PROPERTY

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I. PROLOGUE: THE CASE OF GLEBE FARM

Andrew and Gail Wallbank were married in St. John the Baptist Church, Aston Cantlow, Warwickshire, England, in September 1973.[1] It is a historic stone parish church, listed as Grade 1,[2] built in the 1200's, and "nestled in a leafy churchyard."[3] In 1990, the couple inherited Glebe

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1. Victoria Moore, *Pay £500,000? God Help Us, Say Couple Forced by a Medieval Law to Foot the Bill for Church Repairs*, MAILONLINE (Dec. 13, 2008), http://www.dailymail.co.uk/news/article-1094403/Pay-500-000-God-help-say-couple-forced-medieval-law-foot-church-repairs.html [hereinafter "God help us"].

2. Properties in England that have historic importance are placed on the Statutory List of Buildings of Special Architectural or Historic Interest, and graded on a scale of I, II or III. A grade I listed property is one "of exceptional interest, sometimes considered to be internationally important." *Listed Buildings*, ENGLISH HERITAGE, http://www.english-heritage.org.uk/caring/listing/listed-buildings/ (last visited Apr. 20, 2011). An excellent photo and detailed description of the Church can be found on the English Heritage, Images of England website, IoE number 305366. *Images of England*, ENGLISH HERITAGE, http://www.imagesofengland.org.uk/Details/default.aspx?pid=2&id=305366 (last visited June 11, 2011).

3. Sara Scharefer Munoz, *In England, Buying the Farm Can be a Fate Worse Than Debt*, WALL ST. J. (May 20, 2010), http://online.wsj.com/article/SB10001424052748704247904575240044025240632.html.

Farm, located a quarter mile from St. John's, from Gail's father.[4] The name of the farm was pregnant with meaning, for the land had formerly belonged to the parish church as "glebe land."[5] Little did they suspect that within the year, their inheritance would burden them with unlimited financial obligations to St. Johns, and that over the next 19 years, they would be embroiled in a legal battle that would turn on concepts that were as old as the parish church itself, and that would not end until the land was no longer theirs.

Pollock and Maitland, in their famous work *The History of English Law,* traced the evolution of the concept of glebe, or church, land in England from Roman times, when all church property was under the control of the civic administration and the Bishop, into the era of the barbarian tribes. Roman legal concepts required advanced commerce and orderly government, but when society provided neither, it was the owner of the lands on which a church was built who ended up with what came to be known as the right of patronage.[6] While the right of patronage might seem to entail control of that which was on the land of the patron, other factors were also at play:

> [T]he bishop will not consecrate the altar unless a sufficient provision of worldly goods is secured for the priest. The owner or patron, whichever we call him, must hand over to the church and an appurtenant glebe to the priest by way of 'loan'. In modern England it is in this context and this context only that we still know, though only in name, the 'land-loan' of the old Frankish world: the parson still has a 'benefice,' a *beneficium.*[7]

From this rude beginning, gradually, "the parish church became an owning unit with rights distinct from those of the bishop . . . on the one

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4. *Moore, supra* note 1. Many of the articles suggest that Andrew inherited the land, but that is an error. It was Gail's inheritance, which is confirmed by the Wallbanks' website, which tells the couple's side of the story. CHANCEL REPAIR LIABILITY, http://chancelrepair.org (last visited Apr. 20, 2011) [hereinafter "chancelrepair.org"]. Andrew was actually added to the litigation when it was determined that he was a freeholder with his wife. *See also Wallbank v. Parochial Church Council of Aston Carlow & Wilmcote with Billesley, Warkshire,* [2001] EWCA (Civ) 713, 3 (Eng.) [hereinafter Wallbank Case, Ct. of Appeals].

5. Ruth Gledhill, *Couple Lose £95,000 to Church Over 'Arcane' Law*, THE TIMES (June 27, 2003), http://property.timesonline.co.uk/tol/life_and_style/property/article1145713.ece [hereinafter "Couple Lose £95,000"].

6. SIR FREDERICK POLLACK & FREDERIC WILHELM MAITLAND, THE HISTORY OF ENGLISH LAW, Vol. 1, 497-98 (Cambridge Univ. Press 1968) (1895).

7. *Id.* at 498.

hand and from those of the founder or the patron on the other."[8] Yet it did so "behind a mystic veil," for in popular thought and speech the saints to whom they were dedicated owned the churches.[9] Nonetheless, because there were obviously human beings directing the temporal affairs of the saint, these persons developed their own status as "the *rectores* of his church."[10] Eventually, through a process combining both material and mystical elements, a church came to be thought of as a person—a corporate person—an intellectual construct with important implications for the growth of English law.

Eventually, the rectory of the parish came to include the right to receive a tenth of the product of the labor of the parishioners (tithes), the entire production of the glebe land, which was now all the church's land other than the parsonage house and grounds, and the rector was to use the result to maintain himself and to keep the chancel of the church in repair.[11]

In the 1500's, the reformation as wrought by Henry VIII saw the dissolution of the monasteries as Henry's desire to be the supreme figure in the English church dovetailed with his enormous appetite for new sources of revenue.[12] Monastic lands were placed in private hands by the King,[13] but this revolutionary expropriation did not sweep away all the old habits of mind and thought. The new owners of these lands remained responsible as lay rectors—the successors to the *rectores*—to fund repairs to the chancel of church buildings.[14] Thus, under what is known as chancel law,[15] there were "5,200 pre-Reformation Church of England

8. *Id.* at 499.

9. *Id.*

10. *Id.* at 500.

11. *Wallbank Case,* [2001] EWCA (Civ) 713, [10] (appeal taken from Eng.).

12. *Id.* at [11].

13. *Id.*

14. REPORT OF THE CHANCEL REPAIRS COMMITTEE, PRESENTED BY THE LORD HIGH CHANCELLOR TO PARLIAMENT 2-4 (1930) [hereinafter "1930 COMMITTEE REPORT"].

15. A chancel is actually a limited portion of a church, usually defined as the area directly around the altar. *See* DICTIONARY.COM, http://dictionary.reference.com/browse/chancel (last visited Apr. 20, 2010). The nave, the portion of the church where the parishioners gathered, was commonly considered the obligation of the parishioners. *See Glossary*, ST. LAWRENCE CHURCH, TOWCESTER, http://www.mkheritage.co.uk/SLT/glossary.html (last visited Apr. 20, 2011). As stated by the appellate court in the Glebe Farm case: "The liability of the rector of a parish to repair the chancel of the parish church...has been known to the law from time immemorial. It was part of the medieval cannon law and has been absorbed by the common law; but its form has changed radically over time." *Wallbank Case,* [2001] EWCA (Civ) 713, [9] (appeal taken from Eng.). The Chancel Repairs Act of 1932 created the currently applicable procedural rules. *Wallbank Case*, [2001] EWCA Civ 713 [9 and 18] (appeal taken from Eng.).

and Church of Wales Parishes" with land subject to these rules.[16] For many years the lay rectors were themselves entitled to the tithes. However, in 1936, the tithes were abolished, but not the whole of the chancel law.[17]

A few years earlier, in 1932, the Chancel Repair Act had itself been modified by a triumph of the material over the mystical. The former penalty for those who failed in their duty as lay rectors to maintain the chancel of the church, excommunication from the Church of England, was revoked (although to be sure, the clerical authorities also had resort to the power of the state, for there could be committal to the High Court for contempt of the ecclesiastical court, and as late as 1927 the refusal of J.H. Stevens to pay for repairs of the Hauxton parish church landed him in Bedford Gaol).[18] Instead, parochial church councils could now sue the lay rectors in civil courts for the cost of repair. And so the law remained through the terrible years of the Second World War, its long and painful aftermath in Britain (where rationing lasted until 1954), and all of the swinging sixties—38 years of immense cultural and political change.[19]

Gail Wallbank's father bought Glebe Farm at auction in 1970 for £41,500.[20] While the sale documents for that 179 acre farm stated that a chancel repair liability "is still subsisting and capable of being enforced"[21] in fact that liability appears to have attached solely to a 6.5 acre field within the farm known as Clanacre.[22] In 1743, Lord Brooke had been awarded Clanacre in return for maintaining the chancel, [23] and like "the black spot" in Treasure Island, once placed, the mark remained to haunt its recipient.[24]

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16. Helen Pidd & Jo Adetunj, *A Blessing for Vicars, a Curse for Residents: Church Invokes Archaic Tax to Fund Repairs*, GUARDIAN (Dec. 8, 2008), http://www.guardian.co.uk/artanddesign/2008/dec/08/church-of-england [hereinafter "A Blessing for Vicars"].

17. *Id. See also Wallbank Case,* [2001] EWCA (Civ) 713, [9] (appeal taken from Eng.) (indicating that this "medieval cannon law" is now, albeit radically changed, a part of the common law).

18. *Hauxton Parochial Church Council v. Stevens*, [1929] P. 240 (Eng.), *discussed in* 1930 COMMITTEE REPORT 2-12.

19. For a readable summary of the period from 1945-1982, see A. MARWICK, BRITISH SOCIETY SINCE 1945 (1982).

20. *Moore, supra* note 1.

21. *Id.*

22. *Id.*

23. Sarah Hall, *Farmer Spared £100,000 Bill for Church Repairs*, THE GUARDIAN (May 18, 2001), http://www.guardian.co.uk/uk/2001/may/18/sarahhall (last visited Apr. 11, 2011).

24. *See* ROBERT LOUIS STEVENSON, TREASURE ISLAND 25 (Doyle Studio Press 1996) (1883).

Gail recalled that her father made inquiries about the chancel repair obligations at the time, including speaking with the local vicar, and he was satisfied that the law was an anachronism without legal force, a recollection buttressed by minutes from 1968 of the local Parochial Church Council (or PCC) in which the vicar stated that he had been advised by the Diocesan lawyers that the chancel obligation had no weight in law.[25]

Then, in 1990, a letter from the church wardens arrived advising, "[a]s the owner of Glebe Farm, you know that there is a charge . . . for the maintenance and the repair of the Chancel of St. John the Baptist."[26] The Wallbanks offered to donate Clanacre to the church but the offer was rejected; this was hardly surprising since the value of that 6.5 acre tract was estimated at £6,000-7,000 and the repair bills for the church had already reached £66,094 in 1992 and were at £91,791 in 1994.[27] The Wallbanks told the Daily Mail that their annual income in 2008 was approximately £63,000.[28]

A nine year legal battle ensued that quickly became a test case for the Chancel Repair Act.[29] At the trial court before Judge Ferris, the Wallbanks maintained that the law of chancel liability was uncertain at common law, at least under these circumstances. However, the trial court could not agree, nor did the court of appeals, finding the law plain enough.[30] But the English common law was not the only law at issue. England is subject to the European Convention on Human Rights under the Human Rights Act of 1998,[31] and the Wallbanks argued that chancel liability is incompatible with one's rights under that Convention,[32] which prohibits a public authority from interfering in an arbitrary fashion with

25. *Moore*, *supra* note 1. That chancel repair obligations seemed to have been viewed as a vanished obligation that could be safely ignored by the late 1960s is confirmed by the 1985 report of the Law Commission, Property Law Liability for Chancel Repairs. THE LAW COMMISSION, PROPERTY LAW LIABILITY FOR CHANCEL REPAIRS, REPORT, 1985, H.C. 152, (U.K.) [hereinafter "1985 Law Commission"]. The report notes "[t]he difficulties which [chancel repair liability] causes were drawn to the Commission's attention in 1969, and although some work was done on the subject it was dropped because it was judged not to be urgent." *Id.* at 1. According to the Wallbanks website, the General Synod of the Church actually recommended "repeal of the liability" in the 1980s. *See Chancel Repair Liability,* CHANCELREPAIR.ORG, http://chancelrepair.org/6.html (last visited Apr. 11, 2011).

26. *Moore*, *supra* note 1. The Wallbanks rented the farm after inheriting it; they did not live there.

27. *Id.*

28. *Id.*

29. *See generally Wallbank Case, Ct. of Appeals*, [2001] EWCA (Civ) 713.

30. *Id.* at [24].

31. *Id.* at [6].

32. *Id.* at [23].

the peaceful possession of one's property.[33] The court of appeals ruled in favor of the Wallbanks, concluding that chancel liability violated the Convention in two ways:

> The first is that [the liability] . . . is a form of taxation which does not meet the basic standard . . . for the protection of citizens' possessions from the demands of the state, because it operates arbitrarily. The second is that the way in which the common law singles out the owners of such land from other lands is unjustifiably discriminatory.[34]

However, when the case reached the House of Lords, it was concluded that even if the Human Rights Act applied, the PCC's were not "public authorities" and hence their actions could not contravene the Act and the Convention.[35] The Lords made plain that they looked unfavorably on the common law rule of chancel repair liability;[36] but it was also clear that their reservations about the Human Rights Act's broad application to the acts of the parish councils governed their conclusions.[37] This was indeed understandable; more troubling was the sense that the law of chancel repair liability was somehow justifiable as necessary to achieve a larger purpose. Lord Hope of Craighead stated: "there is no other source of private funding that can be relied upon, and there is no right of access to public funds. Unsatisfactory though the system may appear to be, there is no obvious alternative."[38] This sentiment encapsulates the sense of cultural inertia, rationalization of unfairness, and lack of energy to achieve reform that is associated with the worst of the remnants of the *ancien regime.*[39]

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33. *Id.* at [26].

34. *Id.* at [53].

35. *Aston Cantlow & Wilmcote with Billesley Parochial Church Council v. Wallbank*, [2003] UKHL 37, [13] [hereinafter "Lord's Decision"].

36. *See, e.g.*, *id.* at [2] (describing the rule as "arcane and unsatisfactory").

37. *See generally id.*

38. *Id.* at [74].

39. One wonders if Lord Hope has read his Trollope. In 1855, the first book of Anthony Trollope's famous *Barsitshire Chronicles* appeared. In that novel, a thoughtful clergyman who serves as a warden of a hospital for the poor is confronted by the fact that his office and the salary that goes with it has come to provide a highly comfortable income, while the 12 pensioners in his care are entitled to very modest recompense. This was not the result of some evil scheme, but rather occurred insensibly, over generations, as the property that had supported the bequest grew in value. The book is a beautifully balanced and thoughtful analysis of the situation—one that was "ripped from the headlines" of Victorian Britain, where many similar cases were coming to public attention. How were the needs of the church, which included the support of its clergy, to

The case of Glebe Farm, compelling as it is in many ways, was not the best test case for the law, as their sale documents disclosed the chancel liability.[40] Cases could have easily arisen where the conveyancing documents were silent, since some land, like Glebe Farm, had been registered as subject to chancel liability, but in many parishes this was not the case.[41] Although it is quite possible that conveyancing documents fail to note the existence of a potential chancel law liability, under the terms of the Land Registration Act of 1925, Chancel Repair Liability is characterized as an overriding interest in registered land, meaning that it remains an obligation even if it is not shown on the registry.[42]

There is, however, the Record of Ascertainments, which sets out the obligations of the title owners in a parish to the chancel repair. Nonetheless, the complexities in making use of this record are many, and they are not a complete guide to chancel liability.[43] It should be noted, however, that protection of various kinds from the chancel law liability has come into being–much of it as the result of the publicity surrounding

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be balanced against the spirit of justice and fairness which a rapidly changing world seemed to have turned topsy-turvy? A. TROLLOPE, THE WARDEN (Oxford Univ. Press 2008) (1855). For the background with respect to the issue in Victorian Britain, *see id.* at 6 ("the *cause célèbre* of the forties and fifties was that of the Hospital of St Cross at Winchester, where the Reverend Francis North, 5th Earl of Guilford, was enjoying from the Mastership an income considerably greater than the revenue applied to the charitable purpose of the hospital . . . "). One of the main reasons that these problems persisted was because the aristocratic structures of the *ancien regime* remained intact when it came to the established Anglican Church. Positions in the Church of England came via connections to the aristocracy. In the last quarter of the 19th century "most parish clergymen held their public office essentially as the gift of private transaction with the owner of the right of presentation." D. CANNADINE, THE DECLINE AND FALL OF THE BRITISH ARISTOCRACY 255 (Yale Univ. Press 1990).

40. *Wallbank Case, Ct. of Appeals*, [2001] EWCA (Civ) 713, [21].

41. One website reports that up to 40% of land in England and Wales could have potential chancel liability, but this seems to be an overstatement. *See* CHANCEL.ORG.UK, http://www.chancel.org.uk/chancel-repair-liability.php (last visited Apr. 20, 2010).

42. *Chancel Repairs,* NAT'L ARCHIVES http://www.nationalarchives.gov.uk/documents/ifa_11_chancelrepairs.pdf [hereinafter "NA Research Catalogue"]. For the wary landowner, the following statement from the English National Archives in its Research Catalogue on Chancel Repairs is disconcerting: "There is no single central register which can be used to identify all chancel repair or other liabilities or restrictions attached to land and property in England and Wales. Enquirers are strongly recommended to check the deeds, the Land Registry and current landowners for relevant information." *Id.*

43. *Id. The Guardian* quotes one barrister as remarking: "Chancel repair liability is a blot on the legal landscape. It is hard to discover, its enforcement can be capricious, and the extent of the liability may exceed the value of the land burdened. It is wholly unsatisfactory that this form of liability should still exist in 2008." *A Blessing for Vicars, supra* note 16.

the Wallbank's case. There is now a web-based service that will both search addresses against parish boundaries and carry out a full fledged search at the National Archives. The search firm also offers insurance of up to £2,000,000 for 25 years for £60.[44] Insurance from various other sources is also available.

Six years passed after the decision by the House of Lords before the case of Glebe Farm actually came to an end. In 2009, The Wallbanks sold Glebe Farm at auction for £850,000.[45] Fifteen minutes before the auction, an agreement had been signed with the Church of England, freeing the land from future liability under chancel law for a payment of £37,000.[46] From the sale proceeds, the Wallbanks also paid the £230,000 (plus VAT) of repair liability that had been upheld by the Lords, and paid (or recouped) their £250,000 in legal fees.[47] Andrew Wallbank commented that: "It is a great relief that we have a resolution but I feel we have been treated very, very harshly."[48] Gail Wallbank criticized the church authorities, saying that their behavior was "completely against Christian principles."[49]

Notwithstanding Gail Wallbank's conclusion, the Church of England, guided by its Legal Advisory Commission, determined that the result of the Lord's decision should result in a very different view of the principles at stake.[50] In a somewhat more elegant—and legalistic—version of the time-honored rubric that "charity begins at home," the Advisory Commission opined that PCCs had an obligation to pursue chancel repair rights, stating: "A PCC is a charity so its members are subject to the usual duty of charity trustees to exercise their power in its best interests."[51] "They cannot therefore simply choose not to enforce chancel repair liability."[52] Pollack and Maitland would appreciate the irony, for on behalf of the things that were once thought of as the

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44. Chris Partridge, *Why Archaic Laws Could Land You with Repair Bills for the Local Church*, THE INDEPENDENT (Nov. 15, 2006), http://www.independent.co.uk/life-style/house-and-home/property/why-archaic-laws-could-land-you-with-repair-bills-for-the-local-church-424390.html.

45. Sandra Haurant, *Chancel Repair Couple Sell Property at Auction*, THE GUARDIAN (Oct. 21, 2009), http://www.guardian.co.uk/money/2009/oct/21/homeinsurance-insurance.

46. *Church Repairs Row Over as Farm Sold Off*, SHROPSHIRE STAR (Oct. 21, 2009), http://www.shropshirestar.com/latest/2009/10/21/church-repairs-row-over-as-farm-sold-off/.

47. *Id.*

48. *Id.*

49. *Id.*

50. *A Blessing for Vicars*, *supra* note 16.

51. *Id.*, *supra* note 16.

52. *Id.*, *supra* note 16.

property of the saints, through the same amalgam of materiality and mysticism that transformed churches into entities with the status of persons, the churches have been further transformed into charity, such that those acting on behalf of charity must enforce its rules, no matter how uncharitable the result. The Advisory Commission did express one caveat, however. If the bad publicity from enforcing the chancel repair law is counter-productive, and such action might harm "the PCC's 'ability to pursue its object of promoting in the parish the pastoral mission of the church, or by alienating potential financial support,'" then the PCC might be excused from insisting upon it.[53] One might also be excused for concluding that in the minds of the Law Advisory Commission, the material has none too subtly triumphed over the mystical; one might also suspect that the saints would not approve of charity being a servant of the law, rather than the law being the handmaiden of charity. And so the *ancien regime* has persisted in England in the case of Glebe Farm, with this body of law intact, even if the fate of its soul is in doubt.

II. INTRODUCTION: THE PERSISTENCE OF THE *ANCIEN REGIME*

The historian Arno Mayer, in his book *The Persistence of the Old Regime*,[54] argued that the horror of the First and Second World Wars was, in various ways, the outcome of the grip that the feudal remnants of Europe's political, religious and cultural systems continued to maintain in the years from 1870 onward.[55] It is an interesting thesis and, when introduced, it was a revisionist one, because previously the emphasis had been on the impact of modernization and industrialization in creating the climate for these terrible events.

Mayer was hardly the first to introduce the theme of continuity with the *Ancien Regime*. Alexis de Tocqueville wrote *The Old Regime and the French Revolution* in 1856, stressing the continuity between past and present ways of thinking and acting.[56] After the Second World War, French historians, most notably Braudel, articulated the concept of the *longue durre*–that there are deep, underlying structural aspects to human

53. *Id., supra* note 16.

54. ARNO MAYER, THE PERSISTENCE OF THE OLD REGIME: EUROPE TO THE GREAT WAR (1981).

55. *Id.* at 3-15.

56. ALEXIS DE TOCQUVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION (Francois Furet & Francois Melonio eds., Alan S. Kahan trans., Univ. of Chicago Press 1998) (1856).

affairs that persist over very long time periods, and which have greater importance than the dramatic vicissitudes that garner so much attention.[57]

While historians have long argued as to whether events are caused primarily because we are in the grip of the past or buffeted by change, as lawyers, we have a conflicted relationship with historical ways of thinking. Those trained in the common law have an awareness of the long period of time over which common law rules have come into existence, as well as the long period of time that various statutes have dealt with problems from one generation to the next. A respect, even devotion, to precedent is an essential component of law, and precedents often, directly or indirectly, span generations. Yet law requires a certain assumption that it is not historical at all. Rather, it relies to a significant extent on the belief that law is always of the present. We have a constitution in the United States that was ratified 200 years ago, yet it is said to represent the consent of the governed, without need for a new plebiscite every 20 years.[58] It is hardly uncommon to find statutes in Michigan that remain unchanged from 100 years ago, and common law rules that stretch beyond that. While alteration is, of course, possible and can be frequent, the interpretation of laws tends not to be burdened with historical analysis.[59] To the extent that, in the interpretation of law, there

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57. *See* FERNAND BRAUDEL, HISTORY AND THE SOCIAL SCIENCES: THE *LONGUE DUREE*, *reprinted in* HISTORIES: FRENCH CONSTRUCTIONS OF THE PAST 115, 115-53 (Jacques Revel & Lynn Hunt eds., Arthur Goldhammer et al. trans., 1995). *See also* JACQUES REVEL, INTRODUCTION, IN HISTORIES: FRENCH CONSTRUCTIONS OF THE PAST (Jacques Revel & Lynn Hunt eds., Arthur Goldhammer et al. trans., 1995) (describing Braudel's views on *longue duree*).

58. *See, e.g.*, A. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 609 (2008) ("The challenge is to answer the complaint that following an ancient constitution amounts to dead generations governing the living.").

59. In the field of constitutional law, there has been some effort to look at historical context to help understand a provision's meaning (*see, e.g.*, Thirteenth and Fourteenth amendments, P. BRANDWEIN, RECONSTRUCTING RECONSTRUCTION (1999) for a sociological analysis of the historical debate), although textual analysis has a preferred, if not a privileged, position. And when it comes to a garden variety state court case or statute, it is exceptional when there is even resort to legislative history let alone historical analysis more broadly. Nevertheless, as noted by W.W.B. SIMPSON, LEADING CASES IN THE COMMON LAW 10 (Oxford Univ. Press 1996 (paperback edition with corrections)), "There is indeed something at first very peculiar about the tradition, in legal academia, of suppressing curiosity about cases. Both modern and ancient cases are, at least as a general rule, studied without anyone knowing, or indeed caring who the litigants were, why they litigated, what they were trying to achieve, what they did achieve . . . " As he goes on to note, these questions are not answered in the law reports. *Id.* at 11-12. However, as his work goes on to show, there is great value in looking for the answers to these questions if one wants to understand in a sense broader than that of most legal thinking what a case "means." Historical context allows us to see discrete cases or statutes as specific trees in

has been an emphasis from time to time—and especially during the last 25 years—it is on language separate and apart from historical context. Law as an historical artifact receives little attention in the day to day work of lawyers, judges and government officials.[60]

One of the great advantages in reviewing a body of cases, even over a period as short as a year–hardly the *longue durre*!–is that it gives us the opportunity to take a more historical approach to the law and look for trends and patterns that would elude us in our day to day focus on the particular. The Michigan real property cases during this *Survey* period frequently reveal the historical aspects of the law, and the way in which past patterns, archaic if not ancient, persist. Sometimes the impact of these laws is benign or even beneficial; in other instances, it seems arbitrary and anachronistic. In each case the laws discussed reflect vestiges of past ways of thinking about and articulating the rules that govern us. They recreate the world view of an earlier age, and often codify results which may be consistent with precedent but are less compatible with our contemporary notions of what reasonable results the law is intended to bring about, and even, on occasion, challenge our understanding of what such fundamental concepts as the consent of the governed are intended to mean.

The term *ancien regime* is most often associated with pre-revolutionary France, and is said to encompass remnants of feudalism, aristocratic rule, a unique role for the church, and an absence of social justice.[61] However, like Meyer, I see a broader meaning and so use the

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the larger forests; without such a vantage point, we shall always be at risk for remaining lost in Dante's dark wood of error, D. ALIGHIERI, THE DIVINE COMEDY, Canto 1.

60. The emphasis on the words of the statute and their "plain meaning" generally ignores historical analysis, which would suggest consideration of such factors as the problem that the law was intended to address at the time it was enacted, the policy that the law appears to have been intended to promote, how the law fit with other laws at the time of its enactment, and so forth. The use of precedent in interpreting statutes at least implicitly takes some of these factors into account. The use of legislative history, which has now fallen into disfavor in many quarters, does so as well. Because law is a social, cultural and political institution, which develops and changes over time, a historical understanding of law can be helpful in assessing meaning, and, more importantly, determining whether laws are serving desirable ends summarized under the heading of "justice."

61. *See, e.g.*, Gilbert Shapiro, *Class in the French Revolution: A discussion* in THE SOCIAL ORIGINS OF THE FRENCH REVOLUTION 237 (R.W. Greenlaw, ed., 1975), noting that the term "feudalism," cited as the essence of the Old Regime "refers to all those institutions of the old regime providing special rights, privileges, or powers to the first two orders of the realm, or to privileged groups of commoners, including (besides seigneurial rights) privileges in legal processes (such as *committimus*); exclusive access to careers in the church, the military, and the diplomatic corps; deferential rights to church pews, the wearing of swords, and the use of weather vanes; recreational privileges

term to reflect long held patterns of custom and practice; a disconnectedness between rules and the rationales that once made them reasonably just and efficient; the existence of arbitrary distinctions based upon historical circumstances of long ago; and the habit of mind so well encapsulated in Lord Hope's statement: "Unsatisfactory though the system may appear, there is no obvious alternative."[62]

The case of Glebe Farm may seem like an extreme example of this persistence of the *ancien regime* in the law. But, as we will see, many of the aspects of that case which so illuminate the congruence between law and history and politics and culture, remain at play in the Michigan real property law cases that have been decided in the past year. These include the importance of church law; the persistence of parallel schemes of law; the insistence upon different results for those similarly situated based upon distinctions which have become arbitrary; the unknowability of the rules and procedures that will ultimately govern a case–not because there are no rules and procedures but because they place control in the hands of a third party; the conflicts caused when there is a change in some rules but not others even though there had been a logical link between them; the persistence of legal rules that date back 500 years or more; and, finally, an appreciation that the law will, from time to time, preserve what is acknowledged to be a completely unfair–even illegal–result, especially when it comes to the State collecting money. We may read of a case like Glebe Farm and think to ourselves, "I would not have expected this to happen in England, but at least it doesn't happen here." But in ways that are good, bad and indifferent, we would be wrong.

III. DISCUSSION: THE PERSISTENCE OF THE *ANCIEN REGIME*

A. The Law of the Church

Unlike Britain, America and Michigan have no established churches.[63] Without its history of the Anglican Church as an affiliate of the state, England's chancel law might have developed in a very different way, or been abolished altogether. Yet despite our very different history from that of England over the last 225 years, we in Michigan are hardly free of controversies that involve a curious mixture of legal principle and

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such as the rights to hunt, fish, and keep pigeons and rabbits; the rights of assembly and political representation; and, perhaps most important, tax privileges, exemptions, and advantages. The fact that many of these, the seigneurial rights particularly, came in later years into the hands of *roturiers* does not change their designation as 'feudal.'"

62. *Lord's Decision*, [2003] UKHL 37, [74].

63. *See* U.S. CONST. amend. I.

religious practice. Since religious organizations own property in Michigan, and because these organizations can become embroiled in internecine quarrels, periodically the courts are called upon to resolve them. A recent example is found in the case of *Lamont Community Church v. Lamont Christian Reformed Church.*[64]

The Lamont Christian Reformed Church (the "Local Reformed Church") was an affiliate of the Christian Reformed Church in North America, which is an organization constituted in accordance with a Church Order (the "Denomination").[65] That Denomination established various governing bodies to make decisions for the Local Reformed Church.[66] The Local Reformed Church was incorporated over 100 years ago, and acquired the property at issue in 1959.[67] In 1998, the Local Reformed Church created the Lamont Christian Reformed Church Property Corporation (the "Property Corporation") because, according to the court, if the Local Reformed Church "decided to leave the Denomination, it could do so and retain the church property."[68] For the same reason, the Property Corporation was made non-denominational.[69]

In 2004, the consistory of the Local Reformed Church began active efforts to leave the Denomination and approved a committee report in favor of that course of action.[70] Issues surrounding the pastor of the Local Reformed Church complicated the process, but on October 30, 2005, 132 signatures were obtained committing to a new congregation, and shortly thereafter, the Lamont Community Church (the "New Church") was incorporated.[71]

The New Church demanded that the Local Reformed Church turn over the property; the Local Reformed Church asked for the assistance of the Denomination to resolve the dispute.[72] The Denomination, through one of its administrative entities called the Zeeland Classis, concluded that the New Church had failed to follow proper denominational procedures; was not expressing doctrinal differences but rather was unhappy about decisions relating to the pastor; had engaged in un-Christian behavior; and that the Local Reformed Church was the

64. 285 Mich. App. 602 (2009).
65. *Lamont Cmty. Church*, 285 Mich. App. at 604.
66. *Id.* at 605.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 605-06.
71. *Lamont Cmty. Church*, 285 Mich. App. at 606-07.
72. *Id.* at 607.

"continuing, legitimate church and therefore the rightful agent of the church's property."[73]

The New Church then took its complaint to the court, arguing that it represented a majority of what had been the membership of the Local Reformed Church (although it was subsequently conceded that this had not been established)[74] and that the relevant inquiry was not the decision of the Denomination, but rather the bylaws of the non-denominational Property Corporation.[75]

The trial court considered the matter in cross motions for summary disposition.[76] The general legal framework was not in dispute. Under Michigan law and federal law, property disputes are decided either by what is known as "hierarchical/policy approach" or the "neutral principles of law approach," with the former given preference over the latter.[77]

The Denomination had been determined to be hierarchical by the Michigan Supreme Court in a prior case, as opposed to "congregational," where property ownership is vested at the local level.[78] Thus, it seemed that this might be a simple analysis: a hierarchical church had determined that the property was owned by the local church and not the new church; therefore, the local church prevailed. However, the existence of the Property Corporation was a potentially complicating factor. What, if anything, was the significance of the transfer to the apparently non-denominational Property Corporation? Did that cut off the rights of the Denomination?

Furthermore, there was a more esoteric question added by the trial court: was the Denomination hierarchical for doctrinal purposes, but not with respect to property matters?[79] Ultimately, the trial court determined that the Denomination is hierarchical as to real property ownership.[80]

On the fundamental issue of whether the Denomination was hierarchical as to all relevant matters, property included, the court of appeals agreed with the trial court,[81] although it disapproved of the trial court's methods.[82] The court of appeals found that the only relevant

73. *Id.* at 607-08.
74. *Id.* at 608 n.2.
75. *Id.* at 608.
76. *Id.* at 609.
77. *Lamont Cmty. Church*, 285 Mich. App. at 624-25.
78. Borgman v. Bultema, 213 Mich. 684 (1921).
79. *Lamont Cmty. Church*, 285 Mich. App. at 610.
80. *Id.*
81. *Id.* at 626.
82. *Id.* at 617-18.

inquiry was, in essence, what the Denomination said of itself in its constituent documents or in its official pronouncements.[83]

The relevant Michigan Supreme Court precedent dated back to 1921.[84] In 1970, the Denomination had adopted model articles of incorporation.[85] These, it was argued by the New Church, were "congregational," not "hierarchical."[86] However, the articles changed again, in 1980, and once more in 1997.[87] The last incarnation seemed to revert to the hierarchical model, and so the court of appeals concluded, saying the language of various orders of the Denomination "evidence an intent to set the Denomination up as the arbiter of property disputes, making it a hierarchical organization with respect to property ownership."[88]

As to the significance of the transfer to the Property Corporation, the court found that the question turned on whether that transfer was valid.[89] If it was, there was authority for the proposition that "neutral principles" rather than a hierarchical analysis was proper.[90] However, the court noted that "the Denomination . . . has already decided this issue and determined that [the New Church] was without authority both to create the Property Corporation and to transfer the church property"[91] without proper consent. The court of appeals concluded that it was bound to defer to this decision.[92]

It is ironic that England's "unwritten" constitutional scheme, which by custom and statute incorporates an established church, and America's, which expressly and permanently forbids one by a written constitution, come to what is essentially the same result in church property cases: the established denomination, which pronounces itself the arbiter of church property disputes, will be deferred to as the authoritative decision-maker. Hence, in England, the invocation of chancel law in the first instance is left to the church and its local parish authorities; meanwhile in the United States, including Michigan, the ownership of churches is a matter for the church. In this manner, the *ancien regime* persists, in the one case as a bulwark of religious freedom (or at least a tactical concession to its preservation), and in the other, as a bulwark of maintaining the

83. *Id.* at 617.
84. *Id.* at 619.
85. *Lamont Cmty. Church*, 285 Mich. App. at 620.
86. *Id.*
87. *Id.*
88. *Id.* at 624.
89. *See id.* at 625.
90. *See* Bennison v. Sharp, 121 Mich. App. 705 (1982).
91. *Lamont Cmty. Church*, 285 Mich. App. at 625-26.
92. *Id.* at 626.

established church (or at least a tactic to help ensure that there will be funds to maintain the church property that is tied to its continued existence).

The lesson here would seem to be that ancient schemes of property law emanating from the long history of church law and self rule can evolve within seemingly similar and yet strikingly different varieties of Anglo American law, to remain vital to the determination of critical rights of ownership. In Britain, the church, by virtue of ownership of a piece of land, can conscript all your material resources to maintain its property;[93] in Michigan, the church can determine who owns the property that was contributed and maintained by those who no longer accept its tenets.[94]

B. Common Law and Statutory Law: How Presumptuous Can You Get?

The case of Glebe Farm shows the persistence of at least two venerable legal regimes—that of church law and that of common law—all the while persisting in a world of mostly statutory law. Just as *Lamont Community Church v. Lamont Christian Reformed Church* shows the persistence of church law in Michigan property law, the case of *2000 Baum Family Trust v. Babel*[95] shows the sometimes peculiar way in which common law and statutory law schemes persist, generating different results in what might be perceived as similar circumstances.

The plaintiffs in this case owned lots fronting Lake Charlevoix.[96] Their lots were separated from the Lake by a public road that runs next to the Lake.[97] Although their properties were taxed as "lake view" rather than "lakefront" property, and their deeds did not purport to grant riparian rights, over the years they used the lake in front of their properties, including building some docks into the lake.[98] "[T]he Army

93. *See Wallbanks Case, Ct. of Appeals*, [2001] EWCA (Civ) 713.

94. *See Lamont Cmty. Church*, 285 Mich. App. 602.

95. 284 Mich. App. 544 (2009). After the close of the Survey period, the Michigan Supreme Court reversed the court of appeals in a 4 to 3 decision, with Justices Markman, Kelly, Corrigan and Young in the majority and Davis, Cavanagh and Hathaway in dissent. 488 Mich 136 (2010). The court of appeals decision had generated considerable controversy. *See, e.g.*, C. BLOOM, THE 2000 BAUM CASE DECISION DISASTER, http://www.mlswa.org/Legal/CliffBloomBaumArticle2009.pdf (last visited Apr. 20, 2011) which includes an analysis of the practical impact of this decision. For a lengthy analysis of the case and a defense of the court of appeals decision, *see* B. Liefbroer, *After* 2000 Baum Family Trust v. Baker*: The Impact of Public Roads on the Riparian Rights of Michigan Real Estate Owners*, 37 MICH. REAL PROP. REV. 121 (2010).

96. *2000 Baum*, 284 Mich. App. at 545.

97. *Id.* at 545-46.

98. *Id.* at 547.

Corps of Engineers issued each of them permits to maintain their docks."[99]

To the consternation of the plaintiffs, some back lot owners in their same plat also began building their own docks, supposedly without Corps of Engineer approval, as well as fencing, landscaping, rocks and rock walls, septic drains and a flagpole.[100] The lake view plaintiffs filed a complaint against the back lot owning defendants, as well as the Charlevoix County Road Commission and Charlevoix Township, alleging trespass and nuisance. The back lot defendants filed counterclaims, asserting adverse possession, or alternatively, easements by acquiescence or prescription.[101]

Summary disposition was then sought against the Road Commission only, on the theory that only the lake view lots had riparian rights.[102]

The case turned on whether the dedication of the roadway conveyed an absolute fee, cutting off riparian rights, or a limited fee, leaving the riparian rights in place. While generally the land must touch the water to have riparian rights,[103] there is an exception in certain circumstances when the land touches the edge of a roadway which abuts the water, as was the case here.[104] However, for riparian rights to be granted pursuant to this exception, the roadway must have been dedicated in a certain way.[105] If the dedication is at common law, the lot owners touching the road have riparian rights, because a common law dedication is said to grant merely an easement for the road.[106] Thus, since the lot owner actually maintains rights in the land that is subject to the easement, it is clear that, at least in the abstract, its property does indeed touch the water.[107] On the other hand, a statutory dedication is said to grant a fee interest in the land under the road.[108] Since the abutting lot owner has no residual rights in any part of the property touching the water, he is literally and legally cut off from riparian rights.

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99. *Id.* However, "[t]here is no documentation in the lower court record reflecting these facts." *Id.* at 547 n.2.

100. *Id.* at 548.

101. *Id.*

102. *2000 Baum*, 284 Mich. App. at 548.

103. *Id.* at 551.

104. *Id.* at 552-53.

105. *Id.* at 553.

106. *Id. See* Patrick v. Young Men's Christian Ass'n of Kalamazoo, 120 Mich. 185, 211 (1899) ("Common-Law dedications do not ordinarily convey the fee. In fact under the strict rule they never do.")

107. *See generally id.* at 553-54.

108. *2000 Baum*, 284 Mich. App. at 554.

Nonetheless, a statutory dedication does not necessarily have to grant a fee interest.[109] Whether or not it does so is a matter of intent according to the Michigan authorities, and it is possible to grant an easement for a road as well as a fee pursuant to a statutory dedication.[110] It is also the case that a failed statutory dedication creates a common law dedication.[111]

The road was dedicated pursuant to the Plat Act of 1887, which provided that when the requirements for platting and recording the plat are completed, every dedication to the public "shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses . . . and for no other uses or purposes whatsoever."[112] The Court noted that the relevant portion of the current Land Division Act is substantially similar.[113]

Interpreting this language and prior supreme court decisions, the court concluded that the grant of the fee is not intended to be, in and of itself, a grant of fee simple absolute, which would convey any and all rights that can be had in a parcel of property, but rather what might be thought of as the ability, but not the necessity, to grant such rights as described by the plattors, for the qualified purposes described (presumably, up to and including an unqualified right if that is what is desired).[114]

The plaintiffs argued that the dedication was only for maintaining the alleys and streets of the plat.[115] The court of appeals did not agree.[116] Looking at the language of the 1911 plat, it quoted the following

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109. *Id.* at 555.

110. *Id.* at 555-56.

111. *Id.* at 555 n.6 (citing DeFlyer v. Co. Rd. Comm'rs, 374 Mich. 397 (1965)).

112. *2000 Baum*, 284 Mich. App. at 557.

113. *Id.* at 556-57.

114. *Id.* at 559. The supreme court reversal of *2000 Baum* places much emphasis on what type of fee is granted by a statutory dedication. 488 Mich. 136, 159-65. The court's conclusion is that there is a special type of fee, a "base fee" which is, however not the same as a base fee as defined in the relevant entries of the renewable Bouvier's Law Dictionary, Black's Law Dictionary, or as defined in other States. *Id.* at 164 n.17. It is more a fee in name only, as opposed to the full collection of rights that one has come to think of as the essence of a 'fee simple absolute' to use the classic terminology. The issue is best summarized by the majority in footnote 23: "While we agree with the proposition that a common-law fee title cuts off riparian rights, we see a clear distinction between a common-law fee and a statutory 'base fee,' as the interest has long been defined in Michigan. The dissent was of the view that a base fee is generally viewed as a "fee simple determinable" which it states "is indistinguishable from that of a fee simple other than the possibility of the estate terminating at some point." 488 Mich. 136, 189 (Davis, J. dissenting).

115. *2000 Baum*, 284 Mich. App. at 559.

116. *Id.*

language: "the streets and alleys as shown on said plat are hereby dedicated to the use of the public."[117] Thus, it said it was "unequivocally" a "clear intention" to dedicate the "areas delineated as streets and alleys to the public's use."[118] Note, however, that the court is equating a dedication of "the streets and alleys as shown on the plat" to the "areas delineated as streets and alleys." This does not seem to be a clear and unequivocal reading but, rather, a logical leap. Consider the following formulations: 1. We dedicate streets and alleys to the public; 2. We dedicate areas delineated as streets and alleys to the public; 3. We dedicate areas on which streets and alleys are delineated to the public; 4. We dedicate that portion of the areas on which streets and alleys are delineated to the public; and 5. We dedicate the portions of the area on which streets and alleys are delineated to the public but not the subsurface areas. There is nothing in 1 that logically prevents 2, but there is nothing in 1 or 2 that logically prohibits the formulation in 3, 4 or 5, either.

What the court seems to be saying is that by dedicating the area delineated as streets and alleys without saying more, the party making the dedication must have really been saying that by "area" the dedication must have meant the property in that area, and by the property in that area, they must have meant all of the rights, including riparian rights, associated with that property. But, as we have just shown, while that is a possible conclusion from the language, it is by no means a necessary conclusion, or, without more, is it obviously the most likely conclusion.

Now, it would not be unreasonable to make a default presumption. This is what the common law does. The common law says, unless your words are crystal clear and susceptible of no other reasonable interpretation, we will assume that you only intended to grant an easement when you dedicate roads and alleys.[119] It is also not unreasonable for the court to say, we will presume the opposite. What is not persuasive is for the court to say the intent is clear merely from these words, when it is not at all difficult to reconcile the words with the totally opposite intent.[120]

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117. *Id.*

118. *Id.* at 559.

119. *Id.* at 553-54.

120. In essence, the supreme court majority's decision in *2000 Baum* is the opposite of that of the court of appeals in that it operates from the premise that the lot owners fronting the dedicated road do have riparian rights unless it is made clear that those rights were to have been eliminated by the dedication. The supreme court argued that this has been the long understood reading of the relevant case law. "[*E*]*very* Michigan decision that has addressed this exact issue has held that a dedication of a parallel road does *not* divest front-lot owners of riparian rights." 488 Mich. 136 at 173-74.

The court takes the contrary position by stressing the meaning of the word "use." It tells us use of streets and alleys, unlimited in scope, is inconsistent with riparian rights.[121] Yet is this so? Isn't the real issue the use of the property on which the streets and alleys are located (or the "area" in the court's more topographical language)?

Since the usual definition of real property includes subsurface rights, easement rights, air rights and riparian rights, language which speaks solely to streets and alleys and not the property on which those streets and alleys are located, seems to be narrower than what is otherwise implied by the words the court is using.

The court then goes on to make some additional arguments, which actually seem more persuasive since they relate more closely to the issue at hand as the kind of evidence one might expect to use if there was an intention that these lots have riparian rights.[122] Plaintiffs' deeds do not set forth riparian rights.[123] This is helpful but not dispositive unless a deed needs to mention riparian rights in order to give such rights. Plaintiffs' properties are taxed as lake view properties not riparian properties.[124] This might be even more persuasive if this has been the case since 1911, but the court does not say. Similarly, the statement that there is no evidence that plaintiffs paid any consideration for riparian rights[125] is not compelling given that it might be hard to find such evidence after 100 years.

On the other hand, the court concedes that the plaintiffs have set up docks on the shore, apparently for some period of time.[126] The court does not address whether some of those docks (or their predecessors) may have been in place for a century. If they had, that fact might be less easy for the Court to dismiss as irrelevant.[127]

The Court's analysis does persuade us that it is very hard to see a clear, unequivocal intention to reserve riparian rights to the owners abutting the lots. In such a circumstance, rather than stretching the language and the facts to argue that the intent was clear, it seems more justifiable to apply a default rule. This is particularly so when the

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121. *2000 Baum*, 284 Mich. App. at 559.

122. *Id.* at 651.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. If the front lot owners were building and maintaining docks, and otherwise acting in a manner consistent with having riparian rights in 1911, immediately after the dedication, that would certainly be of some evidentiary value in determining whether the dedication was intended to terminate the riparian rights of these owners.

evidence other than the language of the documents that might shed light on intent is lost in the mists of time.

Which leads to one last observation, which is why did the common law default rule and the statutory rule need to vary? What policy interest is served in making a statutory dedication one which is effectively presumed to cut off all existing rights in the property, while one at common law does not?[128] The existence of parallel common law and statutory law rules is another example of the persistence of the *ancien regime*.[129] The question of why the two schemes should continue to coexist in the same area, when they potentially lead to two different results, is one that would seem to be worth asking.

In another published riparian rights case, *Persell v. Wertz*,[130] the court of appeals clarified the Michigan rule that "no riparian rights arise from an artificial body of water," following *Thompson v. Enz*.[131] The case involved the unhappy spectacle of formerly friendly neighbors who shared in the construction of an artificial pond across their property lines, but who then had a falling out.[132] Among other things, one of the neighbors ran a two strand barb wire fence across the pond at the

128. *See 2000 Baum*, 284 Mich. App. at 553-55. On this point, the majority opinion in the Michigan Supreme Court decision in *2000 Baum* makes an effort to reconcile the two rules, referring to the early case law addressing the point and arguing that the two rules were in relative harmony. 488 Mich. 136, 165-66. The majority is at its most persuasive where it explores the historical reasons why the common law rule was changed, and how the reasons for that change do not contradict the concept of a limited "base fee" as opposed to a fee simple absolute or a fee simple determinable. *E.g.*, *id.* at 159 n.14. Observers of the Michigan Supreme Court will note the considerable irony in the fact that the majority opinion, authored by Justice Markman and joined in by Justices Kelly, Corrigan and Young, is one which ventures far beyond the plain language of the statute involved and gives deference to an interpretation that is rooted in historical circumstance, precedent, and even policy considerations. On the other hand, the opinion of Justice Davis, joined by Justices Cavanagh and Hathaway, largely looks at the statutory language, concludes that the term "fee" means what someone reading the statute and not much more would think it means, and reconciles the authorities to this facial reading. Thus, three Justices usually viewed as opponents of textualism have written a textualist dissent, while a leading proponent of textualism, together with two other ardent textualists, have written a contextualist opinion. While one might argue that this illustrates a results-oriented jurisprudence on the part of both factions, I would argue instead that it demonstrates that each view has its merits which all can perceive under the right set of circumstances, and that a *modus vivendi* between the contending factions would be of greater benefit than a perpetual feud.

129. As Guido Calabresi has said, this is "An Age of Statutes." G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

130. 287 Mich. App. 576 (2010).

131. 379 Mich. 667 (1967).

132. *Persell*, 287 Mich. App. at 578.

property line.[133] The plaintiff succeeded in the trial court at obtaining a judgment that included damages for the fence, based on the theory that it violated riparian rights in the pond–rights which would allow it to use the entire surface.[134] The court of appeals reversed this portion of the verdict, concluding that the common law rule, affirmed by *Thompson,* was that there were no riparian rights in this small, artificial body of water, and that it was too small to be covered by the Inland Lakes and Streams Act of 1972, which created riparian rights in artificial lakes of at least 5 acres in size.[135] Hence, here too, the rules of the *ancien regime* prevailed, although the notion that "good fences make good neighbors" seems to have been undermined.

C. Suffocated By the Fog of Law in the Regulatory Thicket

In his indictment of the English Chancery courts, in *Bleak House,* Charles Dickens likens the law to a vast fog covering London.[136] In chancery, there were pleadings without end, procedures without apparent substance, and the exact posture of the case disappeared in a mass of obfuscation. One is lost in the fog of the law.

One feels the fog roll in when reading the case of *Risko v. Grand Haven Charter Township Zoning Board of Appeals.*[137] The owners of a parcel of land 2.46 acres in size wanted to build a house.[138] Because the land was in a "critical dune zone," only part of it was buildable and the approval of the Michigan Department of Environmental Quality (MDEQ) was required.[139]

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133. *Id.*

134. *Id.*

135. *Id.*

136. CHARLES DICKENS, BLEAK HOUSE 8 (1852) ("Fog everywhere. Fog up the river, where it flows among green aits and meadows; fog down the river, where it rolls defiled among the tiers of shipping and the waterside pollutions of a great (and dirty) city. Fog on the Essex marshes, fog on the Kentish heights. Fog creeping into the cabooses of collier-brigs; fog lying out on the yards and hovering in the rigging of great ships; fog drooping on the gunwales of barges and small boats. Fog in the eyes and throats of ancient Greenwich pensioners, wheezing by the firesides of their wards; fog in the stem and bowl of the afternoon pipe of the wrathful skipper, down in his close cabin; fog cruelly pinching the toes and fingers of his shivering little 'prentice boy on deck. Chance people on the bridges peeping over the parapets into a nether sky of fog, with fog all round them, as if they were up in a balloon, and hanging in the misty clouds.")

137. 284 Mich. App. 453 (2009).

138. *Risko*, 284 Mich. App. at 454.

139. *Id.*

The property owners commissioned an architect who developed a plan that won MDEQ approval.[140] However, the plan included an attached two car garage, which encroached on the Township's 50 foot setback by 9.5 feet.[141] This setback was part of the various requirements for R-1 residential properties under the Grand Haven Charter Township Zoning Ordinance.[142]

The property owners applied for a variance on the grounds that "the encroachment was necessary because the critical dunes in the rear lot area forced part of the structure to be moved closer to the property line."[143] A hearing was held before the Township Zoning Board of Appeals at which "several residents expressed objections to the proposed variance."[144] At the hearing, "it was determined that there appeared to be adequate room to construct a side-loading garage, which would eliminate the front yard encroachment."[145]

The property owners contended that revising their plans would not only require significant expense, but would also necessitate a new MDEQ approval, resulting in significant delay.[146] They pointed to the four pronged test for a variance in the Township Ordinance for determining whether a variance should be granted, and contended that they met all four prongs of the test, namely: (1) "exceptional or extraordinary circumstances . . . that do not apply . . . to other properties in the same zoning classification"; (2) that the variance "is necessary for the preservation and enjoyment of a substantial property right"; (3) that the "variance will not be . . . [a] detriment to adjacent property"; and (4) that the situation is sufficiently unique that a generally applicable rule is not needed.[147] It was uncontested that the third and fourth test were met,[148] even though the Zoning Board formally stated that it found that tests one and two were not met.[149] It was also clear that it had concluded that there were exceptional circumstances, due to the critical dune zone and the need for MDEQ approval of all plans, satisfying test one.[150] Thus, the court concluded that: "The sole issue is whether, under the circumstances, the 9.5-foot setback 'variance is necessary for the

140. *Id.* at 455.
141. *Id.*
142. *Id.*
143. *Id.* at 455.
144. *Risko*, 284 Mich. App. at 456.
145. *Id.* at 456-57.
146. *Id.* at 457.
147. *Id.* at 455-56.
148. *Id.* at 456.
149. *Id.*
150. *Id.* at 456-57.

preservation and enjoyment of a substantial property right similar to that possessed by other properties in the same zoning district,'"[151] the second prong of the test.

Looking at the record before it, the court of appeals concluded that the property owners had not refuted the Board's conclusion that their property might accommodate a two car garage without the need for a variance if they adopted a different design.[152] This led the court to conclude that the essential issue in the case was "whether a 'substantial property right' includes construction of a particular design."[153] Having so framed the issue, not surprisingly, the court found that there was no such right.[154] It reasoned that zoning boards have broad discretion, and that the phrase "substantial right" should be construed narrowly.[155]

These conclusions are reasonable enough, but the critical question is whether the court was correct in framing the question as it did. From the property owners' perspective, the substantial right was not simply that they wanted this particular design of their own choosing, but that they were entitled to a particular design of their own choosing under circumstances where State environmental approval was a necessary part of the design process. The property owners could not simply present a new design to the Township Board, but effectively they would need to develop a new design and go to the MDEQ and obtain approval before doing anything further.[156] They could not necessarily predict whether MDEQ would bless a design that did not require a variance. Thus, the assumption that a new design could be developed without the need for a variance ignored an essential aspect of the situation–the property owners did not have the control over the design choice that would ordinarily exist.[157] The design for which the property owners were seeking approval was not just a design they liked, it was a design that came with an approved right to build.

When they received MDEQ approval of their design, the property owners immediately had something of substantial value, just as a developer who obtains a desirable change in zoning would. It seems likely that the value of their lot increased as well, for it could now be sold with a buildable plan, but for the variance issue.

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151. *Risko*, 284 Mich. App. at 459.
152. *Id.*
153. *Id.* at 460.
154. *Id.* at 463.
155. *Id.*
156. *Id.* at 456.
157. *See Risko*, 284 Mich. App. at 459.

The court cites a number of cases that relate to what constitutes "substantial rights" and notes that they include such things as the right to an abutting alley and building and use restrictions.[158] The court compares the right to a particular design to these rights and finds it wanting, but isn't the fairer comparison the right to make use of a design that comes with MDEQ approval? Viewed in this light, the decision by the Zoning Board seems very much in line with the precedents cited by the court as determinative of what the concept of substantial rights really means.

The court's method of analysis seems anachronistic in these circumstances.[159] In a world where seeking MDEQ approval for a

158. *Id.* at 461 (citing Forster v. City of Pontiac, 56 Mich. App. 415 (1974) and Indian Village Ass'n v. Barton, 312 Mich. 541 (1945)). One might also keep in mind the incisive analysis of Justice Christenson in *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308 (1874):

> Of what does property practically consist, but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of?' Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practicably valuable to him? And among the incidents of property in land, or anything else, is not the right to enjoy its beneficial use, and so far to control it as to exclude others from that use, the most beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than of the mere abstract idea of property without incidents? This use, or the right to control it with reference to its use, constitutes, in fact, all that is beneficial in ownership, except the right to dispose of it; and this latter right or incident would be rendered barren and worthless, stripped of the right to the use. Property does not consist merely of the right to the ultimate particles of matter of which it may be composed,--of which we know nothing,-- but of those properties of matter which can be rendered manifest to our senses, and made to contribute to our wants or our enjoyments.

159. The unpublished decision in *Kawkawlin Twp. v. Sallmen*, No. 290639, 2010 WL 2510001 (Mich. Ct. App. June 22, 2010) makes an interesting comparison. In that case the Sallmens constructed a two story, three season addition to their home, *id.* at *1, at a cost of about $35,000, *id.* at *2. The addition was ultimately determined to be two feet over the ten foot setback. *Id.* at *1. However, they obtained a building permit, and there was evidence that the Township inspector looked into the complaint of the Kuschs, the Sallmens' neighbors, and did not find an issue. *Id.* at *5. However, after construction began, Pattie Kusch filed a formal complaint with the Township, and Jan Sallmen then requested a variance, which the Township Board denied. *Id.* at *1. Nonetheless, the addition was completed. The Township then sued, asking that the Sallmens be forced to remove the encroachment. *Id.* After first requiring the Township Zoning Board to hold a new hearing with a more complete record, which again resulted in a denial of the variance by the Board, the trial court entered summary disposition in favor of the Sallmens, concluding that, in these circumstances, estoppel against the Township was appropriate. *Id.* at *2. The court of appeals, after reviewing the Michigan authorities,

redrawn design would be a costly and time consuming process, holding such a right would seem to have substantial value, but the court instead focuses on the right to have a design of one's own choosing without reference to the regulatory scheme. As has been argued before, both the New Property and the New Real Property are not tangible interests, but rather claims upon the government and the ability to make use of assets within the framework imposed by bureaucratic and regulatory schemes.[160]

In this case, the legal fog is the language of what might be, as opposed to the language of what is. The court notes, but chose to ignore, just as the old English Courts of Equity ignored, that the litigant enmeshed in a system that imposes huge burdens of time and money on every twist and turn of the process, is deprived of substantial rights by the procedural gauntlet that he is forced to run. Of course the landowners can develop a new plan (if they can afford the architect's fees), and of course, MDEQ might approve the new plan (if the landowners have the time and professional help required to obtain the approval), and perhaps at that point a variance from the Zoning Board might not be needed.[161] But what constraints have been imposed on the Board by this approach if another request is made by the property owners after they go through this second round? Might not the Board again refer to the infinite variety of choices that still exist? While the property owners will undoubtedly be better prepared to say that they considered many other alternatives, how are they to prove that they considered them all?

Is not the practical effect of this decision that the property owner must prove that there is no conceivable alternative to his plan? Who can satisfy such a requirement? The property owners sought to convince the court that other property owners seeking a variance were not treated

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concluded that a township might be equitably estopped from enforcing its zoning ordinances in exceptional cases, but it also concluded that the Kuschs had made various factual assertions that, looked at in their most favorable light, would lead one to conclude that the Sallmens knew that they were in violation of the setback requirements, but hoped that they could obtain a building permit without objection and circumvent the requirement. *Id.* at *5. Accordingly, the court of appeals remanded for further proceedings to determine the facts. *Id.* at *6. What is interesting about this case in comparison to *Risko* is how "exceptional circumstances" are treated as the key in this case, while in *Risko*, rather than focusing on whether there were special circumstances (which was, in a sense, assumed), the focus was on whether there was a substantial property right that was at stake. *See Risko*, 284 Mich. App. 453. It seems virtually certain that the Sallmens would have had difficulty in demonstrating that their addition could not have been built in any other way--how could they not?

160. *See* Carl W. Herstein, *Real Property, 1997 Ann. Survey of Mich. Law,* 44 WAYNE L. REV. 1019 (1998).

161. *See Risko*, 284 Mich. App. at 460.

similarly.[162] The court argued that the cases were all dissimilar to the one at bar, and of course, in many respects that was true.[163] One involved replacing an old shed with a new shed "and there was some indication that the shed really could not be put elsewhere without reducing its size."[164] Another involved a lot burdened with "a drainage easement and the available alternative design apparently would have necessitated a smaller, rather than a relocated, garage."[165] A third involved a "'severely limited' buildable area and no suggestion that alternative designs would be available."[166] Yet another involved adding a deck to an already encroaching structure "and, again, nothing to indicate that an alternative to the proposed deck addition might have been available."[167] Yet look at the linguistic and rhetorical devices applied by the court in making its distinctions: "some indication"–this hardly gives confidence that all other alternatives were foreclosed; "the available alternative design"–as if there could only be one alternative; "no suggestion that alternative designs would have been available"–which could mean that the issue was never even raised; "nothing to indicate that an alternative . . . might have been available"–as the saying goes "absence of evidence is not evidence of absence." Is it not difficult to conclude from this amorphous–might one say foggy?–set of descriptions that in each example the question of whether there were any alternatives was given only cursory attention? And we hardly would be surprised if the answer to that question is "yes," because in everyday life one does not consider every, or even most, possible alternatives. Rather, one looks to whether there are comparable, reasonable alternatives under the circumstances. One sympathizes with the property owner in this case, who surmises that his neighbors have been held to a standard of what is reasonable, for he feels aggrieved because he is held to a standard of what might be conceivable. How critical this is when we think back to Lord Hope's statement in Glebe Farm: "Unsatisfactory though the system may appear, there is no obvious alternative."[168] Here we stand at the other extreme, where the court seems to say: "No matter how near to satisfactory the solution may appear, there is always a superior alternative." Between these two extremes, one might seek a more reasonable accommodation.

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162. *Id.* at 466.
163. *Id.* at 465-66.
164. *Id.* at 466.
165. *Id.*
166. *Id.*
167. *Risko*, 284 Mich. App. at 466.
168. *Lord's Decision*, [2003] UKHL 37, [74].

Looked at in a slightly different way, what is lacking from this view of the Board's conduct is not whether it was rational but rather whether it was predictable. When there are potentially unlimited alternatives, how does one guess which one the authorities will endorse? Or when they will conclude that the search for alternatives has been exhausted? Both the standard of a "substantial property right" and the court's interpretation of it in this case, is one of infinite vagueness, which forces one to peer into an impenetrable fog.

Hence, one might conclude from this case that the *ancien regime* lives on in at least two respects: the decision fails to recognize that there are few more valuable property rights in the 21st century than possessing the permission of the regulatory authorities, and that when law is uncertain and unpredictable–when it is as foggy as the rules of English Chancery–it loses that critical ability to guide action without the need for litigation, and it loses the moral authority that derives from treating each citizen equally.[169]

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169. Although unpublished, the opinion in *Chicago Area Council v. Blue Lake Twp.*, No. 285691, 2010 WL 986500 (Mich. Ct. App. March 18, 2010), is worth noting. The oldest Boy Scout camp in the country, Camp Owasippe, occupies 4,748 acres in Blue Lake Township. *Id.* at *1. The Boy Scouts were apparently exploring options to sell some or all of the property in October 2002. *Id.* at *2. The Scouts alleged that they had been offered $19.3 million for the property. *Id.* at *5. But in December, 2002, the zoning code for the property was changed, purportedly to bring it into compliance with a 1996 Master Plan. *Id.* at *1. In effect, the zoning change limited the use of the property to camping. *Id.* The Scouts' efforts to make changes to the rezoning were rebuffed. *Id.* at *2. The Scouts sued, claiming various Due Process violations and inverse condemnation. *Id.* A ten day trial took place and the trial court found for the Township. *Id.* at *3. While finding that the Township's expert now valued the property as restricted at $12.3 million, the court was not persuaded that a 36% drop in value was sufficient to support an inverse condemnation claim. *Id.* at *5 (The Boy Scouts' expert valued the property as rezoned at $2.8 million.) *Id.* The Boy Scouts appealed. Among other things, they contended that "they cannot operate a camp in an economically viable way and that there is no market for the property without allowing further development." *Id.* at *6. The court of appeals was unpersuaded, finding that "While the restrictions . . . on the land may have reduced its value, the restrictions have not rendered the land worthless or economically idle." *Id.* at *8. A zoning classification that restricts a huge swath of property to narrow historic uses (youth camps, music camps and scout camps) seems disturbingly analogous to the feudal rules of the *ancien regime,* restricting lands, and those who were tied to those lands, to their historical status. Not only is the equity in the property dramatically diminished or destroyed, but there are no means to remedy the situation. The property owners are to continue to make use of the property as they always have, and to pay taxes for its ownership, with no ability to change with evolving circumstances. Because an organization like the Scouts has other sources of revenue, it cannot merely abandon the land. It has become like Glebe Farm, only in this case the Scouts must continue to pay property taxes and maintain their property as a camp, with no limit on the cost and no relationship to the value of the property, for the benefit of the surrounding community.

D. *Partition: The Ancien Regime Survives the Survival Statute*

The case of *Jackson v. Estate of Ronald Green* deals with two very interesting issues, first whether a partition action survives the death of the co-tenant who is seeking the partition, and second, when the statute of limitations accrues in connection with breach of contract claims for an oral agreement.[170] Since our focus is on real property issues, and the second issue is essentially a debate among three Justices that is merely dicta, we will look closely at the first issue and merely commend the second to the attention of the interested reader.[171]

The partition decision is an example of the sway that the common law still holds. A joint tenancy is a venerable concept that allows co-tenants to hold in common an undivided interest in property with a right of survivorship.[172] This means that upon the death of a co-tenant the remaining co-tenants are immediately vested with exclusive ownership in the property.[173] Michigan recognizes two types of joint tenancies: an ordinary joint tenancy and one that has been created with "full rights of survivorship."[174] Once created, an ordinary joint tenancy is not indefeasible.[175] An action for partition can be commenced to undo the ordinary joint tenancy and replace it with a tenancy in common and, if necessary, force the sale of the property.[176]

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170. *Jackson v. Estate of Ronald Green*, 484 Mich. 209 (2009).

171. The opinions of the three Justices who addressed this issue run the gamut with respect to when the time period begins to run for application of the statute of limitations where there is an alleged oral promise to pay that has no express date for payment. *See Jackson*, 484 Mich. 209. Justice Markman concludes that the statute should begin to run when the loan is made, since he believes this to be the rule with respect to demand notes generally. *Id.* at 226. Justice Young contends that the statute should begin to run after a reasonable time under all the relevant facts and circumstances. *Id.* at 215. Justice Cavanagh believes that it should begin to run six years after the loan was made, that being what he believed was the reasonable time period established by prior precedents. *Id.* at 227-28. The court of appeals had held that the statute had not begun to run until the plaintiff had filed her action demanding payment. *Id.* at 213.

172. *See* J.G. CAMERON, MICHIGAN REAL PROPERTY § 9.9 (3d ed. 2004).

173. *Id.*

174. *Id.* at § 9.11.

175. *Id.* at § 9.10; MICH. COMP. LAWS ANN. § 600.3304 (West 2000).

176. In his dissent Justice Cavanagh explains the distinction. He writes: "In the standard joint tenancy, one joint tenant can unilaterally destroy the right of survivorship by severing the joint tenancy," including through a partition action. *Jackson*, 484 Mich. at 228 (citing Albro v. Allen, 434 Mich. 272 (1990), and Smith v. Smith, 290 Mich. 143 (1939)). However, if the joint tenancy has express words of survivorship in the granting instrument, such as the deed, then "the survivorship right of this type of joint tenancy is indestructible and is not affected by a petition action." *Jackson*, 484 Mich. at 288 (citing *Albro*, 434 Mich. 272).

In this case, Joan Jackson and Ronald Green held two parcels of real estate as joint tenants with full rights of survivorship.[177] Ms. Jackson also made a series of loans to Mr. Green, the terms of which were entirely oral, and some of which were apparently vague or unspecified.[178] Eventually, Ms. Jackson filed a breach of contract action alleging that Mr. Green had failed to repay the loans, and demanding the property.[179] The trial court granted summary disposition as to the demand for the property, finding that it was properly held by the parties as tenants in common.[180] It conducted a jury trial as to the loans, and the jury found in favor of Ms. Jackson after the trial court rejected defendant Green's statute of limitations argument.[181]

Green then filed both an appeal of the trial court judgment and a separate action for partition of the two parcels of real estate.[182] However, at Ms. Jackson's request, the partition action was stayed pending the appeal of the lower court judgment.[183] While the appeal was still pending, Mr. Green died and his estate was substituted in his place in both proceedings.[184]

The court of appeals affirmed the trial court's ruling as to the ownership of the property, but also determined that upon the death of Mr. Green, his interest as co-tenant reverted to Ms. Jackson.[185] The Estate of Green applied for leave to appeal, contending that the partition action should have been allowed to go forward, despite Mr. Green's death.[186] Before the supreme court decided, however, the Justices conceded that the joint tenancy with full rights of survivorship could not be affected by the petition for partition, so the question was limited to the ordinary joint tenancy.[187]

The court of appeals decision was upheld.[188] Justices Weaver and Hathaway concluded that the result reached by the court of appeals was correct and that leave to appeal had been improvidently granted.[189] While also agreeing with the result as to partition, Justice Corrigan, Justice

177. *Jackson*, 484 Mich. at 211-12.
178. *See id.* at 212.
179. *Id.*
180. *Id.*
181. *Id.* at 211-12.
182. *Id.* 212.
183. *Jackson*, 484 Mich. at 212.
184. *Id.*
185. *Id.*
186. *Id.* at 211.
187. *Id.* at 213; *see also id.* at 213 n.5.
188. *Id.* at 215.
189. *Jackson*, 484 Mich. at 246.

Young and Justice Markman each wrote an opinion.[190] All three concurred in the result regarding partition.[191] Only Justice Cavanagh dissented.[192]

Justice Corrigan's opinion on the petition issue is simple and straightforward. She wrote, "the universal rule in the United States is that a pending suit for partition does not survive the death of one of the joint tenants."[193] Since no order effectuating a petition had been filed at the time of Mr. Green's death, his interest in the parcel immediately vested in Ms. Jackson. The common law rule of long standing triumphed.

Justice Cavanagh argued for a different rule. His argument hinges on the Michigan survival statute, which provides that "[a]ll actions and claims survive death."[194] Reviewing the legislative history of the Survival Act, Justice Cavanagh noted how it gradually expanded over time to encompass more actions that survived a claimant's death.[195] He quoted the following language from the legislative history which is of particular interest, given our theme:

"At common law, personal rights of actions died with the person. This seemed manifestly unfair in certain cases, so Survival Acts were written to allow certain actions to survive. *There is no good reason to allow some actions to survive, and not others, apart from cultural inertia* . . . ."[196]

Justice Cavanagh goes on to say that while the Act is commonly applied to tort actions, it was clearly intended to address all claims arising under the Revised Judicature Act.[197] Since a partition action arises under the Revised Judicature Act, in his view it is crystal clear that a partition action survives the death of the claimant.[198]

What possible response can there be to this argument against the forces of cultural inertia? The *ancien regime* seems to be holding out in the last ditch.[199]

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190. *See id.* at 211, 215, 221.

191. *See id.*

192. *See id.* at 227.

193. *Id.* at 214.

194. MICH. COMP. LAWS ANN. § 600.2921 (West 1961).

195. *Jackson*, 484 Mich. at 230. Justice Cavanagh relies extensively on the discussion of the Act found in *Hardy v. Maxheimer*, 429 Mich. 422 (1987).

196. *Id.* (citing *Hardy*, 492 Mich. at 437-38).

197. *Jackson*, 484 Mich. at 231.

198. *Id.*

199. The idiomatic reference to the "last ditch" dates to the 1600's at least. It is a military term, referring to the last line of defense. Those in England who held out against the reforms of the liberal era of the 1860's through the 1900's were said to be "last ditchers." The term was often associated with those who fought against efforts to limit expansion of the franchise and the power of the House of Lords. The expression was

For the majority, the issue of the Survival Act is simply irrelevant. As Justice Corrigan viewed it, once it is concluded that the property interest has passed to the survivor prior to partition, the claimant's estate "has no interest in the property, and even if [the claimant's] partition action survived his death under Michigan's survival statute . . . .nothing remains to partition."[200] It would be reasonable to ask how it is that the majority of the court is so comfortable with even the hypothetical (note the "even if" language used to avoid taking a clear stance) possibility that there would then exist what has been described as an "absolute right" to a partition without a remedy. Justice Cavanagh's opinion simply assumes that the vesting of title in the surviving co-tenant should not create an insuperable problem. If the claimant's estate is entitled to a partition, the surviving co-tenant will lose a portion of the property by judicial order. For the majority, this seems to be an unthinkable leap—the opinions simply assume that once one or more co-tenants obtain a survivorship interest, any prior claim is beyond the law.

It may not be fair to call it "cultural inertia" which applies a pejorative patina, for there can be profound value in preserving certainty and stability which necessitates refusing to change the rules of the game. But, this does very much seem to be a case in which there is a comfort with what are perceived to be the existing rules and outcomes that does not totally square with the shifts in the surrounding legal landscape. It is difficult to think through the ultimate logic of the majority's opinion, but one can surely posit various explanations, such as this: A joint tenancy is a bit of an unusual construct (and the special joint tenancy with rights of survivorship even more so), and a decision to permit a partition after the death of a co-tenant partition would undermine the integrity of that construct to a meaningful degree, particularly when the special joint tenancy has already been placed outside the bounds of even this discussion.

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attributed to Lord Curzon, who remarked at a peers luncheon in May 1911 that the plan to break the veto of conservative aristocrats by creating a new set of liberal peers to pack the House of Lords was a "fantastic dream," adding, "We will die in the last ditch before we give in." Thereinafter, the conservatives divided in two—the "Ditchers" who fought the parliamentary reform to the bitter end, and the "Hedgers," who preferred to limit the powers of the Lords rather than see the institution irrevocably reconstituted. G. DANGERFIELD, THE STRANGE DEATH OF LIBERAL ENGLAND 44 (1961). Somewhat anachronistically, the reference to conservatives who resisted reform was also applied to earlier eras. *See e.g.*, B. COLEMAN, CONSERVATISM AND THE CONSERVATIVE PARTY IN NINETEENTH CENTURY BRITAIN 131 (1988) ("Most men of sense seem to have concluded that Tories who chose to die in the last ditch, and worse, fought each other for the privilege would condemn themselves to another eternity in opposition.")

200. *Jackson*, 484 Mich. at 213.

To which one might respond, "So what?" What are the rationales for the continued existence of such a robust joint tenancy and why do they trump other considerations? One suspects that the majority believes undertaking such an analysis that goes beyond the bounds of judicial modesty—requiring a policy analysis that is more in the province of the legislature. On the other hand, Justice Cavanagh might point out that if a policy analysis is necessary to fairly answer the logical imperatives of the case before the court, then the court must engage in such an analysis, even if it would prefer not to.[201]

All of which illuminates why the *ancien regime* persists. These are hard questions without answers to which all would agree, and if one views the law as a conservative institution that should have a modest conception of its role,[202] then leaving established rules in place requires other institutions to take on the task of discerning and putting into place the necessary modifications, if indeed such modifications are necessary. While it could be argued that in at least some circumstances this is an overly circumscribed view of the role of the courts, it is clearly not an unreasonable one. There is always uncertainty at the boundaries of change. Thus, the *ancien regime* will sometimes survive because in those places where the old and new overlap, like tectonic plates, sometimes they will fold over and sometimes under their boundaries. At the same time we can be sure that in such situations there will also be upheaval.

E. Adverse Possession and Acquiescence—The Ancien Regime is Alive and Well and Living in the Land That Time Forgot

There seems to be a bit of schizophrenia in the law when it comes to unpublished opinions. The Michigan courts do not accept them as binding precedents, but since "unpublished" no longer means unpublished in the era of electronic databases, and because they are easy to find, litigators seem happy to cite them to the courts. Further, the

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201. An unpublished decision of the Michigan Court of Appeals during the *Survey* period, *McCormick v. McCormick*, No. 283209, 2010 WL 935310 (Mich. Ct. App. March 16, 2010), also deals with the right to partition. In this case the court found that it was enough that the petitioner had only a current possessory interest and an expectancy interest in the property in order to seek partition. *Id.* at *4. This is something like halfway between having a present ownership interest, where a right to partition clearly exists, and a mere claim of interest, as in *Jackson v. Estate of Ronald Green*, where the lack of a right to partition is now established. Query, what is the result if there is a mere expectancy interest? Is that any different than a prior claim of interest?

202. Admittedly, a critic might say of the law what Churchill said about Clement Atlee, "[He] is a very modest man. But then he has much to be modest about." CHRIS WRIGLEY, WINSTON CHURCHILL: A BIOGRAPHICAL COMPANION 32 (2002).

courts are undoubtedly happy to know what their brethren have to say on similar issues. Hence, unpublished decisions have a growing importance despite their somewhat illegitimate status.

To include every unpublished property opinion in this *Survey* would be almost as great a burden on the reader as it would be on the author, so generally speaking, the text of this article is restricted to published cases.[203] However, an exception will be made for cases dealing with Adverse Possession and its cousin, Acquiescence, for two reasons. First, they are outstanding examples of the persistence of the *ancien regime* in the law, and, second, their very abundance makes them worthy of comment. The number of cases in the daily reports from the State Bar of decided real property law cases that deal with Adverse Possession, Acquiescence and related matters is stunning. It is clear that the continuing existence of these doctrines has increased rather than decreased the amount of litigation that exists with respect to border disputes.

Harper v. Lamar[204] illustrates the extraordinary complexity of adverse possession and related cases, and the many incongruities and peculiarities of this ancient body of law. The case involved competing claims to a strip of land known as parcel B.[205] There was no doubt that as a matter of record title, Parcel B belonged to the Harpers, who owned a car parts and salvage operation on this land as well as neighboring property.[206] However, the owners of the property to the North, Lamar and Bourquin, believed that Parcel B belonged to them.[207]

Lamar and Bourquin traced their title to a neighboring property to the North of Parcel B to the VanderLaan Land Co.[208] The Land Co. had acquired that property in the late 70's or early 80's, and it was subject to a lease to the U.S. Postal Service, which went back to at least 1962, when the Post Office was built.[209] At some point prior to 1994, a well and septic system for the Post Office were built on Parcel B, as was a parking lot that had been "used by postal service employees for many years and was later blacktopped."[210] So, it was clear that, in a number of respects,

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203. The footnotes, however, are restricted only to those things that the author finds interesting or amusing and that can be related in the most tangential fashion to the subjects in the text, so unpublished cases can be found in them from time to time.

204. No. 282498, 2009 WL 2515762 (Mich. Ct. App. Aug. 18, 2009).

205. *Id.* at *1.

206. *Id.*

207. *Id.*

208. *See Id.*

209. *Id.*

210. *Harper*, 2009 WL 2515762, at *2.

Lamar and Bourquin's lessee, the Postal Service, had acted as if it was the owner of Parcel B for quite a long time.

The Harpers contended that they had acquired Parcel B in 1994 from CSX, a railroad company, via a quitclaim deed.[211] Parcel B was part of a railway right of way, and as such, there were two problems with the title: first, it was subject to a right of reverter to the original owner under the 1899 deed by which CSX had acquired the property.[212] Second, CSX could not actually divest itself of the land without the Federal Surface Transportation Board's (STB) approval.[213] That approval was not forthcoming until 1997.[214] In 1994, after obtaining the quitclaim deed from CSX, Harper's lawyer sent a letter about the well, stating that it was on his property.[215] According to Harper, one of the predecessors in title to Lamar and Bourquin offered to move the well and the septic system, but Harper gave permission to use them where they were.[216]

Harper also said that he parked vehicles on the paved area of Parcel B.[217] This suit was sparked when Lamar and Bourquin had some of those vehicles towed.[218] Harper sued for trespass and conversion and Lamar and Bourquin counterclaimed for adverse possession and acquiescence to a boundary line.[219]

The trial court upheld the adverse possession claim on remand.[220] The case was originally decided on the basis of the reversionary right in the 1899 deed, but a previous appellate court ruled that the right of reverter was merely a right of reentry and had been lost when not asserted during the statutory period.[221] In this appeal, the court of appeals strongly hinted that it would have overturned the adverse possession claim on the theory that there could be no adverse possession of a railroad right of way, but that issue was never reached.

Instead, the court of appeals concluded that Lamar and Bourquin could not demonstrate one of the key elements of an adverse possession claim, namely, that its possession was uninterrupted for fifteen years.[222] Now, obviously the party that had shown the actual adversity in its

211. *Id.* at *1.
212. *Id.* at *3
213. *Id.*
214. *Id.*
215. *Id.* at *2.
216. *Harper*, 2009 WL 2515762, at *2.
217. *Id.*
218. *Id.*
219. *Id.* at *3.
220. *Id.* at *4.
221. *Id.* at *3.
222. *Harper*, 2009 WL 2515762, at *5.

possession was the tenant–the Post Offices and it had apparently done so for a period of time in excess of fifteen years.[223] However, relying on the supreme court's earlier decision in *Capps v. Merrifield*,[224] the court of appeals concluded that the tenant's actions were not sufficient if the ownership of the leased property was not the same.[225] This seems an overbroad rule, since one of the justifications for adverse possession is to give effect to the actual use of the property, and one would think that the tenant's claim would be vindicated, at least for the length of the tenant's lease. The Post Office was not a party to the case; one has to wonder what impact, if any, the decision had on it.

In any event, application of this rule meant that Lamar and Bourquin, as the owners of the fee underlying the leased property, needed to show that they were entitled to an adverse possession claim by "tacking" on the rights of their predecessors.[226] Tacking required a showing that either Parcel B was included in the instruments of conveyance or that there was parol evidence that Parcel B was conveyed.[227] The first prong of this test illustrates one of the many peculiarities of adverse possession decisions, since if Parcel B had been included in the conveyance, there would have been no need for a claim of adverse possession. The second prong of that test is difficult to meet because of the long time period involved and the inherent murkiness of testimony about such issues. However, Lamar and Bourquin duly produced affidavits at the trial court that said that Bourquin "was 'advised by the sellers that the conveyance included the entire property including the parking area, well and septic system.'"[228] Another prior title holder gave a somewhat similar affidavit.[229] Nonetheless, this was not sufficient for the court of appeals, which required that parol evidence be provided in connection with each of the various conveyances, although related parties were involved in the various transactions.[230] As we shall see in the next case,[231] a different appellate panel has taken a more liberal view of this test.

Even if one puts aside the question of whether the fifteen year period was satisfied, and the issue of whether adverse possession claims can be made against railroad right of ways, the facts recited by the court of appeals certainly suggested that there was still room to argue whether all

223. *Id.*
224. 227 Mich. 194 (1924).
225. *Harper*, 2009 WL 2515762, at *5.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *See infra*, note 249, Matthews v. Natural Res. Dep't, 288 Mich. App. 23 (2010).

of the other tests for an adverse possession claim had been met. Harper's testimony that he allowed the use by the Post Office of Parcel B after he received his quitclaim deed in 1994, at least created some doubt as to the hostile nature of the claim.

Lamar and Bourquin also contended that there was acquiescence to their claim. However, the court of appeals concluded that there was no evidence that all parties had treated the boundary line as established for the statutory period.[232]

Notwithstanding the fact that the court of appeals concluded that the Harpers had the better claim to the land due to their quitclaim deed from CSX, and that the adverse possession claim of their neighbor had failed, the court left the Harpers in a tenuous position as to Parcel B.[233] The court expressed some doubt as to whether the quitclaim deed from CSX could have conveyed the property to the Harpers before the statutory requirements for abandoning a right away had been met, three years later.[234] Furthermore, it took note of the fact that under the State Transportation Preservation Act[235] abandoned railroad property must be offered to the State before offering it for sale.[236] The circumstances suggest that this did not happen here.

So, all appearances indicate that there were no winners in this litigation, despite all the proceedings–which included two trips to the court of appeals. Surely this illustrates some of the glaring deficiencies of adverse possession law. It is incredibly fact specific, yet it covers long periods of time when it is difficult to find witnesses, where the memories of those who are witnesses are susceptible to a multitude of human frailties, and the legal concepts involved, such as hostility, notoriousness, and the like, have peculiar meanings that have evolved over hundreds of years. Thus, such cases are difficult and expensive, and as we have seen here, can open up a host of issues that would have been forgotten but for the demands of proving one's case.

An interesting complement to *Harper* is *Nara v. Dine*.[237] This case was decided on the basis of acquiescence and also features an enormously detailed factual history, this time going back to the 1930s.[238] What is most noteworthy in this context is that the court found that

232. *Harper*, 2009 WL 2515762, at *6. There are actually three varieties of acquiescence: (1) for the statutory period, (2) by agreement following a dispute, and (3) intention to deed to a marked boundary. *Id.*

233. *See id.* at *7-8.

234. *Id.* at *7.

235. MICH. COMP. LAWS ANN. §§ 474.51-.70 (West 2002).

236. *Harper*, 2009 WL 2515762, at *8.

237. No. 281354, 2009 WL 1567353 (Mich. Ct. App. June 4, 2009).

238. *Id.* at *1.

unlike with respect to adverse possession, "the doctrine of acquiescence does not require proof of privity to employ tacking of holdings to obtain the 15-year minimum statutory period."[239] While there are somewhat different policy rationales between acquiescence and adverse possession, the one theoretically involving passive acceptance, the other forced submission, the reality is that they are more similar than different, and in both cases the legal, or rightful, owner is forced to give up his land. Hence, the difference in the tacking rules does not seem entirely justifiable.

On the other hand, the case of *Kosky v. Byczek*[240] is an illustration of why the allure of these older common law doctrines remain, because they can facilitate a common sense result when more current and formal methods for avoiding disputes fail. In this case, when a parcel of property was being sold, it was discovered that the location of the monuments marking the boundaries of the property were at different locations than the deeds specified.[241] As an apparent result of what was a longstanding discrepancy, structures had been built over deed lines, as well as a fence.[242]

Several properties were involved in the mix-up, and most of the disputes were settled privately.[243] However, one was not, resulting in the fence being cut down, items of personal property being placed on disputed territory, and access to a driveway being blocked.[244]

The party relying on the legal description in the deed asked for damages for trespass and conversion.[245] The other party, relying on the established boundary location based on the monuments, countersued.[246] The court of appeals concluded that there had been acquiescence for the statutory period, finding that cottages, fences and markings had been located based on the monuments for more than forty years.[247] This was a textbook case for the advantages of the doctrine.

The last of our cases dealing with adverse possession, acquiescence and prescription illustrates three points: first, the persistence of the *ancien regime* in the doctrine of prescriptive easement; second, the ability of the State to sweep away that regime when it comes to its interests, such that it has come even closer to *ancien regime* values; and

239. *Id.* at *8 (citing Siegel v. Renkiewicz Estate, 373 Mich. 421, 426 (1964)).
240. No. 293558, 2010 WL 2016309 (Mich. Ct. App. May 20, 2010).
241. *Kosky*, 2010 WL 2016309, at *1.
242. *Id.*
243. *Id.* at *1 n.1.
244. *Id.* at *1.
245. *Id.* at *2.
246. *Id.*
247. *Kosky*, 2010 WL 2016309, at *2.

finally, how the burdens placed by the state on land in terms of environmental laws can put property owners back on the road to Glebe Farm, just as we saw previously in subsection C.

In the case of *Matthews v. Department of Natural Resources*,[248] a piece of landlocked property was acquired by the Funnell family in 1969, and then handed down to members of their extended family.[249] The property was bounded on two sides by the Martiny Lake State Game area.[250] The Funnells and their progeny gained access to the landlocked parcel by travelling over the State Game area.[251] Part of their access route was through swampy terrain, and they constructed an ersatz road of wooden pallets to allow vehicles to reach their property.[252] By the end of the 1990's, the DNR noted their activity and concluded that it was harming the wetland and creating safety issues for hunters who used the Game Area.[253] By 2003, the DNR had placed a gate to block the entry point of their access route.[254] Desultory discussions were had between the landlocked owners and the DNR, but the property owners concluded that they would not get an easement from the Department, or if they did get it, the terms would not be acceptable, so they filed suit alleging that they had acquired an easement by prescription which should allow them to maintain their pallet roadway and continue to have access to their property.[255]

Prescription is simply adverse possession that results in an easement rather than fee ownership.[256] The tests are essentially the same and it has the same pedigree, reflecting the land use concepts that have persisted for over half a millennium.[257] Under common law, however, one could not acquire property owned by the state via adverse possession.[258] For a time, Michigan had changed the common law rule by statute, but that change was itself reversed by statute in 1988, and the common law rule was restored.[259] An exception was provided for actions that had already accrued.

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248. 288 Mich. App. 23 (2010).
249. *Id.* at 27.
250. *Id.*
251. *Id.* at 28.
252. *Id.*
253. *Id.* at 29-30.
254. *Id.* at 30.
255. *Mathews*, 288 Mich App. at 30-31.
256. *See* Dumner v. U.S. Gypsum Co., 153 Mich. 622 (1908).
257. *See generally* J.G. CAMERON, MICHIGAN REAL PROPERTY § 6.11 (3rd Ed. 2004).
258. *Matthews*, 288 Mich. App. at 31.
259. MICH. COMP. LAWS ANN. § 600.5821 (West 2000); *Matthews*, 288 Mich. App. at 35.

The landlocked property owners contended that they had met all of the requirements for prescription for the necessary 15 year period before the 1988 statutory change.[260] The Department of Natural Resources (DNR) argued that they did not, pointing out that the current owners were not the same as the original Funnell family owners, and that they therefore could not qualify as having engaged in "continuous use" for 15 years.[261] There was no dispute as to whether the requirements of open, notorious and hostile use had been met.

The theory of the DNR was that there was no privity between the original and the current owners, saying that "an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance" was the only potentially applicable basis for privity to be found.[262] The court of appeals concluded that the case was analogous to an earlier Michigan Supreme Court decision in *von Meding v. Strahl*.[263] In what seems to be a very common sense application of the law to the facts, the supreme court had concluded that when the totality of the evidence showed that all the relevant parties had been conversant with the circumstances and had made the same use of the disputed property as the prior owners, no formal oral statement was necessary.[264] Here, where the testimony was that all the family members had "always" used the easement, the court of appeals found that precedent compelling and that it would have been unreasonable to expect an express articulation of a claim being handed down from one family member to the next.[265]

Although the court of appeals agreed that the landowners were entitled to a prescriptive easement, it appears to have been a Pyrrhic victory.[266] While the court agreed that the existence of various environmental laws, such as the Natural Resources and Environmental Protection Act (NREPA), did not eliminate the common law right to a prescriptive easement, it also concluded that the laws nonetheless

260. *Mathews*, 288 Mich. App. at 31.

261. *Id.* at 35.

262. *Id.* at 38-39.

263. 319 Mich. 598 (1948).

264. *Id.* at 371.

265. *Mathews*, 288 Mich. App. at 40-41.

266. The phrase "Pyrrhic Victory" comes from King Pyrrhus of Epirus who twice defeated the Roman armies, but the losses he sustained were so great that he said "[if] we are victorious in one more battle with the Romans, we shall be utterly ruined." What is less well known is that he expected the Romans to negotiate a peace after two brutal defeats. They did not, and that was ultimately his real undoing. 9 PLUTARCH, LIVES 417 (Bernadotte Perrin trans., Harvard Univ. Press, 1950); *see* ADRIAN GOLDSWORTHY, THE PUNIC WARS 38-39 (2000).

governed the scope and the terms of that easement.[267] The property owners had argued, and the trial court had agreed, that once the existence of the easement had been established, then the easement could be used in a reasonable manner in order "to make effective the enjoyment of the easement."[268] They feared that the cost of compliance with the NREPA, which called for them to obtain a permit from the DNR, would be prohibitive. At trial, some testimony was entered which suggested that satisfying the DNR's permit requirements would likely "include the installation of a boardwalk, engineered floating pads, or a similar structure . . . over the full .22-mile path."[269] A boardwalk was estimated to cost $40,000 or more.[270]

Accordingly, this would mean, as the trial court put it, that the property owners "had achieved nothing in establishing the existence of the easement."[271]

The court of appeals concluded that the trial court had assumed too much in its analysis:

> The trial court's concerns about the additional burdens that may be placed on the landlocked property owners by the permitting process are speculative. And it is the province of the Department of Environmental Quality, not the court, to assess the circumstances and devise a plan to allow the landlocked property owners the most reasonable use of their land while still protecting the state's interest in preserving and protecting the character and integrity of the wetlands.[272]

The court of appeals did not address other concerns that its decision might also imply, namely, the responsibility of the landowners for damages under NREPA and otherwise for the damage to the wetlands that the DNR had alleged from the pallet roadway and the illegal use of motorized vehicles. It would seem that, in light of the court's ruling, the landowners faced potential remediation and other costs in addition to whatever costs might be necessary in obtaining a permit.

As a legal matter, it is hard to disagree with the conclusion of the court of appeals. The trial court had leapt to the conclusion that the DNR was not likely to "devise a plan" that would allow the "most reasonable

267. *Mathews*, 288 Mich. App. at 33-34.
268. *Id.* at 37; *see also id* at 44 n.44.
269. *Id.* at 33.
270. *Id.* at 34.
271. *Id.*
272. *Id.* at 46-47.

use of their land" while protecting the wetlands.[273] On the other hand, as a practical matter, one is hard pressed to envision a workable solution in light of the positions that the parties had taken at the trial court. The landlocked parcel had limited value to begin with, and was used for hunting and recreation.[274] Replacing the pallet roadway with something that the DNR would find acceptable almost surely would be an investment that would exceed the value of the land, and the process of working with the DNR to find a satisfactory outcome was likely to be time consuming and expensive. Resolving environmental issues generally requires either accepting what DNR proposes, or hiring both experts and lawyers who specialize in the process, to contest the basis for its position and to craft alternatives. The cost of such an effort is then an addition to whatever the final cost of the solution may be. Such costs were probably beyond the means of the landowners, and even if not beyond their means, it was likely to be a financially foolish decision to spend more than the land was ultimately worth in the hope of gaining an acceptable agreement.

While one can press the analogy too far, this situation is certainly not unlike the case of Glebe Farm in certain respects. In both situations, the value of the property is limited but the cost of maintaining ownership is very high, and that cost is not constrained by matters in the hands of the landowners.[275] The decision as to what chancel repairs were required was in the hands of the Parish in Glebe Farm; the decision as to how the easement could be utilized was in the hands of the DNR in *Matthews*. And, in both cases, the budget was outside the control of the landowner, who is simply expected to pay whatever is necessary.

F. Taxation Without Consent of the Governed

One of the unsettling aspects of the Glebe Farm case is that it harkens to an *ancien regime* of taxes that do not spring from the consent

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273. *Mathews*, 288 Mich. App. at 47.

274. *Id.* at 27. There was a cabin on the parcel and it was used as a "hunting camp" and a "family retreat." *Id.*

275. The 1930 Report of the Chancel Repairs Committee said, "It is hardly necessary to add that the lay impropriator in repairing the chancel is not paying a tax or subsidizing a church; he is merely performing a duty of which he may divest himself by disposing of the rectorial property in his possession to which the performance of the duty is attached." 1930 Committee Report, at 8. Surely this is disingenuous as a general principal. When the liability for owning land is both unlimited and outside the control of the landowner, to whom will he divest his property? This is a recipe for abandonment, just as those whose mortgage liability far exceeds the value of their interest in property have often given the keys to their lender or merely walked away.

of the governed, but that arise from circumstances that are difficult to know, and once known, are nearly impossible to prevent. That not terribly different circumstances can arise, and be upheld by the Michigan Supreme Court, just as the House of Lords upheld the case of Glebe Farm, is illustrated by the case of *Briggs Tax Service v. Detroit Public Schools*.[276]

Baldly stated, the essence of the case was this: for three years the Detroit Public Schools levied an illegal tax, collecting as much as $240,000,000 in revenue, none of which was refunded to the taxpayers.[277] There was no dispute that the tax was illegal.[278] Under Proposal A, adopted in 1994, Michigan school districts were prohibited from levying more than 18 mills without taxpayer approval, but preexisting levies were grandfathered in for the period for which they had already been approved.[279] The Detroit Public Schools authority for the grandfathered levy expired in 2002.[280] Nonetheless, erroneously, the Schools certified tax levies in 2002, 2003 and 2004 that violated the law.[281] In 2005, the Schools publicly acknowledged the mistake.[282]

Briggs Tax Service, L.L.C. filed a claim with the Tax Tribunal seeking a refund of the unauthorized taxes levied and collected.[283] Among the claims was that the tax constituted an unlawful taking and that the property owners had been deprived of due process of law.[284]

The Tax Tribunal initially dismissed Briggs' petition because it was not filed within 30 days of the issuance of the applicable tax bills, the usual rule for appealing one's taxes at the time.[285] Briggs was permitted to amend its petition to allege mutual mistake of fact under MCLA

276. 485 Mich. 69 (2010). The Author's firm filed an amicus brief in this case on behalf of the Building Office Managers Association of Metropolitan Detroit, arguing for what turned out to be the losing analysis.

277. *See Briggs Tax*, 485 Mich. 69.

278. *See id.*

279. *Id.* at 72.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Briggs Tax*, 485 Mich. at 72. This case actually began as a class action, but class actions are not permitted in this context; a successful class action could have meant a $240 million refund. *See id.* at n.2. Only about 50 individual taxpayers out of the many thousand affected brought actions.

284. *Id.* at 73.

285. MICH. COMP. LAWS ANN. § 205.735(2) (West 2003), subsequently amended to 35 days as set forth in MICH. COMP. LAWS ANN. § 205.735(3); *see also Briggs Tax*, 485 Mich. at 73 n.2.

section 211.53a, which allows a three year window for obtaining relief.[286]

As a result, the issue in the case became whether there was a "mutual mistake of fact made by the assessing officer and the taxpayer," in the language of the statute.[287] The Tax Tribunal concluded that the assessor had not made a mistake of fact and dismissed the claim.[288] The court of appeals reversed, saying that both parties (assessor and taxpayer) believed that the taxpayer was obligated to pay the illegal taxes, and that whether the taxes were authorized or not and whether they needed to be paid or not were factual questions.[289]

In the opinion of the supreme court, however, the sole mistake here was the mistake of the Detroit Public Schools, which was required to determine the amount of tax levy necessary to meet its budget.[290] The court concluded that "[t]here is no authority supporting petitioner's argument that assessors are empowered to review or alter certified tax rates."[291] Essentially, based on its reference to language from a prior case, the court was saying that an assessing officer cannot fail to perform a statutory duty because it is his opinion that his superiors have not followed the law, relying on *Board of State Tax Commr's v. Quinn*.[292] Hence there could be no mistake of fact by the assessor.

Quinn does not seem to be persuasive on this point. In that case, the assessor refused to place assessments as ordered by the State Board of Tax Commissioners, the predecessor to the current State Tax Commission.[293] There was clear statutory authority for the Tax Commissioners to make changes to a tax roll, and it was fair to characterize that group as the assessor's "superiors."[294]

Indeed, within the next two paragraphs of its opinion, the Michigan Supreme Court in *Briggs* goes on to say that "assessors are not agents of taxing authorities;"[295] they were not controlled by the Public Schools, they were not subject to the Schools via contract; and they are independently employed by tax-assessing jurisdictions.[296] Thus, it is hard to see how the analysis from *Quinn*, which is dependent upon a

286. MICH. COMP. LAWS ANN. § 211.53a (West 2005); *Briggs Tax*, 485 Mich. at 73-74.
287. *Id.* (citing to MICH. COMP. LAWS ANN. § 211.53a (West 2005)).
288. *Briggs Tax*, 285 Mich. at 73-74.
289. *Id.* at 74-75.
290. *Id.* at 79.
291. *Id.* at 76.
292. 485 Mich. at 79 n.29 (1900).
293. Bd. of State Tax Comm'rs v. Quinn, 125 Mich. at 128-29 (1900).
294. *Id.* at 131.
295. *Briggs Tax*, 485 Mich. at 80.
296. *Id.* at 80-81.

superior/subordinate relationship, supports the court's conclusion that the assessor had no duty to do anything other than act in accordance with the certification from the Detroit Public Schools.

The logic of what the court seems to be saying, and what seems germane to this analysis, is that even if the assessor believed that the Detroit Public Schools was wrong in its certification, notwithstanding the fact that the assessor was an independent agent with his own separate duties and obligations under the statutory scheme, he should have accepted that certification and spread what he concluded was an illegal tax. Such a rule would seem to be going too far. Surely one would hope that the assessor would not mindlessly accept whatever certification is handed down, but rather make some, at least cursory, review of its accuracy, and if he believed that there was a mistake (*e.g.*, that the voters were said to have approved a millage when there had been no vote; or that there was a mathematical error, or that the amount of the millage was in excess of the constitutional limit), that he would first draw this to the attention of the Schools so that the matter could be reviewed, and that if there was a disagreement, that he would bring the matter to the attention of the courts, whether before or after certifying the rolls. Going further, if the assessor knows with certainty that there is an error, is he not responsible for falsely certifying the rolls or is he excused because "he was just following orders"?[297]

If, however, one believes that the assessor has a duty to do more than merely accept the certification of the rolls without any independent thought or investigation, then one is forced to conclude that if he errs in performing this duty, he has made a mistake. Now that still leaves the question of what kind of a mistake it was, legal or factual, but it does suggest that the Court is not on the right path in saying that there was no mistake by the assessor at all, and that the sole mistake was on the part of the Detroit Public Schools.

Per the court, the mistake that the Public Schools committed in this case was a "unilateral mistake of law."[298] Citing a string of prior decisions, the court stated that "an unauthorized tax levy constitutes a mistake of law."[299] It is hard to disagree with the conclusion that the

297. Under MCLA section 211.42(d) the assessor must certify that "the spread of taxes and adjusted taxes are correctly recorded," MICH. COMP. LAWS ANN. § 211.42(d), and per MCLA section 211.119(1) it is a criminal misdemeanor for the assessor to neglect or fail to perform his duties under the act. If the assessor is independent of the taxing authority, it is hard to conclude that he does not have a statutory duty to do what is necessary to spread the taxes "correctly," and not merely as directed by the authority. MICH. COMP. LAWS ANN. § 211.119(1) (West 2005).

298. *Briggs Tax*, 485 Mich. at 84.

299. *Id.* at 81.

action of a taxing jurisdiction in imposing an illegal tax is ordinarily a mistake of law, although one could posit various hypotheticals where even the taxing authority made a mistake of fact. For example, what if the authority was allowed to impose a tax on residents of an area with over 100,000 taxpayers, and after the tax was spread on the rolls, new census data became available which unexpectedly showed 99,000 taxpayers where there had previously been 105,000?

The determination of whether the assessor's mistake (taking the position rejected by the court that the assessor actually did make a mistake) was one of fact or law is somewhat more difficult. For example, if the assessor believed that a certification from the Schools that an election had been held when in actuality it had not, would seem to be a mistake of fact (as opposed to a determination as to whether an election was necessary, which would seem to be a mistake of law).

Regardless of the misgivings stated here, *Briggs* is a unanimous decision of the Michigan Supreme Court.[300] What is most remarkable is that nowhere in the court's opinion is the slightest qualm expressed about the result; there is no dissent nor even a concurrence reflecting unease at the fact that the unambiguous command of the people of the State had been ignored, and that millions of dollars of taxes had been collected illegally. Furthermore, there is no indication that the court considered whether the distinction between the ability to recover an illegal tax based upon whether there was a mistake of fact by the assessor, or a mistake of law by the taxing jurisdiction, is rational, reasonable or sensible. Obviously, one can make the argument that it is the people, via the legislature, that determined that one should only have 30 days (or 35 days) to determine that a tax has been illegally imposed, and to appeal or pay under protest when there is a mistake of law rather than of fact. But, what reasonable, or rational, basis exists for such a conclusion? Determining that a tax levy is illegal is often the result of a lengthy process of adjudication. Even where it is not, few taxpayers would have the temerity to think that they can determine for themselves if a tax is valid; most taxpayers would only suspect that a tax was illegal if they learned it from a trusted source and it received attention via mass media. Of course, by then, it may be too late. As this case illustrates, even those few sophisticated parties who eventually learned of the unlawful tax missed the very brief window of opportunity afforded by the law.[301] One suspects that the vast majority of those who paid the tax at issue here never knew that they paid a tax that was levied contrary to the law, and

300. *Id.* at 85.
301. *Id.* at 73.

that the tax collecting entity was under no obligation to repay it even after admitting its mistake! As with most things, an effectively functioning government that prides itself on reflecting the consent of the governed operates on trust–the belief that the overwhelming majority of those involved in governance are attempting to follow the law to the best of their admittedly imperfect ability and that when mistakes are made, as is inevitable, there will be reasonable redress. Yet here we see due process reduced to an exceedingly low level.

Of course, in the *ancien regime*, it was believed that those who governed generally knew best, and that the consent of the governed was a concept that appeared in a much different form; a form that accepted hierarchies of rights and obligations, and looked for justice to be safeguarded by relationships as much or more than by laws. Because the results of this system often came to be seen as arbitrary, and old relationships were replaced with new and very different ones, change eventually came about and a more law-based system developed. However, as the Glebe Farm case also indicates, as the law evolves from older concepts, it can leave serious anomalies in its wake.[302] Theoretically, the owners of Glebe Farm had notice of their potentially unlimited liability for chancel repairs; theoretically, the taxpayers of Detroit had a remedy for the illegal taxes that they were required to pay. Yet as a practical matter, the law preserved a fundamental injustice. Ultimately, a system of law that leaves too many such anomalies will lose the allegiance of those who live under it.

IV. CONCLUSION: LIVING WITH THE LEGACY OF THE *ANCIEN REGIME*

Our *Survey* period saw the conclusion of the Glebe Farm case in Britain, as the Wallbanks divested themselves of property which was freighted with ancient burdens that they struggled mightily, but unsuccessfully, to throw off. During their long ordeal they found that the legal system offered scant comfort, for the desultory efforts at reform of the chancel law over the past century had left intact many of the assumptions and concepts of days gone by. The ultimate conclusion of the matter seemed, at best, an embarrassment to both the law and the religious institution that the law was intended to support, and at worst, a gross miscarriage of justice which summed up the characteristics that a wise jurisprudence is intended to avoid: the arbitrary, the inequitable, the unpredictable, and the logically insupportable. When the ironically named Lord Hope pronounced the case's lamentable epitaph—

302. *Wallbank v. Parochial Church Council of Aston Carlow & Wilmcote with Billesley, Warkshire*, [2001] EWCA (Civ) 713, 3 (Eng.).

"Unsatisfactory though the system may appear, there is no obvious alternative,"[303]–the ghost of Dickens' High Chancellor reappeared, surrounded by fog, fixed on his high bench, immobile and unmoved, tyrannical through his torpidity, and so encumbered by habits of mind and concepts of law that had subsisted long after the facts and circumstances that gave them vitality had come to an end, that he was unable to conceive of solutions, but could merely consent to allow the process that the law had unleashed to grind down all in its path.[304]

In this fashion, the case of Glebe Farm reminds us of the worst aspects of the persistence of the *ancien regime*. In reviewing the Michigan real property law cases during this *Survey* period, too often we see echoes of that case. Results that seem patently unjust, such as the levying of a blatantly illegal tax, that evades all remedy; a zoning review process that seems to yield only new rounds of exhausting and expensive procedure rather than a predictable outcome; and a property right to an easement that appears to turn into a path of limitless liability rather than to the productive use of a landlocked parcel. Yet, in other ways it reminds us that the *ancien regime* could be benign or even helpful in achieving new ends, such as freedom of religion, by allowing a parallel system of church law to determine property disputes. Or that it could sometimes show refreshing common sense in its application of some common law principles.

Perhaps the most important lesson to be gleaned from both Glebe Farm and the Michigan cases of the *Survey* period is that there is an urgent need for undertaking a thorough review, on an ongoing basis, of Michigan property law. Despite Lord Hope's cry of despair, there are surely alternatives to be found when laws are archaic and are no longer logical and reasonable responses to present circumstances, but are artifacts of a bygone era. Michigan has had a vigorous Law Revision Commission[305] in the past, and that group remains one of several models for reform. It is time for the real property bar to take steps to comprehensively canvas our State's property laws, and thoughtfully and systematically identify and pursue reform, bringing to the attention of the bench, the legislature and the citizenry those areas where the *ancien regime* needs to be revised and replaced, while leaving intact those areas

303. *Aston Cantlow & Wilmcote with Billesley Parochial Church Council v. Wallbank*, [2003] UKHL 37, [13].

304. *Supra* note 138.

305. *See, e.g.*, MICHIGAN LAW REVISION COMMISSION FORTY-FIRST ANNUAL REPORT TO THE LEGISLATURE FOR CALENDAR YEAR 2008 1. Part of the Commission's work in 2008 is "[t]o examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reform."

where conservation is the better part of wisdom. History has already shown, on more than one occasion, the bitter consequences of allowing the persistence of the *ancien regime* on its own terms.