PRESIDENTIAL GOVERNMENT AND THE LAW OF PROPERTY

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This Article introduces a phenomenon that has been overlooked in the literature on property lawmaking: presidential governance of property law. On the conventional account, contributing to the development of the property system is about the last thing we would expect to see presidents doing. Yet the president is uniquely situated to treat property as a system, not just as a right, and presidents expressly affect the property system. While presidents do not, cannot, and should not control property lawmaking, recognizing their influence opens up new lines of inquiry that we miss when we think of property simply as bundle of rights—the now-dominant understanding of property law. Focusing upon the unfamiliar category of presidential governance of property forces us to unpack the link between property's structure and function on the one hand and institutional choice on the other. This link involves variables of institutional choice that are rooted in constitutional separation of powers and federalism as well as a pragmatic assessment of how the property system works. The first variable concerns the quality of property decision making. The second focuses upon the mixture of uniform and diverse structures of rights and duties within property law. The third involves stability and flexibility, and the risk of turmoil and instability, within the property system. The balance of these three variables dictates that the breadth and depth of presidential governance of the property system should vary based upon differences among resources and contexts of ownership. Surprising as it may sound given our conventional understanding of what property law is and how it is made, we should not ignore presidential governance of property—not in how we teach property law or in how we write about it.

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INTRODUCTION

Every American lawyer knows the story: Post, having hunted a fox over a "'wild'" and "'unpossessed . . . waste land,'" sued Pierson, who had snagged the "'beast'" before Post did.[1] The Supreme Court of New York found for Pierson, reasoning that possession, not "mere pursuit," makes something property.[2] That *Pierson v. Post*[3] has consumed so many hours of classroom time, and so many pages in the law reviews, testifies to our focus upon what courts—particularly state courts—do when we talk about property.

Comparatively few lawyers know about President Bill Clinton's Framework for Global Electronic Commerce and his Commerce Department's White Paper on the Internet's domain name system.[4] Yet the White Paper was a *Pierson* for the Internet. At the White House's direction, Clinton's Commerce Department fostered the creation of the Internet Corporation for Assigned Names and Numbers (ICANN), a not-for-profit corporation tasked with entrenching and managing a property system for domain names, and the result was a general rule of first possession with exceptions to protect trademark holders from so-called bad faith "cybersquatters."[5] Thus, presidential action cemented a property system within the wilds of cyberspace.

Influencing the development of property law is about the last thing we would expect to see a president doing. Property law is state law, or so we usually assume.[6] Of course, there are a handful of familiar contrary examples: President Abraham Lincoln's Emancipation Proclamation is

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1. *Pierson v. Post*, 3 Cai. 175, 175 (N.Y. Sup. Ct. 1805) (quoting the case declaration, appearing in the preamble to the opinion).

2. *Id.* at 178.

3. 3 Cai. 175 (N.Y. Sup. Ct. 1805).

4. Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998).

5. *Id.* at 31,746. ICANN and the Department of Commerce entrenched a rule of first possession for domain names that had begun as a norm of private ordering before the federal government became more involved in the design of Internet governance. *See, e.g.*, Jonathan Zittrain, *ICANN: Between the Public and the Private—Comments before Congress*, 14 BERKELEY TECH. L.J. 1071, 1077–78 (1999) (discussing early Internet governance under Jon Postel, a computer scientist working at the University of Southern California under contract with the United States).

6. Under our system of federalism, the Supreme Court often opines, "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979).

one,[7] and President Harry Truman's steel seizure order is another.[8] But these examples involve aggressive assertions of presidential power and significant disruptions to existing property arrangements. Beyond these extraordinary cases, presidential governance surely is not an important part of the property story.

Yet look beyond the extraordinary cases and a different story emerges. Consider a less dramatic example of presidential governance of property: President Ronald Reagan's and President George W. Bush's executive orders on takings of private property.[9] The Fifth Amendment to the Constitution provides that "private property" shall not "be taken for public use, without just compensation."[10] To understand what the Takings Clause proscribes, we look to state law and the Supreme Court's jurisprudence.[11] By executive order, however, Reagan and Bush aimed for more protection for private ownership than constitutional doctrine provides.[12]

In an era where one president's "ownership society" was followed by another president's struggle to unscramble a subprime mortgage crisis,[13] it is worth exploring presidential governance of property. President Barack Obama, for instance, has created a "Homeowner Bill of Rights" that aims to correct "the patchwork of rules that govern the mortgage servicing industry."[14] The Obama administration is working with various agencies—including the Consumer Financial Protection Bureau (CFPB), which President Obama pushed for on Capitol Hill—to implement "an enforceable set of rules, not just guidance, for the

7. Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 350 ("[T]he Proclamation is best understood as a legal document, albeit one promulgated under unusual circumstances.").

8. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589–92 (1952). Both the Emancipation Proclamation and the steel seizure order involve presidential government and private property. This Article will also explore how presidents have shaped governance of public property and the commons and regulatory property.

9. *See infra* notes 12, 235–38 and accompanying text.

10. U.S. CONST. amend. V.

11. *See, e.g.*, Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 969 (2000).

12. *See* Exec. Order No. 12,630, 53 Fed. Reg. 8859, § 4(d), (Mar. 15, 1988) *reprinted in* 5 U.S.C. § 601 (2012) (instructing federal agencies to prepare takings impact statements); Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 28, 2006) (responding to *Kelo v. City of New London*, 545 U.S. 469 (2005), with list of permissible "public uses").

13. *See* David J. Reiss, *Reforming the Residential Mortgage-Backed Securities Market*, 35 HAMLINE L. REV. 475, 478 (2012) (discussing the Bush II Administration's "ownership society" vision of property).

14. COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 125 (2012).

servicing industry."[15] President Obama has explained his actions as Alexander Hamilton might have, emphasizing the energy his office can bring to fixing how we finance the property system.[16] Rather than wait for "processes to play themselves out slowly and painfully," the Obama administration took "multifaceted and fiscally responsible actions" in an attempt to address the housing crisis.[17]

The main goal of this Article is to introduce presidential government as a property lawmaker.[18] Its principal contribution is to show that the presidency has the capacity to treat property as a system, and that presidents expressly affect the property system. The president's actions are uniquely visible, the president has unique rhetorical authority as a single public official at the head of the national executive branch, and the president can coordinate executive lawmaking. We elect presidents based in no small measure upon their views concerning social and political values and regulation, and we expect that they will seek to implement those views. And presidents, particularly those in the modern era, offer orienting visions of the values to be served by property.

Surprising as it may sound given our conventional understanding of what property law is and how it is made, we should not ignore

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15. *Id.*

16. In the Federalist No. 70, Alexander Hamilton defended energetic presidential government as necessary to protect property rights, albeit with a focus on protecting negative liberties against factions. THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

17. COUNCIL OF ECON. ADVISERS, *supra* note 14, at 127. The Obama Administration's attempts were not wholly successful, which is an important part of the story of presidential governance of property and its limits. *See infra* note 483 and accompanying text.

18. Presidential government consists of unilateral presidential action, presidential administration of the federal bureaucracy, and presidential leadership—a catch-all category that includes the president's participation in the legislative process and agenda-setting for federal lawmaking. *See infra* Part I.B.

The presidency, of course, "is a 'they,' not an 'it.'" Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006). It includes the president, White House officials, and policy advisors and their staff in the Executive Office of the President. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2338 (2001). What distinguishes this assembly of officials is its far from limitless, yet comparatively unique, capacity for collective action and unified decision making.

State governors may similarly have a comparative advantage at collective action. This Article leaves for future work analysis of the role of state governors and executive branches in property lawmaking, though the framework it develops has implications for institutional choice at the state level. That being said, state separation of powers doctrines may differ significantly from the federal model. Consider, for example, executive management of property in a crisis. Unlike the federal Constitution, state constitutions may expressly set out the executive's lawmaking powers during a crisis. *See* Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 243 (2006).

presidential governance of property—not in how we teach property law and not in how we write about it. For all the continuing importance of state courts, the next *Pierson v. Post* may be hashed out in the halls of the Eisenhower Executive Office Building and 1600 Pennsylvania Avenue. That is not to claim that property law is, or should be, the product of presidential proclamation. Rather, within the constitutional structure of separation of powers and federalism, there is substantial room for thinking about the president's role in shaping property lawmaking.[19]

Presidents may shape property law in three contexts: public property, private property, and the commons. In shaping property law within these three contexts, presidents may use the tools of presidential governance: unilateral presidential action, presidential administration, and presidential leadership. Using these tools, they may delineate property by assigning particular resources to particular types of ownership, shape property rights and duties, make owners by influencing who will be an owner and how many owners there will be, enforce property by calibrating and coordinating enforcement, and manage property in crises.

Presidential power to shape property law is not, however, uniform across resources and contexts of ownership. The Constitution or federal statutory law may limit the president's authority to use unilateral action or presidential administration to make property decisions, and the president's attempts to use soft law mechanisms of leadership may fail. Or the law may permit the president to use a particular tool, such as presidential administration, but only to produce a specific type of property decision, such as enforcing property law. Combining the contexts, tools, and products of presidential governance of property suggests its systemic possibilities and limits.

This Article's descriptive claim has two important implications. The first concerns the role of politics in property law. On one august view, property is where politics ends. "[F]or a man's house is his castle," and outside lies the state.[20] On that view, to speak of presidential governance

19. There is a sense in which administrative law recognizes that the president can affect property. But it has focused upon unilateral presidential action to affect private property rights, particularly executive orders that fall within either the second or third *Youngstown* categories. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (setting out influential tripartite categorization of presidential power); *infra* notes 47–50 and accompanying text (explaining Justice Jackson's categories). That leaves unexamined the wide swath of presidential governance of property that falls within *Youngstown* category one, where Congress has delegated property lawmaking power to the executive branch, as well as presidential leadership and participation in the legislative process.

20. EDW. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 162 (1644).

of property is to confuse property law with a president's political decisions about regulation. Sometimes the president's actions are dictated by the politics of the moment. At other times, they reflect deeply thematic and political visions of the property system. In either case it is far from clear how to place presidential politics within the property story.

Recognizing the role of presidential governance in shaping property invites us to rethink the relationship between politics and property. Just as property is a lightning rod for competing definitions of "a legitimate social order,"[21] so too the president is a "lightning rod . . . attracting and objectifying contending interpretations of the existing state of affairs."[22] For FDR, property was personal security.[23] For Reagan, it was liberty.[24] For Clinton, citizenship.[25] By examining presidential governance, we can trace competing conceptions of property's role in constituting who we are as a people and what kind of society we want to have.

The second implication of my descriptive claim concerns institutional choice in property law. The existing picture of institutional choice in property law is familiar. Courts, particularly state courts, create property law in a common law mode. To the extent that legal change is warranted, it comes through the legislature. The system thus maintains stable ownership by limiting the impact of shifting political winds in property lawmaking. The presidency does not fit within this picture. After all, presidents build legacies by breaking down walls: the office "is a governing institution inherently hostile to inherited governing arrangements."[26]

There is, however, a more nuanced story of institutional choice to be told in property law, and the presidency has an important role within it. Federal law significantly shapes property rules across diverse resources and contexts of ownership, and presidents participate in the legislative process and can significantly shape executive branch lawmaking. By describing presidential governance of property, this Article points towards comparing the capacities of courts, legislatures, administrative agencies, and the executive when making institutional choices in property law. A thorough comparative analysis may yield counter-intuitive results. At first glance, valuing stability in property would seem to dictate strong judicial policing of presidential governance. Yet presidents may stabilize property by responding swiftly when crises

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21. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1049 (2009).

22. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 20 (2003).

23. *Infra* Part I.D.1.a.

24. *Infra* Part I.D.1.b.

25. *Infra* Part I.D.1.c.

26. SKOWRONEK, *supra* note 22, at 20 (emphasis omitted).

destabilize existing rights, promoting equal treatment in the market for housing, or directing executive agencies where constitutional protections for owners end.

To get traction on the contextual questions of institutional choice that arise when we recognize presidential governance of property, I elaborate a comparative institutional analytics for property lawmaking. The first variable of institutional choice concerns the quality of property decision making. Sometimes the property system employs shortcuts to solve problems of resource use. Many of these shortcuts, particularly with respect to real property, are enshrined as common law rights.[27] But sometimes we want systematic and thematic engineering of property rules, with special attention to the purposes that property may serve and the interfaces among property rules.[28] Where that is the case, presidential influence may play a welcome role in constituting the governance of property, as it did with Clinton's domain names initiative. But presidential influence is not without costs. The second variable of institutional choice focuses upon the mixture of uniform and diverse structures of rights and duties within property law. Presidents will tend towards uniform structures across resources and contexts of ownership. The third variable of institutional choice addresses the temporal dimension of these costs. It involves stability and flexibility, and the risk of turmoil and instability, within the property system. Sometimes presidential decision making brings welcome flexibility to property law, as in the case of the Kennedy and Clinton orders promoting fair housing.[29] But too much presidential power can destabilize property rights. Combining these factors offers a generally applicable framework for institutional choice in property.

Applying this framework in light of constitutional federalism and the separation of powers, this Article sketches the metes and bounds of presidential governance of property. The basic insight is that the costs of the president's decision making begin to outweigh the benefits as thematic and systemic property lawmaking raises the risks of instability and undesirable uniformity in property law. These costs and benefits

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27. *See* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012) ("Property is a shortcut over the 'complete' property system that would, in limitlessly tailored fashion, specify all the rights, duties, privileges, and so forth, holding between persons with respect to the most fine-grained uses of the most articulated attributes of resources.").

28. *See id.* at 1693–94 (arguing that "property . . . enriches the system of domains of owner controls with interfaces using governance strategies").

29. *Cf.* Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 482 (2011) (arguing that "there are ex ante signaling benefits to a regulatory regime that moves beyond the reactive nature of traditional civil rights law and instead takes a more active role in ensuring inclusion" in property regimes).

vary determinately based upon the tools and products of presidential property lawmaking and the types of resources and contexts of ownership. Therefore, the breadth and depth of presidential property lawmaking should not be uniform across resources and contexts. In particular, I distinguish among presidential governance of private property, the commons and regulatory property, and public property.

My argument unfolds as follows. Part I describes presidential governance of property. Part II assesses the normative questions of comparative institutional choice that presidential governance of property raises. Part III offers some preliminary thoughts on the design of presidential governance of property by applying this Article's normative framework to concrete cases.

I. DESCRIBING PRESIDENTIAL GOVERNANCE OF PROPERTY

What role does presidential government play in shaping property law? Sometimes the president's role is direct. By his Emancipation Proclamation, for example, President Lincoln declared, notwithstanding the property law of the Confederate states, that more than three million slaves were "and henceforth shall be free."[30] In other instances the president plays a substantial role in interactions among the federal branches and the states in the development of the property system. Presidents John F. Kennedy and Bill Clinton, for example, issued executive orders directing agencies participating in federal home ownership programs to eliminate racial discrimination in underwriting practices and to further fair housing policies.[31] Often the president's impact is more subtle and limited. Consider, for example, President Obama's Home Affordable Modification Program (HAMP), which has influenced state court development of the common law of foreclosures.[32]

Yet in the conventional story, American property law is doubly decentralized: Federalism reserves to the states the power to make owners, and property rights delegate to owners the power to determine the uses of things they own. Property lawmaking, particularly with respect to land, is often treated as a "quintessential state and local power" reserved under the Tenth Amendment.[33] After all, the system of estates in land—the distinction between fee simple absolutes and fee simple determinables, or, for instance, between shifting and springing executory interests—is state common law. With the exception of the takings

30. ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 240 (2010) (quoting the Emancipation Proclamation).

31. *Infra* Part III.B.2.

32. *See infra* note 414.

33. *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

doctrine, federal lawmaking, much less presidential government, surely plays a peripheral role in the property story.

This Part, the heart of the Article, aims to unsettle this conventional understanding of property lawmaking. It is wrong to equate state primacy in the creation of the estates system in land with state exclusivity in property lawmaking. The federal law of property not only accounts for many ownership rights, but also plays a substantial role in property governance. The president, in turn, can propose a vision of the property system and seek to implement it using all the tools of presidential government.[34]

Part I.A describes the contexts of presidential governance of property based upon constitutional federalism and the separation of powers. With this background in mind, Part I.B sketches the tools of presidential governance of property. Part I.C shows how presidents use those tools to shape property law. Part I.D ties the examples of presidential governance together to describe the president's capacity to treat property as a system.

A. Specifying the Framework

This Subpart describes the constitutional framework for presidential governance of property lawmaking, distinguishing among private property, the commons and regulatory property, and federally owned property.

1. PRIVATE PROPERTY

The Constitution addresses "property" in the Takings Clause of the Fifth Amendment, which provides, "Nor shall private property be taken for public use, without just compensation,"[35] and the Due Process Clauses of the Fifth and Fourteenth Amendments, which provide that no person shall "be deprived of . . . property, without due process of law."[36] To apply these clauses, courts traditionally measure "the existence of a property interest . . . by reference to 'existing rules or understandings that

34. *Cf.* Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1195 (1994) (explaining that the presidency is especially well-suited to "undertake . . . systematic regulatory change").

35. U.S. CONST. amend. V.

36. *Id.*; U.S. CONST. amend. XIV (providing that no state may "deprive any person of . . . property, without due process of law").

stem from an independent source such as state law.'"[37] Accordingly, state law is a centerpiece of the constitutional jurisprudence of property.

Federalism exerts a powerful pull on the institutional design of property lawmaking regarding private rights. As a constitutional matter, "the National Government possesses only limited powers; the States and the people retain the remainder."[38] Among the "essential attribute[s] of sovereignty," the Court has opined, is a state's control over the lands it owns.[39] More broadly, federal courts commonly state that "[w]ith rare exceptions property law (especially real-property law) is state law,"[40] and that "[r]egulation of land use . . . is a quintessential state and local power."[41] Even so, federal law may reach into local land use. For instance, after the Court struck down the Religious Freedom Restoration Act in *City of Boerne v. Flores*,[42] Congress enacted the more targeted Religious Land Use and Institutional Persons Act to prohibit local governments from substantially burdening religious practices through land use regulation.[43] And, for their part, presidents have expressly influenced the development of modern land use regulation.[44]

Though we do not usually place presidential government within the property story, there is a sense in which legal scholarship recognizes that the federal executive affects property. In perhaps the best-known opinion on presidential power, *Youngstown Sheet & Tube Co. v. Sawyer*,[45] the Court held that President Truman acted unconstitutionally when he

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37. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

38. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

39. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987).

40. *Drake v. United States*, 642 F. Supp. 830, 832 (N.D. Ill. 1986).

41. *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

42. 521 U.S. 507, 532 (1997).

43. 42 U.S.C. § 2000cc (2006 & Supp. V 2012).

44. *See, e.g.*, *Almquist v. Town of Marshan*, 245 N.W.2d 819, 824–25 (Minn. 1976) (looking to the report of President Lyndon Johnson's National Commission on Urban Problems to conclude that a zoning ordinance designed to stall urban sprawl served a valid public purpose); *Golden v. Planning Bd. of Town of Ramapo*, 285 N.E.2d 291, 306 (N.Y. 1972) (Breitel, J., dissenting) (concluding that the "Ramapo ordinance . . . would frustrate . . . well-directed efforts" of "President[] [Johnson's] National Commission on Urban Problems"); *Willistown Twp. v. Chesterdale Farms, Inc.*, 300 A.2d 107, 114 (Pa. 1973) (discussing how "the exclusionary use of zoning was . . . brought to national attention in 1968 by" President Lyndon Johnson's National Commission on Urban Problems); John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1292 (1993) (discussing recommendations of President Johnson's National Commission on Urban Problems and his Committee on Urban Housing); *cf. Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 & n.9 (D.C. Cir. 1970) (discussing expectations of tenants in terms derived from National Commission on Urban Problems).

45. 343 U.S. 579 (1952).

authorized the Commerce Department to seize steel mills to maintain production during the Korean War.[46] In his influential concurring opinion, Justice Robert Jackson laid out three categories of presidential lawmaking power.[47] Under Jackson's scheme, where Congress has authorized the president to act, her powers are at their apogee, and presidential action is invalid only where it violates a constitutional norm.[48] Where Congress has neither authorized nor prohibited an action, the president may have residual authority to act where she and Congress have concurrent powers, which Justice Jackson famously labeled a "zone of twilight."[49] By contrast, where Congress has prohibited the president from acting, her powers are at their nadir, and she may act only if Congress's restriction is unconstitutional.[50] When it comes to presidential governance of property law, we have usually focused upon Jackson's second and third categories in the context of presidential takings of private property during military and national security emergencies.

This traditional focus on unilateral presidential action leaves out important questions of the design of presidential governance of property within *Youngstown* category one, where Congress has delegated lawmaking to the executive branch. The principle that the president cannot make or break private rights of property on her own authority remains a foundational assumption of the separation of powers.[51] For the president to make hard law regarding private property, therefore, she must point to congressional authorization.

In many instances, congressional authorization for the creation of federal property law is easily found. For example, Presidents Clinton and Kennedy issued executive orders promoting fair housing in federal programs. With these orders, the presidents were sorting between different local interests, much as state legislatures might do. There was a statutory predicate for these directions to federal agencies about taking actions Congress had authorized.[52]

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46. *Id.* at 589.

47. *Id.* at 635–38 (Jackson, J., concurring).

48. *Id.* at 635–37 (Jackson, J., concurring).

49. *Id.* at 637 (Jackson, J., concurring).

50. *Id.* (Jackson, J., concurring).

51. *See Medellín v. Texas*, 552 U.S. 491, 532 (2008) (holding that the Take Care Clause "allows the President to execute the laws, not make them"); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 4 (1993) ("[N]o independent, free-standing presidential law-making authority exists insofar as the rights of American citizens are concerned.").

52. *See infra* Part III.B.2.

Congress has "wide power to structure" executive lawmaking.[53] It may create independent agencies and limit presidential control by, for example, limiting the president's power to remove public officials.[54] For instance, by statute the Federal Communications Commission (FCC) is an independent agency that has authority to regulate electromagnetic spectrum and broadband, among other areas.[55] The FCC has been a source of federal property law regarding these nontraditional resources. And the president has played a role in these efforts, but not by directing specific FCC decisions. Instead, for example, the president has lobbied Congress on behalf of the FCC regarding property problems. There is, of course, a live debate about whether the Constitution prohibits Congress from shielding independent agencies from presidential control.[56] As a matter of doctrine, however, the Constitution does not mandate a unitary executive branch.[57]

Absent statutory prohibitions, however, administrative law permits presidential influence upon administrative lawmaking. The president may seek to politicize agencies by appointing political allies to high-level administrative posts.[58] Where Congress has not forbidden it, the president may remove agency heads at will. Even so, more than a president's say-so is necessary to sustain administrative action, and the courts may closely scrutinize agency action where it appears the White House has controlled expert decisions committed to agency officials by statute, as *Massachusetts v. EPA*[59] attests.[60] Federal courts may also

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53. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 110–11 (2005).

54. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (holding that Congress cannot create multiple layers of for-cause limits between the president and policymaking officials, but not questioning Congress's power to create independent agencies).

55. 47 U.S.C. § 151 (2006).

56. *Compare, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549 (1994) (arguing the "Executive Power Clause actually does what it says it does, i.e., it vests (or grants) a power over law execution in the President, and it vests that power in him alone"), *with* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (arguing that unitary executive interpretation of Constitution "is just plain myth").

57. *See* Gillian E. Metzger, *The Interdependent Relationship between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 436 (2009).

58. David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008) ("Presidents . . . have been making novel and aggressive use of their powers of appointment to remake agencies.").

59. 549 U.S. 497 (2007).

60. *See id.* at 533. *See also* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (arguing that

shape presidential governance of property through statutory interpretation and administrative law.[61] Of course, moreover, federal courts have a role to play in defining private property rights through application of the Fifth Amendment's Takings and Due Process Clauses.

2. THE COMMONS

Federal law also plays a substantial role in the regulation of the commons. When it comes to global commons law, presidents have the primary power to speak for the United States.[62] When it comes to regulating commons resources within the United States, the primary source of federal lawmaking power is the Commerce Clause. There is, of course, a controversy over the breadth of that power, which would require another article to address. Federal regulation of some commons resources—say, electromagnetic spectrum—is at this point well established and not subject to convincing constitutional objection. For my part, much federal regulation of air and water falls within that category. The structural objection, in a nutshell, is that federal commons law encroaches upon "truly local" matters reserved to state law.[63] On one view, this objection is unavailing: "[C]ourts have consistently treated appropriations of privatized commons resources as meeting the 'substantial effects test' for determining the validity of federal legislation under the Commerce Clause."[64] But the Rehnquist and Roberts Courts' Commerce Clause opinions—*Lopez*,[65] *Morrison*,[66] and *National Federation of Independent Business v. Sebelius*[67] spring to mind—may have given heft to constitutional objections to some federal commons

Massachusetts v. EPA reflects the Court's "increasing worries about the politicization of administrative expertise").

61. For example, the plurality opinion in *Rapanos v. United States* suggested that federal agencies cannot regulate land use without clear congressional authorization. 547 U.S. 715, 738 (2006) (plurality op.).

62. *See, e.g.*, J.M. Spectar, *Elephants, Donkeys, or Other Creatures? Presidential Election Cycles & International Law of the Global Commons*, 15 AM. U. INT'L L. REV. 975, 976 (2000) ("[C]hanges in presidential administrations have led to dramatic shifts in United States positions on the norms of the global commons.").

63. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000). *See, e.g.*, *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1078–79 (D.C. Cir. 2003) (considering and rejecting the argument that the Endangered Species Act is an unconstitutional regulation of local matter).

64. Blake Hudson, *Commerce in the Commons: A Unified Theory of Natural Capital Regulation under the Commerce Clause*, 35 HARV. ENVTL. L. REV. 375, 377 (2011).

65. *United States v. Lopez*, 514 U.S. 549 (1995).

66. *United States v. Morrison*, 529 U.S. 598 (2000).

67. 132 S. Ct. 2566 (2012).

law, particularly under environmental statutes.[68] The best version of federalism may be one that "empower[s] each level of government to deal with social problems,"[69] but that may lead to counterintuitive design choices for different property problems.

As in the case of private property, the president generally must point to congressional authorization to make hard law concerning the commons. To be sure, presidential leadership has played an important role in shaping federal property law for regulatory property and commons resources.[70] But presidential administration, based upon congressional authorization, has been equally if not more important.

Of course, Congress may limit presidential governance of commons resources. When it comes to agency adjudication, for example, presidential influence over federal administration is significantly circumscribed. In *Portland Audubon Society v. Endangered Species Committee*,[71] for example, the Ninth Circuit held that communications between the White House and the Endangered Species Act's "God Squad" Committee, which had the authority to grant exemptions from the Act's requirements notwithstanding threats to listed species, were subject to the Administrative Procedure Act's (APA) limits on ex parte communications during adjudications.[72] In that case, the White House allegedly had pressured the Committee to grant exemptions permitting the taking of the northern spotted owl for the sake of timber sales.[73] The Congress had not, the court of appeals reasoned, committed the decision regarding the taking of this common resource to the president.[74]

3. PUBLIC PROPERTY

In short, not all American property law is state law, even when it comes to land and personal property. The Constitution separately addresses federal property in Article IV, Section 3, which provides,

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68. *See, e.g.*, *United States v. Sterling Centrecorp Inc.*, 960 F. Supp. 2d 1025, 1052–54 (E.D. Cal. 2013) (considering and rejecting the argument based upon *National Federation of Independent Business v. Sebelius* that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) impermissibly regulates "inactivity").

69. ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 8 (2008). *See also* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 118 (2010) ("A federal constitution ideally gives the central and state governments the power to do what each does best.").

70. *See infra* Part I.B.3 and accompanying text.

71. 984 F.2d 1534 (9th Cir. 1993).

72. *Id.* at 1541.

73. *Id.* at 1538 & n.5.

74. *See id.* at 1546.

"Congress shall have [the] Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[75] The doctrine does not clearly say how far this power runs, but the Court has described it in broad terms,[76] explaining that congressional power is "without limitations"[77] and includes the power to regulate other owners whose uses of their property affect federal property.[78] Congress has often delegated broad lawmaking authority to the president to make law concerning federal property.[79]

In addition, the president may have some inherent authority to shape public rights in property. In 1915, in *United States v. Midwest Oil Co.*,[80] the Court affirmed the president's unilateral decision to remove public lands from occupation for oil extraction based upon "a recognized administrative power of the executive in the management of the public lands."[81] Although Congress has limited inherent presidential power to

75. U.S. CONST. art. IV, § 3, cl. 2. The "category of [public] property has been somewhat neglected amidst scholarly fascination with" private property. Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 993 (2014). But there are several reasons to widen the lens of property theory to include public property. First, given that the "federal government alone owns nearly one-third of the land area of the United States," ignoring public property means ignoring a practically important aspect of how the property system works to manage resource uses. *Id.* Second, excluding public property hampers our understanding of how federalism and the separation of powers impacts institutional choice in property lawmaking; with public property left out of the picture, categorical assertions about state law exclusivity or primacy and about the primary role of legislatures and courts in property law appear more tenable. Third, leaving public property out of property theory makes it more difficult to understand the relationships between public and private rights in resources. As Bruce Huber has recently argued, for instance, private claims to public property "are remarkably durable." *Id.* at 994. In examining presidential policies concerning the public lands, this Article also examines the balance of public and private rights in property law.

76. *See* Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 4 (2001).

77. *United States v. City & Cnty. of San Francisco*, 310 U.S. 16, 29 (1940).

78. Appel, *supra* note 76, at 4 (citing *United States v. Alford*, 274 U.S. 264, 267 (1927)), and *Camfield v. United States*, 167 U.S. 518, 528 (1897)).

79. As Michael Rappaport notes, an "area where the nondelegation doctrine might not apply is that of managing government property." Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 354 (2001). *But see* Appel, *supra* note 76, at 105–06 ("[T]he nondelegation doctrine applies to the exercise of the Property Clause power, although the Supreme Court has applied that doctrine less rigorously to federal actions involving public lands because of a tradition of interbranch accommodation and congressional acquiescence to exercise of executive authority.").

80. 236 U.S. 459 (1915).

81. *Id.* at 474.

reserve public lands since 1915,[82] controversy over the extent of the president's inherent authority to manage federal lands persists. One example involves interstate exchange of lands. In 1996, for instance, President Clinton proposed to exchange federal lands for private lands owned by Crown Butte Mines with the aim of preventing mining near Yellowstone National Park.[83] The administration scrapped the exchange,[84] but it raised the question of whether the president had inherent authority to execute the exchange.[85]

The distinction between public and private rights has a long pedigree.[86] The Executive needs specific statutory authority to espouse the private rights of citizens in federal courts.[87] By contrast, a long line of case law holds that the federal Executive has an implied public right of action to enforce the federal government's public rights in property.[88]

B. The Tools of Presidential Governance of Property

The constitutional doctrines of federalism and the separation of powers help define the metes and bounds of presidential governance across the three contexts of property lawmaking. The president can propose a vision of the property system and use the tools of presidential government to shape property lawmaking.[89] This Subpart categorizes these tools into *unilateral presidential action*, *presidential administration*, and *presidential leadership*.

1. UNILATERAL ACTION (AND A WORD ON BROAD DELEGATIONS)

Sometimes the president may make property decisions on her authority. A president may issue an executive order authorizing the seizure of property, enter into an executive agreement with other nations concerning property, or refuse to enforce property rights. The limits on

82. *See, e.g.*, Federal Land Policy Management Act, 43 U.S.C. §§ 1701–85 (2006).

83. *See* Kenneth Amaditz, Note, *Executive Authority to Perform Interstate Land Exchanges*, 15 J.L. & POL. 195, 195–96 (1999).

84. *Id.* at 196.

85. *See id.* at 212–15.

86. Indeed, Christian Turner has argued that the distinction between public and private categories is "the most basic sorting criterion in our legal system." Christian Turner, *Law's Public/Private Structure*, 39 FLA. ST. U. L. REV. 1003, 1005 (2012). The distinction can be complicated, however; as this Article will describe, for example, lawmakers may shape private rights out of the public lands.

87. Monaghan, *supra* note 51, at 5.

88. Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 15, 17–18 (2014).

89. Rodriguez, *supra* note 34, at 1195.

the president's unilateral lawmaking authority are strict in light of Article I's assignment of the legislative power to Congress. Congress is "first among equals"[90] when it comes to federal lawmaking. The president can recommend and veto laws, but she generally must predicate her actions upon a statute.[91]

Still, the president may have limited residual power to make property law unilaterally. Consider a familiar example. Slavery was one of the most important and divisive property controversies in American history. And this controversy prompted one of the best-known examples of presidential governance of property: President Lincoln's Emancipation Proclamation. Invoking the Commander-in-Chief power in a time of civil war, Lincoln proclaimed that slaves within the rebellious Confederate states were free.[92] The Proclamation has since been derided as having "all the moral grandeur of a bill of lading,"[93] but this underscores that the Proclamation made property law. Indeed, it was an "extraordinary, even revolutionary, disruption[] of property rights."[94] Is it too much to say that we can glimpse in Lincoln's Proclamation the stirrings of a national consciousness that has, in the decades hence, chipped away at state primacy in property governance?[95] For all its apparent limits—Lincoln did not, for instance, purport to free slaves in the loyal slave states—is it not worth remembering that "blacks read the Proclamation as an inspirational charter?"[96] And is it not worth marking that, due in no small measure to Lincoln's successor, emancipation did not end the property regime of plantation feudalism?[97]

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90. Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 239 (2005) (reviewing HAROLD J. KRENT, PRESIDENTIAL POWERS (2005)).

91. This assumption is reflected in Justice Robert Jackson's influential tripartite scheme of presidential powers set out in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

92. Finkelman, *supra* note 7, at 377.

93. *Id.* at 386.

94. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 24–28.

95. *See* FONER, *supra* note 30, at 23–24 (arguing that Lincoln's action "clothed national authority with an indisputably moral purpose"); *cf.* GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY 5 (2001).

96. Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 531 (1989) (reviewing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (2002)).

97. As W.E.B. Du Bois put it, "[T]o have given each one of the million Negro free families a forty-acre freehold would have made a basis of real democracy in the United States that might easily have transformed the modern world." W.E.B. DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA 1860–1880, at 602 (1935). The Johnson Administration "suggested that the freedmen 'make the best terms they could' and establish labor contracts with the plantation owners who held

Debates over the legality of Lincoln's Emancipation Proclamation reflect the uncertain balance between congressional authorization and the president's inherent authority involving emergencies. For instance, the president's power to conduct wars and foreign affairs may provide independent support for property lawmaking. President Franklin Delano Roosevelt reshaped property at the same time that he reshaped the presidency—perhaps most dramatically and disastrously when he authorized military commanders to relocate citizens during World War II, a decision to which the Supreme Court deferred in *Korematsu v. United States*[98] and which led to Japanese-Americans' loss of property.[99] FDR also entered into executive agreements with the Soviet Union that preempted state property law, as the Court held in *United States v. Belmont*[100] and *United States v. Pink*.[101] Presidents Ronald Reagan and Jimmy Carter pointed to both statutory and inherent power to support nullifying attachments American citizens had obtained against Iranian property following the 1979 Revolution, which the Court blessed in *Dames & Moore v. Regan*.[102]

Congress has also delegated property lawmaking authority to the president with regard to national security emergencies. Consider, for example, the National Emergencies Act of 1976 (NEA)[103] and the International Emergency Economic Powers Act (IEEPA),[104] which cede to the president unilateral authority to declare an emergency and the power to limit property rights.[105] The USA PATRIOT Act[106] expanded the president's discretion in this regard.[107] Section 1702(a)(1)(B) of the

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'legal' title" over plantation lands. Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 18 (2007). For instance, Andrew Johnson set about repealing the special field orders of Union generals that aimed to give blacks private property to the lands they once worked as slaves. Kamille Wolff Dean, *Corporate Social Responsibility and Conservation: The Preservation of Ecology and Culture to Sustain the Sea Islands*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 375, 381–82 (2013).

98. 323 U.S. 214 (1944).

99. *See id.* at 218.

100. 301 U.S. 324, 331 (1937).

101. 315 U.S. 203, 233–34 (1942).

102. 453 U.S. 654, 669 (1981).

103. 50 U.S.C. §§ 1601–1651 (2006).

104. *Id.* §§ 1701–1706.

105. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1079 (2004).

106. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-57, 115 Stat. 272 (codified in scattered sections of the United States Code).

107. *See, e.g.*, Bethany Kohl Hipp, Comment, *Defending Expanded Presidential Authority to Regulate Foreign Assets and Transactions*, 17 EMORY INT'L L. REV. 1311,

IEEPA—when read generously, as courts tend to do[108]—gives the president the power to determine an owner's property rights short of outright expropriation.[109] If one wants to know what property law under the NEA and IEEPA is, one must look, as the trade journals do, to the president's executive orders and the agency actions that he has authorized or directed,[110] not to the courts or Congress.[111]

2. PRESIDENTIAL ADMINISTRATION

Congress's broad delegation under the NEA and IEEPA provides the statutory predicate for presidential administration of property. To understand presidential administration, consider again President Lincoln and the problem of slavery. Lincoln's Emancipation Proclamation was not his first intervention as president into the status of slaves as property in the Confederate states. Earlier, Lincoln had used the power of presidential administration—directing agencies' actions, reviewing their work, and claiming responsibility for their accomplishments[112]—to shape federal property lawmaking. In May 1862, Major General David Hunter, the commander of the Department of the South, proclaimed "all the slaves in his department (over 900,000 men, women, and children) 'forever free.'"[113] Lincoln was incensed.[114] He quickly countermanded Hunter's order, explaining that an executive branch decision to end slavery in the warring states would be his, if anyone's.[115]

In the modern administrative state, presidential administration is the primary tool of presidential governance of property. Of course, the president is not the puppeteer of the regulatory state. Rather, the

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1313 (2003) (explaining that the PATRIOT Act "expands the authority of the President to block transactions and confiscate property or assets of terrorists and their supporters").

108. *See, e.g.*, *Consarc Corp. v. Office of Foreign Assets Control*, 71 F.3d 909, 914 (D.C. Cir. 1995) (holding that the earlier version of the statute "grants broad powers to the President to control property"). *But see KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 878 (N.D. Ohio 2009) (concluding that the Fourth Amendment limits presidential authority to seize property).

109. David Klass, *Asset Freezing of Islamic Charities under the International Economic Emergency Powers Act: A Fourth Amendment Analysis*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 155, 157 (2007).

110. The Department of the Treasury's Office of Foreign Assets Control (OFAC) administers trade sanctions pursuant to executive orders. *See, e.g.*, Exec. Order 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

111. *See, e.g.*, James J. Savage, *Executive Use of the International Emergency Economic Powers Act: Evolution through the Terrorist Taliban Sanctions*, CURRENTS: INT'L TRADE L.J., Winter 2001, at 28.

112. Kagan, *supra* note 18, at 2250.

113. FONER, *supra* note 30, at 206.

114. *Id.* at 206–07.

115. *Id.*

presidency is in an important sense a "they," not an "it."[116] It is an "institutional actor" composed of the president, White House officials, and policy advisors and their staff in the executive office of the president.[117] Law, logistics, and politics will limit an individual president's ability to manage these actors. And the measure of presidential action will be in the president's interactions with federal agencies, as well as Congress, the federal courts, states, and private parties. In some cases—President Lincoln's Emancipation Proclamation springs immediately to mind—the president may shape the political conditions in which other lawmakers will make property law.

Consider the work of the Office of Information and Regulatory Affairs (OIRA), which has been an important tool of centralized control of agency action.[118] Reagan, for example, campaigned on a platform of "regulatory relief," and the Reagan Office of Management and Budget (OMB) pushed tradable pollution permits as a mechanism of environmental regulation.[119] Carol Rose and Richard Stewart have called tradable permits "hybrid property," in so far as they are "focused on allocations of rights to a larger resource whose total use has been consciously limited through regulation."[120] Like other forms of property, tradable permits give their owner the exclusive right to use (a portion of) a resource and are alienable. One of the Reagan administration's early successes with regulatory property in emissions was the lead rights permit program. Under this program, as the Environmental Protection Agency (EPA) gradually phased down the permissible amounts of lead in gasoline, it permitted refineries to trade rights to a certain amount of lead in gasoline.[121] In other words, the program created a marketable property

116. Bressman & Vandenbergh, *supra* note 18, at 49.

117. Kagan, *supra* note 18, at 2338. Thus defined, the presidency includes the Executive Office of Management and Budget, which contains the Office of Information and Regulatory Affairs (OIRA). *Id.* at 2277–78, 2338.

118. By executive order, OIRA is tasked with reviewing proposed agency rulemakings in light of their costs and benefits as well as coordinating agency policies based upon the president's priorities. Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2012).

119. *See* John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 959 (2006) (discussing Reagan's "regulatory relief" platform).

120. Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 164 & n.114 (1998) (citing Richard Stewart, *Privprop, Regprop, and Beyond*, 13 HARV. J.L. & PUB. POL'Y 91, 93 (1990)).

121. *See* Robert W. Hahn & Gordon L. Hester, *Marketable Permits: Lessons for Theory and Practice*, 16 ECOLOGY L.Q. 361, 380–83 (1989).

right in lead use. The result was a "vigorous market in lead rights" and a model for property-rights approaches in federal environmental law.[122]

Presidents may use their appointment and removal powers to shape the property system, even where they do not have authority to intervene in agency decision making.[123] Consider the Obama administration's push for net neutrality. During his first term, President Obama appointed Julius Genachowski to chair the FCC.[124] Genachowski was a proponent of net neutrality who spearheaded the administration's effort to pass net neutrality regulations.[125] Tim Wu coined the term "net neutrality" to refer to the idea that broadband providers have a duty to allow open use of their networks to access the Internet without limit to content or applications.[126] To understand the idea, think of it as a property rule. Daniel A. Lyons, a critic of net neutrality, has explained it as a "permanent virtual easement" to content providers that limits broadband providers' right to exclude.[127] Proponents of net neutrality, including Wu, have explained it as the net analogue to public accommodations doctrine in property law or the fair use doctrine in copyright law.[128] The tortured

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122. *Id.* at 389.

123. There is a thriving debate about whether, and, if so, to what extent, the president can influence independent agencies. Some commentators argue that it is possible to create independent agencies that are more or less insulated from political influence, presidential or otherwise. Others contend that "independent agencies['] . . . freedom from presidential oversight . . . has simply been replaced by increased subservience to congressional direction." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (plurality opinion). Yet a third camp argues that "[t]he president's power to appoint members, even in the face of bipartisanship requirements, coupled with the president's ability to apply informal pressures to the agency, result in considerable executive control." Cristina Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1823–24 (2010) (discussing but not endorsing this line of argument). This Article's descriptive claim does not depend upon resolving this debate. It is enough to show that the President interacts with independent agencies and Congress concerning property problems and to make a plausible case that, at least in some instances, the President has influenced federal property lawmaking by doing so.

124. *See* Stephen Labaton, *The Caucus: The Politics and Government Blog of the Times, Obama to Select Genachowski to Lead F.C.C.*, N.Y. TIMES, Jan. 13, 2009, http://thecaucus.blogs.nytimes.com/2009/01/13/obama-to-select-genachowski-to-lead-fcc/?_r=0.

125. *See In re Preserving the Open Internet Broadband Indus. Practices*, FCC Rcd. 10–201 (Dec. 23, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

126. *See, e.g.*, Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 145–46, 165–68 (2003).

127. Daniel A. Lyons, *Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation*, 86 NOTRE DAME L. REV. 65, 68–69 (2011).

128. *See* Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15, 30–35 (2006) (explaining net neutrality as extension of public accommodations doctrine); Lawrence

path of the FCC's net neutrality effort and the resistance of the D.C. Circuit to it underscore that the president's efforts to shape property lawmaking involve interactions with the other branches, states, and private parties.[129]

3. PRESIDENTIAL LEADERSHIP

These interactions are not limited to managing the administrative state, but also include participating in the enactment of legislation. These powers of presidential government have been of interest to political scientists and historians, but less so to legal scholars.[130]

Consider Lincoln's presidency once more. Because he treated the Proclamation as a war time measure, Lincoln made "intensive lobbying efforts [that] were instrumental in securing passage of the Thirteenth Amendment" eliminating property rights in other people.[131] Following his reelection in 1864, Lincoln implored Congress to recognize "the voice of the people" by ratifying the Thirteenth Amendment.[132] Reminding his congressional allies that "the president is 'clothed with immense power,'" and inviting congressmen who were on the fence with the White House to discuss their votes, Lincoln traded federal appointments and other forms of patronage for votes.[133]

Thus, presidentialism is significant not just in the sense of direction, review, and appropriation of agency action. Presidential leadership, a catch-all category that includes the president's participation in legislating and use of the bully pulpit, may shape property lawmaking. The president's legislative powers give her significant inputs into the development of federal property law. Under the Recommendation

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Lessig, *Fair Use and Net Neutrality*, LESSIG (May 21, 2006), http://www.lessig.org/2006/05/fair-use-and-network-neutralit/ (explaining net neutrality in fair use terms, as "state enforced limits on the property rights of others"); Jonathan Zittrain, *Net Neutrality as Diplomacy*, YALE L. & POL'Y REV. INTER ALIA (May 1, 2010, 10:00 AM), http://ylpr.yale.edu/inter_alia/net-neutrality-diplomacy (explaining net neutrality as extension of public accommodations doctrine).

129. *See* Edward Wyatt, *Lobbying Efforts Intensify after F.C.C. Tries 3rd Time on Net Neutrality*, N.Y. TIMES, Apr. 24, 2014, http://www.nytimes.com/2014/04/25/business/lobbying-efforts-intensify-after-fcc-tries-3rd-time-on-net-neutrality.html?_r=0.

130. *See, e.g.*, JAMES MACGREGOR BURNS, PRESIDENTIAL GOVERNMENT: THE CRUCIBLE OF LEADERSHIP 75–76 (1966).

131. Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1936 (1987).

132. *See* FONER, *supra* note 30, at 312.

133. *Id.* at 312–13.

Clause,[134] for example, President George H.W. Bush's White House proposed the Clean Air Act (CAA) Amendments of 1990, which created a property system in tradable emissions permits for sulfur dioxide.[135] The principal author was President Bush's White House Counsel, C. Boyden Gray.[136] Like the Reagan administration's property system for the lead phase-down, the CAA Amendments create a property right in a regulated pollutant.[137] The White House's successful proposal for property rights to emit sulfur dioxide has been credited with creating what has become "prevailing government policy" with respect to strategies for reducing pollution.[138]

Presidents have used the veto—and the threat of a veto—to shape federal property law. In some cases, presidents have reasoned that a regulation purporting to affect property did not fall within Congress's powers, including the power to regulate federal property.[139] In other cases, they have vetoed legislation as inconsistent with their conception of ownership and property rights.[140] Sometimes, presidents have used their veto messages to convey their views of the property system.[141]

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134. U.S. CONST. art. II, § 3 (providing that the president "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient").

135. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 401, 104 Stat. 2399, 2585 (1990).

136. C. Boyden Gray & Andrew R. Varcoe, *Octane, Clean Air, and Renewable Fuels: A Modest Step toward Energy Independence*, 10 TEX. REV. L. & POL. 9, 9 (2005) (stating that C. Boyden Gray "was one of the principal architects of the 1990 Clean Air Act Amendments").

137. *See* Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1792 (1991) (stating that the allowances under the Clean Air Act Amendments of 1990 "can be used for current emissions, sold, or held in reserve for future emission increases"); *see also* Robert W. Hahn & Robert N. Stavins, *The Effect of Allowance Allocations on Cap-and-Trade System Performance*, 54 J.L. & ECON. S267, S280 (2011).

138. John M. Broder, *From a Theory to a Consensus on Emissions*, N.Y. TIMES, May 16, 2009, http://www.nytimes.com/2009/05/17/us/politics/17cap.html?pagewanted=all&_r=1&; *see also* Christopher S. Hooper, *Limiting the Use of Emissions Allowances: A Statutory Analysis of Title IV of the 1990 Amendments to the Clean Air Act*, 5 N.Y.U. ENVTL. L.J. 566, 573 (1996).

139. *See, e.g.*, President John Tyler, *Veto Message: June 11, 1844*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=67563 (last visited Aug. 15, 2013) (vetoing legislation appropriating money for harbor and river improvements as inconsistent with scope of federal power because Congress's "claim to power would invest it with control and dominion over the waters and soil of each State without restriction").

140. *See, e.g.*, Message to the Senate Returning Without Approval a Bill Authorizing Private Access Across a Portion of Buffalo National River Park, 2 PUB. PAPERS 1316, 1316 (Oct. 11, 1988), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=35003&st=property&st1= ("If we begin with S. 1259 to establish by private bills special roadway privileges in our National Parks for the convenience of

Signing statements have also furnished a tool of presidential property lawmaking. A signing statement is a presidential announcement accompanying the signing of a bill into federal law. Presidents have claimed credit for specific property laws,[142] announced statutory interpretations[143] and plans for implementing property provisions,[144] and addressed constitutional concerns[145] through these statements. Courts have pointed to these statements in construing federal property law.[146]

Presidents have also used judicial appointments to shape property law. The Reagan White House's careful selection of judicial appointments is a case study on the use of this power, such that it is reasonable to speak of a "Reagan Revolution" in federal takings jurisprudence.[147]

Finally, presidents have an overlooked role in articulating property norms. As Sanford Levinson has put it, "The modern presidency . . . is

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private landowners fortunate enough to have sufficient influence to secure passage of such bills, we will have begun to squander our national treasure.").

141. *See, e.g.*, Message to the House of Representatives Returning without Approval Fish and Wildlife Refuge Eminent Domain Prevention Legislation, 2 PUB. PAPERS 1744, 1744 (Oct. 2, 1996), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=52036&st=property&st1= ("Private property is a fundamental American right and value. But this bill is unnecessary and would erode [an eminent domain] authority that has served the public interest for over 200 years.").

142. *See, e.g.*, Statement on Signing the Bill Amending the Declaration of Taking Act, 2 PUB. PAPERS 1554, 1554 (Nov. 4, 1986), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=36734&st=private&st1=property.

143. *See, e.g.*, Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 2 PUB. PAPERS 1843, 1847 (Oct. 23, 1998), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=55138&st=private&st1=property (explaining how the administration would construe a provision of the Act in light of international law governing diplomatic property).

144. *See, e.g.*, Statement on Signing the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, PUB. PAPERS 3 (Jan. 2, 1971), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=3154&st=property&st1= (explaining a plan for implementing a law providing for "uniform and equitable treatment of persons displaced from their homes, businesses, or farms by Federal and federally assisted programs").

145. *See, e.g.*, Statement on Signing the Coastal Barrier Resources Act, 2 PUB. PAPERS 1336, 1336 (Oct. 18, 1982), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=41879&st=property&st1= (last visited Aug. 15, 2013) (explaining that legislation "will not prohibit a property owner from building on his property").

146. *See, e.g.*, *NRG Co. v. United States*, 31 Fed. Cl. 659, 669 (1994) (interpreting the Declaration of Taking Act in light of Reagan's statement on amendment, *supra* note 142).

147. Christopher P. Yates, *Reagan Revolution Redux in Takings Clause Jurisprudence*, 72 U. DET. MERCY L. REV. 531, 531, 561 n.175 (1995); *see also* Dawn Johnsen, *Tipping the Scale*, WASH. MONTHLY, July–Aug. 2002, at 16 (discussing the Reagan Administration's "detailed blueprints" for judicial appointments, including criteria regarding private property and takings).

far more than the sum of its formal, constitutionally-granted, powers."[148] The president's powers of rhetoric and persuasion are also, as political scientists have emphasized, "instrument[s] of governance."[149]

President George W. Bush's "ownership society" is a good example of presidential articulation of a vision of property; it was both a demand for legal and financial innovations and a way of thinking about property as a social and political system. In his second inaugural address, Bush stated that for every citizen to have a "stake in the promise and future of our country," it would be necessary to "build an ownership society" in which more individuals owned businesses and homes.[150] Only then, he reasoned, would "every citizen" be "an agent of his or her own destiny."[151]

The ownership society entailed presidential promotion of mortgage lending to low-income borrowers. Regulation of mortgages is one area of property law that has long been shaped by the federal government. For example, Fannie Mae and Freddie Mac are government-sponsored entities (GSEs) that, with the backing of the federal government, are charged with promoting affordable housing by participating in the secondary mortgage market.[152] The president has had some, although not exclusive, influence over the GSEs' policies. Prior to the stock market crash of 2008, the president appointed a minority of members of these GSEs' boards.[153] Through his choice of appointments and OMB direction, the president could prod the GSEs' regulator (first the Office of Federal Housing Enterprise Oversight and then the Federal Housing Finance Agency[154]) to take action concerning the GSEs. And he could

148. Sanford Levinson, *Reconsidering the Modern Hanoverian King*, 36 HARV. J.L. & PUB. POL'Y 63, 69 (2013).

149. Jonathan Cannon & Jonathan Riehl, *Presidential Greenspeak: How Presidents Talk about the Environment and What It Means*, 23 STAN. ENVTL. L.J. 195, 199 (2004).

150. *President Bush's Second Inaugural Address*, NPR (Jan. 20, 2005, 12:00 AM), www.npr.org/templates/story/story,php?storyID=4460172.

151. *Id.*

152. While in private practice, I represented Fannie Mae and Freddie Mac in the wake of the market meltdown and during the first years of the Great Recession. Nothing in this Article, however, reflects non-public information or anyone's views but my own.

153. *See, e.g.*, Darrell Issa, *Unaffordable Housing and Political Kickbacks Rocked the American Economy*, 33 HARV. J.L. & PUB. POL'Y 407, 416 (2010) ("Until President George W. Bush ended the practice, the President of the United States appointed five members to the GSEs' boards.").

154. *See* Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, § 1312, 106 Stat. 3672, 3945 (1992) (codified at 12 U.S.C. § 4512); Housing and Economic Recovery Act of 2008, Pub. L., No. 110-289, § 1312, 122 Stat. 2654, 2662 (2008) (codified at 12 U.S.C. §§ 4511–4512).

direct the Department of Housing and Urban Development (HUD) in setting goals for the expansion of affordable housing for the GSEs.[155]

The Clinton administration set ambitious affordable housing goals, which the Bush administration expanded as part of its commitment to an ownership society. For example, prior to the market meltdown in 2007, the Bush administration's "HUD increased the GSEs' affordable housing goals from forty-two percent to fifty-five percent."[156] And the GSEs responded by expanding into the subprime mortgage markets.[157] Presidential promotion of an ownership society norm thus encouraged mortgage practices regarding who would be an owner and how many owners there would be, until the system grinded to a near-halt.

C. The Products of Presidential Governance of Property

On one view, however, the regulation of mortgages does not involve property law at all. Usually we "talk about" property "as an individual right"[158] or a bundle of them[159]—the right to exclude, the right to use, the right to alienate, and so on. As a right, property "is a creature of" state common law, subject to legislative clarification or revision.[160] It is this bundle-of-rights conception of property we have in mind when we say that federalism reserves property law to the states. Land, our primary metaphor for property,[161] lends itself to a focus upon state law. But a landowner's common law rights, future interests, and servitudes do not exhaust governance of the property system.

Property is not simply a bundle of rights but also a system that "structures control over scarce resources."[162] At the most granular level, property is a system of "bundled rights" that cannot be rearranged any

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155. *See* 12 U.S.C. § 1723a(m)–(n) (1994); *see also id*. § 1456(e)–(f).

156. Thomas Combs, *A Proposal for Regulation of the Government-Sponsored Enterprises*, 84 ST. JOHN'S L. REV. 759, 772 (2010).

157. *See, e.g.*, *id.* at 773.

158. Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 273 (2006).

159. Drawing inspiration from Wesley Hohfeld, legal realists elaborated the bundle conception of property. *See, e.g.*, Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); Wesley Newcomb Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 24 (1913).

160. Elizabeth B. Wydra, *Constitutional Problems with Judicial Takings Doctrine and the Supreme Court's Decision in* Stop the Beach Renourishment, 29 UCLA J. ENVTL. L. & POL'Y 109, 120–21 (2011).

161. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 351 (1996) ("[W]hy is land—immovable, enduring land—the central symbol for property?").

162. Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQUIRIES L. 79, 92 (2001).

which way.[163] It includes, but is not limited to, the right to exclude others from a resource. More generally, property encompasses many subsystems governing different resources in different contexts, from land to water to wavelengths to domain names. The many "elements" of the property system "work together to accomplish specific" functions.[164] Property reduces transaction and information costs,[165] serves as a foundation for market exchange,[166] can constitute personhood,[167] and shapes social and political relationships.[168]

To understand the many functions of the property system, it is not sufficient to think about the common law estates alone. Property theory has begun to look beyond "the private-common-public property triangle" to the "real-life proliferation of property configurations" that mixes features of these three forms.[169] And, as Joe Singer has explained, "[a] contemporary understanding of the operation of the estates system must look . . . to the numerous statutes that regulate the contours of market relationships, especially fair housing laws, consumer protection statutes, zoning, land use, mortgage and foreclosure laws, environmental laws, and marital property laws."[170] In exploring presidential governance of property, this Article aims to contribute to that contemporary understanding of the property system. Each of the examples of presidential governance that I discuss involves well recognized property problems.

Presidential government produces property law in five different ways. *Delineating property* involves identifying which resources can be owned, determining what types of ownership will exist, and assigning particular resources to particular types of ownership. *Shaping property rights and duties* sets the extent of control that owners presumptively have over resources and identifies their basic rights and duties to non-owners. *Making owners* concerns who will be an owner and how many owners there will be. *Enforcing property* concerns the mechanisms and levels of enforcement of property rights and duties. The final

163. Singer, *supra* note 21, at 1050 (citing Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 11–14 (2000)).

164. Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 482 n.8 (1997) (internal quotation marks omitted) (quoting MICHAEL L. GIBSON & CARY T. HUGHES, SYSTEMS ANALYSIS AND DESIGN 5 (1994) (defining systems analysis)).

165. *See, e.g.*, Merrill & Smith, *supra* note 163, at 8–14.

166. Clifford Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 321 (1985).

167. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

168. Singer, *supra* note 21, at 1062.

169. Amnon Lehavi, *Mixing Property*, 38 SETON HALL L. REV. 137, 140 (2008).

170. Singer, *supra* note 21, at 1052.

category, *managing property in crisis*, is unique and can include the previous four. I treat it separately in light of the jurisprudence that suggests the president may have unique authority during emergencies.

1. DELINEATING PROPERTY

Delineating property involves broad and deep questions about how to allocate the power to use resources. They include whether to create property rights in a resource, and, if so, what types of property ownership will exist and which owners will control which resources. I focus upon four examples.

a. Mixing property in land

Management of the federal public lands has long been a source of federal property law. The Constitution's Property Clause gives Congress broad powers to address federal property through legislation.[171] In *Kleppe v. New Mexico*,[172] the Court opined that the congressional power is one "without limitations."[173] Using that power, Congress has done much to direct lawmaking concerning the public lands.[174] Natural resources and public lands scholars often view the "central question in public lands governance [thus]: should Congress or bureaucracy be primarily responsible for resolving controversial political conflicts over public lands management?"[175] Focusing upon presidentialism suggests a third design alternative.

Presidential involvement in public lands management should be unsurprising, as land management has long been politically charged and controversial. For instance, during the 1980 presidential campaign, then-candidate Reagan embraced the Sagebrush Rebellion, in which western counties, states, and private landowners challenged federal lawmaking authority and public ownership in the West.[176] As President,

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171. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

172. 426 U.S. 529 (1976).

173. *Id.* at 539.

174. *See, e.g.*, Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; Healthy Forest Restoration Act, 16 U.S.C. §§ 6501–6591 (2010); Robert B. Keiter, *Breaking Faith with Nature: The Bush Administration and Public Land Policy*, 27 J. LAND RESOURCES & ENVTL. L. 195, 202 (2007).

175. Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223, 223 (2004).

176. *See generally* Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982).

Reagan sought to make good on (some of) his campaign promises regarding the public lands.[177]

Presidents have directed hard lawmaking concerning the public lands. Land use planning is one example. The Clinton administration, for example, embraced an ecosystems management program. President Clinton created an Interagency Ecosystem Management Task Force, which included OMB officials, members of the White House Office of Science and Technology Policy, and assistant secretaries from twelve departmental agencies.[178] Clinton also aggressively used his authority to designate national monuments under the Antiquities Act as part of a conservation strategy. For example, he designated 1.7 million acres of Utah canyon land the Grand Staircase Escalante National Monument to "break[] a stalemate in Congress,"[179] notwithstanding stiff local and state opposition. Nor was that "the first time a President has invoked the Antiquities Act in order to break a deadlock in Congress" regarding property disputes.[180]

The traditional view is that public lands management involves a straightforward regime of public ownership. By statute, Congress has provided that the "public lands be retained in Federal ownership."[181] The reality, however, is more complicated than that statutory statement suggests. The public lands under presidential administration during the Bush II era are a good example. Under Bush II, the Department of the Interior adopted a "4Cs" ecological policy designed to achieve "consultation, cooperation, and communication, all in the name of conservation," with a focus upon "voluntary action" and "respect for property rights."[182] Through both executive orders and administrative regulations, the Bush II administration promoted private leasing of public lands in the West.[183] Critics of this privatization program worried that "the leases create[d] property rights in the lease holder" that would "stand as a barrier to future alternative uses."[184] The Bush II administration also pushed for revisions to the Bureau of Land

177. *See infra* note 310 and accompanying text.

178. ECOSYSTEM MANAGEMENT INITIATIVE OVERVIEW (1994), *reprinted in* U.S. GEN. ACCT. OFF., PUB. NO. GAO/RCED-94–111, ECOSYSTEM MANAGEMENT: ADDITIONAL ACTIONS NEEDED TO ADEQUATELY TEST A PROMISING APPROACH, at 70 (1994).

179. Paul Veravanich, *The Propriety of President Bill Clinton's Establishment of the Grand Staircase Escalante National Monument*, 20 ENVIRONS ENVTL. L. & POL'Y J. 2, 4 (1996).

180. *Id.*

181. 43 U.S.C. § 1701 (1976).

182. *See* Keiter, *supra* note 174, at 211–12.

183. *Id.* at 205.

184. *Id.* at 206.

Management (BLM) rangeland regulations. Under regulations proposed during the Bush II administration, the United States would have shared title to permanent range improvements with private parties and would have yielded to ranchers the title over water.[185] But for a violation of the National Environmental Policy Act's requirement of an adequate environmental impact statement, which resulted in an injunction against the rule change, the administration would have succeeded in creating these private ownership rights.[186] The core point is that, as James Huffman has put it, private rights in public lands appear inevitable[187]—and much of that has to do with presidential initiatives.

b. Property rights in water

Presidential administrations have created federal property rights in water, worked to coordinate federal water rights with state water law, and shaped ownership of water through their decisions regarding the scope of reserved and non-reserved water rights. Under the federal reserved rights doctrine, the federal government may acquire property rights in water without regard to state water law when those rights would implement the federal purposes of a reservation of land.[188] Decisions regarding reserved water rights implicate fundamental questions about the appropriateness of private versus public ownership of water as a resource.

While many of the details of reserved rights are left to state and federal courts, the president can, and historically has, made major and interesting decisions regarding federal reserved water rights. This fact should not be surprising. Federal agencies make the decision to claim a water right, and the White House can influence those decisions.[189] Presidents have also taken an active role in creating reserved rights as they reserve lands for federal use. By executive order, the Carter administration reserved water rights for seventeen national monuments in

185. *See W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 476 (9th Cir. 2011) (discussing rulemaking).

186. *See id.* at 476–77.

187. James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241 (1994).

188. The doctrine's origins lie in *Winters v. United States*, which held that a congressional statute creating an Indian reservation implicitly reserved water rights sufficient to support tribal farming that were "exempt . . . from appropriation under the state laws." 207 U.S. 564, 577 (1908). Later cases have confirmed that the federal government may obtain reserved rights for non-Indian reservations, such as reservations for national forests or military bases. *See United States v. New Mexico*, 438 U.S. 696 (1978).

189. *See generally* Jason Marks, *The Duty of Agencies to Assert Reserved Water Rights in Wilderness Areas*, 14 ECOLOGY L.Q. 639 (1987).

Alaska.[190] President Clinton expressly reserved water rights for many more while expressly disclaiming water rights for others.[191] During the Carter administration, moreover, the White House directed federal agencies to quantify and to promptly resolve disputes concerning Indian reserved water rights and federal non-Indian reserved water rights.[192] This is best understood as an attempt to bring federal water rights into line with the quantification principle in state law.[193] Quantification of reserved rights would, like the quantification rule in state appropriative regimes, put other owners on notice of present and potential federal ownership claims. The next president favored "comprehensive settlements" of Indian water rights, with the administration dictating the distribution of property rights in detail.[194]

The debate over non-reserved federal rights in water—one of the most divisive in natural resources law—was centered not in the courts or Congress, but in the halls of the Department of the Interior and the White House. The Carter administration embraced the proposition that in some circumstances the federal government could claim water rights without regard to state law and without regard to the needs of a specific reservation of lands for public or Indian use.[195] Soon after Reagan took office, the Department of the Interior disclaimed the doctrine in its

190. John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. DENV. WATER L. REV. 271, 278 (2001).

191. *Id.* at 278–79.

192. *See* GAO, CED-78-176, RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION 11–12 (Nov. 16, 1978) (summarizing President Carter's Water Policy Statement).

193. Many states, particularly those in the American West, have the doctrine of prior appropriation. The first to use water becomes the appropriative owner and has the right to exclude others from using the quantity of water she appropriated for beneficial use. *See, e.g.*, Todd A. Fisher, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 CORNELL L. REV. 1077, 1078–80 (1984); Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 ALA. L. REV. 679, 696–97 (2008). Riparian rights doctrine, by contrast, confers upon landowners a more limited right to reasonable use of water from surface sources appurtenant to their land. Fisher, *supra*; Zellmer & Harder, *supra*. Riparian regimes are more common in eastern states, where water is less scarce. Fisher, *supra*; Zellmer & Harder, *supra*.

194. *See* Marianna Guerrero, *American Indian Water Rights: The Blood of Life in Native North America*, *in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION AND RESISTANCE 189, 204 (M. Annette Jaimes ed., 1992).

195. *See* Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553, 574 (1979); *see also* Supp. to Solicitor Op. No. M-36914, On Federal Water Rights of the National Park Service, Fish & Wildlife Serv., Bureau of Reclamation and the Bureau of Land Management, 88 Interior Dec. 253 (1981); James Cefalo, *Return of the Federal Non-Reserved Water Right*, 10 U. DENV. WATER L. REV. 45, 54–57 (2006).

entirety.[196] Ultimately the White House's Office of Legal Counsel, in a memorandum written by then-Assistant Attorney General Theodore Olson, offered the administration's final say, opining that under standard preemption principles a state's water law may be preempted by a specific statutory scheme in favor of federal water rights.[197]

c. Entrenching property in domain names

If the Internet is a virtual world, then the domain name system is its map and its transportation system. Want to visit the website for Harvard Law School? Type its domain name address—www.law.harvard.edu—into your web browser. Domain name addresses, which are much easier to remember than the IP addresses that correspond to them,[198] reduce the costs of navigating on the net. And they are scarce because each domain name needs to match with a specific IP address for the system to work. When you type "www.law.harvard.edu" into your browser, you have one destination in mind, and you want to get there.

Assigning domain names, as with any other scarce resource, has created controversy. For a time, registering a domain name was free through InterNic, which was run by the Stanford Research Institute until 1991, and then by Network Solutions, a private company under contract with the National Science Foundation.[199] In 1995, Network Solutions began charging for the registration of domain names.[200] The system was based upon a property rule of first possession, with limited protection for trademark holders. That resulted in "cybersquatting," or registering a domain name that includes a trademark to extract rents from the trademark holder.[201] As addresses on the web became vehicles for

196. Nonreserved Water Rights—United States Compliance with State Law, 88 Interior Dec. 1055 (1981).

197. *See* Federal "Non-Reserved" Water Rights, 6 Op. O.L.C. 328, 370 (1982). There the matter stands to this day, with scholars continuing to look to the sparring presidential administrations for the considerations that bear upon the question. *See, e.g.*, Cefalo, *supra* note 195, at 45–47.

198. TCP/IP stands for Transport Control Protocol/Internet Protocols. Under these protocols, unique strings of numbers correspond to locations on the Internet. The words we normally type into our browser to navigate the Internet correspond to unique IP numbers. For the foundational discussion of the concepts behind the domain naming system's relationship to TCP/IP, see Zaw-Sing Su & Jon Postel, *The Domain Naming Convention for Internet User Applications*, IETF TOOLS (Aug. 1982), http://tools.ietf.org/pdf/rfc819.pdf (discussing the "network service providing name-to-address translation").

199. David Nelmark, *Virtual Property: The Challenges of Regulating Intangible, Exclusionary Property Interests Such as Domain Names*, 3 NW. J. TECH. & INTELL. PROP. 1, 7 (2004).

200. *Id.*

201. *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 563–64 (2009).

making (lots of) money, a second property rights conflict emerged "over the right to top-level domain name assignments, which were valued because they might bring with them the right to sell . . . second-level domain names."[202]

The Clinton administration sought to resolve both conflicts. Primarily through presidential executive orders and the efforts of Ira Magaziner, a presidential policy adviser and head of an interagency task force on global e-commerce, the Clinton administration entrenched the regime of first possession while promoting greater rights for trademark holders by "midwiv[ing] the birth of a new organization," the ICANN, and tasking it with managing the domain name system.[203] Thus, the administration aimed to institutionalize governance of domain names, rather than leave control to technologists who claimed "ownership rights . . . in the name of a stateless, emergent 'Internet community.'"[204] ICANN operated under contract with the Department of Commerce and the United States retained ultimate control of the root file that enables matching domain names with IP addresses. The creation of ICANN was the "formation and structure of [a] new property rights institution[]."[205] ICANN's early actions tracked the administration's White Paper on a property system in domain names.[206] As Tim Wu and Jack Goldsmith have put it, "judged by what the United States, in particular, hoped it would do, ICANN has delivered the goods" by establishing a system that relies upon the first-possession rule while giving trademark owners a robust mechanism for combating cybersquatting.[207] These protections have been reinforced by Congress, which passed a statute prohibiting cybersquatting.[208]

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202. MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 114 (2002).

203. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 168 (2006).

204. MUELLER, *supra* note 202, at 73. Shortly before the Clinton Administration began the process of public comment on its proposals, "an incident occurred that demonstrated the fragility of the existing, somewhat informal, understandings" among technologists about control of domain names. A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution*, 50 DUKE L.J. 17, 64–65 (2000). Jon Postel, who had significant responsibility for coordinating technologists' informal domain name policies, took steps that, at least in the long term, "would have enabled him to control the root." *Id.* The Clinton Administration threatened Postel with criminal liability and he backed down. *See id.*

205. MUELLER, *supra* note 202, at 59.

206. Froomkin, *supra* note 204, at 70–71.

207. GOLDSMITH & WU, *supra* note 203, at 170; *see* MUELLER, *supra* note 202, at 185 ("In its first two-and-a-half years of operation, ICANN worked with the U.S. Department of Commerce to . . . define[] and distribute[] property rights in the domain name space . . . .").

208. *See* 15 U.S.C. § 1125(d)(1)(A) (2012).

Domain names are property rights. They have some features of leases, insofar as they can be revoked by the registrar under limited conditions, such as nonpayment.[209] In a landmark decision, the Ninth Circuit held that a domain name, "[l]ike a share of corporate stock or a plot of land" is a "well-defined" property right: "Registering a domain name is like staking a claim to a plot of land at the title office."[210]

d. Wavelength property

Electromagnetic spectrum is "infinitely renewable," yet scarce because "two individuals cannot use the same frequency at the same time in the same place without canceling out—or at least interfering with—both transmissions."[211] According to statutory text, the nation's airwaves are public property, with licenses to use wavelengths handed out by the FCC.[212] But the administrative reality is more complicated. In fits and starts, federal spectrum regulation has moved towards the recognition of *in rem*-like property rights in spectrum.

With respect to radio spectrum, for example, the FCC steadily moved towards wavelength property. "By the middle of the [twentieth] century, it was clear that . . . the radio spectrum was governed by a de facto system of property rights."[213] Holders of these licenses had the important rights we associate with property owners. They could exclude others from broadcasting on the wavelengths they licensed from the FCC. They could sell their licenses when they sold their broadcasting equipment because the agency reasoned that the license runs with the equipment.[214] When it comes to non-broadcast spectrum, pursuant first to congressional permission and later by dint of congressional mandate, the FCC auctions off licenses and delegates to their holders significantly

209. Nelmark, *supra* note 199, at 8.

210. *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003). *But see Network Solutions, Inc. v. Umbro Int'l, Inc.*, 259 S.E.2d 80, 86 (Va. 2000) ("[A] domain name registrant acquires [a] contractual right to use a unique domain name for a specified period of time.").

211. Philip J. Weiser & Dale Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 GEO. MASON L. REV. 549, 556–57 (2008). *But cf.* Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 291 (1998) (objecting that "rhetorical effects of treating spectrum as 'a resource' obscure the more important choice to be made with respect to radio communications").

212. *See, e.g.*, Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162–63 (1927).

213. STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 215 (2011).

214. *See id.*

more discretion in spectrum use.[215] These auctions "entrench[] a way of speaking of spectrum" in property terms.[216]

There is an important debate about how far the current regime has moved towards a property strategy. As Thomas Hazlett explains, for example, the FCC has moved "towards in rem" spectrum property in licensing spectrum for cellular use.[217] The agency does not specify which "applications, wireless technologies, [or] business models" a cellular service provider may use, and conflicts between cell phones have been "resolve[d] under a 'liberal license' regime, sharply contrasting with the 'traditional license' under which most spectrum use rights are retained by the regulatory authority."[218] In other instances, the FCC has created a "spectrum commons" in bands of spectrum that are unlicensed.[219] The result is a mixed regime of property forms.

Presidents have played important parts in the management of spectrum property. Their science and technology councils have issued white papers advocating for more wavelength property.[220] They have proposed legislation to give the FCC greater authority to create property rights in spectrum.[221] They have based budget proposals on the idea of spectrum property. And they have appointed FCC commissioners committed to spectrum property and encouraged the agency to move in that direction. Consider a few recent examples. The Clinton administration lobbied Congress for legislation facilitating auctions of nonbroadcast spectrum licenses, which proved to be the crucial factor in

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215. *Compare* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387–88 (1993), *with* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251, 258 (1997).

216. LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 225 (2002). "[A]head of the very first spectrum auction in 1994, then-FCC Chairman Reed Hundt proclaimed that the auctions would 'offer Americans the opportunity to purchase a piece of the airwaves and then they—and their customers—will decide how to use it.'" Charles M. Davidson & Michael J. Santorelli, *Seizing the Mobile Moment: Spectrum Allocation Policy for the Wireless Broadband Century*, 19 COMMLAW CONSPECTUS 1, 32–33 (2010).

217. Thomas W. Hazlett, *Tragedy TV: Rights Fragmentation and the Junk Band Problem*, 53 ARIZ. L. REV. 83, 87 (2011).

218. *Id.*

219. *Id.* For examples of defenses of the spectrum commons approach, see LESSIG, *supra* note 216, at 230 (arguing for a mixture of commons and private rights strategies for spectrum allocation); Benkler, *supra* note 211, at 297 ("[T]here are good reasons in terms of democratic values to support the development of a significant component of our information infrastructure that is free of centralized control."); Kevin Werbach, *The Wasteland: Anticommons, White Spaces, and the Fallacy of Spectrum*, 53 ARIZ. L. REV. 213, 235–39 (2011) (responding to criticisms of spectrum commons).

220. Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & ECON. 529, 533–35 (1998).

221. *Id.* at 532–33.

the legislature's "sudden policy reversal" in enacting a "policy reform so long sought by executive branch agencies."[222] Obama's Council of Advisors on Science and Technology proposed auctioning government-owned spectrum,[223] and President Obama issued an executive order directing federal agencies to repurpose some spectrum they own.[224] Presidents have also intervened to push the FCC to cancel auctions, including where, as during the Bush II administration, they believed the terms imposed inappropriate constraints on the licensee's use rights.[225]

* * *

There are many other examples. Presidential administration has been an important source of recognition of property interests for Indian Tribes for much of the nation's history,[226] including with respect to executive order reservations, the management of Indian trust assets, and protection for cultural property.[227] Presidents have proclaimed federal control over (parts of) the high seas; for instance, President Harry Truman's 1945 proclamation that the United States enjoyed "jurisdiction and control" over the continental shelf "helped 'turn the old order of the seas into a shambles.'"[228] They have delineated "new property" rights in welfare benefits.[229] Presidents have interjected themselves into controversies over whether the human body can be medical property.[230]

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222. *Id.* at 562–64.

223. Yochai Benkler, *Open Wireless vs. Licensed Spectrum: Evidence from Market Adoption*, 26 HARV. J.L. & TECH. 69, 71 (2012).

224. Memorandum from President Barack Obama, Unleashing the Wireless Broadband Revolution (June 28, 2010), http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution.

225. Jeffrey Silva, *Bush, Martin at War over AWS-3 Spectrum Auction: White House Argues for Auction 'without Price or Product Mandates*,*'* RCR WIRELESS (Dec. 11, 2008), http://www.rcrwireless.com/article/20081211/wireless/bush-martin-at-war-over-aws-3-spectrum-auction.

226. Note, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627, 628–29 (1960).

227. *See* Exec. Order No. 13,007, 3 C.F.R. 196 (1996) (protecting Indian sacred sites by requiring agencies to offer access to Indians to sites on public lands); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1110 (2005) (discussing Executive Order No. 13,007 on sacred sites).

228. Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. ENVTL. L. & LITIG. 317, 346–47 (2006).

229. Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975, 1033 (2000).

230. *See, e.g.*, President George W. Bush, Speech on Cloning (Apr. 10, 2002) (transcript available at http://www.pbs.org/newshour/bb/white_house/jan-june02/bush-

Different presidents have taken inconsistent positions on whether, and to what extent, executive privilege and presidential custom allow them to exclude others, as owners would, from their presidential papers.[231] The common thread throughout these examples is the question whether to assign a property right to a particular resource and, if so, what type of right to assign.

2. SHAPING PROPERTY RIGHTS AND DUTIES

Presidents have also shaped property rights and duties. There is, of course, a thriving debate about the basic incidents of property.[232] The common thread, and conceptual core that drives the analysis here, is the simple proposition that property rights and duties must inhere in the owner's relationship with the thing she owns.

Presidents have been active in shaping the law of fair housing, for example. President Kennedy issued an executive order directing executive branch agencies "to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin in the sale, leasing, rental, or other disposition of residential property and related facilities" for all properties supported by loans "insured or guaranteed by the Federal Government."[233] This order led agencies to change their rules: "the FHA," for example, "finally eliminated racial restrictions from its underwriting guidelines in the 1960s" in response to the order.[234] President Clinton's Executive Order 12,892 created a presidential council on fair housing and ordered all agencies to coordinate their programs "in a manner affirmatively to further" the Fair

cloning_04-10.html?print) ("Human cloning is deeply troubling to me, and to most Americans. Life is a creation, not a commodity. . . . Our children are gifts to be loved and protected, not products to be designed and manufactured.").

231. *See* Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 657–66 (2003).

232. *See supra* notes 158–78 and accompanying text.

233. Exec. Order No. 11,063, Equal Opportunity in Housing, 27 Fed. Reg. 11,527 (Nov. 24, 1962); *see also* Brian Gilmore et al., *The Nightmare on Main Street for African-Americans: A Call for a New National Policy Focus on Homeownership*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 262, 278 (2008) (discussing Executive Order No. 11,063).

234. Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REFORM 527, 536 (1993).

Housing Act's purposes.[235] Unlike many executive orders, these are enforceable by beneficiaries in court.[236]

Presidents Ronald Reagan and George W. Bush promulgated executive orders on takings that provided more protection for private ownership than constitutional doctrine. Assessing the practical impact of these orders is tricky, particularly because they did not create private rights of action.[237] For now, the hardness or softness of executive orders matters less than the fact that both aimed to shape the rights of private owners broadly and deeply. President Reagan instructed agencies to tread warily when their regulations impacted private property and to prepare takings impact statements as part of rule makings.[238] President Bush responded to the political backlash to the Supreme Court's decision in *Kelo*[239] with an executive order that directed agencies to a list of permissible public uses that did not exhaust what the courts would permit.[240]

The examples could continue to include, among others, presidential efforts to shape conservation easements through expanding or restricting tax credits[241] and presidential involvement in developing the emerging international law of property through bilateral and multilateral agreements on topics like investment and expropriation.[242] In short, as in the case of delineating property, presidential action is worth close attention because it shapes property rights and duties.

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235. Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994); *see also* Gilmore et al., *supra* note 233, at 279 (discussing Executive Order No. 12,892).

236. *See, e.g.*, *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710, 720 (N.D. Ill. 2003); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 76 (D. Mass. 2002).

237. *See, e.g.*, *Duval Ranching Co. v. Glickman*, 965 F. Supp. 1427, 1446 (D. Nev. 1997).

238. Exec. Order No. 12,630, § 3, 53 Fed. Reg. 8859, 8860–61 (Mar. 15, 1988), *reprinted in* 5 U.S.C. § 601 (2012).

239. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (holding that a "[s]tate may transfer property from one private party to another if future 'use by the public' is the purpose of the taking").

240. Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 23, 2006).

241. *See, e.g.*, DEP'T OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2014 REVENUE PROPOSALS 161–62 (Apr. 2013), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2014.pdf (explaining President Obama's proposal to extend existing enhanced conservation easement incentives in the Tax Code while limiting the use of conservation easements for certain land uses, such as golf courses).

242. *See generally* John G. Sprankling, *The Emergence of International Property Law*, 90 N.C. L. REV. 461 (2012).

3. MAKING OWNERS

Making owners concerns who will be an owner and how many owners there will be. The most familiar example is the law of mortgages.[243] Mortgages developed as a common law device for securing interests in a loan. This common law tool for financing a property transaction has become the subject of extensive federal law. For example, federal law requires specific disclosures of loan terms involving mortgages.[244] The White House and the Executive Office have been involved in the federal regulation of mortgages. Fannie Mae, for instance, was originally created on February 10, 1938, by the Reconstruction Finance Corporation upon President Franklin D. Roosevelt's order.[245] More recent and well-known examples involve President Obama's push for the creation of the CFPB, with powers to regulate mortgage lending, and his proposals regarding the future of Fannie Mae and Freddie Mac.[246] Other examples are less well known. In 2003, for instance, OIRA influenced the Federal Trade Commission to consider changing its Truth-in-Lending Act regulations regarding home mortgages.[247] Presidents have also promoted particular types of mortgages and underwriting guidelines.[248]

An important example involves federal support for mortgage securitization and the antifragmentation principle in state property law. State property laws tend towards an antifragmentation principle designed

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243. There are other examples. An early example not involving mortgages is President Andrew Jackson's Specie Circular directing the Treasury Department to reject payments for the purchase of public lands unless they were made in gold or silver. *See* Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1112–13 (2007). The closure of military bases provides another opportunity for presidents to treat property as a system for achieving social goals by setting policy for transferring ownership of federal property. *See* Benjamin L. Ginsberg et al., *Waging Peace: A Practical Guide to Base Closures*, 23 PUB. CONT. L.J. 169, 182 (1993–94).

244. *See, e.g.*, Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, tit. III, 89 Stat. 1125.

245. *See* Letter to Reconstruction Finance Corporation Recommending Financial Assistance for Home Builders, 1938 PUB. PAPERS 81, 81–82 (Feb. 7, 1938), *available at* http://www.presidency.ucsb.edu/ws/?pid=15596; *see also* Adam J. Levitin & Susan M. Wachter, *The Public Option in Housing Finance*, 46 U.C. DAVIS L. REV. 1111, 1143 (2013) ("[In] 1938, the RFC, on presidential directive, created [Fannie Mae].").

246. Jackie Calmes, *Obama Outlines Plans for Fannie Mae and Freddie Mac*, N.Y. TIMES, Aug. 6, 2013, http://www.nytimes.com/2013/08/07/us/politics/obama-fannie-mae-freddie-mac.html?_r=0.

247. *See* Anderson P. Heston, *The Flip Side of Removal: Bringing Appointment into the Removal Conversation*, 68 N.Y.U. ANN. SURV. AM. L. 85, 99–100 (2012).

248. *See, e.g.*, Leslie Braunstein, *Energy Efficient Mortgages: A Utility Perspective*, PUB. UTIL. FORT., July 1, 1992, at 21, 22 ("[D]uring the 1970s, a Presidential Executive Order directed the secondary mortgage institutions to develop underwriting guidelines for [energy efficient mortgages], which they did in the 1980s.").

to keep ownership rights and duties in manageable bundles.[249] Securitization of mortgages is in tension with the antifragmentation principle because it breaks the standard mortgage relationship into separate bundles of rights and duties that can be sold to different parties.[250]

Before the Great Recession, successive White Houses pushed for more home ownership and took concrete steps to achieve this goal. Presidents used their influence over the government-sponsored entities Fannie Mae and Freddie Mac to encourage federal policies that favored fragmentation of property interests through securitization. Some scholars think policies like Clinton's implementation of the Community Reinvestment Act played an important causal role in the recent market meltdown.[251] Others think that, to the contrary, presidential initiatives played a marginal, if any, causal role.[252] My point is simply that presidents have expressly shaped the mortgage markets.

4. ENFORCING PROPERTY

Presidents may also shape property through their decisions regarding enforcement. In other work, I have highlighted the importance of coordinating federal enforcement policies.[253] There is still a great deal we have left to learn about presidential enforcement, including the ways in which it shapes the property system.[254]

A historical example involves the Cherokee removal from the southeastern United States. In *Johnson v. M'Intosh*,[255] Chief Justice John Marshall was quite clear that Indian Nations have a property right of "possession" and "occupancy" of their aboriginal lands, notwithstanding

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249. *See* David A. Dana, *The Foreclosure Crisis and the Antifragmentation Principle in State Property Law*, 77 U. CHI. L. REV. 97, 98, 111–12 (2010).

250. *See id.* at 98.

251. *See, e.g.*, John Carney, *Here's How the Community Reinvestment Act Led to the Housing Bubble's Lax Lending*, BUS. INSIDER (June 27, 2009, 9:33 AM), http://www.businessinsider.com/the-cra-debate-a-users-guide-2009-6.

252. *See, e.g.*, RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY 257 (2010).

253. *See generally* Davis, *supra* note 88.

254. Examples not discussed in the text include presidential espousal—or non-espousal—of Americans' property rights in international disputes, *see* Matthew C. Porterfield, *State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations*, 37 N.C. J. INT'L L. & COM. REG. 159, 188 (2011), and the executive creation of private rights of action to enforce property through executive orders, *see Wildland CPR, Inc. v. U.S. Forest Serv.*, 872 F. Supp. 2d 1064, 1081 (D. Mont. 2012) (discussing Executive Order 11,644, as amended by Exec. Order 11,989).

255. 21 U.S. 543 (1823).

the "title given by discovery" to the United States.[256] Marshall reaffirmed that principle in *Worcester v. Georgia*,[257] in holding that the state of Georgia could not abridge tribal sovereignty over tribal territory.[258] There is a well-known, likely apocryphal story that President Andrew Jackson responded to *Worcester* by saying, "John Marshall has made his decision, now let him enforce it."[259] Whatever his words, Jackson repudiated *Johnson* and *Worcester* by pursuing a policy of permitting Georgia to ignore the holdings and coercing Eastern tribes, including the Cherokee Nation, into relocating.[260]

Presidents can also shape property law by shaping federal litigation decisions. Consider, for example, the George W. Bush Administration's decision regarding *Tulare Lake Basin Water Storage District v. United States*,[261] a water law case that has generated controversy.[262] The plaintiffs in *Tulare Lake* claimed that the federal government took their water rights through restrictions on water deliveries designed to protect two endangered species of fish under the Endangered Species Act.[263] The federal government claimed that California's public trust doctrine limited the plaintiffs' property rights and that this background principle defeated the takings claim.[264] In a much-criticized decision, the Court of Federal Claims rejected the government's argument.[265] In its fourth month in office, the Bush administration declined to appeal the ruling, which it saw as "consistent with" President Bush's "pro-property rights policies."[266] The administration's decision is significant for the development of the takings doctrine; the Court of Federal Claims, after all, has an important docket of takings cases against the federal government.

Another recent example involves President Obama's plan for addressing the woes in the housing market. In his 2012 State of the Union Address, President Obama offered a "Blueprint for an America

256. *Id.* at 576–77.

257. 31 U.S. 515 (1832).

258. *Id.* at 560–61.

259. *See Ex parte James*, 713 So. 2d 869, 893 & n.10 (Ala. 1997) (discussing evidence that Jackson believed he could disregard the Court's judgments).

260. *See, e.g.*, Alfred A. Cave, *Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830*, 65 HISTORIAN 1330, 1331–32, 1349–50 (2003). I thank Joe Singer for a conversation that prompted my thinking on this point.

261. 49 Fed. Cl. 313 (2001).

262. *Id.* at 314.

263. *Id.*

264. *Id.* at 316.

265. John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 937–38 (2012).

266. *Id.* at 938.

Built to Last" that proposed coordinating "a broad range of tools to help homeowners."[267] Among those tools are federal and state enforcement actions to protect homeowners against mortgage misconduct by lenders and servicers.[268] Under the auspices of Obama's Financial Fraud Enforcement Task Force, several agencies and state attorneys general have created a Residential Mortgage-Backed Securities Working Group "that will be responsible for investigating misconduct contributing to the financial crisis through the pooling and sale of residential mortgage-backed securities."[269] President Obama has linked this coordinated effort at enforcement with his recently released "Homeowner Bill of Rights," which is designed to promote a "unified framework of servicing standards" in the mortgage industry.[270] It seeks to curtail foreclosures by requiring "servicers . . . to contact homeowners who have demonstrated hardship or fallen delinquent, and [to] provide them with a comprehensive set of options to avoid foreclosure."[271] This bill of rights "is meant to provide an enforceable set of rules, not just guidance, for the servicing industry."[272] The president cannot, of course, simply enact the Homeowner's Bill of Rights into law. Rather, as President Obama has explained, his administration "will work closely with the Consumer Financial Protection Bureau (CFPB) and other independent regulators, Congress, and other stakeholders" to codify the Homeowner's Bill of Rights.[273]

5. MANAGING PROPERTY IN CRISIS

A final category, managing property during a crisis, can implicate the previous four products of presidential governance. Crises are interesting because they cause the contradictions of property to surface,[274] as the Great Recession suggests. As Nestor Davidson and

267. *Fact Sheet: President Obama's Plan to Help Responsible Homeowners and Heal the Housing Market*, OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE, (Feb. 1, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/01/fact-sheet-president-obama-s-plan-help-responsible-homeowners-and-heal-h.

268. *See id.*

269. *Id.*

270. 2012 ECON. REP. PRESIDENT 125, *available at* http://www.whitehouse.gov/administration/eop/cea/economic-report-of-the-President/2012.

271. *Id.*

272. *Id.*

273. *Id.*

274. *See, e.g.*, Kathleen J. Tierney, *From the Margins to the Mainstream? Disaster Research at the Crossroads*, 33 ANN. REV. SOC. 503, 512 (2007) ("[D]isasters are occasions that can intensify both social solidarity and social conflict."); E.L. Quarantelli & Russell R. Dynes, *Property Norms and Looting: Their Patterns in*

Rashmi Dyal-Chand have argued, the federal government adopted different conceptions of property to deal with the homeownership and financial market spheres of the Recession.[275] When it came to homeownership, the government "reactively preserved a core vision of property as creating ownership opportunities" in which "[p]roperty manifests as a negative right of access to credit and ownership opportunities."[276] When it came to fixing the financial markets, by contrast, "regulators adopted the property norms that come to the fore in times of crisis, including a more interconnected . . . and coordinated view of property."[277] President Obama's Homeowner Affordability and Stability Plan,[278] for example, was fairly conservative in its approach, having as its "primary if not exclusive goal" the "restor[ation]," rather than the transformation, of the housing market.[279] By contrast, the Obama administration took significant ownership stakes in banking firms and the auto industry, emphasizing the "duties" of property owners.[280] Here, property "became a means of collective action against the broad distributional consequences of unrestrained private behavior;" to put the point forcefully, property was wielded as a tool of punishment rather than recognized as an inviolable right.[281] Moreover, as part of the GM and Chrysler bailouts, the government reshuffled the right of secured creditors—a right that straddles the line between property and contract—to protect the unsecured interests of pensioners of the two corporations.[282]

D. The Systemic Possibilities of Presidential Governance of Property

This Subpart ties together the preceding examples to formalize the Article's central descriptive claim, specifically, that the president is well-situated to treat property as a system, not just as a right. In particular, presidential governance of property has the capacity to be *political* and *thematic*, not doctrinal and formal; *coordinated* and

Community Crises, 31 PHYLON 168, 173 (1970) (discussing sociocultural significance of looting during crises).

275. Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1649, 1652–53 (2010).

276. *Id.* at 1645, 1649.

277. *Id.* at 1645.

278. *See* Sheryl Gay Stolberg & Edmund L. Andrews, *$275 Billion Plan Seeks to Address Housing Crisis*, N.Y. TIMES, Feb. 19, 2009, at A1, http:// www.nytimes.com/ 2009/02/19/business/19housing.html.

279. Davidson & Dyal-Chand, *supra* note 275, at 1647–48.

280. *Id.* at 1653.

281. *Id.* at 1652–53.

282. Todd Zywicki, *Economic Uncertainty, the Courts, and the Rule of Law*, 35 HARV. J.L. & PUB. POL'Y 195, 200 (2012).

uniform, not differentiated and diverse; and *flexible* and *adaptive*, not stable and entrenched.

1. POLITICAL AND THEMATIC DECISION MAKING

The structure of presidential decision making lends itself to political and thematic decision making regarding property problems.[283] The president's actions are uniquely visible, the president has unique rhetorical authority as a single public official at the head of the national Executive Branch, and the president can centralize and coordinate executive lawmaking and policy making. The president's visibility as a "policy leader"[284] opens her property decisions up to notice and evaluation. Her rhetorical authority allows her to build an orienting normative vision of ownership, while her singular leadership permits her to engage in "administrative value selection" based upon this vision.[285] Her orienting vision of property will not only reflect her sense of national moral commitments regarding property, but also may shape the morality of property. In developing that vision, the president is likely to be attuned to the value choices regarding property disputes because the presidency is well situated to receive complaints about the consequences of particular property regimes. Because the White House sits at the apogee of the federal bureaucracy, "[f]ew impending decisions reach [it] without previous, often extensive, analysis in one or more of the executive agencies."[286] The president will have the benefit of debate about the wisdom of a particular decision from policy and legal experts at the agencies, the Executive Office, and the White House.[287] Her staff will also be tracking public opinion on the issues through polling and gauging the views on Capitol Hill.[288]

Unsurprisingly, presidential governance of property is political and thematic. This descriptive claim is nicely illustrated by the president's annual *Economic Reports*, which are filled with presidential descriptions of property's systemic features and provide a window into an

283. Part II offers a more detailed assessment of the systemic possibilities, limitations, and potential pathologies of presidential government.

284. Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV. 519, 521 (1987).

285. *See* Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 306 (1993).

286. Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 14 (1982).

287. *See, e.g.*, *id.* at 14–16.

288. *See, e.g.*, Or Bassok, *The Two Countermajoritarian Difficulties*, 31 ST. LOUIS U. PUB. L. REV. 333, 337–38 (2012).

administration's view of its property lawmaking efforts.[289] Consider, for instance, President George H.W. Bush's discussion of ownership in his 1992 *Economic Report*, which provides a pithy statement of the property-as-system theory:

> Ownership of a piece of land gives the owner the right either to exclude others from it or to give them access to the benefits or use of a resource on that property. . . . Property rights are not defined in the abstract, however. *Private property rights are determined by overall societal goals*.[290]

To drive the point home, consider presidential governance of property during the FDR, Reagan, and Clinton administrations. Each president offered, and sought to implement, different visions of the property system.

a. FDR's vision of property as personal security

For FDR, "[t]he point of property rights . . . was to enjoy personal security."[291] His Commonwealth Club address, given during his candidacy for the 1932 presidency, explains this vision.[292] In FDR's account, the substance of property law is dependent upon social and economic conditions. When the frontier was open, "individualism was . . . the great watchword of American life."[293] With the frontier closed, the "freedom to farm has ceased" and "the opportunity in business has narrowed."[294] To protect personal security in an era of resource scarcity, property law should recognize that "[e]very man has a right to his own property, which means a right to be assured . . . in the safety of his savings."[295] This right "is paramount; all other property rights must yield to it."[296]

The Social Security Act was born from this vision of property. Using his power under the Recommendation Clause, President Roosevelt

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289. The annual economic reports are written by the Chair of the President's Council of Economic Advisers.

290. ECONOMIC REPORT OF THE PRESIDENT 159 (1992) (emphasis added).

291. Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1853 (2009).

292. *Id.*

293. Franklin Delano Roosevelt, Commonwealth Club Address (Sept. 23, 1932), *available at* http://www.heritage.org/initiatives/first-principles/primary-sources/fdrs-commonwealth-club-address.

294. *Id.*

295. *Id.*

296. *Id.*

pushed for "new property" rights with his New Deal.[297] Roosevelt was explicit about his "intention to create a property right" in Social Security: "We put those payroll contributions there," he explained, "so as to give the contributors a legal, moral and political right to collect their pensions and their unemployment benefits."[298] As Cass Sunstein has argued, this right to social security has become a "constitutive commitment" of our constitutional order.[299]

b. Reagan's vision of property as liberty

In a radio address in 1977, Ronald Reagan castigated President Carter for signing the United Nations Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.[300] These covenants, Reagan warned listeners, undermine "one of our most precious rights," namely, "*the right to ownership of property*."[301] This right, he argued, is the "basic right" from which liberty and the "pursuit of happiness" follow.[302] Any regulation that burdens the individual owner's property interests without compensation is tantamount to "theft."[303]

President Reagan governed with that understanding of property. In an address to Congress, Reagan announced an ambitious program for legislative and regulatory change premised upon what he called America's "first principles."[304] "For too long now," he intoned, "we've removed from our people the decisions on how to dispose of what they created."[305]

Treating property as a precious right distinguished American property as a social system. America is the "land of liberty," President Reagan reasoned, because it does not restrict ownership "to a privileged few."[306] "Instead of locking [land] up for the exclusive use of royalty,"

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297. *See generally* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771–73 (1964).

298. Dilley, *supra* note 229, at 1033.

299. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 180 (2004).

300. RONALD REAGAN, REAGAN, IN HIS OWN HAND: THE WRITINGS OF RONALD REAGAN THAT REVEAL HIS REVOLUTIONARY VISION OF AMERICA 167 (Kiron K. Skinner et al. eds., 2001).

301. *Id.*

302. *Id.* at 168.

303. *Id.*

304. Ronald Reagan, Address before a Joint Session of the Congress on the Program for Economic Recovery (Feb. 18, 1981), *available at* http://www.reagan.utexas.edu/archives/speeches/1981/21881a.htm.

305. *Id.*

306. Message to the Congress Transmitting the Report of the Council on Environmental Quality, 2 PUB. PAPERS 1272 (Oct. 3, 1988), *available at*

the American property system promotes "widespread ownership" and thus fosters "the dream of personal liberty."[307] For Reagan, that vision pointed towards the need to free private property from regulation.

This vision of property was evident in President Reagan's proposals for environmental policy. In a 1986 message to Congress "defining our values for a modern age," Reagan explained that "[h]uman institutions can encourage or constrain the ability of people to make the best use of their resources and to solve environmental problems."[308] Constraint on owners was to be avoided. Rather, to achieve "[e]fficient use of the Nation's resources," we should be "guided whenever possible by free markets rather than centralized controls."[309]

Of course, only so much ideological consistency is possible for any White House, even one as disciplined as Reagan's. Not every Reagan initiative was consistent with robust rights for private owners. And some of his messages acknowledged the social obligations of ownership. Consider, for instance, his 1988 message transmitting a report of the Council on Environmental Quality to Congress.[310] By regulating nuisances, Reagan explained, we "promot[e] liberty by securing property against the destructive trespass of pollution."[311]

The Reagan presidency suggests the possibilities for systematic property lawmaking by a president with strong views about the property system. In the words of Robert Durant, President Reagan was a "professed 'sagebrush rebel'" who "relished and promised to implement a fundamental change" in federal land policy based upon a singular vision of property ownership.[312]

c. Clinton and property ownership as citizenship

President Clinton's vision of property was more open to regulation than Reagan's. Like Reagan, Clinton recognized the role of property in determining "the way we live as a people and what kind of society we're

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http://www.presidency.ucsb.edu/ws/index.php?pid=34951&st=property&st1=.

307. *Id.*

308. Message to the Congress on America's Agenda for the Future, 1 PUB. PAPERS 153, 157 (Feb. 6, 1986), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=36768&st=&st1=.

309. *Id.*

310. Message to the Congress Transmitting the Report of the Council on Environmental Quality, 2 PUB. PAPERS 1272 (Oct. 3, 1988), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=34951&st=property&st1=.

311. *See id.* at 1273.

312. ROBERT F. DURANT, THE ADMINISTRATIVE PRESIDENCY REVISITED: PUBLIC LANDS, THE BLM, AND THE REAGAN REVOLUTION 8 (1992).

going to have."[313] And like Reagan, Clinton described property as a "fundamental American right and value."[314] But while Reagan linked property with liberty and regulation of property with constraint, Clinton linked property with citizenship and regulation of property with the obligations citizens owe each other.

Clinton's response to Republicans' proposed takings legislation highlights the difference between his vision and Reagan's. This legislation would have cemented the Reagan approach to takings into the U.S. Code and required the United States to compensate property owners for regulations that would pass muster under the Court's *Penn Central*[315] test for regulatory takings.[316] During the 1996 campaign, Clinton's campaign staff explained his opposition to the takings legislation: "The so-called 'property rights' or 'takings' legislation . . . say[s] that no one is required to follow the law unless they are paid to do so. This is not what President Clinton believes is the meaning of citizenship."[317]

Clinton repeated these themes in his executive orders and memoranda to federal agencies and public speeches. When calling for "federal leadership on fair housing" and directing federal agencies to "affirmatively further fair housing in the design of their policies and administration of their programs," Clinton echoed the theme that ownership is a key to full citizenship.[318] He made the same claim in pushing the GSEs to expand home ownership. An address to the National Association of Realtors furnished him with an opportunity to reflect that "ownership of property" makes "people more devoted to democracy and freedom."[319] Personal ownership of property, he went on, is necessary for "democracies [to] last. . . . [O]ne reason [America] probably will go on is that we all have a piece of America."[320]

A common criticism is that Clinton's take on property law amounted to a preference for "extreme regulations" and a lack of due

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313. Remarks on the National Homeownership Strategy, 1 PUB. PAPERS 806 (June 5, 1995), *available at* http://www.presidency.uscb.edu/ws/?pid=51448.

314. *See* Message to the House of Representatives Returning without Approval Fish and Wildlife Refuge Eminent Domain Prevention Legislation, *supra* note 141, at 1744.

315. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

316. *See id.* at 124.

317. Resources for the Future, *From the Candidates*, RESOURCES, Summer 1996, at 9, *available at* http://www.rff.org/RFF/Documents/RFF-Resources-124-cadidates.pdf.

318. Memorandum on Fair Housing, 30 WEEKLY COMP. PRES. DOC. 114–15 (Jan. 17, 1994), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=50187&st=Property&st1=Private.

319. Remarks to the National Association of Realtors, 1 PUB. PAPERS 645 (Apr. 27, 1996), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=52733&st=Remarks+to+the+National+Association+of+Realtors&st1=.

320. *Id.*

care for the rights of private property owners.[321] The reality is more complicated. The Clinton administration often embraced private property as a regulatory tool.[322] Its initiatives, as well as the administration's particular concern for environmental law's impact on small landowners, are consistent with Clinton's understanding of property as citizenship.[323]

2. COORDINATION AND UNIFORMITY

The president's centralizing and coordinating powers allow her to systematize property interventions across regulatory and doctrinal areas and to respond to the ways in which property imposes externalities on a national scale. Importantly, the president oversees a bureaucracy that combines lawmaking functions (legislation, execution, adjudication) and lawmaking perspectives (prospective and retrospective). Her contributions to property lawmaking can draw upon all three institutional capacities across different ownership problems. As a result, the president is well situated to consider problems of designing and enforcing property rules, and to think about the national and international externalities of property arrangements. Any consideration of presidential government must also account for the reality that Congress delegates broadly to the federal bureaucracy. Overseeing a bureaucracy that develops regulations and enforces and adjudicates them, the president has a systemic perspective that Congress does not have regarding the problems of enforcing laws.

Reagan's efforts to reshape property rights and federal regulation are an example of presidential coordination. Across a diverse range of resources running from land to lead emissions, Reagan pushed for a private-rights approach with robust rights to exclude. In some cases his administration was successful. The experiment with hybrid property to phase down lead emissions is one example. In other instances the record was mixed. While Reagan's judicial appointments helped transform constitutional takings doctrine, it is not clear whether, and to what extent, his takings order changed how federal agencies balanced private property rights and public regulation. The presidency has only so much bandwidth

321. *See* Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches—A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837, 845, 848 (1998).

322. *See, e.g.*, Lois J. Schiffer, *Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 153, 158–59 (1997) (discussing Clinton's use of wetlands mitigation banking).

323. Particularly in the environmental area, the "Clinton administration . . . bent over backwards to offer compensation" where not "legally required." Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1, 64 (1999).

to administer the regulatory state.[324] Therefore, whatever the systemic virtues of presidentialism in property law, there are practical constraints on how much presidents can shape the property system.[325]

3. FLEXIBILITY AND ADAPTATION

The familiar examples of presidential governance of property—Lincoln's Emancipation Proclamation, or Truman's steel seizure order—involve significant disruptions to private property rights protected under state law. As a result, we are likely to think presidential governance of property is inconsistent with property law. Property, after all, is about stability. The presidency, by contrast, "is a governing institution inherently hostile to inherited governing arrangements."[326] Presidents appoint new officials, seek to place their stamp on executive branch policies, and aim to build their legacies by satisfying demands for change. Presidential leadership can be dynamic and innovative; presidents can push new property principles in response to changing social, technological, and economic conditions. They may alter federal property law as they seek to remake the property system.

Clinton's domain names initiative reflects some of the complexities of assessing the flexibility of presidential governance of property and the risks of turmoil and instability it may create. Clinton's White House shepherded a significant property decision when Congress was unable or unwilling to act. The United States found itself in control of a resource that suddenly had become economically, socially, and globally vital. The White House responded by fostering the creation of ICANN and the cementing of private rights in domain names. Congress held hearings and acknowledged the presidency's actions, but did not legislate on the

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324. Jennifer Nou, *Agency Self-Insulation under Presidential Review*, 126 HARV. L. REV. 1755, 1815 (2013).

325. Some scholars charge that "the White House acts non-systematically" in light of its resource constraints and political incentives. Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 583 (2011). I do not deny the limits on presidential review, but quantitative and qualitative data suggest that the White House, when compared to other candidate institutions, has a unique capacity to engage in meaningful and systematic review. *See, e.g.*, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 873 (2003) (concluding, based upon study of OIRA review, that "White House review appears to be at least partially technocratic and at any rate not ad hoc"); Kagan, *supra* note 18, at 2339–40 (concluding, based upon the author's experiences within the Clinton administration, that presidential administration facilitates "rational priority-setting" and "consistency"). *But cf.* Bressman & Vandenbergh, *supra* note 18, at 71–72 (reporting that a majority of EPA officials surveyed said that OIRA review helped coordinate across agencies but not across policies within EPA's sole purview).

326. SKOWRONEK, *supra* note 22, at 20.

issue.[327] We might take the domain names initiative to be an example of the capacity of the presidency to destabilize existing property norms. But the story is more complicated than that. With respect to the rule of first possession of domain names, the White House worked to entrench a preexisting customary property rule, much as a common law court might do.

II. ASSESSING PRESIDENTIAL GOVERNANCE OF PROPERTY

What are we to make of presidential governance of property? This Article's descriptive claim puts into sharp and new relief fundamental questions of institutional choice in property lawmaking. This Part poses these difficult questions and develops a framework to address them. The next Part specifies this framework by focusing upon the contexts, tools, and products of presidential governance of property.

In a nutshell, when allocating property lawmaking power we face what Clifford Geertz has called "a choice of worries."[328] The choice among institutions is a choice among "imperfect alternatives" for achieving particular goals, some of which may conflict.[329] One set of choices requires us to consider the *quality of decision making* regarding property. The second concerns the tradeoff between *uniformity and diversity* of property structures and functions. The third dimension looks to the balance of *stability versus flexibility* and the risks of instability within the property system.

A. Comparative Institutional Choice in Property Law

For all that it has taught us about the content of property rights, the bundle of rights conception of property does not help us make these choices among worries. The bundle metaphor treats property rights as nothing more than legal rules regulating relationships between individuals. If that is right, then it is hard to distinguish property law

327. *See* Edward Brunet, *Defending Commerce's Contract Delegation of Power to ICANN*, 6 J. SMALL & EMERGING BUS. L. 1, 25 (2002) ("Congress held hearings in both 1998 and 1999, indicating clear receipt of notice of the privatization reasoning contained in the President's directive.").

328. Clifford Geertz, *Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263, 265 (1984); *see also* Joseph W. Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139, 149–50 (2008) (discussing the debate about paternalism in regulation as involving a "choice of worries").

329. *See* NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994).

from constitutional law, tort law, or contract law.[330] From the bundle perspective, the tractable question involves policy engineering, namely, what "are the particular rights in" any particular property "bundle."[331] But there is no determinate relationship between this question of substance and the problem of institutional choice.

To see why, consider how law-and-economics, "the dominant mode of theorizing about property in contemporary legal scholarship,"[332] tends to treat the choice between property law and private ordering.[333]

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330. Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980).

331. Singer, *supra* note 21, at 1033.

332. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 745 (2009).

333. Among property scholars, there has been sustained interest in the roles of state versus private ordering. Ronald Coase, for example, explored from a transaction-costs perspective the choice among the market, firms, and governmental ordering in deciding how resources will be used. *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 389–93 (1937). Other scholars have focused upon how private ordering works. Perhaps the best known of these studies is Robert Ellickson's study of how neighboring landowners in Shasta County, California settle disputes over trespassing cattle in an orderly way through social norms rather than by resorting to law. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 52–53, 123 (1991).

To the extent that property law has grappled with the choice between different lawmaking institutions, the focus has been upon the choice between courts and legislatures. As D. Benjamin Barros has put it, "[c]ourts historically have been hesitant to make major changes in property law, in part because making broad, systemic changes . . . [is] better suited to the institutional competence of the legislatures." D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 5 (2009); *see also* Merrill & Smith, *supra* note 163, at 58–60 (considering the allocation of authority between the legislature and judiciary to alter property rights); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 603 (1988) (arguing that "[t]he split between crystals and mud . . . falls along divisions in our legal institutions," specifically those between legislatures and courts). Perhaps the most extensive exploration of the institutional question has come in the context of takings, but these accounts do not purport to offer a systematic theory of property lawmaking institutions. *See, e.g.*, Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CONST. L. 667, 739 (2007). Amnon Lehavi has argued generally that "legislatures or administrators supervised by judicial review are generally more competent institutionally to deal with conflicts that have" wide-ranging property implications. Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 2022 (2008). But he too is often more concerned with the judicial role. *See, e.g.*, Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L.J. 81, 135 (2010).

In an era of administrative governance within a federal system, however, the choice is not that straightforward. As Neil Komesar notes, the "political process is not homogenous." NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMANDS OF RIGHTS 29 (2001) (noting that although he "tend[s] to speak of three institutional alternatives – the market, the political process, and the courts," comparative analysis may look to administrative agencies, as well as choice among local, state, and federal governments as well). A complete analytics would address the choice between

Economic theory treats property as a bundle of rights that can be assembled and reassembled as policy demands.[334] In this picture, the state recognizes simple property rights to facilitate private ordering through contracting. Where private ordering breaks down because of market failures, the state adopts more complex property rules, calibrated by courts as a matter of common law and equitable remedies. As Neil Komesar has pointed out, this analysis is "single institutional": it focuses solely upon failures in one institution (private ordering) as a reason to prefer another institution (the courts) without considering how the preferred institution too may fail.[335]

The alternative is comparative institutional choice, which focuses upon the "relative merits and limitations" of different institutions in achieving desired outcomes.[336] The challenge of comparative institutional choice is its complexity. For any particular regulatory problem, it may be possible to identify a great many variables of institutional choice.[337] This is in large part due to our disagreement about the ends of law and the interdependence of selecting ends and selecting institutions to pursue those ends.[338] Though it may be that "we cannot say anything definitive about institutional choice" without resolving

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state and federal authority and the allocation of lawmaking power among courts, legislatures, administrative agencies and the executive, and private ordering.

334. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 397–98 (2001).

335. KOMESAR, *supra* note 333, at 23.

336. *Id*. at 27.

337. *See* Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 971 (1997).

338. *See id.* at 990 ("Means and ends are all mixed up, and we cannot say anything definitive about institutional choice as a means until we have reached a consensus about ends.").

For example, compare monist and pluralist accounts of the property system. Monists think the property system reflects one value and has one function. For example, a monist might think that property's value is stable ownership. *See* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 551 (2005) ("[T]he institution of property is designed to create and defend the value that inheres in stable ownership."). Pluralists, by contrast, might agree that property law values stability, or more generally, social utility, but also think it determines social and political relationships, promotes personhood and autonomy, fosters community, and so on. *See, e.g.*, Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1018–22 (2011) (contrasting monism and pluralism); Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1412 (2012) ("[P]roperty is an umbrella for a set of institutions, serving a pluralistic set of liberal values: autonomy, utility, labor, personhood, community, and distributive justice."). From a bundle-of-rights perspective, the debate between monists and pluralists often cashes out in terms of whether the right to exclude is at the "core" of property law, where monists tend to put it. *See* Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 919–20 (2010) (discussing the debate). But these disagreements about goal choice also bear upon the problem of institutional choice in property law.

disagreement about goals,[339] it is possible to make the problem of institutional choice tractable by specifying the choices among worries that our disagreements about goals create.

In particular, it is helpful to think about the structure and function of property from a systemic perspective. Some systems theorists—for ease of exposition, call them "structuralists"[340]—tend to prefer a formal and non-thematic approach to deciding disputes over resource use by assigning formal property rights. One way to make a property decision is to "eschew[] context"[341] by assigning property rights based upon formal criteria. Another is to consider a property problem systematically and thematically, which entails calibrating property rules in light of their externalities, contextualizing judgments about property claims, and deliberating about the instrumental and non-instrumental values of property law.

Henry Smith has modeled the considerations in terms of exclusion and governance. Exclusion strategies economize on decision costs about resource use by assigning strong property rights to individual owners. This assignment leaves decision making about specific resource uses to the owners. Its benefits outweigh its costs "where the optimal level of precision [about resource uses] is low."[342] For example, we tend to think that an owner's decision to paint her house blue or red is best left to her discretion. But the exclusion strategy "rapidly becomes high cost" when the stakes are high.[343] In that case, the benefits of precisely delineating uses are worth the decision costs of doing so. Hence nuisance law, for instance.[344] To precisely delineate the range of permissible uses requires systemic and thematic thinking that attends to the purposes property serves. Systemic decision making is necessary to manage the interfaces between different packages of ownership rights. On this understanding, property governance—but not the basic property strategy of assigning rights to exclude—is "transparent to purposes."[345] From a structuralist's perspective, whether exclusion or governance furthers property's

339. Merrill, *supra* note 337, at 990.

340. Without intending to convey anything weighty with this label, I have in mind the distinction between structuralism and functionalism in the social sciences. *E.g.*, MARSHALL SAHLINS, CULTURE IN PRACTICE: SELECTED ESSAYS 18, 535 (2005) (discussing, in context of anthropological theory, structuralism as focusing upon "symbolic order of economic and ecological practice" and functionalism as focusing upon "function" of culture, where "function" is roughly synonymous with "purpose").

341. Smith, *supra* note 27, at 1692.

342. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1756 (2004).

343. *Id.*

344. *Id.* at 1754.

345. Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON. J. WATCH 279, 283 (2011).

purposes should be assessed "in the context of the system as a whole," with a presumption in favor of maintaining exclusion strategies where they exist.[346]

Other systems theorists—call them "functionalists"—tend to think a systemic and thematic approach is appropriate for a wider range of property disputes. In part, functionalists part ways with structuralists on descriptive grounds. Where structuralists see the right to exclude as the property system's first cut at solving problems of resource use, functionalists see the many exceptions to exclusion as equally significant.[347] Not only is complexity inevitable, functionalists contend, it is also desirable. Joseph Singer puts the point forcefully: "we cannot conclude that a particular set of property rules or institutions is acceptable unless we attend to the systemic effects of exercising those property rights."[348] Similarly, Eduardo Peñalver argues that "land-use decision making" should "consider [the] diverse values" the property system serves,[349] while Jedediah Purdy explains that the "allocation and various dimensions of context," not the "mere form of property rights,"[350] determines whether property serves its purported functions. That does not mean that functionalists see everything as up for grabs in every property dispute. Rather, they recognize the value of a formal rights approach to some property disputes. For instance, Singer explains that "the castle conception of ownership"—what Smith calls the exclusion strategy—"does important work in shaping property norms."[351] But functionalism does entail a greater commitment to what Smith calls property governance, namely, a process of decision making that takes account of "the many subtle and incommensurable values (including economic values) implicated by" property decisions.[352]

In sum, property structuralists are concerned that the decision costs of systemic and thematic property decision making will tend to outweigh the benefits and may lead to significant errors. They emphasize clarity and stability in the structure of property rules.[353] Structuralists tend to

346. *Id.* at 286.

347. *See* Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1046–47 (1996).

348. Singer, *supra* note 21, at 1050.

349. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 868–69 (2009).

350. Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1298 (2005).

351. Singer, *supra* note 21, at 1034; *see also* Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 319–20 (2006).

352. Peñalver, *supra* note 349, at 868.

353. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) ("For property to serve as an in rem

prefer coordination and standardization of property structures across different resources and contexts. They are worried about having multiple, variegated structures and change in the property system.[354] Functionalists, by contrast, tend to welcome multiple, variegated structures and change in the property system.[355] They are worried about the law becoming too rigid and standardized[356] at the price of interfering with the different functions of different property rules for different resources and contexts.[357] Identifying these choices of worries gives us purchase on the variables of institutional choice in property law.[358]

B. The Quality of Property Decision Making

Perhaps the most obvious question raised by recognition of presidential governance of property concerns the quality of property decision making. Any comparison of presidential government with the alternatives must be consistent with constitutional federalism, which mandates state primacy in property lawmaking, and the separation of powers, which places Congress in the driver's seat when it comes to federal lawmaking. The constitutional structure directs us to assume that a limited federal property law requires specific constitutional authorization. And it requires the president to point to legislative authorization for her actions, particularly when they bear upon private rights. To what extent should presidential politics—within the confines of federalism and the separation of powers—shape property lawmaking?

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coordination device, the morality upon which it rests must be simple and accessible to all members of the community."); Merrill & Smith, *supra* note 163, at 61–66 (explaining that allocating authority to change the estates system to the legislature has several benefits, including clarity and stability in property law).

354. *See, e.g.*, Henry E. Smith, *Mind the Gap: The Indirect Relation between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 964–65 (2009).

355. *See, e.g.*, Davidson, *supra* note 29, at 443 ("[T]he ex ante signal of flexibility, rather than being orthogonal or even adverse to the structure of decisionmaking about property, may stand at the legal system's core.").

356. *See, e.g.*, Singer, *supra* note 21, at 1054–55.

357. *See* Dagan, *supra* note 338, at 1412.

358. To build these variables into a framework for considering presidential governance of property, this Part reiterates the assumptions concerning the separation of powers and federalism that are built into the constitutional structure. *See supra* Part I.A. Drawing upon these assumptions, it elaborates on the variables for comparing the presidency with other lawmaking institutions. For an example of a similar approach to comparative institutional choice, albeit one concerned with a different substantive problem, see Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 746–47 (2008) (identifying constitutional assumptions that "provide the essential backdrop to any consideration of institutional roles in determining when state law is displaced by federal law" and then discussing "criteria . . . for assessing the capacity of different institutions to make displacement decisions").

The most modest normative defense of presidential governance of property lawmaking rests upon the president's capacity to enrich the property "conversation."[359] In mapping the intersection of presidential government and property, Part I underscored the political dimension of property rights. Libertarians may find much to like, for example, in President George W. Bush's executive order aiming to discourage the use of eminent domain for economic development.[360] Progressives might point to FDR's description of property as personal security in arguing that the property system should "make it realistically possible for each person to become an owner of the property needed for a full human life . . . ."[361] Civic republicans may be apt to see their tradition reflected in President Clinton's account of property as citizenship.[362] The capacity of the presidency to energize and focus the debate—and its tendency to frame questions about the proper scope of regulation and property rights in political terms—are virtues from a systemic perspective that takes seriously property's role in setting the "contours of a free and democratic society."[363] In short, the president can make unique systemic and thematic contributions to the property conversation.

To formalize the argument a bit, consider the standard set of pragmatic arguments for presidentialism. "From the beginning of the twentieth century onward," Congress has left many of the details of legislative schemes open for administrative agencies or courts to fill.[364] In the face of broad congressional delegations of lawmaking power, presidential administration may increase accountability and efficiency. Roughly speaking, accountability connotes responsiveness to the public will, which, as Jake Gersen has explained, requires both "clarity of responsibility" and "the ability of citizens to utilize information about

359. *See* Baron, *supra* note 338, at 920 (framing the distinction between structuralist and functionalist accounts of the property system in terms of competing metaphors: property as a "machine" and property as a "conversation").

360. *See* Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 28, 2006); *cf.* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 163 (1974) ("[N]o end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives.").

361. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1312 (2014).

362. *See* Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 923 (2011) (discussing and critiquing civil republican account of property ownership).

363. Singer, *supra* note 361, at 1323. Importantly, this argument does not depend upon presidential decision making displaying the same degree of deliberativeness that agency decision making arguably has. *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1422–23 (2013) (questioning the presidency's capacity for deliberative, as opposed to "political," decision making).

364. Kagan, *supra* note 18, at 2255–56.

national support.[382] And the comparative point is less powerful when the question concerns execution of the laws. The primary mechanism of congressional control of the bureaucracy is the congressional committee or subcommittee, which is less likely than the president to adopt a national perspective.[383] Presidential and congressional influence encourages agencies to update regulations. Of the two, the president is better situated to introduce a contemporaneous vision of the property system.[384] Even so, the appropriateness of allowing the national majority's views to dominate federal lawmaking should be questioned, and the defense of presidential government cannot rest upon the nationalism justification alone.

C. The Tradeoff between Uniformity and Diversity

Another political process breakdown that may point towards a presidential role is familiar from the literature on presidential administration. The presidency may serve as a focal point for coordinating property lawmaking. The Obama administration's effort to coordinate enforcement actions against mortgage lenders is one example.[385] More generally, the evidence from interagency coordination suggests "the President is uniquely positioned and motivated to tackle coordination problems."[386] The presidency's capacity for coordination is often treated as a clear good in the literature on presidential administration. But in property law, diversity may be a virtue.

A uniform property system applies the same principles across property regimes—for instance, those concerning land and intellectual property—regardless of the particular resources or contexts at issue. A

382. *See, e.g.*, Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371, 372 (2009).

383. *See* Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1703 (2009); *cf.* Bressman & Vandenbergh, *supra* note 18, at 88 (reporting the results of a survey of EPA officials that found they believe the White House "served a nationalizing role" in environmental policy making at the agency level).

384. That is not to deny the separation-of-powers costs of agency drift from the preferences of an enacting Congress. For a discussion of the virtues and vices of updating statutes, *see, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482 (1987).

385. *See generally* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1079–81 (2013).

386. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1203 (2012). It is important, however, not to overstate the presidency's comparative advantage at addressing coordination problems. *See, e.g.*, Seidenfeld, *supra* note 363, at 1424 (arguing that while "[c]oncentration of power . . . facilitates coordination[,] . . . [s]upporters of presidential control . . . may underestimate the ability of agencies to overcome inertia and coordination problems").

differentiated system applies different packages of property rights to different resource problems in different contexts. Uniform property systems can economize on information and transaction costs. Differentiated property systems reflect contextual differences in resources. In some contexts, say corporate shares, for instance, we may want to maximize the economic pie. For others, say, marital property, we may be more focused upon social relationships.[387]

To the extent we think "property serves plural values"—not just efficiency, for instance, but also autonomy, liberty, citizenship, community, and so on—federalism may lead to a property system that "reflect[s] those multiple values."[388] There are many general justifications for federalism, including diffusing power to protect liberty, fostering political accountability, satisfying diverse preferences, promoting experimentation, and institutional competence.[389] When it comes to property lawmaking, these defenses of federalism boil down to a few plausible intuitions about the quality of property decision making and the balance of uniformity and diversity in property law. An effective solution to property problems may require information about local conditions that will be more costly for a centralized decision maker to obtain.[390] Moreover, as Abraham Bell and Gideon Parchomovsky have argued, interstate competition and experimentation may maximize the opportunities for satisfaction of diverse preferences regarding property and regulation.[391] Thus, federalism in property law tilts the balance in favor of diversity in property forms.

By contrast, presidential government will likely err on the side of uniformity. For property structuralists, this feature reflects the Presidency's beneficial capacity to coordinate property across resources and contexts, at least up to a point. The other candidate institutions will tend towards less uniform property lawmaking. Congress's capacity for coordinating federal property law approaches the president's, but its plural structure and the limitations on its control of law execution distinguish it from the presidency. Federal courts are not as likely as the other branches to coordinate property rules across resources and contexts. The Supreme Court's ability to coordinate judicial lawmaking

387. *See* Dagan, *supra* note 338.

388. Singer, *supra* note 21, at 1054 (arguing "property serves plural values and that law should reflect those multiple values").

389. *See generally* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 386–405 (1997).

390. The story can be more complicated than this stylized account suggests. Consider mining law. The federal government "formalized and simplified" the customary property codes of mining communities. *See* Henry E. Smith, *Custom in American Property Law: A Vanishing Act*, 48 TEX. INT'L L.J. 507, 518 (2013).

391. Bell & Parchomovsky, *supra* note 338, at 76–78.

across the federal circuits and districts has obvious limitations. And "court decisions tend to be ideologically heterogeneous across issues."[392] The common law process of judicial decision making may appeal to some property functionalists, who see in it a tendency towards "pluralism of values and ideals" regarding property.[393] For similar reasons, some functionalists might see bureaucratic self-control as a virtue along this dimension of institutional comparison, because it tends to compartmentalize regulation and thus may lead to different value selections for different resources.

From a functionalist perspective, the concern is that the president may impose a unitary stamp on the property system. But swaths of property law remain a state concern, even under conditions of presidential leadership. For another, "government authority is diffused among a large and diverse set of government decisionmakers who have a hand in the exercise of state power."[394] That is not to deny that presidents might seek to impose a unitary stamp on federal law, including property law. It is simply to doubt that their successes will amount to presidential dictation of federal property law.

D. The Balance of Stability and Flexibility

Even so, if property is *all* about stability, then our usual focus on state courts makes some sense. Courts cannot make law on their own motion. Instead, they must wait for litigants to bring disputes before them and follow precedent in resolving those disputes. As a result, the common law of property may change slowly. Channeling significant changes through the legislature also makes sense, as legislating is costly and vulnerable to gridlock.[395] And focusing upon states, rather than the federal government, can promote stability by limiting those affected by one state's change to property rights and duties.

By contrast, the presidency may introduce turmoil and instability into the property system. Presidents campaign on promises of changing the status quo. They build political capital and legitimacy by reshaping the executive branch in their own images, both through political appointments and the direction of policy decisions. As presidents seek to

392. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036 (2006).

393. Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1599 (2010).

394. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 605 (2001).

395. *See* Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1103–07.

impose their stamp on executive branch lawmaking, they may destabilize existing property relationships. It is important not to overstate the problem of instability, however. Under the *Accardi*[396] doctrine, for instance, which requires an agency to follow its own legislative rules until they are changed through legislative rule making, presidents who channel their agendas through agency rule makings can entrench their preferences by raising the costs of future change.[397] Still, the *Accardi* doctrine does not preclude significant regulatory change. For those who favor stability above all else in property law, the other candidate institutions may be preferable, with, perhaps, the exception of state executives, who may act with similar decisiveness to the presidency.[398]

Though property theory has tended to focus upon the virtues of stability, recent scholarship has highlighted the virtues of flexibility. The traditional focus upon stability is reflected in Jeremy Bentham's canonical description of property as "nothing but a basis of expectation."[399] Frank Michelman has famously argued for just compensation for takings to offset demoralization costs.[400] Michelman's argument is psychological: changes to private property rights "are the cause of a kind of instinctive unease which demands rectification."[401] Nestor Davidson has recently added to this description of the psychology of property an account of the virtues of flexibility in property law. Property owners want "assurances that the legal system will respond when external forces threaten to overwhelm the value owners create, that it will provide a fair process of adjustment over time, and that it will ensure inclusion."[402] Though the empirical claim is nuanced, the basic intuition is simple enough: "Any owner can potentially be not only the victim but also the beneficiary of legal change, and the legal system should recognize the inherent reciprocity of expectations that this implies."[403]

When will stability or flexibility be more or less important? The question suggests the need for calibrating the variables of comparative

396. *United States ex rel. Accardi v. Shaughnessy*, 247 U.S. 260 (1954).

397. *See id.* at 266–67 (1954); Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006).

398. The picture is complicated by the "unbundled" nature of many state executive branches, in which authority is split among multiple elected officials. *See* Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008).

399. JEREMY BENTHAM, THE THEORY OF LEGISLATION 137 (Richard Hildreth trans., Weeks, Jordan, & Co. 1840) (1802).

400. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

401. *Id.* at 1210.

402. Davidson, *supra* note 29, at 437.

403. *Id.* at 443.

institutional choice when applying the framework to specific problems of institutional design in property lawmaking. To make the argument more concrete, the next Part disaggregates the institutional comparisons based upon the contexts, tools, and products of presidential governance of property.

III. DESIGNING PRESIDENTIAL GOVERNANCE OF PROPERTY: APPLICATIONS AND LIMITS ON PRESIDENTIAL POWER

The balance among the quality of decision making, stability and flexibility, and uniformity and diversity within the property system suggests the design of property lawmaking should involve some presidential governance. This Part becomes more specific about the choices among different institutional arrangements. The basic insight is that the costs of the president's decision making begin to outweigh the benefits as thematic and systemic property lawmaking raises the risks of instability and undesirable uniformity in property law. These costs and benefits do not vary randomly, but rather determinately based upon the tools and products of presidential property lawmaking and the types of resources and contexts of ownership. Accordingly, the breadth and depth of presidential property lawmaking power should not be uniform across resources and contexts.

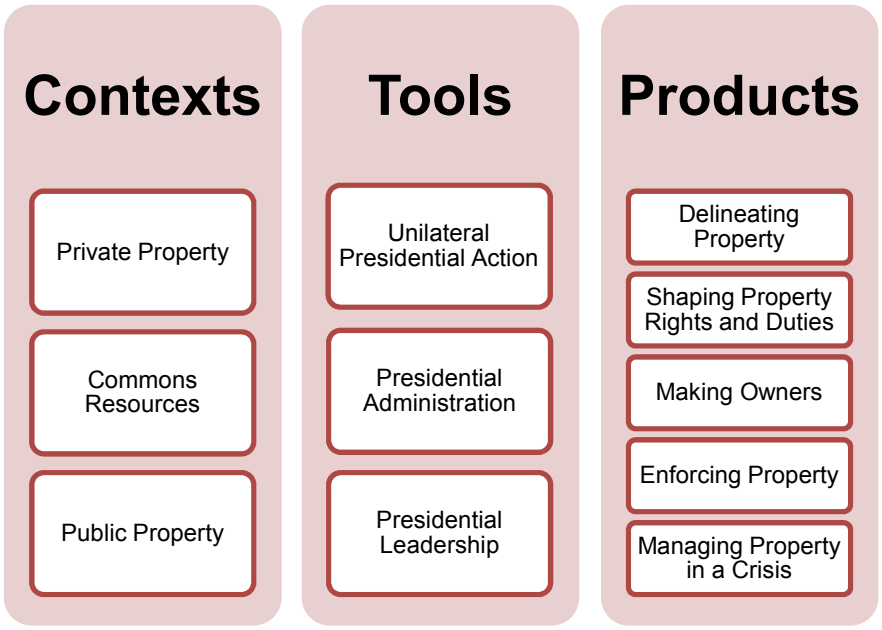
This Part does not purport to offer a full accounting of the questions that this Article's descriptive claim raises. Rather, it has two more modest aims. First, it offers some rules of thumb for specifying the breadth and depth of presidential governance across the contexts and products of property lawmaking. Second, it makes the discussion concrete by identifying some surprisingly easy and surprisingly hard cases of institutional design. Thus, the analysis leaves for future work more granular analysis of the presidency's role in shaping property lawmaking. Instead, it offers a framework to begin the conversation about comparative institutional choice in federal property lawmaking.

A. Specifying the Framework

Comparative institutional choice becomes quite complicated when one opens up the black box of the political process and compares not simply markets, courts, and politics, but rather markets, courts, legislatures, administrative agencies, and the executive. When disaggregated, politics (or, for that matter, courts and markets) appear not only as a set of institutions, but also as a network of interactions among multiple actors. What we compare, in other words, are different potential structures and processes of interaction among and within institutions. This Subpart will reflect on these comparisons. To get some

purchase on the complex comparisons, it is helpful to recall that the tools of presidential governance—unilateral presidential action, presidential administration, and presidential leadership—refer to different types and degrees of interaction among the presidency and other institutions. Presidents may apply these tools to the multiple contexts of property law in order to produce a variety of property products, but they do so in the context of interactions with other institutions. The contexts, tools, and products of property lawmaking can be pictured as lying along three spectrums of institutional design, as in Figure 1.[404]

FIGURE 1.



A first cut of comparative institutional choice would disfavor presidential governance at the top of each spectrum but favor it at the bottom of each spectrum. All else being equal, delineating property and shaping rights and duties involve the broadest and deepest decision making regarding a property regime, as they determine the metes and bounds of whether there will be ownership and what ownership will mean. The reasons we might disfavor unilateral presidential authority over private property were eloquently suggested by Edward Livingston, who in the early 1800s "object[ed] to [President] [Thomas] Jefferson's unauthorized presidential interference with his property."[405] Livingston

404. I thank Dave Owen for discussions of these points.

405. *See* Monaghan, *supra* note 51, at 26 n.123.

wrote that where "an individual be chosen for the victim" of a "public functionary['s]" action, "little sympathy is created for his sufferings, if the interest of all is supposed to be promoted by the ruin of one."[406] In a "free republic," Livingston continued, the problem of majoritarian bias means that "a popular leader is . . . sometimes rewarded with applause for acts that would make a tyrant tremble on this throne."[407] Strident rhetoric, to be sure, but is there not something to the intuition that unilateral presidential power to make and unmake private property rights would be inconsistent with our "[p]roperty . . . law of democracy"?[408] A broad presidential prerogative over private property smacks of the feudal privileges we have left behind us.[409]

Yet that same sense of feudal ownership—an owner's property is his castle—may explain our traditional acceptance of broader presidential powers over public property. Presidential leadership with respect to managing public property in a crisis seems far less problematic than presidential seizures of private property. Presidents may seek to lead, but that does not mean other institutions will follow. And presidential leadership does not entail hard lawmaking. Moreover, managing property during a crisis involves, by definition, an extraordinary state of affairs.[410] As we move along the spectrum from delineating property to managing crises, the problems tend to require systemic and thematic decision making about property's purposes in specific contexts of resource conflicts.[411] When compared with other

406. *Id.*

407. *Id.*

408. *See* Singer, *supra* note 361, at 1287.

409. When it comes to regulating private property, if our choice were between exclusive state control and unilateral presidentialism, we would have to choose the states. *Cf.* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1815 n.424 (2013) (arguing that even if the Court refuses to overrule precedent permitting federal government to exercise eminent domain power, "Congress might reconsider the sweeping condemnation authority given by 40 U.S.C. § 3113 (2006), or the President might consider increased reliance on state eminent domain"). But the choice is not that stark, given the possibility of careful institutional design of presidential administration and the role of presidential leadership in shaping property lawmaking.

410. That does not mean, however, "that presidential emergency action can be somehow placed outside the ordinary system—outside the constitutional order of which it is a part." Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1768 (2013). Indeed, managing property with a crisis may overlap with, and complicate consideration of, the other four categories, particularly where a president presses an emergency precedent for all that it may be worth.

411. In structuralist terms, they tend to involve problems of designing governance of resource uses, rather than assigning rights to exclude. At a minimum, then, there should be rough agreement between structuralists and functionalists on the comparative costs and benefits along the spectrum from delineating property to managing property during a crisis. Functionalists, of course, would go further to embrace a property

federal institutions, the presidency seems best equipped to lead governance of public property during crises.

That being said, presidential leadership during a crisis could be problematic, as the "President uses the formulation and articulation of crisis and emergency to take control of the political agenda, shape the nation's political imagination, and make resistance seem, at least in the short run, parochial, narrow-minded, and even futile."[412] Much depends upon how we define a crisis and whether the president's definition is politically sticky or receives deference from other lawmakers. But presidential leadership concerning public property during a crisis seems preferable, especially if compared with no presidential involvement at all.

To be clear, the matter is not as simple as assigning presidents decisions only at the bottom of the spectrum, such as those involving property crises. President Clinton's domain names initiative is one example where presidential involvement in the delineation of intangible property rights for a cutting-edge resource was appropriate.[413] Nor is it the case that we should rely upon presidents alone for resolution of property crises. For example, state courts have played an important role in developing the common law of mortgages to respond to the Great Recession.[414]

Nor is the analysis as simple as assigning the president broad powers over lawmaking concerning public property and narrow (or no) powers with respect to private property. This argument cuts against the

strategy that delineates rules based on systemic and thematic decision making. *See* Singer, *supra* note 21, at 1054.

412. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1847 (2010).

413. *See infra* notes 456–63 and accompanying text.

414. State courts, for example, have had to decide the policy implications of President Obama's Home Affordable Modification Program (HAMP) for common law. They have decided, for instance, whether it implies a right of action in favor of homeowners—and they have mostly said no, although some state courts and one federal district court have held otherwise. *E.g.*, *Parker v. Bank of Am., N.A.*, Civil Action No. 11–1838, 2011WL6413615 (Mass. Super. Ct. 2011) (stating that the servicer participation agreement under HAMP creates a third-party beneficiary right of action for the homeowner). Still, other state courts have developed other aspects of the common law in ways to further the HAMP program. In New York, for instance, courts have considered procedural questions and homeowners' defenses to foreclosure actions in light of the HAMP, holding that "a strict application of the law . . . is counterproductive to" the President Obama's HAMP policies. *HSBC Bank USA, N.A. v. Cayo*, 934 N.Y.S.2d 792, 796 (Sup. Ct. 2011). As Nestor Davidson has described, state courts have played an important role in addressing borrowers' problems through a "new formalism" that "accept[s] claims by borrowers that lenders and other entities involved in securitizing mortgages failed to follow requirements related to perfecting and transferring their security interests." Nestor M. Davidson, *New Formalism in the Aftermath of the Housing Crisis*, 93 B.U. L. REV. 389, 390 (2013).

constitutional tradition that suggests the president may have inherent powers to direct the federal government in its proprietary capacity. According to the doctrine, the president has a greater claim of authority to shape public rights in federal property than private property rights. Michael Rappaport has noted that an "area where the nondelegation doctrine might not apply is that of managing government property."[415] Perhaps it is no accident that *Midwest Oil*, the only decision in which the Supreme Court upheld presidential action that arguably violated a congressional statute, involved federal property.[416] In any event, Congress has ceded broad authority to the president to govern federal property, including with respect to public lands. As a result, the president may "tak[e] the yield that is practically available."[417] Presidential power over public lands, though supported by constitutional tradition, has created governance problems from a property theory perspective. For example, one impetus for Congress's decision to limit the president's authority to withdraw public lands was that successive administrations had created "instability of national policies."[418]

To further elaborate some implications of this Article's framework, it is helpful to return to Part II's variables of comparative institutional choice. Consider first the quality of property decision making. Some property problems are solved well—or at least well enough—through a rights-based approach that economizes on decision costs. It is beyond the scope of this Article to delineate precisely the point at which the costs of treating property problems systematically outweigh the benefits; the comparative costs and benefits will differ for different resources. But we can identify rules of thumb for thinking about the tradeoffs. First, there is general agreement that the benefits of systemic thinking will outweigh the costs with respect to high-stakes disputes about resource use.[419] Second, novel problems—as in the case of developing property law for a new type of scarce resource, for example—invite systemic thinking

415. Rappaport, *supra* note 79, at 354; *cf.* Appel, *supra* note 76, at 105–06 ("[T]he nondelegation doctrine applies to the exercise of the Property Clause power, although the Supreme Court has applied that doctrine less rigorously to federal actions involving public lands.").

416. *See* Monaghan, *supra* note 51, at 44 (noting but disputing interpretation of *Midwest Oil*).

417. Harold H. Bruff, *Executive Power and the Public Lands*, 76 U. COLO. L. REV. 503, 503 (2005).

418. H.R. REP. NO. 94–1163, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6175 (legislative history to 43 U.S.C. § 1714); PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 43–44 (1970), *available at* http://ia601500.us.archive.org/34/items/onethirdofnation3431unit/onethirdofnation3431unit.pdf (last visited Sept. 17, 2013); Richard M. Johannsen, Comment, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 446 n.63 (1981).

419. *See, e.g.*, Smith, *supra* note 342, at 1756–57.

about the structure and function of property rules. Third, the complexity of an issue also may determine whether the benefits of systemic thinking outweigh the costs. A property problem can be complex along one of two dimensions. One dimension involves what we might call technocratic complexity and implicates the tradeoff between politics and expertise.[420] The other dimension involves what we might call values complexity. Here, the concern is with the breadth of values implicated by a property decision and the depth of the disagreement about them. That is the type of complex decision making that administrative law scholars have identified as within presidential competence.[421]

Assessing the quality of property decision making includes questions of political accountability that animate not only constitutional doctrines of federalism and the separation of powers, but also pragmatic assessment of property lawmaking. To make progress on accountability questions, we should distinguish among different resources and contexts of ownership. Given the office's nationalizing and systemic tendencies, for example, the president may have distorted incentives and institutional competence problems that prevent her from giving due weight to local concerns. From an anthropologist's perspective, all "[l]aw . . . is local knowledge."[422] But some property problems are more local than others. When it comes to decisions about specific land uses, for instance, we may want to limit presidential power. Yet when it comes to the public lands, for example, the president sometimes has broad powers to direct specific land use decisions.[423]

The question of the president's political accountability is related to the problem of uniformity in property rules where diversity is called for. Broadly speaking, there are two instances in which presidential governance, notwithstanding its strengths in thematic and systemic decision making, is most likely to lead to uniformity problems. The first—the risk that unilateral presidential action or broad powers of presidential administration will close off democratic and pluralistic property conversations—we have already considered in Part II.C. The second concerns the tradeoff between politics and expertise.

Some resource problems demand unique expertise. Electromagnetic spectrum, for example, is a unique resource. The ways we use spectrum "defy boundaries and can propagate in unpredictable ways."[424] That

420. The design of property rights in electromagnetic spectrum, for instance, requires understanding the physics of spectrum use.

421. Kagan, *supra* note 18, at 2354.

422. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY 215 (1983).

423. *See infra* Part III.C.1–2.

424. Weiser & Hatfield, *supra* note 211, at 553.

makes dealing with "trespass" to spectrum property more difficult than trespass to land.[425] These technical difficulties suggest the need for resource-specific expertise in property lawmaking for spectrum and corresponding limits on presidential direction of spectrum policy making. Appropriately, therefore, under current law the FCC, an independent agency, has primary administrative authority over the design of spectrum property, with the president working with the agency and using the tools of presidential leadership to influence spectrum policy.[426]

The tradeoff between expertise and politics may counsel for caution about presidential initiatives to replace command-and-control regulation with regulatory property, notwithstanding the presidency's capacity to stimulate desirable regulatory innovation. As we have seen, presidents have successfully pushed for the creation of trading markets to address governance problems for fungible resources like air pollutants and lead gasoline. But not all environmentally salient resources are fungible, as James Salzman and J.B. Ruhl have emphasized.[427] Take wetlands mitigation banking, which the Clinton administration pushed and which is based on the assumption that a developer can trade one wetland—or, more precisely, the right to destroy a wetland—for preserving another wetland somewhere else. That assumption is not a sound one: "a bog wetland in Maine may not provide the same function values as one in Oregon."[428] Therefore, we should think about more careful institutional design when it comes to presidential direction of the adoption of environmental trading markets.[429] That is particularly true if Salzman and Ruhl are right that "the low-hanging fruit . . . has largely been picked" when it comes to hybrid property solutions to environmental problems.[430] On that view, more than a president's say-so should be necessary to adopt hybrid property in environmental policy.

Still some commons problems have systemic features that the president is uniquely situated to address. The example of domain names is illustrative. Designing a property system for domain names involves not only national externalities, but also international externalities that are

425. *See id.* at 552. *But see* Lawrence J. White, *"Propertyzing" the Electromagnetic Spectrum: Why It's Important, and How to Begin*, 9 MEDIA L. & POL'Y 19, 22 (2000) (analogizing spectrum to real property).

426. *Cf.* Bressman & Vandenbergh, *supra* note 18, at 71 (reporting the results of a survey of EPA officials that found that OIRA review enhanced interagency, but not intra-agency, coordination).

427. James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 607 (2000).

428. *Id.* at 663.

429. *Cf. id.* at 678 (discussing agency "invest[ment] in" environmental trading "as a consequence of the Clinton administration's high profile support").

430. *Id.* at 671.

peculiarly within the president's foreign affairs purview. For example, when a tech firm sued South Africa, claiming it had a property right in southafrica.com, the federal courts kicked the case on jurisdictional grounds.[431] That result is unsurprising to anyone familiar with the Foreign Sovereign Immunities Act[432] or, more generally, with the law of the presidency.[433]

The other significant potential vice of presidential governance is its tendency towards instability. Changes in property rules can be a problem where they confound reasonable expectations and undermine an owner's sense that her property rights are secure against arbitrary or oppressive government action. At the same time, flexibility in response to changed circumstances or value judgments can be a virtue in property law. Indeed, changing property rules may *restore* an owner's sense of security where changes to the circumstances of ownership threaten it, as the Great Recession and its aftermath suggest. Thus, "property law is caught between two competing pressures"[434] of stability and flexibility.

The costs and benefits of stability and flexibility are not evenly distributed across the property system. As Lee Anne Fennell has recently noted, "property scholarship, although steeped in the analysis of entitlements, has done little to examine whether we have designed property rights packages that deliver the right combination of speed, maneuverability, crash-resistance, flexibility, and protection."[435] We can roughly categorize the comparative costs and benefits by type of resource and the context of ownership, though the discussion here is necessarily tentative and suggestive.

For some resources, instability is a particularly pressing problem. The demoralization costs we associate with losses arising from changes to property rules are greater the stronger our relationship with a particular resource. The loss of my computer would be frustrating. The

431. *Virtual Countries, Inc. v. South Africa*, 148 F. Supp. 2d 256, 263 (S.D.N.Y. 2001), *aff'd*, 300 F.3d 230 (2d Cir. 2002).

432. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, Oct. 21, 1976, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1602–1608 (2006)).

433. *Cf. United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (discussing "delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). *But cf.* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 955–56 (2014) (critiquing the one-voice doctrine).

434. Craig Anthony (Tony) Arnold, *Legal Castles in the Sand: The Evolution of Property Law, Culture, and Ecology in Coastal Lands*, 61 SYRACUSE L. REV. 213, 241 (2011).

435. Lee Anne Fennell, *Property and Precaution*, J. TORT L., Oct. 2011, at 1, 2–3.

loss of my wedding ring would be devastating.[436] Thus, instability in protections for "personal property" may be a more significant problem than instability in the rules governing "fungible property."[437]

In considering the tradeoff between stability and flexibility, it is important to assess the resources and contexts of ownership and the products of presidential governance together. In some instances of presidential governance, there is no established property regime, or the property problems at issue are characterized by frequent technological change. Presidential governance has an important role to play in addressing these cutting-edge questions systematically—at least when it comes to the design of the property regime and potentially on a continual basis.

These considerations point towards some rules of thumb for the design of presidential governance of property. First, the risk of costly uniformity, instability, and majoritarian bias are greatest when the president can make property law on her own motion. Therefore, unilateral presidential property lawmaking should be very limited, and not just for private property.[438]

Second, presidential delineation of private property rules should be limited, though not nearly as limited as *Youngstown* might suggest.[439] In particular, presidential leadership can play an important role in enriching the property conversation without ending it. And robust presidential administration may be necessary to address cutting-edge property problems and changing circumstances that generate national externalities.

Third, where Congress has authorized executive action, the president should be empowered to make general value judgments about the property system to coordinate administrative action. Such value judgments may be particularly appropriate with respect to commons resources and regulatory property. The president's administrative authority should include the power to encourage the use of the property strategy as a regulatory tool, with the caveat that more than a president's say-so should be required to sustain this strategy under the APA's arbitrary-and-capricious standard of review.[440]

436. The example is drawn from Radin, *supra* note 167, at 959.

437. *Id.* at 960; *cf.* HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 40–49, 63–108 (1997) (discussing the implications of personhood theory for a design of property rights).

438. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

439. *See id.* (stating that the president's property lawmaking functions are limited "to the recommending of laws he thinks wise and the vetoing of laws he thinks bad").

440. As Mark Seidenfeld has argued, it is possible to be sympathetic to political influence through presidential administration and still see arbitrary-and-capricious review

Fourth, and relatedly, when it comes to presidential power to direct specific property decisions, the analysis has lessons for institutional design for Congress. For instance, Congress should take special care that local voices will be heard within the presidential decision-making process. That entails first deciding whether to make presidential property lawmaking authority exclusive or concurrent with the states. When it comes to resources and contexts where the risk of distorted presidential incentives is high, concurrent delegation is more appropriate and sometimes required by the structure of the federal system. Internal separation of powers constraints on presidential authority may also be necessary.[441]

B. Three (Surprisingly) Easy Cases

These general design principles can be further specified by considering some cases of presidential action that are often seen as problematic, but should be seen as clearly legitimate. An easy case exists where the presidency can enrich the property conversation, address a coordination problem, or help solve a political process breakdown by shaping property lawmaking in ways that are unlikely to dictate uniform outcomes across diverse contexts or to destabilize the property system.[442]

1. TAKINGS ORDERS

Reagan's takings order is a good example of presidential oversight of the executive branch, although many scholars have criticized it as ineffective, unnecessarily burdensome, or simply a deregulatory arrogation of decision-making power.[443] These criticisms overlook the

as playing an important role in "ensur[ing] that agencies do not hide value judgments behind simple incantations that their actions are justified by political influence." Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 144–45 (2012).

441. As I have argued elsewhere, administrative federalism depends in part upon state and local interests' opportunities for voice within federal administration. Cooperative federalism, for example, allows states a voice that is more than "complaining;" it entails "the opportunity to influence and check" federal regulation. R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPAct*, 108 COLUM. L. REV. 404, 441–46 (2008).

442. In discussing these easy and hard cases, this Article leaves for future work complete comparative analyses of the potential institutional choices.

443. *See, e.g.*, Robin E. Folsom, *Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control Over Executive Agency Regulatory Decisionmaking*, 20 B.C. ENVTL. AFF. L. REV. 639, 642 (1993); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 288 (1996).

potential virtues of presidential direction regarding takings. For decades, takings doctrine has been decried as a "[m]uddle,"[444] "a bewildering mess,"[445] and the "doctrine-in-most-desperate-need-of-a-principle."[446] From a property structuralist's perspective, the presidency is well situated to develop a coordinated alternative approach. From a property functionalist's perspective, the takings order was part of a pluralist conversation about takings doctrine. The doctrine's various rules and standards reflect different conceptions of private property rights. Reagan's takings order was within this tradition of takings pluralism. To be sure, it involved broad and deep claims about property as a right trumping government regulation. As a substantive matter, that is not property's whole story. But as a matter of thinking about property as a system, it is *part* of the property story.

That is not to suggest that presidential inputs into takings doctrine are legitimate only when they tend towards a deregulatory direction. For example, when vetoing the "Silvio O. Conte National Fish and Wildlife Refuge Eminent Domain Prevention Act," which would have restricted the federal government's eminent domain authority, President Clinton explained that "eminent domain remains an important tool" to advance the public interest in natural resources.[447] That too is part of the property story.

2. FAIR HOUSING

Clinton's and Kennedy's executive orders promoting fair housing were similarly legitimate acts of presidential administration, notwithstanding the obvious objection that the president's systematic perspective is especially problematic when it comes to private property rights. Recall that Clinton issued an executive order creating a presidential council on fair housing and ordered all agencies to coordinate their programs "in a manner affirmatively to further" the Fair Housing Act's purposes.[448] This executive order built upon President Kennedy's landmark order seeking to eliminate racial discrimination in

444. Carol M. Rose, Mahon *Reconstructed: Why the Takings Doctrine Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566 (1984).

445. James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1997).

446. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993). *But see* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 103 (2002) (discussing "assorted benefits from vagueness in regulatory takings doctrine").

447. Message to the House of Representatives Returning without Approval Fish and Wildlife Refuge Eminent Domain Prevention Legislation, *supra* note 141.

448. Exec. Order No. 12,892, 59 Fed Reg. 2939 (Jan. 17, 1994).

housing supported by federal government loans.[449] Both executive orders support private rights of action to protect non-owners' rights to fair housing.[450] That alone makes them controversial. Under current law, implied private rights of action are, in a word, "disfavored."[451] In statutory cases, the Court is averse to concluding that Congress has authorized the executive to create private rights to sue.[452]

If anything, however, the Clinton and Kennedy orders do not go far enough, or, at least, as far as the president should be empowered to go when it comes to recognizing fair housing rights. As Davidson argues, flexible and active property lawmaking—virtues of presidential action—is particularly appropriate when it comes to "exclusionary practices."[453] Presidents can "generat[e] a regulatory response that would seek to replace the uncertainty of private exclusion with the stability of active inclusion."[454] On that view, Kennedy, for example, should have gone further to implement his campaign promise to change federal housing policy by extending the executive order's promotion of fair housing retrospectively and beyond housing funded "directly" by federal money.[455]

3. DOMAIN NAMES

The common wisdom is that Clinton's decisions about privatizing control of domain names should be criticized, not celebrated. On this view, the administration unilaterally made decisions under the cover of delegating authority to a private corporation. It is not clear that Congress had authorized these decisions. The administration pointed to the Department of Commerce's general statutory authority to enter into contracts.[456] My own view is that Clinton was firmly within Justice Robert Jackson's "zone of twilight,"[457] in which he was managing the

449. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 20, 1962).

450. *See, e.g.*, Henry Korman, *Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L., 292, 297 (2005); *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710, 720 (N.D. Ill. 2003).

451. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009).

452. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also* John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837–38 (1981).

453. Davidson, *supra* note 29, at 481–82.

454. *Id.* at 483.

455. *Cf.* Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 URB. LAW. 399, 461–62 (2003).

456. Froomkin, *supra* note 204, at 28.

457. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

federal government's proprietary interests. Regardless of whether the root file at the center of the domain name system is a traditional object of property,[458] it involves proprietary interests of the United States.[459] As to these interests, the president arguably has policymaking discretion.[460] This authority is particularly relevant where, as in the case of management of domain name resources, the United States finds itself facing an unanticipated property problem that arose from its proprietary relationships.

Substantively, we might object that entrenching the system of first possession of domain names gave more social, political, and economic power to those well situated to grab it.[461] But from an institutional perspective, the question is: Would an alternative institution have been better suited to make the property decision? From the perspective of a systems theorist, the administration's actions had several benefits. The presidency is well situated to receive complaints about the consequences of particular property rules, and, in the case of domain names, the Clinton administration was responding to those types of complaints. It was also attuned to the value choices and value arguments regarding a property system in domain names, as it had received lobbying from a wide range of interest groups regarding the problem.[462] The administration was well situated to consider the problems of enforcing any particular regulatory regime and to think about the national and international externalities of property disputes, albeit (and this is an important caveat from an international perspective) with a focus upon American interests.[463]

458. *Compare* Peter T. Holsen, *ICANN't Do It Alone: The Internet Corporation for Assigned Names and Numbers and Content-Based Problems on the Internet*, 6 MARQ. INTELL. PROP. L. REV. 147, 163 (2002) ("Although the government may not 'own' the Internet, it arguably 'owns' the root files from which the domain name system operates."), *with* Markus Muller, *Who Owns the Internet? Ownership as a Legal Basis for American Control of the Internet*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 709, 730 (2005) ("The root file is a set of data, which does not fall within the realm of land or tangible movables, and is thus precluded from protection under property law.").

459. Froomkin, *supra* note 204, at 44 ("[A]lthough [the United States] clearly controls the content of the file, the government's power over the root seems to sound more in contract than in property.").

460. *See* Monaghan, *supra* note 51, at 11.

461. Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 734 (2003).

462. *See* MUELLER, *supra* note 202, at 172 ("The U.S. government . . . served as the bridge between the U.S. corporate and technical groups and other national governments and international organizations.").

463. *See, e.g.*, *id.* at 164 (explaining that while "[m]ost participants in the United States welcomed the procedural solidity that the U.S. Commerce Department proceeding brought to what had been a chaotic process, . . . groups that opposed [these efforts] . . .

States do not fare well in comparison. From a structuralist perspective, having fifty different states design the basic regime would lead to unacceptable complexity and instability in the worldwide domain name system. From a functionalist's perspective, states are not situated to be aware of all the potential consequences and functions of the domain name system.

Nor would a systems theorist think that Congress or the federal courts should proceed on their own in designing property in domain names. More so than courts, the presidency is attuned to the consequences and value judgments involved in designing a property system. And the presidency is more likely than Congress to see the problems that will arise from enforcing and implementing a property regime.

Another alternative would have been to leave the design of domain name regulation to private ordering. In large measure, that is what Clinton aimed to do. The question I am concerned with answering here is which institution should have had primary responsibility to make that decision. And in answering the question, the presidency fares surprisingly well, given our conventional assumptions about which institutions make property law.

C. Three (Surprisingly) Hard Cases

Applying the framework for comparative institutional choice also generates novel insights about some hard cases of presidential property lawmaking. These cases are hard because there are strong arguments that presidential action is an appropriate response to political failures, and yet, upon close inspection, presidential decision making may be subject to countervailing breakdowns.

1. NATIONAL MONUMENTS

Presidents have been designating national monuments for some time now. According to doctrine, the president has a greater claim of authority to shape public rather than private rights in property. This doctrine creates a troubling conundrum. Allocating control of a scarce resource

reviled [them] as U.S. coup d'état that took no heed of the international character of the Internet").

In response to criticisms of the United States' ICANN policies, it is worth noting that the Obama administration has announced its plan to end oversight of ICANN in 2015 and its support for a multi-stakeholder transition, notwithstanding domestic political opposition. *See, e.g.*, John Ribeiro, *Surveillance, ICANN Transition Dominate Internet Governance Meeting*, PC WORLD (Apr. 25, 2014, 8:47 AM), http://www.pcworld.com/article/2148320/surveillance-icann-transition-dominate-brazil-netmundial-meeting.html.

through public property rights has the effect of limiting or precluding private control of that resource. *Midwest Oil*[464] is a good example; it is not difficult to see how shutting off public lands affects private interests.

One surprisingly hard example involves presidential conservation under the Antiquities Act, which cedes broad authority to the president to designate, "in his discretion," national monuments and thus to preclude the creation of private rights in public lands.[465] As discussed in Part I, presidents have used their authority under the Act to circumvent debates in Congress over which lands to designate for conservation. In some instances, they have done so without regard to state and local opposition. President Clinton's creation of the Grand Staircase Escalante National Monument in Utah is one example.[466] In the face of congressional requests for information regarding proposed monuments, moreover, presidents have claimed executive privilege.[467]

This broad delegation of authority to the president, and the use of it to cut through debate, is troubling. There may be no meaningful local voice in the conversation or sorting between different local interests. That distinguishes national monument designations from the executive orders on fair housing. Those orders sorted between different local interests: owners and non-owners. State courts and legislatures do that all the time too. By contrast, monument designations may be driven solely by national interests.

As a matter of institutional design, there are templates for interjecting local voices into the designation process. One possibility is internal separation of powers. President Clinton, for instance, created interagency committees, such as the Interagency Ecosystem Management Task Force, to advise him on other property problems. So too might the president broaden the voices within the administration by creating additional checks on monument designations. Alternatively, Congress could create the same. While presidents presumptively should control property lawmaking within the federal administration, broad delegation and careless institutional design can let the president's vision of the property system become a vice.

464. *See supra* notes 80–88, 416–17 and accompanying text.

465. 16 U.S.C. § 431 (2012); *see* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 476 (2003) ("[I]t is arguably the very lack of process that has allowed the Antiquities Act to serve the American people so well over its long history.").

466. *See Utah Ass'n of Cntys. v. Bush*, 316 F. Supp. 2d 1172, 1182 (D. Utah 2004).

467. *See* Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument—A Call for a New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409, 434 n.166 (1998).

2. THE KEYSTONE XL PIPELINE

Is there an exception to the general principle that the presidency should not have broad power to make specific land use decisions? In recent years the Keystone XL pipeline controversy has put this question into stark relief. TransCanada Keystone Pipeline, LP has proposed to build a pipeline to transport tar sands oil from Alberta, Canada to Texas.[468] TransCanada needs a presidential permit to do so. This is a classic land-use problem in one sense and anything but that in another. It implicates the foreign relations of the United States, the systemic problems of balancing externalities, the national welfare, and NIMBYism.[469] It seems like the design question would be easy; after all, who better to speak for the United States when it comes to transnational land use than the president, the official who has the power to conduct our foreign affairs? At the same time, presidential power in this context presents a substantial risk of distorted incentives and loss of local voices in the decision-making process. The Keystone XL pipeline thus presents a surprisingly hard problem.

The existing design is a mixture of internal separation of powers and ad hoc congressional oversight. The president has delegated decision-making authority over to the Department of State in the first instance.[470] These decisions are shielded from judicial review.[471] Congress, of course, can monitor executive decisions. It has been involved in the Keystone XL controversy by, for example, passing legislation setting a deadline for President Obama to decide whether to issue the permit and requiring a presidential memorandum justifying any denial.[472] Obama denied the permit, citing Congress's deadline and

468. Kathy Parker, *Keystone XL: Reviewability of Transboundary Permits in the United States*, 24 COLO. J. INT'L ENVTL. L. & POL'Y 231, 234 (2013).

469. *See, e.g.*, *id.* at 235. "NIMBY" is an acronym for "not in my back yard."

470. Exec. Order 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004).

471. *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1082–83 (D.S.D. 2009); *see also Sierra Club v. Clinton*, 746 F. Supp. 2d 1045, 1032 (D. Minn. 2012); *NRDC v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 111 (D.D.C. 2009).

472. STATE DEPARTMENT, REPORT TO CONGRESS UNDER THE TEMPORARY PAYROLL TAX CUT CONTINUATION ACT OF 2011 SECTION 501(B)(2) CONCERNING THE PRESIDENTIAL PERMIT APPLICATION OF THE PROPOSED KEYSTONE XL PIPELINE (2008), *available at* http://www.state.gov/documents/organization/182453.pdf.

inviting a new application.[473] TransCanada accepted the invitation, and the administration is considering a modified project.[474]

In terms of institutional design, it is hard to know what to make of this political back-and-forth and the Obama administration's apparent trepidation at approving the pipeline. The president has the flexibility to make a decision of national and international moment without the ossification that might come with judicial review, and, by virtue of the visibility of a transnational pipeline project, is subject to enough congressional oversight and political pressure to encourage the airing of local and national concerns. But the ad hoc and one-sided nature of congressional review is troubling. Congress might enact additional legislation setting forth criteria for presidential consideration of pipeline permitting and providing for judicial review of the inputs into presidential decision making.[475]

3. FEDERAL MORTGAGE REGULATION

Prior to the mortgage meltdown, there was much to celebrate about federal mortgage regulation. Roosevelt's New Deal ushered in the fixed-rate, long-term mortgage, which settled (in 1948) on the familiar thirty-year period.[476] Eventually, the mortgage markets evolved "a [broad] . . . menu of choices."[477] Presidents sought to make those choices broadly available. For example, Clinton's efforts to promote homeownership appeared "laudable," with minorities "especially benefiting from [his administration's] policy."[478] During Clinton's two terms, "mortgage lending increased by 98 percent for African American homebuyers and by 125 percent for Hispanic homebuyers[,] . . . a positive step toward closing the wealth gap between whites and other

473. *See* Juliet Eilperin & Steven Mufson, *Obama Administration Rejects Keystone XL Pipeline*, WASH. POST, Jan. 18, 2012, http:// www.washingtonpost.com/national/health-science/obama-administration-to-reject-keystone-pipeline/2012/01/18/gIQAPuPF8P_story.html.

474. The administration recently delayed consideration of the project, citing an adverse state court ruling, which underscores the political controversies transnational projects can create. *See* David Lauter & Lisa Mascaro, *Obama Administration Delays Decision on Keystone XL Pipeline*, L.A. TIMES, Apr. 18, 2014, http://www.latimes.com/nation/politics/politicsnow/la-pn-obama-administration-keystone-xl-pipeline-delay-20140418,0,6905254.story#ixzz30b8Aob5r.

475. *See* Parker, *supra* note 468, at 259.

476. *See* Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSP. 93, 95–96 (2005).

477. *Id.* at 112.

478. John J. Ammann, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 314 (2000).

groups."[479] By executive order, President Clinton directed HUD and the U.S. Treasury "to streamline the mortgage lending process in Indian country," an important example of "promising development[s] . . . to foster lending for Indian homeownership."[480]

Fast forward to today and these apparent successes seem disastrous to some. Commentators have argued that federal affordable housing policies—including implementation of the Community Reinvestment Act of 1977 (CRA) and HUD's goal setting for the GSEs—inflated the housing bubble.[481] Some seem to suggest presidentialism in federal mortgage regulation caused the Great Recession.[482] On that view, Clinton and Bush II substituted politics for expertise in a mad dash to make everyone a homeowner, pushing the GSEs and the FHA to dive into subprime mortgages. Moreover, this critique of presidentialism might continue, for all the political fanfare, President Obama's actions have done little, if anything, to stabilize the housing markets.[483]

We can tell, then, two very different stories about presidential governance and the law of mortgages. One indicts the presidency for pandering to the politics of homeownership and contributing to a global financial crisis. The other takes a longer view and suggests that "the public option" in housing finance "is a well-pedigreed regulatory mode that has historically been associated with stable housing finance markets."[484]

This Article does not resolve that debate. In my view, the evidence suggests presidentialism in property lawmaking did not cause the Great Recession—at least, not any more than congressional government, bureaucratic self-control, and problems in the market for private-label, mortgage-backed securities.[485] And yet presidential power remains a hard case.

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479. Gilmore et al., *supra* note 233, at 267.

480. Yair Listokin, *Confronting the Barriers to Native American Homeownership on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 URB. LAW. 433, 466 (2001).

481. *See, e.g.*, FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 444 (2011) (a dissenting statement).

482. *See, e.g.*, Sheldon Richman, *Clinton's Legacy: The Financial and Housing Meltdown*, REASON, Oct. 14, 2012, http://reason.com/archives/2012/10/14/clintons-legacy-the-financial-and-housin (arguing that Clinton and HUD Secretary Andrew Cuomo's goal setting for GSEs led to the financial crisis).

483. *See, e.g.*, Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727 (2010).

484. Levitin & Wachter, *supra* note 245, at 1111–12.

485. *See, e.g.*, Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1181 (2012) (arguing that the housing bubble was

The need for careful institutional design springs from the politics of homeownership. Promoting homeownership has long been good presidential politics, as well as congressional politics, and state politics too.[486] To my mind, that counsels in favor of some separation between elected officials and the bureaucrats responsible for the details of national mortgage regulation. It counsels for something like the CFPB, an "independent bureau" within the Federal Reserve that has power over the regulation of mortgage origination and mortgage insurance.[487] It may well also counsel in favor of replacing Fannie and Freddie with an institution subject to either greater expert or market discipline. Though the president is well situated to introduce a systemic perspective into property lawmaking, presidential government is subject to its own pathologies.

CONCLUSION

This Article has laid out a nuanced account of the ways in which presidents may shape the law of property. To strike the appropriate balance in institutional design, it is necessary to consider how the costs and benefits of presidential decision making vary based upon the tools and products of presidential property governance and the types of resources and contexts of ownership. This Article's account of presidentialism in property lawmaking yields some surprising insights into practical problems of institutional design that range from cutting edge property disputes in cyberspace to controversies over the siting of energy transmission facilities. Property in everything from land to culture to water to wavelengths is not a matter for the courts alone, the courts and the legislatures, or even all the branches of the fifty state governments. Our theories of property should reflect that fact.

Thinking about the unfamiliar category of presidentialism in property lawmaking pushes us in that direction. But an account of the federal law of property cannot stop with the president. The federal law of property ranges more widely, to include statutes and judicial doctrines

"multicausal" and emphasizing "excessive supply of housing finance"). The "timing of the bubble," which postdated the CRA's origins in 1977 and its amendment in 1995, as well as the fact that "few subprime loans even qualified for CRA credit," cut against the causal claim regarding the statute. *Id.* at 1215–17. The GSEs may have contributed to the crisis, but there are good reasons to think "their contribution may have been due to factors other than the affordable-housing goals, most notably competition with [private label securities], attempts to maximize short-term executive compensation, and an attempt to recapitalize themselves following losses" in the early 2000s. *Id.* at 1221.

486. Eamonn K. Moran, *Wall Street Meets Main Street*, 13 N.C. BANKING INST. 5, 25–30 (2009).

487. 12 U.S.C. § 5491(a) (2012).

that shape property in land, water, and intangible resources. But that is a story for another day.