OBJECT AS OBLIGATION IN PROPERTY

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In Texaco Inc. v. Short, *Justice Stevens quoted: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state laws or rules that secure certain benefits and that support claims of entitlement to those benefits."*[1] *Justice Stevens and the Supreme Court went on to uphold the constitutionality of Indiana's Mineral Lapse Act, or Dormant Mineral Interest Act (collectively or separately as "DMIA"), which transferred unused or unrecorded, severed mineral interests to the surface owner upon a surface owner's implementing a termination proceeding.*

Despite coming out in 1982, the Court did not enlist the "usual" regulatory-takings inquiry articulated in Penn Cent. Transp. Co. v. New York.[2] *The Court did not apply that inquiry because it held that the regulation fell within the realm of "recordation acts." Recordation, or recording, acts have been accepted as part of the plenary power of the state since the end of the 18th and beginning of the 19th century.*[3]

One major distinction between Penn Central *and its progeny and* Texaco *is the nature of the government action. In* Texaco, *the government created a statutory abandonment provision that required a* de minimis *notice to the county recorder; conversely, in* Penn Central *and cases of its ilk, the government restricted what could be done with the property. The only restriction in Indiana was that it required the mineral-estate owners to file a notice of claim if they had not already leased, rented, or used the mineral estate in any other way.*[4]

This Note analyzes the particular distinction between regulatory statutes that trigger a compensable taking and the Court's holding in Texaco *to parse out why a statute*

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1. Texaco, Inc. v. Short, 454 U.S. 516, 525 (1982) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).
2. *Id.* at passim.
3. *See, e.g.*, Jackson ex dem. Hart v. Lamphire, 28 U.S. 280, 286 (1830) (involving a dispute over a piece of legislature drafted in 1797).
4. *Texaco*, 454 U.S. at 518–19.

would avoid a Takings Clause analysis. Particularly, this Note focuses on the functional conflict between the surface and mineral estates that requires the "government as mediator" to step in and redefine the rights of each entitlement. In this context, I suggest that when regulations adhere to the practical application of providing both negative and positive rights to distinct estate claimants, a taking will not occur.

By analyzing state-law creation in this way, it allows a legislature to determine, with some clarity, if a DMIA—or another piece of "regulatory state action" involving property—would trigger a Takings Clause claim. Secondly, this Note proposes a DMIA for the State of Arizona and offers an additional rationale as to why a DMIA would be in the best interest of the State's economy and its citizens' self-determination and development of autonomous personhood.

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INTRODUCTION

Arizona is on the rise. In the past year, Arizona was the seventh fastest-growing state in numeric population growth,[5] and the sixth fastest-growing state in percentage population growth.[6] The single-year growth rate was twice as high as the rate of the average state.[7] In the past ten years, the population has grown at a rate of 14.96%.[8] Needless to say: Arizona is in demand. The people, culture, landscape, and climate attract outsiders to the State. And an influx of outsiders drives an escalation in development. But that development faces a major obstacle: dormant mineral interests.[9]

In Arizona, most mineral estates have been severed from the surface patent and reserved by the federal government or private entities.[10] While this Note does not provide a mechanism to unify severed mineral estates reserved by the Federal Government—43 U.S.C. § 1719 occupies that area—it does provide a state-specific mechanism to unify severed and fractured mineral interests with surface estates.

There is disagreement, though, on whether unifying severed mineral interests to surface estates is in Arizona's best interest. On the one hand, Arizona is a mineral- and mining-rich state, and because mineral estates and mining are such an integral part of Arizona's culture and economy, perhaps the severed mineral interests should remain severed. On the other hand, outstanding severed mineral estates deter development of the surface and other environmental safeguards. A developer is unlikely to invest in a development only to have a mine appear around it, drastically decreasing its viability and value. To limit this risk to developers and its deterring effect, perhaps the severed mineral interest should be unified with the surface estate.

Existing common-law mechanisms are inadequate to unify surface and mineral estates. The reason for this is that most common-law mechanisms that *could* address dormant mineral estates originate from a surface estate interacting with

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5. U.S. Census Bureau, *Idaho Is Nation's Fastest-Growing State, Census Bureau Reports*, U.S. CENSUS BUREAU, (Dec. 20, 2017) https://www.census.gov/newsroom/press-releases/2017/estimates-idaho.html (displaying the top ten states in numeric growth).

6. *Id.* (displaying top-ten states in percentage growth).

7. Evan Comen, *The Fastest Growing (and Shrinking) States: A Closer Look*, USA TODAY (Jan. 15, 2018, 8:00 AM), https://www.usatoday.com/story/money/economy/2018/01/15/fastest-growing-and-shrinking-states-closer-look/1019429001/.

8. *Id.*

9. *See, e.g.*, Silverado Nevada, Inc, GFS(MISC) 7(2013) (Aug. 30, 2013). A dormant mineral "interest" is part of or all of a severed mineral "estate," which is owned by someone other than the surface-estate owner. In this Note, I will often refer to any and all mineral interests as collective: the "mineral estate." This is because an interest can be anything from a leased interest to a fully owned estate. To avoid confusion and to address that the "interest" is severed and produces a de facto "estate," I will use "mineral estate" to articulate the severed nature, regardless of where the "interests" eventually lie.

10. Conversation with Professor John Lacy, Director Global Mining Law Center and Professor of Practice, University of Arizona, James E. Rogers School of Law, in Tucson, Ariz. (September 7, 2017); *see, e.g.*, Kyle W. Hindman, 2011 WL 1665390, at *1.

another surface estate.[11] But severed mineral estates are their own beasts. Often, severed mineral estates are unrecorded and have been passed down through inheritance, causing the severed mineral estate to become fractured. For instance, one mineral estate could have 32 different interest holders.[12] The cost of finding and unifying the mineral-interest holders, many of whom do not reside in the State and are often unaware that they have mineral interests in Arizona, is considerably high.[13] The time it takes to unify contributes greatly to the cost because it is difficult to track down the original document of conveyance and the heirs of interest from that conveyance and—worst-case scenario—to potentially reopen closed estates to get the legal interest into the heir's name in order to then convey the interest to either a mining company, developer, or other potential buyer.[14] This is not an exclusive list as to the difficulties of purchasing or working with fractured mineral interests, but only the tip of the iceberg to those who work with mining law on a regular basis.[15]

However, Arizona is not without a remedy. In 1982, the U.S. Supreme Court upheld the constitutionality of Indiana's Mineral Lapse Act—Indiana's version of a DMIA—in *Texaco, Inc. v. Short*.[16] In *Texaco*, the Court held that a state may permissibly enact regulations governing dormant mineral estates and compared such regulations to "recording acts."[17]

In Part I, I analyze *Texaco* and explain why the regulation at issue in that case did not violate the Takings Clause. In some instances, states that have previously held their DMIAs to be unconstitutional have changed their opinions after *Texaco*.[18] In my constitutional analysis, I focus on "the character of governmental action" and draw upon Professor Sax's assertion that when a state mediates between two non-governmental claims, a taking does not occur.[19]

In Part II, I address criticisms of the Court's rationale in *Texaco* and challenges to the positive economic effect of DMIAs. To counter these claims, I analyze the "nongovernmental competing interests" inherent in the tensions between dormant mineral interests and active mineral-interest holders, and between dormant mineral interests and the surface estate, that cause detrimental economic effects to the production and development of both the mineral and surface estates. I also analyze the ability of states to prospectively create the rule of property, which is to create the entitlement right and modify that entitled right. Secondly, I counter challenges to the positive economic effects of DMIAs by analyzing the decreased transaction costs involved with economic production of both the surface and mineral

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11. *See, e.g.*, Terrell Fenner, *A Problem Lurking Just Below the Surface: The Need in Texas for Dormant Mineral Legislation*, 2 TEX. A&M L. REV. 501, 518 (2015).

12. Lacy, *supra* note 10.

13. *Id.*

14. *Id.*

15. *Id.*

16. Texaco, Inc. v. Short, 454 U.S. 516, 529 (1982).

17. *Id.* at 528–29 (quoting *Jackson v. Lamphire*, 28 U.S. 280, 290 (1830).

18. Peterson v. Sanders, 806 N.W.2d 566 (Neb. 2011) (suggesting that perhaps *Wheelock v. Heath*, 272 N.W.2d 768 (Neb. 1978) had been decided incorrectly; however, since *Wheelock* was not at issue, the Nebraska Supreme Court refrained from overruling).

19. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149,150–51 (1970) [hereinafter *Takings*].

estates that result from increasing the available information about mineral-interest holders.

In Part III, I propose a forward-looking DMIA that incorporates information tracking as well as unification as its main purposes. My proposed DMIA varies from the Uniform Dormant Mineral Interest Act (UDMIA) proposed by the Uniform Law Commission and other like statutes on one point: it requires continual recordation fees and requires the State of Arizona, through the counties, to provide easily accessible information of property ownership to the public. Through the DMIA, the cost of the informational mechanism is to be placed on the interest holders and potential interest holders rather than nonestate owners in Arizona that neither have nor will have an interest in the estates—surface or mineral.

In Part IV, I recognize noneconomic motivators for both protection of exclusion in property and diversity in property. I focus on property as a mechanism of self-determination, personhood, and social obligation entrenched in historical and contemporary property law. Lastly, I suggest that the Court implicitly takes an object-allocative, inclusionary-use conceptual principle in determining the constitutional validity of the Indiana DMIA, and I conclude that a DMIA is in Arizona's prospective best interest.

I. *TEXACO INC. V. SHORT* AND A MINERAL-INTEREST HOLDER'S OBLIGATION

In delivering the opinion of the Court, Justice Stevens concluded:

> [a] [s]tate may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property - and not the action of the State - that causes the lapse of the property right; there is no "taking" that requires compensation.[20]

The Indiana Statute had a simple goal: marketability of title. To achieve its goal, the Statute stated that a mineral estate that had been unused for 20 years was deemed to be "abandoned."[21] Once abandoned, the interest in the estate reverts back to the ownership from which it was carved.[22] The "use" of a mineral estate included actual or attempted exploitation of the minerals, payment for rents or royalties, payment of taxes, or filing a statement of claim.[23]

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20. *Texaco*, 454 U.S. at 530.
21. *Id.*
22. *Id.*
23. *Id.* at 519. The Court once again clarified that "recordation acts," such as the DMIA legislation at bar in *Texaco*, do not violate the Contract Clause:

> Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. This principle of harmonizing the constitutional prohibition with the necessary

Indiana's DMIA was not altogether different from many other DMIAs, which had a tumultuous judicial beginning. State courts were unsure how to handle them: some courts found them to be unconstitutional while others found them to be permissible within both the state and national constitutions.[24] On the one hand, the courts recognized that a state had an interest in making sure that the property under its control was easily marketable; on the other, courts recognized that legislation could not regulate property in a way that would require compensation for regulatorily taking a mineral-estate interest from the holder and "giving it" to another private party.[25]

To this point, Indiana's DMIA as recognized in *Texaco* cleared the air as to what regulatory devices were within the plenary power of the state. It also made state supreme courts question whether they misattributed a Takings Clause analysis to DMIAs when they analyzed the legislature under the typical regulatory takings analysis versus that of a recording act.[26] As to this point, this Note looks at *Texaco*'s justification for recognizing DMIAs as part of the police power of the state, and why such police power should be recognized in Arizona.

A. Regulatory Takings vs. Police Power to Create Recording Acts

Realistically, any regulation of land could conflict with the Constitution's Takings Clause of the Fifth Amendment as applied through the Fourteenth Amendment.[27] The Takings Clause reads: "[N]or shall private property be taken for public use, without just compensation."[28] Correspondingly, when a regulation essentially gives property to a private party through the guise of public regulation, the Takings Clause could trigger an action by the original property owner.

In confronting such actions, the Supreme Court in *Penn Central* counseled lower courts to administer ad hoc factual inquiries that include consideration of the

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> residuum of state power has had progressive recognition in the decisions of this Court. Moreover, the economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. The State has the sovereign right to protect the general welfare of the people. Once we are in this domain of the reserve power of a State we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary . . . . It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.

Id. at 528–29 (quoting City of El Paso v. Simmons, 379 U.S. 497, 508–09 (1965)).

24. Peterson v. Sanders, 806 N.W.2d 566 (Neb. 2011) (suggesting that perhaps *Wheelock v. Heath*, 272 N.W.2d 768 (Neb. 1978) had been decided incorrectly; however, since *Wheelock* was not at issue, the Nebraska Supreme Court refrained from overruling).

25. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

26. *Peterson*, 806 N.W.2d 566 (suggesting that perhaps *Wheelock v. Heath*, 272 N.W.2d 768 (Neb. 1978) had been decided incorrectly; however, since *Wheelock* was not at issue, the Nebraska Supreme Court refrained from overruling).

27. *Takings*, *supra* note 19, at 149–50 ("Nearly every attempt to regulate the private use of land, water, and air resources may be claimed to violate the takings clause.").

28. U.S. CONST. amend. V.

following factors: (1) "the economic impact of the regulation on the claimant;" (2) the "nature" and "extent" to which the regulation has interfered with the claimant's reasonable "investment-backed expectations;" and (3) the "character of the governmental action."[29] In *Penn Central*, the Court entertained the question:

> whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation.' Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has 'taken' its owners' property in violation of the Fifth and Fourteenth Amendments.[30]

The Court found that New York City's Landmarks Preservation Law did not violate the Takings Clause because it "d[id] not interfere in any way with the present uses of the Terminal."[31] DMIAs are distinguishable from Penn Central because they do not restrict what can be done on the property but determine ownership.

The Court has modified *Penn Central*'s rationale in ways that do not affect the holding in *Texaco* but will be discussed to show functional differences between DMIAs and other statutes that have been subject to inverse condemnation claims. In *Dolan v. City of Tigard*, another standard, first-year property- and constitutional-law case, the Court stated a regulation's purpose needed an "essential nexus" to a governmentally imposed condition for a building permit.[32] It then required the regulating statute to have a "required degree of connection between the exactions and the projected impact of the proposed development."[33] If the degree of connection was too tenuous, or not "roughly proportional," then an inverse condemnation claim had legs.[34]

The Court in *Dolan* looked at whether a permit system that conditioned issuance of the permit on whether an individual dedicated a portion of the land to a bike path and walkway had the essential nexus to a government interest to reduce traffic, and whether the dedication of a relatively large section of individual property was within the requisite degree of proposed impact of lessening street traffic.[35] The Court found that the rough-proportionality test was necessary for such a determination.[36] The rough-proportionality test, just to repeat, took the governmental reason for the conditioned permit and pitted it against the

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29. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
30. *Id.* at 107.
31. *Id.* at 136.
32. Dolan v. City of Tigard, 512 U.S. 374, 386–87 (1994).
33. *Id.* at 386.
34. *Id.* at 391.
35. *Id.* at 386–88.
36. *Id.* at 391.

individualized "taking" of the particular property.[37] Thus, in following *Penn Central's* analysis, the rough-proportionality test affects only landowners' rights to their own lands, and no other claims to the properties in question.

In *Lucas v. South Carolina Coastal Council*, another standard 1L case, the Court was asked to determine if a coastal-preservation law that denied Lucas from building on his property constituted taking Lucas's property without just compensation.[38] The Court identified two types of takings: one in which the government took physical control, and another in which the government regulations removed all economic and beneficial use of the property.[39] At issue in *Lucas*, like in the previous cases, was the government's regulation and action in regard to a single landowner whose property—the Object—had no other claimants.

Simply put, regulatory-takings legislation begins and ends with a government intrusion upon the rights of a single owner in the name of public good. The conflict in *Penn Central*, along with its progeny of *Dolan* and *Lucas*, was a conflict between the property holder and the public through the regulation.[40] There was no other party that had a claim the property affected.

Recording acts, on the other hand, have long been held to "settle disputes" between property owners.[41] Recording acts do not remove any right to use property for any particular purpose but rather clarify who has a right and to what parcel or property that person has a right.[42] In essence, the recording act is required to promulgate the rights of the individual through the sovereignty of the state. Absent the right recognized by the state, no taking could ensue.[43] In addressing this issue, Justice Stevens stated:

> Court [has always] upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse.[44]

Thus, in determining whether a regulation is within the nature of "a recording act" or regulation subject to a Takings Clause inquiry, the analysis must start with the government action. If the action clarifies or limits pursuant to abandonment of property related to the sole action of the owner at the time, the Court

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37. *Id.*

38. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007 (1992)

39. *Id.* at 1015.

40. *See, e.g.*, *Penn Cent. Transp. Co.*, 438 U.S. 104; *Dolan*, 512 U.S. 374; *Lucas*, 505 U.S. 1003.

41. *See, e.g.*, Jackson ex dem. Hart v. Lamphire, 28 U.S. 280, 286 (1830) ("The act of the legislature of New York, entitled 'an act to settle disputes concerning the title to lands in the county of Onondaga,' passed the 24th of March 1797, is not repugnant to the constitution of the United States.").

42. *See, e.g.*, *id.*

43. *See, e.g.*, U.S. CONST. amend. V.

44. Texaco, Inc. v. Short, 454 U.S. 516, 529 (1982).

recognizes that the legislature does not invoke a Takings Clause violation. If however, like in the *Penn Central* cases and their progeny, the legislature limits what acts a particular property owner could do with a property, the essential nexus and rough-proportionality test is required to determine whether a takings occurred.

B. Due-Process Requirement

The Court requires due process in a DMIA. Precisely, it requires a built-in hearing mechanism for the mineral-estate owner to contest whether a lapse occurred, but not whether the lapse was self-executory.[45] The claim the appellants made in *Texaco*, which the Court rejected, was that notice needed to be given to the mineral-estate owners before the self-effecting reversion at the end of the grace period.[46] The Court, however, stated that due process "does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run," even if it would bar the defendant from making a claim.[47] What the Court does require is notice and hearing for the determination as to whether the statutory-use requirement *did in fact* lapse:

> If there has been a statutory use of the interest during the preceding 20-year period, however, by definition there is no lapse-whether or not the surface owner, or any other party, is aware of that use. Thus, no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice. It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause-including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard-must be provided.[48]

To summarize, there is no requirement to issue notice before the lapse of either the grace period or failure to use. The Court recognized the inherent presumption that the property owner knows or should know of the statutes affecting his or her property and is presumed to be on notice that if action is not taken, then the property reverts back to the estate from which the mineral estate was carved.[49]

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45. *Id.* at 536 ("Appellants simply claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding.").

46. *Id.*

47. *Id.*

48. *Id.* at 533–34.

49. *Id.* at 533 ("On the basis of the records in these two proceedings, we cannot conclude that the statute was so unprecedented and so unlikely to come to the attention of citizens reasonably attentive to the enactment of laws affecting their rights that this 2-year

C. *Why DMIAs Balance Possessive and Distributive Principles to Clarify and Determine Ownership*

In *Texaco*, the Court balanced the competing interests of the surface-estate owner and the mineral-estate owner and held that the State of Indiana could regulate the mineral estate to a 20-year abandonment provision without committing a Takings Clause violation.[50] This came as somewhat of a surprise in the 1980s, considering that a classical approach provided that a state's function centers on its protection of *established* private-property rights with little "interference to the free working of the market."[51] Put another way, classical approaches to property provide a "strong, albeit rebuttable, presumption" of a private-property owner's right to exclude.[52] Within the context of property's constitutional protection, Professor Frank Michelman calls this presumption a "possessive right."[53] However, this possessive—or negative—right,[54] does not exist as an absolute and does not "necessarily [prevail] over other constitutional principles with which it may come into conflict."[55]

One necessary conflict is within "distributive claims" or "positive rights," which arise from a state's responsibility to grant and manage the entitlements within its borders.[56] Thus, a state is obligated to intervene when entitlements compete.[57] What the Indiana DMIA did, and what the Supreme Court found not to be a taking, was institute both positive and negative rights regarding surface- and mineral-estate interests to settle "disputes between two nongovernmental property owners."[58]

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period was constitutionally inadequate. We refuse to displace hastily the judgment of the legislature and to conclude that a legitimate exercise of state legislative power is invalid because citizens might not have been aware of the requirements of the law . . . . We have concluded that appellants may be presumed to have had knowledge of the terms of the Dormant Mineral Interests Act. Specifically, they are presumed to have known that an unused mineral interest would lapse unless they filed a statement of claim. The question then presented is whether, given that knowledge, appellants had a constitutional right to be advised-presumably by the surface owner-that their 20-year period of nonuse was about to expire.").

50. *Id.*

51. Gerald Torres, *Joe Sax and the Public Trust*, 45 ENVTL. L. 379, 384 (2015)

52. Sheila R. Foster & Daniel Bonilla, *Introduction*, 80 FORDHAM L. REV. 1003, 1011 (2011).

53. Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319 (1987) ("The possessive conception predominates in the ordinary thought of American constitutional lawyers. When we speak of constitutional protection for property rights, we think first of keeping, not having—of negative claims against interference with holdings, not positive claims to endowments or shares. Thus, we primarily understand property in its constitutional sense as an antidistributive principle, opposed to governmental interventions into the extant regime of holdings for the sake of distributive ends.").

54. *Id.*

55. *Id.*

56. *See id.*

57. *See id.*

58. *See Takings*, *supra* note 19, at 150–51.

Before fully analyzing how DMIAs blend and utilize the two property principles, it is important to understand and discuss how severed mineral estates conflict with surface estates, how fractured mineral estates conflict with other parts of the mineral estate to the detriment of the collected estate, and how the common law fails to resolve these conflicts.

1. Problems with Dormant Mineral Interests and Common-Law Approaches

The practical problem with severed mineral estates is that surface-estate holders of severed mineral estates are subject to the mineral-estate holders' legal occupation of the surface estate in order to cultivate and exploit the minerals of the mineral interest.[59] While mineral owners normally cannot "substantially damage" the surface estate in development of the mineral estate and interest,[60] if previous owners of the surface estate conveyed full exploitive rights and privileges to the mineral estate, then the surface estate has limited legal recourse to curb the surface's destruction.[61] Doubly problematic is that there is no requirement to keep up-to-date records or file a conveyance of a mineral estate. This means that a potential purchaser is reliant on the most recent recorded deeds or title insurance that may not show that a severance occurred, nor its scope.[62]

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59. *See, e.g.*, Pigeon Creek, LLC, 183 Interior Dec. 256, 258 (IBLA 2013) (reserving "all coal, oil, gas and other minerals, including sand, gravel, stone, clay and similar materials, together with the usual mining rights, powers and privileges, including the right at any and all times, to enter upon the land and use such parts of the surface as may be necessary in prospecting for, mining, saving and removing said minerals or materials"); Spurlock v. Santa Fe Pac. R. Co., 694 P.2d 299, 309 (Ariz. Ct. App. 1984) ("In general, the owner of the mineral estate possesses the incidental right of entering, occupying, and utilizing the surface to explore for and develop the underlying minerals. If the grant or reservation specifically authorizes surface destruction by the mineral owner, then courts should give effect to this intention. Rarely, however, is such a right expressly conferred in the conveying instrument. Nevertheless, the court should examine the four corners of the document and give effect to any specific provisions regulating the use of the surface estate by the mineral owner.").

60. *Spurlock*, 694 P.2d at 309 ("The holder of the mineral estate owns such substances, but his development of these resources must not substantially interfere with the surface owner's estate. Only in this way can the general intention of the parties to create and enjoy two co-existing, individually valuable estates be given effect.").

61. *See id.*

62. *See* UNIF. DORMANT MINERAL INTEREST ACT (AM. BAR ASS'N 1987), 1 [hereinafter UDMIA] http://www.uniformlaws.org/shared/docs/dormant%20mineral%20interests/udmia_final_86.pdf ("Dormant mineral interests in general, and severed mineral interests in particular, may present difficulties if the owner of the interest is missing or unknown. Under the common law, a fee simple interest in land cannot be extinguished or abandoned by nonuse, and it is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals. Thus, it is possible that the only document appearing in the public record may be the document initially creating the mineral interest. Subsequent mineral owners, such as the heirs of the original mineral owner, may be unconcerned about an apparently valueless mineral interest and may not even be aware of it; hence their interests may not appear of record.").

Critics of DMIAs suggest that DMIAs produce economic inefficiencies for oil producers and mineral producers;[63] however, those inefficiencies are addressed in my modification of the UDMIA.[64] Yet my proposed DMIA stays true to the UDMIA's economic focus on *both* the surface-estate owners, whose remedies to mineral-interest severances are almost entirely limited under the common law, and the marketability of the severed mineral estate through the reduction of transaction costs associated with purchasing mineral interests for exploitation or other purposes.[65]

First, it is well established that in most states, including Arizona, severed mineral rights are a "vested property interest."[66] This vested property interest affords the interest holder all the protections of a fee simple,[67] and often precludes application of common-law abandonment.[68] Depending on the state, mineral interests have absolute protection from abandonment.[69] In states that afford an abandonment claim, practical proof problems arise: abandonment requires a showing of intent to abandon—"nonuse of the mineral interest alone is not sufficient evidence of intent to abandon."[70] However, it is within the Arizona's legislative power to create a statutory rule of abandonment from which a surface owner may make a claim for the severed mineral interest.[71]

Second, the cure of adverse possession is also problematic as possession of the surface is ineffective to extinguish mineral interests.[72] The only way to adversely

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63. *See* Joshua Elias Teichman, *Dormant Mineral Acts and Texaco, Inc. v. Short: Undermining the Taking Clause*, 32 AM. U. L. REV. 157, 175 (1982).

64. *See infra* Section III.A.

65. *See* UDMIA *supra* note 62, at 1.

64. *See, e.g.*, Texaco, Inc. v. Short, 454 U.S. 516, 525–26 (1982).

67. *Id.*

68. *See, e.g.*, Pocono Springs Civic Ass'n, Inc. v. MacKenzie, 667 A.2d 233 (1995) (holding that a family could not abandon a worthless property and had to continue to pay taxes); *see also* James C. Roberton, *Abandonment of Mineral Rights*, 21 STAN. L. REV. 1227, *passim* (1969) (stating that incorporeal herediments have often been held as abandonable, while corporeal herediments have not).

69. *See Texaco*, 454 U.S. at 540–41("The State of Indiana has historically afforded owners of *incorporeal* interests in minerals all the protections and privileges enjoyed by any owner of an estate in land held in fee simple. The mineral interests of the appellants here were thus assuredly within the scope of the dual constitutional guarantees that there be no taking of property without just compensation, and no deprivation of property without the due process of law."); *see also* Shirley Norwood Jones, *Constitutional and Practical Problems in Legislation to Terminate Non-Productive Mineral Interests*, 3 MISS. C. L. REV. 175, 180–81 (1983).

70. *See* UDMIA *supra* note 62, at 5.

71. *See supra* Sections I.A–B.

72. Roberton, *supra* note 68 at 1228; Patrick J. Garver & Patricia J. Winmill, MEDICINE FOR AILING MINERAL TITLES: AN ASSESSMENT OF THE IMPACT OF ADVERSE POSSESSION, STATUTES OF LIMITATION, AND DORMANT MINERAL ACTS, 29 RMMLF-INST 7 (1983); Jones, *supra* note 69, at 180–81 (states that treat oil and gas as incorporeal hereditaments tend to allow abandonment while those treating oil and gas as corporeal property tend to adhere to the common-law rule that real property cannot be abandoned.).

possess a mineral interest is to exploit and hold the mineral.[73] Because fractionalized mineral-interest holders are considered cotenants, each capable of exploitation, one interest holder can exploit the mineral and may not constitute notice of adverse possession via ouster of a *dormant-mineral-interest holder*.[74] Even such an act may require something more.[75] The exploitation requirement makes it even more difficult for a surface-estate holder to adversely possess a mineral estate. This common-law problem arises because adverse possession of a mineral interest replicates the adverse-possession doctrine of surface rights and does not take the practical problem of the surface-estate and mineral-estate relationship into consideration.[76] Even a claim concerning color of title cannot cure the mineral interest;[77] rather, it could only allow for a purchaser to be made whole by the seller, but only if a claim is filed within the statute of limitations.[78]

The remaining remedies available are equally as difficult to perfect, even on interests that for all intents and purposes have been abandoned. Absent an economic and realistic common-law mechanism, Arizona should turn to legislation.

2. Possessive and Distributive Action in DMIAs

Before the Indiana Statute, a mineral estate in Indiana was subject to a solitary negative claim—the mineral-estate holder had absolute control to dictate the terms of the estate and, depending on the reservations grant, the happenings of the surface estate.[79] After the Indiana Statute and the Court's ruling in *Texaco,* a mineral estate was subject to a state's positive claim over the mineral estate *and* a newly created subservient negative claim by the surface owner to the severed mineral in the reversion provision, but only after the mineral estate had been legally abandoned.[80] More simply, the positive claim to the severed mineral interest was Indiana's ability to create a statute of limitations, or abandonment provision, for a mineral estate.[81] The Indiana Statute, despite the positive claim and limitation, does

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73. Roberton, *supra* note 68, at 1229; Garver & Winmill, *supra* note 72, at 7; Jones, *supra* note 72, at 180–81 (1983).

74. *See* Fenner, *supra* note 11, at 510.

75. *Id.*

76. Garver & Winmill, *supra* note 72, at 7 ("In most instances, the doctrine of adverse possession will not operate to divest severed mineral interests. This is true, not because special rules apply to the adverse possession of severed minerals, but rather because the courts apply the usual rules. Those rules—open, notorious, exclusive, continuous, and hostile possession under claim of right for the statutory time period—were developed in the context of surface possession. When applied to a severed mineral interest, the rules will usually result in a conclusion that no adverse possession has occurred.")

77. *See, e.g.*, Wheatley v. San Pedro, 147 P. 135, 138–39 (1979) (for an adverse possession claim one must enter onto property that is owned by the original possessor, or for color of title enter onto a portion to constructively occupy the whole).

78. *See, e.g.*, Brown v. Lober, 389 N.E.2d 1188, 1191 (1979).

79. *See supra* Subsection I.A.1.

80. Texaco, Inc. v. Short, 454 U.S. 516, 529 (1982).

81. *See id.* at 526 ("We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."). The Court's rationale for the Statute not

not deny the mineral-estate owners' rights to assert the full breadth of their initial and long-held rights; rather, it only requires a *de minimis* action to notify the rest of the world that they are in fact acting upon those rights.[82]

However, if the statute had stopped there then a different level of scrutiny may have been required, even if the result would be the same.[83] Instead, the Indiana Statute went on and created both a negative claim to the severed mineral estate for the surface owner and a de facto positive restriction to that claim (the interested party must wait for the abandonment and grace period before asserting the negative claim).[84]

To explain in a different context, think of a Thanksgiving dinner with the whole family sitting around the turkey, mashed potatoes, stuffing, cherry-filled Jell-O (family recipe), and other delicious accouterments. Before everyone can eat they must wait for Grandma to walk through the line and distribute the meal. It was noon when the food had been set out. Grandma has not gone through the line. Now, it is three o'clock, and the family is starving, but Grandma still hasn't gone through the line and grabbed her food. Grandma doesn't even know that she is supposed to go through the line or that she can even go through the line. What complicates the ordeal beyond repair is that she is the only one responsible for distributing or withholding the distribution of food to the starving family.

To extend the analogy, imagine that it is five hours later, and the family has eaten some fast food and wants to clear the table and play a board game together. Grandma, though, has yet to go through the line. Absent an abandonment measure, the table will forever remain full of food. Post *Texaco's* upholding Indiana's DMIA, a legislature can essentially create a rule that allows the other family members to either eat the dinner or clear the table after a half hour. It does not remove the fact that Grandma has first choice and first use, and it requires the other family members to take action by proving that the time has passed before clearing the table or eating the food—the food is not given to them immediately upon sitting, nor is the food necessarily cleared.

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being a taking is quite simply that people should not be accorded a remedy at law for their own neglect. *Id.* at 530 ("In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect. We have concluded that the State may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation."). While this "neglect" seems a harsh stroke—surmised by the dissent and its discussion on adequate notice—the Court relies on the prospect of obligation associated within any right. This obligation requires action beyond a day-to-day existence if the right is to be held against all others.

82. *Id.* at 519 ("The 'use' of a mineral interest that is sufficient to preclude its extinction includes the actual or attempted production of minerals, THE payment of rents or royalties, and any payment of taxes; a mineral owner may also protect his interest by filing a statement of claim with the local recorder of deeds.").

83. *See, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1946 (2017).

84. *See Texaco, Inc.*, 454 U.S. at 518–19.

In creating a DMIA for Arizona that recognizes both proactivity and inherent obligation within a right, it is the opinion of this Note writer that it is not sufficient to create only the positive claim (the state's assertion of its right to limit an entitlement) to have a mineral interest revert to the surface owner after the statutory period.[85] A proper DMIA would necessarily create a subsequent negative claim for the surface owner, where the surface owner, acting upon the right of that negative claim, asserts the right to quiet title before (and only before) a mineral-interest holder asserts the right to a statement of claim. In order to verify that no claim has been made by the mineral-interest owner before the surface owner asserts its secondary right, notice and hearing must be built into the process.

By creating the secondary claim for the surface owner, an act does not "remove" the possibility to dispute the claim from the mineral-right owner.[86] Nor does the act inadvertently reward the secondary claim for its neglect (not filing a termination) while punishing the initial right holder for its neglect. Rather, the act requires that the surface owner go to the table to get the Thanksgiving Dinner or to clear the table. If the surface owner does not go to the table before the mineral-interest holder, the mineral-interest holder should retain all rights and renew its rights just as it would receive the bounty from the Thanksgiving table. The Court in *Texaco* found that automatic reversion without a Court's determination of non-use to be in violation of due process, stating:

> [N]o mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice. It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause-including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard-must be provided.[87]

While no notice is required before the abandonment, notice and hearing are required before the quiet-title determination reaches final judgment.

The caveat I propose is that once the abandonment has occurred, the owner of the abandoned mineral interest has the opportunity to assert ownership before the secondary claimant asserts ownership. While this necessarily means that there would be a time in which the object—the mineral estate—has two proper claimants, this would establish a policy initiative in Arizona to reward the claimant for proactive acceptance of the obligation and benefits of the mineral estate.

D. Why the Government as Mediator in Functional Property Dispute Prohibits a Takings Clause Claim In General

In applying the recordation-act standard to a DMIA, it is required to show that there is a functional dispute to the owner's ability to enjoy the rights associated

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85. *Id.* at 518.
86. *Id.* at 517.
87. *Id.* at 534.

with the object's obligation and ownership. General principles work here to fully distinguish the difference between regulation that invokes a Takings Clause analysis and regulation that does not.[88]

Analyzing the "character of the governmental action," Professor Mulvaney suggests that inverse condemnation claims as a result of regulatory actions generally succeed "only when the state cannot justify an imposition that is 'functionally equivalent' to the imposition sustained in an ordinary exercise of the eminent domain power without providing compensation."[89] To determine the "character of the governmental action" as only imposing requirements under the "ordinary exercise of the eminent domain power," Professor Sax provides a persuasive explanation as to what types of acts would fall under the ordinary exercise of a state's power:

> The basis for distinguishing between takings (compensation compelled) and exercises of the police power (compensation not compelled) was the nature of the government activity. Where private parties incur economic loss as a result of government enterprise activity, it was argued that the activity be classified as a taking. Where losses are incurred as a result of competition among various nongovernmental property owners, the government having acted as a mediator between those claims, it was argued that the losses should not be compensable as a constitutional right.[90]

In expressing this difference, Professor Sax uses the analogy of one property owner letting pollution runoff leave his or her property and enter another.[91] On the one hand, any regulation to the runoff of pollution essentially limits the profitability of the property owner producing the runoff; on the other hand, any lack of regulation essentially limits the profitability of the property owner whose land is affected by the runoff.[92]

In the dormant-mineral-estate holder's context, the regulation and lack of compensation for the regulation follows the theory that the *dormant* mineral interest ignores the *allocative* value of the object. The allocative value could be said to be the general obligation to exploit or otherwise actively use the estate, even if the use

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88. *See supra* Section I.A.

89. Timothy M. Mulvaney, *The Legacy of* Lucas: *Property-as-Society*, 2018 WIS. L. REV. __ (forthcoming 2018).

90. *See Takings, supra* note 19, at 150–51 (1971). While Sax's argument centers on an "extant public right" to property in an environmental-protection context, the core of the "extant public right" translates in "extant other right" to a private holding. This "extant other right" like the "public right" only appears when a harm or conflict occurs. *Id.* at 153 ("Under present theories of takings, if it is recognized that both the miner and the lower landowner are equal property owners, each using both his own tract and the tract of his neighbor, an anomaly results. To prohibit strip mining would be a taking of the miner's property, while a failure to prohibit the mining would be a taking of the lower owner's land.").

91. *Id.* at 178.

92. *Id.* at 181–82.

is an "active non-use".[93] Secondly, the surface owner remains subject to the "potential" use of an otherwise-dormant estate below the owner's feet and remains subject to the activities associated with future exploitation.[94] The fear of future exploitation or of repurchase thus puts the surface owner in a precarious position: does the surface owner develop the surface area subject to that encumbrance; or does the surface owner attempt to find, if possible, a *dormant-mineral-interest holder* and purchase that mineral interest, often at a price incongruent with economic efficiency?[95] Thus, a severed mineral estate is inherently at odds with the surface right, especially when the only instrument showing that a severed mineral estate exists is the granting instrument of the mineral severance that may or may not be recorded in the register of deeds.[96] A DMIA resolves this inherent conflict by requiring the mineral-estate holder to make "use" of the estate. To repeat, the statute merely makes a choice as to the well-being of the public and clarifies ownership of various estates.

The Supreme Court recognized, albeit implicitly, what Professor Sax suggested: a state can use reasonable means to safeguard the economic structure

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93. Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 484 (1983) [hereinafter *Decline*] ("I argue that Penn Central and its companions do not turn on the compensation/no compensation issue, which has traditionally dominated legal thinking about property. Instead, they address the allocational function of property. Put as bluntly as possible my thesis is this: We have endowed individuals and enterprises with property because we assume that the private ownership system will allocate and reallocate the property resource to socially desirable uses. Any such allocational system will, of course, fail from time to time. But when the system regularly fails to allocate property to 'correct' uses, we begin to lose faith in the system itself. Just as older systems of property, like feudal tenures, declined as they became nonfunctional, so our own system is declining to the extent it is perceived as a functional failure. Since such failures are becoming increasingly common, the property rights that lead to such failures are increasingly ceasing to be recognized.").

94. *See, e.g.*, Spurlock v. Santa Fe Pac. R. Co., 694 P.2d 299, 309 (Ct. App. 1984) ("In general, the owner of the mineral estate possesses the incidental right of entering, occupying, and utilizing the surface to explore for and develop the underlying minerals. If the grant or reservation specifically authorizes surface destruction by the mineral owner, then courts should give effect to this intention. Rarely, however, is such a right expressly conferred in the conveying instrument. Nevertheless, the court should examine the four corners of the document and give effect to any specific provisions regulating the use of the surface estate by the mineral owner.") (internal citations omitted).

95. UDMIA *supra* note 62. ("The owner of a dormant mineral interest is not motivated to develop the minerals since undeveloped rights may not be taxed and may not be subject to loss through adverse possession by surface occupancy. The greatest value of a dormant mineral interest to the mineral owner may be its effectual impairment of the surface estate, which may have hold-up value when a person seeks to assemble an unencumbered fee. Even if one owner of a dormant mineral interest is willing to relinquish the interest for a reasonable price, the surface owner may find it impossible to trace the ownership of other fractional shares in the old interest.").

96. *Id.* at 1 ("Under the common law, a fee simple interest in land cannot be extinguished or abandoned by nonuse, and it is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals. Thus, it is possible that the only document appearing in the public record may be the document initially creating the mineral interest.").

upon which the good (surface estate and mineral estate) of all depends, and the Court will hold that these public interests were entitled to be weighed against the mineral-estate owner's interests.[97] *Texaco* upholds this ideology saying the interest of the state to create an abandonment term is not arbitrary in and of itself, and it has always been clear that a state has the power to legislate "recording acts" and other requirements of property owners.[98] The recording requirement in *Texaco* follows the public's right to know the nature of ownership; thus, when someone does not adhere to the recording fee, despite autonomy to do so, a taking does not occur when, after a period of time, a new right and remedy is triggered for an interested party.[99]

Arizona law similarly states:

> For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process . . . . [t]here can be no question as to the right of the state to enact laws based on classification of the objects of legislation or of the persons whom it affects.[100]

If the aforementioned cannot be accepted as a rationale for the statute's regulation of an existing conflict, another conflict exists: taxes. Only if a tax decrease for the surface estate exists after a mineral estate is severed from the surface estate would a tax conflict be avoided. The only tax on mineral interests predominantly recognized is a tax on the exploited material.[101] In practice, a distinct difference in value of the surface rights exists between a unified surface/mineral estate and a surface estate with a severed mineral interest.[102] While Arizona precludes the taxing of "stocks of raw materials,"[103] it is the severed estate as an object, and not necessarily the material within the object, that retains some value,

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97. *See Takings*, *supra* note 19, at 158–59.

98. Texaco, Inc. v. Short, 454 U.S. 516, 529 (1982) ("It is also clear that the State has not exercised this power in an arbitrary manner. The Indiana statute provides that a severed mineral interest shall not terminate if its owner takes any one of three steps to establish his continuing interest in the property. If the owner engages in actual production or collects rents or royalties from another person who does or proposes to do so, his interest is protected. If the owner pays taxes, no matter how small, the interest is secure. If the owner files a written statement of claim in the county recorder's office, the interest remains viable. Only if none of these actions is taken for a period of 20 years does a mineral interest lapse and revert to the surface owner.").

99. *Id.* at 530 ("In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect.").

100. Sw. Eng'g Co. v. Ernst, 79 Ariz. 403, 410 (1955); *see also* Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 84 (1981) (where the Court denied compensation to an individual that would have received compensation under common law).

101. *See, e.g.*, UDMIA, *supra* note 62, at 1 ("the owner of a dormant mineral interest is not motivated to develop the minerals since undeveloped rights may not be taxed").

102. *Id.* at 1.

103. ARIZ. CONST. Art. IX §2(5) (West, Westlaw through 2003 amendments).

and it is the estate that would be taxed.[104] Without a requirement of the mineral interest to assert a right as to the claim, the conflict of tax allocation makes an almost impossible and incomprehensibly difficult turn.[105]

II. ADDRESSING CRITICISM OF DORMANT MINERAL INTEREST ACTS

The Supreme Court's ruling in *Texaco* was not without criticism. In this Part, I address both the criticism to the Court's rationale and the criticism to the functional socioeconomic outcome of the ruling.

A. Criticism of the Court's Rationale in Texaco

Criticism of the Court's rationale in *Texaco* is two-fold: first, there is no direct analogy to a statute of limitations or recording act to that of the dormant mineral interests; and second, the statutes do not resolve controversies.[106] Despite simple foresight concluding the existence of functional and practical controversy involved in dormant and unrecorded conveyances, critics claim that because no controversy exists with the mineral estate itself, a regulation of the estate constitutes a taking.[107] Such a clear distinction of the mineral estate as freehold estate and the surface as freehold estate is not compatible with the idea that "the right to a [mineral interest] consists of the right to mine it."[108] To mine an interest, more likely than not, is to enter upon the freehold surface estate.[109] While not every surface will require entrance for every mineral, the possibility exists, both in theory and practice, which inevitably engulfs the estates in a constant form of controversy.

In his criticism of *Texaco*, Professor Teichman said that the Court's rationale failed because the surface-estate holder has no claim to the mineral estate.[110] However, the Indiana DMIA inherently created (de facto) a new remedy for the surface estate; or to put it another way, the statute created an interest in the object that couldn't have been addressed prior to the legislation.[111] It's not that the surface owner didn't have an "interest"—the tax issue discussed above would suffice[112]—rather, there was no discernable legal remedy or interest commiserate with the functional interest. Thus, it is the corresponding creation of a remedy to a specialized interest that the Court recognized within the police power.[113]

But, this is precisely Professor Teichman's issue with *Texaco*: can the state hide behind a de facto created claim to avoid a taking? In Arizona and other states,

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104. *See infra* Section I.A.
105. *Id.*
106. *See, e.g.*, Teichman, *supra* note 63, at 175.
107. *See id.*
108. Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (quoting Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331 (1917)).
109. *See supra* Section I.C.
110. *See* Teichman, *supra* note 63, at 173.
111. *See supra* Section I.C.
112. *See supra* Section I.D.
113. *Id.*

the "doctrine of rule of property has no operation against subsequent legislation."[114] When legislation is prospective in nature, it does not encroach on judicial and common-law powers, but it can redefine them under the police power of the state.[115] Despite the appearance of a zero-sum equation—loss of remedy plus addition of remedy—the functional aspect of providing a curative element in dormant mineral estates creates an object-allocative incentive to act, whether informational in a recording act, pay-for-play market-entrance taxation, or distributive inclusion with title divestment.[116] This, of course, may be an abruption from the classical law of the demarcation of mineral and surface estate, but the classical demarcation is built on the illusion of purely autonomous interests, which the surface and mineral estate are not, and adheres to an ever more obsolete absolutist theory of property rights.[117] The Court in *Texaco* implicitly recognized the social obligation that each landowner has to the world and how the state through its legislation can develop enumerated rights to estates in which discrete members of the public are directly affected by the allocative use of the object within the estate.[118]

B. Socioeconomic Criticism of DMIAs

Socioeconomic criticism of DMIAs states that marketability and unification are solely a means of nepotistic transferring of property from foreign investors to domestic holdings.[119] This line of rationale does not consider "transaction costs" to doing business and their reach on profitability.[120] Haddock and Hall suggest a major difference between surface and mineral estates' profitability as the crux of their argument: surface rights are usually exploited continuously while mineral rights are often held in "inventory" until production is marketable.[121]

However, through this approach Haddock and Hall look at the exploitation of profits as being the object being owned, rather than the object itself—the estate.[122] Their approach looks at the proposed statute as violating free-market assertion of autonomy to the profits and implicitly suggest through that rationale that profits

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114. Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 81 (1981).

115. *Id.*

116. *See id.*

117. *See* John G. Sprankling, *Property Law for the Anthropocene Era*, 59 ARIZ. L. REV. 737, 739 (2017).

118. *See infra* Section IV.B.

119. David D. Haddock & Thomas D. Hall, *The Impact of Making Rights Inalienable:* Merrion v. Jicarilla Apache Tribe, Texaco, Inc. v. Short, Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, *and* Ridgway v. Ridgway, 2 SUP. CT. ECON. REV. 1, 23 (1983) ("Our conjecture is that the Lapse Act's real purpose was not to extinguish lost or abandoned mineral interests but to transfer wealth from 'foreign' mineral-rights owners to 'domestic' surface-rights owners. If such wealth transfers motivated the Act, then it would have been counterproductive to require or encourage notice of impending lapse, but it was desirable to permit in-state mineral-rights owners easily to retain possession by filing a claim in the county seat.").

120. *See id.; see infra* Section IV.A.

121. *Supra* note 119, at 23

122. *See id.*

themselves be the privileged right of ownership.[123] Simply put, this line of argumentation misses the point that the "profits" are not the object of ownership, and even if they were the object of ownership, DMIAs decide only who actually has the right to the profits as object.

III. A PROPOSED DORMANT MINERAL INTEREST ACT FOR ARIZONA

But what would a recordation fee look like in an Arizona DMIA? Below, I postulate one formulation. Overall, the language in Arizona's DMIA would follow that of the Uniform Dormant Mineral Interest Act, with the major exception listed just below, and would include multiple ways for a dormant-mineral-interest owner to retain rights.[124] For the full-proposed statute, please see the addendum.

A. Proposed Recordation Requirement

SECTION 4. RECORDATION REQUIREMENT

(a) A severed-mineral-interest holder, whether the interest is dormant or not, is required to register the interest with the county tax assessor each year forthcoming beginning [two years from the date of ratification]. The tax assessor will allocate a $5 recordation fee for any interest, whether or not already taxed. The $5 fee shall be for each interested party of each severed parcel. The tax assessor will maintain public records as to the interest holders and whether their interest has been maintained and will be made public as part of the surface-estate tax assessment. If after two years of not paying the fee, the mineral-interest holder is said to have abandoned the property, pursuant to an action by the surface-interest holder, the mineral interest will merge with the surface estate. The portion of the abandoned, severed mineral interest that merges will no longer be said to be severed and will no longer be subject to recordation and the recordation fee.

(b) For a mineral interest that is wholly contiguous underlying numerous surface parcels, the recordation fee is to be $5 per severed parcel but no greater than $50 per county except as delineated in (c) and (d) of this Section.

(c) For purposes of delinquent payment, a payment of the previous year's fee will suffice for payment even if there was an increase in surface parcels that would require a $5 recordation fee. However, upon notice by the county, the difference between the paid fee and the fee attributed to the mineral interest will be applied to the recordation fee for the following year.

(d) Mineral-interest holders are to be afforded good-faith credit when attempting to record their mineral interests with each respected county. If one mineral interest is recorded in one county while another is not recorded in the same county, it is to be assumed that the owner has recorded each individual interest. Any difference in attributable fee would be allocated to the following year's recordation fee along with a notice of payment. If the interest holder does not record his or her mineral interest the following year and has not made up the payment, the mineral interest is said to have not been acted on for one year.

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123. *See id.*

124. *See* UDMIA, *supra* note 62, at 5; *see also* Fenner, *supra* note 11, at 510.

(e) State, Federal, and Indian actors must comply with the recordation requirement, but the fee is waived. However, their interest is not abandonable according to this Act pursuant to Section 3 of this Act.

B. Analysis of Registration Requirement and Termination of Mineral Interests

This Section contains the guts of the proposed legislation. Section 4 of the proposed act differs greatly from both the UDMIA and other proposed DMIAs.[125] A recording requirement produces one major thing: free and easily accessible information to the general public. This information can be used by mineral-interest holders to see if their interest is shared, by prospective mineral developers, prospective surface developers, the state, environmental groups, or any other interested party. The recordation fee pays for the implementation and upkeep of a freely accessible and up-to-date online records system. The recordation fee attributed to the mineral-interest holder internalizes the transaction costs and prohibition of development of fractionalized mineral interests. The proposed recordation fee shall be a *de minimis* amount to the mineral-estate holder, but in a larger scale and in the long run, the requirement will decrease the transaction cost of finding, negotiating with, and procuring the estate.

The recordation-fee requirement comes with the requirement that counties maintain and provide records on the surface estate's tax assessment. The fees, both the recordation fees and the termination fee, will be used to fund and run systems and personnel to keep the records up to date. If the information is not up to date, the whole system falters and the recordation fee becomes an arbitrary fee. After the initial rush of recordation or quiet-title claims, the recordation fee shall be required at every closing and filed with the county similar to mandatory state-transfer returns of fee-simple conveyances. This fee is by no means to be confused with a tax on a sale or conveyance in violation of the Arizona Constitution,[126] nor will it violate Equal Protection measures by requiring a fee to be made by an estate holder versus a nonestate holder because the individuals are not similarly situated.[127]

The UDMIA does not have a similar recordation requirement and fee; rather, the UDMIA has a "Preservation by Notice" section, which defines how a mineral-estate holder can keep a mineral interest without "using" the estate.[128] However, the UDMIA notice fails in comparison to the internalization mechanism of the recordation fee. The UDMIA's section is attached in the addendum for your reference and could replace my drafted Section 4 above. However, absent Section 4, the only purpose of the legislation would be the unification of the fractionalized and severed mineral estates, and it misses the mark in terms of cost internalization important to the free flow of information, social welfare, and production available with a recordation fee and recordation on the surface estate's tax records.

Functionally, absent a recordation requirement and fee, the DMIA works as a de facto once-every-twenty-year event.[129] Absent a recordation requirement and

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125. *See, e.g.*, UDMIA, *supra* note 62, at 7–10.
126. ARIZ. CONST. art. IX, § 24 (West, Westlaw through Nov. 2008 amendments).
127. *See* U.S. CONST. Amend. XIV (West, Westlaw through P.L. 115–223).
128. *Compare* UDMIA, *supra* note 62, at 7–10; *with supra* Section III.A.
129. *See, e.g.*, UDMIA, *supra* note 62, at 7–10.

fee, a dormant-mineral-interest *holder* need only surface once a decade or every other decade. What the recordation fee contemplates is that when an owner actively non-uses the estate it is a distinction with a difference when compared with a neglectful or passive non-user. The passive non-user is one that does not file a notice nor uses the estate and yet retains all benefits of the estate. On the other hand, the active non-user internalizes market costs to actively and strategically not use the estate. Thus, the obligation to the object (the mineral estate) falls on all owners to actively pursue and maintain their claims. This obligation, shown below, is inherent within the action requirements central to our jurisprudence and a general social desire as a state and country.[130]

IV. GENERAL RATIONALES IN SUPPORT OF AN ARIZONA DORMANT MINERAL INTEREST ACT AND AN OBJECT-ALLOCATIVE FOCUS IN PROPERTY-BASED LEGISLATION

First, just because something could happen does not necessarily mean Arizona should do it. Second, a property-based legislation should not be administered solely because it is possible and economical, but legislatures should recognize other key conceptual make-ups that address property's place within society as a whole. In this Section, I address different theoretical concepts of property in society and how these various theoretical concepts support, in this instance, an Arizona DMIA. Also, I argue that these concepts support an object-first analysis of potential property rights. This argument is not the first of its kind; however, I attempt to synthesize the broad objectives into focus regarding the proposed DMIA.

A. Decreased Long-Term Transaction Costs

Transaction costs, simply, are the costs that accompany the use and transfer of economic assets.[131] These information costs have two main determinants: the level of communal cohesion and a state's capacity to collect and share information.[132] Currently in Arizona, two largely competing communal interests exist. On the one hand, there are the culturally and economically powerful mines; on the other hand, Arizona is the seventh-fastest growing state in the United States, and development of the surface estate is increasingly more profitable and in demand.[133] Given the more divergent the communal cohesion, the greater the

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130. *See* Texaco, Inc. v. Short, 454 U.S. 516, 530 (1982).

131. *See, e.g.*, Taisu Zhang, From Information to Preference: A Theory of Property and Sociopolitical Change, (February 18, 2018) (unpublished manuscript) (on file with author) (citing Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 593 (1988); Jedediah Purdy, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION (2010); Hanoch Dagan,Property: VALUES AND INSTITUTIONS (2011); Hanoch Dagan, *Property's Structural Pluralism: On Autonomy, the Rule of Law, and the Role of Blackstonian Ownership*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 27 (2014); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287 (2014)).

132. *See* Zhang, *supra* note 131, (manuscript at 2).

133. *See* Foster & Bonilla, *supra* note 52, at 1011.

"information cost" of doing business.[134] To counteract such information shortages, a detailed recordation system will provide for increased guarantee of ownership and ability to "exclude," which is paramount for a property owner.[135] A DMIA, while allowing for exclusion and means to exclude, also creates a mechanism where information costs are allocated to owners rather than the market at large and more readily allows contemporary outsiders a chance to enter the market.[136]

For their earlier point, Haddock and Hall contend that a purely economic rationale would preclude required "action" because it would cut down on mineral-estate profits.[137] However, a DMIA will likely create a *greater* net benefit for both the mineral estate *and* the surface estate by strengthening the exclusionary ability of the surface estate and by keeping up-to-date records of each estate freely available to the public, which fosters the potential for diversified economic gain through decreased transaction costs of finding current owners.[138] The yearly cost of the information will pay out to the decreased information costs to access the object (the estate/interest).[139]

Thus, to deny a DMIA—by adhering to a negative-right allocation of profit that looks at the owner's proposed use and efficiency within that use—would be inefficient to everyone but the current owner, and even potentially inefficient to the owner if the owner would want to sell. Instilling a distributive and inclusive model that requires an economic or social action to maintain an exclusionary right to the mineral estate internalizes the cost of holding the estate. Ideally, such holding triggers the stakeholder to engage in a broader economic analysis that would necessarily require different market categories and know-how to enter the estate-holder's conscious focus, diversifying the profit capabilities of the estate. The estate holder's doing this would allow for a greater social and economic efficiency while retaining the autonomous ability to do with the property as the owner wishes, whether efficiently or not.[140] The rationale being that because a market's adjustment absent external incentives requires high transaction costs (information in this instance[141]) that negate efficient allocative use, the increased cost of ownership requires a property owner to include external interests to inform his or her

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134. *See* Zhang *supra* note 129, (manuscript at 2, 9) ("[T]here are information costs that are specifically related to potential transactions: [I]f I were to purchase Blackacre, for example, I would want to know whether it has any liens attached, if there are any future interests, or if there are tenants on the grounds—anything that might burden my potential ownership . . . . Depending on how broadly one defines the term 'transaction cost,' it is possible to see these information costs as a subset of transaction costs.").

135. *Id.* (manuscript at 5).

136. *See supra* Sections I.A–III.B.

137. Haddock & Hall, *supra* note 119, at 23.

138. Zhang *supra* note 131, (manuscript at 23).

139. *See, e.g.*, Zhang, *supra* note 131 and accompanying text.

140. *Id.* (manuscript at 5). By maintaining a right to exclude, security and value associated with security remains. However, in a "preference diverse" landscape, the ability to exclude would require some "blood at the door" for full economic efficiency.

141. Lacy, *supra* note 10.

decision.[142] Thus, any inefficiency in economy would be that of the actor, the cost of which is internalized by the actor because of the *de minimis* requirement of a recording fee on the mineral estate, rather than a systemic inefficiency.

B. Social Obligation and Property's Inclusive Underpinnings

Professor Alexander and others suggest that a property doctrine entrenched within an individual's duty *to* fellow community members has existed since this Nation's founding.[143] It is only the breadth and impact of which that have not been fully analyzed and systemically developed.[144] This Note addresses, only in very broad terms, some of those "duty" and "obligation" functions.

1. Avoidance of Harm

First, an "obligation" principle has always included the well-understood caveat that owners cannot use their property in a way that harms others; however, the difficulty has been to define just what that means.[145] In *State v. Shack*, the court addressed the issue of trespass onto the land of a self-interested farmer who had hired migrant workers subject to state benefits.[146] The court held that people's rights to property (particularly their ability to exclude) are not absolute, and necessity, private or public, may justify entry upon the constitutionally protected lands.[147] The court explained that democratic well-being must remain the paramount concern of a system of law.[148]

Nuisance laws, public and private, have always allowed for states or private parties to assert a claim against private owners.[149] Private citizens can also file an injunction citing the public-trust doctrine.[150] People and the state itself have a general public-trust protection.[151] Health need not be the only concern of protection:

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142. For example: large-scale residential surface development vs. mineral development.

143. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 745–46 (2009).

144. *Id.*

145. *Id.* at 754.

146. State v. Shack, 277 A.2d 369 *passim* (N.J. 1971).

147. *Id.* at 373–75.

148. *Id.* However, a rebuttal to an argument based on the holding in *Shack* is that it is only inclusive to the extent that it defines property through the lens of the owner and what the owner cannot exclude. Rashmi Dyal-Chand, *Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law*, 63 AM. U. L. REV. 1683, 1748 (2014). According to Dyal-Chand, it was a case about ownership but not a case about the voices that needed the protection. *Id.* Regardless of alternative rulings that could have given express agency to the workers, the court did not need to go there for the agency to hold, albeit implicitly. Even if the court did side-step a potentially deeper issue, the court held that non-right holders could not be deterred fundamental services while on another's property. State v. Shack, 277 A.2d 369 *passim* (N.J. 1971).

149. *See* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1997); *Takings*, *supra* note 19, at 153.

150. *See, e.g.*, Spur Industries, Inc. v. Del E. Webb Development Co., 494 P.2d 700 (1972).

151. *Takings*, *supra* note 19, at 153.

economic protection of another person could suffice.[152] Thus, even in its classical-liberalism form, an obligation to non-fee holders has always curbed the right of the fee holders to do what they want on their property.[153]

2. Private Ownership as Restrictive

Second, an obligation exists in a system of property where every "ownership right" necessarily means a lack-of-ownership for everyone but the owner. The argument for such obligation is that members of a state or community are obligated to the betterment of fellow citizens, just as the state is obligated to the betterment of its citizenry. To answer why state imposition of legislative obligations to individual owners would be necessary, Professor Michelman summarizes the progressive property arguments as the following: (1) no difference in "evil" of uncontrolled private power and public power; (2) private power is no less constituted than governmental power; (3) exposure to superior private power leaves other private owners without the material independence required for effective citizenship; and (4) oppression occurs from a vast system of private choices, which only a public power may be able to remedy.[154]

However, these abusive private powers may not solely be mitigated by a state function because whatever state function would deter any potential privatized dominant-subordinate relationship will inevitably have to subject the subordinate to similar obligations to its detriment—essentially negating its own purpose.[155] Thus, it is in the face of this paradox that progressives suggest that property be *both* distributive as well as possessory—both broadening the potential claims of an object and restricting the "permanence" of that claim.[156]

Here, the Arizona DMIA functions both possessively and distributively.[157] It may not be an ideal fix, but it is better suited to encourage a proactive population when both the information and a potential means to the process of property exist. By requiring a recording fee directly proportional to the scale of property owned, the subordinate has a fighting chance to self-determination. It is important for this point that an active non-use is a form of a population acting proactively as opposed to passive non-use, which often implicates neglect. While constant proactivity has its own drawbacks, it is a better alternative than a property regime founded on passivity.

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152. *See, e.g.*, Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (1975).

153. Alexander, *supra* note 1431, at 753–56 (2009). ("'Noxious-use' doctrine freezes those uses of land that are for constitutional purposes a nuisance—meaning that the owner is responsible to the public for its well-being and may be regulated by the state without compensation—just for those actions that state common law has never permitted at any time in its history.").

154. Michelman, *supra* note 53, at 1335–36.

155. *Id.* at 1336.

156. *Id.*

157. *See supra* Section I.A.

3. Economic Obligations

Third, even in more economic and profit-based theories, social obligation exists. Professor Purdy has suggested "a freedom-promoting axiom" of property that centers around Adam Smith's theory of economics governed by principles of "natural liberty," which assumes that self-interested activity turns into socially beneficial courses of action.[158] At the core, Purdy's proposition wishes to define reform measures in property in order to serve human values and human freedom to the extent that they can turn potential capabilities into *actual* capabilities.[159] Purdy suggests that heightening the capabilities of people to participate in and with their property creates a greater form of freedom and makes the individual more fit to be free.[160] To achieve this, social inclusion *must allow possession to become right*.[161] Possession is not enough to fully be expressive because it invariably leaves a demarcated split between possessor and "right" holder.[162]

Here, a DMIA will effectively remove the split between the surface and the mineral estate. It will also allow for a discrete mechanism for the functional possessor (surface-estate holder) to have a legal claim to actuate a surface's capabilities. Also, the informational impetus of the proposed DMIA allows for those looking to actuate the mineral estate's capabilities to easily identify where they need to go to do so.

4. Property as Manifesting Capabilities

Fourth, Professor Alexander proposes a more dynamic and robust social-obligation theory, which he calls the "Human Flourishing" model.[163] The Human Flourishing model contains two important considerations.[164] First, the model is premised on "human beings develop[ing] the capacities necessary for a well-lived, and distinctly human life only in society with . . . [and] . . . dependent upon, other human beings . . . ."[165] The second important feature requires the capacity to analyze, alternatively, different "life horizons," and "think and feel deeply in [the] decision-making process."[166] Like the freedom-promoting model, a major aspect of the Human-Flourishing Model is the development of "capabilities," expressly those

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158. Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1251 (2005).

159. *Id.* at 1298.

160. *Id.* at 1257. According to Purdy, this pursuit of capabilities has "ossified into a form of institutional essentialism" that was not there in Smith's original work. *Id.*

161. *Id.* at 1266.

162. *Id.*

163. Alexander, *supra* note 1431, at 760.

164. *Id.* at 761–62.

165. *Id.* at 761.

166. *Id.* at 762.

outside a particular right holder.[167] The ability to analyze alternatively allows for the increased diversity of human capabilities.[168]

Here, it is difficult to "think and feel deeply in a decision-making process" when information is limited. To understand the course of property in Arizona, a system of identification and readily available and cheap or free information is imperative.[169] It is in this mode that DMIAs adopt an object-allocative inclusionary principle to property regulation. This principle makes the object the important nexus of consideration. Looking at the "object" first allows a more diverse population to appropriate the "use" of the object.[170] This is done in the DMIA by allocating cost to the owner of the object to incite action of some sort. In calculating how to "use" the property, the DMIA allocates certain "preferences." Professor Sax considered this type of appropriate use the "allocative value" of the object (or property).[171] This allocative value will be defined by the market's interest once the information is made public. This information being public represents the "inclusive" aspect of the DMIA—particularly, the right of the surface owner to file a claim to dormant mineral estates.

However, there is a problem with this foundation. Professor Dagan warned that "a naive dismissal of property's protective role may . . . lead to the systemic exploitation of weak property owners and to a cynical abuse of social solidarity, subverting the very aims it intends to further."[172] The deterioration of the protective role is the development of the secondary claim. This secondary claim would likely cause Professor Dagan to have "some skepticism about the disproportionate contribution to the community's well-being . . . particularly when contributions are required from politically weak or economically disadvantaged landowners."[173] By creating a fee, the downside would be that disadvantaged landowners would be more likely to sell their holdings at a reduced cost.

Dagan's concern essentially recognizes the weaker claim of the poor, or non-majoritarian allocative value, to the allocative value of the object they possess and their reduced possible use of the property.[174] This recognition leads Dagan to

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167. *Id.* at 762–64 ("The account of human flourishing on which the thicker conception of community adopted in this Article is based borrows from the 'capabilities' approach developed in recent years by Martha Nussbaum and Amartya Sen. That approach measures a person's well-being not by looking at what they have, but by looking at what they are able to do. The well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction, or what Sen calls 'functionings,' rather than a life characterized merely by the possession of particular goods, the satisfaction of particular (subjective) preferences, or even, without more, the possession of particular negative liberties.").

168. *Id.*

169. *See, e.g.*, Zhang, *supra* note 131 and accompanying text.

170. *See, e.g.*, Faisal Chaudhry, Securitizing Rent and the Other New Property (November 2, 2017) (unpublished manuscript) (on file with author).

171. *See, e.g.*, *Decline*, *supra* note 93, at 484.

172. Alexander, *supra* note 143, at 772.

173. *Id.*

174. *Id.*

conclude that an object-orientated ideology based on allocative values necessarily equates to the weaker positioned people inevitably losing their claims because of the non-allocative use, as articulated by a majority, of the property to which they have a right.[175] However, the possibility of this occurring does not necessarily determine the outcome for DMIAs.[176] To mitigate Dagan's concern, an object-allocative inclusionary model would necessarily recognize the right of the holder while asserting a minimal right to a previous non-right holder.[177] To keep the costs of the weaker claim minimized, the costs will be proportional to scale of ownership.

Any regulation will inevitably affect some greater than others; however, a grace period should allow for the allocatively "poorer" claimants to prepare themselves for the fee. Also, allocative principles would suggest that society, as a conglomeration of people, will determine some uses to be weaker rights.[178] While allocation to a weaker right is an unfortunate aspect of property regulation and property in general, DMIAs mitigate the difficulty of the weaker right holders by asking only for a *de minimis* payment in absence of other profit-providing uses.[179]

C. Property as Personhood

As alluded to in the previous Section, property has an inherent connection to personhood, or development of an individual within society: "A person is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity by which he exacts respect for himself from all other rational beings in the world."[180] Professor Michelman suggests at least three reasons for constitutional protection of a person's dignity.[181] First, the founders feared that people's differences would trigger a self-interest too strong for simple civil functions to overcome, and that a "redistributively inclined majority would" inevitably be "ready to violate a minority's proprietary interests and rights."[182]

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175. *Id.* at 772–73.

176. *Id.*

177. *See supra* Sections I–I.A.

178. *See Decline*, *supra* note 93, at 484.

179. *See supra* Section III.B.

180. IMMANUEL KANT, THE METAPHYSICS OF MORALS 230 (Mary Gregor ed. & trans., Cambridge Univ. Press 1991) (1797).

181. Michelman, *supra* note 53, at 1328.

182. *Id.* However, the suggested failure of the Occupy Movement to promulgate any direct action could negate this claim. *Compare* Andy Ohstroy, *Why Occupy Wall Street Failed*, HUFFINGTON POST THE BLOG (May 13, 2012 12:36 AM or PM ET), http://www.huffingtonpost.com/andy-ostroy/the-failure-of-occupy-wal_b_1558787.html, *with* Michael Levitin, *The Triumph of Occupy Wallstreet*, THE ATLANTIC (June 10, 2015), https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/. The only successes of "Occupy" appear to be indirect, such as increased minimum wage and other redistributive mechanisms. *Id.*

One reason for this could be that the founders underestimated the power associated with possessory property, and the property, in all its machinations, could be said to be representative of wealth and that those with established possession become the "faction." Thus, a historicist's interpretation would be that the landed created the government because of their position as the landed and minority and that they provided a greater

Second, property lent itself nicely to a "[categorical] separation of law and politics" upon which a self-limiting government depended.[183] And third, private property was not just a "private self-interest" issue, but was intertwined with the nation's core as a "secure base of material support."[184] It is from this constitutionally protected framework of personhood and capabilities we must begin.

Personhood, it is suggested, requires a community for its full expression.[185] One theory suggests that this expression is achieved through contractual principles.[186] Professor Dean Hanoch Dagan suggests that a "[c]ommunity is valuable only insofar as it contributes to the satisfaction of some individual preference," is never an "end in itself," is both "contractual and welfarist," and is "bound together by mutual agreement, sometimes express but commonly implied, to associate with each other to pursue some shared end."[187]

However, these aspects of personhood protect only those that currently possess property. Professor Yoo, in terms of intellectual-property and copyright law, recognizes this possession as an end artifact.[188] Similar to the psychological, aesthetic, and social-theory principles that affect creation of an artistic artifact (for example, a book or poem),[189] these same motivators influence and articulate through a person's engagement with other forms of property in the care of someone's home or some other plenary-protected property.[190]

Here, a DMIA recognizes both the mineral-estate holder and all the other potential estate holders as being in the process of creating their own expression.[191]

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framework to "keep" rather than guarantee allotment. *See* U.S. CONST. AMEND. V. (first requiring possession for violation of due process and takings)

Professor Michelman's Progressive Property Critique illuminates this point further:

> there is no difference, abstractly and in principle, between the evil of exposure to uncontrolled so-called private power, where one has neither formal, legal voice in the power's exercise nor effectively countervailing private power of one's own, and the evil of exposure to uncontrolled public power, where a political minority confronts a determinedly self-interested majority.

Michelman, *supra* note 53, at 1335.

183. Michelman, *supra* note 53, at 1329.

184. *Id.*

185. Alexander, *supra* note 1431, at 758.

186. *Id.*

187. *Id.* at 759.

188. *See* Christopher S. Yoo, Rethinking Copyright and Personhood (February 18, 2018) (unpublished manuscript) (on file with author).

189. *Id.*

190. *See id.* (manuscript at 17 ("Most importantly, creative works are important not just as artifacts that are extensions of the will of their creators, but also as sources of engagement that can help a person achieve self-actualization.").

191. *See id.* (manuscript at 35) ("The process-oriented perspective on personhood reflected in the psychological, aesthetic, and philosophical literature shifts the focus away from creative works as static artifacts and instead reconceives of them as essential contributors to a dynamic process of self-actualization.").

The DMIA does not restrict the self-determinative force of the mineral-estate holder but only limits it by requiring the mineral-estate holder to act on the right to self-determination.[192] What a DMIA really does is open up the possibility for a currently unentitled population to self-determine when the mineral-estate holder does not act on the right. It is not only the preservation of the artifact (the traditional property right) that is important, or the end use of the object (profits from the mineral estate), but also the reduced process cost for a willing person to self-determine when previously not available.

Yoo's article states that it is in the human act of creating their world around them, where the "systemic quality of the whole person" allows "the fusion of the person[s] and [their] world."[193] It is at these moments "when people are 'most fully realizing themselves, most mature and evolved, most healthy, when, in a word, they are most fully human.'"[194] In this way, a DMIA allows both the mineral-estate holder and the corresponding surface-estate holder to act on a mineral estate and realize their respective capabilities.

CONCLUSION

An individual's interest in an object does not exist in isolation. People rub into and press against each other's interests in economic, social, and political means in ways unimagined centuries and even decades ago. The previous centuries' rationales of property circumnavigate an exclusionary principle; however, this principle has shown its flaws. In such a time, it is inevitable that legislation emerges through the cracks to supplant and modify the common law of property, making the regime and doctrine more robust and versatile.

An object-focused, allocative-inclusionary use principle may not be the best principle, but its application to dormant mineral interests gives a person a right to an otherwise-dormant interest. This additional right provides a potential outlet from economic and social stagnancy of an object and will theoretically make a greater number of people, including the original right holders, prosper to a greater degree despite the incurred costs.

It is in this context that Arizona should adopt its own DMIA and recordation requirement and fee. While the need for it is currently mitigated with private ownership being the minority, uncertainty in the federal retention of property interests mandates that action should be taken. Thus, Arizona would be best served by having an inclusive mechanism in place to confront whatever future comes Arizona's way.

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192. *See supra* Section I.A–B and accompanying text.

193. *See* Yoo, *supra* note 188, (manuscript at 23) (quoting Abraham H. Maslow, *The Creative Attitude*, 3 THE STRUCTURIST 4, 9–10 (1963)).

194. *Id.* (quoting Abraham H. Maslow, *The Creative Attitude*, 3 THE STRUCTURIST 4, 6 (1963)).

ADDENDUM

I **A. The Proposed Dormant Mineral Interest Act**

SECTION 1. STATEMENT OF POLICY

(a) The public policy of Arizona is to enable and encourage marketability of real property and to mitigate the adverse effect of dormant mineral interests on the full use and development of both surface estate and mineral interests in real property.[195]

(b) This Act shall be construed to effectuate its purpose to provide a means for termination of dormant mineral interests that impair marketability of real property.

SECTION 2. DEFINITIONS

(a) "Mineral interest" means an interest in a mineral estate, however created and regardless of form, whether absolute or fractional, divided or undivided, corporeal or incorporeal, including a fee simple or any lesser interest or any kind of royalty, production payment, executive right, nonexecutive right, leasehold, or lien, in minerals, regardless of character.

(b) "Minerals" includes gas, oil, coal, other gaseous, liquid, and solid hydrocarbons, oil shale, cement material, sand and gravel, road material, building stone, chemical substance, gemstone, metallic, fissionable, and non-fissionable ores, colloidal and other clay, steam and other geothermal resource, and any other substance defined as a mineral by the law of this State.[196]

(c) "Surface Owner" means an individual who has concurrent or sole legal right or title to a present interest in real property from which a mineral interest has been severed, except the holder of a leasehold interest or an estate for years.[197]

SECTION 3. EXCEPTIONS

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195. A comment section could include something on the public policy of Arizona to levy tax on and make known for public disposition the owners of the mineral estate. It is within the foundations of Arizona to foster an action-forward society, of which the ability to act also includes the obligation to the fellow citizens of the State of Arizona in order to act.

196. *See* UDMIA *supra* note 62, at 5, 6. As to the definition of "mineral" it should be noted that "mineral" will ultimately be applied as to how it is defined in Arizona. The list is meant to be an all-inclusive list of those minerals as being defined as such within the State. *Id.* at section 3 comments.

197. *See* Fenner, *supra* note 11 at 516. Defining surface owner broadly is important to unification in that surface owner is anyone with an interest in the surface. *Id.* at 520.

(a) This Act does not apply to:

(1) a mineral interest of the United States or an Indian tribe, except to the extent permitted by federal law; or

(2) a mineral interest of this State or an agency or political subdivision of this State, except to the extent permitted by state law other than this [Act].

(b) This Act does not affect water rights.

SECTION 4. REGISTRATION REQUIREMENT

(a) A severed-mineral-interest holder, whether dormant or not, is required to register the interest with the county tax assessor each year forthcoming beginning [two years from the date of ratification]. The tax assessor will allocate a $5.00 recordation fee for any interest, whether or not already taxed. The $5.00 fee shall be for each interested party of each severed parcel. The tax assessor will maintain public records as to the interest holders and whether their interest has been maintained and will be made public as part of the surface estate tax assessment.[198] If after two years of not paying the fee, the mineral-interest holder is said to have abandoned the property and pursuant to an action by the surface interest holder, the mineral interest will merge with the surface estate. The portion of the abandoned severed mineral interest that merges will no longer be said to be severed and not subject to recordation and the recordation fee.

(b) For a mineral interest that is wholly contiguous underlaying numerous surface parcels, the recordation fee is to be $5.00 per severed parcel but no greater than $50.00 except as delineated in (c) and (d) of this section.

(c) For purposes of delinquent payment, a payment of the previous year's fee will suffice for payment even if there was an increase in surface parcels that would require a $5.00 recordation fee. However, upon notice by the county, the difference between the paid fee and the fee attributed to the mineral interest will be applied to the recordation fee for the following year.

198. This section is not in the Uniform Dormant Mineral Act and is the most controversial and subject to invalidity. Further analysis will be given in the next Section, but the recordation fee will be similar to other forms of property-registration fees.

(d) Mineral-interest holders are to be afforded good-faith credit when attempting to record their mineral interest with each respected county. If one mineral interest is recorded in one county while another is not recorded in the same county, it is to be assumed that the owner has recorded each individual interest. Any difference in attributable fee would be allocated to the following year's recordation fee.

(e) State, Federal, and Indian actors must comply with the recordation requirement, but the fee is waived. However, their interest is not abandonable according to this Act pursuant to Section 3 of this Act.

SECTION 5. TERMINATION OF DORMANT MINERAL INTEREST

(a) The surface owner of real property subject to a mineral interest may maintain an action to terminate a dormant mineral interest once a two-year grace period for recordation pursuant to Section 4 has passed. A mineral interest is dormant for the purpose of this Act if the interest is unused within the meaning of Subsection (c) for a period of 20 or more years immediately preceding commencement of the action and has not been preserved pursuant to Section 6, and has not fulfilled their recordation requirement pursuant to Section 4. "Immediately preceding" precludes an action to quiet an interest if unused at any 20-year period before the "immediately preceding timeframe." The action must be in the nature of, and requires the same notice as is required in, an in rem action according to the State of Arizona. The action may be maintained whether or not the owner of the mineral interest or the owner's whereabouts is known or unknown. Disability or lack of knowledge of any kind on the part of any person does not suspend the running of the 20-year period.

(b) If a recordation fee pursuant to Section 4 is delinquent for two consecutive years, the surface owner of real property subject to a mineral interest may maintain an action to terminate the dormant mineral interest, regardless of whether the owner has "used" the interest pursuant to (c) of this section.

(c) For the purpose of this Section, any of the following actions taken by or under authority of the owner of a mineral interest in relation to any mineral that is part of the mineral interest constitutes use of the entire mineral interest:

(1) Active mineral operations on or below the surface of the real property or other property unitized or pooled with the real property, including production, geophysical exploration,

> exploratory or developmental drilling, mining, exploitation, and development, but not including injection of substances for purposes of disposal or storage. Active mineral operations constitute use of any mineral interest owned by any person in any mineral that is the object of the operations.
>
> (2) Payment of taxes, other than those required in Section 4, on a separate assessment of the mineral interest or of a transfer or severance tax relating to the mineral interest.
>
> (3) Recordation of an instrument, other than the requirement in Section 4, that creates, reserves, or otherwise evidences a claim to or the continued existence of the mineral interest, including an instrument that transfers, leases, or divides the interest. Recordation of an instrument constitutes use of (i) any recorded interest owned by any person in any mineral that is the subject of the instrument, and (ii) any recorded mineral interest in the property owned by any party to the instrument.
>
> (4) Recordation of a judgment or decree that makes specific reference to the mineral interest.

(d) This Section applies notwithstanding any provision to the contrary in the instrument that creates, reserves, transfers, leases, divides, or otherwise evidences the claim to or the continued existence of the mineral interest or in another recorded document unless the instrument or other recorded document provides an earlier termination date.

(e) Notice of termination procedure is required and must comply with Arizona's due process requirements for notice to known or unknown parties.

(f) Only upon a termination proceeding by the surface owner could a mineral interest merge with the surface estate. The mineral-interest owner can rectify its recordation delinquency at any time after the two-year period so long as the action was done before any termination proceeding by the surface owner.

> (a) For reasons of certainty, it is suggested that a one-time termination proceeding be done by the surface-estate owner, regardless of whether

the owner believes there is a claim outstanding or not.[199]

SECTION 6. LATE RECORDING BY MINERAL OWNER

(a) In this Section, "litigation expenses" means costs and expenses that the court determines are reasonably and necessarily incurred in preparing for and prosecuting an action, including reasonable attorney's fees.

(b) In an action to terminate a mineral interest pursuant to this Act, the court shall permit the owner of the mineral interest to record a late notice of intent to preserve the mineral interest as a condition of dismissal of the action, upon payment into court for the benefit of the surface owner of the real property the litigation expenses attributable to the mineral interest or portion thereof as to which the notice is recorded.

(c) This Section does not apply in an action in which a mineral interest has been unused within the meaning of Section 5(b) for a period of 20 or more years; this only applies to those mineral-interest holders who are active but have failed to register according to Section 4.[200]

SECTION 7. EFFECT OF TERMINATION

A court order terminating a mineral interest merges the terminated mineral interest, including express and implied appurtenant surface rights and obligations, with the surface estate in shares proportionate to the ownership of the surface estate, subject to existing liens for taxes or assessments.[201]

SECTION 8. SAVINGS AND TRANSITIONAL PROVISIONS

(a) Except as otherwise provided in this Section, this Act applies to all mineral interests, whether created before, on, or after its effective date.

(b) An action may not be maintained to terminate a mineral interest pursuant to this Act until two years after the effective date of the Act.

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199. *See* UDMIA, *supra* note 62, at 10–12.
200. *Id.* at 12–13.
201. *Id.* at 13–14.

> (c) This Act does not limit or affect any other procedure provided by law for clearing an abandoned mineral interest from title to real property.
>
> (d) This Act does not affect the validity of the termination of any mineral interest made pursuant to any predecessor statute on dormant mineral interests. The repeal by this Act of any statute on dormant mineral interests takes effect two years after the effective date of this Act.[202]

SECTION 9. SEVERABILITY CLAUSE.

> If any provision of this or its application to any person or circumstance is held invalid, the invalidity does not affect any other provision or application of this that can be given effect without the invalid provision or application, and to this end the provisions of this are severable.

B. Commentary on the Proposed Act

1. Statement of Purpose, Definitions, and Exclusions

The Act's purpose would be to foster development of both of the surface-estate and the mineral-estate interest: for this the Uniform Dormant Mineral Interest Act language suffices.[203] As a general matter, the police power of the state can create and modify proprietary entitlements.[204] Arizona never receives the land and therefore avoids triggering Section 3 of Article 10 of the Arizona Constitution, which prohibits personal preference of lands gained by the State and subjects lands to auction.[205] This is somewhat divergent of recently proposed acts, but the structural

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202. *Id.* at 14.
203. *Id.* at 15.
204. *See supra* Section III.
205. ARIZ. CONST. art. 3 § 10 "Section 3. No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves.").

uniformity of the proposed legislation allows for the substantive individual nature of Arizona's Act to remain easy to read while maintaining its independent clauses.[206]

Definitions would make clear what would constitute a "mineral," "mineral interest," and the "surface owner" and would closely follow what is laid out in the UDMIA.[207] In defining "surface owner," it is important to make sure the definition is read as broadly as possible.[208] It is also important to clarify, for means of staying true to the purpose of recordation information, that the only distributive right associated with the abandonment claim is that of the surface holder.[209] This is different from something like Minnesota's DMIA that considers the mineral estate to be "forfeited" and then passed to the state sovereign and subject to a public auction.[210] The auction would necessarily not be seen to have the purpose of "unification" or "recordation."

Exclusions would include Federal and Indian lands and any land owned by the state.[211] Conversely, contemporary discussions and committees are currently considering whether or not to "privatize" federal lands, or to re-grant large swathes of federal land to states.[212] While this Note neither wishes to comment on nor condone such discussions, an Arizona DMIA would set up a preemptory regime as a means of control and mechanism for information gathering and dissemination.

Replacement of Section 4:

> (a) An owner of a mineral interest may record at any time a notice of intent to preserve the mineral interest or a part thereof. The mineral interest is preserved in each county in which the notice is recorded. A mineral interest is not dormant if the notice is recorded within 20 years next preceding commencement of the action to terminate the mineral interest or pursuant to Section 6 after commencement of the action.
>
> (b) The notice may be executed by an owner of the mineral interest or by another person acting on behalf of the owner, including an owner who is under a disability or unable to assert a

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206. *Compare* UDMIA, *supra* note 62, at 3, *with* Fenner, *supra* note 11, at 122.

207. *See* UDMIA *supra* note 62.

208. *See id.*; Fenner *supra* note 11, at 220.

209. Fenner, *supra* note 11, at 220.

210. Minn Stat. § 93.55 https://www.revisor.mn.gov/statutes/cite/93.55

211. It should be noted that the federal government holds the greatest amount of mineral interests. UDMIA, *supra* note 62 at 3. While there is a movement toward Arizona potentially re-acquiring lands held by federal government, the DMIA would exclude Federal and Indian reservations from the statute. *See, e.g.*, *id.;* Fenner, *supra* note 11 at 121.

212. *See, e.g.*, Kristin Brady, *Arizona County Opposes Transfer of America's Public Lands to the State*, THEODORE ROOSEVELT CONSERVATION PARTNERSHIP (June 7, 2016), http://www.trcp.org/2016/06/07/arizona-county-opposes-transfer-of-americas-public-lands-to-the-state/; Heather Hansman, *Congress Moves to Give Away National Lands, Discounting Billions in Revenue*, THE GUARDIAN (Jan. 19, 2017, 9:39 AM), https://www.theguardian.com/environment/2017/jan/19/bureau-land-management-federal-lease.

claim on the owner's own behalf, or whose identity cannot be established or is uncertain at the time of execution of the notice. The notice may be executed by or on behalf of a co-owner for the benefit of any or all co-owners or by or on behalf of an owner for the benefit of any or all persons claiming under the owner or persons under whom the owner claims.

(c) The notice must contain the name of the owner of the mineral interest or the co-owners or other persons for whom the mineral interest is to be preserved or, if the identity of the owner cannot be established or is uncertain, the name of the class of which the owner is a member, and must identify the mineral interest or part thereof to be preserved by one of the following means:

> (1) A reference to the location in the records of the instrument that creates, reserves, or otherwise evidences the interest or the judgment or decree that confirms the interest.
>
> (2) A legal description of the mineral interest. [If the owner of a mineral interest claims the mineral interest under an instrument that is not of record, or claims under a recorded instrument that does not specifically identify that owner, a legal description is not effective to preserve a mineral interest unless accompanied by a reference to the name of the record owner under whom the owner of the mineral interest claims. In such a case, the record of the notice of intent to preserve the mineral interest must be indexed under the name of the record owner as well as under the name of the owner of the mineral interest.]
>
> (3) A reference generally and without specificity to any or all mineral interests of the owner in any real property situated in the county. The reference is not effective to preserve a particular mineral interest unless there is, in the county, in the name of the person claiming to be the owner of the interest, (i) a previously recorded instrument that creates, reserves, or otherwise evidences that interest or (ii) a judgment or decree that confirms that interest.[213]

213. UDMIA, *supra* note 62, at 7–10.