

SMALL TRACT OWNERS AND SHALE GAS DRILLING IN TEXAS:
SANCTITY OF PROPERTY, HOLDOUT POWER OR
COMPULSORY POOLING?

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ABSTRACT

In some sense, oil and gas law in Texas simultaneously strips small mineral owners of their property freedom while affording protection from uncompensated drainage. In another sense, owners of small mineral interests are left at the mercy of oil and gas producers who can drain their resources without compensation. This article proposes the resolution of these conflicts pertaining to property protection and rights evisceration by arguing that in the midst of imperfect options, small tract owners are better off with a strong compulsory pooling regime that further diminishes their property freedom but assures greater protection from loss of their oil and gas deposits. In essence, the loss of a measure of property rights would translate to a gain of actual property.

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INTRODUCTION

Traditional ownership rules are facing friction with technological advances in the oil and gas industry. Modern technology allows exploration companies to access valuable information about oil, gas and mineral deposits without the mineral owner's permission and incur no liability for trespass, so long as there was no physical entry upon the subject land.¹ Hydraulic fracturing and horizontal drilling in shale reservoirs raise concerns that resources beneath small tract owners will be drained without compensating the mineral owners.² Other occasions for concern exist. This article is primarily concerned with the property-rights-related impact of shale gas development, especially as it pertains to small mineral owners. Texas, the nation's leading oil and gas producing state, presents a fitting illustration of this conundrum. Under the Texas Mineral Interest Protection Act (MIPA), a gas (or oil) operator can apply to the Texas Railroad Commission (RRC) to bring adjoining landowners into a pool for joint exploration and

¹ *Villarreal v. Grant Geophysical*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied) (declining invitation to eliminate the physical entry requirement for trespass and stating that “[a]lthough it appears that Texas law regarding geophysical trespass has not kept pace with technology, as an intermediate court we must follow established precedent”); Davis Mosmeyer, Comment, *Ubi Jus Ibi Remedium: The Gap in Texas Courts' Protection of Mineral Owners Against Unpermitted Seismic Exploration Without Physical Entry*, 68 BAYLOR L. REV. 797, 808 (2016).

² For ample illustration of this challenge in the case of hydraulic fracturing, see generally *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008); see also Caleb A. Fielder, *I Drink Your Milkshake: The Status of Hydraulic Fracture Stimulation in the Wake of Coastal v. Garza*, 46 ROCKY MTN. MIN. L. INST. 17, 23–24 (2009); Aaron Stemplewicz, *The Known “Unknowns” of Hydraulic Fracturing: A Case for a Traditional Subsurface Trespass Regime in Pennsylvania*, 13 DUQ. BUS. L.J. 219, 236 (2011) (discussing the possibility that operators can use hydraulically fractured wells to capture minerals, without compensation, from the lands of small property owners who did not lease or pool with the operator).

development.³ Prior to RRC interpretation of *Finley*, observers and stakeholders widely believed that MIPA did not give oil and gas operators the right to apply for forced pooling.⁴ Instead, they thought that the statute simply permitted small mineral interest owners to “muscle” or force themselves into a pool, when desirable.⁵ Many other oil and gas producing states have similar or stricter compulsory pooling statutes that accomplish the same result against mineral owners that own small tracts.⁶ Mineral owners frown upon these statutes as a form of private eminent domain. While *Finley* broadened the understanding of MIPA’s reach, successful MIPA actions are extremely rare.

The second, and more worrisome, legal provision that works against small tract owners in Texas is Rule 37, or more precisely, the RRC unfairly granting exceptions under Rule 37.⁷ Rule 37 acts to protect the correlative rights of adjoining mineral interest owners. Under special field wide rules for the Barnett Shale promulgated under Rule 37, a gas well bore has to be drilled at least 330 feet from lease lines of adjoining property.⁸ Under Rule 37, on the application of a drilling party, the RRC can make an exception, shortening the distance and allowing the drilling party to move the bore closer to the neighboring, unleased land.⁹ A Rule 37 exception could allow the producer to drain from beneath the adjacent property, leaving the adjacent mineral

³TEX. NAT. RES. CODE ANN. § 102 (West 2011).

⁴Tex. R.R. Comm’n, *Application of Finley Resources, Inc., for the Formation of a Unit Pursuant to the Mineral Interest Pooling Act for the Proposed East Side Unit, Newark, East (Barnett Shale) Field, Tarrant County, Texas*, Docket No. 09-0252373, 1 (Oil & Gas Div. Aug. 25, 2008) (final order granting application) [hereinafter *Finley*].

⁵The history of the statute supports this understanding. MIPA was enacted to cater to the interests of small tract owners who would find it unprofitable to develop their tracts and with whom big energy companies would not want to pool, knowing that they can conveniently drain the oil underneath their tracts. MIPA provided a system to enable pooling where there is no voluntary agreement to pool. See Sharon O. Flanery & Ryan J. Morgan, *Overview of Pooling and Unitization Affecting Appalachian Shale Development*, 32 ENERGY & MIN. L. INST. 13, § 13.02 (2011).

⁶See, e.g., JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 715 (6th ed. 2013) (comparing Texas’s compulsory pooling statute—MIPA—with similar or more stringent statutes in other states).

⁷16 TEX. ADMIN. CODE § 3.37 (2011) (Tex. R.R. Comm’n, Statewide Spacing Rule).

⁸*Field Rules for the Newark, East (Barnett Shale)*, Field Number 65280200, Tex. R.R. Comm’n., <http://webapps.rrc.state.tx.us/DP/fieldSelectAction.do> (select “Matching this Number Exactly” button; type “65280200” into field and click “Search” button; select “65280200 09 NEWARK, EAST (BARNETT SHALE)” and select “View Field Rules” button) (last visited April 7, 2018).

⁹16 TEX. ADMIN. CODE § 3.37 (2011) (Tex. R.R. Comm’n, Statewide Spacing Rule).

owner without compensation.¹⁰ Protesting landowners have a right to a hearing before the RRC grants an exception, but if there is no protest, the agency can make the order without a hearing.¹¹ Experience suggests that individuals who own quarter-acre lots and below may not be interested in going to the state capital to fight. Landowners generally view eminent domain with disfavor. The outcome under Rule 37 is worse for the adjoining mineral owner, because unlike Rule 37 exceptions, eminent domain compensates property owners who are deprived of their property rights.

Unfairly granting Rule 37 exceptions also creates problems that go beyond an individual landowner's interest. Developers effectively drill around the unleased units, resulting in subsurface waste, as some of the natural gas remains underground.¹² The state experiences revenue loss from the taxes that would have been levied on production, while the society suffers from reduced supply of gas which can push energy prices higher.

In April 2013, I conducted a focus group of residential property owners in the Dallas-Fort Worth-Arlington area who were targeted for gas drilling underneath their homes. This area had recorded a sharp increase in urban drilling.¹³ Participants, numbering about twelve men and women, decried energy developers' interference with their property freedom and their ability to holdout when negotiations are orchestrated. After examining applicable legal provisions and hearing the concerns of the focus group participants, it is apparent that the *Finley* interpretation of MIPA and unfair granting of exceptions to spacing rules do interfere with the property freedom of small tract owners.¹⁴ They also encroach on their power to holdout for better deals or more desirable outcomes. The negative impacts of drilling emanating from spacing exceptions and the *Finley* decision may be quite small compared to the amount of drilling overall in the state of Texas. Yet, for affected small

¹⁰Mike Lee, *Rules on Natural Gas Drilling Haven't Caught up With Today's Reality*, *Experts Say*, FORT WORTH STAR-TELEGRAM, Apr. 22, 2010, at B.

¹¹*Id.*

¹²*Id.*

¹³BRYAN D. MEREDITH, REGULATORY TAKINGS OF MINERAL INTERESTS AND THE "PARCEL AS A WHOLE", § 1.01 [1] (n.d.) ("In Tarrant County alone, a county with almost 1.7 million in estimated population, the number of gas wells has quadrupled in recent years, reaching 1,176 as of February, 2008.") (citation omitted); Pilita Clark, *FT Series: Fightback Against the Frack Attack*, FIN. TIMES, April 24, 2012, at 7 ("The number of horizontally drilled wells producing gas in Texas's Barnett Shale alone, the most developed U.S. shale area, jumped from fewer than 400 in 2004 to more than 10,000 in 2010 . . .").

¹⁴Focus Group Transcript (Apr. 2013) (on file with the author).

tract owners, it is quite substantial since it may involve 100 percent of their most important asset: their residence and the underlying minerals. These owners need a legal regime that is responsive to their needs and affords greater recognition to their property interests. Ironically, this article argues, the path to protecting small tract owners' property interests lies in an approach that they do not readily embrace: pure compulsory pooling. With forced pooling, small tract owners lose their holdout power but gain protection from uncompensated drainage under the cover of law. This outcome is likely to be more economically beneficial to the small tract owners, while also presenting appreciable energy and environmental benefits to the society.¹⁵

This article is organized as follows. Part I discusses the conflict between shale gas development and property rights. Through MIPA and Rule 37, mineral owners with natural gas under their land also found out they were powerless to influence development decisions. Parts II and III concentrate on the complaints of small tract owners in Texas, who participated in a focus group meeting organized as part of the present research project. Part II examines the notion of sanctity of property and small tract holders' complaint about its breach, while Part III focuses on holdout power and how it fares under urban shale gas drilling. Part IV argues for enacting strong compulsory pooling legislation in Texas as a vehicle for property protection, energy conservation, and environmental protection. Part IV is the conclusion. With the recent rebound in fracking activities, following a slow down due to lower oil and gas prices in the past few years, one can hardly overstate the need for these reforms.¹⁶

¹⁵See James E. McDaniel, *Statutory Pooling and Unitization in West Virginia: The Case for Protecting Private Landowners*, 118 W. VA. L. REV. 439, 465–67 (2015) (discussing the benefits of compulsory pooling to mineral owners).

¹⁶I should note that arguments about private property rights, holdout power, and compulsory pooling are not the only relief small tract owners have—common law property torts like trespass are also an option. The mineral owner should thus be comforted by the remedy that the trespass option may offer. It is one thing to say that an oil company may forcefully pool the small tract owner's mineral estate into its unit to meet a minimum regulatory acreage threshold. It is another matter entirely to state that by force pooling the small tract owner, the oil company is now entitled to put a rig on the owner's backyard or drill a wellbore into the owner's mineral estate.

I. CONFLICT WITH SMALL MINERAL OWNERSHIP

The shale revolution has orchestrated the development of large quantities of hitherto inaccessible deposits of oil and gas in shale rock formations.¹⁷ Undoubtedly, this revolution has brought tangible benefits to mineral owners, energy companies, energy consumers and various levels of government.¹⁸ At the state level, the shale boom has positively affected economic growth.¹⁹ There has also been a remarkable improvement in the economic fortunes of royalty owners across the country.²⁰ The natural gas boom has even spurred the emergence of “niche spinoff companies that look for lease heirs who don’t even know they’re owed money.”²¹ The benefits extend beyond gains made by small tract owners.²²

Nevertheless, the shale revolution has arrived with noticeable challenges.²³ One of the consequences that has accompanied the shale

¹⁷Francesco Gracvea & Peter Zeniewski, *Exploring the Uncertainty Around Potential Shale Gas Development—A Global Energy System Analysis Based on TIAM (TIMES Integrated Assessment Model)*, 57 ENERGY 443, 443–49 (2013); Christophe McGlade et al., *Methods of Estimating Shale Gas Resources—Comparison, Evaluation and Implications*, 59 ENERGY 116, 116 (2013) (discussing shale gas production’s present and projected impact on American and global gas markets); Meghan L. O’Sullivan, *How Trump Can Harness the U.S. Energy Boom*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/opinion/trump-energy-boom.html?rref=collection%2Fsectioncollection%2Fopinion>.

¹⁸See, e.g., Alex Hannaford, *Nordheim Inherits the Waste, and Few of the Profits, From the South Texas Oil Boom*, TEXAS OBSERVER (Nov. 6, 2014), <https://www.texasobserver.org/nordheim-fracking-waste-pits/> (describing the economic boom experienced by small towns situated over the Eagle Ford Shale in Texas).

¹⁹*Id.*

²⁰Kevin Begos, *Pennsylvania Fracking Royalties Could Top \$1 Billion as Private Landowners Rake in Cash*, ASSOCIATED PRESS (Jan. 28, 2013), <http://www.businessinsider.com/fracking-royalty-payments-in-pa-2013-1>.

²¹*Id.*

²²A catalog of the benefits of fracking includes an improvement in GDP and balance of payments numbers; rise in employment; increase in tax revenues; billions of dollars in cost savings to consumers annually; reviving of U.S. manufacturing, especially the petrochemicals industry that is heavily dependent on natural gas; energy security stemming from less dependence on energy imports from unfriendly and unstable zones; and the environmental benefit from the fact that natural gas is a cleaner-burning fuel than coal, whose use has resulted in the reduction of U.S. greenhouse gas emissions. John M. Golden & Hannah J. Wiseman, *The Fracking Revolution: Shale Gas as a Case Study in Innovation Policy*, 64 EMORY L.J. 955, 966–67 (2015).

²³See Hannaford, *supra* note 18 (referencing the increase in traffic, crime and other social changes that have accompanied the shale oil boom in some Texas towns around the Eagle Ford Shale play).

revolution is the conflict between energy developers and homeowners in communities hosting oil and gas operations.²⁴ The legal regime in Texas diminishes small tract owners' power to make decisions regarding resource development and facilitates capturing small tract owners' resources without compensation. Section A below deals with the current Texas compulsory pooling regime as interpreted by *Finley* and its impact on decision-making power of property owners. Section B focuses on waste of oil and gas through exceptions to spacing regulations.

A. *Powerlessness Through Compulsory Pooling*

Imagine the scenario described below.

You and your family own and live in a house in Arlington, Texas, just outside of Dallas. One day, a landman or an oil

²⁴There are many social, economic, political, and geopolitical consequences of shale gas development in the United States and abroad, but they are outside the scope of this article. The article focuses on one major consequence: the impact of fracking on property interests of small mineral owners, especially in urban and suburban areas. On some of the domestic and international consequences, see Jinsok Sung, *The Impact of US LNG Exports and the Prospects for Price-Competitiveness in the East Asian Market*, 10 J. W. ENERGY L. & BUS. 316, 316 (2017) ("The shale revolution in the USA has greatly affected international LNG market participants for dramatically different reasons."); Clifford Krauss, *Boom in American Liquefied Natural Gas Is Shaking up the Energy World*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/business/energy-environment/liquified-natural-gas-world-markets.html?ref=collection%2Fsectioncollection%2Fbusiness-energy-environment&action=click&contentCollection=energy-environment®ion=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=sectionfront&r=0.

A shale gas drilling boom over the last decade has propelled the United States from energy importer to exporter, taking the country a giant leap toward the goal of energy independence declared by presidents for half a century. Now the upheaval of the domestic energy sector is going global. A swell of gas in liquefied form shipped from Texas and Louisiana is descending on global markets, producing a broader glut and lower energy prices. The United States was supposed to be a big L.N.G. importer, not a world class exporter. The frenzy of drilling in shale gas fields across the country changed that over the last decade, creating a glut far larger than domestic demand could possibly consume. Companies that spent billions of dollars to build import platforms suddenly had useless facilities until they spent billions more to convert them for export. The switch will remake the global gas market for decades to come. Energy experts are predicting that the transformation will weaken Russia's dominance over European power markets, help clean the air in cities across China and India by replacing the burning of coal and eventually provide cheaper and cleaner fuel to African villages.

Krauss, *supra* note 24.

and gas company representative sends you a letter offering to give you 15% to 20% of production if you enter into a pooling agreement with ABC oil company. Assuming you have no oil and gas background, how do you respond? Most homeowners would ignore the letter and move on, but this would result in a pooling order from the Texas RRC. Even if you attempt to negotiate for a higher percentage or more favorable terms, the offer is likely “reasonable” and would result in a pooling order from the RRC.

Shale booms in urban areas have put small mineral interest owners in a difficult situation. In most oil and gas producing states, small mineral owners are forced into a pool with other owners to carry out oil and gas production.²⁵ This practice, known as compulsory pooling, has been legislatively recognized in cities and states in the United States for almost a century.²⁶ Compulsory pooling statutes provide that “at the request of an interested party, a conservation agency *may*, or under many acts *must*, issue an order pooling tracts and interests within a spacing unit. The pooling order may be issued even though some interest owners are opposed to pooling.”²⁷

Typically, any owner within a designated spacing unit may demand forced pooling.²⁸ The coerced party has a choice of (1) participating and paying costs; (2) leasing on terms established by the state conservation agency; or (3) being “carried” by the other owners until payout plus a “penalty” is recovered.²⁹ While opposing interest owners may feel that their

²⁵ Marie C. Baca, *Forced Pooling: When Landowners Can't Say No to Drilling*, PRO PUBLICA (May 18, 2011), <https://www.propublica.org/article/forced-pooling-when-landowners-cant-say-no-to-drilling>.

²⁶ LOWE ET AL., *supra* note 6, at 715 & n.77 (stating that while city ordinances on compulsory pooling existed in some cities in Texas, Kansas and other states, Oklahoma and New Mexico were the first states to enact statewide compulsory pooling statutes in 1935); *see also* Flanery & Morgan, *supra* note 5 (“The practice of statutory pooling dates back to 1920s municipal zoning ordinances designed to limit drilling within the boundaries of the locality, the first of which was enacted in Winfield, Kansas in 1927.” (citation omitted)).

²⁷ LOWE ET AL., *supra* note 6, at 715–16 (citation omitted) (emphasis in original).

²⁸ *Id.*

²⁹ *See generally* Bruce M. Kramer, *Compulsory Pooling & Unitization: State Options in Dealing With Uncooperative Owners*, 7 J. ENERGY L. & POL'Y 255 (1986) (discussing approaches by various states to compulsory pooling and options offered mineral owners forced into a pool) [hereinafter Kramer, *Compulsory Pooling*]; *see also* Baca, *supra* note 25.

property rights are being infringed upon, “[t]he constitutionality of compulsory pooling acts has been upheld as a proper exercise of the police power of a state.”³⁰ Some scholars have made the apt observation that “[w]hile forced pooling laws, and spacing requirements before them, have been in effect in most states since the 1930s to 1940s, the recent escalation of high-volume hydraulic fracturing operations for shale oil and gas extraction has reemphasized these laws’ importance.”³¹

While many landowners do not wish to develop the resources below their land, most oil and gas producing states do not allow them to refuse a pooling offer.³² Small tract mineral owners in Texas were in a different boat. Prior to *Finley*, small tract mineral owners could force or “muscle” themselves into a (pooled) tract, if they so desired. Large tract owners or oil and gas operators could not force small tract owners to pool.³³ This situation conferred enormous power on small tract owners, who could explore a range of options before making a final decision.³⁴ In the process, they could land better deals with developers, who had limited bargaining power.³⁵ All of these circumstances changed in 2008 when the Texas Railroad Commission issued an order that owners of small tracts could be forced into a pool for oil and gas development.³⁶ While this interpretation by the RRC was contrary to expectations and precedent, it is consistent with the plain text of the statute.

If the board approves the driller’s petition, holdout landowners typically have three choices: contribute to the cost of the well and share profits from the sale of the gas; don’t pay for the well and share the gas profits after a “risk aversion” penalty is subtracted, or receive a state-mandated minimum royalty payment. Landowners who choose none of these options are automatically enrolled in the last plan. Opting out is not a possibility.

Baca, *supra* note 25.

³⁰LOWE ET AL., *supra* note 6, at 716 n.80.

³¹Frank Sylvester & Robert W. Malmsheimer, *Oil and Gas Spacing and Forced Pooling Requirements: How States Balance Energy Development and Landowner Rights*, 40 U. DAYTON L. REV. 47, 53 (2015) (citation omitted).

³²Russell Bopp, *A Wolf in Sheep’s Clothing: Pennsylvania’s Oil and Gas Lease Act and the Constitutionality of Forced Pooling*, 52 DUQ. L. REV. 439, 446 (2014) (“Practically speaking, forced pooling disregards landowners’ property rights and requires unwilling landowners to allow natural gas development on their properties.” (citation omitted)).

³³Ronnie Blackwell, *Forced Pooling Within the Barnett Shale: How Should the Texas Mineral Interest Pooling Act Apply to Units with Horizontal Wells?*, 17 TEX. WESLEYAN L. REV. 1, 10–11 (2010).

³⁴LOWE ET AL., *supra* note 6, at 714.

³⁵*Id.*

³⁶*Finley*, *supra* note 4.

The *Finley* order sent shock waves across the state, if not the nation, as stakeholders started assessing the implications of this shift in bargaining power.³⁷ Now, forced pooling in Texas is no longer within the sole purview of a small mineral owner but can also serve as additional leverage by oil and gas companies with leases covering large swaths of neighboring tracts.³⁸ For oil and gas companies, forced pooling has helped in addressing a serious challenge of extracting shale gas deposits in urban and suburban settings that include many owners of small lots.³⁹

B. Resource Loss Through Spacing Exceptions

Conservation regulations in various states impose spacing requirements for drilling oil and gas wells.⁴⁰ These requirements vary from state to state in terms of specific numbers.⁴¹ The overall purpose is the same, which is to ensure that wells are located in such a way as to maximize natural resource recovery, minimize physical and economic waste and protect correlative rights of neighboring mineral owners.⁴²

In Texas, the well spacing requirements may be relaxed to allow mineral owners who do not own sufficient acreage to meet the spacing regulations to receive a permit to drill a well on their property.⁴³ Thus, while Texas's Rule 37 requires an oil or gas well to be placed at a distance of 467 feet from a property line and 1,200 feet from another well in the tract, the regulatory

³⁷H. Philip Whitworth & Olga Kobzar, *Regulatory Update: Recent Developments at the Railroad Commission and General Land Office*, Paper presented at the 2012 Oil, Gas and Mineral Law Institute, Houston 13–14 (Mar. 30, 2012).

³⁸*Id.*

³⁹See *LOWE ET AL.*, *supra* note 6, at 714.

Horizontal drilling in urban and suburban areas has presented other problems under the MIPA. Some of the areas where horizontal drilling is taking place underlie urban and suburban developments with hundreds of small lots. Operators are thus occasionally confronted with a situation where one or more owners of small lots that lie directly in the path of a proposed horizontal well refuse to execute a lease or authorize pooling.

Id.

⁴⁰See, e.g., TEX. NAT. RES. CODE ANN. §§ 85.045, 86.011 (West 2011).

⁴¹See, e.g., OKLA. STAT. tit. 52, § 52-87.1 (2014); N.M. STAT. ANN. § 70-2-17 (2013).

⁴²Benjamin Holliday, *New Oil and Old Laws: Problems in Allocation of Production to Owners of Non-Participating Royalty Interests in the Era of Horizontal Drilling*, 44 ST. MARY'S L.J. 771, 784–85 (2013).

⁴³See Eric C. Camp, *Dealing With Missing Persons and Holdouts: Using Rule 37 and MIPA for Urban Gas Development*, DALL. BAR ASSN.-ENERGY LAW SECTION 5 (2011).

agency may grant an exception to ensure that oil and gas is not left underground, i.e. “wasted” or to prevent the confiscation of property.⁴⁴ Additionally, the RRC, recognizing that the 467 foot/1,200 foot spacing applicable to vertical wells was not appropriate for horizontal wells in shale fields, adopted special field rules for a number of the shale fields.⁴⁵ “One such rule, which recognizes the extremely low permeability of shale formations, reduces the required distance from the property line from 467 feet, which is the statewide rule, to 330 feet.”⁴⁶ Notwithstanding this reduction, an exception may be granted to those who seek to develop their shale gas but do not meet the 330 feet distance requirement to enable them recover natural gas under their tract.⁴⁷ The Rule 37 exception can be beneficial to small tract owners who have sufficient acreage to drill a productive well but insufficient to meet the state’s spacing requirements. Yet, oil and gas companies have employed this exception to drill a well near a small adjacent tract owner who has refused to lease to or pool with the company.⁴⁸

A cursory look at the legal regime suggests that the law places small mineral owners at a disadvantage relative to energy developers. This perception of disadvantage has served as a cannon fodder for conflicts between these two groups. As fracking has become more widespread, the tension has only escalated.⁴⁹ To find out how small tract owners really feel, I convened a focus group in Arlington, Texas, where residents were voicing out concerns about the impact of fracking in their area. I held the focus group session on April 5, 2013, in a local hotel meeting room, and about a dozen men and women attended.⁵⁰ In addition, during two separate trips, I met or spoke with city officials responsible for oil and gas matters in Dallas, Fort Worth, and Arlington. I also extensively analyzed applicable legal rules and compared them to small mineral owners’ complaints or concerns. The following parts deal with focus group participants’ two major concerns,

⁴⁴ See *LOWE ET AL.*, *supra* note 6, at 700 (“Under Rule 37, spacing exceptions may be granted to prevent waste or to prevent ‘confiscation’ of property.”).

⁴⁵ *Id.* at 665.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Lee*, *supra* note 10.

⁴⁹ Jamie Lavergne Bryan, *Municipal Drilling Regulation of Urban Drilling: How Far is Too Far?*, Institute for Energy Law, 61st Annual Oil and Gas Law Conference (February 1, 2010) (“With many of these shale formations reaching into the heart of urban areas, tensions are increasing and competing interests abound.”); *Clark*, *supra* note 13, at 7.

⁵⁰ Focus Group Transcript (Apr. 2013) (on file with the author).

namely encroaching on private property rights and diminishing holdout power.

II. SANCTITY OF PRIVATE PROPERTY

Sanctity of private property refers to the freedom or right enjoyed by property owners to do what they want with their property.⁵¹ Focus group participants complained bitterly about how the legal regime simultaneously empowered energy companies and disempowered mineral owners in the sense that these owners had little input into the decision-making process regarding the development of their natural resources. This complaint is expressed across the country.⁵² Section A outlines the complaint of the participants while Section B provides the relevant legal background and context. Section C provides a direct response to the complaint, taking into account the legal context and understanding of the issues.

A. *Mineral Owners' Complaint*

Focus group participants demonstrated characteristic passion for property freedom. They rejected the notion that others can easily decide for them what to do with their property. A participant, Huy Nguyen, whose parents migrated from Vietnam, was concerned that shale gas development and the rules facilitating it were giving the United States a character not dissimilar from the one in the country they fled:

[M]y background is a little different from everyone, so that's why my thinking is a little different. I was born after the Vietnam War in 1979. During that time, my grandparents were super rich and they were probably millionaires there. They started in the 60s with a little grocery store. Right after April 30 of 1975, the last day of the war, the next day she heard a knock on the door. "We need to borrow your properties for a meeting." So pretty much "everything is ours

⁵¹Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 499 (1987) ("Sanctity of private property means the right of an individual to the total ownership and benefits of property he owns so long as the process by which he attained the property was proper . . ."); see also Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 6 & n.19 (1995) (discussing philosophical underpinnings of the concept).

⁵²See *Baca*, *supra* note 25.

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now.” They lost everything overnight. That’s what happens when you live under communist rule. During that time, that’s why Vietnamese people are called boat people. They were making their own boats and said, “I’ll rather die at sea than live under this government.” It’s pretty much your property, but you have no say in it. They get to do whatever they want. That’s what my thinking was. I was going to go down there (state capital, Austin) and switch it back on them and say isn’t this Communism? Why don’t you just change your name to Communist Gas Drilling?⁵³

Like other participants in the focus group, this gentleman was concerned that he was being asked to lease his tract, over his strident objection, or risk having the natural gas under his land drained without compensation.

⁵³Focus Group Transcript (Apr. 2013) (on file with the author).

B. Legal Context

It is almost trite to mention that the concept of sanctity of private property is not of recent vintage.⁵⁴ Instead, it is a notion that enjoys a rich legal, social and political heritage.⁵⁵ It has been observed that “from the Middle Ages on,

⁵⁴ Kitty Calavita, *Blue Jeans, Rape, and the “De-Constitutive” Power of Law*, 35 LAW & SOC’Y REV. 89, 99–100 (2001) (“[A]lthough a wide range of new criminal laws in 18th-century England had a substantial material impact on the poor, and to a lesser extent on wealthy landowners and merchants, their less visible, but equally powerful, effect was to reinforce emerging notions about the sanctity of private property”); William J. Cohen, *Private Property and the Takings Issue: Enhancing the Position of Ecological Values in the Supreme Court’s Constitutional Calculus*, 28 J. ENVTL. L. & LITIG. 303, 328 (2013) (“As our society has developed from the earliest days of European exploration, through colonial settlement and finally to expansion from agricultural dependence to technological achievement, how we have used our land has been the direct result of a dominant value system that has maintained the sanctity of private property rights.”); Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 30 (1986) (contrasting “the classical liberal insistence on the sanctity of ownership, and the modern legal conception of property as a bundle of rights”); Lee A. Harris, “Reparations” as a Dirty Word: *The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 417–18 (2003) (stating that belief in the sanctity of private property “can be traced to early political-philosophical influences” (citation omitted)); William P. LaPiana, *Thoughts and Lives*, 39 N.Y.L. SCH. L. REV. 607, 627 (1994) (reviewing G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993) and GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994)) (discussing how sanctity of private property is viewed as an “eternal principle” for which any violation through legislation or majoritarian rule is virtually intolerable).

⁵⁵ See Jonathan L. Hafetz, *A Man’s Home Is His Castle: Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 180 n.23 (2001) (“So great moreover is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the community.” (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES 139)); Michael B. Kent, Jr., *From “Preferred Position” to “Poor Relation”: History, Wilkie v. Robbins, and the Status of Property Rights Under the Takings Clause*, 39 N.M.L. REV. 89, 98 (2009) (“[B]y the time of the Constitutional Convention, property rights had long held a central place in American legal and political thought, and this centrality was preserved by the American legal culture after ratification. Courts during the late eighteenth and early nineteenth centuries repeatedly demonstrated a general belief in the sanctity of private property, viewing it as directly related to the freedom and well-being of the people.” (citation omitted)); John T. Marshall, *The Property Rights Movement and Historic Preservation in Florida: The Impact of the Bert J. Harris, Jr. Private Property Protection Act*, 8 U. FLA. J.L. & PUB. POL’Y 283, 284 (1997) (“Private property rights go to the core of the common law tradition. Property rights are natural or fundamental rights and as such receive the highest protection under the law.” (citation omitted)); Wayne McCormack, *Lochner, Liberty, Property, and Human Rights*, 1 N.Y.U. J.L. & LIBERTY 432, 448 (2005) (reviewing earlier philosophical and judicial deference to sanctity of private property); Polly J. Price, *A Constitutional Significance for Precedent: Originalism, Stare Decisis, and Property Rights*, 5 AVE MARIA L. REV. 113, 119 (2007) (“Many judges imposed upon

the sanctity of private property was a fundamental principle of Western Europe's unwritten constitutions.⁵⁶ The U.S. Constitution protects the notion of sanctity of private property by placing strong impediments to the taking of private property by the government.⁵⁷ One commentator notes that some jurists and legal scholars view the sanctity of private property "as the most essential element of American culture."⁵⁸ Indeed, it is hardly a contestable observation that "in this society, we value our property almost as much as we value our liberty."⁵⁹

Sanctity of private property enjoys such a juridical pride of place that it is recognized and respected in both the domestic and international legal

themselves external limits on discretion to change law in property cases, and these limits are readily linked to Founding-era political rhetoric that emphasized the sanctity of private property.”).

⁵⁶O. Lee Reed, *What Is "Property"?*, 41 AM. BUS. L.J. 459, 475 n.46 (2004) (quoting RICHARD PIPES, *PROPERTY AND FREEDOM* 240 (1999)).

⁵⁷William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711–12 (1985); Keith M. Babcock, *Severance Damages*, SG059 ALI-ABA 175, 185 (2002) (“The constitutions of the United States and the various states embody the philosophies upon which this country was founded, and the sanctity of private property is one of the corner stones of this nation.”).

⁵⁸Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 332 (2000) (citation omitted).

⁵⁹Heather S. Ellis, “*Strengthen the Things That Remain: The Sanist Will*,” 22 N.Y.L. SCH. J. INT’L & COMP. L. 195, 195 (2003) (citation omitted); Brian Logan Beirne, *George vs. George vs. George: Commander-in-Chief Power*, 26 YALE L. & POL’Y REV. 265, 303 (2007) (“Even with his Continental Army starving, [George] Washington was still unwilling to compromise his principles regarding the sanctity of private property. Only under very specific circumstances, and providing adequate restitution (echoed in the Takings Clause) would Washington confiscate supplies for the good of the nation.”); Mark Fenster, “*A Remedy on Paper*”: *The Role of Law in the Failure of City Planning in New Haven, 1907-1913*, 107 YALE L.J. 1093, 1097–98 (1998); Cambra E. Stern, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 853 (2004) (observing that Americans believe strongly in the sanctity of private property). *But see* Lynda J. Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. ENVTL. AFF. L. REV. 243, 279 (2012) (noting that contrary to the statement of James Madison that “[g]overnment is instituted no less for the protection of the property, than of the persons of individuals,” the Supreme Court and other courts over the years have adopted a “curiously weak” stance regarding property rights).

systems.⁶⁰ While its acceptance is not universal,⁶¹ sanctity of property is held sacred across cultures,⁶² cutting across various strata of the society.⁶³ Both

⁶⁰ See, e.g., Daniel R. Cahoy, *Changing the Rules in the Middle of the Game: How the Prospective Application of Judicial Decisions Related to Intellectual Property Can Promote Economic Efficiency*, 41 AM. BUS. L.J. 1, 4 (2003) (stating that Western society “tends to view the sanctity of private property rights as a bedrock principle” (citation omitted)); L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property From Sovereignty in International Law*, 13 AM. U. INT’L L. REV. 263, 264 (1997) (“Private property has always enjoyed a unique sanctity under modern international law. Unlike other ‘human rights,’ which have received tentative and hesitant protection, both customary and conventional international practice have repeatedly asserted the sanctity of private property.”); Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation* 119, 28 BROOK. J. INT’L L. 871, 910–11 (2003) (discussing an international regulation protecting sanctity of private property); Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT’L L. 195, 286 & n.431 (2005) (referencing an international regulation that protects sanctity of private property) [hereinafter Fox, *Occupation*]; Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 WIS. INT’L L.J. 297, 339 (2002) (discussing sanctity of property under the colonial regime and the independent Constitution of Kenya); G. Nasieku Tarayia, *The Legal Perspectives of the Maasai Culture, Customs, and Traditions*, 21 ARIZ. J. INT’L & COMP. L. 183, 213 (2004) (stating that political party representatives from Kenya negotiating for independence accepted the sanctity of private property and included it in the Constitution in order to obtain a transfer of political power from the colonial leaders).

⁶¹ See Patricia McKinstry Robin, *The Bit Won’t Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. 931, 958 n.177 (1984) (“The world’s nations do not agree on basic issues concerning the sanctity of private property, the advantages of private enterprise, and foreign investors’ participation in the host country’s national economy.”); Peter M. Ward et al., *El Título En La Mano: The Impact of Titling Programs on Low-Income Housing in Texas Colonias*, 36 LAW & SOC. INQUIRY 1, 3 (2011) (stating that planners and public officials in some countries “are uneasy with plural or parallel (legal) systems and alternative property rights with which they are unfamiliar and that they feel threaten the sanctity of private property”). But see Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 840–41 (2011) (referencing the view that sanctity of property is a natural law principle, a part of God’s law, which mortal legislators are not empowered to change); Fox, *Occupation*, *supra* note 60, at 286 (noting that not all countries accord respect to the sanctity of private property).

⁶² Sean D. Clarkson, *Following the Curse of the Phantom Roads in Vermont*, 6 VT. J. ENVTL. L. 16, 20 (2004–2005) (“The right to be secure in one’s private property is one of the cornerstones of the Judeo/Christian/Islamic, Anglo-European, and American systems of law and of liberty.” (citation omitted)). But see Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution Part One*, 13 CARDOZO ARTS & ENT. L.J. 847, 866 & n.88 (1995) (discussing the Russian experience); Chris X. Lin, *A Quiet Revolution: An Overview of China’s Judicial Reform*, 4 ASIAN-PAC. L. & POL’Y J. 255, 315–16 (2003) (discussing economic reforms in China and recognition of private property); Tamir Moustafa, *Law Versus The State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883, 890 (2003) (discussing the reestablishment of sanctity of private property in Egypt); Jeanne M. Woods, *Rights as Slogans: A Theory of Human Rights Based on African Humanism*, 17 NAT’L BLACK L.J. 52, 58

the wealthy and the poor have good reason to embrace the concept.⁶⁴ Where the concept does not seem to exist, there is persistent clamor for its

(2003) (“The African Charter emphasizes the communal ownership and use of land, a basic right in traditional African society grounded in the social nature of the human condition, while arguably liberalism regards the sanctity of private property as the primary natural right often trumping life and liberty, as colonialism and slavery attest.” (citations omitted)).

⁶³Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307, 311–12 (1991) (lamenting “the nation’s sanctification of the rights of private property, which is rooted in the Due Process Clause of the Constitution” (citation omitted)); Erin Morrow, *The Environmental Front: Cultural Warfare in the West*, 25 J. LAND RESOURCES & ENVTL. L. 183, 185 (2005) (stating that ranchers in the Western part of the United States “are practical, pragmatic, utilitarian, and believe in the sanctity of private property”); John W. Ragsdale, Jr., *Possession: An Essay on Values Necessary for the Preservation of Wild Lands and Traditional Tribal Cultures*, 40 URB. LAW. 903, 905 (2008) (stating that “the private pursuit of growth and profit and the public genuflection toward the sanctity of private property and its use had complicated preservation”); see also James W. Ely, Jr., *American Legal History Revisited*, 65 VAND. L. REV. EN BANC 185, 190 (2012) (reviewing G. EDWARD WHITE, *LAW IN AMERICAN HISTORY, VOLUME 1: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR* (2012)); Alfred L. Brophy, *Book Review: Records of the Courts of Sussex County Delaware, 1677-1710* (2 Vols.), Craig W. Horle Ed., Philadelphia, Pennsylvania: University of Pennsylvania Press, 1991, 26 CUMB. L. REV. 145, 149 n.22 (1995–1996) (referencing the existence of sanctity of private property in English law since the eighth century); Stephen B. Presser, *Some Realism About Atheism: Responses to the Godless Constitution*, 1 TEX. REV. L. & POL. 87, 107 (1997) (reviewing ISAAC KRAMNICK AND R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1996)) (tracing the Christian roots of the notion of sanctity of private property); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 837 (1995) (suggesting that the Takings Clause was introduced to emphasize the importance of the sanctity of private property); Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, 50 WASH. & LEE L. REV. 1673, 1683 (1993) (“John Locke, who argued for the sanctity of private property, was a deeply religious thinker as well as one of the founders of modern psychology. These intellectual interests led him to a concern not only for the protection of the individual against government, but also for the moral and intellectual capacities of the individual.” (citation omitted)).

⁶⁴Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1423 (2006) (discussing how disregard of private property rights could lead to redistribution of wealth from the poor to the rich); Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City Of New London, Babbitt v. Sweet Home, and Other Tales From the Supreme Court*, 75 U. CIN. L. REV. 663, 668–69 (2006); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R. C.L. L. REV. 295, 304 n.20 (1988) (noting how the elite elevated the rights of private property to a sacred status to protect the rich from the redistributive inclinations of the majority); Chester R. Ostrowski, *A “Blighted Area” of the Law: Why Eminent Domain Legislation Is Still Necessary in New Jersey After Gallenthin*, 39 SETON HALL L. REV. 225, 238 (2009) (noting that Republicans base their view that the use of eminent domain should be restricted on sanctity of private property rights while Democrats also want eminent domain restrictions because a good portion of the properties affected are likely to be owned by the poor and

introduction or recognition,⁶⁵ although it should be noted that its continued existence has also been challenged in some places.⁶⁶

A number of explanations serve as rationales for upholding the sanctity of private property: “Several ideas underpin the traditional sanctity of private property and retain their vitality at this time: expectations, stability, fairness, and liberty.”⁶⁷ Indeed, there are discernible benefits from duly recognizing private property rights.⁶⁸ Some people view “sanctity of private property as

the elderly); Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. U. L. REV. 106, 113 n.21 (1989) (commenting on the view by some historians that while deep divisions exist in American society over many issues, there is a considerable level of agreement over a small number of issues, including the sanctity of private property); Stephanie Stern, *Protecting Property Through Politics: State Legislative Checks and Judicial Takings*, 97 MINN. L. REV. 2176, 2195 n.86 (2013) (stating that American “judges imbibe the sanctity of private property by cultural and moral beliefs and may be more likely to endorse private property protection and stability of property rights because they are typically upper-income property owners themselves”).

⁶⁵Brice M. Clagett, *The Controversy Over Title III of the Helms-Burton Act: Who Is Breaking International Law—the United States, or the States That Have Made Themselves Co-Conspirators With Cuba in its Unlawful Confiscations?*, 30 GEO. WASH. J. INT’L L. & ECON. 271, 297 n.87 (1996–1997) (“The fundamental principles behind the sanctity of private property, sanctity of contracts, and fair compensation when governments do exercise sovereign rights of eminent domain are principles that multinational investors the world over have been urging for decades.” (quoting Malcolm Wilkey, *Helms-Burton: Its Fundamental Basis, Validity, and Practical Effect*, INT’L L. NEWS, Spring 1997, at 1, 18)); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law”*, 101 MICH. L. REV. 2275, 2276 (2003) (discussing increased efforts by American and international institutions to advance legal reforms around the world, particularly in countries emerging from crisis and transitional societies; adding that The World Bank and multinational corporations support the reforms “since the sanctity of private property and the enforcement of contracts are critical to modern conceptions of the free market”) (citation omitted).

⁶⁶Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT’L L. 221, 282–84 (1994) (stating that “[t]he early post-independence constitutions of Latin America used the U.S. Bill of Rights and the French Declaration of the Rights of Man as models for the protection of individual liberties and private property; civil codes also emphasized freedom of contract and the sanctity of private property” but adding that code revisions occurred later that put restrictions on the use of private property (citation omitted)).

⁶⁷James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 ENVTL. L. 735, 755 (1993).

⁶⁸See William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 95–107 (1990) (providing a historical account of efforts to justify, protect and defend the sanctity of private property in the early years of the United States).

a matter of individual liberty.⁶⁹ Accordingly, the principle of sanctity of private property presents a limit on state power, preventing the government from encroaching into the life and liberty of the citizens.⁷⁰ Such an encroachment portends negative consequences for the citizens and the society, as citizens are made to order their lives at the mercy and control of the governing group.⁷¹ It has been noted that, from the perspective of the framers of the American Constitution, “[p]roperty was important for the exercise of liberty and liberty required the free exercise of property rights.”⁷² Without a doubt, sanctity of private property is pivotal to the establishment of a viable social and political order.⁷³ Accordingly, sanctity of private

⁶⁹Carl J. Circo, *Does Sustainability Require a New Theory of Property Rights?*, 58 U. KAN. L. REV. 91, 144 (2009).

⁷⁰John A. Chiappinelli, *The Right to a Clean and Safe Environment: A Case for a Constitutional Amendment Recognizing Public Rights in Common Resources*, 40 BUFF. L. REV. 567, 571 (1992) (“In particular, American suspicion of government power made Americans receptive to the writings of John Locke, who advocated the sanctity of private property as a defense against government encroachment.”); Clarkson, *supra* note 62, at 21–22 (“Several of the most respected of the Founding Fathers wrote that rights to ‘[p]roperty [must] be secured, or liberty cannot exist.’ The belief in the sanctity of private property rights spanned the breadth of the Founders’ political ideologies, from Hamilton, to Jefferson, and to Madison.” (citations omitted)); Christopher C. Faille, *Book Review: Property and Freedom, By Richard Pipes*, 46-OCT FED. LAW. 53, 54 (1999) (approving the thesis that the property sanctity “principle is a necessary, although not a sufficient, condition for the preservation of limits on the power of the state”); Glen E. Summers, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 858 (1993) (stating that sanctity of private property is considered important “to the security of liberty”) (citation omitted)). *But see* Richard J. Lazarus, *Debunking Environmental Feudalism: Promoting the Individual Through the Collective Pursuit of Environmental Quality*, 77 IOWA L. REV. 1739, 1744 (1992) (examining the argument that closely associates the loss of sanctity of private property “with a reduction of individual autonomy and liberty”).

⁷¹JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 248 (1990) (focusing on the perspective of property serving as a limit on governmental authority); JAMES BOVARD, LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY 48 (1994); Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 154–55 (1999) (stating that the sanctity of private property and the freedom of contract constituted the pillars on which civil society rested under laissez-faire capitalism).

⁷²NEDELSKY, *supra* note 71, at 205.

⁷³*City of Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 18 (1908) (“Our social system rests largely upon the sanctity of private property; and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property

property “has been described as foundational to democracy.”⁷⁴ Democracy is said to function best where “citizens are both enlightened and independent.”⁷⁵ Property ownership or, more precisely, ownership of land, is key to self-reliance or individual independence.⁷⁶ Respect for private property rights is therefore crucial.⁷⁷ Some observers extend the argument to state that the government exists primarily to protect the sanctity of private property.⁷⁸ If individuals are allowed to violate the private property rights of others, with government endorsement or acquiescence, chaos will likely result.⁷⁹ Recognition of sanctity of private property rights, thus, obviates a breakdown of order in the society.⁸⁰ Sanctity of private property provides a moral and

its just reward, thus unsettling values and destroying confidence.”); Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 738 (1999); Rome G. Brown, *The Water-Power Problem in the United States With Particular Reference to the Causes of the Present Stagnation of Water-Power Development in that Country*, 24 YALE L.J. 12, 22 (1914); Hon. Thomas E. Martin, Jr., *Citing Magna Carta—the Validity of the Great Charter in Pennsylvania Today*, 86 PA. B.A. Q. 105, 107–08 (2015); BOVARD, *supra* note 71, at 30–31.

⁷⁴Celeste Pagano, *DIY Urbanism: Property and Process in Grassroots City Building*, 97 MARQ. L. REV. 335, 377 (2013) (citation omitted).

⁷⁵Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 537 (2001).

⁷⁶*Id.* at 537–38 (referencing the views of Thomas Jefferson and W.E.B. Du Bois).

⁷⁷See Matthew Murphy, *Property Rights and the Democratization Process—Sharing the Wealth—Fundamental Legal Foundations in Nation Building and United States Foreign Policy—Haiti and Nicaragua*, 22 SUFFOLK TRANSNAT’L L. REV. 163, 166 n.16 (1998) (“In the United States, the protection of private property reflected the goal, and substantively stood for, the restraint of the government’s power over its citizens. . . . The sanctity of private property served as a litmus test for the rights of the people from an overbearing government.”); Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 86 (1994) (“The constitution of a society of free men must preserve the vital private sectors as a counterpoise to tyranny.”).

⁷⁸HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 47–62 (2000); Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1621 (2008) (“John Locke argued famously that the state arose to protect property, and this vision of the supposed sanctity of private property has been influential in our legal culture from the outset.” (citation omitted)); Roy Hunt, *Property Rights and Wrongs: Historic Preservation and Florida’s 1995 Private Property Rights Protection Act*, 48 FLA. L. REV. 709, 710 (1996).

⁷⁹Pagano, *supra* note 74, at 377 (“Guerilla urbanism, to the extent it disregards legal processes, might appear a dangerous form of anarchy, the first step on a slippery slope to people erecting homes on the front lawns of their vacationing neighbors.”).

⁸⁰*Id.*

philosophical basis for laws against theft, fraud and highway robbery, among others.⁸¹ The moral foundation of the sanctity of private property is given expression by such thinkers as Adam Smith, who reasoned that it is only moral for an individual to keep the product of his labor without other people or the state forcing him to surrender it.⁸²

Respect for private property by the government and the legal system is considered a fundamental facilitator of economic development.⁸³ In other words, security of property is crucial to economic advancement.⁸⁴ In the absence of strong respect for private property rights, titles are not assured, and people may not feel the environment is sufficiently safe for investment and growth in productivity.⁸⁵ When people know that legitimately acquired property will not be taken away from them, nor the enjoyment of it unduly constrained, they will be more motivated to be industrious.⁸⁶ Countries that protect property rights are better positioned to experience remarkable economic growth, while deceleration of economic growth is likely to be

⁸¹Intisar A. Rabb, *The Islamic Rule of Lenity: Judicial Discretion And Legal Canons*, 44 VAND. J. TRANSNAT'L L. 1299, 1331 (2011) (stating that in medieval Arab societies "the laws against theft, fraud, highway robbery, and the like promoted the sanctity of private property" (citation omitted)).

⁸²Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119, 124 (1994).

⁸³A.W.B. Simpson, *Constitutionalizing the Right of Property: The U.S., England and Europe*, 31 U. HAW. L. REV. 1, 2 (2008) ("The wilder enthusiasts for the free market and for the economic analysis of law tend today to suppose that sanctity of private property, and freedom from government regulation, are fundamental to economic development.").

⁸⁴See Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 456 (1994) (analyzing the claim that a legal regime that includes sanctity of private property "encourages both investment-backed expectations and the expectations of those whose land lies idle because it protects all owners of property"); see also Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 338–39 (2001).

⁸⁵Donald J. Kochan, "Public Use" and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 87–88 (1998) ("In governmental condemnations for private use, the disruption in the sanctity of private property and the reductions in investment and productivity as a result of 'unsafe' title may outweigh the benefits obtained from the property's alternative use prompted by the transfer.").

⁸⁶See James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1026–27 (2000); Robert E. Freer, Jr., *The Significance of Restitution in the Economic Recovery of Cuba*, 4 U. MIAMI Y.B. INT'L L. 185, 188–89 (1996); Erik Nelson, *Two Stories of Taxation of Capital*, 16 LEWIS & CLARK L. REV. 1049, 1051 (2012); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2358 (1994) ("Property is seen as both a reward and incentive for productivity . . .").

present in countries that stifle property rights.⁸⁷ Indeed, sanctity of private property is a bedrock principle of the capitalist economic system.⁸⁸ As one commentator notes, sanctity of private property “reflects an underlying value of modern capitalist society.”⁸⁹ It should be noted, however, that not every serious thinker subscribes to this idea.⁹⁰ Moreover, sanctity of private property could constitute an impediment to economic development, particularly in those cases where owners of property are reluctant to surrender their property rights so that economically beneficial ventures may be accommodated in their area.⁹¹

⁸⁷ See Major Paul E. Welling, *Human Rights: The Measure of Success in Nontraditional War*, 32 WIS. INT'L L.J. 267, 293–94 (2014).

⁸⁸ Jared A. Goldstein, *The Tea Party's Constitution*, 88 DENV. U. L. REV. 559, 568 (2011); Jerrold A. Long, *Overcoming Neoliberal Hegemony in Community Development: Law, Planning, and Selected Lamarckism*, 44 URB. LAW. 345, 355–56 (2012); Christopher Osakwe, *Anatomy of the 1994 Civil Codes of Russia and Kazakhstan: A Biopsy of the Economic Constitutions of Two Post-Soviet Republics*, 73 NOTRE DAME L. REV. 1413, 1420 (1998) (discussing legal changes from socialism to capitalism in Russia and Kazakhstan after the collapse of the Soviet Union); Welling, *supra* note 87, at 293 (“Sanctity of private property and enforcements of contracts are critical to modern conceptions of the free market, as the protection of these human rights creates stable, favorable business climate with increased investment and market opportunities.” (citation omitted)).

⁸⁹ Neil Fox, *PATCO and the Courts: Public Sector Labor Law as Ideology*, 1985 U. ILL. L. REV. 245, 250 (1985) (citation omitted); see also Jerrold A. Long, *Waiting for Hohfeld: Property Rights, Property Privileges, and the Physical Consequences of Word Choice*, 48 GONZ. L. REV. 307, 322 (2012–13) (“Among the core neoliberal principles are the sanctity of private property and deregulation.” (citation omitted)).

⁹⁰ For a critical appraisal of the wealth-generating potential of respect for sanctity of private property, see Thomas W. Merrill, *Zero-Sum Madison*, 90 MICH. L. REV. 1392, 1400–02 (1992) (reviewing JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990)); see also Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462, 464–65 (1998); John G. Steinkamp, *A Case for Federal Transfer Taxation*, 55 ARK. L. REV. 1, 77–82 (2002).

⁹¹ See, e.g., Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 121–22 (2008) (discussing how sanctity of private property posed an obstacle to agrarian reforms in Latin America that sought to redistribute unproductive lands to landless people); Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1789-1860*, 40 U. CHI. L. REV. 248, 270 (1973) (“The various acts to encourage the construction of mills offer some of the earliest illustrations of American willingness to sacrifice the sanctity of private property in the interest of promoting economic development.”); Nancy K. Kubasek, *Time to Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 RUTGERS L. REC. 3, n.23 and accompanying text (2003). But see Lynda J. Oswald, *Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law*, 35 B.C. ENVTL. AFF. L. REV. 45, 73 n.143 (2008) (discussing economic justice concerns that arise with location of some needed projects such as landfills, sewage-treatment and rehabilitation facilities in areas that are far removed from rich neighborhoods where

Sanctity of private property provides a good basis for development and protection of the right to privacy in the home and work settings.⁹² Respect for private property stems from, or at least supports, the idea that a man's home is his castle, in which he enjoys privacy, and which cannot be invaded with ease.⁹³ The Fourth Amendment to the U.S. Constitution has given constitutional imprimatur to this proposition.⁹⁴ On the other hand, the right to privacy may serve as a qualifier to the sanctity of private property, ensuring that a person's privacy or dignity is not damaged through respect for another's right to private property.⁹⁵ This is likely to occur in the area of personal property, where, for instance, a photographer's copyright in salacious photographs may yield to the privacy right of the persons photographed, if the latter do not want the photographs publicized.⁹⁶

they are not desired while the poorer communities are saddled with them); Michael Pappas, *Energy Versus Property*, 41 FLA. ST. U. L. REV. 435, 461 (2014); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1060 (1989) (discussing early post-revolutionary statutes that allowed private property rights to be overridden to permit the construction of mills in expectation of economic development).

⁹²Matthew W. Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 COMP. LAB. L. & POL'Y J 577, 630 (2002) (stating that in the United States, contrasted with Germany, "the common law's strong historical attachment to the sanctity of private property enervated the law's capacity to develop a robust idea of privacy rights in the work setting").

⁹³See Richard A. Epstein, *Kelo: An American Original: Of Grubby Particulars and Grand Principles*, 8 GREEN BAG 2d 355, 356 (2005) ("For most people, the key question was whether a man's home is his castle, for which the naïve answer is yes, except when property is used for traditional public purposes such as roads and parks.").

⁹⁴Susan W. Brenner & Leo L. Clarke, *Fourth Amendment Protection for Shared Privacy Rights in Stored Transactional Data*, 14 J.L. & POL'Y 211, 234 (2006) ("The Fourth Amendment is intended to protect the sanctity of private property from intrusions by public officials; its concern with protecting private property derives from common law." (citation omitted)); Susan W. Brenner, *The Fourth Amendment in an Era of Ubiquitous Technology*, 75 MISS. L.J. 1, 4 (2005).

⁹⁵James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1176 (2004).

⁹⁶*Id.* (commenting on a French court decision in the mid-nineteenth century to the effect that privacy "must sometimes be allowed to trump property, at least where lascivious images were involved: [o]ne's privacy, like other aspects of one's honor, was not a market commodity that could simply be definitively sold").

C. *Response to Complaint*

Private property comes with the freedom to decide what to do with it, how to use it and whom to allow to share in its use.⁹⁷ Liberty enthusiasts extol the virtues of the free enterprise system.⁹⁸ Forcing owners of tracts in a common reservoir into a pool is considered socialistic in some quarters.⁹⁹ Governments in the socialist end of the ideological spectrum are associated with a lack of respect for sanctity of private property.¹⁰⁰

The present situation is ironic. Both mineral developers and property owners are likely to subscribe to the notion of sanctity of private property, as it allows them to retain their interests and keep the benefits of their economic enterprise.¹⁰¹ On the other hand, when it comes to mineral development, there is some level of divergence among surface owners, subsurface owners and energy companies.¹⁰² When sanctity of private property interferes with mineral development, the common purpose to defend private property rights begins to crumble.¹⁰³ Additionally, private ownership of natural resources is

⁹⁷Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982) (summing up this sentiment).

⁹⁸See, e.g., *Walter Block & Richard Epstein Debate on Eminent Domain*, 1 N.Y.U. J. L. & LIBERTY 1144, 1149 (2005) [hereinafter Block & Epstein Debate].

Did you ever see a city block entirely taken up by a high rise except for a little sliver of land on which appears a little cottage? Did you ever see that? This is evidence that the land assembly negotiations didn't succeed. You won't find that in the Soviet Union. This phenomenon is a testimony to the virtues and the freedom of capitalism and free enterprise. Namely, that sometimes people don't make deals even though those who believe in making interpersonal comparisons of utility think that the cottage should have been taken down and the entire block given over to the large building. I say that this is a magnificent example of the operation of the free enterprise system.

Id.

⁹⁹See Paula C. Murray & Frank B. Cross, *The Case for a Texas Compulsory Unitization Statute*, 23 ST. MARY'S L.J. 1099, 1121 (1992).

¹⁰⁰Note, *Avoiding Expropriation Loss*, 79 HARV. L. REV. 1666, 1668 (1966) ("Even more orderly political change may produce a socialist government that would not recognize existing contracts based primarily on the sanctity of private property.").

¹⁰¹Patricia Nelson Limerick, *Changing Winds*, No.1 RMMLF-INST PAPER NO.1 (2008).

¹⁰²*Id.* ("Current conflicts between surface owners and developers of subsurface mineral rights seem, to the outside observer, to pit against each other two groups of people who otherwise hold remarkably similar views in matters of government regulation, individual self-determination, and the sanctity of private property.").

¹⁰³*Id.* A similar reaction has been witnessed among the political class, who advocate sanctity of private property rights with every fiber of their strength but quickly discard it when it is not

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the main reason that the shale revolution has taken place in the United States and nowhere else.¹⁰⁴ In virtually every other country, the minerals are held by the state, the government, the public, or the crown, and not by the individual.¹⁰⁵ It is here, in the U.S., where independent oil and gas operators are negotiating with private land owners—without the government interfering with the sanctity of private property—that the shale revolution was able to occur.¹⁰⁶

convenient or runs contrary to other deeply held political beliefs. *See, e.g.*, Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095, 1123 (2005) (“Regardless of the merits of the federalism argument, the retreat exposed a weakness in the Southern position. They championed the sanctity of private property only when Washington was the regulator. They were happy to allow local government to regulate away. As such, the private property argument collapsed into one about federalism or about the propriety of segregation.”).

¹⁰⁴ *See* Meri-Katriina Pyhäranta, *State Ownership of Petroleum Resources: An Obstacle to Shale Gas Development in the UK?*, 10 J. W. ENERGY L. & BUS. 358, 358 (2017).

The private ownership structure in the USA has significantly contributed to the shale gas development. The rapid development has been enabled by partnerships between mineral owners and lessees, which have benefited both parties and provided mineral owners an economic incentive to have their shale gas reserves developed. The same kind of success is not, however, expected to be replicated elsewhere, as the private ownership of shale gas resources is rather unique in the whole world. Nearly all other countries in the world have reserved the ownership of petroleum resources to the state.

Id. at 360 (citations omitted).

¹⁰⁵ *See* CURTIS H. LINDLEY, 1 A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS 5–22 (reprint ed. 1972); ERNEST E. SMITH, ET AL., INTERNATIONAL PETROLEUM TRANSACTIONS 248–49 (2d. ed. 2000); David Johnston, *How to Evaluate the Fiscal Terms of Oil Contracts*, in ESCAPING THE RESOURCE CURSE 53, 68 (Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz, eds., 2007) (“With the exception of the United States, Canada, and a very few old Spanish land grants in Colombia, mineral rights belong to the state.”).

¹⁰⁶ *See* Golden & Wiseman, *supra* note 22, at 1039; Thomas W. Merrill, *Four Questions About Fracking*, 63 CASE W. RES. L. REV. 971, 977–78 (2013).

In practice, sanctity of private property has often come into conflict with the government's exercise of the power to regulate certain activities¹⁰⁷ or uses of property,¹⁰⁸ in order to operate public facilities or programs¹⁰⁹ or in a bid

¹⁰⁷Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 945–46 (2001) (discussing 19th century judicial resistance to legislative effort to destroy liquor in New York because liquor was private property and such destruction would run afoul of sanctity of private property); Robert Elias, *The Law of Personhood: A Review of Markus Dirk Dubber's Victims in the War on Crime: The Use and Abuse of Victims' Rights*, 52 BUFF. L. REV. 225, 239 (2004) (“Today, it is also assumed that police can just destroy property (such as drugs or alcohol) that has been defined as criminal yet a century ago that would have been a violation of the sanctity of private property.”); Ilana Waxman, *Hale's Legacy: Why Private Property Is not a Synonym for Liberty*, 57 HASTINGS L.J. 1009, 1014 (2006) (“[T]he federal courts struck down early attempts at labor regulation and redistribution as unconstitutional intrusions on the sanctity of private property.” (citation omitted)).

¹⁰⁸Lora Jo Foo, Laura Ho & Thomas M. Kim, *Worker Protection Compromised: The Fair Labor Standards Act Meets the Bankruptcy Code*, 2 ASIAN PAC. AM. L.J. 38, 59 (1994) (discussing a particular case of collision of two principles of democratic socialism enshrined in the U.S. Constitution, namely abolition of involuntary servitude and the sanctity of private property rights); Patrick M. Garry, *A Different Model for the Right to Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process*, 61 U. MIAMI L. REV. 169, 196 & nn.162 & 163 (2006); Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341, 1347 (1994) (“At the same time, concepts of rugged individualism and the sanctity of private property made courts extremely reluctant to change the plan of the charitable donor because it might discourage philanthropy. Therefore, courts sometimes voided trusts when the methods the testator chose for achieving a charitable purpose were impossible to carry out, rather than relying on the doctrines of administrative deviation or cy pres to modify the trust.” (citations omitted)); S. Colin G. Petry, *The Regulation of Common Interest Developments as It Relates to Political Expression: The Argument for Liberty and Economic Efficiency*, 59 CASE W. RES. L. REV. 491, 518 (2009) (“The sanctity of private property rights, as well as that of freedom of expression (especially political speech) may be in tension, but are not fundamentally incompatible, especially with regard to expression in legitimate public forums.”).

¹⁰⁹Edwin M. Borchard, *Government Liability In Tort*, 34 YALE L.J. 229, 249–50 (1925) (discussing conflict between sanctity of private property and establishment of facilities such as contagious diseases hospital or pest-house that pose an injury to neighboring private property, even when establishing them does not present a case of negligence); J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915, 920 (2012) (“Despite mixed litigation results, property rights advocates have won some notable judicial victories and shifted rightward public discourse about the sanctity of private property.”); James B. Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is It Anyway?*, 19 WM. MITCHELL L. REV. 331, 356 (1993) (discussing the evolution away from strict sanctity of private interests to a recognition that private ownership should bow to legitimate public interest).

to protect the environment¹¹⁰ or other public interest.¹¹¹ Some commentators have aptly observed: “Our need for safe drinking water and a healthy environment and our ingrained belief in the sanctity of private property cause conflicts that are not amenable to easy resolutions.”¹¹²

The indisputable reality is that the freedom that comes with private property is not absolute.¹¹³ The law typically regulates its use and transfer

¹¹⁰Michael Pace, *Aesthetic Regulation: A New General Rule*, 90 W. VA. L. REV. 581, 581 (1988) (“Deeply ingrained in American tradition, the prerogative of owners to do as they please with their private property has created an inherent tension between such rights and government regulation. In prohibiting the taking of private property without compensation, the Constitution reflects the sanctity of private property while at the same time recognizing the sometimes greater public interest.”); Linda S. Somerville, *Constitutional Law—Fifth Amendment—Eminent Domain—Regulatory Taking—The United States Supreme Court Held That Land Use Regulations That Deprive a Landowner of All Economically Viable Use of Property Categorically Require Compensation*, 31 DUQ. L. REV. 427, 438 (1993) (“As this environmental bandwagon picked up speed, it left in its wake an ideological chasm between those who seek to protect and preserve the environment and those who seek to protect and preserve the sanctity of private property ownership.”); Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach Of) the Contract With America: Improving Environmental Policy or Destroying Environmental Protection?*, 5-WTR KAN. J.L. & PUB. POL’Y 9, 22 (1996); David Farrier, *Conserving Biodiversity On Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 352–53 (1995) (“Land-use regulation supporting environmental conservation clashes with deeply held values about the sanctity of private property.”).

¹¹¹Lisa Healy, *Trophy Homes and Other Alpine Predators: The Protection of Mountain Views Through Ridge Line Zoning*, 25 B.C. ENVTL. AFF. L. REV. 913, 928–29 (1998) (discussing the conflict between private property rights and advancement of the public interest and the difficulty in deciding when one interest would enjoy precedence over the other); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1448 n.19 (1987) (discussing “the tension between the need to assert the sanctity of private property and the legitimate sovereignty of the state”); Harris, *supra* note 54, at 417, 419 (“Additionally, individualists believe in, almost worship, private property. . . . Support for reparations frustrates this basic premise of individualism. The reparationist would argue that at least some private property should be ceded and redistributed to the descendants of slaves.” (citations omitted)).

¹¹²Daniel Riesel & Steven Barshov, *When Does Government Regulation Go “Too Far”?*, 6 FORDHAM ENVTL. L.J. 565, 595 (1995); see Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 363 (1991) (“The essential question is how we, as a society, should balance our need and desire for economic progress and public works against our duty and desire to protect the sanctity of private property.”).

¹¹³Steven J. Eagle, *Securing a Reliable Electricity Grid: A New Era in Transmission Siting Regulation?*, 73 TENN. L. REV. 1, 13 n.115 (2006); Richard A. Epstein, *Rights and “Rights Talk”*, 105 HARV. L. REV. 1106, 1114 (1992) (reviewing MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991)) (“[P]roperty rights are not absolute”); Barry Gosin, *Pennsylvania Northwestern Distributors, Inc. v. Zoning Hearing Board of Moon Township: Amortization of Nonconforming Uses or Amortization of the Police Power in*

through, for instance, the tort of nuisance, zoning ordinances and rules regarding restraints on alienation.¹¹⁴ It is certainly the case that “[p]roperty law has a long and well-documented history of limiting—for reasons of necessity, progress, or equity—owners’ rights to exclude, use, and transfer, even at the expense of an individual owner’s subjective expectations or idiosyncratic preferences.”¹¹⁵ Such limitations are not necessarily inconsistent with the notion of private property, nor does it automatically turn any political and legal system supporting it into a socialist regime.¹¹⁶ Indeed, the idea of an individual’s right to untrammelled control of his property is one

Pennsylvania?, 37 VILL. L. REV. 161, 163 (1992) (“One’s right to use private property is not absolute.” (citation omitted)); Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to “Environmental Takings”*, 46 S.C. L. REV. 613, 614 (1995) (“Environmental protection has been pitted against the rights of the individual to use and benefit from his own land, and against the ability of communities to maintain a tax base. This has left a bitter taste in the mouths of millions of people all across America who are beginning to fight back.”); Jeffrey G. Miller, *A Generational History of Environmental Law and Its Grand Themes: A Near Decade of Garrison Lectures*, 19 PACE ENVTL. L. REV. 501, 507 (2002) (“Our efforts to achieve environmental goals through controls on private land use are greatly hampered by our constitutional protections on private property, our traditional concepts of the sanctity of private property, and our traditional views that land use controls are state and local matters best isolated from federal authority.”).

¹¹⁴See 1 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 1:1 (4th ed. 2016); Robert F. Blomquist, *Witches’ Brew: Some Synoptical Reflections on the Supreme Court’s Dangerous Substance Discourse, 1790-1998*, 43 ST. LOUIS U. L.J. 297, 334 (1999) (stating that a person’s “right to erect what he pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors” and quoting judicial opinion that a person committing nuisance cannot shield himself with the notion of sanctity of private property); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 693–99 (1973); Gary D. Meyers & Jean Meschke, *Proposed Federal Land Use Management of the Columbia River Gorge*, 15 ENVTL. L. 71, 95 (1984); David S. Wilgus, *The Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology*, 33 MCGEORGE L. REV. 99, 118–28 (2001).

¹¹⁵Deepa Varadarajana, *Improvement Doctrines*, 21 GEO. MASON L. REV. 657, 658 (2014).

¹¹⁶See Jonathan Lahn, *The Uses of History in the Supreme Court’s Takings Clause Jurisprudence*, 81 CHI.-KENT L. REV. 1233, 1247 (2006); Stephanie Hunter McMahon, *A Law With a Life of Its Own: The Development of the Federal Income Tax Statutes Through World War I*, 7 PITT. TAX REV. 1, 26 (2009) (reviewing an argument that presented the sanctity of private property as the polar opposite of a journey toward communism).

that has long been assailed¹¹⁷ and one that has become increasingly moribund.¹¹⁸

The perceived and observable advantages of pooling further address complaints about ownership freedom being trampled on by forced pooling, which in turn provide justifications for compulsory pooling.¹¹⁹ These benefits are discussed in Part IV below.

III. HOLDOUT POWER

The risk of holdout presents “a classic collective-action problem”¹²⁰ that has fascinated economists and legal scholars for some time.¹²¹ The term

¹¹⁷See, e.g., *People’s Gas Co. v. Tyner*, 31 N.E. 59, 60 (Ind. 1892) (“The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others.”).

¹¹⁸See Emeline C. Acton, *Much Ado About Nollan: The Supreme Court Addresses the Complex Network of Property Rights, Land Use Regulations, and Just Compensation in the Keystone, Nollan, and First English Cases*, 17 STETSON L. REV. 727, 729 (1988); George P. Smith, II, *Cigarette Smoking as a Public Health Hazard: Crafting Common Law and Legislative Strategies for Abatement*, 11 MICH. ST. U. J. MED. & L. 251, 278–79 (2007) (stating that those whose use of property poses health hazards to their neighbors cannot shield themselves from liability by hiding under a claim of sanctity of private property).

¹¹⁹See Gary D. Libecap & Steven N. Wiggins, *The Influence of Private Contractual Failure on Regulation: The Case of Oil Field Unitization*, 93 J. POL. ECON. 690, 693–95 (1985). Some of the gains of unitization are summarized as follows:

The potential aggregate gains from unitized, single-firm production are large: extraction rates can more fully consider user costs and follow rent-maximizing patterns; capital costs can be reduced through elimination of excessive wells and surface storage; and total oil recovery can be increased since subsurface pressures can be better maintained through controlled oil withdrawal.

Id. at 712. *But see* Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 55–56 (2004) (attributing the growth of compulsory unitization laws to antitrust laws that discouraged voluntary unitization or other strategies for cooperative resource development).

¹²⁰Richard Squire, *How Collective Settlements Camouflage the Costs of Shareholder Lawsuits*, 62 DUKE L.J. 1, 26 (2012).

¹²¹Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351, 351 (1991) (“Holding out and free riding are well-worn terms in the lexicon of law and economics.”) [hereinafter Cohen, *Holdouts*]; Calvin Massey, *The Political Marketplace of Religion*, 57 HASTINGS L.J. 1, 32–33 (2005). For an excellent discussion of the holdout problem, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 40–42 (1965); Thomas J. Miceli & C.F. Sirmans, *The Holdout Problem, Urban Sprawl, and Eminent Domain*, 16 J. HOUSING ECON. 309, 311–12 (2007) (explaining the holdout problem).

“holdout” may be defined as “as a circumstance in which one entity cannot undertake an action without consent of another entity.”¹²² The person seeking to hold out is also called a holdout.¹²³ The holdout problem may manifest “in a situation in which a buyer must assemble contracts with multiple sellers to realize the full value of the synergy of those contracts—that is, in a multilateral assembly environment.”¹²⁴ Securing leases from multiple property owners for oil and gas drilling falls into this category.¹²⁵ The holdout problem that confronts prospective lessees of oil and gas interests is a prime example of the tragedy of the anticommons.¹²⁶ This phenomenon “occurs

¹²²Sean M. Collins & R. Mark Isaac, *Holdout: Existence, Information, and Contingent Contracting*, 55 J.L. & ECON. 793, 794 (2012); see also Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 62 (2009) (stating that holdout is a dynamic that “occurs whenever a property owner’s right to exclude gives him leverage over productive efforts whose value cannot be realized without making some use of that property”); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 966 (1996) (stating that, in the field of economics, the holdout problem refers to “a situation in which some subset of those involved in a collective negotiation are in a position to scuttle any genuine compromise that does not give them everything they want” (citation omitted)).

¹²³Michael J.D. Sweeney, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 FORDHAM L. REV. 661, 695 (1995) (“A holdout is someone who tries to extract an exorbitant price for her interest.” (citation omitted)).

¹²⁴Collins & Isaac, *supra* note 122, at 794–95; Zachary T. Brumfield, *The “Short Cut” to the Stabilization of the Underwater Housing Market: How the New FHFA Short Sale Guidelines Promote Economic Efficiency*, 41 REAL EST. L.J. 456, 474–75 (2012).

The holdout problem arises when there are multiple parties in a bargaining situation, and one of the parties has an increased bargaining power due to an inherent monopoly that is created by the structure of the negotiation. A monopoly power is created in this “holdout” party because in order for the all the parties to have a mutual surplus, the holdout party must consent to an agreement. Thus, this monopoly power of the holdout party creates high bargaining cost for all the parties involved. The holdout party can use its high bargaining position to demand higher payouts because of its monopolistic hold on the negotiation.

Id. (citations omitted).

¹²⁵See Collins & Isaac, *supra* note 122, at 793–94 (“The concept of the holdout problem is an integral part of the vernacular of land acquisition, facilities sitings, contract negotiation, and other instances of multilateral bargaining.”).

¹²⁶For a useful definition of the anticommons, see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998) (“In an anticommons, by my definition, multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to underuse—a tragedy of the anticommons.” (citations omitted)); Ian Ayres & Gideon Parchomovsky, *Tradable Patent Rights*,

when there are too many property-rights holders; that is, too many owners have a right to exclude others from using a resource at its most efficient scale, and no one has an effective privilege of use, which often leads to underuse.”¹²⁷ In that situation, an assembly of rights or interests that would have redounded to the benefit of every participant and improved on the status quo would not materialize because of the increased cost of consummating the deal in the face of strategic holdout behavior.¹²⁸

As seen above, cases of holdout also fall within the property freedom category discussed in Part II. However, they warrant special treatment because they often involve owners that want to use their freedom to promote development, but for a number of reasons opt not to enter into a contract at the time they are offered.¹²⁹ This point is not presented to discount the fact that there are holdouts, who for ideological or other strongly-felt reasons do not want to deal at all and would rather not see oil and gas development continue.¹³⁰ Besides, while a property owner may exercise her property freedom in several ways without affecting other people, holdout behavior is virtually guaranteed to always have an effect on the interests of other people.

60 STAN. L. REV. 863, 873 (2007) (discussing holdout and the tragedy of the anticommons in the patent area); Lee Petherbridge, Ph.D., *Road Map to Revolution? Patent-based Open Science*, 59 ME. L. REV. 339, 354–55 (2007); Michael Mattioli, *Power and Governance in Patent Pools*, 27 HARV. J.L. & TECH. 421, 427–28 (2014).

¹²⁷D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1190 (2013).

¹²⁸*Id.* at 1191.

¹²⁹See Claire Finkelstein, *Financial Distress as a Noncooperative Game: A Proposal for Overcoming Obstacles to Private Workouts*, 102 YALE L.J. 2205, 2221 (1993) (for a description of the holdout problem); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1119 (1972).

¹³⁰See Thomas Brugato, *The Property Problem: A Survey of Federal Options for Facilitating Acquisition of Carbon Sequestration Repositories*, 29 VA. ENVTL. L.J. 305, 319 (2011) (“The holdout can take two forms—demanding unreasonably high prices for the land, or refusing to sell at all”); E. Chase Dressman, *COWho? Kentucky’s Need to Statutorily Define Property Interests in Geologically Sequestered Carbon Dioxide*, 98 KY. L.J. 375, 387–88 (2009); Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 126 (2004) (discussing ideological holdouts who may not want an objectionable activity to continue); J. Gregory Sidak & Susan E. Woodward, *Takeover Premiums, Appraisal Rights and the Price Elasticity of a Firm’s Publicly Traded Stock*, 25 GA. L. REV. 783, 804 (1991) (describing strategic holdouts as “who bet on what the transaction is worth to the other parties”); Stewart E. Sterk, *Freedom From Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 631 (1985) (“The decision to hold out is not always strategic in nature. Holdouts frequently do attach greater intrinsic value to their rights than do potential buyers.”).

A. *Mineral Owners' Complaint*

One of the participants in the Focus Group, Ranjana Bhandari, spoke about her lack of interest in leasing:

Anyway, we didn't sign and we were one of the few holdouts. . . . The landman called us and told us "Look this is going to happen. You might as well take the money and go buy a new TV. Don't expect any royalties, gas prices are too low. I can promise you a TV from Walmart." That was his sales pitch. He called again another day and he said to my husband, "Do you know what a field study is?" And my husband said "Yes, I think so." He's published in peer reviewed journals. And he said, "There's so many peer reviews that show that this is safe, so just take the money."¹³¹

Mrs. Bhandari was not a strategic holdout who wanted to use her leverage to get more money for herself. She was opposed to fracking for safety reasons and so did not want to entertain any offers to lease her property and encourage what she views as a disruptive and destructive activity. She also decried what she considered a "pretty rigged" system in favor of energy companies who do not have to make a strong case before the RRC to receive a grant of a Rule 37 exception, beyond stating there was a chance they could lose some billion cubic feet of gas.¹³² Safety concerns also drove another focus group participant, Greg Hughes, to resist drilling in his neighborhood.¹³³ Mr. Hughes comes with a background as a systems engineer in the aeronautical industry, where a much higher standard of safety is required than what exists for fracking operations.¹³⁴ In a later interview with a Texas newspaper, he restated this point: "Hughes isn't against oil and gas development or even fracking. His position reflects his professional interest in risk reduction: He believes the industry hasn't tried hard enough to make fracking safe in densely populated areas."¹³⁵

¹³¹ Focus Group Transcript (Apr. 2013) (on file with the author).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Priscila Mosqueda, *The Holdouts*, TEXAS OBSERVER (Feb. 16, 2015), <https://www.texasobserver.org/the-holdouts-three-texas-families-refused-sell-mineral-rights-fracking/>.

Mr. Nguyen, the participant with a Vietnamese background, described his decision to holdout in the following words:

My story is weird. All these years, none of them messed with me. I don't know why. They send me letter and I tear it up. They come to the house and I'd ask them how much money I was getting. "\$20," and "I don't want \$20 a month! What's that going to do for me?" All of a sudden, September of last year, this guy Tim Martinez sent me a letter and I tear it up. All of a sudden, out of nowhere, he gets his Vietnamese friend to call me. He thinks I need a translator I guess. So he talked to me. He said "Did you know you're the last one on the block that didn't sign? Because you're not signing, no one is getting that money. The whole block." I'm like "What? I don't care what they do. That's not my problem." They kept calling and I told them I would call my lawyer. The next day, they were all like "Did you decide yet?" "No. it's the same answer. No." And then, I think it was December and Tim Martinez sent me a letter. "This is your final offer and if you don't sign it, I'm taking you down to Austin for the Rule 37." "I'm like okay." That's when I started doing research. My thing wasn't like everybody else about the disadvantages. Mine was about I don't care about that money. It's only going to bring me to a higher bracket and I don't need the money.¹³⁶

This participant's story is an eye-opener in the sense that not every property owner wants the money from drilling. While some reject the money because they do not need it or consider it some sort of "blood money," some property owners reject drilling revenue to avoid paying higher taxes in a new income tax bracket. This participant's position is a common misconception.¹³⁷

B. Legal Context

Mineral interest owners deserve a public policy that preserves their ability to hold out. There are several justification for holdouts. First, holding out can

¹³⁶Focus Group Transcript (Apr. 2013) (on file with the author).

¹³⁷If somehow the mineral owner's \$20 per month put him in a higher tax bracket, that higher tax bracket would only apply to the \$20 and not the rest of his income. I.R.C. § 1 (2012).

place the person taking the stance in a stronger bargaining position.¹³⁸ They may use this stronger bargaining power to negotiate better terms, such as higher royalty rates or other lease benefits.¹³⁹ Being a holdout is not necessarily bad or injurious or only for the benefit of the party holding out. A holdout can use her strong bargaining position to extract concessions that are beneficial to her neighbors or the society generally.¹⁴⁰ For instance, in negotiations with a polluting factory in the neighborhood, a holdout can ensure that the polluter agrees to adopt effective pollution abatement technology, provide money for a park or offer scholarships for local students to go to college, which may not be the case if she accepted whatever deal that was initially presented by the factory owner and accepted by the neighbors.¹⁴¹ Similarly, a holdout can insist on better terms for an oil and gas lease, including higher royalty rates; getting a minimum fee regardless of how much oil and gas is produced; or requiring the lessee to conduct operations at a level of health, safety, and environmental protection that goes beyond existing legal requirements. These demands have a limit, however, as lessees and factory owners could opt for a different location rather than accede to demands that make their enterprise unprofitable.¹⁴²

Holding out is also used as a tool by mineral owners to delay development when commodity prices are low.¹⁴³ In such cases, the small landowners want to hold out until gas prices rise, which in turn would increase the income they

¹³⁸ See, e.g., Gavin D. George, *What is Hiding in the Bushes? Ebay's Effect on Holdout Behavior in Patent Thickets*, 13 MICH. TELECOMM. & TECH. L. REV. 557, 559 (2007).

¹³⁹ Gary D. Libecap, *Chinatown: Owens Valley and Western Water Reallocation—Getting the Record Straight and What It Means for Water Markets*, 83 TEX. L. REV. 2055, 2083 (2005) (stating that as a result of the holdout strategy adopted by property owners, the acquirer “on average paid more for properties the longer the owner held out for higher prices”).

¹⁴⁰ Adam Clanton, *Enforcing Individual Rights in an Industrial World: Legal Rules and Economic Consequences*, 4 GEO. J. L. & PUB. POL’Y 165, 191–92 (2006).

¹⁴¹ *Id.*

¹⁴² Some scholars have observed that where the government wants to acquire property by eminent domain, the actions of holdout landowners “purportedly could drive up the price of the property until the government offers compensation higher than the market price and equal to or greater than the value of the property to the government.” Nadia E. Nedzel & Walter Block, *Eminent Domain: A Legal and Economic Critique*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 140, 151–52 (2007) (citation omitted).

¹⁴³ See LOWE, ET AL., *supra* note 6, at 697 (stating that various interest owners may not come into an agreement to pool their interests based on a number of factors, including the timing of drilling).

generate from the lease.¹⁴⁴ Again, this approach may also end up favoring other mineral owners, in addition to the holdout, if developing their tracts is also postponed as a result of the holdout and consequently commodity prices appreciate. Moreover, the presence of holdouts arguably forces greater transparency and education by those affected. Those seeking the leases are forced to host town-halls and church gatherings in order to ‘sell’ people on the notion of leasing.

Nonetheless, the holdout phenomenon raises a number of constraints and concerns: “At least three distinct problems have been attributed to holdout: uneven distribution of available surplus from trade, costly delay in bargaining, and failure to consummate efficient trades.”¹⁴⁵ These problems play out in various areas of life where bargaining is essential. In connection to sovereign debt workouts, one scholar echoes the sentiments this way: “The worry has been that, as creditors saw holdouts being paid in full by sovereigns in order to avoid adverse judgments, more creditors would be attracted to this tactic. If enough creditors defected from the negotiations, prospects for a workout would dim.”¹⁴⁶ Other areas of law or human endeavor are not left

¹⁴⁴*Id.*

¹⁴⁵Collins & Isaac, *supra* note 122, at 794; Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389, 400 (2008) (stating that the presence of holdout threatens to render the pursuit of negotiations pointless); Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 766 (2004) (stating that unlike other sources of transaction costs, holdout problems “are quite likely to be fatal to efficient exchange”); Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. REV. 2007, 2033–34 (2003) (viewing holdouts as costly strategic behavior); Zohar Goshen, *Voting (Insincerely) in Corporate Law*, 2 THEORETICAL INQUIRIES L. 815, 822 (2001) (stating that while a holdout is possible even when only one individual is involved, the problem is less challenging because the holdout realizes that she bears the risk of failure alone whereas for “a transaction involving collective decision-making . . . since the risk of losing the transaction due to [the holdout’s] excessive demands is borne equally by all members of the group, she is in fact externalizing an uncompensated risk of losing the deal to the other members of the group”); Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 936–37 (1988) (noting that holdout problems may delay or scuttle a proposed deal); Cohen, *Holdouts*, *supra* note 121, at 358–59, 361 (illustrating both how holdouts can orchestrate negotiation breakdowns and cause a deal not to come to fruition); Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1682–83 (2007).

¹⁴⁶Daniel K. Tarullo, *Neither Order nor Chaos: The Legal Structure of Sovereign Debt Workouts*, 53 EMORY L.J. 657, 686 (2004); *see also* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 245 n.12 (1992); *see generally* Brent Skorup, *Sweeten the Deal: Transfer of Federal Spectrum Through Overlay Licenses*, 22 RICH. J.L. & TECH. 5 (2016).

out of this outcome.¹⁴⁷ Indeed, “holdout behavior, such as strategic bargaining, can be an insurmountable barrier to negotiations.”¹⁴⁸ Generally, the courts will protect a landowner’s right to exclusive possession by granting injunctive relief.¹⁴⁹ That is, the courts will adopt a property rule approach, rather than a liability rule approach.¹⁵⁰ Holdouts provide one of the very few exceptions to the rule because of the impediment the problem poses to bringing negotiations to an efficient conclusion.¹⁵¹

¹⁴⁷See Anthony E. Chavez, *Exclusive Rights to Saving the Planet: The Patenting of Geoengineering Inventions*, 13 NW. J. TECH. & INTELL. PROP. 1, 16 & n.118 (2015) (discussing holdout behavior and its negative impact on the development of innovative products); Andrew T. Guzman, *Against Consent*, 52 VA. J. INT’L L. 747, 751 (2012) (discussing how strategic holdout behavior undermines negotiation and quality of international conventions because international treaty-making requires the consent of states); Guy A. Rub, *Stronger Than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 77 (2013) (“For example, if a negative servitude on a parcel of land prohibits the building of high rise buildings on it, and the servitude is in favor of ten neighboring lots, building the high rise will require the consent of all ten neighbors. In that case negotiation can be expensive and it might fail.”); Sabrina Safrin, *Hyperownership In a Time of Biotechnological Promise: The International Conflict to Control the Building Blocks of Life*, 98 AM. J. INT’L L. 641, 653 (2004) (“In this anticommons environment of fragmented property rights, proceeding with a particular gene therapy or downstream bioengineered good entails high search and negotiation costs to locate and bargain with the many rights owners whose permissions are necessary to complete broader development. In addition, a single holdout can completely stymie a project. The tragedy is that upstream research results are underutilized and downstream medical treatments, therapeutics, and other potentially helpful goods remain undeveloped.” (citations omitted)); Karen E. Sandrik, *Reframing Patent Remedies*, 67 U. MIAMI L. REV. 95, 110 (2012) (referencing the point that holdout behavior can hold up innovation); Joshua D. Sarnoff, *The Patent System and Climate Change*, 16 VA. J.L. & TECH. 301, 315 (2011); Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT’L L. & BUS. 470, 505 (1997).

¹⁴⁸Jake Phillips, *EBay’s Effect on Copyright Injunctions: When Property Rules Give Way to Liability Rules*, 24 BERKELEY TECH. L.J. 405, 413 (2009) (citations omitted); see also Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2664 (1994) (noting that liability rules that award damages are preferable to property rules that impose injunctions where the likelihood of strategic bargaining is present); Amos B. Elberg, *Remedies for Common Interest Development Rule Violations*, 101 COLUM. L. REV. 1958, 1984 (2001) (discussing liability and property rules).

¹⁴⁹Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 453 (2005) [hereinafter Sterk, *Property*].

¹⁵⁰Elberg, *supra* note 148, at 1984.

¹⁵¹Sterk, *Property*, *supra* note 149, at 453 (“The principal exceptions to property rule protection are two. The first (and most familiar in the economic literature) includes cases in which holdout or freerider problems would impede negotiations to an efficient result.” (citation omitted)).

Characterizing the demand made by holdouts as a “bribe”—a loaded term that comes with negative connotations—some scholars highlight the dangerous consequences that may accompany the holdout behavior:

Because a given project will fail without their cooperation, “holdouts” may be prompted to demand a bribe close to the value of the entire project. And, of course, every property holder needed for the project is subject to this same incentive; if everyone holds out, the cost of the project will rise substantially, and probably prohibitively.¹⁵²

The holdout problem in oil and gas leasing is more likely to occur in urban and suburban areas where owners hold title to relatively small tracts of land, as opposed to non-urban settings where one owner can own hundreds or thousands of acres.¹⁵³ If a handful of mineral owners in urban and suburban areas adopt a holdout strategy, it may pose a potent threat to the development project.¹⁵⁴ It is possible that this point is a bit overstated. Arguably, these small tract owner holdouts are uniquely situated to do very little damage. These are very tiny tracts (¼ and ½ acre lots at most) across a wide field of development. Even in the immediate vicinity of their property, an oil and gas

¹⁵²Dan L. Burk & Mark A. Lemley, *Biotechnology’s Uncertainty Principle*, 54 CASE W. RES. L. REV. 691, 728–29 (2004) (citation omitted).

¹⁵³See Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211, 251 (2012); Robert H. Abrams, *Superfund And The Evolution Of Brownfields*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 265, 281 (1997) (discussing fracturing of land ownership in urban areas that has increased the number of owners and the potential for strategic holdout behavior); Eric T. Freyfogle, *The Tragedy of Fragmentation*, 36 VAL. U. L. REV. 307, 325–26 (2002) (discussing the role of fragmentation into smaller parcels in increasing holdout and free rider problems). Cf. Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1042 (2008) (arguing that holdout problems could arise, not simply because of multiple owners, but as a result of the small size of the asset in question and the consequent inability to meet the acquirer’s need); Mosqueda, *supra* note 135 (“Houston-area oil and gas heir Daniel Harrison III collected \$1 billion in cash in 2013 when Shell Oil Co. leased his 100,000-acre ranch in the Eagle Ford.”).

¹⁵⁴The problem would also be present in non-urban settings, so long as there are multiple owners of a reservoir or a required number of acres for optimal development. See Peter M. Gerhart & Robert D. Cheren, *Recognizing the Shared Ownership of Subsurface Resource Pools*, 63 CASE W. RES. L. REV. 1041, 1099 (2013) (advocating prevention of anticipated holdout behavior from some owners of shared subsurface resource pools through legislation that forces a minority of owners to accept the decisions of the majority regarding allocation of shares and selection of an appropriate governance mechanism); Harold Demsetz, *Transaction Cost and the Organization of Ownership—An Introduction*, 53 ARIZ. L. REV. 1, 4–5 (2011).

operator is drilling multiple laterals; so it is difficult to describe this kind of holdout situation as an existential threat. Nevertheless, such holdouts can imperil or at least delay a multi-million-dollar project.¹⁵⁵

On the other hand, lease holdouts can impair their neighbors' interest and the state that collects oil and gas production taxes. Neighbors might hold out because they think other neighbors will hold out. Thus, leases may not be signed on time or at all, thereby jeopardizing the ultimate extraction of oil and gas deposits in the area.¹⁵⁶ In particular, a minimum amount of acreage

¹⁵⁵Camp, *supra* note 43, at 3 (“A single missing person or holdout who owns even the smallest tract or undivided mineral interest can hold up a multi-million dollar development plan.”); Whitworth & Kobzar, *supra* note 37, at 11.

Operators attempting to drill and develop acreage in populated areas of the Barnett Shale have encountered multiple problems related to urban drilling. In these highly subdivided areas, some lot owners could not be found and others refused to lease or pool their property to allow wells to be drilled. If the unleased lots were located in the path of proposed horizontal drainholes, an operator's alternatives were either to force pool these unleased tracts under the MIPA or forego the drilling of the well.

Id.

¹⁵⁶This argument has been made in connection with vulture funds and sovereign debt restructuring. See Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010*, at 15 (Eur. Cent. Bank Res. Paper Series, Working Paper No. 2135, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997 (stating that holdouts create a situation where “minimum participation thresholds may no longer be reached if too many investors decide to follow the strategy of ‘vulture’ funds and hold out”); John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CAL. L. REV. 1671, 1685 (2014) (“The refusal to participate in a voluntary debt restructuring can deter other bondholders from participating in the restructuring process and can threaten to derail restructuring agreements after they are achieved.” (citation omitted)); see also Collins & Isaac, *supra* note 122, at 795.

An occurrence often associated with multilateral assembly is that the last of multiple sellers receives a disproportionate share of the trading surplus. While this fact, in and of itself, has no direct efficiency consequences, it may nevertheless impact the likelihood that mutually advantageous trades are consummated. If it is commonly anticipated that the last man standing obtains a disproportionate share of the trading surplus relative to early sellers, then this may provide incentives to create a tournament in which sellers strategically avoid contracting in order to obtain the final position. Claeys . . . describes how such a situation is likely to cause mutually beneficial multiple-rights bargaining to fail.

Id.; Steven L. Schwarcz, *Looking Forward: 2005-2010 A Sovereign Debt Restructuring Reverie*, 6 CHI. J. INT'L L. 381, 384 (2005) (“In practice, though, holdouts discourage all creditors, even those who otherwise wish to reach an agreement, from agreeing to a debt restructuring plan.”).

is needed before permitting development, which would require in urban settings that a significant number of people agree to lease to constitute a drilling unit.¹⁵⁷ Even when an operator has assembled more than a sufficient number of leases to cover the regulatory requirements, the operator company may still be reluctant to drill its well because it cannot obtain the amount of acreage necessary to drill a well long enough to be profitable, or as profitable as the company may desire.¹⁵⁸

Numerous tools and techniques are available for defeating holdouts, including legislation, regulations, judicial resolution and private arrangements.¹⁵⁹ There is a plethora of initiatives, strategies and tools in other arenas for facilitating negotiations or resolving an impasse caused by holdouts.¹⁶⁰ One of such arenas in which some of these tools have been deployed is debt restructuring in both domestic¹⁶¹ and international

¹⁵⁷Schwarcz, *supra* note 156, at 384.

¹⁵⁸It should be mentioned that there are enormous differences between these two scenarios. Finley Resources, Inc., for example, did not need to use the forced pooling in order to get a permit. It needed to use the forced pooling in order to drill a lateral as long as it wanted. Finley, *supra* note 4.

¹⁵⁹See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 581 (1996) (“Holding out, free riding, and other strategic actions may preclude an efficient outcome. Regulation reduces these strategic transaction costs by selecting and enforcing preferred outcomes directly.” (citations omitted)); Amnon Lehari & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1711 (2007) (“Beyond the use of eminent domain, the law has employed other methods to prevent monopolistic holdouts in anticommons settings.”); Jonathan C. Lipson, *Against Regulatory Displacement: An Institutional Analysis of Financial Crises*, 17 U. PA. J. BUS. L. 673, 704–05 (2015) (stating that the market may be unable to correct holdout behavior, thereby justifying resort to other institutions, such as bankruptcy courts, for solution); Anthony Scott & Georgina Coustalin, *The Evolution of Water Rights*, 35 NAT. RESOURCES J. 821, 906 (1995) (discussing the use of cooperative organizations since at least the 19th century to, among other things, deal with holdouts); A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 908 (2000) (“After a lengthy negotiation, the trial court imposed a physical solution, much like compulsory unitization is imposed on holdout oil and gas pumpers, after over 80 percent of the basin water users agreed to it.”).

¹⁶⁰Sidak & Woodward, *supra* note 130, at 804 (“Both public and corporate constitutions contain provisions that enable holdouts to be overruled. Each shareholder (or citizen) trades the ex post opportunity to be a holdout for the increased likelihood ex ante that a beneficial transaction will not be blocked by other shareholders (or citizens).” (citation omitted)).

¹⁶¹Philippe Aghion, Oliver Hart & John Moore, *Improving Bankruptcy Procedure*, 72 WASH. U. L.Q. 849, 861 (1994) (“A structured procedure like Chapter 11 reduces the severity of . . . bargaining problems by making the majority’s will binding on the minority (this mitigates freeriding and holdout behavior).”); Bryant B. Edwards, Jeffrey A. Herbst & Selina K. Hewitt, *Mandatory Class Action Lawsuits as a Restructuring Technique*, 19 PEPP. L. REV. 875, 878 (1992) (discussing

settings.¹⁶² As one court has noted, “[t]he holdout problem occurs in restructuring negotiations because creditors who refuse to capitulate early can often secure more favorable terms by ‘holding out.’”¹⁶³ One solution that has been adopted to tackle the problem is usage of collective action clauses (CACs) that are often included in sovereign debt instruments and “permit a supermajority of bondholders to impose a restructuring on potential holdouts,”¹⁶⁴ thereby, increasing the chances of arriving at a resolution by disincentivizing holding out.¹⁶⁵ There is a counterpoint that the debt comparison is imperfect. Unlike a debt restructuring where all creditors must agree (or must be forced to), oil and gas development in an area or indeed even the drilling of a single well is rarely a zero-sum scenario. Oil and gas companies can (and often do) drill shorter laterals or fewer wells in order to address a holdout problem. It is relatively rare that the holdout problem

a solution to a particular type of holdout problem in bankruptcy cases through insistence by unofficial bondholder committees that an “issuer implement the restructuring through a ‘prepackaged’ Chapter 11 plan of reorganization, which, unlike an out-of-court exchange offer, binds all holders to a plan approved by holders representing sixty-six and two-thirds percent in amount of claims and fifty percent in number of creditors in any class of creditors.” (citations omitted)).

¹⁶²Numerous articles discuss the holdout problem in debt restructuring. *See generally*, e.g., Elisa Benezze, *Stopping the Circling Vultures: Restructuring a Solution to Sovereign Debt Profiteering*, 49 VAND. J. TRANSNAT’L L. 245 (2016); Susan Block-Lieb, *Austerity, Debt Overhang, and the Design of International Standards on Sovereign, Corporate, and Consumer Debt Restructuring*, 22 IND. J. GLOBAL LEGAL STUD. 487 (2015); Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043 (2004); Tim R. Samples, *Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law*, 35 NW. J. INT’L L. & BUS. 49 (2014); Umakanth Varottil, *Sovereign Debt Documentation: Unraveling the Pari Passu Mystery*, 7 DEPAUL BUS. & COM. L.J. 119 (2008).

¹⁶³Franklin Cal. Tax-Free Trust v. Puerto Rico, 805 F.3d 322, 327 n.6 (2015).

¹⁶⁴Natalie Wong, *NML Capital, Ltd. v. Republic of Argentina and the Changing Roles of the Pari Passu and Collective Action Clauses in Sovereign Debt Agreements*, 53 COLUM. J. TRANSNAT’L L. 396, 398 (2015).

¹⁶⁵For additional discussion of collective action clauses, *see generally* W. Mark C. Weidemaier & Mitu Gulati, *A People’s History of Collective Action Clauses*, 54 VA. J. INT’L L. 51 (2014); Christian Hofmann, *Sovereign-Debt Restructuring in Europe Under the New Model Collective Action Clauses*, 49 TEX. INT’L L.J. 385 (2014); *see also* D.A. Skeel, Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677, 720 (2012) (“The CACs resemble a limited form of bankruptcy because they enable a sovereign debtor to restructure its bond debt by majority vote of its bondholders.”); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Pricing Terms in Sovereign Debt Contracts: A Greek Case Study With Implications for the European Crisis Resolution Mechanism*, 6 CAPITAL MARKETS L.J. 163, 170 (2011).

actually prevents a well permit due to insufficient acreage for a producing unit.

The central point remains that, in general, a negotiation environment requiring unanimous consent, unlike the current negotiation environment under post-*Finley* MIPA, invites strong holdout behavior or is fraught with that possibility.¹⁶⁶ These clauses are premised on that understanding: “Collective action clauses and exit consents are useful tools in helping to limit the holdout problem and encourage private creditors to act collectively.”¹⁶⁷ However, there is a concern with arrangements that require less than unanimous agreement to change the state of affairs because of the impact it may have on the minority. Where unanimous consent is not required, the minority may be adversely affected.¹⁶⁸ Yet, the argument for continuing with such arrangements remains strong, as evidenced in various areas of human endeavor. In the copyright area, compulsory licenses came into existence, amidst a legal environment that had a presumption that generally favored property rights.¹⁶⁹ Under this licensing regime, the recording industry is afforded “a statutory license to access copyrighted

¹⁶⁶See Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1998 & n.122 (2012); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 767–68 (1997) (noting that the holdout problem is “endemic to group decision-making under a unanimity rule,” leading some plaintiffs to come into agreement “ex ante that majority rule will govern their settlement negotiations”).

¹⁶⁷Alice de Jonge, *What Are the Principles of International Law Applicable to the Resolution of Sovereign Debt Crises?*, 32 POLISH Y.B. INT’L L. 129, 155 (2012).

¹⁶⁸Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 4 (2003) (“If coalitions of less than all are able to change the status quo, this necessarily means that a party left out of a coalition may potentially be made worse off.”).

¹⁶⁹Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253, 259–60 (2009); see also Henry H. Perritt, Jr., *Cut in Tiny Pieces: Ensuring That Fragmented Ownership Does Not Chill Creativity*, 14 VAND. J. ENT. & TECH. L. 1, 52–57 (2011).

compositions, provided they pay a standard fee¹⁷⁰ to the composers.¹⁷¹ The compulsory scheme was introduced to avert holdout problems.¹⁷²

Contests for corporate control is another territory that would be fertile ground for holdouts, if unanimous consent or cooperation were required.¹⁷³ That is, the holdout problem is addressed in this area by allowing a majority or less than unanimous vote to impose its will on the holdouts: “Reducing the stockholding required to change the board mitigates any potential holdout problem. When a mere majority of the shares held by a multitude of

¹⁷⁰Crane, *supra* note 169, at 260 (citation omitted); *see also* Robert M. Vrana, *The Remix Artist’s Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 WASH. & LEE L. REV. 811, 850–53 (2011) (outlining justifications for, and providing examples of, compulsory licensing of copyrighted works).

¹⁷¹*See* James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. L. REV. 45, 68 (2014); Peter Dicola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 189–90 (2012). For opposing sentiments on compulsory licensing, especially of patents, *see* Cynthia M. Ho, *Unveiling Competing Patent Perspectives*, 46 HOUS. L. REV. 1047, 1057 (2009) (referencing the view in some quarters that compulsory licensing may be likened to stealing).

¹⁷²Crane, *supra* note 169, at 270; Richard A. Epstein & F. Scott Kieff, *Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents*, 78 U. CHI. L. REV. 71, 85–86 (2011) (explaining the rationale for compulsory licensing of copyrighted songs); *see also* James H. Richardson, *Create a Compulsory Licensing Scheme for On-Demand Digital Media Platforms*, 3 ENT. & SPORTS LAW 9, 11 (2014) (proposing a modified compulsory licensing scheme for streaming music platforms, where potential holdout problems loom).

¹⁷³*See* Sanford J. Grossman & Oliver D. Hart, *Takeover Bids, the Free-rider Problem, and the Theory of the Corporation*, 11 BELL J. ECON. 42, 43 n.3 (1980) (“The use of unanimity never occurs in takeovers of widely held companies, presumably because each shareholder would attempt to be the only ‘holdout’ and thus anticipate a secret payment from the raider for his shares in addition to the tender price. With many small shareholders it would be very difficult to enforce a unanimous contract for the above reason.”); Cohen, *Holdouts*, *supra* note 121, at 360.

Consider a legal rule that permitted boards of directors to be totally self-perpetuating unless all the outstanding shares were owned by a single entity that wished to remove the board. Such a rule would solve any potential free-rider problem in corporate takeovers. Its shortcoming, however, is that it would generate a holdout problem with a vengeance. A potential raider would be faced with multiple potential holdouts. It is less their multiplicity than the certainty that they will appear that would stop corporate takeovers cold.

Id. at 360–61; *see* Mnookin, *supra* note 168, at 4 (“A requirement of unanimity in multilateral negotiation, however, creates potential holdout problems that may pose severe strategic barriers to resolution. These problems can be mitigated if the consent of less than all the parties can permit action.”).

individual shareholders can win a contest for control, the prospect of holdouts is effectively eliminated.”¹⁷⁴ A corporate raider interested in a corporation and intent on changing its management, possibly to improve the company’s fortunes or for other reasons known to the raider, may purchase shares in the open market or utilize the tender offer technique to acquire a majority of the company’s shares.¹⁷⁵ In the tender offer process, the raider solicits the company’s shareholders to sell their shares to him, usually at a healthy premium over the market price.¹⁷⁶ The raider’s interest in acquiring a lot of shares, especially in the case of a tender offer where the shareholders have become aware of the raider’s plan to acquire control, could quickly transform into an unintended invitation to hold out, as some shareholders would prefer to extract any higher price that they can get for their shares.¹⁷⁷

Corporate law evolved to deal with this transparent opportunity for holdout behavior through procedures discarding the requirement of unanimous approval by all shareholders to effect a merger and allowing for the squeeze-out of minority shareholders.¹⁷⁸ “The squeeze-out rule” is a relatively recent alternative to earlier corporate law, which applied a rigid property regime to shareholders individually. “Until the early twentieth century, a merger could not occur unless approved unanimously by all of the shareholders on the grounds that to do otherwise would violate dissenting stockholders’ property rights in their stock.”¹⁷⁹ In view of this legal transformation, the potential hold out problem is quashed, *ab initio*, by the

¹⁷⁴Cohen, *Holdouts*, *supra* note 121, at 361 (citation omitted).

¹⁷⁵Lloyd R. Cohen, *Why Tender Offers? The Efficient Market Hypothesis, the Supply of Stock, and Signaling*, 19 J. LEGAL STUD. 113, 124 (1990) [hereinafter Cohen, *Tender Offers*].

¹⁷⁶See WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 532 (5th ed. 2016) (describing the tender offer as the “simpler expedient of purchasing enough stock oneself to obtain voting control rather than soliciting the proxies of others”); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of Target Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1161 (1981) (“A cash tender offer typically presents shareholders of the ‘target’ corporation with the opportunity to sell many if not all of their shares quickly and at a premium over the market price.” (citation omitted)); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 826 (1981).

¹⁷⁷Zohar Goshen, *Controlling Strategic Voting: Property Rule or Liability Rule?*, 70 S. CAL. L. REV. 741, 766 (1997); see generally Grossman & Hart, *supra* note 173.

¹⁷⁸Jeanne L. Schroeder, *Three’s A Crowd: A Feminist Critique of Calabresi and Melamed’s One View of the Cathedral*, 84 CORNELL L. REV. 394, 476 n.288 (1999) (“Obviously, this limitation gave tremendous holdout power to individual stockholders and rendered the negotiation of mergers of widely held public corporations extremely difficult, if not impossible.”).

¹⁷⁹*Id.* at 476.

fact that the raider does not need to own all of the company's shares or even a supermajority to take over the company.¹⁸⁰ "The ability to acquire a simple majority of the shares and then squeeze out the minority at unfavorable terms not only overcomes the free rider problem, it also increases the risks to prospective holdouts, effectively eliminating their incentive to engage in the effort."¹⁸¹

The holdout problem has been widely discussed in the realm of eminent domain.¹⁸² The economic rationale for resort to eminent domain to address challenges posed by holdouts has been summed up in efficiency, with a desire to ensure that public benefits are not jeopardized by respect for a landowner's title.¹⁸³ In a nutshell, "[E]minent domain is designed to increase social wealth by facilitating certain transactions that otherwise would not take place, or that would take place only at an inefficiently high cost."¹⁸⁴ Yet eminent domain presents and represents a direct challenge to private property rights, as it converts the legal protection hitherto enjoyed by the property owner from a property rule into a liability rule.¹⁸⁵ Moreover, since the acquirer is only required to pay fair market value for the property without considering any additional value it may hold for the owner, eminent domain is considered a

¹⁸⁰Cohen, *Tender Offers*, *supra* note 175, at 125 ("[A]s long as only a majority of the shares are required for control, holdouts present no threat to corporate raiders.").

¹⁸¹*Id.* at 123–24 (citation omitted). It should be noted that a squeeze out may require a supermajority vote. *See id.* at 124 n.23. However, this point does not change the essence of the argument. *See further* JOSEPH W. BARLETT, EQUITY FINANCE: VENTURE CAPITAL, BUYOUTS, RESTRUCTURINGS AND REORGANIZATIONS, 21.3A (2016) (discussing the use of squeeze out mergers to end holdouts); Faith Stevelman, *Going Private at the Intersection of the Market and the Law*, 62 BUS. LAW 775, 802 (2007).

¹⁸²Thomas Brugato, *supra* note 130, at 318. For a critical appraisal of eminent domain and its effects, *see* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 86 (1986) [hereinafter Merrill, *Public Use*]; RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 161–81 (1985).

¹⁸³Alberto B. Lopez, *Kelo-Style Failings*, 72 OHIO ST. L.J. 777, 787–88 (2011).

¹⁸⁴Merrill, *Public Use*, *supra* note 182, at 82. For a discussion of the advantages of using the eminent domain power, *see* Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y 491, 534–35 (2006).

¹⁸⁵Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 553 (2009) ("Private takings carried out by eminent domain—whether by delegation, government mediation, or other legal doctrine—permit the taker to convert the property owner's legal protection from a property rule to a liability rule by the voluntary act of invoking the power of eminent domain.").

form of tax on a property owner.¹⁸⁶ On that ground, it is contended that the only justification for eminent domain is the existence of holdout problems.¹⁸⁷

While the power of eminent domain should not be extravagantly exercised, it remains a tool designed to target holdouts, but one which may not be resorted to if a holdout is not genuinely in view¹⁸⁸: “The law of eminent domain often reflects this anti-holdout rationale by confining the power to situations where holdout is a genuine threat. Sometimes this is accomplished through statutory requirements that governmental bodies attempt negotiation before condemnation,”¹⁸⁹ thereby creating a balance between private rights and public purpose.¹⁹⁰ As with other exercises of eminent domain, a forced pooling statute may require the existence of the threat of holdout, before the power to forcefully integrate or acquire their interests could be exercised. In

¹⁸⁶For a differing perspective, see Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 137 MICH. L. REV. 101, 105 (2006) (challenging the strongly rooted assumption that eminent domain systematically undercompensates property owners by paying only a fair market value).

¹⁸⁷Richard A. Posner, *The Supreme Court, 2004 Term-Foreword: A Political Court*, 119 HARV. L. REV. 31, 93–94 (2005) (“The only justification for this almost random form of taxation is the existence of holdout problems, problems best illustrated—paradoxically—when the power of eminent domain is employed on behalf not of government but of private firms, such as railroads and pipeline companies, that provide services over rights of way.”); Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 42 n.155 (2010) (citing to a statement to the effect that preventing strategic bargaining by holdouts is “an important justification for eminent domain”); Matthew Cory Williams, *Restitution, Eminent Domain, and Economic Development: Moving to a Gains-Based Conception of the Takings*, 41 URB. LAW 183, 196 (2009) (referencing the point that holdout behavior justifies the exercise of the eminent domain power); Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L. J. 2091, 2112 (1997) (“Public officials resort to the eminent domain power only where holdouts confound voluntary transactions.”); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 77 & n.117 (1996) (discussing the point that holdout problems provide the primary justification for takings by the government).

¹⁸⁸Michèle Alexandre, “*Love Don’t Live Here Anymore*”: *Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1, 8 (2008) (“The use of eminent domain is designed to be a tool of last resort, to be used only in the case of holdout by one or more property owners.” (citation omitted)).

¹⁸⁹Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 750 (1986).

¹⁹⁰See *Landowner Interests in Project Approval Cases*, 27 No. 8 NAT. GAS TRANSP. INFO. SERVICE NEWSL. 5 (2011) (discussing balancing of interests and benefits in the exercise of eminent domain power); Richard A. Epstein, *Property Rights in Water, Spectrum, and Minerals*, 86 U. COLO. L. REV. 389, 412–13 (2015).

that connection, one could also mention eminent domain for oil and gas pipelines, which is relevant to this topic and much more closely associated with oil and gas production.¹⁹¹

C. *Response to Complaint*

A number of arguments justify resorting to Rule 37 exceptions and forced pooling, including the *Finley* decision, to prevent or end holdouts.¹⁹² One of them is the “fairness” argument.¹⁹³ So long as the law requires a minimum number of acreage for drilling a well, those who want to develop their property would always be at the mercy of those who do not want to, in the absence of state intervention.¹⁹⁴ If the law allows everybody to develop the oil and gas underlying his or her land regardless of the size of the land or mineral interest, holdouts have a stronger basis to complain if they are forced to join in development over their objection. However, because of well spacing regulations, those interested in developing, but who lack the required minimum acreage, may not proceed without being joined with their neighbors’ tracts.¹⁹⁵ In this sense, the neighbors not interested in developing would be given a veto power by the state over those interested in developing.¹⁹⁶ When most neighbors want to develop, this veto power seems unfair. So, while holdouts may complain of state power being used against them to force them to develop, the neighbors may make a similar argument

¹⁹¹ See *Pipelines*, 26 Am. Jur. 2d *Eminent Domain* § 84 (2017).

¹⁹² Christopher W. Smart, *Legislative and Judicial Reactions to Kelo: Eminent Domain’s Continuing Role in Redevelopment*, 22 PROB. & PROP. 60, 63 (2008) (“To allow one property owner to thwart the economic redevelopment plans of a community, advocates argue, would create a tyranny of the minority of the most damaging sort.”).

¹⁹³ *Id.*

¹⁹⁴ See Danelle Gagliardi, *Made in America: Why the Shale Revolution in America Is not Replicable in China and Argentina*, 14 WASH. U. GLOBAL STUD. L. REV. 181, 185–86 (2015) (justifying spacing regulations as being anchored on a balance between a free market system and state intervention); Kevin L. Colosimo & Daniel P. Craig, *Compulsory Pooling and Unitization in the Marcellus Shale: Pennsylvania’s Challenges and Opportunities*, 83 PA. BAR ASSN. Q. 47, 55 (2012) (stating that spacing rules justify compulsory pooling law).

¹⁹⁵ See Lindsey Trachtenberg, *Reconsidering the Use of Forced Pooling for Shale Gas Development*, 19 BUFF. ENVTL. L.J. 179, 210 (2012) (“Without forced pooling, landowners who are prohibited from drilling on their own land by spacing regulations are not entitled to compensation.”).

¹⁹⁶ See Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1185 (1999) (illustrating how holdout behavior by a minority of property owners amounts to a use of veto power that can undermine the interests of a vast majority of neighboring property owners).

of state power being used against them to prevent them from developing and consequently reaping the benefit of their mineral interests, if the law unduly favors holdouts.¹⁹⁷

In addition, breaking holdouts through compulsory pooling promotes economic development.¹⁹⁸ Forced pooling reduces physical and economic waste. By not allowing oil and gas to lie unused underground, forced pooling ensures the generation of revenues for socio-economic development.¹⁹⁹ While this progress might occur without compulsory pooling, forced pooling can continue to facilitate fracking, especially in places where there is strong sentiment against the activity.²⁰⁰

Proponents of compulsory pooling also argue that options for dealing with strategic holdouts in other scenarios may not be available in the oil and gas lease. One of such options is purchase of land through secret agents, an approach that notable individuals and institutions, including billionaire entrepreneur Paul Allen, Harvard University, and the Disney Corporation have successfully utilized in various property procurements.²⁰¹ While an oil or gas lease potentially could last for many years, it is not an outright purchase of the property.²⁰² It could be argued that since the lessor and lessee would maintain an ongoing relationship, the lessee would have a hard time

¹⁹⁷Sylvester & Malmshemer, *supra* note 31, at 53 (“[T]he non-consenting landowners are interfering with the correlative rights of the landowners who voluntarily entered leases.”).

¹⁹⁸*Id.* at 48.

¹⁹⁹Begos, *supra* note 20.

²⁰⁰See Elizabeth A. McClanahan, *Coalbed Methane: Myths, Facts, and Legends of Its History and the Legislative and Regulatory Climate into the 21st Century*, 48 OKLA. L. REV. 471, 524 (1995) (noting that without forced pooling, coal bed methane development might not occur because of some mineral owners who would refuse to lease their interests).

²⁰¹Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 6 (2006) (“Harvard University, for example, working through a real estate development company, used secret agents to avoid strategic holdouts and purchase fourteen parcels of land for \$88 million. Similarly, Disney has used buying agents in Orlando, Florida, and Manassas, Virginia, to assemble thousands of acres for its theme parks.” (citations omitted)); Robert C. Ellickson, *Federalism And Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 760 (2009); Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 OHIO ST. L.J. 451, 469 n.78 (2003) (“Many wealthy corporations and developers acquire the property they need in this manner, including Paul Allen (who purchased large tracts of land at the base of Lake Union in Seattle), and even Harvard University (which secretly bought up land in Allston that is now being proposed as the site of a new mega-graduate school complex).”).

²⁰²See OWEN L. ANDERSON ET AL., *HEMINGWAY OIL AND GAS LAW AND TAXATION* 211–17 (4th ed. 2004) (discussing the nature of the oil and gas lease).

entering into the lease through a secret agent.²⁰³ In essence, potential holdouts would know that a lease is being contemplated and decide to holdout, unlike sellers of land who might sell if they believe an adequate price had been offered, although they could have held out and obtained a higher sum if they knew the real purchaser and the objective for purchasing particular pieces of property. As good as the arguments sound, the reality is a little different. It is true that if a landowner is being asked to sign a lease, he will know that it is for the purpose of oil and gas development and so in that sense, a secretive acquisition scheme would be difficult. However, secret negotiations for oil and gas leases are possible. Oil and gas companies very often use agents, brokers or dummy companies to take leases on their behalf without revealing the identity of their client.²⁰⁴ Accordingly, this rationale is, at best, partially applicable.

Another option for breaking holdouts that is unlikely to work with oil and gas holdouts is the use of social or peer pressure.²⁰⁵ Some commentators propose that approach for intellectual property (IP) holdouts.²⁰⁶ It may be that IP owners are more emotionally involved and passionate about their work and would be committed to seeing the growth of an industry to which they belong.²⁰⁷ Oil and gas lessors are not part of the energy industry and are more likely holding out for better financial and other terms that may not be influenced by emotional appeals.²⁰⁸ A repeat business is not anticipated, and

²⁰³Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1468 (2008) (discussing the inapplicability of secret negotiations to some land transactions).

²⁰⁴Bernard E. Nordling, *Landowners' Viewpoints in Pipeline Right-of-Way and Oil and Gas Lease Negotiations*, 52 J. KAN. B. ASS'N. 35, 36 (1983).

²⁰⁵See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 853–54 (3d ed. 2005) (stating the case that community members can apply pressure to their neighbors to end holdouts).

²⁰⁶F. Scott Kief & Troy A. Paredes, *Engineering a Deal: Toward a Private Ordering Solution to the Anticommons Problem*, 48 B.C. L. REV. 111, 131 (2007) (“The combined use of peer and social pressure may help cabin any resulting holdout behavior that arises by appealing to different sensibilities of the holdout IP owner than direct financial payoffs do.”); Philip J. Power, *Sovereign Debt: The Rise of the Secondary Market and Its Implications for Future Restructurings*, 64 FORDHAM L. REV. 2701, 2711–14 (1996) (discussing the role played by peer and institutional pressure in negotiations).

²⁰⁷See Jiarui Liu, *Copyright For Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, 38 COLUM. J.L. & ARTS 467, 531–32 (2015) (discussing use of legal principles in copyright law to target emotional benefits, including reputational gains from movies and televisions, resulting in a reduction of the holdout problem).

²⁰⁸See Andrew Laurance Bab, *Debt Tender Offer Techniques and the Problem of Coercion*, 91 COLUM. L. REV. 846, 883 (1991) (discussing the powerful effect that financial motives have in the decision to hold out).

regulatory or reputational pressures that could propel one not to hold out are largely absent.²⁰⁹ In a similar vein, the lessee does not have the option of imposing time pressure on the lessor or invoking a penalty for delaying resolution of the negotiation, which is another tool resorted to for ending holdout situations in some cases, such as plea bargaining.²¹⁰ In addition, while there may be situations where “one would expect that community sanctions could be used effectively to deter holdouts,”²¹¹ negotiating for an oil and gas lease in an urban setting may not be among those, especially where the holdout’s supposed misdeeds are simply seeking a higher price or opposing drilling on ideological and environmental grounds.

Another tool that has proven useful in limiting or eliminating holdout problems is the use of “upset prices.” In the railroad insolvencies that were witnessed in the United States more than a century ago, courts handling the bankruptcy cases specified the lowest prices that they would accept for the insolvent company.²¹² These prices, known as upset prices, were usually pegged at a point that was considerably below market value, notwithstanding that the presumed objective was to help establish a fair price.²¹³ “The result was that they helped force holdouts to agree to the prices established in negotiations because the alternative to the upset price was so unattractive.”²¹⁴

²⁰⁹ See Laura Alfaro, *Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling*, 5 HARV. BUS. L. REV. 47, 62–63 (2015) (discussing the role of existing or anticipated business relationships and regulatory and reputational pressures in avoiding holdout behavior).

²¹⁰ See Sean C. Griffin, *Three’s Company, Too: Navigating Multiparty ADRs*, For The Def., May 2013, at 27, 29.

Alternatively, if it is possible to impose a penalty for delaying resolution of the negotiation, then a holdout may relent sooner rather than later. . . . For instance, in the context of a plea bargain, a defendant’s holdout strategy could result in additional time in pretrial detention or additional years in prison. . . . Rarely can a civil negotiator threaten to throw a recalcitrant party into prison for its negotiation strategy. However, if a non[-]holdout can impose credible time pressure onto the holdout with a warning such as “If we can’t resolve this today, you get nothing,” then the holdout might take less than it otherwise would.

Id.

²¹¹ Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131, 158 (2000).

²¹² Benjamin A. Berringer, “*It’s All Just a Little Bit of History Repeating: An Examination of the Chrysler and GM Bankruptcies and Their Implications for Future Chapter 11 Reorganizations*,” 7 N.Y.U. J.L. & BUS. 361, 366 (2010).

²¹³ *Id.* at 366–67.

²¹⁴ *Id.* at 367.

Again, this tool is not available to lessees in negotiating oil and gas leases in urban and suburban areas. The court is not involved at this stage and the price offered to neighbors is not necessarily below market value. The holdouts would already know the price and find it unattractive or believe that they can receive more if they bargained harder, capitalizing on the fact that the lessee has already expended enormous energy and tremendous resources to get the non-holdouts to sign leases with the lessee.

After all the analysis of rationales, tools and options, it bears noting that oil and gas law and policy has long faced and responded to the problem of mineral owners who would choose not to develop their property at all or only upon certain conditions being met. The rule of capture, a venerable institution of petroleum law, represents a solution to holdouts. An owner of the mineral estate may elect not to lease the property for development or develop it on his own.²¹⁵ Such inaction deprives the state of revenue and ensures a waste of the resource as it is trapped underground. The rule of capture eliminates the problem by allowing neighboring mineral owners to drain the oil from their neighbor's land without the danger of legal liability, so long as they did not commit trespass in the process.²¹⁶ As a result, mineral owners who would use their property right to forestall or frustrate development are disempowered from doing so.²¹⁷ Forcing holdouts to join in the production of oil and gas could be viewed as a continuation of this tradition, albeit with a touch of compulsion. Besides, forced pooling ensures that the rule of capture does not ultimately work against the holdouts, as lessees can obtain leases from their neighbors and then drain their oil, either by acquiring sufficient number of acres for a drilling unit or seeking an administrative exception to the minimum acreage requirement.²¹⁸

We should not gloss over, however, some credible objections to the use of forced pooling to defeat holdouts. Eminent domain, in any form, is often a target of attack and even opprobrium.²¹⁹ It is considered a relic of the past

²¹⁵Nancy Saint-Paul, 1A SUMMERS OIL AND GAS § 8.4 (3d ed. 2017).

²¹⁶See generally Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1 (2004) (providing an extensive account of the rule of capture's origins, rationale and application).

²¹⁷See Mosmeyer, *supra* note 1, at 817 (stating that “the rule of capture seeks to encourage development of natural resources” (citation omitted)).

²¹⁸Camp, *supra* note 43, at 4–6.

²¹⁹Bell, *supra* note 185, at 520–21.

that has no place in modern democratic governance.²²⁰ The power of eminent domain is also viewed as unnecessary, as voluntary options exist for the assembly of land for various purposes.²²¹ One of the chief concerns with eminent domain is the potential for abuse, especially when the power is exercised to allow a private project to proceed.²²² Public authorities at local, state or federal level, for instance, may trade the power for favors to powerful business interests that make campaign contributions to the politicians.²²³

Even in a less sinister sense, government officials may allow private players to acquire properties from unwilling sellers with the expectation that the new project would increase tax revenues or bring other monetary benefits to the government or its officials.²²⁴ In essence, the government is getting a windfall from the acquisition in that some of the money that would have gone to the property owners winds up in the city's pockets.²²⁵ This concern about abuse is perhaps illustrated by the uproar that was generated by the Supreme Court decision in *Kelo v. City of New London*.²²⁶ The use of eminent domain power is also condemned because it weakens incentives to devise creative

²²⁰*Id.* at 527 (“The fact that takings might be thought to have been an unavoidable part of the package of powers granted to a sovereign power in seventeenth-century political theory hardly commends itself as a reason to recognize a power of eminent domain today.”).

²²¹See Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129, 152 (2015) (“In theory, any project developer could buy out private holdouts, as is well chronicled in the law and economic literature surrounding property law.”); Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1104 (2013); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 560 (1972).

²²²Block & Epstein Debate, *supra* note 98, at 1164 (“You get a powerful zoning board and they will come up to you and say we are going to wipe you out unless you sell to one of our friends in a ‘voluntary’ transaction.”).

²²³See Audrey G. McFarlane, *Putting the “Public” Back Into Public-Private Partnerships for Economic Development*, 30 W. N. ENG. L. REV. 39, 49 (2007); Ashley J. Fuhrmeister, *In the Name of Economic Development: Reviving “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 DRAKE L. REV. 171, 216–17 (2005). For a discussion of abuse of power by local governments, which could be worse than that perpetrated by national government, see CLINT BOLICK, *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* 76 (1993).

²²⁴Fuhrmeister, *supra* note 223, at 217–18.

²²⁵See Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1, 58 (2007); see generally Timothy J. Dowling, *How to Think About Kelo After the Shouting Stops*, 38 URB. LAW. 191 (2006); Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201 (2006).

²²⁶See generally Mihaly, *supra* note 225; Dowling, *supra* note 225; Kanner, *supra* note 225.

private bargaining tools.²²⁷ So long as developers know that they can beckon on the government to rescue them from tiresome negotiations, they are disinclined to pursue negotiations with property owners that are likely to be recalcitrant.²²⁸

The fear of abuse may be overblown.²²⁹ Courts apply safeguards against abuse of the power of eminent domain.²³⁰ In addition, eminent domain is an expensive, if not irksome, process that public authorities do not seem in a hurry to invoke.²³¹ It has been observed that in a good number of instances governments tend to acquire land from private owners through voluntary negotiations.²³² This preference for resorting to market transactions, rather than exercising the eminent domain power, “suggests that the government views eminent domain as a cumbersome and expensive process to be avoided if at all possible.”²³³ The point can be made that while eminent domain is an appropriate analogy for a legal analysis, it does not work for a cost analysis. True compulsory pooling schemes like those in Oklahoma and Louisiana are relatively inexpensive to pursue and there is little or no hesitancy on the part of the public authorities to invoke them.²³⁴

A significant problem with using compulsory pooling to address the holdout problem in urban oil and gas drilling is that it does not adequately cater to the various holdout scenarios.²³⁵ An owner or co-owner may choose not to sell a business or her interest in the business because she cherishes the autonomy and satisfaction that come with running one’s business, not

²²⁷ Kochan, *supra* note 85, at 89.

²²⁸ *Id.*

²²⁹ See NATURAL GAS—JORDAN COVE ENERGY PROJECT, L.P., FED. ENERGY REG. COMM’N REP. P 61190 (C.C.H.), 2016 WL 950112 (stating that the exercise of eminent domain was dependent on a balancing of pertinent factors and considerations); Garnett, *supra* note 186, at 104 (stating that those exercising eminent domain power are constrained by costs stemming from the “need to avoid holdouts and the political fallout from negative publicity. They are legally obligated to bargain with property owners and are penalized financially if these negotiations fail. And they almost always are legally required to provide substantial relocation assistance to displaced owners.”).

²³⁰ See generally Smart, *supra* note 192.

²³¹ Merrill, *Public Use*, *supra* note 182, at 80.

²³² *Id.*

²³³ *Id.*

²³⁴ See, e.g., 52 OKLA. STAT. ANN. § 87.1(E) (West 2017).

²³⁵ This argument also applies to the use of eminent domain to end holdout behavior.

necessarily because she wants a higher price.²³⁶ When she holds out in a negotiation or an expression of interest to buy the business, it is not helpful to the potential acquirer to treat her as a strategic holdout. Ascertaining the true basis for her hesitancy or unwillingness to sell could succeed in moving the deal forward for mutual benefit.²³⁷ In one particular transaction along these lines, the acquirer was able to form a joint venture with the business owner, with the owner receiving a 20% stake and the position of president that enabled the owner to run the new venture while the acquirer used the period of joint ownership to study the business with a view to converting it into a chain.²³⁸ There are similar situations where small tract mineral owners hold out on a forced pooling offer for reasons other than money.²³⁹

Forced pooling solves the problem of those strategic holdouts who are seeking a higher price for their access to their mineral interest. It also works in the case of “unreasonable” holdouts who will not sell for any reasonable price and may not have a genuine reason for their position.²⁴⁰ It does not seem to adequately touch on the concern of ideological holdouts, who may have moral,²⁴¹ sentimental,²⁴² cultural,²⁴³ or philosophical objection to the

²³⁶ *CPR Legal Program Annual Meeting*, 9 ALTERNATIVES TO HIGH COST LITIG. 147, 148 (1991).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See the objections of some focus group participants in the discussion *infra* Section III.A.

²⁴⁰ John Gergacz & Douglas Houston, *Legal Aspects of Solar Energy: Limitations on the Zoning Alternative From a Legal and Economic Perspective*, 3 TEMP. ENVTL. L. & TECH. J. 5, 10 (1984) (“Perhaps the holdout problem many market solution critics have in mind is the very unreasonable person—the person who would not agree to yield solar access rights for any ‘reasonable’ amount of money. Such idiosyncratic people do, indeed, exist.”).

²⁴¹ Vincent M. de Grandpré, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 110–11 (2001) (discussing moral holdouts).

²⁴² Parchomovsky & Siegelman, *supra* note 130, at 83, 128–29 (arguing that those refusing to accept a deal for sentimental reasons may be better characterized as “holdins” and not holdouts).

²⁴³ Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1412–13 (1982).

And sometimes the holdout may confer a long-term benefit, even though the benefit is not obvious at the time. One has only to read Professor Dunham’s charming story about the crotchety Montgomery Ward, who thwarted construction in Chicago’s downtown lakeshore park by insisting on his servitude right to an unobstructed vista to the lake, to realize that today’s “holdout” may be tomorrow’s culture hero.

acquisition or more specifically to fossil fuel production, or those strategically holding out for the collective, rather than merely personal, benefit.²⁴⁴ This category includes mineral owners who hold out for environmental reasons or who do not want to lease at the moment because prices are low and there is a reasonable expectation, based on market fundamentals rather than speculation, that commodity prices would increase in the near future.²⁴⁵ Holding out, in that circumstance, redounds to the benefit of all the mineral owners who would enjoy the higher prices and resulting royalties if the deal is successfully delayed. Viewed from that perspective, forced pooling does not seem to be a good idea.²⁴⁶

The Texas approach strikes some semblance of balance in that mineral interests are not automatically pooled without leaving room for negotiation.²⁴⁷ Yet, the Texas rule falls short in that it does not carve out

Id. (citation omitted); Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L. Q. 737, 762 (2000) (“Moreover, cultural groups value property differently.” (citation omitted)).

²⁴⁴See Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 45 (2009) (recommending against the use of eminent domain in the case of good faith holdouts who truly believe that their property is worth more than the government is offering while retaining the power to condemn in the case of strategic holdouts); John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 45–46 (2005) (arguing for differential standards among different kinds of holdouts); Sally Brown Richardson, *Nonuse and Easements: Creating a Pliability Regime of Private Eminent Domain*, 78 TENN. L. REV. 1, 21 (2010); Michael I. Krauss, *The Perils of Rural Land Use Planning: The Case of Canada*, 23 CASE W. RES. J. INT’L L. 65, 68–69 (1991).

²⁴⁵Trachtenberg, *supra* note 195, at 213–14 (stating that, for shale gas development, environmental concerns are a factor, alongside economic considerations, in the decision by some property owners to hold out). Of course, it is a trite point that if a proposed project will clearly benefit property owners, they are unlikely to hold out and all this discussion about defeating holdout behavior would become moot. See Samuel S. Bacon, *Why Waste Water? A Bifurcated Proposal for Managing, Utilizing, and Profiting From Coalbed Methane Discharged Water*, 80 U. COLO. L. REV. 571, 598 (2009).

²⁴⁶See Amanda W. Goodin, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 189 (2007) (arguing that community benefit should be taken into account in making eminent domain decisions); Trachtenberg, *supra* note 195, at 217–18 (proposing a change in New York’s forced pooling procedures to further empower non-economic holdouts by making it more difficult for operators to obtain the required acreage for development or ensuring that a greater portion of the neighborhood population support the decision to proceed with shale gas development).

²⁴⁷Ernest E. Smith, *The Texas Compulsory Pooling Act*, 44 TEX. L. REV. 387, 387–88 (1966) (providing an early discussion of the process under the Texas compulsory pooling statute)

rationales for upholding holdouts where development is shown not to be in the economic interest of the mineral owners as a group. An appraisal process that mandates such an assessment by the Texas Railroad Commission may offer some panacea.²⁴⁸

Where owners are holding out for strong ideological or collective-benefit reasons, forcing them into a pool may not be the most desirable outcome.²⁴⁹ Yet, the application of a strict property rule approach, as opposed to adopting a liability rule approach, may lead to a different undesirable outcome by foreclosing any chance of mineral development on the land and surrounding tracts.²⁵⁰ It becomes a battle of choosing between two less than optimal outcomes. When the various factors discussed so far are considered carefully, forced pooling appears to have the upper hand.

Moreover, for a number of reasons, small tract owners should not be overly concerned about the impact of MIPA, even under the *Finley* paradigm, on their holdout power. First, MIPA is a weak version of compulsory pooling legislation. In states like Oklahoma and Louisiana with strong compulsory pooling statutes, the small tract owner virtually has no holdout power.²⁵¹ Second, MIPA confers a privileged position on the person sought to be pooled by imposing hurdles on the person seeking to pool.²⁵² Pooling may not be compelled under MIPA unless a number of conditions are satisfied: the field was discovered after 1961; the applicant for forced pooling has made

[hereinafter Smith, *Compulsory Pooling*]. For the argument that the holdout problem is resolved if negotiation between developers and property owners precedes exercise of eminent domain power, see Thomas J. Miceli & Kathleen Segerson, *A Bargaining Model of Holdouts and Takings*, 9 AM. L. & ECON. REV. 160, 161 (2007).

²⁴⁸Warren J. Ludlow, *Property Rights vs. Modern Technology: Finding the Right Balance in a World of Energy Shortages*, 2005 NO. 1 RMMLF-INST PAPER NO. 14, 19 (2005) (proposing an appraisal mechanism for exploration access that has the secondary effect of eliminating holdouts).

²⁴⁹For an examination of this point in the context of eminent domain, see Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning, and Judicial Review*, 94 MARQ. L. REV. 1, 35 (2010) (“The problem with eminent domain in practice is that it is used not only to avoid negotiations where there are bilateral monopoly problems, but also to circumvent political opposition to redevelopment by neighborhood groups concerned about the disruption of their community or the loss of their homes.”).

²⁵⁰See, e.g., Craig-Taylor, *supra* note 243, at 761 n.142 (“Hiroshi Fujishige, a strawberry farmer, will forever be famous for rejecting offers from the Walt Disney Company and resort developers that would have made him an instant millionaire. . . . The protection of the property rule allowed Fujishige to preserve his traditional way of life on his fifty-six acre farm.”).

²⁵¹See LOWE ET AL., *supra* note 6, at 715–16 n.78.

²⁵²*Id.* (“In any event, in those states that do require an effort to pool voluntarily, the burden is not as exacting as it is in Texas.”).

a good faith effort to voluntarily pool the neighboring tracts; and the applicant has made a fair and reasonable offer to the owners of tracts that would be pooled compulsorily.²⁵³ In essence, MIPA is a very weak compulsory pooling statute with multiple hurdles that must be cleared before an application will even be considered, and it is extremely rare that it is used.²⁵⁴ Third, the RRC will likely grant a forced pooling order on relatively generous terms to the owner sought to be pooled, such as “a 1/5 royalty and a 4/5 carried working interest with no risk penalty” as was the case in *Finley*.²⁵⁵ On this last point, the current MIPA process has been criticized as giving the holdouts more favorable terms than those that chose to lease earlier and thus encouraging holdout behavior.²⁵⁶

Small tract owners have a more credible case about encroachment on their holdout power regarding exceptions under Rule 37. Focus group participants anchored their complaint primarily on Rule 37 and the way the RRC is granting exceptions.²⁵⁷ The threat or dread of their resources being drained by the recipient of an exception permit weakens the position of the small tract mineral owner in bargaining for better terms when a lease or pooling offer is offered. Holding out could mean losing all the resources. While the temptation among small tract owners would be to demand the end of granting exceptions under Rule 37, such call would not lead to the best outcome. The exceptions serve some useful purpose, including ensuring that every mineral owner is not unfairly deprived of the opportunity to produce the oil and gas he owns²⁵⁸ and preventing the stranding of valuable resources underground because using the legal location of a well, as opposed to an exception location, will not assure their recovery.²⁵⁹ Yet, the current system allowing oil and gas companies to drill around the small tracts risks leaving oil and gas beneath them, which flies in the face of the state’s policy against physical and economic waste.²⁶⁰ To solve this problem, Texas should adopt a strong compulsory pooling statute.

²⁵³TEX. NAT. RES. CODE ANN. §§ 102.003, 102.013.

²⁵⁴See *LOWE ET AL.*, *supra* note 6, at 710–15.

²⁵⁵*Camp*, *supra* note 43, at 21.

²⁵⁶*Id.* at 22; Whitworth & Kobzar, *supra* note 37, at 13 (stating that “the favorable terms imposed upon the force pooled parties (no risk penalty, 1/5 royalty and 4/5 working interest) could encourage some unleased parties to hold out rather than to lease or pool voluntarily”).

²⁵⁷Focus Group Transcript. (Apr. 2013) (on file with the author).

²⁵⁸*LOWE ET AL.*, *supra* note 6, at 670.

²⁵⁹*Id.* at 674.

²⁶⁰See *Lee*, *supra* note 10, at B.

IV. THE CASE FOR COMPULSORY POOLING IN TEXAS

In Parts II and III, I discussed some of the rationale for compulsory pooling in responding to the complaints about encroachment on sanctity of property and interference with the holdout power.²⁶¹ This part develops the argument further and presents a compelling case for a strong or pure compulsory pooling regime in Texas.

A. *Merits and Challenges of Compulsory Pooling*

There are good arguments for pooling.²⁶² First, it enhances energy production by preventing the depletion of reservoir pressure that is critical in ensuring the lifting of oil and gas from their underground locations.²⁶³ This is important considering that in Texas, we have a conservation policy that is premised on waste prevention.²⁶⁴ Ensuring that oil is not left underground tackles sub-surface waste. Second, pooling prevents economic waste as more money is saved by lumping owners into pooled tracts and drilling fewer wells thereon instead of drilling multiple wells by having a well on each owner's tract.²⁶⁵ Third, drilling fewer wells also translates to less physical and environmental waste, since the amount of surface space exposed to drilling is reduced accordingly.²⁶⁶ Further, pooling ensures the protection of each

²⁶¹ See *supra* notes 111 and 180–203 and accompanying text.

²⁶² Some of these arguments also apply to unitization. See Bruce M. Kramer, *Unitization: A Partial Solution to the Issues Raised by Horizontal Well Development in Shale Plays*, 68 ARK. L. REV. 295, 319–20 (2015).

²⁶³ Gary D. Allison, *The Prorationing of Natural Gas in Oklahoma*, 57 U. COLO. L. REV. 169, 169 (1986); Michael J. Wozniak, *Fundamentals of Drilling and Spacing Units and Statutory Pooling*, 2012 No. 1 RMMLF-INST Paper No. 17, 17-4 (2012).

²⁶⁴ See 1 ROBERT L. BRADLEY, JR., *OIL, GAS & GOVERNMENT: THE U.S. EXPERIENCE* 205 (1996) (noting that mandatory unitization is efficient); JACQUELINE LANG WEAVER, *UNITIZATION OF OIL AND GAS FIELDS IN TEXAS* 21–22 (1986); EUGENE V. ROSTOW, *A NATIONAL POLICY FOR THE OIL INDUSTRY* 34–42 (1948).

²⁶⁵ JAMES T. O'REILLY, *THE LAW OF FRACKING* § 3:10 (2016); Keith B. Hall, *Hydraulic Fracturing: If Fractures Cross Property Lines, Is There an Actionable Subsurface Trespass?*, 54 NAT. RESOURCES J. 361, 404 (2014).

²⁶⁶ Brad Secrist, *Not All "Units" Are Created Equal: How Hebble v. Shell Western E & P, Inc. Missed an Opportunity to Curb the Expansion of Fiduciary Obligations in Oklahoma Oil and Gas Law*, 65 OKLA. L. REV. 157, 160 (2012); Owen L. Anderson, *State Conservation Regulation—Single Well Spacing and Pooling—Vis-a-Vis Federal and Indian Lands*, 2006 No. 4 RMMLF-INST Paper No. 2, 3 (2006) (“Surface waste is the unnecessary proliferation of valves, pipes, and storage facilities used to handle produced oil when more wells are drilled than are necessary to effectively

mineral owner's correlative rights, which is the right of an owner of a mineral interest in a reservoir to be afforded a fair chance to produce a fair share of the oil and gas in the reservoir.²⁶⁷ Moreover, pooling obviates a worse outcome for mineral owners who may face the more unpalatable alternative of seeing the oil underneath their land drained by their neighbors.²⁶⁸ Under the rule of capture, such drainage is permissible, perfectly legal and not actionable.²⁶⁹ All of these reasons provide reasonable justification for making pooling compulsory.²⁷⁰

Support for forced pooling can also be framed in the context of cooperation. The starting premise is that "individual rights owners, as well as society as a whole, can benefit significantly from cooperation. Unfortunately, it is known both theoretically and empirically that cooperation will not necessarily ensue."²⁷¹ Dealing with a large number of rights owners entails an increase in transaction costs.²⁷² A cooperative deal may be forestalled if it

and efficiently drain the reservoir. This unnecessary proliferation creates a greater likelihood for leaks and spills of oil. Thus, the concern is the loss of oil.").

²⁶⁷PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS MANUAL OF OIL AND GAS TERMS 222–25 (16th ed. 2015) (providing several definitions of correlative rights); *see generally* LOWE ET AL., *supra* note 6.

A compulsory pooling act eliminates the need for small-tract exceptions, avoids the drilling of unnecessary wells, and, in turn, helps prevent the inefficient dissipation of reservoir energy. These acts protect the correlative rights of owners of oil and gas interests within the pooled unit by giving each owner a fair share of the production from the well. Each working interest owner also pays, either directly or out of its share of production, for a fair share of the drilling and operating costs of any productive well.

Id. at 716. (citation omitted). *See* Jared B. Fish, *The Rise of Hydraulic Fracturing: A Behavioral Analysis of Landowner Decision-Making*, 19 BUFF. ENVTL. L.J. 219, 253 (2012) ("Increased risk of drainage from horizontal drilling creates a prisoner's dilemma for holdout landowners, who will recognize a greater risk that their minerals might be taken from them whether they lease or not.").

²⁶⁹RICHARD C. MAXWELL ET AL., THE LAW OF OIL AND GAS 19 (8th ed. 2007); Fielder, *supra* note 2, at 24–25.

²⁷⁰Michael L. Krancer & Margaret Anne Hill, *Shale Gas Leasing-Achieving Clarity, Transparency and Conservation: Recent Actions of the Pennsylvania Supreme Court and Legislature*, 84 PA. BAR ASS'N. Q. 93, 101 (2013) ("There is wide support among producers, royalty owners and conservation groups for 'forced pooling' for the Marcellus. The proponents of forced pooling argue that the pooling of properties and interests promotes efficiency in gas extraction, reduces the number of drilling sites, and minimizes environmental impacts to land while maximizing the amount of gas extracted."); *see also* Trachtenberg, *supra* note 195, at 199–200.

²⁷¹Murray & Cross, *supra* note 99, at 1113.

²⁷²*Id.*; *see also* Bell, *supra* note 185, at 552 (noting that compulsory pooling is commended as a way of "solv[ing] narrower problems of excessive transaction costs in the use of resources").

would cost a lot of time and money to conclude.²⁷³ Specifically, neighboring property owners who want to pool voluntarily would abandon such efforts when confronted with the enormity of the task and the cost implications.²⁷⁴ Cooperation efforts may also be stymied by any single rights owner who figures out that she stands to receive greater amount of benefit from a refusal to cooperate, such as when geological conditions are in her favor.²⁷⁵ If a project, including oil or gas drilling, requires the cooperation of all rights owners, any owner can choose to exercise her property freedom by insisting on better terms than those agreed upon by other rights owners.²⁷⁶ The choice becomes one of allowing a project that is substantially beneficial to the group to die or giving in to the selfish actions of the obstructing owner.²⁷⁷ Cheating is also likely to occur in any cooperative arrangement.²⁷⁸ Based on the foregoing issues, it is incumbent upon a legal system interested in promoting efficiency and equity to develop “legal structures [that] encourage cooperative action and discourage cheating.”²⁷⁹ Compulsory pooling is designed as that structure.

Other factors further justify compulsory pooling. As discussed above, voluntary cooperation or absence of forced pooling generates transaction costs. Forced pooling solves the problem and facilitates energy development by curbing delays in negotiating oil development contracts.²⁸⁰ It also promotes efficiency by streamlining the process for producers to design a development plan for the area in which they want to embark on production.²⁸¹ Without compulsory pooling, producers are not assured that the area where they want to conduct operations would be available, and so they are constrained to come up with an alternative plan that is suboptimal because

²⁷³Murray & Cross, *supra* note 99, at 1113.

²⁷⁴*Id.*

²⁷⁵*Id.* at 1114.

²⁷⁶*Id.* at 1113.

²⁷⁷*Id.*

²⁷⁸*Id.* at 1113–14.

²⁷⁹*Id.* at 1114.

²⁸⁰Krancer & Hill, *supra* note 270, at 101 (“According to the National Association of Royalty Owners (NARO), a strong proponent of ‘forced pooling,’ a producer’s failure to obtain consent from that one landowner may prevent development of an entire area.” (citation omitted)).

²⁸¹Brady Paul Behrens, *Rule 37 Exceptions and Small Mineral Tracts in Urban Areas: An Argument for Incorporating Compulsory Pooling Into Special Field Rules in Texas*, 44 TEX. TECH. L. REV. 1053, 1078 (2012).

they could not secure the consent of adjoining property owners.²⁸² Another argument for forced pooling is that oil and gas transactions are dictated by geology: energy companies have little room to pick or choose where to start exploration and development projects.²⁸³

Additionally, apart from mineral owners, forced pooling occasionally benefits surface owners who get paid by energy companies, where the law requires the payment.²⁸⁴ These surface owners, therefore, would favor forced pooling, even when it places them at loggerheads with the owners of the minerals under the surface estate.²⁸⁵ As a general concept, however, a surface owner who is interested in getting paid surface damages would be opposed to forced pooling, as fewer pooled units would likely lead to more surface drilling locations and thus more chances for him to make money. However, some surface owners are generally likely to oppose oil and gas development on their land or neighboring land because of perceived negative impact on their quality of life and value of their homes.²⁸⁶ Forced pooling also ensures

²⁸² *Id.* at 1077.

²⁸³ *See infra* note 292 (This argument is interesting because both proponents and opponents of compulsory pooling may rely on it.).

²⁸⁴ *Baca, supra* note 25.

²⁸⁵ *Id.*

Gas companies argue that forced pooling allows them to build fewer wells and harvest gas efficiently, creating tidy drilling parcels as opposed to a patchwork pattern of leased and unleased land. Forced pooling is also supported by landowners who fear that drilling companies will place wells near their property and siphon off their gas without payment. Another group of supporters includes people who own the surface rights to their property while someone else owns the mineral rights—a situation known as a “split estate.” Although these landowners usually aren’t entitled to any payment, some forced pooling laws compel drillers to compensate them, too.

Id.

²⁸⁶ Michael J. Mazzone, *Changing Times Bring Conflict With Surface Owners*, AM. OIL & GAS REPTR. (Dec. 2011), <http://www.aogr.com/web-exclusives/exclusive-story/changing-times-bring-conflict-with-surface-owners> (last visited April 7, 2018).

Today, litigation is rising in many urban and suburban areas. The names and jurisdictions change, but the story unfolds in virtually the same way: A family owns the surface estate and lives on a tract of land, but does not own the valuable mineral estate beneath it. The mineral owner leases the minerals to an oil and gas company, and wells are drilled on the land or nearby. Transportation and production facilities are constructed. One day there is peace and quiet. The next day, there is industry. The view from the kitchen window now includes towers, compressors, tanks, pumps, pipelines, trucks and pits. Homeowners

development of minerals instead of allowing them to lie underground, unutilized. It accords with capitalist instincts and ethos to utilize our resources to greater benefit to the owners and the society than when the resources lie untapped.²⁸⁷

In sum, pooling holds numerous benefits that justify making it mandatory.²⁸⁸ Compulsory pooling is both efficient and equitable.²⁸⁹ Accordingly, while mineral owners understandably have a strong interest in protecting property rights, compulsory pooling's overall societal benefit outweighs those property rights concern. In light of this reasoning, compulsory pooling statutes across the country, while not without their imperfections, have considerable merit.²⁹⁰ The Texas legislature should amend MIPA to match other states' compulsory pooling statutes.

Notwithstanding the benefits of compulsory pooling, it poses some challenges. It could be opposed in principle as amounting to eminent domain to take private property and use it for private enterprise.²⁹¹ Because oil and gas companies gravitate toward areas with favorable geological conditions, they would end up signing leases with owners without the assistance of

raise a howl about contamination, odors, noise and excessive light. Neighbors not only go after the drillers, but they also take up arms against other neighbors.

“Ron Hilliard came back from church one Sunday to find hundreds of plastic \$5, \$10, \$20 and \$100 bills hanging on his fence in Flower Mound, Tx., another message from townfolk angry at him for signing a lucrative natural gas drilling lease for his suburban Dallas property,” the Associated Press reported from North Texas.

Id.

²⁸⁷This is also the rationale behind the notion of adverse possession and the rules governing it.

²⁸⁸*See, e.g.,* Stephen L. McDonald, *Unit Operation of Oil Reservoirs as an Instrument of Conservation*, 49 NOTRE DAME L. REV. 305, 312 (1973) (stating that unitization “would harness the ingenuity, enterprise, and energy of profit-motivated businessmen in the interest of society as a whole, and would permit the flexible adjustment of current vs. future recovery under changing circumstances”).

²⁸⁹Murray & Cross, *supra* note 99, at 1154 (making a similar argument with regard to compulsory unitization).

²⁹⁰Sylvester & Malmshemer, *supra* note 31, at 51 (“Forced pooling laws are an imperfect, yet practical, way to balance efficient resource production and landowner rights.” (citation omitted)).

²⁹¹Colosimo & Craig, *supra* note 194, at 62 (“Compulsory pooling and unitization laws effectively grant a private power of eminent domain; the state exercises its police power to take an interest in private property for private use.”); *see also* Baca, *supra* note 25 (referencing the objection of then-Governor of Pennsylvania, Tom Corbett, to forced pooling for fracking because he considered it to be private eminent domain).

compulsory pooling legislation.²⁹² Further, many mineral owners are willing to lease; thus, they do not need to be pushed into the transaction by energy companies or government officials. Indeed, voluntary pooling happens all the time. The vast majority of pooled units in Texas are voluntary and Texas is the leading state in the nation in both oil and gas production. Moreover, the government can work around the holdouts to develop oil or gas by eliminating or relaxing the rules on minimum acreage for drilling.²⁹³

Apart from general arguments against compulsory pooling, the case for compulsory pooling is further weakened in the specific case of shale gas development through fracking due to the nature of the rock formation. Because shale is largely impermeable, oil and gas trapped within it does not migrate far under natural pressures and so an unleased or unpooled owner's minerals may not necessarily be lost in many cases if there is no pooling.²⁹⁴ In that sense, forced pooling in the context of shale gas production is somewhat of a misnomer, as there is really no pool of gas to extract from or into which to force a mineral owner. Technically, therefore, it may be more appropriate to use such phrases as "compulsory integration" or "forced participation" instead of compulsory pooling. Secondly, resort to forced pooling in order to preserve reservoir energy to prevent underground waste is inapplicable to shale formations.²⁹⁵

However, in Texas, where Rule 37 exceptions make it possible for oil and gas to be drained from an owner who has chosen not to lease or pool, even in shale rock formations, the case for compulsory pooling to protect small tract owners has considerable merit. Section B below further delves into this point.

²⁹²This argument cuts both ways; it could also weigh in favor of compulsory pooling. *See supra* text accompanying note 283.

²⁹³In reality, governments are unlikely to embark on such option because it would be inefficient from energy and environmental perspectives.

²⁹⁴Trachtenberg, *supra* note 195, at 212 ("Shale gas development may not be a proper target for forced pooling regulations, which have been traditionally applied to migratory mineral resources. Due to shale's low permeability, shale gas does not migrate far under natural subsurface pressures.").

²⁹⁵Phillip E. Norvell, *Prelude to the Future of Shale Gas Development: Well Spacing and Integration for the Fayetteville Shale in Arkansas*, 49 WASHBURN L.J. 457, 474 (2010) ("Physical waste and drainage should also have limited applicability to shale gas development. First, there is no natural reservoir energy mechanism that needs to be preserved to achieve maximum ultimate recovery in tight-sand reservoirs. Lack of permeability moots that problem.").

B. Time for Strong Compulsory Pooling in Texas

In shale and other unconventional rock formations from which oil and gas are extracted through horizontal drilling and hydraulic fracturing, small tract owners are in serious jeopardy of having an uncompensated drainage of their oil and gas in Texas if they refuse to lease to an oil company.²⁹⁶ One commentator, focusing primarily on fracking in the Barnett Shale, reflects on this unfortunate situation in the following manner:

The existing methods by which Texas deals with unleased tracts in urban oil and gas fields leave unleased, small-tract mineral owners out in the cold. When producers obtain Rule 37 exceptions, they obtain the right to violate well-spacing regulations implemented to protect the property rights of all mineral owners over a common source of supply. Therefore, when producers drill horizontal wells within areas normally designated as off-limits by the applicable spacing rules, the wells can potentially capture hydrocarbons from beneath the adjacent, unleased property, and the neighboring mineral owner will receive no compensation for those minerals. Because neighboring, unleased mineral owners are not entitled to receive royalty payments for minerals drained from beneath their tracts, their correlative rights as mineral owners are not adequately protected. . . . Although it seems producers receive a windfall under the Rule 37 dominated system, producers do not benefit greatly from the existing framework either.²⁹⁷

Without a strong compulsory pooling statute in Texas, small tract mineral owners are exposed to drainage by bigger developers who, through the Rule 37 exception process, can be granted a permit to drill wells close to adjoining landowners' property lines where the adjoining landowner has not entered into leases with the developers.²⁹⁸ In Pennsylvania and West Virginia, where

²⁹⁶Mosqueda, *supra* note 135; Lee, *supra* note 10, at B.

²⁹⁷Behrens, *supra* note 281, at 1055–56 (citations omitted).

²⁹⁸In describing the Rule 37 Exception experience of Kaushik De and Ranjana Bhandari, a husband and wife team that also participated in our focus group in Arlington, a Texas newspaper writes:

Then came the letter from the Railroad Commission. Ten months after the hearing—and after Chesapeake's reassuring letter—the agency notified the family that it had granted

compulsory pooling statutes did not extend to drilling in the Marcellus Shale, operators could conceivably drain natural gas of unleased owners so long as they drilled elsewhere but completed the well to the desired depth within the Marcellus Shale.²⁹⁹

A few years ago, Pennsylvania amended its Oil and Gas Lease Act to allow for a measure of forced pooling across the state, including the Marcellus Shale.³⁰⁰ House Bill 259, passed by the Pennsylvania General Assembly in 2013 and signed into law by then-Pennsylvania Governor Tom Corbett, permits operators who have the right to develop multiple contiguous leases separately to develop those leases jointly by horizontal drilling unless a lease expressly prohibits the joint development.³⁰¹ The law also provided that where there is no agreement by all affected royalty owners, the operator shall, in making royalty determinations where multiple contiguous leases are developed, allocate production to each lease in such proportion as the operator reasonably determines to be attributable to each lease.³⁰² When the law was constitutionally challenged, the court held that “the law was valid, constitutional, and clarified that Pennsylvania oil and gas operators have the right to pool and unitize contiguous tracts that are subject to oil and gas leases but do not have voluntary pooling and unitization clauses.”³⁰³

Texas’s weak pooling statute also leads to subsurface waste, even in shale rock formations. Developers have the ability to drill around small tracts whose owners refuse to pool with or lease to them.³⁰⁴ The natural gas on these small tracts remain untapped underground.³⁰⁵ Not developing these resources

Chesapeake the exception it sought, effectively allowing the company to siphon the natural gas under their home without paying the couple a dime. Unlike their neighbors who leased their mineral rights to Chesapeake, the family never received a signing bonus and will never see a royalty check.

Mosqueda, *supra* note 135; *see generally* Behrens, *supra* note 281.

²⁹⁹ *See* Colosimo & Craig, *supra* note 194, at 50.

³⁰⁰ Wesley S. Speary, *Shortcomings of the 2013 Amendments to Pennsylvania’s Guaranteed Minimum Royalty Act and the Need to Better Protect Royalty Owners’ Rights*, 77 U. PITT. L. REV. 77, 108–11 (2015).

³⁰¹ 58 PA. STAT. AND CONS. STAT. ANN. § 34.1 (West 2015).

³⁰² *Id.*

³⁰³ Benjamin M. Sullivan, Esq., *Pooling and Unitization Methods Across Shale Basins (Or Lack Thereof): Pooling and Unitization in the Marcellus and Utica Plays in Ohio, Pennsylvania, and West Virginia*, 2014 No. 2 RMMLF-INST Paper No. 8a, 8a-18 (2014) (citation omitted).

³⁰⁴ Lee, *supra* note 10, at B.

³⁰⁵ *Id.*

meets the legal definition of waste under the Texas statutes and could ultimately lead to reduced energy supply for the consumer and less revenue for the government. In essence, society pays some price because of the absence of voluntary cooperation between mineral owners and lack of enforced cooperation by the government through extensive compulsory pooling legislation.

All major oil-producing states, with the exception of Kansas, have some form of compulsory pooling legislation to prevent physical and economic waste and protect correlative rights.³⁰⁶ Economic waste experienced directly by oil and gas producers translates into higher prices for the consumer of petroleum products.³⁰⁷ While Texas mandates pooling in certain circumstances under the Mineral Interest Pooling Act, the statutory provisions are a watered-down version of the typical compulsory pooling statute.³⁰⁸

More significantly, MIPA has limited utility in cases of hydraulic fracturing and horizontal drilling, which are utilized to develop shale gas reservoirs. This limitation stems from the fact that MIPA's application is restricted to a relatively small amount of acreage, compared to what is often involved in fracking and horizontal drilling. Leading oil and gas scholars explain this constraint as follows:

With the increasingly widespread use of horizontal drilling and hydraulic fracturing in shale reservoirs, arguments have been strongly advanced for a less restrictive reading of the act The language of the act itself, however, often precludes its use where horizontal drilling is involved. Under MIPA, units cannot exceed 160 acres for oil wells or 640 acres for gas wells, plus a 10 percent tolerance; but under Rule 86, where the size of a unit depends in large part upon the length of the horizontal portion of a horizontal well, units often substantially exceed these size limitations. The result precludes the use of the MIPA by an operator who wishes to incorporate a small tract into the unit or by the owner of a small tract who would like to "muscle into" a horizontal unit.

³⁰⁶LOWE ET AL., *supra* note 6, at 698.

³⁰⁷See Kramer, *Compulsory Pooling*, *supra* note 29, at 288 ("Compulsory pooling and unitization is a vital regulatory tool created to conserve oil and gas, protect correlative rights and prevent waste.").

³⁰⁸See Smith, *Compulsory Pooling*, *supra* note 247, at 393.

The latter situation is especially likely to occur when a horizontal well is hydraulically fractured, and the fractures extend beneath an adjacent small tract. Damages for drainage are precluded by the Texas Supreme Court's holding in *Coastal Oil & Gas Corp. v. Garza Energy Trust* . . . and the size of the unit may preclude the use of the "muscle-in" pooling clause, leaving the owner of the tract being drained without any effective remedy.³⁰⁹

The foregoing discussions illuminate the point that the merits of a strong compulsory pooling statute of the type that exists in some other states like Oklahoma outweigh the demerits at this stage of oil and gas development.³¹⁰ Indeed, recent reforms in Oklahoma, Ohio and North Dakota extending the amount of acreage that can be force pooled for horizontal wells drilled in shale formations have prompted one scholar to contend thus: "The reforms and adaptations of compulsory pooling statutes in other states demonstrate that it is time for Texas to also reform MIPA in order to ensure that the state's public policy objectives are achieved in the horizontal well context."³¹¹

With the appreciable volume of shale gas development in urban and suburban areas, the time has come for Texas, with a weak compulsory pooling statute, to adopt a stronger compulsory pooling statute.³¹² Such a statute would provide greater flexibility for developers and protect small mineral owners by preventing the drainage of their minerals without compensation.³¹³ However, opposition to enactment of such a statute remains strong in Texas, especially among mineral owners who are concerned about its consequences for property freedom and contractual bargaining power.³¹⁴

³⁰⁹LOWE ET AL., *supra* note 6, at 714.

³¹⁰Bret Wells, *Allocation Wells, Unauthorized Pooling, and the Lessor's Remedies*, 68 BAYLOR L. REV. 1, 52 (2016) ("This artificial acreage restriction contained in MIPA was put into place before the advent of the previously unforeseen horizontal drilling practices of today and should now be removed for horizontal wells.").

³¹¹*Id.*

³¹²Colosimo & Craig, *supra* note 194, at 66 (stating that opponents of pooling "deride the concept with conjectural arguments about encroaching on private property rights. However, compulsory pooling has consistently proven to be the best mechanism for protecting the interests of all landowners and the energy industry alike, as well as a means of addressing certain environmental concerns related to oil and gas drilling.").

³¹³See Fish, *supra* note 268, at 264–65.

³¹⁴See Caleb A. Fielder, Esq., *Blood and Oil: Exploring Possible Remedies to Mineral Cotenancy Disputes in Texas*, 50 TEXAS TECH LAW REV. (forthcoming) (2018) (arguing against

In exchange for the acceptance of a strong forced pooling statute, it may be imperative to incorporate additional protections for mineral owners that ensure that operators do not ride roughshod over them in the face of a weakened bargaining position. Thus, while small tract mineral owners would not be allowed an option as to whether they want to be part of a pooled tract, they should be given a fair amount of flexibility regarding the financial compensation component of the deal. Mineral owners should be able to select from a plethora of options ranging from straight royalty to partnership with the energy companies to share the risks and rewards of production.³¹⁵ Operators should also be more amenable to these concessions, considering the significant benefits they stand to reap from compulsory pooling, such as savings from not having to drill multiple wells or avoidance of the cost and inconvenience of drilling more wells at a fast pace and with increased frequency.

V. CONCLUSION

This article advocates the strengthening of compulsory pooling legislation in Texas. With the cost of delayed or inefficient development for operators and dangers of uncompensated drainage oil and gas faced by small tract owners, a statute is imperative. One would be remiss to ignore the fact that participants in a focus group convened in Arlington, Texas, as part of this research project are unlikely to be satisfied with this conclusion about forced pooling. Those citing concerns over sanctity of property rights, demands for better terms, complaints about rigged systems and anxiety over poorly located drill sites would hardly agree that forced pooling has the upper

compulsory pooling as solution to cases in Texas where property owners do not agree on a resource development approach); Behrens, *supra* note 281, at 1079.

³¹⁵Sylvester & Malmsheimer, *supra* note 31, at 70.

States that provide non-consenting landowners with multiple alternatives arguably best address the dichotomy between waste prevention, energy resource development, and correlative rights. As Professor Kramer suggests, states providing alternatives in forced pooling laws represent the marketplace more accurately because the laws mimic some of the options available to operators seeking to persuade landowners to voluntarily pool and participate in the production. The variety of options provided by these states may eliminate or lessen opposition to drilling operations. For example, a royalty option allows non-consenting landowners, who otherwise have no choice but to be part of the drilling operations, to receive some compensation without being involved in the process.

Id. (citation omitted).

hand in the discussion of applicable options for developing their oil and gas resources.

Nevertheless, while compulsory pooling is not a perfect panacea, it does a better job of addressing the challenges and constraints confronting the various stakeholders in the face of continued desire, if not demand, for shale gas development in Texas and across the country. Indeed, while this article focuses on Texas law and experience, the description of the problem and policy prescription is germane to other states interested or involved in shale gas development. The ideas, therefore, may be adopted by those states, *mutatis mutandis*, while mindful of the diversity of geological, political, economic and other characteristics.