CANN CONSTITUTIONS BE TRANSFORMATIVE?
The Role of Background Traditions and Culture

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In a society that lacks any legal tradition or culture of strong protection of property rights, a constitutional property clause that was intended to render property rights secure may end up eviscerated through the process of legal interpretation. Conversely, in a society with a strong legal tradition of protecting the extant holdings of property, a property clause that was designed to have politically progressive, or even transformative result may be effectively neutered by a community of judicial interpreters who were all acculturated in the old regime and whose own legal consciousness has not been transformed. As I will discuss later, this is the single greatest risk now confronting South Africa’s constitutional property and socio-economic clauses. By the same token, a society with a strong legal tradition of secure property rights probably has no need for a constitutional provision expressly protecting property. In such a society, constitutional protection is simply redundant.

My use of the term “background legal and political traditions and culture” is intentionally broad. It includes a country’s historical political ideologies and conflicts, its private law system, especially the rules and concepts relating to property, and political and judicial attitudes toward the ordinary processes of democratic politics and how those processes affect property interests. Historical political ideologies matter because constitutional interpretation always occurs in a historical context, even if the interpreter does not acknowledge that fact. Even—perhaps one

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should say especially–rejected ideologies of the past exert a strong influence on interpretation of constitutional provisions, including property clauses. This is especially true of countries like Germany and South Africa. National Socialism and apartheid are political palimpsests, images from the past that remain visible just beneath the surface of the constitutional present that has tried to erase them.

A nation's private-law system, especially its property regime, is another important background factor. A basic question confronting interpreters of any constitutional property clause is the role of the private-law meaning of property. Is the constitutional meaning of property limited to how private law defines property, or is it independent of the private-law meaning? Even if private law does not formally define the constitutional meaning of property, it still exerts an influence on it. The private-law meaning of property is a rhetorical trope that runs throughout the entire legal discourse of property.

South Africa provides an example, par excellence, of the argument I wish to make here: that background legal traditions and cultures play a central role in the development of the normative pull of any constitutional property clause. The normative trajectory that will eventually emerge as courts interpret South Africa's new constitutional property clause is still unclear. Chief among these threats is the country's background legal culture, more specifically, its private-law juristic tradition, which is based largely on Roman-Dutch law. That legal culture, still firmly entrenched among white lawyers and lower court judges, has decidedly regressive consequences for how land is distributed in a society where the disastrous consequences of generations of apartheid are still very much in evidence. Dislodging that legal culture will be no easy task.
Background tradition and culture strongly influence constitutional interpretation, but they do not dictate how a legal community of interpreters will react to a new constitutional provision. The effect of a constitutional property clause may vary over time, as traditions and cultures change. No constitutional provision, including a property clause, is a true precommitment device. Constitutions can be amended, not only explicitly but also implicitly through the process of interpretation. All that the decision to include a property clause in a constitution signals is the existence of a political consensus in favor of (relatively) strong property rights, at this moment in time. It is not a guarantee for the future.

My emphasis on the role of background traditions and culture raises one argument that is sometimes made in support of inclusion of a constitutional property clause in the new constitution of a nation. The argument is that where the new constitution is that of a nation that lacks a historical legal culture or tradition of secure property rights, there is special reason to adopt a constitutional property clause in order to promote the transition to a rights-respecting legal environment. Such a provision, that is, will serve as a catalyst for creating a new legal culture. For example, a constitutional property provision might be a place to start in developing a new legal culture that is committed to those liberal values that are commonly associated these days with the label “rule-of-law order,” that is, the values of economic liberalism.

This argument has considerable force. Still, it is worth considering in any given case whether constitutionalizing property is the best way to begin creating a new legal culture, one oriented by economic and political liberalism. Especially in a society with a history of economic injustice, a constitutional property clause may be extremely controversial. A property clause may
ultimately be adopted but only at a cost of substantial political capital. There may be better
places to start changing the background legal culture and traditions than property clause, such as
the particular characteristics of legal institutions like courts.

It is also possible that a constitutional property clause may serve as a catalyst for legal,
political, and social transformation in a progressive direction. Perhaps the best current example
is South Africa, where some of the proponents of the new constitution’s property clause argued
that a carefully-constructed property clause, far from having the laissez-faire effects that some
opponents claimed, would be a catalyst for true political and social transformation.** The most
important question in South African constitutional law today is whether the new property clause
will have that effect.

**Andre van der Walt has been the most forceful advocate of this view. See, e.g., Andre
van Walt, The Constitutional Property Clause: Striking a Balance between Guarantee and