarize some of the options individuals might access to achieve their desired land use ends for both their own property and for the property of others that might affect them.

## II. CATEGORIES OF LAND USE CONTROLS

One might phrase this Article's approach as an examination of land use control system's "ecology." Ecology is defined as, *inter alia*, "the totality or pattern of relations between organisms and their environment."<sup>39</sup> Here, the organisms are the various stakeholders in the land use control system—from those that want to use land (including owners, investors, developers, etc.) to those that want to limit uses (including neighbors and governments [and their constituencies]). The environment includes the universe of potential uses and the multiple legal channels or "environmental responses" available to those that wish to manipulate the "legal ecosystem."<sup>40</sup> The participants in this dynamic system must adapt as they move through or are confronted from the varying control sectors available within this legal environment. It can be described, as J.B. Ruhl has stated in a different context, that in this area as in other parts of the legal ecosystem, "law and society coexist inter-dependently and dynamically, approximating the behavior of nonlinear systems as they exist in the physical world."<sup>41</sup> This Part helps us to better understand the land use control system's ecology, briefly describing the composition and arrangement of its environmental markers.

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36. Joseph L. Sax, *Land Use Regulation: Time to Think About Fairness*, 50 NAT. RESOURCES J. 455, 464 (2010) (reasoning that "[h]owever unselfconsciously, we have created a competitive system in which landowners effectively vie with each other to get the benefit of acceptable levels of density, assimilative capacity, habitat, open space, and the like.").

37. *Id.* at 467.

38. Arnold, *supra* note 2, at 476 (describing competing interests in land use regulation and decision making that creates conflict and how "[t]he competition for power to control (or influence) land use outcomes occurs among many different groups . . .").

39. See MERRIAM-WEBSTER DICTIONARY ONLINE, available at <http://www.merriam-webster.com/dictionary/ecology> (last visited Feb. 2, 2015).

40. For an important work examining the legal process through ecosystems analysis, see generally J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996).

41. *Id.* at 1410.

### A. *From the State of Nature to a Lockean-Liberal System of Governance*

Land use regulation is best understood by starting with the differences between the treatment of property and land in a state of nature moving toward a state of governance in which there are accepted initial assignments of property rights with institutions of neutral enforcement and peaceful dispute resolution.<sup>42</sup> The best way to appreciate the options available is to understand what the world of land use would be like without regulation or law of any kind. Then one can appreciate the different ways in which law can be formed to respond to the deficiencies of that state of nature. Thus, we start our discussion with the state of no law and describe some of the reasons for law's emergence.

The basic idea is that humans in their natural condition are self-interested and will seek to use their strength to obtain what they want. Epstein calls this condition that of the "Hobbesian man"<sup>43</sup>—where one seeks his self-interest without regard for others and where interrelations in a community are organized only by brute power, self-help, and survival of the fittest.<sup>44</sup> One could say that our self-interested nature includes a desire to obtain the most things at the least cost—a "laziness-principle" of sorts.<sup>45</sup> As such, in a might-makes-right world without law, humans will plunder other humans to get what they want or need.<sup>46</sup> This leads to a chaotic and orderless "society" (if one can even call it that). In the words of Thomas Hobbes, it guarantees us lives that are nothing but "solitary, poore, nasty, brutish, and short."<sup>47</sup>

The belief regarding these human tendencies has been posited as the driving force motivating individuals to establish a society of laws with the

42. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 121 (James Alt & Douglass North eds., 1990) ("Secure property rights will require political and judicial organizations that effectively and impartially enforce contracts across space and time.").

43. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 9-10 (1985).

44. THOMAS HOBBS, LEVIATHAN 186 (C. B. Macpherson ed., 1968) (1651) (discussing man's self-interested nature); see also FREDERIC BASTIAT, THE LAW 16 (Dean Russell trans., 1996) (1850) ("Sometimes the law defends plunder and participates in it. Thus the beneficiaries are spared the shame, danger, and scruple which their acts would otherwise involve.").

45. BASTIAT, *supra* note 44, at 16 ("[S]ince man is naturally inclined to avoid pain—and since labor is pain in itself—it follows that men will resort to plunder whenever plunder is easier than work.").

46. *Id.*

47. HOBBS, *supra* note 44, at 185-88. "[D]uring the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man." *Id.* at 185; see also *id.* at 266 (arguing that "masterlesse men" enjoy "full and absolute Libertie" at the cost of living in a state of "perpetuall war").

appropriate and accountable institutions that can substitute for, and guard against, the imperfections of state-of-nature “remedies” like self-defense and self-help.<sup>48</sup> Indeed, it is this reality (or at least the assumption of it) that gives us our liberal system of limited government with corresponding individual rights.<sup>49</sup> As Ludwig von Mises puts it,

Peace—the absence of perpetual fighting by everyone against everyone—can be attained only by the establishment of a system in which the power to resort to violent action is monopolized by a social apparatus of compulsion and coercion and the application of this power in any individual case is regulated by a set of rules—the man-made laws as distinguished both from the laws of nature and those of praxeology.<sup>50</sup>

Humans have realized, at least when adopting liberal schemes of governance, that the law can serve as the instrument of peace and the avoidance of these persistent battles and perpetual wars.<sup>51</sup>

This Article uses the term “liberal” in the traditional sense. Consider the usage of the term described by Mises in his seminal work *Human Action: A Treatise on Economics*:

I employ the term “liberal” in the sense attached to it everywhere in the nineteenth century and still today in the countries of continental Europe. This usage is imperative because there is simply no other term available to signify the great political and intellectual movement that substituted free enterprise and the market economy for the precapitalistic methods of production; constitutional representative government for the absolutism of kings or oligarchies; and freedom of all individuals from slavery, serfdom, and other forms of bondage.<sup>52</sup>

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48. LUDWIG VON MISES, *SOCIALISM* 32-33 (J. Kahane trans., 1981) (“Out of violence emerges law.”).

49. EPSTEIN, *TAKINGS*, *supra* note 43, at 7 (“Hobbes gave us the account of human nature on which a system of limited government rests.”).

50. LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 280 (Bettina Bien Graves ed., 4th rev. ed. 1996) (1949).

51. See DAVID HUME, *A TREATISE OF HUMAN NATURE* III.6 314-15 (Oxford Univ. Press ed. 2000) (1740) (“It is only a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules.”).

52. MISES, *HUMAN ACTION*, *supra* note 50, at vii. Niall Ferguson offers an outline of the minimum structures and institutions critical to Western liberal governments:

Western civilization is more than just one thing; it is a package. It is about political pluralism (multiple states and multiple authorities) as well as capitalism; it is

Each and all of those basic tenets—limited constitutional government, markets, individual liberty, the rule of law, and institutions that support those concepts—sit at the base of classic Western liberal governance systems.<sup>53</sup>

These same liberal beliefs and goals influenced the founding of the American constitutional system and its recognition of the need for a legal structure formulated under principles of what Epstein calls the “Lockean world” as a response to the “Hobbesian man.”<sup>54</sup> Epstein begins the distinction by explaining that Hobbes

[R]epeatedly emphasizes the selfish behavior of selfish individuals in a world without external authority to restrain their appetites, passions, and ambitions. In this world, the only “right” is that of self-preservation, so each individual either engages in actions of aggression against his neighbor or is forced to act in self-defense.<sup>55</sup>

The quest to attain the “personal security and social order” that is absent in the state of nature necessitates some movement away from a self-defense based society.<sup>56</sup> While the Hobbesian solution to the Hobbesian man required a type of acceptance of and submission to an absolute sovereign,<sup>57</sup> John Locke had a different view.

Locke, in essence, agreed with Hobbes’ assessment of the state of nature and man’s self-interest but identified a system of governance based on liberalism as the best means for providing the security and order that humans desired.<sup>58</sup> As Epstein put it, “Locke searched for the *tertium quid*, that is, for a set of institutional arrangements that would allow individuals

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about the freedom of thought as well as the scientific method; it is about the rule of law and property rights as well as democracy. Even today, the West still has more of these institutional advantages than the Rest. . . . Of course Western civilization is far from flawless. . . . Yet this Western package still seems to offer human societies the best available set of economic, social and political institutions—the ones most likely to unleash the individual human creativity capable of solving the problems the twenty-first century world faces. . . . The big question is whether or not we are still able to recognize the superiority of that package.

NIALL FERGUSON, *CIVILIZATION: THE WEST AND THE REST* 323–24 (2011).

53. North’s discussion of the importance of institutions is useful here: “Institutions are the rules of the game in a society, or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic.” NORTH, *supra* note 42, at 1.

54. EPSTEIN, *TAKINGS*, *supra* note 43, at 7, 9-10.

55. *Id.* at 7.

56. *Id.*

57. *Id.* (describing Hobbes’ prescription as being based on the belief that “[t]he price for order is the surrender of liberty and property to an absolute sovereign”).

58. *Id.* at 9.



to escape the uncertainty and risks of social disorder without having to surrender to the sovereign the full complement of individual rights.”<sup>59</sup> There is a recognized need for the establishment of rights and institutions that can interrupt debilitating human tendencies that otherwise dominate when law is absent.<sup>60</sup>

As a minimum condition for achieving stability in society, a government of some kind is necessary.<sup>61</sup> As Mises states, “[i]n order to establish and to preserve social cooperation and civilization, measures are needed to prevent asocial individuals from committing acts that are bound to undo all that man has accomplished in his progress from the Neanderthal level.”<sup>62</sup> There is, he states, a possible “unlimited tyranny of stronger and smarter fellows,” and the individual must be given protection from these elements through institutions that “curb[ ] all antisocial elements.”<sup>63</sup> Locke similarly contemplated a government role and articulated some of its minimum, necessary component parts and obligations, should it serve the interests of humans for peace and the preservation of liberty. Locke contended that, “[t]he great and chief end, therefore, of men’s uniting into common-wealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting.”<sup>64</sup> Adopting a Lockean framework, the Framers of the U.S. Constitution created a government of limited powers, with the protection of private property and exchange as some of its principal purposes.<sup>65</sup> Thus, it is not

59. *Id.* at 9-10.

60. NATHAN ROSENBERG & L.E. BIRDZELL, JR., *HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD* 306 (1987) (discussing the role for the government where “[t]he economic sector requires . . . protection from banditry and an orderly way of settling its internal disputes”).

61. MISES, *HUMAN ACTION*, *supra* note 50, at 280 (“The essential implement of a social system is the operation of such an apparatus commonly called government.”).

62. *Id.*

63. *Id.*

64. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 66 (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690). Locke describes the importance of liberty underlying this protection of property:

[F]reedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man . . . This freedom from absolute, arbitrary power, is so necessary to, and closely joined with a man’s preservation, that he cannot part with it, but by what forfeits his preservation and life together.

*Id.* at 17.

65. See EPSTEIN, *TAKINGS*, *supra* note 43, at 29 (“It is very clear that the founders shared Locke’s and Blackstone’s affection for private property”); *id.* at 16 (“Lockean system was dominant at the time when the Constitution was adopted.”).

surprising to hear James Madison echo Lockean ideas when writing that, “[g]overnment is instituted to protect property of every sort . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.”<sup>66</sup> The purpose of government is to provide protections and secure incentives that do not or cannot exist in a world without laws.<sup>67</sup>

The Lockean-liberal government structure sets forth the minimum architecture and infrastructure for the protection of property rights, the facilitation of exchange in land and the various property rights associated with it, and the third party enforcement structure necessary to resolve disputes.<sup>68</sup> Furthermore, for civil society to maintain itself and progress, the state must play a role in protecting property and providing confidence in the belief that one’s property will receive protection from the state against aggression.<sup>69</sup> Locke envisioned the establishment of private property, exchange, and neutral court systems for the resolution of disputes as critical minimum components of any just and effective government.<sup>70</sup> As Mises likewise explains, a fundamental condition of this move toward a cooperative society is the recognition of property: “Human beings construct society by making their actions a mutually conditioned co-operation. The basis and starting point of social co-operation lie in peace-making, which consists in the mutual recognition of the ‘state of property.’”<sup>71</sup> Consistent with the recognition of private property is the need for security in it and the capability to exchange with it. If one cannot keep the fruits of one’s labor, there is a severely diminished incentive to work, improve property, or engage in exchange.<sup>72</sup> Contracting is only possible if people feel secure and confident in the exchange, security provided in part by neutral institutions for the resolution of disputes—one of the vital Lockean services that a government

66. James Madison, *Property*, NATIONAL GAZETTE (Mar. 27, 1792), reprinted in LANCE BANNING, LIBERTY AND ORDER: THE FIRST AMERICAN PARTY STRUGGLE 107-08 (2004).

67. See LOCKE, *supra* note 64, at § 7.

68. EPSTEIN, TAKINGS, *supra* note 43, at 17 (“Within the original framework the rich array of procedural and jurisdictional protections was expected to serve . . . the protection of private property, of ‘lives, liberties, and estates’ that Locke considered the purpose of government.”).

69. See LOCKE, *supra* note 64, at § 7; see also RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 54 (1995) (“The right set of rules governing control over one’s person and the assignment of ownership of property play an indispensable part in any social system that seeks to maximize the welfare of its citizens.”).

70. See LOCKE, *supra* note 64, at § 7.

71. MISES, SOCIALISM, *supra* note 48, at 512.

72. NORTH, *supra* note 42, at 140 (“One gets *efficient* institutions by a polity that has built-in incentives to create and enforce efficient property rights.”).

must provide.<sup>73</sup> These rights and institutions are the means by which we channel individuals' behaviors toward more productive activities than simply taking from others.<sup>74</sup>

As Douglass North concludes, "third-party enforcement . . . has been the critical underpinning of successful modern economies involved in the complex contracting necessary for modern economic growth. . . . A coercive third party is essential. . . . Indeed, effective third-party enforcement is best realized by creating a set of rules that then make a variety of informal constraints effective."<sup>75</sup> If self-interested persons could get away with plunder and private property rights were not secure, few would have an incentive to enter into agreements, let alone to invest in improving property.<sup>76</sup>

The land use control systems that have emerged in our current law in large part recognize, and are modeled on, some of the same assumptions of Locke and his reverence for private property, including individual autonomy and the right to exclude others.<sup>77</sup> This Lockean foundation means that almost all of our land use regulations should be judged against the Lockean minimum institutional requirements and the fundamental property rights protections within them.<sup>78</sup> Most of the alternatives to the state of nature discussed next in some way seek to enforce or adjust these Lockean norms.

73. *Id.* at 137 ("Institutions determine the performance of economies. . . .").

74. EPSTEIN, *SIMPLE RULES*, *supra* note 69, at 75 (discussing channeling people away from plunder—"get more for yourself by taking it from someone else"—and toward voluntary exchange given the reality that we live "in a world in which everyone desires more and fears ending up with less.").

75. NORTH, *supra* note 42, at 35.

76. See MISES, *SOCIALISM*, *supra* note 48, at 375 ("The desire for an increase of wealth can be satisfied through exchange, which is the only method possible in a capitalist economy, or by violence and petition as in a militarist society, where the strong acquire by force, the weak by petitioning.").

77. Haar recognizes this fact:

The land-use control system especially encompasses the assumption of individual sovereignty: as possessive beings, people best express themselves through the operation of the unfettered market. The land-use control system in the United States stands on a base of a remarkably unified cultural and political tradition. The Lockean view of inherent rights dominates.

Haar, *supra* note 19, at 1018.

78. As Haar describes the default position in the United States, "Where government does take the step of correcting perceived evils, or to provide some guidance for land development, there is little room for divergence over the extent of appropriate government intervention: as little as possible." Haar, *supra* note 19, at 1018. Haar further bemoans the fact that "[c]onflict is muted; the area of disagreement occurs only within an accepted middle range of possibilities." *Id.*

## B. Judicial Land Use Controls and Inherent Limitations

Property systems are a necessity for any society to flourish.<sup>79</sup> Not surprisingly, a fundamental component of the Lockean-liberal system of governance is the establishment and protection of property rights. However, the Lockean system also recognizes that there must be an initial set of controls on those rights as well. Thus, at the foundation of the Lockean system is a set of inherent limitations or controls on what one may do with his or her person or property regardless of any state legislative rules.<sup>80</sup> These inherent limitations—just like the property rights in initially permissible uses—require judicial oversight, enforcement, and neutral application in the face of disputes.

As a consequence, we see a set of rules emerge that are referred to collectively as “judicial land use controls,”<sup>81</sup> principally nuisance and trespass.<sup>82</sup> Nuisance is “[a] condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property.”<sup>83</sup> Trespass is defined as “[a]n unlawful act committed against the person or property of another; esp. wrongful entry on another’s real property.”<sup>84</sup> Both deal with some breach of the boundary of another’s property.<sup>85</sup>

Box 1 in Figure 1 deals with these foundational and inherent limitations that serve as starting-point assignments of rights—i.e., they define what one

79. EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 1 (5th ed. 2006) (“Every human society has a property system.”).

80. PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 2 (2006) (“The common law also constrains how property owners use their lands. One landowner’s right to use his land as he sees fit can clash with the right of a neighbor to do the same, as when one landowner’s desire to build a factory impinges on a neighbor’s air quality.”).

81. DUKEMINIER ET AL., PROPERTY 779 (8th ed. 2014); *see also* Nolon, *supra* note 16, at 821 (“The U.S. system of land use control was based initially on English law precedents. The English system established strong private property rights which were limited initially by a few common law doctrines created and enforced principally by the courts.”).

82. Nolon, *supra* note 16, at 823.

83. BLACK’S LAW DICTIONARY 1233 (10th ed. 2014). Another useful definition states that nuisance applies:

[T]o that class of wrongs which arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt . . .

66 C.J.S. NUISANCES § 1 (2009); *see generally* HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 421-47 (6th ed. 2005) (explaining nuisance law).

84. BLACK’S LAW DICTIONARY 1733 (10th ed. 2014); *see also* RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 11-12 (10th ed. 2012) (summarizing the basic law of trespass to land).

85. Nolon, *supra* note 16, at 823 (discussing trespass and nuisance).

can or cannot do with their property at the outset and are intrinsic in the very foundation of the liberal governance system. These might be categorized as the “basics” of land use controls emerging from the setting of enforceable property rights with reciprocal advantages and responsibilities, the benefits and burdens of which every owner shares equally.<sup>86</sup>

These controls are inextricably mixed into the core of private property rights.<sup>87</sup> Nuisance and trespass are based in the right to exclude and are justified as adhering to the venerable maxim *sic utere tuo ut alienum non laedus*: “each one must so use his own as not to injure his neighbor.” The Supreme Court recognizes this as “the rule by which every member of society must possess and enjoy his property.”<sup>88</sup> Although we have high regard for exclusion, it is not absolute and the enforcement and regulatory authorities may impose societally-demanded limitations. Nonetheless, the right to exclude is strong in our system, and the doctrines of nuisance, trespass, and related judicial land use controls—those things enforced by the judiciary not because they are in a statute but because they are part of the property package of rights and obligations that each land owner holds by the very nature of being recognized as an owner in the first place—find their justification in this *sic utere* maxim and the corresponding right to exclude others.<sup>89</sup>

Each owner in our Lockean-liberal society is willing to accept these inherent controls, it is theorized, precisely because they know that by doing so, their neighbor is subject to the same constraints.<sup>90</sup> I give up my ability to harm my neighbor in exchange for a legally protectable right to prevent my neighbor from harming me. I give up my ability to trespass on a stranger’s property in exchange for the added reciprocal right to prevent strangers from coming onto my land. Mutual and reciprocal limits produce mutual and reciprocal gains.

Furthermore, these judicial land use controls—particularly nuisance—are designed to enforce the prohibition against harming others. Put differ-

86. See generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

87. The U.S. Supreme Court has explained that these limitations and the government’s enforcement of the same are “the very essence of government” reflecting the core of the compact-based social and political agreement regarding “the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.” *Munn v. Illinois*, 94 U.S. 113, 124 (1877).

88. *Id.* at 145.

89. See H. WILSON FREYERMUTH ET AL., *PROPERTY & LAWYERING* 7 (2d ed. 2006) (“Regardless of the philosophical perspective through which one views the concept of property, the concept of property does have one unifying or necessary characteristic—the right to exclude.”).

90. On these concepts, see generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

ently, they prevent one from imposing impermissible negative externalities on others. At the initial assignment stage—where we determine the rights and obligations inherent in each owner’s package—we know that an owner is responsible to keep the harms generated from the uses of her property contained (or, internalized). When harm escapes from a use of one’s property, we call it a negative externality. At that point, a nuisance or other tort claim may be triggered.<sup>91</sup> As Paul Goldstein and Barton Thompson note, “the most basic and defining right remains a landowner’s right to exclude other people or things from his or her land,”<sup>92</sup> and this includes the ability to exclude trespassers and to keep out the harms from other negative externalities as well. As we will see soon when turning to public land use controls, once we have set the initial right to exclude, it is only a baseline against which society must now make determinations whether to cut away at it through other means, like public land use controls (regulations and legislation).

Recognizing the inherent limitations on property rights, and thereby the foundational constraints on land use, allows all parties to know where they stand. It is a starting point, a baseline against which individuals can judge whether the initial assignment aligns with her preferences. It then allows one to seek out means to adjust those initially assigned rights should she wish to do so. I may be told that it is a nuisance to play my music too loud in my backyard, and I may not like that result. Once I know that is the baseline, and I know that I do not have that stick in my bundle,<sup>93</sup> and I know that my neighbor has a stick in his bundle that includes the power to enjoin me from playing my music too loud (in other words my neighbor has a right to exclude), then I know what I need to do. I need to approach my neighbor and seek to acquire his stick and put it in my bundle. I need to redistribute through exchange the initial assignment of rights. So long as private exchange is possible, then perhaps I can convince my neighbor to sell me the right he holds to enjoin my music. The neighbor will be implicitly agreeing (for the right price) to deal with hearing my loud music, and I will get to play it and play it loudly.

Of course, the initial assignment could be quite the opposite. I might play my music loudly and my neighbor dislikes it, but it is not loud enough to be considered a nuisance. What is my neighbor to do? Here, again, once

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91. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967) (explaining the “close relationship between property rights and externalities”).

92. GOLDSTEIN & THOMPSON, *supra* note 80, at 2.

93. As the U.S. Supreme Court has explained: “A common idiom describes property as a ‘bundle of sticks’ -a collection of individual rights which, in certain combinations, constitute property.” *United States v. Craft*, 535 U.S. 274, 278 (2002) (citing BENJAMIN CARDOZO, *PARADOXES OF LEGAL SCIENCE* 129 (1928) (reprint 2000)).

the initial assignments are known, then the neighbor has options. He can buy out my right to play the music—the right that is implicitly recognized when a court determines that this level of noise does not rise to the level of a nuisance. Or, perhaps the neighbor might seek out his city official and convince that official to impose a noise ordinance that captures my disturbing level of music volume that the nuisance law did not. Individuals will resort to public land use controls to alter initial assignments and the prospects for success are increasing as the scope of available legislative and regulatory interventions is broadening. Goldstein and Thompson note that “there have always been limits, and the exceptions to a property owner’s right to exclude are growing in response to humanitarian, equitable, and political concerns over the ‘despotic’ character of exclusive rights.”<sup>94</sup> We must share this world, and our governments are influenced by these “human values” previously described in the discussion of *Schack* when choosing when and how to regulate property or control land uses.<sup>95</sup>

Whether one turns to private land use controls (Box 2 in Figure 1 and Section II(C) below) or public land use controls (Box 3 in Figure 1 and Section II(D) below), the rights of the respective parties in any conflict, including the initial assignments of rights and obligations, facilitate the alterations. The next subsections explain those alteration options.

### C. Private Land Use Controls

Generally, judicial land use controls and initial assignments of rights and obligations simply set default rules against which individuals can bargain and deviate away from their respective original positions.<sup>96</sup> It is here, with private land use controls (Box 2 in Figure 1), where we see the law create mechanisms for adjusting property rights voluntarily and consensually. This type of exchange is perfectly consistent with the Lockean vision and anticipated in the set of minimum, necessary components of a liberal regime.<sup>97</sup>

Individual preferences may very well deviate from the original assignments made in judicial land use controls and the original package of rights and obligations which came built into the idea of initial ownership in our system. The person who wants to operate a noisy factory on his lot but

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94. GOLDSTEIN & THOMPSON, *supra* note 80, at 2; *see also* Arnold, *supra* note 2, at 484 (discussing “the complex and varied array of forces and influences that the land use regulatory system must mediate as society makes choices”).

95. *Shack*, 277 A.2d at 372.

96. *See generally* Hovenkamp, *supra* note 25 (discussing some of the bargaining scenarios and choices between land use controls, particularly private ordering options like servitudes).

97. This is why Box 2 includes the words “Lockean World” to indicate such consistency and to distinguish the judicial and private control categories from the public one.

cannot do so because it would be deemed a nuisance may be unsatisfied with the limits on the use of his land. Consequently, he may wish to buy out his neighbor's right to sue him for that nuisance, for example. As Epstein explains,

Very often . . . the lot we are given by nature, or have acquired by taking possession, is not the lot we wish to have in the end. We therefore need some way of altering control of various resources so as to enhance their value to all people simultaneously: hence the critical role of voluntary exchange.<sup>98</sup>

Once we have made assignments, such exchange is possible and people can customize their bundles of property rights to meet their preferences. This outcome is in large part due to the corollary right to exclusion—i.e., the right to include<sup>99</sup>—and the idea that ownership facilitates exchange of the property or of the varying and severable rights and interests in the property.<sup>100</sup> In fact, it is in setting the initial assignments that the law facilitates mutually beneficial exchanges.<sup>101</sup> Individuals only agree to adjust rights if they are both made better off after the adjustment.<sup>102</sup>

The menu of options available to private individuals wishing to engage in adjustments to initial assignments and the trading of rights are quite broad. Two or more individuals may choose to enter into agreements for the adjustments of their original positions, and these people might accomplish varying degrees of transfer depending on what outcome they seek and how much they are willing to invest in the transfer. The common law has developed several vehicles by which owners can satisfy these preferences, includ-

98. EPSTEIN, *SIMPLE RULES*, *supra* note 69, at 71.

99. See *DUKEMINIER ET AL.*, *supra* note 81, at 104 (“Felix Cohen’s notion of property [is] a relationship among people that entitles so-called owners to *include* (that is, permit) or *exclude* (that is, deny) use or possession of the owned property by other people. . .”).

100. Hovenkamp, *supra* note 25, at 528-29 (discussing advocates of Coasian bargaining models for understanding choices between regulatory means, and their arguments that “private bargaining would give landowners an incentive to maximize joint wealth”).

101. RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* 88 (2011) (“the clear delineation of common-law rules . . . reduces the transaction costs that have to be incurred to fashion specific contract solutions to correct errors in allocation under the existing property rule. . . . a voluntary transfer of rights could leave both sides better off than before.”).

102. *DUKEMINIER ET AL.*, *supra* note 81, at 809 (private land use control agreements usually “involve two or more parcels of land, and the purpose of the agreements is to increase the total value of all the parcels involved,” and usually “the effect of the agreements is to burden one parcel of land for the benefit of another parcel.”); JOSEPH WILLIAM SINGER, *PROPERTY* 228 (3d ed. 2010) (“owners are free to make promises restricting land use for their mutual benefit and are secure in the knowledge that such restrictions will be enforceable.”).



ing some especially valuable ones that create “property” interests rather than mere contract rights.<sup>103</sup>

These property-based vehicles principally fall into the category of “servitudes,”<sup>104</sup> and to a lesser extent licenses.<sup>105</sup> With servitudes, “the particular set of rights and obligations is tailored by contractual arrangements designed to suit the buyers.”<sup>106</sup> Property-based arrangements are unique as they allow for the creation of obligations that attach to and thereby run with the land to future buyers.<sup>107</sup> Servitudes can be enforced as one of several options, including easements; common law real covenants; equitable servitudes; covenants, conditions, and restrictions (CC&Rs) used primarily in common interest communities; and other forms of restrictions in deeds.<sup>108</sup> These doctrines have emerged out of market demands. Individuals have expressed an interest in having these vehicles for agreements that are enforceable by property law, as interests in property, and with the attributes of property and its concomitant provision of security in ownership. The law has responded accordingly.<sup>109</sup>

The formation and enforcement of these agreements can be complicated. But those difficulties are beyond the scope of this Article except to make the point that to the extent these difficulties raise the cost of satisfying one’s preferences, a party may be channeled into seeking less expensive means for achieving the ends sought. For example, if it costs one hundred dollars to bargain for an agreement that adjusts the rights in a beneficial manner but one can spend just fifty dollars in lobbying to have public land use controls imposed that achieve the same result, then it will be economi-

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103. SINGER, *supra* note 102, at 228 (discussing the incentives to enter into private agreements for the control of land, including the security and enforceability issues related to such transfers in interests in land as opposed to mere contracts).

104. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000) (adopting a single term, “servitudes,” for a variety of common law mechanisms for adjusting rights in land, including easements, real covenants, and equitable servitudes).

105. SINGER, *supra* note 102, at 180.

106. *Id.* at 229.

107. DUKEMINIER ET AL., *supra* note 81, at 809 (servitude “agreements create interests in land, binding and benefitting not only the parties to the agreement in question but also their successors.”); SINGER, *supra* note 102, at 226 (“The law of real covenants was created to regulate the enforceability of contractually based land use restrictions”).

108. Arnold, *supra* note 2, at 489 (describing many of these forms and explaining that the “[p]rotection of private property values serves not only to impose informal limits on government regulatory power but also to generate private restrictions on land use”); see also HOVENKAMP & KURTZ, *supra* note 83, at 327-420 (explaining servitudes).

109. SINGER, *supra* note 102, at 228 (“Covenants therefore play both a facilitative and a protective role in property law. Owners are free to contract for land use restrictions and they have the security of knowing that those restrictions will be enforceable against current and future owners of the restricted parcels.”).

cally rational for the seeker of this benefit to skip over the private land use control options. What is critical to understand for purposes of this Part is that (1) people may not be satisfied with their position after identifying the initial assignment of rights and obligations vis-à-vis others, and so (2) recognizing this, the law tries to facilitate the exchange of sticks from the respective property rights bundles so that parties can best align their interests with their portfolio of land use rights.

Although private land use controls may be the option for adjusting property rights most consistent with the Lockean-liberal scheme and the protection of individual autonomy, they are not necessarily the most common means by which property rights adjustments are made in the modern society. As the next Section explains, public land use controls are widespread.

#### D. *Public Land Use Controls*

The final broad category in this discussion involves public land use controls—the group of controls to which the use of the word “regulation” most aptly applies, although this grouping is primarily about government-based, involuntary adjustments that may come by way of regulation, legislation, or other method of coercive imposition. Public land use controls are often stated as exercises of the police power,<sup>110</sup> although, again, that need not be their outer limit. This category involves those sets of controls available to the governing bodies in our society—federal, state, and local—that have coercive powers to compel uses or disuses of land through top-down, interventionist, and command mechanisms.<sup>111</sup> I have also categorized this as “Post-Lockean” in Figure 1 because we are now talking about those rules that go beyond the anticipated minimum, necessary standards for the operation of a liberal regime and that may, in fact, deviate from some of the Lockean ideals to the extent that they begin to erode private property rights in favor of more community-based values.

By public land use controls, I mean things that are imposed by public means, i.e. through government action/coercive power—all legislative and regulatory controls are public land use controls. These controls can fall into a number of different categories.<sup>112</sup> Zoning is, of course, a major component

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110. Haar, *supra* note 19, at 1036 (“The police power enables society to uniformly regulate a wide variety of land-use activities in order to protect the health, safety, and general welfare of the citizenry.”).

111. Arnold, *supra* note 2, at 486 (discussing the basics of public land use controls and the dominance of local governments in the same).

112. See Nolon, *supra* note 16, at 824-34 (describing the history and origins of regulatory controls on land use); HOVENKAMP & KURTZ, *supra* note 83, at 448-502 (explaining legislative land use controls).

of the public land use control category.<sup>113</sup> Zoning limits individuals' accessibility to the choices that further their preferences.<sup>114</sup> There are also all of the activities that require permits from an agency that fall into public land use controls. In other words, Box 3 in Figure 1 is large, filled with a variety of possible ways that the government can impose restrictions on land use. This includes zoning; building codes; architectural codes; health, safety, environmental, and welfare regulations; preservation laws; water usage restrictions; disability and other equal access rules; and discrimination and civil rights laws. The list could go on and on.

There is also a less obvious area of public land use controls—government limitations on the types of property agreements (from Box 2 in Figure 1 and Section II(C)) that are enforceable, which are essentially coercive measures that limit the pool of available property uses and the scope of potential property adjustments. The exercise of eminent domain should also be considered a type of public land use control. It is, after all, an option that a party might seek out to satisfy their preference—if I cannot negotiate with my neighbor to convince him to repair his house then perhaps I can lobby the city to get his property condemned as “blighted,” for example.

There are intra-category moves an individual might seek as well, such as using a legislative control mechanism to relieve oneself of another legislative control. Of course, the most obvious example is the seeking of a variance from, exemption from, or amendment to a zoning ordinance or other public land use control.<sup>115</sup> Even when one has become the subject of public land use controls, she might seek other avenues of relief in this same category to satisfy her preferences. These exemptions, variances, and the like can be quite valuable.<sup>116</sup>

When it comes to public land use controls, the issues become policy-based and political rather than strictly legal, whereas the focus in the enforcement of common law restrictions or private agreements is a matter of application of set law to facts or the enforcement of pre-existing agreements

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113. See Nolon, *supra* note 16, at 829-30 (discussing zoning); see generally *DUKEMINIER ET AL.*, *supra* note 81, at 967 *et seq.*

114. Nolon, *supra* note 16, at 831 (discussing zoning as limiting choice when stating that “[t]he most controversial aspect of zoning was that it prohibited private landowners from using their land for activities of their own choosing”).

115. See Arnold, *supra* note 2, at 480 (showing an example where parties may seek amendments to zoning to satisfy preferences).

116. Jaeger, *supra* note 34, at 126 (“[A]n individual exemption from a binding land-use regulation can be expected to have a positive effect on a property’s value,” because “if a land-use regulation imposes a cost on landowners, eliminating that cost is likely to make that particular property more valuable, so long as the benefits associated with the land-use regulation are unaffected”).

according to the terms and intentions of consensual private parties.<sup>117</sup> As stated earlier,<sup>118</sup> the tension within public land use controls lies between not doing enough and trying to do too much (at the expense of other values like private property rights).

Arnold explains that the “superdominance” of private property rights and the preference for private control of land places direct, institutional, and constitutional limitations on how far public land use controls can go,<sup>119</sup> as well as indirect “[p]rivate property norms [that] serve as political, cultural, and even psychological constraints on decision makers from exercising strong government control over privately owned lands.”<sup>120</sup> Although there is a thumb on the scale in favor of private control and against public land use controls, the community’s will as expressed through political bodies can be a powerful force.<sup>121</sup>

For the most part, public land use controls are debated and created at the local government level.<sup>122</sup> Yet, it is no small affair today. While judicial land use controls appear to set the foundational controls on land use, their relative influence is small today compared to public land use controls.<sup>123</sup> For this reason, Arnold claims that “the greater portion of land use ‘law’ is about flexible regulatory and planning tools, discretionary choice, and public policy. Thus the terms ‘rules and tools,’ ‘discretionary judgment,’ and

117. See, e.g., Arnold, *supra* note 2, at 447 (“[T]he land use regulatory system is ‘thin’ on law and ‘thick’ on policy”).

118. See *supra* Section I.

119. Arnold, *supra* note 2, at 488 (listing as some of the legal constraints on regulatory powers over land use as including “the regulatory takings doctrine, the exactions takings doctrine, substantive and procedural due process rights, judicial protections of vested rights and nonconforming uses, and other such doctrines”).

120. *Id.*

121. Haar, *supra* note 19, at 1019 (“The functional law of property always balances protection of private advantage with both the enjoyment of other land owners and with contemporary community goals.”).

122. See Sara Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 235 (2008) (“Professors Richard Briffault, Carol Rose, and Dan Tarlock, for example, assert that land use control is ‘the most important local regulatory power,’ and ‘has always been an intensely local area of the law,’ and ‘should be controlled at the lowest level of government, if at all.’”) (referencing Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 839 (1983); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990); A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651, 653 (2007)).

123. Arnold, *supra* note 2, at 492 (“[T]he area of ‘land use law’ has a relatively modest set of judicial doctrines governing land use and its regulation, both in quantity and quality. . . . The real ‘law’ of land use regulation exists mostly in zoning codes and regulatory procedures, as well as in the actions or decisions of local land use regulatory bodies.”).

‘thin law, thick policy’ characterize the land use regulatory system.”<sup>124</sup> In other words, the breadth of legislative and regulatory power, the variety of ways it can be used, and the power exerted through all forms of decision (such as grants and denials of proposed uses, variances, exceptions, special permissions, demands and exactions, etc.) that is available to the public land use authorities make this policy-laden, broad-authority, discretion-based realm of activity far more impactful on land use decisions than a court’s simple nuisance determination.

The imposition of public land use controls by regulation or legislation is sometimes justified as a response to market failures and sometimes rests on an inability of private land use controls to accomplish certain ends due to high bargaining or transactions costs, collective action problems, traceability concerns, and the like.<sup>125</sup> Some private parties prefer to seek out public land use controls simply because it might cost too much to get what they want in a private exchange, irrespective of whether that high cost is due to an actual market failure.<sup>126</sup> Public land use controls might just be the cheaper alternative for satisfying one’s preferences. Other times still, advocates for public land use controls might see them as a necessary or more efficient alternative to judicial land use controls, particularly for multi-party, large scale, or recurring litigation problems. Pollution is a great example of these concerns.<sup>127</sup> Finally, the public may dispense with finding a flaw in one of the alternative control methods and instead impose public land use controls simply as a choice for more control based on other public policy.<sup>128</sup>

This is also the category of controls in which many interest groups emerge to compete for the formulation of policy that satisfies their preferences.<sup>129</sup> Public land use controls may reflect the preferences of the commu-

124. *Id.*

125. HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, *ECONOMIC ANALYSIS FOR LAWYERS* 186 (2d ed. 2006) (describing market failure as a justification for government regulation).

126. For a discussion of rent-seeking and public choice concerns behind this possibility, see Donald J. Kochan, *The Mask of Virtue: Theories of Aretaic Legislation in a Public Choice Perspective*, 58 ST. LOUIS U. L.J. 295, 322-36 (2014).

127. DUKEMINIER ET AL., *supra* note 81, at 806-08 (discussing the “shortcomings of nuisance litigation” and explaining that “[a]n alternative to judicial resolution of pollution problems is legislative and administrative intervention. . .”).

128. *Cf. Shack*, *supra* note 27, at 372.

129. Haar, *supra* note 19, at 1024 (“[C]ountervailing force of neighborhood groups and participatory democracy—forces uniquely at play in the land-use control area—can subvert the purported supremacy of local legislative sovereignty.”); Arnold, *supra* note 2, at 476 (discussing the diversity of interest groups and the variety of rivalries that exist in land use fights).

nity at large,<sup>130</sup> or, perhaps more likely, reflect the preferences of the individual or interest group that is able to access and conscript the public land use control mechanism for their own gains.<sup>131</sup>

### III. NAVIGATING THE DUAL-DIRECTIONAL DYNAMIC CIRCLE OF LAND USE CONTROLS

The Article has explained the contours of the categories of action from which land use controls may emerge. This Part explains broadly the concept of choice of controls and movement among them. Once we have explained the basic navigational opportunities, Part IV will demonstrate the movement described herein through two concrete examples of conflicting land use preferences.

Figure 1 displays the dual-directional decision points along the dynamic circle. The points represent the sources for property and land use rights' definition, assignment, and alteration. These points are dual directional because an understanding of the land use control game necessitates a realization that no point should be considered as representing the conclusion of the process. Rather, each should be seen as a rest stop where assignments are created or altered, with a choice to move in either direction after the resolution of any conflict. Furthermore, no point is necessarily the beginning of the process either. One might choose to expend resources to adjust or alter an assignment by public means before trying private controls, and vice versa.

For the purposes of understanding the circle, the preceding Part stayed with the basic concepts and definitions of the land use controls inherent in the system of private property. For our purposes, there is no need not delve deeply into the nuances of any of these doctrines, though, to be sure, there are many details. Suffice it to say, one's choice among the options will require diligent case-specific determinations of the costs, feasibility, and availability before an evaluation of the relative utility of one option over another.

Once an initial assignment is set, some parties' preferences will not be satisfied, and they will want to seek other means for the satisfaction of their preferences. This is where the parties have options to seek an adjustment or

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130. Arnold, *supra* note 2, at 467 ("Zoning and regulatory permitting requirements and decisions also reflect and implement local community choices and values about desired and undesired places.").

131. See, e.g., Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49 (1998) (explaining how interest groups are able to engage in rent-seeking and capture legislative land control mechanisms to serve their own private interests).

alteration of that initial assignment of rights and thereby create a new, controlling assignment.

In this situation, the new adjustment or new regulatory regime could go along the dynamic circle from the initial assignment in Box 1 to the state of nature (Box 0) and seek the destruction of laws that led to the initial assignment. Though that is theoretically possible, it is also the least likely (and least “lawful” presuming a stable legal regime). Therefore, it is more fruitful to discuss moving to Box 2 (private land use controls) or Box 3 (public land use controls). One point of this Article is to underscore that the progression need not be linear and there is no exhaustion requirement demanding that one begin in any particular Box. That means someone dissatisfied with the outcome in Box 1 could immediately move to Box 3. This is likely to occur where the costs of obtaining the satisfaction of one’s preferences is lower in Box 3 than in Box 2, and based on that determination or speculation, one may choose to forgo any attempt at private negotiation to alter the rights and instead seek to enlist the coercive power of the state to alter their rights or another’s rights to satisfy his preferences.

One could proceed directly to private land use controls, Box 2, and if still dissatisfied after attempting that mechanism, could move on and seek public land use controls. Someone who immediately goes to Box 3, public land use controls, and fails to satisfy his preferences there (the legislation or regulation just became too difficult to obtain), could similarly go back to Box 2 and seek a private, voluntary adjustment of rights.

The dynamic, dual-directional nature of this framework also means that someone may wish to skip past actual judicial declaration or resolution of one’s rights in Box 1. She may be able to reasonably predict the outcome in the judicial setting as unsatisfactory or otherwise too costly and never bother wasting the resources. Instead, she begins to seek relief in Box 2 or Box 3. If she is aware of the options of all first-order and second-order (and so on) approaches by visualizing the full circle, she can strategize a more effective route to satisfying her preferences.

#### IV. REPRESENTATIVE SAMPLE APPLICATIONS

The final Part of the Article uses two examples of land use conflicts to demonstrate how one can start to visualize the land use control system through this Article’s framework. Just as importantly, this Part shows why this framework facilitates strategic planning to obtain your objectives in the land use process.

### A. *Pink Houses*

Consider two neighbors, Z and P. Z has a preference that his neighbor not paint his house pink. P likes pink houses and would like to paint his house pink. The two neighbors' preferences cannot both be satisfied simultaneously.

We will assume that there is a rather robust private property regime in the jurisdiction and that individual property owners have a high level of control associated with their ownership rights, including normally painting their houses whatever color they want. But should that painting cause an actionable negative externality, the common law might limit (or control) some land uses.

To decide whether P has a right to paint his house pink, we first need to determine whether the initial assignment of rights allowed for such painting. We first look for any restrictions presently existing in the deed. Let us assume there are none. So P paints his house pink.

Z must consider his options. Below are just a few possible decision-making permutations. Many more could be conjured up, but there will be enough here to get the picture.

#### 1. Scenario 1: Z sues P for nuisance. Z loses.

If Z is unable to convince a court that a pink house is a nuisance, Z is not yet defeated. Z has the option of negotiating with P for a servitude and buying the right of P to have a pink house (a right that was confirmed and judicially assigned when the judicial land use control option resulted in a ruling that Z could not prevent P from painting his house pink; the pink house did not violate the fundamental minimum land use controls established at common law).

Assume that P demands \$5000 to agree to such a servitude because that is the value he gets from having a pink house. Z will have to determine how much harm he is suffering from the pink house and make his own economic calculus.

Let us assume that Z has set his harm at a value of a \$3000 loss suffered as a result of living next to the pink house. (Perhaps this results from emotional distress from viewing a pink house, the decreased price a willing buyer would pay for Z's house because of the pink house next door, etc.). It would not be rational for Z to pay \$5000 to alleviate \$3000 in harm. And since P has the right to have a pink house and does not need to change his behavior at all, he (if rational) is certainly not going to be willing to accept \$3000 (Z's upper limit) and forgo the additional \$2000 in pleasure he gets from having his pink house.



So, the Pink House stays, right? Maybe. The point of the dynamic circle is to demonstrate Z's other options. Z might still have the option of seeking a public land use control—such as a coercive regulation on the color of houses or a zoning restriction of some kind that precludes pink houses (or makes pink houses so expensive that to have one costs P more than \$5000 in permitting fees or other compliance costs thus making it cost more than it is valued to have the pink house).

Assume that Z could obtain such public regulation by spending only \$2000 in lobbying and other costs associated with getting the local city council to pass the law or regulation necessary to satisfy his preferences and achieve the result of precluding P from having any ability (or any financially rational ability) to paint his house pink. This assumption would have to account for any counter-expenditure on P's part to maintain his entitlement (which may make it very difficult to find reality matching the assumption). But working with the assumption, it would be rational for Z to spend \$2000 to alleviate \$3000 worth of harm. He could then proceed to Box 3 after failing in the negotiations—or perhaps even start in Box 3 as a first step, completely bypassing the private land use options (because of a determination of futility or some other reason). Of course, if Z fails to satisfy his preferences in either Box 2 or Box 3, he may have to accept living next to the pink house.

## 2. Scenario 2: Z sues P for nuisance. Z wins.

If Z wins in a nuisance suit, goodbye pink house, right? Not so fast. Assuming all of the bargaining freedom from the first scenario, we may still end up with a pink house. Now, P must evaluate his options in the dynamic circle. Z has won an entitlement to enjoin P from painting his house pink, but it is an alienable entitlement. P can offer Z something slightly more than \$3000 but less than \$5000 to buy Z's injunctive right and still be better off. A rational Z would take something in that range and be better off because the full \$3000 in harm would be offset by the purchase price for the right. Thus, P can acquire a stick in his bundle (the right to paint his house pink) that he did not otherwise have at the initial assignment stage. Of course, this scenario would be more complicated if more neighbors other than just Z could sue P for a nuisance—if that were the case, P's costs to obtain this stick might become prohibitively expensive.

Alternatively, rather than negotiate with Z, P might look into whether it would be cheaper to convince the relevant governmental authorities to intervene on his behalf. They might pass a law that requires that all houses be painted pink. The color in our example may make that seem like a stretch, but there are communities that require, for example, all houses be

painted a shade of brown. Or, P might ask the authorities to pass a law that supersedes the judicial determination and that declares that, for example, “the color of one’s house shall not be deemed a legitimate basis for any nuisance suit” and wresting from the common law the ability to make the adverse determination against P. In this sense, we see a legislative land use control that also in some ways returns the disputes over house color into an “unregulated realm” much like the state of nature.

### 3. Scenario 3: Z never sues P for nuisance.

The most likely scenario may in fact be that Z never starts in Box 1. When one can be relatively certain of and predict the status of the law, the initial assignment of rights, and the nature of the respective deeds, resorting to the courts might be a waste of time and resources. When each party knows what is likely to occur in the court, they do not need a court to “declare” the initial assignment of rights. That initial assignment still exists even if the court has never said a word. Courts in Box 1 are simply stating the limitations that already exist.

In this case, Z might be able to predict with a high degree of certainty that he will lose in a nuisance suit. Z then might proceed immediately to either Box 2 or Box 3 and again ping-pong dynamically between them as necessary to get as many of Z’s preferences satisfied at the lowest cost to Z or to ultimately determine that the cost of getting an adjustment to the initial assignment is too high (exceeds the harm or inconvenience to which the person is subjected) and deciding to acquiesce and live with the initial assignment.

Z and P have options. Knowing this ahead of time allows both to strategize and make a plan for the least costly route to getting what they want or to evaluate whether it is even worth the fight. They then can focus their energies within the circle appropriately and efficiently.

#### B. *Disputes Between Coal Bed Methane and Coal Owners*

Our second example involves another set of competing property owners. Consider the conflict between coal owners and coal bed methane owners, typified largely in disputes within the Powder River Basin.<sup>132</sup> Quite often coal deposits, particularly in the Western United States, include a gas known as coal bed methane (CBM) within tiny little gaps in the coal

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132. William B. Prince, *Joint Development of Coal and Coalbed Methane*, 48 ROCKY MTN. MIN. L. INST. ch. 19, §19.05 (2002).

seam.<sup>133</sup> The problem is one of establishing priorities between conflicting uses of multiple mineral properties.<sup>134</sup>

One party owns the coal. A different party owns the methane inside the coal. Both parties want to extract their natural resource, but there is a problem. If the coal is mined before all of the CBM is extracted from within the coal seam, the gas will escape and typically be lost forever.<sup>135</sup> Thus, if the coal owners exercise a right to mine their coal, they will cause irreparable harm to the value—indeed the existence—of the CBM.<sup>136</sup> Simultaneous extraction is impossible and sequential development of the resources only works in one sequence (CBM first and coal later) that is problematic for at least one party.

Thus, if the coal owners' rights to mine are considered "superior" to the CBM owners, the coal miners can necessarily disrupt the use and enjoyment of the CBM owners' property. It becomes an issue of establishing the priority of rights—i.e., setting the initial assignment of rights—between the two owners and between the conflicting uses.

If the initial assignment of priority rights goes to the coal owner under whatever legal doctrine one might choose, then the CBM owner would have to negotiate with the coal owner using Box 2 options—i.e., buy the coal or pay the coal owner not to mine.

If the law instead assigns a priority right to the CBM owners, allowing them to enjoin the mining of the coal in order to protect the CBM owners' rights, the CBM owners get the initial assignments of rights. With this alternative initial assignment of rights, the coal miners would have to negotiate with the CBM owners to allow mining using Box 2 options—i.e., pay the CBM owners for their CBM or buy up their right to exclude the coal miners from extracting the coal. If they do neither of these things, the coal miners would be required to wait until the CBM was fully extracted so that their activities did not infringe on the rights of the CBM owners.

The problem that this second alternative assignment creates is that CBM operations can last for substantially long periods of time (because even after the bulk of CBM is extracted from a seam there are often lingering trickles of the resource that could be tapped for decades) during which time the coal resource is uneconomic from the formal or presumed injunc-

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133. *Id.* at 19-4, 19-4 n.5.

134. *See generally* Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999) (discussing coal and CBM usage conflicts).

135. Jeff L. Lewin et al., *Unlocking the Fire: A Proposal for Judicial Oversight or Legislative Determination of the Ownership of Coalbed Methane*, 94 W. VA. L. REV. 563, 592-99 (1992) (describing the nature of the resources and why simultaneous or even sequential development causes conflicts).

136. *Id.*

tion against the mining.<sup>137</sup> At this point, the CBM exclusion power may very well be more valuable than the CBM itself. Moreover, because multiple CBM wells can be drilled relatively inexpensively,<sup>138</sup> the assignment of priority rights to CBM owners to block the mining creates a very valuable commodity—leverage to force a buyout from coal owners who desperately need the CBM owner's rights or consent in order to complete their operations. This creates perverse economic incentives where individuals who hold CBM rights but never planned to extract the CBM (or individuals who are extracting only minor and relatively worthless amounts in the market for CBM itself) may be inclined to start or continue their operations for the sole benefit of selling their right to block mining to the mining companies.

If we assume that the coal is more valuable than the CBM, this extortion-value initial assignment is inefficient because it does not give the superior rights to the most valuable resource and therefore inefficiently adjusts the price. The initial assignment of rights to the CBM operator gives the CBM operator not just their rights to the CBM but also the much more valuable right to legally "interfere" with the ability of another property owner, here the coal owner, to use and enjoy his property.

Had this conflict arisen with no law—i.e., no initial assignment and no basic nuisance and trespass law, of course we would be in Box 0, the state of nature, where the two interests would compete with no neutral and unbiased arbiter, but only force. That is not an attractive option either.

So with all of that in mind, it begs the question—how has the law established the initial assignment of rights between these two conflicting uses? As should always be the case in property law and land use regulation, we should start with the deeds.

The typical deeds involved in these cases include the splitting of the surface estate from the coal estate.<sup>139</sup> The owner of the coal estate typically received a deed that gave them the rights to the coal, the rights to mine the coal, and certain exemptions from liability from damages to the surface from mining the coal.<sup>140</sup> The surface owner retains the surface estate in the typical severance deed, along with reserving for itself all of the other minerals besides the coal, including oil and gas which have often been interpreted to mean that the surface owner has the rights to the CBM inside the coal seam.<sup>141</sup>

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137. See Lewin et al., *supra* note 135.

138. Jan G. Laitos, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 23 VA. ENVTL. L.J. 1, 19.

139. Lewin et al., *supra* note 135, at 613-15.

140. *Id.* at 614.

141. See, e.g., *Amoco Prod. Co.*, 526 U.S. at 865.

In an effort to determine how the “initial assignments” set the land use regulations for these two parties, litigation has taken place to interpret these deeds and determine the choice between the priority rights options discussed above.<sup>142</sup> This is occurring in Box 1 of the land use dynamic circle. Although the court rulings have not been consistent, the courts interpreting these deeds in a variety of states quite often determined that the priority rested with the CBM owners.<sup>143</sup> Once the initial assignment is set, we understand how that initial assignment itself regulates the use of one’s own property.

Of course, this initial assignment channels behavior into negotiations to buy out the rights. As might be expected, to the extent that CBM owners demanded prohibitively high prices to buy out their rights to prevent or at least delay the mining, the coal owners sought ought public land use controls.<sup>144</sup> This included seeking legislation (a Box 3 option) that would convert the CBM owners’ right to enjoin into a right to damages.<sup>145</sup>

Under proposed federal legislation, it was suggested that the CBM rights should be governed by a liability rule rather than a property rule.<sup>146</sup> The legislation would have allowed the coal companies to proceed with mining their coal so long as they paid the CBM owners the value of the lost coal and would eliminate the CBM owners’ power to stop that activity.<sup>147</sup> They could at best demand payment for the value of the gas, an amount far less than the value of their injunction (because the coal was so valuable that the coal companies were suffering substantial losses from leaving coal in place).

This liability-rule legislation did not pass and the respective parties were largely shuttled back into Box 2. There, CBM owners usually had the leverage and coal companies were faced with less than ideal negotiating positions due to the strength of some of the initial assignments and priorities given to the CBM owners. The setting of those initial assignments can have powerful effects on the relative difficulty and cost of seeking alternative paths to one’s desired ends.

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142. *Id.*

143. *See, e.g.,* LoValerie Mullins, *The Equity Illusion of Surface Ownership in Coalbed Methane Gas: The Rise of Mutual Simultaneous Rights in Mineral law and the Resulting Need for Dispute Resolution in Split Estate Relations*, 16 MO. ENVTL. L. & POL’Y REV. 109, 120-30 (2009) (surveying cases).

144. *See id.* at 164 (describing a variety of state statutory responses to the conflict); S. Ryan White, Note, *Who Owns Coalbed Methane in West Virginia?*, 107 W. VA. L. REV. 603 (2005) (surveying state cases that try to deal with this coal/CBM conflict).

145. *See* Proposed Powder River Basin Resource Development Act of 2001, H.R. 1710, 107th Cong. (2001); *see also* Prince, *supra* note 132, at §19.07[3].

146. *See* H.R. 1710, *supra* note 145.

147. *Id.*

Both the coal owners and the CBM owners were confronted at one point or another in these disputes with each and every part of the dynamic circle. Indeed, they bounced back and forth between boxes. They also learned about the influence of each box on the other and the relative positioning that must occur based on the rights conferred, demands made, and choices offered in each sector of the circle.

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These are but two of countless conflicts that serve as illustrative examples of the framework identified in this Article. These examples begin to solidify the purposes, utility, and application of the framework identified herein for addressing real world concerns. Those engaged in making land use control decisions and in evaluating the options available to use the panoply of land use control mechanisms in a favorable manner to satisfy preferences and achieve desired ends are encouraged to consider this framework in that process.

### CONCLUSION

Now more than ever—whether one is a landowner, regulator, legislator, land use attorney, or simply a student of the law in one capacity or another—there is a serious and compelling need for understanding the growing complexity and the diversity of mechanisms by which land is or can be regulated and controlled.<sup>148</sup> The primary purpose of this Article has been to present a new framework through which land use and other property regulation can be understood. More importantly, it provides insight into the dynamic reality of the land use regulatory control system<sup>149</sup> so that anyone who is engaged with it can effectively understand the options inside the system. Through this understanding, people can choose the optimal navigational path through which their preferences can be satisfied.

The land use control ecology promises more mutations in the time ahead. The system is evolving and will continue to become even more complex. It helps to look down on it from time to time and find a way to comprehend it through a more manageable frame. Only in this way can we develop the adaptive techniques to navigate the land use control system—and all of the games within it—effectively.

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148. Arnold, *supra* note 2, at 442 (“[L]and use regulation is one of the most pervasively influential, and therefore important, areas of law and public policy in the United States.”).

149. *Id.* at 445 (“The [land use] system is dynamic, adaptive, and functional.”).

