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Property Rights & the Demands of Transformation

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PROPERTY RIGHTS & THE DEMANDS OF TRANSFORMATION

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I. INTRODUCTION

When you own something you feel proud that you have got something, but when they take that away from you, you feel naked. You got nothing; there is nothing you have . . . I personally have got nothing to say “that was what I got from my grandfather or my mother or my grandpa or pa.” I had nothing; they took all what I had . . . one thing that you’ve got to realize is that the apartheid government did a lot of damage to us, the Blacks in South Africa. They did a lot of damage.¹

This is one of many poignant stories told by black South Africans who were arbitrarily and brutally deprived of their property during the apartheid regime.² In many ways the South African experience is not unique. Past regimes in several other countries have also systematically took real property from one group and gave it to another. These countries include Zimbabwe, Namibia, US, Hungary, Israel, Nicaragua, Lithuania, Australia, Estonia, Canada, Latvia, Namibia, Kosovo, and Germany.³ Most

1. See Confidential Interview with two former residents of Kilnerton and one former resident of Die Eland who were dispossessed under Apartheid, in Johannesburg and Cape Town, S. Afr. (2008).

2. For a history of land dispossession in South Africa see LEONARD THOMPSON, *THE HISTORY OF SOUTH AFRICA* (3d ed. 2001). All references to “property” in this Article refer to real property and not other forms of property such as cash, securities, or intangible property. Property is stolen or dispossessed when certain persons or communities are systematically deprived of property with no just compensation and this leads to a generalized belief in society that most owners would not own their property today but for these uncompensated takings, see *infra* Section II.

3. The Communist regime took property from the elites and redistributed it to peasants in Nicaragua, Hungary, Lithuania, Estonia, and Latvia. Europeans took property away from natives and gave it to settlers in the US, Canada, Australia, South Africa, Namibia, and Zimbabwe. During World War II, the Nazi regime took property from Jews in Hungary and Germany. The Israelis took property from the Palestinians during the Arab-Israeli war. Serbs and Albanians took property from each other during the Kosovo war. See, e.g., Nicolas J. Gutierrez, Jr., *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI Y.B. INT’L L. 111, 133–42 (1995) (discussing historical dispossession of property by the Soviet regime in the Baltic Republics, Germany, Hungary, and Nicaragua, as well as possible restitution schemes); Ruth Hall, *A Comparative Analysis of Land Reform in South Africa and Zimbabwe*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA 255, 261–64 (Margaret C. Lee & Karen Colvard eds., 2003); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992) (“The history of white settlers’ dealings with the aboriginal peoples of Australia, New Zealand, and North America is largely a history of injustice. People, or whole peoples, were attacked, defrauded, and expropriated; their lands were stolen and their lives were ruined.”); Mark Blacksell & Karl Martin Born,

interestingly, in a subset of these countries, past property dispossession has greatly contributed to present-day inequality and has become a politically explosive issue that can cause backlash.⁴ Backlash is a violent, collective reaction to a social, political, or economic development or event.⁵ In this Article, I explore the issue of backlash in the context of Southern Africa.

To sow the poisonous seeds of white rule in South Africa, Zimbabwe, and Namibia, the colonial and apartheid governments systematically stripped the African majority of nearly all of their native land and gave ownership of it to the white minority.⁶ Consequently, at independence, whites in Southern Africa owned upwards of eighty percent of the fertile agricultural land although they constituted less than ten percent of the population.⁷ Even though it has been more than fifteen years since independence, the African majority in Namibia and South Africa remains landless and impoverished while the affluent white

Private Property Restitution: The Geographical Consequences of Official Government Policies in Central and Eastern Europe, 168 GEOGRAPHICAL J. 178, 182 (2002) (discussing property takings by the Nazis in Germany, Hungary, Poland, Bulgaria, and Romania); Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. OF INT'L L. 295, 297–99 (exploring the private property aspect of the Israeli-Palestinian conflict and the historical background leading to the displacement of Palestinian refugees); Bernadette Atuahene, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829, 849 & n.87 (2009) (citing UNMIK Reg. No. 2000/60, ¶ 2.2, UNMIK/REG/200/60 (Oct. 31, 2000), available at http://www.unmikonline.org/regulations/2000/re2000_60.htm).

4. Atuahene, *supra* note 3, at 838–41, 836 n.28.

5. See *id.* at 838–41 (establishing the link between inequality and property-related disobedience).

6. For a history of land dispossession in Southern Africa, see NIGEL WORDEN, *THE MAKING OF MODERN SOUTH AFRICA* 6–37 (3d ed. 2000). See also ERIKA VON WIETERSHEIM, *THIS LAND IS MY LAND! MOTIONS AND EMOTIONS AROUND LAND REFORM IN NAMIBIA* 47–48 (2008); Neil H. Thomas, *Land Reform in Zimbabwe*, 24 THIRD WORLD Q. 691, 700–02 (2003) (discussing the redistribution of land under President Mugabe); CRAIG RICHARDSON, *THE COLLAPSE OF ZIMBABWE IN THE WAKE OF THE 2000–2003 LAND REFORMS* (2004).

7. See Johan van Tooyen & Bongiwe Njobe-Mbuli, *Access to Land: Selecting the Beneficiaries*, in *AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKETS AND MECHANISMS* 461, 461 (J. van Zyl et al. eds., 1996) (“Land distribution in South Africa is highly skewed. Approximately 87 per cent of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71 per cent of the population, which is predominantly black, live on 13 per cent of the land in high density areas—the former homelands.”). The same is true in Namibia and it was true in Zimbabwe prior to the tumultuous land reform program in 2002. See JS Juana, *A Quantitative Analysis of Zimbabwe’s Land Reform Policy: An Application of Zimbabwe SAM Multipliers*, 45 AGREKON 294, 294 (2006) (“During the colonial era, land was distributed on racial lines, with approximately 4,660 large-scale predominantly white commercial farmers owning about 14.8 million hectares and about 6 million black smallholder farmers owning about 16.4 million hectares in mainly low agricultural potential areas.”); Uazuva Kaumbi, *Namibia: The Land is Ours!*, 426 NEW AFR. 28, 28 (2004) (“[L]ess than 10% of the people own more than 80% of the commercial farmland as a result of colonial theft[.]”).

minority still owns the majority of the land.⁸ Consequently, there is a deep discontent that has been taking root among the African majority. If past property theft is not addressed in a timely fashion, the possibility of severe backlash is high. The world has already witnessed this possibility realized in Zimbabwe.⁹

Countries like those in Southern Africa will never emerge from the indomitable shadow of inequity and the serious threat of backlash unless real property is redistributed; but, the conception of property these countries explicitly or implicitly adopt can adversely affect their ability to redistribute. Under the classical conception of real property (the classical conception), redistribution is difficult because title deed holders are a privileged group who are given nearly absolute property protection.¹⁰ Strangely, the classical conception is ascendant in many transitional states where redistribution is essential.¹¹ The specific question this Article addresses is: for states where past property dispossession has the serious potential to cause backlash and destabilize the current state, is the classical conception appropriate or do these states require an alternative conception of property? This Article is an attempt to map out a transformative conception of real property (the transformative conception) that facilitates property redistribution, which bolsters fairness and stability.

The research question I explore is concerned exclusively with states where past property dispossession has the potential to cause backlash and destabilize the current state. Nevertheless, on moral grounds, past theft should be remediated even if there is no threat of backlash. In reality, remediation often does not occur, however, because those with an interest in maintaining the current property distribution are at odds with those with an interest in transforming it. But, when the failure to address past theft through property redistribution can cause serious backlash, this creates a unique moment of interest convergence, where opponents and supporters of redistribution are most likely to work together to pursue a common goal—stability.¹²

8. See DEP'T OF LAND AFF. ANN. REP. 1 APRIL 2006—31 MARCH 2007 9 (2007) (S. Afr.) (acknowledging that the South African Department of Land Affairs had distributed only 4.3% of the target, which was to transfer 30% of white-owned agricultural land by 2014); SIDNEY L. HARRING & WILLEM ODENDAAL, "NO RESETTLEMENT AVAILABLE": AN ASSESSMENT OF THE EXPROPRIATION PRINCIPLE AND ITS IMPACT ON LAND REFORM IN NAMIBIA 29 (2007) (explaining that the Namibian government had exercised its expropriation powers only eight times since 2004).

9. For more about Zimbabwe's fast track program, see RICHARDSON, *supra* note 6; Thomas, *supra* note 6, at 700–02.

10. See *infra* Part III.A.

11. See *infra* Part III.C.1.

12. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

A. Literature Review

Although the research question this Article explores has a great deal of theoretical and practical importance, legal scholars have not directly addressed it. There is, for example, a substantial legal literature that examines whether it is wise to provide compensation to remediate past injustices experienced by various minority groups in the United States.¹³ The philosophical literature has explored whether compensation for past wrongs is justified when there is a significant passage of time.¹⁴ There is an expansive literature that summarizes and critiques specific efforts to vindicate the rights of dispossessed owners in a range of transitional states.¹⁵ There are, however, no articles that specifically explore whether states, where land reform is necessary to avoid backlash, require a different conception of property.

This Article builds upon the legal literature about backlash created by Mark Roe, Amy Chua, and myself. Roe argues that, when economic-based political turmoil is likely, scholars must rethink the emphasis that law and economics places on analyzing the productive efficiency of a rule or institution.¹⁶ He observes that:

13. See, e.g., ERIC K. YAMAMOTO ET AL., CIVIL LIBERTIES, NATIONAL SECURITY, AND THE JAPANESE AMERICAN INTERNMENT: RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001); William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 52–69 (2005); Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 AFR.-AM. L. & POL'Y REP. 21 (2004) (discussing the importance of reparations for black Americans and potential challenges to reparations); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 388–97 (1987); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

14. See, e.g., Bernard R. Boxill, *A Lockean Argument for Black Reparations*, 7 J. ETHICS 63, 65–66 (2003) (arguing that the passage of time is irrelevant to whether compensation for past wrongs is due and that there must be an unbroken causal chain to the detriment of the present-day group); Waldron, *supra* note 3, at 15–20 (arguing that previous owner's rights to property may fade with the passage of time and when the person no longer attaches meaningful expectations to the property by way of autonomy and planning); Jon Elster, *On Doing What One Can*, 1 E. EUR. CONST. REV. 15 (1992) (arguing that compensation after a significant passage of time is appropriate only when all guilty parties can be targeted, without inconsistent punishment).

15. See, e.g., CONFRONTING PAST INJUSTICES: APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY (Medard R. Rwelamira & Gerhard Werle eds., 1996); RESTITUTION PAST, PRESENT AND FUTURE (Cornish et al. eds., 1998); RETURNING HOME: HOUSING AND PROPERTY RESTORATION RIGHTS OF REFUGEES AND DISPLACED PERSONS (Scott Leckie ed., 2003); Ruth Hall, *Land Restitution in South Africa: Rights, Development, and the Restrained State*, 38 CAN. J. AFR. STUD. 654 (2004); Istvan Pogany, *The Restitution of Former Jewish-Owned Property and Related Schemes of Compensation in Hungary*, 4 EUR. PUB. L. 211 (1998); Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385 (1999); Richard W. Crowder, Comment, *Restitution in the Czech Republic: Problems and Prague-Nosis*, 5 IND. INT'L & COMP. L. REV. 237 (1994).

16. See Mark Roe, *Backlash*, 98 COLUM. L. REV. 217, 239 (1998).

Voters may see market arrangements as unfair, leading them to lash back and disrupt otherwise efficient arrangements. To quell this backlash, inefficient legal structures may arise and survive, despite the fact that they could not withstand a normal efficiency critique. The prospect of backlash—or of strategically tempering otherwise efficient rules and institutions to finesse away a more destructive backlash—complicates a law and economics inquiry.¹⁷

While Roe gives examples of how a state could strategically temper efficient rules or institutions to stave off backlash in the context of bankruptcy law,¹⁸ I apply his insights to the arena of property law. I develop the transformative conception, which is a mechanism for strategically tempering efficient rules to facilitate the timely reallocation of property rights in an effort to promote fairness, avert destructive backlash, and increase the property regime's efficiency.¹⁹

Amy Chua picks up on this theme of backlash in her book, *World on Fire*, where she examines how the mix of markets, democracy, and ethnicity can produce an explosive brand of backlash.²⁰ She argues:

[m]arkets concentrate wealth, often spectacular wealth, in the hands of the market-dominant minority, while democracy increases the political power of the impoverished majority. In these circumstances the pursuit of free market democracy becomes an engine of potentially catastrophic ethnonationalism, pitting a frustrated 'indigenous' majority, easily aroused by opportunistic vote-seeking politicians, against a resented, wealthy ethnic minority.²¹

Chua's analysis is particularly relevant to the land crisis in Southern Africa because most present owners are whites (an ethnically distinct market-dominant minority) while most dispossessed owners are Africans

17. *Id.* at 217.

18. *Id.* at 235–37 (arguing that when political backlash looms large, economically unwise but politically astute policies that will abate the backlash can increase overall economic efficiency).

19. See Leonid Polishchuk, *Distribution of Assets and Credibility of Property Rights*, Ctr. for Institutional Reform and the Informal Sector and New Econ. School (unpublished manuscript on file with author) (“[I]f private property rights are not sufficiently broadly recognized in the society as legitimate and fair, it makes a property rights regime unstable. This instability precludes efficient relocation of assets, and as a result expected efficiency gains of private ownership fail to materialize.”).

20. See AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 6–7 (2003) [hereinafter *WORLD ON FIRE*]; see also Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward A New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998).

21. *WORLD ON FIRE*, *supra* note 20, at 6–7.

(an impoverished yet politically empowered majority). I build upon Chua's work by explaining how strict adherence to the classical conception can prevent the equitable redistribution of property and ignite backlash.²² I also move beyond Chua's analysis of the problem to propose a solution—the transformative conception.

I further added to this important literature about backlash in an article entitled, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Theft (Things Fall Apart)*.²³ That article explored the question: How does a state avoid present-day property-related disobedience when past property theft causes a significant number of people to believe that the current property distribution is illegitimate?²⁴ I argued that the most effective way to do this is to implement a Legitimacy Enhancing Compensation Program (LECP). The main contribution of *Things Fall Apart* was to develop a rational choice model that established the process a state should use to decide when to implement a LECP to avoid backlash.²⁵ This Article builds on my previous work by developing the transformative conception, which gives the state the legal framework necessary to expeditiously and efficiently implement a LECP.

B. *Developing the Transformative Conception*

The transformative conception's central purpose is to strike the correct balance between defending the property rights of current owners and defending the property rights of unjustly dispossessed past owners by facilitating land reform. The state can give current owners varying levels of property protection. On one side of the spectrum is the classical conception and its call for minimal government intrusion into private property. But, if the state gives current owners' property rights a certain sanctity, this makes redistributive measures prohibitively expensive or so cumbersome that the pace of transfer is dangerously slow. This is illustrated by the deep discontent brewing in both Namibia and South Africa around the torpid pace of land reform because of the state's commitment to the classical conception and market-led land reform.²⁶

On the other side of the spectrum is when private property rights have scant protection across the board or a select group is subject to

22. The willing-seller/willing-buyer principle—also known as negotiated land reform—is a market-led approach to land reform where the state can only acquire property from willing sellers and refrains from using its eminent domain power to expropriate land. See discussion *infra* Part III.C.1.

23. See Atuahene, *supra* note 3.

24. *Id.*

25. *Id.* at 851–59 (arguing states should implement a LECP before reaching a legitimacy deficit. A legitimacy deficit is when the cost of illegitimacy begins to outweigh the cost of a LECP).

26. See *infra* Part II.

expropriation without compensation. Zimbabwe's chaotic land reform program in 2000 is a perfect case in point because the state expropriated white-owned farms without compensation.²⁷ The empirical evidence clearly demonstrates that expropriation without compensation discourages investment mainly because entrepreneurs cannot reap the fruits of their investment.²⁸ We need a middle ground between the two extremes where permissible redistribution does not morph into impermissible confiscation. This is the void the transformative conception attempts to fill by facilitating land reform while not falling prey to the well documented perils of nominal property protection.

I begin, in Part II, by giving a brief historical background that explains why past property theft threatens to destabilize certain states today. I use Namibia, South Africa, and Zimbabwe as my primary examples. Once the stage is set, I then move to Part III, where I define the classical conception's central principles. I provide two illustrations of the classical conception and explain why it is inadequate when past theft can lead to backlash. I then turn, in Part IV, to explain the transformative conception's defining principles. I provide concrete examples of redistributive policies—consistent with the transformative conception but not with the classical conception—that can facilitate timely land reform. After reviewing the potential criticisms of the transformative conception, I conclude that although it is not perfect, the transformative conception is a significant improvement over the classical conception for certain states that decide to address past land dispossession. In Part V, I emphasize the limitations of the transformative conception. I argue that the transformative conception is not suitable under all circumstances and when it is appropriate, I suggest a method for determining its appropriate duration. Part VI concludes by emphasizing that the transformative conception is more appropriate than the classical conception in situations where redistribution of real property is essential for promoting justice and stability.

27. See, e.g., Thomas, *supra* note 6, at 700–02.

28. See Stijn Claessens & Luc Laeven, *Financial Development, Property Rights, and Growth*, 58 J. FIN. 2401 (2003) (finding secure property rights increase a firm's willingness to allocate resources to property, which in turn leads to overall economic growth); Stein Holden & Hailu Yohannes, *Land Redistribution, Tenure Insecurity, and Intensity of Production: A Study of Farm Households in Southern Ethiopia*, 78 LAND ECON. 573, 574–75 (2002) (describing observed relationships between willingness of landowners to make long-term improvements and tenure insecurity based on inconsistent land reform efforts in Ethiopia).

II. PAST PROPERTY THEFT CAN DESTABILIZE THE CURRENT STATE: THE CASE OF SOUTHERN AFRICA

In this section, I give a brief history of Southern Africa to demonstrate why land theft, which occurred centuries or decades ago, still deeply embitters the African majority and has great potential to cause backlash. Although I focus on the Southern African case, there are other nations, such as Nicaragua and Kosovo, where the past confiscation of property could also potentially lead to backlash.

Property is stolen or dispossessed when certain persons or communities are systematically deprived of property with no just compensation and this leads to a generalized belief in society that most owners would not own their property today but for these uncompensated takings.²⁹ Under these circumstances, the population is likely to perceive the existing property distribution as illegitimate and this perception can serve as the basis for property disobedience and backlash. This definition is narrow and meant to cover only the cases in which past theft can significantly contribute to present-day backlash. It is not meant to diminish the importance of other instances where there were morally wrong takings of property that do not jeopardize current stability.

For example, this Article's definition of stolen or dispossessed property includes countries similarly situated to Southern Africa, but it does not cover countries like the US. This is because although the US government usurped land from Native Americans during Conquest, there is no generalized belief that I, for example, would not own my home in Chicago today but for past theft. For the majority of Americans, land usurped from Native Americans is a sordid but closed chapter in our country's history. Consequently, it is not currently a politically destabilizing issue. In contrast, in Namibia, South Africa, and Zimbabwe there is a generalized belief that present owners would not own their property today if not for the systematic confiscation of property in the past.³⁰ Moreover, past property theft can potentially destabilize these nations because it plays a prominent role in the present collective memory, the connection between current inequality and past theft is pronounced, the majority group was dispossessed by the minority group, and the state has a weak capacity or willingness to prevent or subdue destructive backlash.

29. See *supra* note 2.

30. See, e.g., JAMES L. GIBSON, *OVERCOMING HISTORICAL INJUSTICES: LAND RECONCILIATION IN SOUTH AFRICA* 46 (2009) ("Among black South Africans, the most widely accepted factor accounting for land inequality is the advantages whites still hold as a result of the apartheid past: 77% of blacks consider this to be either an important or very important cause of land injustice. Coloured people hold similar views (80%), as do those of Asian origin (63%). Whites, as usual, are the exception: Only 34% attribute land inequality to the apartheid past.").

In Southern Africa, the issue of past property theft is a time bomb waiting to explode. Uazuva Kaumbi, the Namibia Broadcasting Corporation Board Chairman, captured the mood of his countrymen when he noted that:

[t]he smoldering land question in Namibia will burst into a bonfire unless and until answers are provided to the satisfaction of the indigenous people who are historically the real owners of the land. Land is the most important means of production, and without an equitable restoration to its real owners, independence will remain a mere paper tiger.”³¹

Past property theft has the potential to cause backlash and potentially destabilize the Namibian state.

Similarly, a study done by James Gibson concludes that past theft has the potential to cause backlash and destabilize South Africa.³² In one of the most ambitious and impressive public opinion studies done on land to date, Gibson surveyed 3,700 South Africans and found that eighty five percent of black respondents believe that “[m]ost land in South Africa was taken unfairly by white settlers, and they therefore have no right to the land today.”³³ In contrast, only eight percent of whites held the same view.³⁴ His most troubling finding is that two of every three blacks agreed that “land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability in the country.”³⁵ Ninety one percent of whites disagreed with this statement.³⁶ Gibson argues that, in South Africa, “[l]and issues have all of the characteristics required to become volatile and destabilizing, should effective political leadership emerge to mobilize the discontented.”³⁷

31. See Kaumbi, *supra* note 7, at 28. See also Henning Melber, *Land & Politics in Namibia*, 32 REV. AFR. POL. ECON. 135, 141 (2005) (“[T]he land issue might be—as long as it remains unresolved for a large part of the population—a social factor to be easily activated by those competing for political power, material gains and seeking popular support.”); Justine Hunter, *Interviews on Land Reform in Namibia*, in WHO SHOULD OWN THE LAND? ANALYSES AND VIEWS ON LAND REFORM AND THE LAND QUESTION IN NAMIBIA AND SOUTHERN AFRICA 109, 117–21 (interviewing various government officials in Namibia about land reform, who all agree that land reform is an emotional issue with the potential to create social unrest); WIET-ERSHEIM, *supra* note 6, at 54 (“The unequal distribution of land became a symbol for all injustice—even when similar or even greater injustices happened in other economic sectors—and in the end the return of land epitomized the return of true independence.”).

32. See GIBSON, *supra* note 30, at 31–32.

33. See *id.* (internal quotation marks omitted).

34. *Id.* at 31.

35. *Id.* at 32 (internal quotation marks omitted).

36. *Id.*

37. *Id.* at 84.

In Zimbabwe, the volatile issue of past property theft is one primary cause of Zimbabwe's present destabilization.³⁸ The unjust, colonial land distribution that gave whites ownership of upwards of eighty percent of the fertile agricultural land was a source of deep resentment and frustration for Africans. After Robert Mugabe, Zimbabwe's president since its independence, led several unsuccessful attempts to fundamentally transform the property distribution, Africans in Zimbabwe (especially veterans of the independence movement) became increasingly unwilling to countenance the injustice any longer.³⁹ In a desperate attempt to rapidly deliver on the promise of land reform and retain power, Mugabe's government supported a hasty and violent land reform program in 2000.⁴⁰ Although the reform program redistributed eighty percent of commercial farmland from whites to blacks, it is not clear which blacks benefited⁴¹—those with ties to Mugabe's political party or those in need of land.⁴²

Mugabe's program did make landownership more equitable; but, because it was implemented in a chaotic, violent manner, this came at an enormous cost.⁴³ By 2005, agricultural output, which is the mainstay of the economy, declined by thirty percent. The number of large, fully operational farms plummeted from 3217 to 250 partially operational farms.⁴⁴ The average annual rate of Zimbabwe's gross domestic product (GDP) growth from 2000 to 2006 was negative 5.6%, whereas in the preceding seven years (1993–1999) there was positive growth of 3.3%.⁴⁵ After Mugabe implemented his violent brand of land reform, inflation has been rampant and reached its peak of 500,000,000,000% in late 2008, before the government abandoned the Zimbabwean Dollar in favor

38. Thomas, *supra* note 6, at 694–95.

39. *Id.* at 700.

40. *Id.* at 700–02.

41. See Int'l Monetary Fund [IMF], *Zimbabwe: Selected Issues and Statistical Appendix*, ¶¶ 14–17, Country Rep. No. 05/359 (Oct. 2005) (prepared by Sharmini Coorey et al.).

42. The lack of transparency has made it difficult to determine who is presently residing on confiscated farms and thus who benefited from the land reform. See *id.* ¶ 23.

43. Samantha Power, *How To Kill A Country*, THE ATLANTIC, Dec. 2003, <http://www.theatlantic.com/magazine/archive/2003/12/how-to-kill-a-country/2845/> (detailing Zimbabwe's economic decline and characterizing Mugabe's fast-track program as a "violent, country-wide land grab"); Heather Boyle, *The Land Problem: What Does the Future Hold for South Africa's Land Reform Program?*, 11 IND. INT'L & COMP. L. REV. 665, 666 (2001) ("In neighboring Zimbabwe, widespread violence, rampant theft, and farm invasions plague Zimbabwe's land reform program.").

44. IMF, *supra* note 41, ¶ 16.

45. U.N. Stat. Div., GDP Annual Rate of Growth (World Bank Estimates), <http://unstats.un.org/unsd/databases.htm> (search for "Zimbabwe GDP growth"; follow "GDP annual rate of growth (World Bank estimates)" hyperlink) (last visited Jul. 5, 2010) (showing Zimbabwe's annual GDP growth percentages from 1961 to 2006).

of a multi-currency system.⁴⁶ Today, Zimbabwe, a once great nation, has deteriorated to the point where shortages of basic goods are commonplace.⁴⁷

Zimbabwe has provided the international community with an evocative portrait of how the failure to successfully address past property theft can lead to backlash and destabilize a state. The African majorities in South Africa and Namibia are also becoming dangerously impatient and if swift action is not taken to redistribute land, these countries may go the way of Zimbabwe. The following subsection explains how the region of Southern Africa came to this point.

A. *The History of Property Theft in Southern Africa*

During the pre-colonial period in Namibia, South Africa, and Zimbabwe, Africans used land in a variety of ways. Some ethnic groups were stationary, cultivated the land and raised livestock while others were nomadic pastoralists or hunters and gatherers.⁴⁸ In contrast to the European model of land ownership, in Southern Africa, those that cultivated land usually relied upon a chief or elder to assign land use rights according to need.⁴⁹

Upon the arrival of Europeans, however, the status quo of property ownership in Southern Africa changed dramatically. The colonial powers—the British, the Germans, and the Dutch—used violence to systematically expropriate innumerable acres of land, without consent or just compensation, in violation of indigenous peoples' most basic human

46. Public Information Notice No. 09/53, IMF, IMF Executive Board Concludes 2009 Article IV Consultation with Zimbabwe (May 6, 2009), <http://www.imf.org/external/np/sec/pn/2009/pn0953.htm> (noting hyperinflation reached its peak in 2008 at 500 billion percent and the financial outlook remains precarious.). For a technical evaluation of Zimbabwe's Inflation, see Steve H. Hanke & Alex K. F. Kwok, *On the Measurement of Zimbabwe's Hyperinflation*, CATO J. 353, 355 (2009) (estimating Zimbabwe's annual inflation rate, as of November 14, 2008, was 89,700,000,000,000,000,000,000%, much higher than the IMF Executive Board's estimate).

47. See IMF, Zimbabwe: 2005 Article IV Consultation—Staff Report; Public Information Notice on the Executive Board Discussion; and Statement by the Authorities of Zimbabwe, AT 4, Country Rep. No. 05/360 (Oct. 2005); WIETERSHEIM, *supra* note 6, at 83 ("In Zimbabwe more than 4,000 (80%) of white farmers have left or were chased off their farms. Commercial farming has largely broken down, and more than 200 000 former farm workers are now both landless and jobless. Three million Zimbabweans have left their country, the inflation rate is the highest in the world, unemployment is around 80%, and almost 6 million citizens depend on food aid.").

48. Leonard Thompson, *supra* note 2, at 6–12 (describing the various modes of production in pre-colonial southern Africa, including hunter-gatherers, pastoralists, etc.); WIETERSHEIM, *supra* note 6, at 141 ("Traditionally, black Namibians have practiced communal ownership of land. Land belonged to the community and was allocated and administered by traditional chiefs. Farmers were allowed to use a piece of land assigned to them in a culturally accepted way, but it would always remain under the chief's authority and control.").

49. WIETERSHEIM, *supra* note 6, at 141.

rights. Land was not only stolen to provide white settlers with farms, but it was also taken to destroy African self-sufficiency and create a surplus of cheap labor to work on white-owned farms and mines.⁵⁰ As a consequence of this, today upwards of eighty percent of commercial farmland in the region is owned by whites, who constitute less than ten percent of the population.⁵¹ Depriving Africans of their property was essential to their domination; consequently, many Africans believe that liberation will not be complete until the land comes back to Africans who are (in their view) its rightful owners.⁵² This is why the return of stolen land was one of the most powerful motivating factors of the region's independence movements.⁵³

In all three countries, independence involved a negotiated settlement between Africans and their former oppressors. In exchange for political independence, the African liberation parties agreed to allow present owners to keep their property and maintain their jobs despite past injustice.⁵⁴ This meant that if, for example, a white family received a surplus of land free of charge from the apartheid or colonial government—which took it from an African community without consent and without paying just compensation—upon independence, the family's legal ownership of that land was solidified.⁵⁵ If the democratic government wanted to expropriate the property from the white family and return it to the African community that owned it originally, then the government had to pay just compensation.⁵⁶

In this bargain, the white minority secured valid legal title to substantial assets while dispossessed African communities received a promise of land reform. For South Africa and Namibia, this promise has been elusive because the majority of Africans have yet to receive land or

50. See Alois Mlambo, *The Ambiguities of Independence, Zimbabwe 1980–1990*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra* note 3, at 64.

51. See sources, *supra* note 7.

52. WIETERSHEIM, *supra* note 6, at 52–53; RICHARDSON, *supra* note 6; GIBSON, *supra* note 30.

53. *Id.*

54. See Margaret Lee, *The Rise and Decline of the Settler Regimes of South Africa, Namibia, and Zimbabwe*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra* note 3, at 1.

55. Section 25.1 of the South African Constitution ensures that all property owners are protected regardless of how they acquired the property. S. AFR. CONST. 1996, § 25.1. European colonizers most often took land from African communities and not individuals. See e.g. Adrien Wing, *Communitarianism v. Individualism: Constitutionalism in Namibia and South Africa*, 11 WIS. INT'L L.J. 295, 299 (1992–1993) (emphasizing the importance of communitarianism in both South Africa and Namibia).

56. S. AFR. CONST. 1996, §§ 25.2, 25.3.

other equitable compensation for past theft.⁵⁷ Consequently, some critics argue that since land reform is moving so slowly, the bargain is illegitimate. Thus, whites who acquired land under dubious circumstances have no legitimate right to it and should relinquish title without the payment of just compensation.⁵⁸ But, although only one side of the liberation bargain has been upheld, the governments of Namibia and South Africa have honored the bargain and thereby ensured its legitimacy.⁵⁹ This is the current reality. Consequently, the starting point for the analysis in this Article is the assumption that present owners have valid legal title to their land and that land reform is imperative.

B. *The Case for Land Reform in Southern Africa*

The objective of land reform, as defined in this Article, is to secure greater access to land for those individuals and groups who were unjustly dispossessed of land or robbed of the opportunity to acquire land in the first place. Without land reform, the unwieldy vines of past property theft will strangle justice and the indelible ink of Colonialism and Apartheid will forever stain the emergent democracies of Southern Africa. In addition to facilitating justice and successful democracies in Southern Africa, land reform is also vital because Africans are in dire need of land. For example, in Namibia, although land is scarce, seventy percent of the population is dependent upon agriculture for their sustenance.⁶⁰ Likewise, prior to the chaotic land reform in 2000, Zimbabwe's economy was primarily agrarian and about seventy percent of its popula-

57. See Wietersheim, *supra* note 6, at 43 (arguing that in Namibia, only about 17% of formerly white land is now settled by blacks). See also *supra* note 7 and accompanying text; *supra* note 8; *infra* note 64.

58. See, e.g., Wolfgang Werner, *Land Reform in Namibia: The First Seven Years* 1, 8–9 (Namibian Econ. Policy Res. Unit [NEPRU], Working Paper No. 61, 1997) (noting that, based on the assumption commercial farmers in Namibia had stolen the land from indigenous farmers, “[p]oliticians from the ruling and opposition parties argued that to buy back commercial farm land was ‘immoral and illegal.’”).

59. Zimbabwe honored the liberation bargain from independence in 1980 until the chaotic land reform program in 2000. See generally Norma Kriger, *Liberation from Constitutional Constraints: Land Reform in Zimbabwe*, 27 SAIS REVIEW 63 (2007) (detailing Zimbabwe's initial policy of paying just compensation to white farmers and the constitutional restraints that were removed by Mugabe in 2000 to circumvent that policy).

60. See *id.*; Mmantsetsa Toka Marope, *Namibia Human Capital and Knowledge Development for Economic Growth with Equity* 5 (World Bank, Afr. Region Human Dev., Working Paper No. 84, 2005); Phaniel Kaapama, *Commercial Land Reforms in Postcolonial Namibia: What Happened to Liberation Struggle Rhetoric?*, in *TRANSITION IN NAMIBIA: WHICH CHANGES FOR WHOM?* 29 (Melber Henning ed., 2007) (“Although the country has a very low population density, most of this land mass comprises semi-arid rangeland, with low rates of rainfall and infertile soils, making it unsuitable for large-scale agricultural production. This has created a condition of land scarcity that has over the years remained a source of social tension and indirectly a potential source of violent political conflict.”).

tion resided in the countryside.⁶¹ There is a serious need for land in South Africa as well because although only four percent of its GDP is based on agriculture, half of its population resides in rural areas.⁶²

Two World Bank economists, Deiniger and Feder, convincingly argue that access to land is vitally important. They state that:

[i]n agrarian societies land is not only the main means for generating livelihood but often also to accumulate wealth and transfer it between generations. The way in which land rights are assigned therefore determines households' ability to produce their subsistence and generate marketable surplus, their social and economic status (and in many cases their collective identity), their incentive to exert non-observable effort and make investments, and often also their ability to access financial markets or to arrange for smoothing of consumption and income.⁶³

Despite the importance of land, the region's land reform programs have slumbered along for at least ten or more years after independence.⁶⁴ Government failure to deliver on the promise of land reform has already had disastrous consequences in Zimbabwe and has the potential to wreak havoc in Namibia and South Africa. This Article tries to uncover and address the legal obstacles to implementing efficient and effective land reform programs.⁶⁵

61. See Ruth Hall, *A Comparative Analysis of Land Reform in South Africa and Zimbabwe* in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra* note 3, at 261; U.N. Stat. Div., *Population by Sex and Urban/Rural Residence*, <http://unstats.un.org/unsd/demographic/products/dyb/dyb2002.htm> (search for "Zimbabwe urban/rural 2002"; follow "Population by sex and urban/rural residence" hyperlink) (last visited Apr. 24, 2010) (showing over 65% of Zimbabweans living in rural areas in 2002).

62. See Ruth Hall, *supra* note 61, at 258, 261.

63. Klaus Deininger & Gershon Feder, *Land Institutions and Land Markets 1* (World Bank, Dev. Res. Group, Working Paper No. 2014, 1998).

64. In Zimbabwe, for example, the government had "acquired only 3 million hectares of land, 44% of which was in the dry and infertile Natural Regions IV and V, while only 5% of the peasant farmers in the communal areas had been resettled." Mlambo, *supra* note 50, at 65, 70. Likewise, the distribution of land under Namibia's land reform program has been slow in its implementation:

[U]ntil July 2007, 349 full-time farmers and 274 part-time farmers had bought farms through the Affirmative Action Loan Scheme. In addition, about 180 blacks have purchased commercial farms on the open market without participating in a state loan scheme. 40 commercial farms were in black hands even before independence. This means that about 14%, or one out of seven commercial farms (843 out of 6,000), is today in the private ownership of black Namibians.

WIETERSHEIM, *supra* note 6, at 33–36.

65. There is a vast literature confirming that land reform can increase economic growth and decrease the potential for instability. See generally SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 378–80 (1968) (observing that land reform has a stabilizing

C. Beyond Southern Africa: A Global Perspective

Although I focus on Southern Africa, there are also several other nations where contested land rights could potentially lead to backlash. In Nicaragua, for example, the left-leaning Frente Sandinista de Liberacion Nacional (the Sandinistas) wrested power from the infamously corrupt Somoza regime. The Sandanistas implemented massive agrarian land reform that transferred land from Somoza loyalists and large landowners to poor peasants.⁶⁶ Upon the defeat of the Sandanistas in 1990, Chamorro and her newly elected administration recognized that the ownership of many land parcels was contested; and that if the claims of both present and past owners were not swiftly addressed, this had the potential to up-end Nicaragua's nascent democracy.⁶⁷ Despite this, Chamorro and

effect on the political system and increases agricultural productivity in the long run); RUSSELL KING, *LAND REFORM: A WORLD SURVEY* (1977); ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT* (1987); Daron Acemoglu, et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001); Timothy Besley & Robin Burgess, *Land Reform Poverty Reduction and Growth: Evidence from India*, 115 Q. J. OF ECON. 389 (2000) (arguing land reforms in India were associated with poverty reduction); Klaus Deininger & Lyn Squire, *New Ways of Looking at Old Issues: Inequality and Growth*, 57 J. DEV. ECON. 259 (1998); Edmundo Flores, *Issues of Land Reform*, 78 J. POL. ECON. 890 (1970); Herschel I. Grossman, *Production, Appropriation, and Land Reform*, 84 AM. ECON. REV. 705 (1994) (determining that land reform can benefit landlords); T. David Mason, *Take Two Acres and Call Me in the Morning: Is Land Reform a Prescription for Peasant Unrest?*, 60 J. POL. 199 (1998); Karl O. Moene, *Poverty and Landownership* 82 AM. ECON. REV. 52 (1992) (concluding that land reform's effectiveness depends on the availability of fertile land); Edward N. Muller et al., *Land Inequality and Political Violence*, 83 AM. POL. SCI. REV. 577 (1989); Klaus Deininger & Pedro Olinto, *Asset Distribution, Inequality, and Growth* (World Bank, Dev. Res. Group, Working Paper No. 2375, 2000) (arguing that land inequality has a negative impact on economic growth); Klaus Deininger, Songqing Jin & Hari K. Nagarajan, *Land Reforms, Poverty Reduction, and Economic Growth: Evidence from India* (World Bank, Dev. Res. Group, Working Paper No. 4448, 2007); Klaus Deininger & Songqing Jin, *Land Rental Markets as an Alternative to Government Reallocation?: Equity and Efficiency Considerations in the Chinese Land Tenure System* (World Bank, Dev. Res. Group, Working Paper No. 2930, 2002); KLAUS DEININGER ET AL., *HOW LAND REFORM CAN CONTRIBUTE TO ECONOMIC GROWTH AND POVERTY REDUCTION: EMPIRICAL EVIDENCE FROM THE INTERNATIONAL AND ZIMBABWEAN EXPERIENCE 1* (2000), available at <http://siteresources.worldbank.org/INTARD/825826-1111148606850/20431879/Zimbabwe.pdf>.

66. See Michael Roche, *Competing Claims: The Struggle for Title in Nicaragua*, 39 VAND. J. TRANSNAT'L L. 577 (2006).

67. See Deena I. Abu-Lughod, *Failed Buyout: Land Rights for Contra Veterans in Postwar Nicaragua*, 27 LATIN AM. PERSPECTIVES 32 (2000) (discussing hastily and poorly executed land reform efforts intended to prevent unrest); Mark Everingham, *Agricultural Property Rights and Political Change in Nicaragua*, 43 LATIN AM. POL. & SOC'Y 61 (2001) (discussing volatile property right issues as a threat to emerging democracies, using Nicaragua as an example).

subsequent regimes have failed to address the claims of past owners, making backlash and state destabilization a tangible possibility.⁶⁸

Kosovo is another example. Prior to the NATO bombing in 1999, thousands of Kosovo Albanians were forced to flee hastily and leave their property behind due to a Serbian-led ethnic cleansing campaign.⁶⁹ When the Kosovo war ended, the interim UN-led civilian administration (the United Nations Mission in Kosovo (UNMIK)) recognized that the failure to resolve contested property rights could undermine the peace process and lead to serious backlash.⁷⁰ Consequently, the arguments I make in this Article likely apply beyond Southern Africa.

In sum, prior to independence, the Southern African liberation parties struck a deal with the white power structure. In exchange for political freedom, the liberation parties agreed that whites could maintain their property despite its provenance.⁷¹ But, there was one major proviso—the state had to vindicate the property rights of the

68. See Anja Nygren, *Competing Claims on Disputed Lands: The Complexity of Resource Tenure in the Nicaraguan Interior*, 39 *LATIN AM. RES. REV.* 123, 132–35 (2004) (describing the land reform policies of Nicaraguan leadership following the Sandinista defeat); David R. Dye et al., *Contesting Everything, Winning Nothing: The Search for Consensus in Nicaragua, 1990–1995* (Hemisphere Initiatives, Brookline, MA) Nov. 1995, available at <http://lanic.utexas.edu/project/hemisphereinitiatives/contesting.htm> (noting the inability of the Chamorro government to address land reform issues adequately and the resulting land invasions and discord).

69. See Leopold von Carlowitz, *Resolution of Property Disputes in Bosnia and Kosovo: The Contribution to Peacebuilding*, 12 *INT'L PEACEKEEPING* 547, 551 (2005) (noting that of the estimated 860,000 Kosovo Albanians who fled or were removed during the conflict, the majority returned to find that approximately 50% of the housing was destroyed during the conflict). Hans Das, *Restoring Property Rights in the Aftermath of War*, 53 *INT'L & COMP. L. Q.* 429, 430–33 (2004) (noting that, by the end of the conflict, approximately 800,000 nationals had fled or been driven out of Kosovo).

70. The United Nations Interim Administration Mission in Kosovo (UNMIK) decided to defend the rights of past owners by passing a law that states any person who was dispossessed of a property right between March 23, 1989 and March 24, 1999 as a result of discrimination has a right to restitution in kind or compensation. UNMIK, *On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission*, § 2.2, UNMIK/REG/2000/60 (Oct. 31, 2000). See also Leopold von Carlowitz, *Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo*, 10 *GLOBAL GOVERNANCE* 307, 307 (2004) (acknowledging that it is too early to judge how successful UNMIK's land reform policies have been; however, arguing that "resolution of property issues is often pivotal for the success of a peace building process in a post conflict situation").

71. See RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT* 312, 317 (2000) (noting that the interim Constitution reflected a compromise between the two positions); Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution*, 11 *S. AFR. J. HUM. RTS.* 222, 229–38 (1995) (providing an insider's view of the pre-liberation negotiation that led to the constitutional property clause, which protected existing property rights); A.J. Van Der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, in *PROPERTY AND THE CONSTITUTION* 109, 111–12 (Janet McLean ed., 1999).

dispossessed African majority through land reform.⁷² In the end, whites kept their land and Africans never received theirs. It should therefore come as no surprise that the cheated African majority is now overcome with anger.⁷³ Consequently, past property theft has the potential to cause backlash and destabilize the South African and Namibian states, as we have already seen in Zimbabwe. Although I focus on Southern Africa in this section, the reallocation of property rights is necessary to secure peace in other nations as well.⁷⁴

III. THE CLASSICAL CONCEPTION

In this section, Part A outlines the classical conception's origins and its defining principles. To paint a more lucid picture of the classical conception, Part B provides two contemporary manifestations of it: the implementation of the South African constitution's land restitution provision and the implementation of the South African constitution's eminent domain provision. After providing a comprehensive description of the classical conception, Part C offers a critique of it, where I explain the weaknesses of the classical conception.⁷⁵ I also argue that the justifications for the classical conception fall short when systematic past property theft places the legitimacy of property rights in question.

A. *The Classical Conception Defined*

The classical conception is often associated with Blackstone who famously defined property as, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."⁷⁶ Blackstone's definition has become a trope for the belief that property is unified (rather than a bundle of rights) and that an owner rightly has near

72. See S. AFR. CONST. 1996 s. 25(7). See also HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 85-92 (2000) (describing the strategies used to confront historical injustice in the constitution).

73. See generally Kaumbi, *supra* note 7; Gibson, *supra* note 30.

74. See Daron Acemoglu & James A. Robinson, *A Theory of Political Transitions*, 91 AM. ECON. REV. 938 (2001) (finding that high levels of inequality between groups in society leads to political instability); Jamie Crook, *Promoting Peace and Economic Security in Rwanda Through Fair and Equitable Land Rights*, 94 CAL. L. REV. 1487, 1490 (2006) (arguing that the Rwandan government must further promote equitable land access through land reform in order to create peace and stability); Ruth Hall, *A Political Economy of Land Reform in South Africa*, 31 REV. AFR. POL. ECON. 213, 214 (2004) (noting that the World Bank advised that redistributing the land in South Africa was necessary to avert social and political instability).

75. For more information on negotiated land reform, see *infra* Part III.B.2.

76. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

absolute power to control his property.⁷⁷ However, it is clear that Blackstone's absolutist and individualist definition was merely a starting point from which he introduced limiting provisions.⁷⁸ In reality, the genesis of the classical conception predates Blackstone, arising in feudal times when a land lord had full control over his land. Land lords had sovereignty over the land that included the power to govern, nominate priests, exact military service, levy taxes, pass legislation, and establish courts.⁷⁹

Today, the classical conception is still predicated upon significant owner control. Singer argues that "[t]he classical conception focuses on the concepts of title and ownership and presumes full control of specific valued resources by the 'owner' backed up by state power. This conception remains powerful and exerts substantial determinative force in adjudicating and developing the rules of property law."⁸⁰ As a practical matter, Singer's argument that the classical conception gives owners full control of their property is a slight overstatement.⁸¹ The following four principles are a more accurate description of the classical conception. Under the classical conception, an owner must:

1. acquire valid legal title through individual efforts to become the sole owner with consolidated rights;
2. possess near absolute control over the use and transfer of her property so long as it does not cause significant harm to anyone else;
3. rely upon the state to defend her rights against third parties who attempt to infringe upon this control while deemphasizing her duties to third parties; and,

77. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603–04 (1998); David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 104–07 (2009).

78. See Rose, *supra* note 77, at 603–04; Schorr, *supra* note 77, at 104–07. See also Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 22 (1927) (pointing out that "[l]awyers occupied with civil or private law have in any case continued the absolutistic convention of property; and in doing this, they are faithful to the language of the great 18th century codes, the French, Prussian, and Austrian, and even the 19th century codes like the Italian and German which also begin with a definition of property as absolute or unlimited though they subsequently introduce qualifying or limiting provisions"); Marshall Harris, *Legal Aspects of Land Tenure*, 23 J. FARM ECON. 173, 176–80 (1941) (providing a very brief history of the classical conception of property from the Roman period to the early English classical school).

79. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 259–61 (3d ed. 1990).

80. Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 69, 70 (G.E. van Maanen & A.J. van der Walt eds., 1996).

81. See, e.g., Harris, *supra* note 78, at 176–80.

4. expect that the state or other third parties will bear the burden of justifying any actions that attenuate her control of the property.⁸²

B. The Classical Conception Applied

1. The Implementation of the South African Constitution's Land Restitution Provision

South Africa's implementation of its constitution's land restitution provision is a prime example of the classical conception at work. The South African government has a three-prong land reform strategy that includes land tenure reform, land redistribution, and land restitution. Land tenure reform is intended to secure tenure by transforming informal property rights into more formal rights. Land redistribution gives formerly disadvantaged individuals an opportunity to own land regardless of what they may have owned or possessed in the past. Land restitution compensates individuals and communities whose land was expropriated by past governments. According to Section 25.7 of the South African constitution, "a person or community dispossessed of property after June 19, 1913 as a result of past racially discriminatory laws or practices" is entitled to land restitution or redress.⁸³

There are many problems with the government's implementation of the constitutional land restitution provision.⁸⁴ One of the most troubling is the amount of financial compensation that the government has paid individuals and communities who did not opt for restitution of their land.⁸⁵ Due to financial constraints, the compensation paid was merely

82. In 1990 when the post-apartheid Namibian state was established, the court solidified the nation's commitment to the classical conception. In the landmark case of *De Roeck v. Campbell & Others* the court ruled that, "ownership includes the right to possess one's property, to dispose of it and even destroy it. If anyone else lays claim to such property or to interfere with any one of those rights, the onus is on such person to justify his claim." See *De Roeck v. Campbell & Others*, (1) 1990 NR 126 (HC) (Namib.). As required by the classical conception, the Namibian state defends the ownership rights of title deed holders who have extensive power to control their property; and non-owners bear the burden of proving the validity of encroachments on owner control.

83. S. AFR. CONST. 1996 § 25(7). See also Restitution of Land Rights Amendment Act 48 of 2003 (S. Afr.) (enabling the means for the right to restitution or redress provided in the constitution).

84. See generally THE RIGHTS AND WRONGS OF LAND RESTITUTION: RESTORING WHAT WAS OURS (Derick Fay & Deborah James eds., 2009); Edward Lahiff, *Land Reform in South Africa: A Status Report 2008*, at 2-6 (Programme for Land and Agrarian Studies, Research Report No. 28, 2008) (highlighting the progress and concerns regarding land tenure reform, land distribution, and land restitution in South Africa).

85. See DEP'T OF LAND AFF. ANN. REP. 1 APRIL 2008 — 31 MARCH 2009, at 30 (2009) (S. Afr.).

symbolic and did not reflect the market value of the property at the time of confiscation or at present.⁸⁶ For example, the government paid R40,000 (about \$5200) to non-whites who were evicted from valuable land they owned in Sophiatown.⁸⁷ The government claims that the reason the amounts it paid were so small is because it lacks the resources to pay market-related prices.⁸⁸ But, if the government uses eminent domain to purchase land from whites who now live in Sophiatown for redistribution to dispossessed populations, then despite its budget constraints, the government pays market value.⁸⁹

The government gives current owners market compensation while past owners who were unjustly dispossessed receive symbolic compensation because the government is giving existing owners' rights more value than the rights of dispossessed individuals and communities. This is because the state is working within a conceptual framework that assumes current owners acquired valid legal title through their individual effort to become the exclusive, deserving owners. The framework assumes that since you worked hard to acquire and develop the property, then you are entitled to the full market value of the property upon expropriation. The framework dismisses the possibility that current owners acquired their property unjustly; and it also ignores the rights of owners unjustly dispossessed. Most importantly, the framework overlooks the duties present owners may have to dispossessed populations with valid ownership claims. Thus, despite the transformative potential of Section 25.7, the classical conception is the framework that has informed the government's decisions and determined the outcomes.

2. The Implementation of the South African Constitution's Eminent Domain Provision

Negotiated land reform—also known as the willing-seller/willing-buyer principle—is a market-led approach to land reform where the state can only acquire property from willing sellers and refrains from using its eminent domain power to expropriate. It emerged as the dominant land reform paradigm following the end of the Cold War.⁹⁰ Prior to this, the norm was administrative land reform, characterized by a state-led,

86. *Id.*

87. *Id.*

88. *Id.*

89. For more information, see *infra* Part III.B.2 and accompanying text.

90. ROSSET, PATEL, & COURVILLE, *PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM* 18 (2006) ("The end of the Cold War heralded at least the temporary end of the possibility of radical land reform programs. While it was inconceivable that land could be redistributed through a willing buyer-willing seller approach at the beginning of the Cold War, by the Cold War's end it was inconceivable that it could be done any other way.").

centralized process.⁹¹ In Southern Africa, negotiated land reform has been implemented such that owners have near absolute power to decide to whom, at what price, and on what terms they will sell their land, despite the fact that expeditious land reform is necessary to address past injustice and avert backlash.⁹² Consequently, negotiated land reform is a powerful illustration of the classical conception.

As a constitutional matter, both the South African and Namibian governments *in theory* have the power to use eminent domain to make land available for land reform.⁹³ But, *in practice* they do not, and it is important to understand why. In the 1979 Lancaster House Agreement—which was the independence constitution containing the negotiated terms of Zimbabwe's political liberation—the post-colonial, democratic government was restricted to negotiated land reform for the first ten years.⁹⁴ During this time, if the government decided to use its powers of eminent domain, then, as a disincentive, it was forced to pay landowners just compensation in scarce foreign currency.⁹⁵ Since Zimbabwe set the blueprint for the region's political transition, negotiated land reform would become the norm in Namibia and South Africa, which gained independence years later.

Unlike Zimbabwe, eminent domain was never constitutionally curtailed in Namibia and South Africa, but due in part to advice from the World Bank, both countries refrain from using it.⁹⁶ World Bank economists have fervently advocated for negotiated land reform and against

91. Klaus Deininger, *Making Negotiated Land Reform Work: Initial Experience from Brazil, Colombia, and South Africa* 2, 28–29 (World Bank, Dev. Res. Group, Working Paper No. 2040, 1999). See generally *id.*

92. Michael Aliber & Reuben Mokoena, *The Interaction between the Land Redistribution Programme and the Land Market in South Africa: A Perspective on the Willing-Buyer/Willing-Seller Approach* (Programme for Land and Agrarian Studies, Occasional Paper No. 21, 2002); see Deininger, *supra* note 92, at 9–10 (describing how the landlord's power to decide the particular buyer and sale price created collusion between the buyer and seller, resulting in overstated property values).

93. See S. AFR. CONST. 1996 § 25; NAMIB. CONST. 1990 art. 16(2). See also ANDRE VAN DER WALT, *CONSTITUTIONAL PROPERTY CLAUSES* 309–58 (Juta & Co. 1999).

94. Southern Rhodesia Constitutional Conference Held, London, Eng., Sept. 10–Dec. 15, 1979, *Lancaster House Agreement* (Dec. 21, 1979).

In its place Britain offered a compromise under which, in return for the Zimbabweans guaranteeing existing property rights, the British would underwrite half the costs of a resettlement program. Land could change hands only on a 'willing seller, willing buyer' basis. Thus whites who wished to keep their farms were free to do so; there would be no expropriation of land.

Robin Palmer, *Land Reform in Zimbabwe, 1980–1990*, 89 AFR. AFFAIRS 163, 166 (1990).

95. See Mlambo, *supra* note 50, at 72–73.

96. HARRING & ODENDAAL, *supra* note 8, at 11; Ruth Hall, *supra* note 61, at 258; Kaapama, *supra* note 60, at 34–38.

eminent domain.⁹⁷ More importantly, these economists have set the tone for what other foreign donors and investors view as acceptable land reform policies. Since Southern African countries require foreign assistance and investment to complete their land reform programs, the governments are somewhat constrained by the neoliberal views of these influential economists.⁹⁸

But, the story of why negotiated land reform has been the prevailing policy is more complicated than this. In South Africa, for example, the landless poor and their civil society representatives want the ruling party, the African National Congress (ANC), to drastically decrease its emphasis on negotiated land reform. At the Land Summit, the landmark land reform meeting involving South African civil society and government, participants overwhelmingly identified negotiated land reform as the major obstacle to timely land reform.⁹⁹ On the other hand, white farmers, their civil society representatives, and the World Bank have encouraged

97. Marc Wegerif, *A Critical Appraisal of South Africa's Market-based Land Reform Policy: The Case of the Land Redistribution for Agricultural Development (LRAD) Program in Limpop 9* (Programme for Land and Agrarian Studies, Research Report No. 19, 2004), available at http://www.sarpn.org.za/documents/d0001269/P1506-RR_19_Marc_Wegerif.pdf ("The World Bank, along with allied academics, had started to engage in policy debates in South Africa from 1990, and they appear to have had a strong influence on policy development with their proposals for a market-based land reform model."). See Yolandi Groenewald, *Mass Land Grabs Dismissed*, MAIL & GUARDIAN (Johannesburg), Feb. 10, 2006, at 7 (quoting senior World Bank economist Rogier van den Brink, who also argued that "[i]t is better for government to negotiate a settlement with farmers" instead of using its expropriation powers to compel purchases). See also KLAUS DEININGER, *LAND RIGHTS AND ADMINISTRATION IN AFRICA 2* (2004), <http://www.iied.org/pubs/pdfs/G00127.pdf> (noting the threat of expropriation has undermined tenure security and investment in many African countries). In addition to negotiated land reform, World Bank economists also advocate for reforming land markets by removing subdivision restrictions and instituting a land tax. R. van den Brink, *Land Reform Policy in Sub-Saharan Africa: Consensus and Controversy*, in LAND REFORM 14 (2003), available at <http://www.landcoalition.org/pdf/wbqrbaf.pdf>; Ben Cousins, *Comments*, in LAND REFORM, *supra*, at 43.

98. *Id.* Regarding the influence of the neoliberal governance model:

It is equally important to acknowledge that the Namibian transition to independence coincided with the ascendance of the neoliberal governance model. Not only was this model seen as a viable idiom for state design and reconstruction, but also its adoption became a prerequisite for the accommodation of emerging and/or reformed states within the context of the international politics of development aid, aid that was instantaneously needed to kick-start their reconstruction and development processes. Thus, the need to embrace the principle of economic neo-liberalism is said to have arisen from these geopolitical shifts at the global level.

Kaapama, *supra* note 60, at 35.

99. See, e.g., Thozzi Gwanya, Acting Dir. Gen., S. Afr. Dep't of Land Aff., *Impact Assessment of Land Reform in South Africa*, slide 20, Remarks at the World Bank Conf. (Feb. 15, 2008) available at http://siteresources.worldbank.org/INTIE/Resources/WorldBankConference14_15February2008-TGwanya.ppt (last accessed Apr. 27, 2010).

the ANC to continue with negotiated land reform.¹⁰⁰ Gibson's empirical work further highlights these opposing views, finding that "a majority of blacks, Coloured people, and those of Asian origin support going further than existing policy to force landowners to sell some of their property to the government for purposes of redistribution. A majority of whites oppose expanding the policy."¹⁰¹

Although those advocating for increased use of eminent domain have significant electoral power, those lobbying for negotiated land reform have immense economic power. If the ANC spurns foreign donors or upsets local investors by more aggressively using its powers of eminent domain, then investment is likely to decrease. On the other hand, since there is no viable opposition party in South Africa, the ANC faces no genuine threat of electoral defeat at the national level.¹⁰² In the 2009 national elections, for example, the ANC retained power with sixty six percent of the vote.¹⁰³ This suggests that the consequences of rattling those with economic power are conspicuous and potentially severe, while the consequences of agitating those with electoral power are less apparent. As a result, the ANC has made a strategic choice to pacify those with economic power and continue with negotiated land reform against the wishes of the majority.¹⁰⁴

100. See Rogier van den Brink et al., *Consensus, Confusion and Controversy* 35 (World Bank, Working Paper No. 71, 2006), available at http://knowledgebase.terrafrica.org/fileadmin/user_upload/terrafrica/docs/345150Consensus101OFFICIAL0USE0ONLY1.pdf (arguing that South Africa's market-assisted land redistribution programs have been successful at transferring land "at reasonable cost and speed"); AGRI SA, Submission on the Expropriation Bill [B16—2008], at 18 (May 14, 2008), available at <http://www.pmg.org.za/report/20080617-expropriation-bill-public-hearings> (follow "AGRI SA Submission" hyperlink) (last visited July 6, 2010) (arguing that expropriation should be used only "as a measure of last resort" and subject to fairness and transparency); DEMOCRATIC ALLIANCE PARTY, LAND REFORM AND THE WILLING BUYER, WILLING SELLER PRINCIPLE 1, available at http://www.da.org.za/docs/566/willingbuyerwillingsseller_document.pdf (last visited Aug. 6, 2010) (favoring a market-oriented approach and blaming the slow progress of land reform on "inefficient management and a lack of financial commitment on the part of the state.").

101. GIBSON, *supra* note 30, at 68–69.

102. See Barry Bearak, *South African Voters Grumble, but Favor the Party in Power*, N.Y. TIMES, Apr. 22, 2009, at A6 (noting that the ruling political party for the past 15 years, the ANC, retains its power despite disappointment among voters because the Democratic Alliance, the only potential challenge to the ANC, still failed to garner a majority of the votes; and Congress of the People (COPE), the splinter group recently created from within the ANC, developed disputes of its own).

103. See S. AFR. ELECTORAL COMM'N., RESULTS REPORT (2009), available at <http://www.elections.org.za> (follow "Results Report" hyperlink; then select "22 Apr 2009 National Election"; then select "<All Provinces>"; then follow "View Report" hyperlink) (last visited Apr. 27, 2010).

104. For a more detailed discussion about race and class dynamics behind the ANC's reluctance to implement more radical land reform, see Jeremy Seekings & Nicoli Nattrass, *Class, Distribution and Redistribution in Post-Apartheid South Africa*, 50 TRANSFORMATION 1, 10 (2002) ("The semi-privileged position of politically powerful African groups—including

Zimbabwe faced a similar political calculus in the late 1980s. But, as soon as its ruling party (ZANU-PF) realized that a precipitous change in the political tide was upon them and the unresolved land question would be the impetus behind the political establishment's potential defeat, the government began facilitating hasty, violent land expropriations.¹⁰⁵ To be sure, there are many important differences between present-day South Africa and Zimbabwe in the late 1990s—namely, South Africa has a much more independent judiciary, which can stop the executive branch from engaging in illegal land grabs. However, in the future, should the ANC consider the unresolved land question to be a key factor in its impending political defeat, the ANC could potentially take actions similar to those of the ZANU-PF.

The international community is betting on the fact that the electoral calculus will not shift drastically in South Africa, thereby making hasty land expropriations necessary for the ANC to maintain power. This is an immensely risky bet to make. A safer bet for the international community is to facilitate the timely and orderly redistribution of real property before the situation severely deteriorates.¹⁰⁶ The World Bank and other international actors must understand that the classical conception's emphasis on negotiated land reform is causing reform to move at a dilatory pace, which can have potentially fatal consequences. The state must use eminent domain more aggressively to redistribute property.

Even in the relatively few instances where South Africa has used its constitutional power of eminent domain to make land available for land reform, the classical conception undermined the transformative potential of this Section. Section 25(3) demands that the state employ a contextual understanding of just compensation that considers several equity enhancing factors. Section 25(3) states,

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—(a) the current use of the property; (b) the history of the

the urban, industrial working class, sections of the intermediate class and the semi-professional class (especially teachers)—gives them good reasons to oppose a universal welfare system in that radical welfare reform would require increased taxation on them, making them subsidizers of the poor rather than beneficiaries of redistribution from the rich.”).

105. William H. Shaw, *They Stole Our Land: Debating the Expropriation of White Farms in Zimbabwe*, 41 J. MODERN AFR. STUD. 75, 76 (2003) (discussing Mugabe's increasing unpopularity and the volatile political climate preceding the implementation of the fast track plan).

106. See Atuahene, *supra* note 3, at 851–59 (arguing a Legitimacy Enhancing Compensation Program (LECP) can temper property-related disobedience).

acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.¹⁰⁷

These equity enhancing factors are a key part of the liberation bargain. Whites kept land acquired during Apartheid and Colonialism despite the circumstances of acquisition; but, if the government needs to expropriate the land post-Apartheid, then the circumstances of acquisition will determine what amount of compensation is just. According to Section 25(3), the Fair Market Value (FMV) should be just a starting point for determining just compensation rather than the final sum current owners are entitled to.¹⁰⁸

Despite this progressive constitutional provision, my interview with Blessing Mphela, the Chief Land Claims Commissioner, revealed that when the government acquires property through negotiated land reform, *in practice*, the price paid often only reflects the FMV and not the other equity enhancing factors enumerated in Section 25(3) of the Constitution.¹⁰⁹ Evidently, this is because the service providers the government hires to do the valuation sometimes do substandard work and submit estimates that do not take into account the equity enhancing factors.¹¹⁰ Even if the service providers do their job properly, the government often pays landowners FMV because, as Mr. Mphela explained, “We don’t like to refer disputes around price to the court because it will take forever. It can drag on for over two years before the matter is resolved.”¹¹¹

This practice of paying FMV without considering the equity enhancing factors exhibits a myopic understanding of just compensation, causes the state to overpay landowners, undermines an important piece of the liberation bargain made in 1994, and treats owners as if they have no duties arising from South Africa’s history of land dispossession. While Section 25(3) appears to embrace a transformative conception of property, in practice, the classical conception prevails because the state gives existing owners more protection than even the constitution requires. Ul-

107. S. AFR. CONST. 1996 § 25(3).

108. *Id.* See also *Ash and Others v Dep’t of Land Aff.* 2000 (2) All SA 26 (LCC) at 40 (S. Afr.) (stating that for determining just and equitable compensation, “equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require”).

109. Interview with Blessing Mphela, Acting Chief Land Claims Comm’r, Dep’t of Land Aff., in Johannesburg, S. Afr. (May 15, 2008).

110. *Id.*

111. *Id.*

timately, this undermines the state's efforts to vindicate the rights of dispossessed populations.

In this section, I have explored two of South Africa's constitutional property clauses. I argued that the government's implementation of the provisions reflects a classical conception of property, which has eviscerated the transformative potential of these constitutional provisions.¹¹²

C. The Classical Conception Critiqued

The classical conception is predicated upon owner control, and hence any policy that interferes with owner control—like eminent domain, for example—is discouraged. In the context of Southern Africa, I argue that the classical conception and its distaste for eminent domain is not appropriate. I then move beyond the Southern African context and the specific issue of eminent domain under Section 25(3) to explore why the classical conception is not justified when the legitimacy of property rights is in question.

1. Weaknesses of Negotiated Land Reform

In the context of Southern Africa, the classical conception, its emphasis on negotiated land reform, and its rejection of eminent domain has several weaknesses. First, relying upon willing sellers often undermines the state's planning capacity because the government cannot condemn and acquire contiguous parcels of land in a specific area. Condemning blocks of land is advantageous and efficient because it allows the state to capitalize upon economies of scale by, for instance, building an irrigation infrastructure to service numerous resettled individuals and families.

Second, negotiated land reform gives landowners the upper hand in land negotiations, which can result in the state paying inflated prices for land.¹¹³ Aliber and Mokoena argue that this is because of the small supply of farms for sale, the high demand for particular properties due to ancestral connections or proximity to established communities, and the high transaction costs involved in rejecting the landowner's offer and starting the process again.¹¹⁴ Third, the quality of the land available

112. *Id.*

113. Wietersheim, *supra* note 6, at 60 (2008) ("There are many willing buyers in the market looking for land, but they end up being frustrated by abnormal prices, insufficient capital, government bureaucracy, and most importantly by the unwillingness on the part of the current owners to sell the land.' By keeping prices of farms high, according to Kandji, 'commercial farmers are making sure that the yesterday "have-nots" remain the "have-nots" of the day after tomorrow.'"). See *supra* note 92.

114. Aliber & Mokoena, *supra* note 92, at 24.

through negotiated land reform is more likely to be sub-standard.¹¹⁵ Landowners with thriving farms are not likely to want to sell a profitable enterprise, while unprofitable farms with degraded land are more likely to be willingly sold.

Fourth, a pervasive and potentially fatal problem with negotiated land reform is that it is too slow.¹¹⁶ This is true in Namibia, South Africa, and Zimbabwe. In an address to the nation, the Namibian Prime Minister Theo-Ben Gurirab stated that, “[o]ver the years, the government has come to realize that the ‘willing-seller-willing-buyer’ approach is cumbersome and as a result, it would not be able to keep up with the high public demand for agricultural land.”¹¹⁷ In 1994, South Africa, advised by the World Bank, modestly aimed to redistribute thirty percent of the country’s agricultural land in five years, but less than one percent was redistributed by 1999, less than three percent by 2003, and less than five percent by 2008.¹¹⁸ In Zimbabwe, the slow process was one key reason behind the great backlash that has led to the destabilization of a once great nation.

Despite the sluggish pace of land reform, World Bank economists argue that negotiated land reform is still a better option than eminent domain because of:

115. Commenting on the factors that diminish the quality of land reform:

The bureaucratic complexity of the process does not make it attractive to landowners, while limited grant sizes, limited budgets, lengthy and restrictive approval processes and landowner prejudice combine to ensure that would-be land reform beneficiaries are restricted to a small proportion of the land coming onto the market every year, and often end up with land that is of relatively poor quality and more extensive than they would wish.

Edward Lahiff, ‘Willing Buyer, Willing Seller’: *South Africa’s Failed Experiment in Market Led Agrarian Reform*, 28 *THIRD WORLD Q.* 1577, 1586 (2007).

116. See Wegerif, *supra* note 97, at 8; Edward Lahiff, *supra* note 115, at 1581–83. (detailing the time-consuming market-based land reform process and noting the slow pace and inability to meet objectives “makes it unlikely that it can ever be a means of large-scale redistribution”); Groenewald, *supra* note 97 (noting that during the State of the Nation speech, President Thabo Mbeki said that “the Land Affairs Department would review the ‘willing-seller, willing-buyer’ principle to speed up land reform”).

117. Uazuva Kaumbi, *Land Reform: Namibia Moves into the Fast Lane*, 428 *NEW AFR.* 28, 30 (2004). See also David Shriver, *Rectifying Land Ownership Disparities Through Expropriation: Why Recent Land Reform Measures in Namibia Are Unconstitutional and Unnecessary*, 15 *TRANSNAT’L L. & CONTEMP. PROBS.* 419, 429 (2005) (“The success, or lack thereof, of the willing-seller, willing-buyer approach is a source of significant contention in Namibia because the program has been inefficient and sluggish.”); WIETERSHEIM, *supra* note 6, at 87 (“So far (September 2008) only five white farms have been expropriated, a ridiculously small number after 18 years of independence.”).

118. See Ruth Hall, *supra* note 61, at 257; DEP’T LAND AFF. ANN. REP., *supra* note 8, at 9 (acknowledging that the Department of Land Affairs had distributed only 4.3% of the target, which was to transfer 30% of white-owned agricultural land by 2014).

the need to maintain public confidence in the land market and more generally to affirm the government's respect for individual property rights. It also reflects the recognition that expropriation in other countries has failed to provide rapid access to land for a large number of people, instead degenerating into lengthy political maneuvering and rent-seeking.¹¹⁹

I disagree with this position for four reasons.

First, these economists' notion of protecting individual property rights is quite shallow because it exclusively refers to the rights of current titleholders and potential investors. A more robust protection of property rights would include not only these well-positioned populations, but also the property rights of individuals and families who were unjustly dispossessed. Land dispossession has severely impoverished many individuals and families by depriving them of their primary asset. If a state protects only the property rights of the economically well-heeled and ignores those of its most vulnerable citizens, then can it truly claim to respect property rights?

Second, in defending their preference for negotiated land reform, World Bank economists argue that corrupt, highly centralized bureaucracies have consistently undermined state-led land reform efforts in other countries.¹²⁰ Although corruption poses an undeniable risk to land reform, to defend their position World Bank economists must demonstrate that increasing the use of eminent domain would make the state more vulnerable to corruption than relying primarily on negotiated land reform. Evidence from South Africa should make us skeptical of this claim.

For example, the Mpumalanga Land Claims Commissioner was removed because he colluded with speculators to inflate sale prices, and the Limpopo Land Claims Commissioner stood trial for misappropriating compensation set aside for displaced residents.¹²¹ This suggests that corruption is also capable of subverting land reform efforts whether the state increases its use of eminent domain or continues to rely on negotiated land reform. The goal should be to devise mechanisms to increase transparency and prevent corruption regardless of what method of land reform a state adopts.

119. Klaus Deininger, *Making Market Assisted Land Reform Work: Initial Experience from Columbia, Brazil, and South Africa*, in *AGRICULTURE AND THE ENVIRONMENT: PERSPECTIVES ON SUSTAINABLE RURAL DEVELOPMENT* 156, 169 (Ernst Lutz ed. 1998).

120. Deininger, *supra* note 91, at 2, 9–10.

121. Sydney Masinga, *Land Commissioner Out of Job*, NEWS24.COM, July 14, 2008, http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2357202,00.html (last visited Apr. 29, 2010); Ügen Vos, *Land-Reform Boss Charged*, THE CITIZEN, Jan. 9, 2008, <http://www.citizen.co.za/index/article.aspx?pDesc=55857,1,22> (last visited Apr. 29, 2010).

Third, from the perspective of World Bank economists, it is more time consuming and financially costly to move away from the classical conception and allow eminent domain to assume a more prominent role in land reform because due process requires various layers of judicial appeals.¹²² As a result, these economists do not recommend using eminent domain.¹²³ But, is the appropriate response to streamline the eminent domain process to make it more expedient, transparent, and efficient or to shy away from it altogether as recommended by these economists? The answer depends on the nation's legal framework, the level of political will, and the quality of its courts and implementing bureaucracy. There is no one size fits all. Therefore, increased use of eminent domain may be a gainful option in certain states, but not in others.

Fourth, maintaining public confidence in the land market is the main reason for South Africa and Namibia's obdurate commitment to the classical conception and its emphasis on the negotiated land reform.¹²⁴ The most notable downside of expropriating land from unwilling sellers is that this can make it difficult for owners to engage in long-term planning because expropriation involves a degree of uncertainty that a state can never fully mitigate. For example, the owner can never be certain if the state will subject her land to expropriation or what exact price she will receive if the state takes the land, and this uncertainty adversely affects investment.¹²⁵

But as I have argued, it is clear that if land reform continues at its current dilatory pace, instability may prevail. Political instability is far worse for the investment environment than strategic expropriation geared towards making the land reform process more efficient. In addition, in societies where animosity over the unfulfilled promise of land reform threatens to destabilize the state, expropriation could potentially alleviate more social tension and political polarization than it will cause. Zimbabwe's present crisis was in large part fueled by the slow redistribution of land. Thus, in order for the international community to ensure the backlash experienced in Zimbabwe never happens again, it must realize

122. See VAN DEN BRINK ET AL., *supra* note 97, at 34.

123. Deininger, *supra* note 91, at 2, 9–10 ("The choice of negotiated land reform rather than expropriation (which, as in Columbia, can still be used as an instrument of last resort) was based on the need to maintain public confidence in the land market, and more generally to affirm the government's respect for individual property rights.").

124. D.L. Carey Miller and Anne Pope, *South African Land Reform*, 44 J. AFR. LAW 167, 167–168 (2000) (describing the influence of Roman-Dutch philosophy, which is based on the assumption that "absolute right of ownership provide[s] maximum security of title").

125. See, e.g., Sarah Gavian & Marcel Fafchamps, *Land Tenure and Allocative Efficiency in Niger*, 78 AM. J. AGRIC. ECON. 460, 469 (1996) (using survey data from Niger to determine that tenure insecurity causes farmers to divert scarce resources to fields where there is greater tenure security); sources *infra* note 139.

that the extensive protection given to current landowners under the classical conception makes the process of land reform extremely cumbersome and dangerously slow.

2. The Classical Conception Is Not Justified When the Legitimacy of Property Rights Is in Question

There are three reasons why the classical conception is not justified in Southern Africa as well as other places where the legitimacy of property rights is in question. First, the theorists who have developed the classical conception did not intend for it to apply in contexts where past property theft was never rectified. Second, the classical conception makes redistribution difficult, but when a significant portion of the population is property-less, redistribution that gives everyone a baseline of property can expand the zone of autonomy. Third, failing to redistribute property can open the flood gates of societal fury and cause things to fall apart.

First, the theorists who have developed the classical conception—primarily John Locke and Robert Nozick—did not intend for it to apply in contexts where past property theft was never rectified, causing severe present-day inequality. One primary justification for the classical conception is the labor theory of ownership developed by John Locke in the *Second Treatise of Government*.¹²⁶ Locke and present day natural law scholars assume that property rights are acquired through individual effort or free and fair market exchanges.¹²⁷ Therefore, an individual's property rights have been violated if the law restrains an owner's control beyond what is necessary for the maintenance of order and protection of other people's rights to control their property.¹²⁸ Locke, however,

126. According to Locke, each person has exclusive control over his body and his labor; therefore, each person also has exclusive control over the property that he creates through his labor:

Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.

See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 18 (C.B. Macpherson ed., Hackett Publ'g 1980) (1690).

127. *Id.* at 20–21 (arguing that an individual may take as much property as she can make use of before it spoils, ensuring that enough is left for others); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1568–69 (2003).

128. LOCKE, *supra* note 126, at 66, 68 (arguing that the chief end of government is to preserve individuals' property and that government shall act only to ensure "the peace, safety, and public good of the people").

acknowledges that the labor theory has its limits. For example, private ownership is legitimate so long as there is some property left over for others.¹²⁹ Locke's labor theory does not apply in the context where past property theft has led to severe present-day ownership inequality where some people have so much property that others are left with none. This is the case in South Africa where, in 1994, eighty seven percent of the land was owned by whites who constituted less than ten percent of the population.¹³⁰ Under these conditions of severe inequality, Locke's labor theory cannot justify the classical conception.

In *Anarchy, State and Utopia*, Robert Nozick tries to justify the principles underpinning the classical conception by constructing an historical entitlement theory that builds upon Locke's work.¹³¹ The entitlement theory is based on the assumption that people deserve their present property holdings, so it is not meant to apply in situations where the connection between past theft and present ownership undermines basic notions of desert. Nozick argues that a person is entitled to their property and minimal government interference with it if the principles of just acquisition and just transfer of property are satisfied. Nozick states that:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.¹³²

If some injustice has occurred at any point of acquisition or transfer, Nozick argues that minimal government intervention could be justified through the principle of rectification, which corrects violations of the first two principles.¹³³

129. *Id.* at 19 ("[F]or this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.").

130. Tooyen & Njobe-Mbuli, *supra* note 7, at 461.

131. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 150-53 (Basic Books 1974).

132. *Id.* at 151.

133. According to Nozick, the principle of rectification is crucial:

This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a

Many critics have lambasted Nozick because he gives no content to the principles of just acquisition, just transfer or rectification.¹³⁴ Nozick himself admits that:

to turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holding: the principle of acquisition of holding, the principle of transfer of holdings, and the principle of rectification of violations of the first two principle. I shall not attempt that task here.¹³⁵

Although the principles lack specified content, it is hard to imagine a state where these principles have never been violated. Although there may be a society where, for the most part, hard work and individual effort determine ownership, in the states this Article is concerned with—that is, states where the current legitimacy of property rights is low because of rampant past property theft—the principles of just acquisition and transfer have been egregiously violated. Therefore, according to Nozick, unless the injustice is rectified, then the entitlement theory's commitment to minimal government is not justified. Consequently, the classical conception and its commitment to minimal government (which includes the state not intervening to correct property imbalances) is not justified. The transformative conception picks up where Nozick left off by beginning to give content to the principle of rectification.

Second, even though the theorists who developed the classical conception did not intend for it to apply in the context of past theft, one can argue that the classical conception is justified because it may be necessary to secure freedom. The classical conception and its emphasis on limited interference with private property promotes freedom by ensuring a zone of autonomy for the owner. In this zone, the owner's individuality can develop and self-expression can flourish. For example, if a homeowner wants to paint her house bright purple in a salute to her Mexican heritage, she can; or if a homeowner chooses to live in a community where everyone has contractually relinquished their right to paint their home a bright color, she can do that too.¹³⁶ In addition, the autonomous

probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.

Id. at 152–53.

134. See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 255 (1988).

135. NOZICK, *supra* note 131, at 153.

136. Renowned novelist, Sandra Cisneros, decided to paint her San Antonio home bright purple and her neighbors unsuccessfully tried to force her to change the color by claiming that

zone guarantees privacy so that owners can engage in acts not allowed in public spaces, like being nude.

While I admit that a zone of autonomy is important even in societies where ownership rights are hotly contested, as the legal realists have pointed out, when a significant portion of the population is property-less, redistribution that gives everyone a baseline of property can expand the zone of autonomy.¹³⁷ The state must not foil redistributive efforts by giving the same high level of property protection to the current owner's primary home (where autonomy is crucial) as to her non-residential investment property, for example, where autonomy is less a factor.¹³⁸

Third, the utilitarian justification for the classical conception is that it maximizes societal wealth because people have an incentive to make long-term investments in property when they can reasonably expect that the future benefits will be secure. The assumption is that the classical conception bolsters security by shielding titleholders from the government and other third parties that may encroach on owner control. The empirical evidence proves that when basic property protection exists, investment thrives.¹³⁹ In these studies, the measure of basic property protection is based on, for example, whether owners are subject to arbitrary expropriations without compensation.¹⁴⁰ But, the existing empirical stud-

it did not fit with the rest of the Victorian homes and was "historically incorrect." Sara Rimer, *San Antonio Journal*; *Novelist's Purple Palette Is Not to Everyone's Taste*, N.Y. TIMES, July 13, 1998, at A13.

137. See Cohen, *supra* note 78, at 18–19; Margaret Radin, *Property as Personhood*, 34 STAN. L. REV. 957, 957–1016 (1982).

138. See *infra* Part IV.A.

139. See, e.g., Holden & Yohannes, *supra* note 28, at 757 ("Many authors . . . have argued that tenure insecurity discourages investment in land by removing the incentives for it, as one may not be able to collect the expected flow of benefits of one's efforts if there looms a threat of losing the land in the future."); Simon Johnson et al., *Property Rights and Finance*, 92 AM. ECON. REV. 1335, 1351 (2002) (finding that "[t]he most insecure firms' investments" were 39% lower than the investment of "[f]irms with the most secure property rights"); Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207, 223 (1995) (finding that political institutions that protect property rights are crucial to economic growth and investment); Daniel Ayalew Ali et al., *Property Rights in a Very Poor Country: Tenure Insecurity and Investment in Ethiopia* 24 (World Bank, Dev. Res. Group, Working Paper No. 4363, 2007) (finding that Ethiopian farmers invest more heavily in their farms when transfer rights are present and there is tenure security).

140. See generally Timothy J. Riddiough, *The Economic Consequences of Regulatory Taking Risk on Land Value and Development Activity*, 41 J. URB. ECON. 56, 56–57 (1997). See also Simon Johnson et al., *Property Rights and Finance*, 92 AMER. ECON. REV. 1335 (2002) (arguing that "weak property rights discourage firms from reinvesting their profits, even when bank loans are available. Where property rights are relatively strong, firms reinvest their profits; where they are relatively weak, entrepreneurs do not want to invest from retained earnings." But, property rights were measured by responses to a survey asking entrepreneurs whether firms in their industry make extralegal payments for licenses and government services or payments for protection of their activities.); David Leblang, *Property Rights, Democracy*

ies do not measure whether forbidding eminent domain and other similar redistributive land policies increases investment. The empirical studies confirm only that a basic level of property protection increases investment (i.e. no expropriations without compensation) and not the heightened level of property protection required by the classical conception (i.e. no expropriations at all). Thus, the claim that the classical conception increases investment is empirically unproven.

Even though it is unclear what exact level of property protection gives owners the incentive to invest and develop their properties, we do know that stability is a prerequisite to sustainable investment. Morris Cohen, a renowned legal realist who wrote the classic article *Property and Sovereignty*, argues that:

[c]ontinued possession creates expectations in the possessor and in others and only a very poor morality would ignore the hardship of frustrating these expectations and rendering human relations insecure, even to correct some old flaws in the original acquisition Any form of property which exists has therefore a claim to continue until it can be shown that the effort to change it is worth while.¹⁴¹

In certain countries with a history of past theft that inspires present-day backlash, honoring current expectations can open the flood gates of societal fury and can leave the state on the brink of collapse. In these situations, human relations are rendered insecure not by disrupting existing expectations, but rather by the failure to disrupt existing expectations built upon a foundation of past property dispossession and oppression.

The paradox is that the classical conception's promise of increased investment requires political stability, but the classical conception's focus on protecting existing expectations can undermine land reform and thereby promote wealth-reducing instability.¹⁴² Thus, in certain contexts, a transparent, accelerated reallocation of property rights—that is not in line with the classical conception—can be the most efficient way to promote investment and maximize wealth.

In this section, I have made four concise arguments that explain why the classical conception is inappropriate in Southern Africa. I have also

and *Economic Growth*, 49 POL. RES. Q. 5 (1996) (arguing that "economies of nations that protect property rights grow more rapidly than those of nations that do not protect property rights." But, to measure property rights he uses data on the prevalence of exchange restrictions and total credit allocated to private enterprise as a percentage of GDP).

141. Cohen, *supra* note 78, at 16.

142. There is growing evidence from all over the world that redistributive land reform helped reduce poverty, increase efficiency, and establish the basis for sustained growth. See *supra* note 67.

provided three reasons why the classical conception is unjustifiable, more generally, in countries where the legitimacy of property rights is in question. It is now time to re-imagine the possibilities. It is time to explore a transformative conception of real property.

IV. THE TRANSFORMATIVE CONCEPTION

In this section, I begin by establishing the transformative conception's defining principles. The transformative conception is a unique approach to property developed in this Article, but it is also rooted in the work of legal realists, critical legal scholars, and African legal scholars who have examined the ways in which property law can undermine transformation. To further illustrate the transformative conception, I give specific examples of how a state can apply it. I present three redistributive policies that can facilitate prompt land reform and explain why the state can only implement the policies once it abandons the classical conception and adopts a transformative conception. After providing a comprehensive description of the transformative conception and demonstrating how it would apply in practice, I critique it. I find that although the transformative conception is far from perfect, it is a significant improvement over the classical conception in certain contexts.

A. *The Transformative Conception Defined*

The transformative conception is designed to address a problem experienced by many countries: a past regime stole real property from one group and gave it to another. The two groups were often racially, ethnically, or religiously distinct, which exacerbated the consequential societal fissures and animosity.¹⁴³ The past theft never becomes a thing of the past because wealth is an intergenerational phenomenon in that it is accumulated during a person's lifetime and then passed along to kin.¹⁴⁴ Likewise, disadvantage is also accumulated over subsequent generations

143. WORLD ON FIRE, *supra* note 20, at 6–7 (arguing that the volatile dynamic of inequality produces social instability in the form of a backlash against market-dominant minorities, democracy, and markets).

144. See MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 6 (1997) (Oliver and Shapiro argue that “Just as blacks have had ‘cumulative disadvantages,’ many whites have had ‘cumulative advantages.’ Since wealth builds over a lifetime and is then passed along to kin, it is, from our perspective, an essential indicator of black economic well-being. By focusing on wealth we discover how black’s socioeconomic status results from a socially layered accumulation of disadvantages passed on from generation to generation.”). See generally JOHN BRITTAIN, THE INHERITANCE OF ECONOMIC STATUS (1977) (investigating social mobility and intergenerational transfer of wealth using regression analysis to predict the son’s economic status based on parental characteristics).

such that the devastating tremors from the initial theft of assets reverberate through time.¹⁴⁵ As a result, in some countries the dispossessed group presently occupies the lowest rungs on the economic ladder in large part due to the fact that they have not recovered from the catastrophic depletion of their assets; while the group that directly or indirectly benefited from the past theft is economically dominant.¹⁴⁶ Under these circumstances, a transfer of assets is needed to put the two groups on more equal footing and ensure that past theft no longer debilitates future generations.¹⁴⁷ The classical conception, however, can make redistribution of real property prohibitively expensive, perilously slow, or altogether impossible and hence is inappropriate when redistribution is vital.¹⁴⁸ The transformative conception has the potential to adequately address past property theft because it gives countries the tools to expedite the transfer of assets without bankrupting the state.

There are four defining principles of the transformative conception. First, one of its major premises is that all property is not alike and thus one uniform standard of protection is inappropriate. The classical conception gives the same protection to a family's home on a farm, for example, as it does to the 1000th acre of their farm. The transformative conception strategically protects autonomy by giving the state the burden of proving that certain modifications intended to facilitate the reallocation and relegitimization of property rights are not justified (which is akin to the heavy burden of proof under the classical conception) only when the case involves modifying the property rights of someone's primary residence.¹⁴⁹

As Margaret Radin has argued, private property is essential because it provides a sphere where the state has limited powers to intrude, creating a space where individuals can control their external environment so

145. BRITTAIN, *supra* note 144.

146. PETER ROSSERT ET AL., *PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM* 58–64 (2006) (detailing the historical background of South African land dispossession and the resulting economic and racial disparities).

147. The transformative conception is agnostic as to whether the state implements land reform that requires specific proof of past ownership or not. Under a proof-based framework, the state's goal is to vindicate the rights of identifiable past owners of specific parcels of land, so proof of prior ownership or occupation is the basis on which the state distributes compensation. The South African Land Restitution Program is a case in point. Under the alternative framework—exemplified by the Namibian land reform program and the South African land redistribution program—the state reallocates ownership rights without requiring an individual or community to provide proof of past ownership. The primary concern is whether the beneficiary is a member of a previously disadvantaged group.

148. See *supra* Part I.B.

149. The state should place a cap on the size of the primary homestead that will receive heightened protection so that a person owning a 500-acre property cannot claim the entire property constitutes her primary residence.

individuality and autonomy can flourish.¹⁵⁰ To promote autonomy, everyone deserves some basic amount of property for their home, even in societies where the legitimacy of ownership rights is contested.¹⁵¹ When the homestead is *not* at issue, then under the transformative conception, property owners' rights are not protected by a heavy burden of proof. The transformative conception requires the state to commit to devising context specific property rules and resist the temptation to formulate one uniform standard of protection.

Second, the transformative conception requires the state to vindicate the rights of both present title deed holders and past owners who were unjustly dispossessed. The rhetoric of defending property rights is powerful. But the essential, unexplored question is: at what point does the state begin defending property rights? Under the classical conception, the state only defends the property rights of present titleholders because the underlying assumption is that all past acquisitions and transfers of property were just or that any injustices have since been rectified.¹⁵² The classical conception does not tolerate the possibility that—due to a past injustice—two or more parties have a valid claim to the same piece of property. In contrast, the transformative conception fully embraces this very real possibility. Under the transformative conception, the state defends the property rights of both the present titleholder and past owners who were unjustly dispossessed.

Third, while the classical conception focuses solely on unidirectional demands titleholders can make on society, the transformative conception requires the state to focus on the duties of titleholders and not just their rights. The transformative conception expands the conversation to include the duties titleholders owe to a society bruised by past property theft.¹⁵³ Hohfeld famously argued that rights and duties are jural

150. See Radin, *supra* note 137, at 957–1016 (exploring the relationship between property and personhood and concluding that “[a]t least some conventional property interests in society ought to be recognized and preserved as personal,” and “that right should be protected to some extent against government invasion.”). In many countries, including the US and South Africa, the state already gives heightened protection to the homestead. See also Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1099–1102 (2009) (listing the various forms of protections offered by the government that are “grafted on to American property, bankruptcy, and tax law,” including “[h]omestead exemptions, tenancy by the entirety, and foreclosure-relief legislation [to] help owners to shield a portion of their personal wealth from creditors and to retain their homes,” tax benefits available to homeowners, and legislation limiting eminent domain for private redevelopment adopted by different states at varying levels).

151. Stern, *supra* note 150, at 1099–1102.

152. NOZICK, *supra* note 131, at 152–53.

153. See JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 16 (2000) (arguing that there is a tension between liberty and obligation. He argues that “[w]e tend to reconcile this tension by privatizing obligation. After all, one might believe that owners

correlatives—one cannot exist without the other.¹⁵⁴ If I have an exclusive right to occupy a parcel of land, then you have a duty not to interfere with my occupation. In the Southern African context, as a result of the political compromise made by the liberation parties, titleholders have a right to their existing property despite the potentially unfair circumstances of acquisition. But, they also have a duty to facilitate redistribution. Likewise, those dispossessed by the past regime have a duty to respect the rights of present titleholders, but they also have a right to the vindication of their land rights.¹⁵⁵ This mutually reinforcing relationship between rights and duties is deeply embedded in the transformative conception.

Fourth, the burden of proof is an important baseline for legal analysis. Singer argues that “[t]he classical conception leads one to attempt to identify the ‘owner’ and then to presume that the owner’s interests prevail in any dispute over use of the property unless some sufficiently strong reason can be evinced to strip the owner of her rights. In this way, the classical conception allocates burdens of proof.”¹⁵⁶ In contrast, the transformative conception does not automatically place the burden of proof on third parties. It requires the owner to bear the burden of proving that certain modifications intended to facilitate the reallocation and re-legitimization of property rights are not justified.¹⁵⁷

In addition to these four principles, there are several further distinctions between the classical and transformative conceptions. The classical conception assumes that property was acquired purely through individual effort and thus abhors government’s attempts to change the property status quo. In contrast, the transformative conception acknowledges that government policies have played a large role in shaping the

should be encouraged to act in a caring manner toward others but that it is wrong for government to mandate such behavior.”).

154. See WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING & OTHER LEGAL ESSAYS* 38 (W.W. Cook ed. 1920) (“If X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.”).

155. See S. AFR. CONST. 1996 § 25.

156. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1457 (1996). SINGER, *supra* note 153, at 84 (“When judges cannot figure out how to rule in a dispute between conflicting interests, values, or policies, they often fall back on presumptions and burdens of persuasion. Traditional property law, to a large extent, is about adopting those presumptions and allocating those burdens.”).

157. See generally AMERICAN LEGAL REALISM (William W. Fisher et al. eds., 1993); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Heinz Klug, *Hybrid(ity) Rules: Creating Local Law in a Globalized World*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 276 (Yves Dezalay & Bryant G. Garth eds. 2002) (describing the negotiation process that led to the property provision in the South African Bill of Rights and explaining how the constitutional property provision complicates transformation).

present-day, inegalitarian property distribution and thus seeks to use government policy to increase the property status quo's equity.

Also, the transformative conception is predicated upon the fact that property rules play a significant role in structuring human relationships. Under the classical conception, only the property claims of present titleholders are recognized, and thus they are placed in a dominant societal position. Those with valid historical claims are subordinate to titleholders, if acknowledged at all.¹⁵⁸ The transformative conception seeks to mitigate this power asymmetry by protecting the rights of current titleholders and also defending the rights of those unjustly dispossessed.

B. The Transformative Conception Applied

The specific policies that a nation adopts to address past theft are informed by the conception of property it embraces. If a nation adopts the transformative conception, then this will determine the range of policy options that follow. Although the policy options available under the transformative conception can facilitate land reform to address inequality generally, this Article specifically argues in favor of eschewing the classical conception and implementing the transformative conception in the extreme case, which is when inequality emanating from past property theft has the potential to cause backlash and destabilize the state.¹⁵⁹ Destabilization is more likely to occur when the current society has a strong collective memory of past property theft; when there are enduring consequences of the past theft such as severe inequality; when the majority or a mobilized minority was dispossessed; and, when the state's capacity or willingness to prevent or subdue potential disobedience is weak.¹⁶⁰

When state destabilization is on the horizon (like in South Africa and Namibia), redistribution is needed to keep things from falling apart. Policies resulting from the classical conception are particularly inapt at facilitating timely land reform, but policies resulting from the transformative conception are ideal. If the political will exists, a state can abandon the classical conception and use redistributive policies such as the automatic right of first refusal, eminent domain, and mandatory land rentals to redistribute land. In the following section, I explain each policy

158. See *WORLD ON FIRE*, *supra* note 20, at 6 (noting how the racial and ethnic aspects to this subordination animate the conflict). For a more on how race confers economic privilege, see also Cheryl Harris, *Whiteness as Property*, 106 HARVARD L. REV. 1707, 1710 (1993) ("In a society structured on racial subordination, white privilege became an expectation and, to apply Margaret Radin's concept, whiteness became the quintessential property for personhood.").

159. See, e.g., Atuahene, *supra* note 3, at 838 ("If a population begins to perceive that its highly unequal property distribution is illegitimate, property-based disobedience may result if the state's last line of defense—its coercive power—fails to secure compliance with law. There is substantial evidence that economic inequality can lead to instability").

160. See *id.*

and why it is incompatible with the classical conception, but exemplary of the transformative conception.

1. Automatic Right of First Refusal

Under the classical conception, all regulations that encroach upon an owner's power to transfer her property are deeply suspect. But under the transformative conception, regulations that are designed to remedy past wrongs by facilitating land transfer are encouraged. For instance, an automatic Right of First Refusal (ROFR) for the state on pre-determined lands is consistent with the transformative, but not the classical conception.¹⁶¹ A ROFR is the right to enter into a contract to acquire an asset from the owner on the exact or approximate transaction terms as a third party.¹⁶² The state must exercise the ROFR within a reasonable time after the owner notifies it of a tentative sale. After exercising its ROFR, if the state does not provide payment for the land within a specified time, then its rights extinguish automatically and the owner is free to sell the land to the buyer. Under this redistributive tool, the owner bears the burden of proving that the ROFR is not justified.

The automatic ROFR is valuable because it can increase the supply of land available for redistribution. It can also give the state an opportunity to seize upon owner sales that are below FMV and thus facilitate the affordable acquisition of land for redistributive purposes. The potential downside of an automatic ROFR is that there are transaction costs in negotiating a sale agreement. If the state chooses to exercise its ROFR, the potential buyer is not able to recover these costs; and ultimately, this

161. Namibia has something similar to a right of first refusal (ROFR) on its books. All owners must first offer land to the state for purchase under negotiated land reform, but, if the state refuses, owners can sell it to anyone else at their elected price. Shriver, *supra* note 117, at 429 ("Any owner who wishes to sell land within Namibia must first offer it to the GRN via the Ministry of Lands, Resettlement and Rehabilitation (Lands Ministry)"). This is not effective because an owner can offer the land for sale to the government at one price and, if the state refuses to purchase the land, the owner can offer it for sale at a lower price to a private party. For example, an owner has the power to offer land to the government for \$10 million and, upon government refusal, offer the same land to a private party for \$5 million. Under the ROFR consistent with the transformative conception, the state can capitalize on the \$5 million sale even if the seller objects. See Kaumbi, *supra* note 7, at 30 (quoting Namibia's Prime Minister confirming that "[t]he process has become too slow because of arbitrarily inflated land prices"). Ultimately, the ROFR under the transformative conception should reduce an owner's incentive to inflate the price offered to the state.

162. Marcel Kahan, *An Economic Analysis of Rights of First Refusal* 4 (N.Y.U. Ctr. for Law & Bus., Working Paper No. 99-009, 1999), available at <http://papers.ssrn.com/abstract=11382> (last visited Apr. 29, 2010) ("A right of first refusal requires the owner of the property subject to the right to offer the property to the rightholder on the same terms as those offered by a third party before the owner can sell the property to that third party.").

can lead to a reduction in land sales.¹⁶³ To mitigate this concern, states can subsidize the potential buyer's transactions costs when it exercises its ROFR. Another potential concern is that the ROFR will increase the red tape involved with land sales and thereby introduce unnecessary inefficiencies into the land market.¹⁶⁴ This is why it is important that the window of time that the government has to exercise its ROFR and provide payment is relatively short and that the option expires automatically when the time period expires with no need for further government intervention.

2. Eminent Domain

Eminent domain allows the state to acquire property against the owner's will so long as it is for a public purpose and just or fair compensation is paid. Eminent domain is widely considered a legitimate part of a state's police power because it counteracts the undue power of intransigent owners to obstruct or make the state's acquisition of land for a valuable public purpose prohibitively expensive. Under the classical conception, however, eminent domain is considered a serious infringement of an owner's rights to use and transfer her property and hence is seriously discouraged.

It is important to note that western nations, like the US, did not spurn eminent domain in their own land reform efforts. In the 1946 case *Puerto Rico v. Eastern Sugar Associates*, Puerto Rico used its powers of eminent domain to condemn 3,000 acres of land on the Island of Vieques that was owned by Eastern Sugar Associates.¹⁶⁵ The condemnation was part of an official strategy to end existing oligopolies, as well as "assist in the creation of new landowners [and] facilitate the utilization of land for the best public benefit."¹⁶⁶ The First Circuit allowed the state to take large corporate land holdings and distribute them to squatters and subsis-

163. See Hayley H. Chouinard, *Auctions with and Without the Right of First Refusal and National Park Service Concession Contracts*, 87 AM. J. AGRIC. ECON. 1083, 1084 (2005) (exploring how attaching a ROFR to auctioned contracts may lead to non-competitive bids and fewer participants).

164. See Edward Lahiff, *From 'Willing Seller, Willing Buyer' to a People-Driven Land Reform 2-3* (Programme for Land and Agrarian Stud., Policy Brief No. 17, 2005), available at <http://www.icarrd.org/es/proposals/Policy17.pdf> (suggesting South Africa could end the landowner "veto over land reform" and ensure a better quantity and quality of land is available by granting a ROFR to the state). Lahiff also notes, however, that giving the state a ROFR may not necessarily lead to land availability and lower prices since "disagreement over price" and "bureaucratic complexity and potential disruption to the land market" could make it less effective than expropriation. *Id.*

165. *Puerto Rico v. E. Sugar Assoc.*, 156 F.2d 316, 319 (1946), *cert. denied*, 329 U.S. 772 (1946).

166. *Id.* at 318.

tence farmers.¹⁶⁷ The court described the redistributive strategy as an acceptable public use under the Fifth Amendment; and the Supreme Court denied certiorari.¹⁶⁸ The same oligopoly that plagued the Puerto Rican Island of Vieques also afflicted the islands of Hawaii, where the government owned forty nine percent of the land while forty seven percent was owned by seventy two private landowners.¹⁶⁹ Consequently, the Hawaiian Legislature enacted the 1967 Land Reform Act, where it used its powers of eminent domain to purchase land from lessors and transfer it to long-term lessees.¹⁷⁰ In *Hawaii Housing Authority v. Midkiff*, the US Supreme Court unanimously ruled that Hawaii's land reform program—intended to dismantle its land oligopoly—served a valid public purpose.¹⁷¹

Under the transformative conception, the state is encouraged to use its power of eminent domain to facilitate land reform and end oligopolies. Following the US example, states should consider land reform a valid public purpose. More importantly, using South Africa as an example, states should adopt a contextual understanding of just compensation that legally establishes the FMV as part of a non-exhaustive list of considerations, which can include current use, amount paid, capital improvements, circumstances of acquisition, and all forms of government subsidy invested in the land.¹⁷² A state can, for example, subtract past receipt of government subsidies from FMV and add a certain amount to the FMV when there is a taking of a primary residence to account for the subjective, non-market value attached to homes.¹⁷³ The

167. *Id.* at 319.

168. *Id.* at 322–25.

169. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1994).

170. *Id.* at 233.

171. *Id.* at 243–45.

172. Land reform is a public purpose and

[t]he amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances including a. the current use of the property; b. the history of the acquisition and use of the property; c. the market value of the property; d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and e. the purpose of the expropriation.

S. AFR. CONST. 1996 § 25. See also *Ex parte Former Highlands Residents; In re: Ash v. Dep't of Land Affairs* 2000 (2) SA 26 (LCC) (stating that for determining just and equitable compensation, equitable balance required by the Constitution will in most cases be best achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require).

173. See Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 748 (2008) (showing that even if there is a commendable purpose for the taking, the justness of the taking is determined by the level of subjective attachment to the property). James J. Kelly, "We Shall Not Be Moved": *Urban Communities, Eminent Domain*

state may also consider disruption costs (including moving expenses and loss of good will), which are customarily not included in compensation calculations.¹⁷⁴

In the context of systematic past property theft, it is not appropriate to assume that compensation should be automatically equivalent to the FMV because property was sometimes not acquired on fair market terms. If I, for instance, acquired a parcel of land from the former regime at nominal cost, is it reasonable for me to demand FMV for that land today? I deserve FMV when the state takes the improvements to the land if I paid FMV for them, but it is unreasonable for me to expect to receive FMV for the underlying land when I did not pay FMV to acquire it. The transformative conception deconstructs this assumption of fair market transactions and creates a new understanding of ownership that takes into account the reality of how an owner actually acquired the land. Under an eminent domain regime consistent with the transformative conception, the owner has the burden of proving that only FMV should apply and not a more contextual understanding of just compensation.

There are downsides to the transformative conception's approach to eminent domain. First, the cost of land transactions will increase for some owners because of the research required to assess the factors beyond the FMV that a state must take into consideration. Second, this approach to eminent domain may discourage long-term investment and planning if investors are unclear about what just compensation entails. "Uncertainty of expropriation affects the uncertainty of returns and tends to discourage investment for risk-averse decision makers."¹⁷⁵ To encourage current owners to invest in their property, it is important that all improvements created or fully paid for by them are entitled to FMV upon expropriation so that owners can recoup their investment. Compensation for the underlying land, however, should be subject to the contextual understanding of just compensation.

3. Mandatory Land Rentals

In many countries, there is ample idle, yet productive land available for redistribution. One consequence of extreme inequality is that there are a few owners who often have more high quality land than they can use productively. For instance, in 1980, sixty percent of large-scale

and the *Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923 (2006) (arguing that traditional calculation of just compensation as a solely equitable remedy (FMV) fails to compensate the property owner for intangible and future earnings, as well as non-monetary value)

174. Kelly, *supra* note 173, at 923.

175. Jahangir Saleh, *Property Rights Institutions and Investment* 7 (World Bank, Working Paper No. 3311, 2004). See also *supra* note 125 and accompanying text.

commercial land in Zimbabwe was completely unutilized.¹⁷⁶ Often, the reason that states do not acquire this unutilized land is because of its high cost and the competing claims on state resources.¹⁷⁷ To overcome this hurdle, states can differentiate productive and unproductive land and subject unproductive land to long to medium term leases with the state. In order to provide current owners with adequate notice, the state should create a comprehensive list of uses that it is likely to classify as unproductive. Once the state classifies land as unproductive, the burden is on the owner to prove that the classification is unjustified.

Under the classical conception, an owner can allow her fertile land to lay fallow even when the state desperately needs it for redistribution to dispossessed populations. But under the transformative conception, owners have a duty to facilitate redistribution. For instance, if an individual owns ten acres of land and she is only using six productively, then the state can rent the remaining four acres for a five to forty year period so long as it pays just compensation for the rental. If the owner objects, then she has the burden of proving that the land use is productive and hence not justifiably subject to a mandatory land rental. In essence, mandatory land rentals are a creative form of eminent domain.¹⁷⁸

For a cash-strapped state, the cost of renting land is often far more feasible than buying it. Therefore, with mandatory land rentals, those unjustly dispossessed will have access to land at a price the state can afford. In their study about access to land, Sadoulet et al. convincingly argue that even though rental is not a transfer of wealth, it does produce welfare effects because in the long-run tenants can labor, build their wealth, and eventually become owners.¹⁷⁹ The goal is to give the landless short-term leases on unused but high quality land in order to increase the land's productivity. The transformative conception makes a distinction between land used productively and unproductively. It recognizes that not all property is the same, so to encourage entrepreneurs to work hard and increase the overall economic pie, all property does not require the same level of protection.¹⁸⁰

176. Zimbabwe Ministry of Lands, Land Reform and Resettlement, Land Reform Programme, <http://www.lands.gov.zw/landreform/landreform.htm> (last visited Apr. 17, 2010).

177. Shaw, *supra* note 105, at 76 ("During the 1990s, however, the pace of change slowed, and disenchantment grew as meaningful and economically viable land reform turned out to be more difficult and more expensive than expected.").

178. See *supra* Part IV.B.2.

179. See Elisabeth Sadoulet, Rinku Murgai, & Alain de Janvry, *Access to Land via Land Rental Markets*, in ACCESS TO LAND, RURAL POVERTY, AND PUBLIC ACTION 196–229 (Alain de Janvry et al. eds., 2001).

180. It is important that environmentally productive uses do not fall into the unproductive category. See generally CARL FOLKE ET AL., RESILIENCE AND SUSTAINABLE DEVELOPMENT: BUILDING ADAPTIVE CAPACITY IN A WORLD OF TRANSFORMATIONS (2002) available at <http://www.sou.gov.se/mvb/pdf/resiliens.pdf> (describing how drastic changes to

An alternative measure for discouraging speculative land holding is to increase the property tax on unproductive land. However, mandatory land rental better serves the dual purpose of preventing speculation and providing the landless with land. The key to making mandatory land rentals work is transparency. The state must clearly define what it considers productive and unproductive land to avert rent seeking behavior among program administrators.¹⁸¹ Also, the state should create and widely disseminate model lease agreements to ensure that owners of unproductive land have sufficient notice of the potential terms of the rental.

These three redistributive policies are consistent with the transformative conception's four defining principles. First, context is crucial. The redistributive policies presented above are merely meant to be examples because a guiding principle of the transformative conception is that not all policies are appropriate in all contexts. Similarly, the level of state protection property receives is also dependent on the context. Thus, to protect autonomy, the owner's primary homestead gets heightened protection while property not used for the primary homestead does not.

Second, a defining feature of the transformative conception is the need to vindicate the rights of both present and past owners. The redistributive policies discussed are specifically designed to facilitate the orderly and expeditious transfer of land to past owners who were unjustly dispossessed while protecting the rights of current owners. Third, in the context of pervasive past theft, all owners have a duty to facilitate the orderly transfer of land. To count as an infringement on an owner's property right under the transformative conception, the redistributive policy must force her to substantially exceed her duty as a property owner. In contrast, under the classical conception the sole focus is on an owner's right to have near full control of her property and hence all encroachments on owner's control are considered unjust infringements.

Fourth, the premise underlying all the redistributive tools mentioned above is that transforming the property ownership status quo and promoting fairness and stability has priority over protecting existing expectations and buttressing owner control. The transformative conception operationalizes this conscious moral judgment by requiring the current owner to bear the burden of proving that the implementation of the redistributive policy infringes on her property rights.

an environment can render a society unable to adequately adjust, which can lead to social instability).

181. See generally John Mbaku & Chris Paul, *Political Instability in Africa: A Rent-Seeking Approach*, 63 PUBLIC CHOICE 63, 63–72 (1989).

In sum, the redistributive policies presented in this section are incompatible with the classical conception, but quintessential manifestations of the transformative conception.

C. The Transformative Conception Critiqued

In this section, I enumerate the most pointed critiques of the transformative conception and explain why I believe that, despite its imperfections, it is still the best available option in certain situations where past property theft threatens to cause backlash and destabilize the current state.

The first critique of the transformative conception is that it is unnecessary because tax and transfer programs more efficiently redistribute assets. Kaplow and Shavell argue that “redistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient.”¹⁸² Thus, while some economists may agree that redistribution is necessary to prevent backlash, they may insist that the redistributive mechanism should be tax and transfer programs rather than altering property rules as required by the transformative conception.¹⁸³ I acknowledge that when the transfer of real property is not critical, tax and transfer programs may suffice. In certain states, however, tax and transfer programs will not be sufficient because the novel attributes of land make its actual transfer essential.

Land is unique in several ways: First, land often has an unquantifiable cultural value because it plays a key role in individual and group identity.¹⁸⁴ Communities are often spiritually and emotionally tied to the land where their ancestors are buried. As a result, although a group or individual may have been dispossessed long ago, past owners can still

182. Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–68 (1994).

183. *Id.*

184. Waldron, *supra* note 3, at 20 (1992). Nadler & Diamond expounded upon particular factors that influence the cultural values and identity associated with land:

We use this term to capture all the reasons why owners might have a special attachment to their property: the improvements they have made over the years using their own labor and design ideas; the memories inexorably connected with the property, including milestones like births, birthdays, and weddings, along with mundane but no less important memories of everyday living; proximity to friends and family; connections with others in the neighborhood that leverage social capital; expression of personality; the ability of a home to provide opportunity to maintain and express personal and group identity.

Nadler & Diamond, *supra* note 173, at 713 (2003). Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005) (arguing that indigenous communities should have a legal right to protect their cultural identity).

have a deep cultural connection to land that the passage of time does not erode. Second, people's perceptions of inequality and unfairness are one primary source of backlash.¹⁸⁵ Since land is a highly visible sign of wealth, perceptions about inequality may not shift without the significant transfer of real property. Third, land is the basis of sovereignty. If an oppressed indigenous majority does not reclaim land that was unjustly dispossessed by an ethnically distinct market-dominant minority, then political independence can ring hollow.¹⁸⁶ Fourth, in some societies land is the most important means of production so access to land is the primary way to counteract poverty and marginalization. Therefore, while some states can address inequality resulting from past theft through tax and transfer programs, others require a new conception of property that facilitates prompt land transfer.

The second critique of the transformative conception is its seeming impracticality. That is, why would countries now shift course and implement the transformative conception when they have failed to move away from the classical conception in the past? In Southern Africa, for example, before the state can implement the transformative conception it has to jump one daunting hurdle—its fear of foreign divestment. But, the current global economic crisis may significantly deflate this roadblock. In the current economic climate, bank lending has decreased drastically and the flow of money to the developing world has lessened.¹⁸⁷ With reduced foreign investment, the fear of disinvestment is also attenuated.

Also, the laissez faire, non-interventionist economic model associated with the classical conception is rapidly losing credibility given the havoc it has wrought in the U.S. banking system. This means that the external forces edifying the classical conception are weakening.¹⁸⁸ At the same time, the internal demands of the poor for a wide range of redistributive programs are becoming more fervent.¹⁸⁹ Consequently, the

185. Mark Irving Lichbach, *An Evaluation of "Does Economic Inequality Breed Political Conflict?"* *Studies*, 41 *WORLD POL.* 431, 456 (1989) ("In other words, [Deprived Actor] theories generally suggest how psychological processes (both cognitive and emotional) intervene and hence may turn grievances about economic inequality into political dissent."). See sources cited *supra* note 31.

186. See Kaumbi, *supra* note 7, at 28.

187. E.S. Browning, Alistair MacDonald & Jonathan Cheng, *Credit Scare Spreads in U.S., Abroad: Fears of a Recession Spark a Global Selloff; New Pressure on the Fed*, *WALL ST. J.*, Jan. 22, 2008, at A1 ("U.S. and European investors, seeking to preserve their gains, are repatriating money they invested in the developing world, helping drive those markets lower, analysts say.").

188. *Id.*

189. Sam Moyo, *The Land Question in Southern Africa: a Comparative View*, in *THE LAND QUESTION IN SOUTH AFRICA: THE CHALLENGE OF TRANSFORMATION AND REDISTRIBUTION* 60, 74 (Lungisile Ntsebeza & Ruth Hall eds., 2007) (noting that "recent experiences of rural land occupations in Zimbabwe and in peri-urban South Africa and Namibia show the

governments of South Africa, Namibia, and other similarly situated nations have a unique window of opportunity to implement the transformative conception although they have failed in the past.

If the particular country's implementation of the transformative conception is riddled by corruption and ineptness, then this will deter investment. But, if the country successfully implements the transformative conception, then financial investment will continue to thrive and, more importantly, the potential for backlash caused by past theft may slowly attenuate.

The third critique of the transformative conception is that it assumes redistribution will mitigate backlash. But, redistribution can also create backlash if, for example, a violent minority wreaks havoc or a foreign power precipitates instability in their opposition to the land reform program. In Nicaragua, for instance, the US funded a military insurgency (the CONTRAS), in part, to prevent the Sandinistas from instituting socialism and a massive redistribution of property.¹⁹⁰ Consequently, the Sandinista land reform program was compromised because the state had to spend a significant portion of its budget on military operations, leaving scarce funding for its land reform program.¹⁹¹ Thus, states should carefully consider not only the backlash that land reform is intended to mitigate, but also the backlash that it may create.

The fourth critique is that all the modifications to existing property rights required by the transformative conception will affect those who had varying degrees of complicity in the past property theft as well as those who had no part in it at all. But, when the wrongdoer's identity is blurred or the state is not able to hold her accountable due to the passage of time, this is a necessary and unavoidable price that present landowners must pay to ensure a stable future.¹⁹²

intensity of popular demand for land redistribution among a diverse range of beneficiaries such as the rural landless, . . . the rural poor, [and] the urban poor . . ."). See also sources cited *supra* note 31.

190. Abu-Lughod, *supra* note 67, at 34; See Everingham, *supra* note 67.

191. See W. Gordon West, *The Sandinista Record on Human Rights in Nicaragua*, 22 *DROIT ET SOCIÉTÉ* 393, 401 (1992) ("In response, whereas Nicaraguan military spending constituted only 7% of the 1980 and 1981 national budgets, the figure had to rise through 13% (1982), 19% (1983), 25% (1984) to about 50% since.").

192. The identity of the wrongdoer is not always muddy. After World War II, for example, France forced individuals occupying Jewish property to return it, even if they acquired it legally from the Nazis, on the theory that they were complicit in the taking. Consequently, property owners not directly involved or complicit in the taking did not have to shoulder the primary burden of rectification. See Wouter Veraart, 'Reasonableness' or Strict Law? The Postwar Restitution of Property Rights in the Netherlands and in France (1945–1952) 9–10 (Dec. 30, 2002) in *YAD VASHEM—THE INTERNATIONAL CONFERENCE ON CONFRONTING HISTORY: THE HISTORICAL COMMISSIONS OF INQUIRY* (noting that the strict restitution law in France made it easier for former owners of property to get their land back because "the judge was obliged to acknowledge the nullity of any transaction of property performed after the

The fifth critique of the transformative conception is that the modifications may deprive the country of necessary capital by giving present landowners an incentive to transfer wealth from real property to other forms of wealth or out of the country all together. The modifications can also impede foreign investment or alienate landowners, causing them to emigrate with their capital and skills. To mitigate these concerns, the state must set clear limits on its power to modify property rights, have a transparent process for defining which properties are subject to rights modification, and give owners ample notice of all impending changes. Once the new rules have been announced to the public, the markets will adjust. It is important to remember that while changing property rules may adversely affect the investment environment, the failure to deliver timely land reform may destroy it.

The sixth critique is that implementation of policies consistent with the transformative conception requires a high level of bureaucratic capacity, which many transitional states do not have. In contrast, the classical conception does not promote the state-led reordering of property rights and thus policies consistent with it are not as severely affected by bureaucratic incapacity. ROFR, eminent domain, and mandatory land rentals, for example, are policies that require a skilled, accountable, and transparent bureaucracy to implement them. The critique is that it is better not to promote policies that redistribute property than to implement redistributive policies that are undermined by corruption and ineptitude. To attenuate this challenge, it is crucial that the international community proactively intervene to assist nations in building the bureaucratic capacity necessary to implement redistributive policies.

The seventh critique is that while the transformative conception facilitates land reform, what is needed is agrarian reform, which is land reform implemented in concert with the socio-economic and political reforms necessary to ensure land reform beneficiaries are successful.¹⁹³ The real challenge of any land reform program is not just acquiring land, but also ensuring that beneficiaries are able to use the land efficiently.¹⁹⁴

original owner had lost his right to dispose of it. This meant that all the transactions performed by so-called 'administrators' were null and void and had to be undone.") available at http://www1.yadvashem.org/about_yad/departments/institute/pdf/veraart_paper_revised_since_conference_new.pdf. Southern Africa does not have this luxury because the identity of wrongdoers is not as clear as it was in the Netherlands due to the passage of time between the wrongful act and rectification.

193. See Saturnino M. Borras, Jr. et al., *Agrarian Reform and Rural Development: Historical Overview and Current Issues* 3 (ISS/UNDP, Land, Poverty & Pub. Action, Policy Paper No. 1, 2007), available at <http://www.iss.nl/content/download/3831/37212/file/ISS%20UNDP%20Overview%20paper.pdf>.

194. See also Saturnino M. Borras, Jr., *Questioning Market-Led Agrarian Reform: Experiences from Brazil, Colombia and South Africa*, 3 J. OF AGRARIAN CHANGE 367, 385 (2003) (noting that the lack of co-ordination between the Rural Development Program and

To ensure success, the state is required to not only transfer title, but also to provide post-settlement support, subdivide the farm, construct infrastructure, and relocate people. The transformative conception, however, only facilitates land acquisition and must be understood as the first of several steps to achieving a more equitable property distribution.¹⁹⁵

Despite the aforementioned criticisms, the transformative conception is still a viable option for states where the lack of timely land reform heightens the possibility of backlash and state destabilization. But, while the transformative conception is necessary for expedited land reform, it is ultimately a limited, technical legal solution. What is needed for comprehensive, lasting transformation is an accompanying political solution. The transformative conception is one piece in a larger puzzle. The other pieces I did not develop in this Article include how a state can: build a transparent, efficient bureaucracy to implement state-led land reform; choose who will benefit from land reform programs; ensure the court system effectively protects the rights of current owners; and, create effective agrarian reform policies. Every puzzle is solved one piece at a time.

V. THE LIFESPAN OF THE TRANSFORMATIVE CONCEPTION

Depending on the context, the transformative conception may be appropriate as a long-term policy, it may be suitable for a shorter period of time and then reach its expiration point, or it may never be appropriate in the first place. This section argues that the appropriateness and lifespan of the transformative conception depends upon whether a state is more

Department of Land Affairs contributes to the failure in implementing farm and beneficiary development).

195. While the focus of this Article is on how to transfer land more effectively, in prior articles I have dealt with how to ensure land reform is successful. I argue that under certain circumstances, dispossession involves more than just the confiscation of an individual or community's property, it is about their removal from the social contract. When they are removed, then they are subject to what I call property-induced invisibility. I argued that the state's task in this instance is not just to give land to the dispossessed, but to do it such that they are reintegrated into the social compact and made visible. While reparations deals exclusively with providing compensation, at the core of restoration is giving the dispossessed a choice as to how they are compensated so that they can decide the terms of their re-inclusion into the social contract. The choices can include, for example, free higher education for two generations, subsidized credit, cash, the actual land that was unjustly taken, or alternative land if it is not available. Restoration allows land reform beneficiaries to choose from an array of compensation options rather than only giving them the option of receiving land, even if they do not have the skills or capital to use it effectively. Restoration—with its focus on choice—is the key to moving from land to agrarian reform. See Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1444–45 (2007).

prone to market or government failure. The section also develops a mechanism states can use to shift from the transformative conception to the classical conception or vice versa.

When deciding whether to adopt the classical conception, the transformative conception, or some hybrid of the two, decision makers must realize that, while the classical conception is vulnerable to market failure, the transformative conception is subject to government failure. Market failure is the idea that “the production and distribution of a commodity through a competitive market in which all the relevant agents are pursuing their own self-interest will result in an allocation of that commodity that is socially inefficient.”¹⁹⁶ For instance, market processes can lead to a highly unequal and socially inefficient distribution of land.¹⁹⁷ Insofar as the classical conception serves as a stumbling block to fostering a socially efficient distribution of property, it is vulnerable to market failure.

Alternatively, government failure “arises when government has created inefficiencies because it should not have intervened in the first place or when it could have solved a given problem or set of problems more efficiently[.]”¹⁹⁸ The value of the transformative conception is that it facilitates government reallocation of property rights. However, government failure can occur if lack of transparency, corruption, bureaucratic incapacity, or other inefficiencies undermine redistributive efforts. The key to mitigating imperfections of a government-led approach is to maintain effective checks on governmental power.

The judiciary plays an important role in limiting the government’s power, but the court walks a fine balance. It must protect the rights of current owners. At the same time, when interpreting existing or new property legislation, the court must reject the classical conception’s seductive siren song, which is the false assumption that all property was acquired due to individual effort and thus the state should give it near absolute protection to reward that effort. Also, once laws consistent with the transformative conception are passed, those charged with implemen-

196. See Julianle Grand, *The Theory of Government Failure*, 21 BRIT. J. POL. SCI. 423, 423 (1991).

197. Although many economists exclude distributional concerns from their evaluation of market success and failure, “from one perspective, it is theoretically correct to consider distributional inequity as an example of market failure. From this perspective, income distribution, or equity as a general systemic attribute, is a particular type of public good.” Charles Wolf, Jr., *Market and Non-Market Failures: Comparison and Assessment*, 7 J. PUB. POL’Y 43, 52 (1987).

198. CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICRO-ECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 3 (AEI-Brookings Joint Ctr. for Reg. Stud. 2006), available at http://www.brookings.edu/~media/Files/rc/papers/2006/09monetarypolicy_winston/20061003.pdf.

tation will inevitably have some degree of discretion, and if this discretion is abused in any way, it is important for the courts to promptly intervene to correct the situation. Successfully implementing the transformative conception involves the joint effort of the legislature and judiciary.

Each state must carefully weigh the potential for and consequences of market failure against that of government failure. If the potential for market failure is more acute, then policies more in line with the transformative conception are a viable option. However, if the potential for government failure is overwhelming, then policies consistent with the classical conception, which require less government intervention, are a better option. South Africa and Namibia are susceptible to both market and government failure. But, market failure is the more detrimental in these countries because the consequences of not implementing redistributive policies and allowing a socially inefficient land distribution to endure are potentially explosive. These countries must implement policies in line with the transformative conception and rely on the international community to help further strengthen their domestic bureaucratic capacity.

Once a state decides which conception of property is more appropriate, then there is the question of how a state can transition from where it is to where it needs to be. The transformative conception is usually ideal during the period in which society is changing from one set of values based on exclusion and oppression to another based on inclusion and fairness. This process of transformation may take five years or fifty; there is no one size fits all. There may come a moment when redistributive efforts make substantial progress towards leveling the playing field imbalanced by past property theft. Once there is a generalized belief that present owners acquired their property fairly, the society may move to the point where the vast majority of citizens believe that it is in their self-interest to adopt a conception of property that prioritizes protecting owners rather than facilitating land reform. At this point, the state can move from the transformative conception to the classical conception or to some hybrid of the two.

The Canadian Notwithstanding Clause of the Charter of Rights provides a practical example of how this transition can occur. Section 33(1) of the Charter allows either Parliament or the provincial legislature to expressly overrule certain sections of the Charter by passing an Act.¹⁹⁹

199. David Johansen & Philip Rosen, *The Notwithstanding Clause of the Charter 2* (The Library of Parliament, Background Paper No. BP-194E, 2008) (Can.). The purpose of the clause is to provide balance between the legislative and judicial branches, but in practice the clause is rarely used. *Id.* at 8, 13.

“Section 33(3) provides that each exercise of the notwithstanding power has a lifespan of five years or less, after which it expires, unless Parliament or the legislature re-enacts it under section 33(4) for a further period of five years or less.”²⁰⁰ In effect, the overruling legislation has a sunset clause, which forces politicians and society at large to deliberate about the merits of the impugned section of the Charter. In the same spirit, a state could enact property laws consistent with the transformative conception, which will automatically expire in five years unless the legislature re-enacts the laws for an additional period of five years or less. Laws implementing the transformative conception should have a sunset clause to encourage society to deliberate about the status of rectification and the continued need for the transformative conception.

In sum, the transformative conception is not always the optimal conception of property for a state to adopt. When it is, its optimal lifespan varies; it could be two years, twenty years, or an indefinite period of time. I have attempted to suggest the factors a state should consider when determining its optimal conception of property. I have also presented a potential mechanism for transitioning from one conception to another.

VI. CONCLUSION

The conception of property that a transitional state adopts is critically important because it affects the state's ability to transform society. The classic conception of property gives property rights a certain sanctity that allows owners to have near absolute control of their property. Singer explains this when he argues that, “[w]hen ownership rights are limited, we imagine those limits to be exceptions to the general rule that owners can do whatever they want with their property. The burden is always on others (meaning non-owners or the state) to explain why the owner's rights should be limited, and in today's political climate that burden is quite heavy.”²⁰¹ In countries where ownership is contested and land reform is essential due to pervasive past property theft, the sanctity given to property rights has made land reform difficult and thus has served as a sanctuary for enduring inequality.

Oddly, the classical conception is flourishing in transitional states, like South Africa and Namibia, where transformation of the property status quo is essential for the state's stability. The virtue of the classical conception is that it gives owners highly secure property rights, which supposedly enhances the investment environment. But, in nations where

200. *Id.* at 2.

201. SINGER, *supra* note 153, at 3.

past property theft can lead to backlash and destabilize the current state, political instability could result if the state does not alter existing property rights and redistribute land in an orderly fashion. Instability can be far worse for the investment environment than redistributive policies; nevertheless, the classic conception endures under these circumstances.

The specific question this Article addresses is: for states where past property dispossession can cause backlash and destabilize the current state, is the classical conception appropriate or do these states require an alternative conception of real property? In Southern Africa, the state robbed Africans of their lands because the property rights systems during Apartheid and Colonialism were built upon a white supremacist ideology. The transition from white minority rule to democracy ushered in a radical change in values, so the property rights system cannot remain the same. I develop the transformative conception to explore how the exigent need for societal transformation should inspire us to rethink what a state's commitment to protecting property rights means. Protecting property rights cannot just be about protecting the rights of current owners; it must also entail vindicating the rights of owners who have been unjustly dispossessed by prior regimes.