

1-1-2016

## The Right to Property and Bank Nationalizations

Rachel Zemke

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### Recommended Citation

Zemke, Rachel (2016) "The Right to Property and Bank Nationalizations," *Chicago Journal of International Law*: Vol. 16: No. 2, Article 8.

Available at: <http://chicagounbound.uchicago.edu/cjil/vol16/iss2/8>

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# The Right to Property and Bank Nationalizations

Rachel Zemke\*

## Abstract

*The financial crisis of 2007–2008 resulted in numerous examples of state governments nationalizing banks or bailing out large private entities. Aside from the theoretical debate about nationalization and bailouts, there were practical questions about how to treat those who had invested in the nationalized banks. This Comment looks at the example of Northern Rock Plc, a U.K. bank that was nationalized in early 2008 and whose shareholders were left uncompensated for their shares. When the shareholders filed suit against the UK Government for violating their right to possessions under the European Convention on Human Rights, the European Court of Human Rights was left to determine the responsibilities of the state to property owners in times of economic crisis. However, instead of analyzing the case under the existing right to possessions doctrine, the Court deferred completely to the state. Furthermore, despite a right to possessions doctrine that reflects the importance of individuals' subsistence, the Court declined to distinguish the situation of the individual plaintiffs from the corporate plaintiffs. The European Court of Human Rights should recognize that individual plaintiffs are differently situated than corporate plaintiffs in terms of economic survival and should engage with the legal implications of those differences.*

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## I. INTRODUCTION

In the fall of 2007 and the winter of 2008, the United Kingdom government took over the bank Northern Rock plc (Northern Rock). After the nationalization, an independent valuer found that shareholders of Northern Rock were entitled to zero compensation for their shares. In a subsequent suit brought by Northern Rock shareholders, *Grainger v. United Kingdom*,<sup>1</sup> the European Court of Human Rights (the ECtHR or the Court) found that under the margin of appreciation doctrine, the national authorities were entitled to such a valuation and that there had been no violation of the right to possessions guaranteed by the European Convention on Human Rights, Article 1 of Protocol No. 1.<sup>2</sup> In the wake of the global financial crisis, a commonly voiced sentiment has been frustration with the sense that the “haves” emerged relatively unscathed from the financial crisis while the “have-nots” (or “have-lesses”) lost their entire lives’ savings.<sup>3</sup> Whether or not this sentiment has any basis in fact, its existence reflects the need for analysis of how our international legal rules have allocated the losses affected by the global financial crisis. This is a hotly disputed topic, especially as there is little agreement on who or what is at fault for the financial crisis of 2007–2008 and the subsequent global recession. This Comment is an attempt to address one issue in this debate: how the ECtHR should weigh party identity in suits to recover lost shares in a nationalized bank under Article 1 of Protocol No. 1.

In suits to recover stock lost in the nationalization of a bank, the ECtHR should take party identity into consideration. In this Comment, “party identity” means whether the party is an individual or a corporate person. Taking party identity into consideration does not mean that all individual shareholders should be fully compensated for their loss. Rather, the fact that a litigant is an individual should help push their case past the margin of appreciation doctrine that shut down the Court’s analysis in *Grainger* and into the balancing of the equities that the ECtHR generally considers in Article 1 of Protocol No. 1 cases.<sup>4</sup>

Analysis of ECtHR precedent on what items are protected “possessions” under Article 1 of Protocol No. 1 of the European Convention on Human Rights

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<sup>1</sup> *Grainger v. United Kingdom*, App. No. 34940/10, Eur. Ct. H.R. (2012), available at <http://hudoc.echr.coe.int/eng?i=001-112312>.

<sup>2</sup> *Id.*; see also European Convention on Human Rights, Protocol 1, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>3</sup> An entirely anecdotal way to see this sentiment is to read the comments section of articles dealing with bank nationalizations and subsequent litigation. See, for example, Red, Comment to *Six Years Later, We’re Still Litigating the Bailouts. Here’s What We Know*, N.Y. TIMES (Oct. 3, 2014), [http://www.nytimes.com/2014/10/05/upshot/six-years-later-were-still-litigating-the-bailouts-heres-what-we-know.html?ref=topics&\\_r=0&abt=0002&abg=0](http://www.nytimes.com/2014/10/05/upshot/six-years-later-were-still-litigating-the-bailouts-heres-what-we-know.html?ref=topics&_r=0&abt=0002&abg=0) (“This is real simple. The banks, and their bloated bosses got paid 100 cents on the dollar. The average working American lost hours of work, lost value in his house, lost his retirement, and has not gotten a raise in 6+ years.”).

<sup>4</sup> See *Grainger*, App. No. 34940/10, 55 E.H.R.R. SE13, ¶ 42 (2012).

(the ECHR) suggests that the ECtHR is concerned with people having a right to their livelihood. Like goodwill in a company, retirement investments are an individual's investment in her future. Like a public benefit, retirement investments are what sustains an individual's day-to-day survival. In fact, retirement investments are a substitute for government benefits, one that is much cheaper for the central government. Finally, sorting by party identity avoids giving compensation to large investment funds, a remedy that poses many of the moral hazard problems that the ECtHR articulated as a reason not to provide any compensation in *Grainger*.<sup>5</sup>

This Comment will look at the history and evolution of the right to property in European human rights law. An analysis of the case law on the definition of "possessions" will show that the ECtHR has been concerned with the right to property as a mechanism for ensuring individual survival and stability. One way to vindicate this line of case law is to recognize that there are different interests at stake with different types of plaintiffs in the bank nationalization cases.

Section II discusses the historical context of Northern Rock and the events leading up to the *Grainger* suit. Section III explores the right to property in international law and the ECtHR's precedent in Article 1 of Protocol No. 1 cases. Section IV goes through the procedural history of *Grainger* and analyzes the ECtHR's opinion in the case. Section V delves into ECtHR case law around the definition of "possessions" in order to determine what values the ECtHR is trying to advance. Using this analysis, I argue that stability and survival are values that the ECtHR is trying to vindicate with the right to possessions, and that those values bring into question the ECtHR's decision in *Grainger*.

## II. NORTHERN ROCK AND THE ORIGINS OF *GRAINGER V. UNITED KINGDOM*

Northern Rock began as the product of a merger between two building societies in 1965.<sup>6</sup> It remained a building society until 1997 when Northern Rock became a publicly traded bank.<sup>7</sup> At that point, members of the building society were given stock in the bank.<sup>8</sup> Northern Rock used a financing scheme that relied on cash from sources other than customers' deposits:

The business model of Northern Rock relied on money market finance rather than retail deposits to finance operations. Following the financial crisis in 2007, the availability of such funds became extremely limited, and Northern

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<sup>5</sup> See *id.*

<sup>6</sup> See *Timeline: Northern Rock's Rise and Fall*, REUTERS (Nov. 17, 2011, 6:14 AM), <http://www.reuters.com/article/2011/11/17/us-northernrock-sale-events-idUSTRE7AG0W520111117>.

<sup>7</sup> See Khawar Qureshi & Catriona Nicol, *Protection of Shareholders under the European Convention of Human Rights and the "Margin of Appreciation"*, 28 BUTTERWORTHS J. OF INT'L BANK. & FIN. L. 135 (2013).

<sup>8</sup> See *Grainger*, App. No. 34940/10, Eur. Ct. H.R. ¶ 3 (2012).

Rock found that it did not have the liquid funds to pay its current liabilities and to repay depositors.<sup>9</sup>

More specifically, in early August 2007, BNP Paribas, one of the largest banks in the world, froze withdrawals on some of its funds, drying up the “money markets” that Northern Rock’s financing so heavily relied upon.<sup>10</sup> In response to Northern Rock’s cash flow problem, sometime in September 2007, “the Bank of England, the Financial Services Authority and HM Treasury (the ‘Tripartite Authorities’) agreed *in principle* to provide financial support to Northern Rock.”<sup>11</sup> When it became public that the Tripartite Authorities had agreed to provide support to Northern Rock, there was a run on the bank.<sup>12</sup> From September 14 to September 18, customers stood in lines outside Northern Rock branches in order to withdraw their savings.<sup>13</sup> Withdrawals from the bank during this period totaled “4.45 billion GBP, nearly 20 percent of Northern Rock’s retail deposits.”<sup>14</sup>

The run on the bank led the Tripartite Authorities to authorize actual financial assistance to Northern Rock as well as the Chancellor of the Exchequer’s assurance that “all deposits in Northern Rock would be guaranteed.”<sup>15</sup> From September 2007 to February 2008, the bank and the U.K. government engaged in various reforms to stabilize the bank, including cancelling a dividend payment, selling mortgage assets, and expanding state guarantees of savings deposits.<sup>16</sup> At various times there were two external plans for rescuing Northern Rock in addition to the bank’s internal reforms.<sup>17</sup>

At this point in time, the two largest shareholders in Northern Rock, RAB Capital and SRM Ltd—who were later plaintiffs in *Grainger*—made moves in an attempt to prevent the nationalization of Northern Rock. In late November 2007, RAB Capital announced that it would oppose one of the proposed rescuer’s buyouts.<sup>18</sup> SRM Ltd sent a letter to the Chancellor of the Exchequer threatening a lawsuit if the nationalization plan compensated investors at “less than a fair price.”<sup>19</sup>

<sup>9</sup> Qureshi & Nicol, *supra* note 7, at 135.

<sup>10</sup> *Timeline: Northern Rock’s Rise and Fall*, *supra* note 6.

<sup>11</sup> Qureshi & Nicol, *supra* note 7, at 135 (emphasis added).

<sup>12</sup> See *Rush on Northern Rock Continues*, BBC NEWS (Sept. 15, 2007), <http://news.bbc.co.U.K./2/hi/business/6996136.stm>.

<sup>13</sup> See *Timeline: Northern Rock Bank Crisis*, BBC NEWS (Aug. 5, 2008), <http://news.bbc.co.U.K./2/hi/business/7007076.stm>.

<sup>14</sup> *Grainger*, App. No. 34940/10, Eur. Ct. H.R. ¶ 8 (2012).

<sup>15</sup> Qureshi & Nicol, *supra* note 7, at 135.

<sup>16</sup> See *Timeline: Northern Rock’s Rise and Fall*, *supra* note 6.

<sup>17</sup> See *Timeline: Northern Rock Bank Crisis*, *supra* note 13. The external plans involved Virgin, who later purchased the bank, and the Olivant Group, an investment consortium.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

The U.K. government ultimately rejected the two official rescue offers for Northern Rock. The bank was then nationalized by the Banking (Special Provisions) Act 2008 in February of 2008.<sup>20</sup>

In early 2008, the Treasury announced the Compensation Scheme for Northern Rock shareholders. The amount that any person could receive would be “the value immediately before the transfer time of all shares in Northern Rock held immediately before the transfer time by that person.”<sup>21</sup> It held that the valuation of shares would be dependent on the assumptions “that Northern Rock—(a) is unable to continue as a going concern; and (b) is in administration.”<sup>22</sup> Furthermore, the Banking (Special Provisions) Act 2008 included requirements that any compensation scheme had to assume that “all financial assistance provided by the Bank of England or HM Treasury to Northern Rock had been withdrawn; no financial assistance would in future be provided by the Bank of England or HM Treasury to Northern Rock . . . (s 5(4) of the Act) . . .”<sup>23</sup> In practical terms, the assumptions meant that the Independent Valuer could only look at Northern Rock’s assets and not at the value of the Northern Rock shares immediately prior to nationalization. This would result in a finding of zero compensation for shareholders.

Also important to note is that the Compensation Scheme refers to rights under the ECHR: “Compensation is payable in respect of a person’s consequential rights only if such compensation is required to be paid to comply with the [ECHR] rights (within the meaning given by section 1 of the Human Rights Act 1998).”<sup>24</sup> Given that SRM Ltd had already threatened a lawsuit if the nationalization went forward, it is unsurprising that the architects of the plan would have ECHR rights in mind. The terms of the Article 1 of Protocol No. 1 itself are the product of an interesting evolution in international law—the emergence of a right to property.

### III. THE RIGHT TO PROPERTY IN INTERNATIONAL LAW

#### A. Historical Development

While there is no binding international right to property, it is reflected in many international treaties.<sup>25</sup> The Universal Declaration of Human Rights (the

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<sup>20</sup> Qureshi & Nicol, *supra* note 7, at 135.

<sup>21</sup> The Northern Rock plc Compensation Scheme Order 2008, S.I. 2008/718, art. 2, ¶ 3(2) (U.K.) [hereinafter Compensation Scheme Order].

<sup>22</sup> *Id.* ¶ 6.

<sup>23</sup> Qureshi and Nicol, *supra* note 7, at 135.

<sup>24</sup> Compensation Scheme Order, *supra* note 21, ¶ 5(4) (referring to the act that incorporated the ECHR into U.K. law).

<sup>25</sup> It is worth noting that the perspective before the mid-twentieth century was that there could be no right to property in international law because property was within the national realm and could not be addressed by international law. See John G. Sprankling, *The Global Right to Property*, 52 COLUM. J.

UDHR) is understood to be an expression of customary international law, although it is not binding on its signatories. Article 17 of the UDHR guarantees the right to own property free from arbitrary deprivation.<sup>26</sup> The lack of an international right to property, however, is not determinative to the *Grainger* case as Article 1 of Protocol No. 1 of the ECHR provides a right to “peaceful enjoyment of possessions.”<sup>27</sup> However, the evolution of a right to property within international law foreshadows issues of how the right can be used for and against established systems of wealth and power.

The right to property has a contentious history. In the post-war period of international legal institutionalization, attitudes toward property marked the difference between “Western” capitalist nations and “Eastern” communist nations.<sup>28</sup> For instance, negotiations over the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) were plagued by tensions between the USSR and the West as “Soviet negotiators tended to view Western efforts to include the right to property in the draft ICESCR as a threat to the integrity of the communist system.”<sup>29</sup> Other efforts in the mid-20th century to cement an international right to property were derailed by tensions between newly independent nations and their former colonial powers. When the British Empire began to give up its colonies, it emphasized a right to property in order to protect former colonials staying in the country who were concerned about expropriation.<sup>30</sup> But as the formerly colonized nations became less interested in defining their identities and more concerned with how to function with one another, they began to recognize a right to property. International treaties ratified in the latter half of the 20th century, regional human rights conventions, and international anti-discrimination treaties either provided for or referred to a right to property.<sup>31</sup>

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TRANSNAT'L L. 464, 467 n.8 (2014) (citing E.A. Harriman, *The Right to Property in International Law*, 6 B.U. L. REV. 103, 104 (1926) (“It is a mere truism . . . to say that the legal right of property is a matter of local law.”)).

<sup>26</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 17 (Dec. 10, 1948) [hereinafter Universal Declaration] (“Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.”).

<sup>27</sup> ECHR, *supra* note 2.

<sup>28</sup> I am being over-general with these terms in an effort to be concise; things were, of course, more complicated.

<sup>29</sup> Sprankling, *supra* note 25, at 471.

<sup>30</sup> Ali Riza Çoban, Protection of Property Rights within the European Convention on Human Rights 1 (2004).

<sup>31</sup> See Sprankling, *supra* note 25, at 477–79.

Most clear in their terms, but limited by region, are treaties such as the ECHR,<sup>32</sup> the American Convention on Human Rights,<sup>33</sup> the American Declaration of the Rights and Duties of Man,<sup>34</sup> the African Charter on Human and Peoples' Rights,<sup>35</sup> and the Arab Charter on Human Rights.<sup>36</sup> The language used in these treaties is short and simple—all are some variation of “Everyone has the right to the use and enjoyment of his property.”<sup>37</sup> These regional treaties are signed by 132 nations, which means that nearly 70 percent of U.N. member states recognize a right to property.<sup>38</sup>

International anti-discrimination treaties refer to a right to property in proscribing discrimination against an individual in their exercise of the right to property. These treaties have been signed by between 38 and 189 nations.<sup>39</sup> They include: the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>40</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>41</sup> the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>42</sup> and the Convention on the Rights of Persons with Disabilities.<sup>43</sup> These treaties do not

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<sup>32</sup> See ECHR, *supra* note 2, art. 1 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.”).

<sup>33</sup> See American Convention on Human Rights, art. 21, Nov. 22, 1969, 1144 U.N.T.S. 123 (“Everyone has the right to the use and enjoyment of his property.”).

<sup>34</sup> See American Declaration of the Rights and Duties of Man, OEA-Ser.L./V.II.23, doc. 21, rev. 6, art. 23 (1948) (“Every person has the right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”).

<sup>35</sup> See African Charter on Human and Peoples' Rights, art. 14, Jun. 27, 1981, 1520 U.N.T.S. 217 (“The right to property shall be guaranteed.”).

<sup>36</sup> See League of Arab States, Arab Charter on Human Rights, art. 31, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) (“Everyone has a guaranteed right to own private property.”).

<sup>37</sup> American Declaration of the Rights and Duties of Man, *supra* note 34, at art. 23.

<sup>38</sup> See Sprankling, *supra* note 25, at 476.

<sup>39</sup> Compare *Status of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, UNITED NATIONS TREATY COLLECTION (Sept. 22, 2015), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

<sup>40</sup> See Convention on the Elimination of All Forms of Discrimination against Women, art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13 (“The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.”).

<sup>41</sup> See International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, Dec. 21, 1965, 660 U.N.T.S. 195 (guaranteeing “the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . (v) the right to own property alone as well as in association with others”).

<sup>42</sup> See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 15, Dec. 18, 1990, 2220 U.N.T.S. 3 (“No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others.”).

<sup>43</sup> See Convention on the Rights of Persons with Disabilities, art. 12, Dec. 13, 2006, 2515 U.N.T.S. 3 (ensuring “the equal right of persons with disabilities to own or inherit property”).

provide for a binding right to property in and of themselves, but they recognize and refer to that right. In the latter half of the 20th century, a right to property gained traction as a human right.

The actual existence of a global right to property is not integral to *Grainger* because of the express right to property provided for by Article 1 of Protocol No. 1. However, the conflicts over the existence of a right to property and the emergence of a right to property contra the state illustrate the competing interests and values at stake. Establishing a right to property and deciding how that right should be vindicated invites questions about what kind of property, whose property, and how much property should be protected. It also illustrates that the right to property is not exclusively a tool for the affluent or the state; it can also be wielded by the less affluent or by the individual against the state to advance their interests. Finally, the historical and theoretical context shows how the balance between an individual's right and the common good will always be the background against which courts and policy makers must define and execute the right to property.

## B. Article 1 of Protocol No. 1

The European Convention on Human Rights was ratified in 1953, but the four articles of the first protocol did not enter into force until a year later, in 1954.<sup>44</sup> These four articles protect property, education, free elections, and provide the mechanism by which a state can accede to the First Protocol. The first article focuses on a right to possessions and reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>45</sup>

It provides for a general right to possessions, which the ECtHR has interpreted substantively as a right to property.<sup>46</sup> The language also suggests that a balance must always be struck when considering the right to property between the individual's right and the "general" or "public" interest. Thus, in the language

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<sup>44</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262.

<sup>45</sup> ECHR, *supra* note 2, at Protocol 1, art. 1.

<sup>46</sup> *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) 5, 27 (1979) ("By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 . . . is in substance guaranteeing the right of property.").

itself, Article 1 of Protocol No. 1 hints at the tension between individual rights and the rights and interests of the state as a representative or agent of the polity.

The ECtHR has interpreted Article 1 of Protocol No. 1 to have three rules:

[T]he first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest . . .<sup>47</sup>

Simply put, the first rule restates the general principle behind Article 1 of Protocol No. 1, the second concerns when the state takes away a possession, and the third addresses when a state controls an individual's use of one of her possessions. While these represent three distinct elements, the ECtHR emphasizes that the rules are connected: “[T]he second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must therefore be construed in the light of the general principle laid down in the first rule.”<sup>48</sup> The second and third rule, deprivation and control of use, are most commonly used in the ECtHR's analysis of Article 1 of Protocol No. 1 cases; the first rule is used more as a gap-filler for when there has been neither a direct expropriation nor direct state control, but rather some interference with the property right.<sup>49</sup>

It is also important to note that Article 1 of Protocol No. 1 provides for both negative and positive obligations on the part of the state. Not only must the state

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<sup>47</sup> Jahn v. Germany, 2005-VI Eur. Ct. H.R. 55, 78; *see also* Sporrong v. Sweden, 52 Eur. Ct. H.R. (ser. A) 7, 24 (1982); James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) 10, 29–30 (1986).

<sup>48</sup> Jahn v. Germany, 2005-VI Eur. Ct. H.R. at 78; *see also* James v. United Kingdom at 29–30 (1986).

<sup>49</sup> Aida Grgić et al., *The Right to Property Under the European Convention on Human Rights*, Human Rights Handbooks, No. 10, COUNCIL OF EUROPE (2007). An example of a case analyzed under the first rule is Stran Greek Refineries v. Greece, 301 Eur. Ct. H.R. (ser. A) 61, 64 (1994), where national legislation meant that applicants' arbitration award against the state was void.

It may be useful to compare the three “rules” of Article 1 of Protocol No. 1 to the common law torts of conversion and trespass to chattels, both of which are trying to address the ways that one person can render another person's property unusable in some manner. Conversion, which is defined as “intentional exercise of dominion or control over a chattel”, is like the third rule, “control of use.” RESTATEMENT (SECOND) OF TORTS §222A (1965). Trespass to chattels—defined as “(a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another”—is akin to the second rule of deprivation in the Article 1 of Protocol No. 1 context. *Id.* §217 (1965). The first rule is a catchall, broader than either of the two common law actions and which covers actions that make property unusable by means other than control or destruction. There are two important distinctions between these common law actions and suits under Article 1 of Protocol No. 1. First, Article 1 of Protocol No. 1 covers more than just chattel property. Second, most suits under Article 2 of Protocol No. 1 are suing for money damages, as opposed to a *replevin* action, which has the same elements as a conversion suit and asks for return of the property in question. *See* WARD FARNSWORTH & MARK GRADY, TORTS 43 (2d ed. 2009).

refrain from unduly interfering with an individual's possessions, it must also, in certain circumstances, take affirmative steps to protect an individual's possessions.<sup>50</sup> These positive obligations are generally analyzed under the first rule, the general principle of a right to peaceful enjoyment of possessions.<sup>51</sup>

No matter what "rule" the ECtHR is considering, analysis of an action brought under Article 1 of Protocol No. 1 has three distinct parts. First, the ECtHR asks whether there was a possession. Second, it determines whether the state interfered with that possession. Finally, in light of the balance that must be sought between individual and community interests, the ECtHR asks whether the interference was justified.<sup>52</sup>

### 1. The meaning of "possessions" under ECtHR case-law.

The doctrine around possessions will be explored in depth in the analysis portion of this Comment, but for now, it is important to note that while the ECtHR has recognized that substantively Article 1 of Protocol No. 1 is a right to property, the term "possessions" is not equivalent to "property." It "has an autonomous meaning" that is more akin to "pecuniary" or "patrimonial" rights.<sup>53</sup> The ECtHR has referred to the use of the French word "biens," meaning "patrimonial rights," to understand the scope of "possessions."<sup>54</sup>

In a 2001 article, Sebastian Van Drooghenbroeck defined two requirements needed for something to be considered a "possession" under Article 1 of Protocol No. 1—it must have commercial value (he terms it "be hereditary"), and, if it is a claim to property, there must be a legitimate expectation of that claim being realized.<sup>55</sup> These two characteristics provide a floor for the wide range of assets that are protected by Article 1 of Protocol No. 1—land, claims, enterprise, and benefits have all been found to be possessions under Article 1 of Protocol No. 1.<sup>56</sup>

<sup>50</sup> Grgić et al., *supra* note 49, at 9.

<sup>51</sup> See *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R. 79, 130 (examining the case under the first rule and finding that "[g]enuine, effective exercise of the right protected by that provision does not depend merely on the State's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions").

<sup>52</sup> See, for example, *Solodyuk v. Russia*, App. No. 67099/01, Eur. Ct. H.R. ¶ 26–36 (2005), available at <http://hudoc.echr.coe.int/eng?i=001-69674>; *Stran Greek Refineries v. Greece*, 301 Eur. Ct. H.R. (ser. A) at 94–98.

<sup>53</sup> Grgić et al., *supra* note 49, at 7.

<sup>54</sup> See *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 27–28; see also Grgić et al., *supra* note 49, at 7.

<sup>55</sup> Sebastian Van Drooghenbroeck, *The Concept of "Possessions" within the Meaning of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, THE EUROPEAN LEGAL FORUM 437, 438–39 (2001).

<sup>56</sup> See *Jahn v. Germany*, 2005-VI Eur. Ct. H.R. at 78–79 (assuming that land was a possession); *Pressos Compania Naviera S.A. v. Belgium*, 332 Eur. Ct. H.R. (ser. A) 6, 20 (1995) (a possession must be

While the range of assets that can be protected is wide, there is no right to *acquire* property under Article 1 of Protocol No. 1. Therefore, a right to inherit is not protected unless the predecessor is in fact deceased.<sup>57</sup> A business can claim protection for its clientele and “goodwill,” but not future earnings.<sup>58</sup> There is no right to a pension, but if an individual qualifies for a pension or public benefit under domestic law, they have a right to receive that benefit.<sup>59</sup> The right to property is a right to extant property.

## 2. State interference with possessions.

After a determination that the applicant’s assets qualify as possessions, the ECtHR asks whether there was an interference with the enjoyment of those possessions. Often the state in question does not contest whether or not there was an interference.<sup>60</sup> This question generally serves as the space in which the ECtHR decides which rule to apply to the case—general provision, deprivation, or control of use. If there is a diminution in value, cessation of payment or inability to access an asset, the ECtHR usually finds an interference.

Interference shares some qualities with the tort of conversion in the American and English common law because it addresses an intrusion on property rights that is more nuanced than outright theft. Conversion is a cause of action that can be brought when someone intentionally destroys or alters another’s property, even if they do not take it for themselves.<sup>61</sup> However, “interference” is broader than conversion and can be applied to non-chattel property, unlike conversion.<sup>62</sup> Furthermore, the different sources of these two doctrines result in different typical fact patterns. Conversion, a common law form of action, is brought against individuals and covers a variety of malicious behavior such as fraud, posing as an imposter, and passing stolen goods.<sup>63</sup> Since Article 1 of

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“certain, current, [and] enforceable”); *Iatridis v. Greece*, 1999-II Eur. Ct. H.R. 75, 96 (“[C]ertain other rights and interests [aside from owning tangible items] . . . can also be regarded as ‘property rights,’ and thus as ‘possessions.’”); *Stec v. United Kingdom*, 2005-X Eur. Ct. H.R. 321, 324 (stating that welfare benefits are possessions within the meaning of Article 1 of Protocol No. 1).

<sup>57</sup> *See Marckx*, 31 Eur. Ct. H.R. (ser. A) at 23 (“Article [1]...applies only to a person’s existing possessions and that it does not guarantee the right to acquire possessions . . .”).

<sup>58</sup> *See Iatridis*, 1999-II Eur. Ct. H.R. at 97 (holding that the applicant’s inability to get back the land on which he operated an open-air cinema violated Article 1 of Protocol No. 1 with regard to his clientele).

<sup>59</sup> *See Stec*, 2005-X Eur. Ct. H.R. at 341 (“Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.”).

<sup>60</sup> *See, for example, James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 30; *Jahn*, 2005-VI Eur. Ct. H.R. (ser. A) at 78.

<sup>61</sup> *See FARNSWORTH & GRADY, supra note 49, at 40–46.*

<sup>62</sup> *See, for example, Stec*, 2005-X Eur. Ct. H.R. at 341 (holding that the right to a welfare benefit is a possession under Article 1 of Protocol No. 1).

<sup>63</sup> *FARNSWORTH & GRADY, supra note 49, at 46–50.*

Protocol No. 1 cases are focused on state action, there is less likelihood of such individual injurious behavior, and the standard relies more on whether the owner can benefit from the property or not.

### 3. Determining whether the interference was justified.

The key point of contention in Article 1 of Protocol No. 1 doctrine is whether the interference is justified. In *Holy Monasteries v. Greece*,<sup>64</sup> the ECtHR laid out a general principle for determining whether an interference is justified. The *Holy Monasteries* court focused on whether the interference “pursued a legitimate aim in the public interest” and “str[uck] a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights.”<sup>65</sup> With slight variations depending on whether it is a rule one, two, or three case, the ECtHR uses three queries to analyze whether *Holy Monasteries*’ principle is being vindicated: (1) is the interference lawful; (2) in the public interest; and (3) proportionate?

a) *Was the interference lawful?* A finding that the authorities acted unlawfully is sufficient to find a violation of Article 1 of Protocol No. 1.<sup>66</sup> Like “possessions,” under Article 1 of Protocol No. 1 doctrine, “lawful” has an “autonomous meaning.”<sup>67</sup> In *James v. United Kingdom*,<sup>68</sup> the ECtHR noted that “the terms ‘law’ or ‘lawful’ in the Convention [do] not merely refer back to domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law.”<sup>69</sup>

Elaborating on this rather circular explanation, *James* cited *Malone v. United Kingdom*<sup>70</sup> for factors that made an action “compatible with the rule of law.”<sup>71</sup> The requirements of compatibility include, first, a citizen’s ability to access the law to understand that it governs his conduct, and second, that the law be “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>72</sup> This two-

<sup>64</sup> *Holy Monasteries v. Greece*, 301 Eur. Ct. H.R. (ser. A) at 8 (1994).

<sup>65</sup> *Id.* at 28-29 (internal quotation marks omitted). Although *Holy Monasteries* was a rule two (deprivation) case, courts have adopted the general analysis to rule one (general principal) and rule three (control of use) cases as well. See also *Solodyuk v. Russia*, App. No. 67099/01, Eur. Ct. H.R. ¶ 30 (2005).

<sup>66</sup> *Grgić et al.*, *supra* note 49, at 13; see also *Iatridis v. Greece*, 1999-II Eur. Ct. H.R. at 20 (“[T]he interference in question is manifestly in breach of Greek law and accordingly incompatible with the applicant’s right to the peaceful enjoyment of his possessions.”).

<sup>67</sup> *Grgić et al.*, *supra* note 49, at 12.

<sup>68</sup> *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 10 (1986).

<sup>69</sup> *Id.* at 41 (internal citations omitted).

<sup>70</sup> *Malone v. United Kingdom*, 82 Eur. Ct. H.R. (ser. A) at 4 (1984).

<sup>71</sup> *James*, 98 Eur. Ct. H.R. at 41.

<sup>72</sup> *Malone v. United Kingdom*, 82 Eur. Ct. H.R. (ser. A) at 27 (1984) (internal citations omitted). Although *Malone* arose under Article 8 of the ECHR, the right to private and family life, there is a

part test maps quite well onto requirements of procedural fairness that an individual have adequate notice of a law—that he knows the law exists and that he understands the law’s implications for his actions.

b) *Was the interference in the public interest?* To determine whether an interference with property is “in the public interest,” the ECtHR looks at whether the interference is in pursuance of a “legitimate aim.”<sup>73</sup> This is often the section in which the ECtHR decides whether it will defer to the state, giving it a wide margin of appreciation.<sup>74</sup>

When determining what constitutes a “legitimate aim,” the ECtHR looks at the principles that the state was trying to vindicate and the factual circumstances in which the state was acting. “Right[ing] the injustice,” “securing greater social justice,”<sup>75</sup> “reduc[ing] excessive and unjustified disparities between rents for equivalent apartments,”<sup>76</sup> and “end[ing] illegal sales . . . and abandonment or uncontrolled development” of land,<sup>77</sup> have all been found to be legitimate aims that the respective states were pursuing when they interfered with property.

The ECtHR found no legitimate aim to “limit an unmarried mother’s right to make gifts or legacies in favour of her child.”<sup>78</sup> Although an interest in “uniform application of the Pensions Law” is a legitimate aim, the ECtHR found that such an aim could not factually support a “retrospective recalculation of the judicial award.”<sup>79</sup> Refusing to allow the destruction of houses that were in imminent danger of being—and eventually were—swallowed up by a refuse dump on “humanitarian grounds” was not a legitimate aim.<sup>80</sup> Generally speaking, discrimination in treatment and what the ECtHR finds to be excessive exercises of authority by the state will lead to a finding of no legitimate aim.<sup>81</sup>

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similar analysis of whether interference with the right is justified, including a question of whether it is “in accordance with the law.” *Id.*

<sup>73</sup> See *Holy Monasteries v. Greece*, 301 Eur. Ct. H.R. (ser. A) at 47 (1994); see also *Scordino v. Italy*, 2006-V Eur. Ct. H.R. 81, 85 (holding that “the applicants have had to bear a disproportionate and excessive burden which cannot be justified by a legitimate aim in the public interest pursued by the authorities”).

<sup>74</sup> *Jahn v. Germany*, 2005-VI Eur. Ct. H.R. at 80–81 (“The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation.”) (internal citations omitted). Since the margin of appreciation doctrine is so fundamental to the Court’s decision in *Grainger*, a later section is devoted to the topic.

<sup>75</sup> *James*, 98 Eur. Ct. H.R. (ser. A) at 32–33 (1986).

<sup>76</sup> *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) 4, 26–27 (1989).

<sup>77</sup> *Holy Monasteries*, 301 Eur. Ct. H.R. (ser. A) at 34 (1994).

<sup>78</sup> *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 28 (1979).

<sup>79</sup> *Pravednaya v. Russia*, App. No. 69529/01, Eur. Ct. H.R. ¶ 40–41 (2005).

<sup>80</sup> See *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R. at 130.

<sup>81</sup> It is common for applicants to combine claims under Article 1 of Protocol No. 1 with claims under Article 14, which prohibits discrimination because the margin of appreciation under Article 14 is

As mentioned previously, this is generally an area in which the ECtHR gives wide latitude to the states in defining the public interest and determining what measures are needed to advance that interest. Because of the doctrine of margin of appreciation, most of the contention in Article 1 of Protocol No. 1 cases takes place at another point in the analysis—defining “possessions” or determining whether an interference is “proportionate” to the state’s announced interest.

*c) Was the interference proportionate to the interest?* Proportionality is usually defined as “strik[ing] a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”<sup>82</sup> Also important is that there is a “reasonable relationship . . . between the means employed and the aim pursued.”<sup>83</sup> The ECtHR often references the language and structure of the Article itself when discussing proportionality, which suggests that this balance is really the “heart” of the question it faces in Article 1 of Protocol No. 1 cases.<sup>84</sup>

The question of proportionality is another area where the doctrine of margin of appreciation can essentially wipe out analysis of the facts and principles in question. When the ECtHR does not give a wide margin of appreciation to the state, however, it is the “[c]ompensation terms . . . and, notably, whether [the contested measure does] not impose a disproportionate burden on the applicants” that is determinative to finding proportionality.<sup>85</sup> Generally, a “taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference . . . .”<sup>86</sup> The ECtHR differentiates between takings, all of which can be lawful, that require full compensation and those that require “less than reimbursement of the full market value”; “measures of economic reform or measures designed to achieve greater social justice” fall into the latter category.<sup>87</sup> Thus, the ECtHR is evaluating which types of state action are more valuable than others and making those actions cheaper for the state to pursue. It is important to recognize that by privileging certain types of state action, the ECtHR is exercising normative values in balancing individual rights and the common good.

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much narrower. Grgić et al., *supra* note 49, at 29. *See also* Gaygusuz v. Austria, 1996-IV Eur. Ct. H.R. 1129 (holding that if an individual meets the statutory requirements for a benefit, a state agency cannot discriminate on the basis of national origin).

<sup>82</sup> *Pressos Compania Naviera S.A. v. Belgium*, 332 Eur. Ct. H.R. (ser. A) at 23; *see also* *Solodyuk v. Russia*, App. No. 67099/01, Eur. Ct. H.R. ¶ 30 (2005).

<sup>83</sup> *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) at 27 (1989).

<sup>84</sup> *See, for example, id.*; *see also* *Grainger v. United Kingdom*, App. No. 34940/10, Eur. Ct. H.R. ¶ 35 (2012).

<sup>85</sup> *Scordino v. Italy*, 2006-V Eur. Ct. H.R. at 116.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

A complete taking, without any “compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances.”<sup>88</sup> Exactly what those “exceptional circumstances” are, however, is not always clear. The Court’s analysis of “exceptional circumstances” has been heavily tied to the doctrine of margin of appreciation, which is explored in greater detail below.

The important point is that the proportionality of an interference is judged in terms of the burden it poses on the individual. If “the person concerned has had to bear ‘an individual and excessive burden,’” then the ECtHR is reluctant to find that a fair balance has been struck.<sup>89</sup> In *Solodyuk v. Russia*, the ECtHR found that delay of pension payments combined with very high inflation constituted interference with the pensioner’s right to their possessions and construed this interference as “impos[ing] an individual and excessive burden on the applicants.”<sup>90</sup>

The central point of a right to possessions case usually lies with the question of proportionality because the ECtHR has to directly face the questions of when individual rights trump the common good. However, the doctrine does not enumerate specific factors that the ECtHR should consider, except for the severity of the burden on the individual. When U.K. courts consider Article 1 of Protocol No. 1 under the Human Rights Act of 1998, they employ the following test:

[T]he question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.<sup>91</sup>

Although the ECtHR has not employed this exact test, it is a helpful declaration of some of the many factors that the ECtHR considers in determining whether an interference is justified.

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<sup>88</sup> *Id.*

<sup>89</sup> *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 34 (1986) (citing *Sporrong v. Sweden*, 52 Eur. Ct. H.R. (ser. A) at 28 (1982)). *See also* *Jahn v. Germany*, 2005-VI Eur. Ct. H.R. at 82 (“Compensation terms . . . are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants.”).

<sup>90</sup> *Solodyuk v. Russia*, App. No. 67099/01, Eur. Ct. H.R. ¶ 36 (2005).

<sup>91</sup> Brian Kennelly, *Commercial Enterprises and Article 1 of the First Protocol ECHR: Not Human, Not Necessarily European: What Are Their Rights?* 10, HUMAN RIGHTS LAWYERS’ ASSOCIATION (2013), <http://www.hrla.org.uk/Commercial%20enterprises%20and%20Article%201%20of%20the%20First%20Protocol%20ECHR%20bk.pdf> (quoting *Bank Mellat v. HM Treasury*, [2013] 3 W.L.R. 179 at 20 (Lord Sumption)). U.K. courts can apply the ECHR through the Human Rights Act of 1998. It is also important to note that the ECtHR has stated that “availability of alternative solutions” (factor (iii) above) is not determinative in and of itself. *See James*, 98 Eur. Ct. H.R. (ser. A) at 35.

### C. Margin of Appreciation

The balancing test discussed above does not come into play once the ECtHR determines that in regard to the particular subject matter of the case, the state should be afforded a wide margin of appreciation. This means that the ECtHR shows great deference to the state's decisions about the "means of enforcement and to ascertaining whether the consequences are justified in the general interest."<sup>92</sup> The ECtHR must only determine whether the state's actions were "manifestly without reasonable foundation."<sup>93</sup>

The theoretical basis for a wide margin of appreciation is the state's "direct knowledge of their society and its needs."<sup>94</sup> This knowledge gives the state an advantage in determining what is in the "public" or "general" interest, the trigger for limiting the right to possession under Article 1 of Protocol No. 1.<sup>95</sup> The case law does not give specific subject areas where a wide margin of appreciation is appropriate, referring to general categories of "political, economic and social issues"<sup>96</sup> or "social or economic grounds."<sup>97</sup>

Generally, a complete wipeout of possessions would "constitute a disproportionate interference . . . justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances."<sup>98</sup> When a state claims exceptional circumstances requiring a complete taking of property, the ECtHR is more willing to "make an inquiry into the facts with reference to which the national authorities acted."<sup>99</sup>

In *Jahn v. Germany*,<sup>100</sup> land that had been part of a redistribution program in East Germany became the subject of a conflict between the state and heirs of the "new farmers" who had acquired the land through the program.<sup>101</sup> The ECtHR granted the state a wide margin of appreciation and found that a lack of compensation for the land "d[id] not upset the 'fair balance' that has to be struck between the protection of property and the requirements of the general interest."<sup>102</sup> In contrast, in *Former King of Greece v. Greece*,<sup>103</sup> the Court found that

<sup>92</sup> *Scordino v. Italy*, 2006-V Eur. Ct. H.R. at 115.

<sup>93</sup> *James*, 98 Eur. Ct. H.R. (ser. A)47, at 32 (1986).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Jahn v. Germany*, 2005-VI Eur. Ct. H.R. (ser. A) at 81.

<sup>97</sup> *Grainger v. United Kingdom*, App. No. 34940/10, Eur. Ct. H.R. ¶ 36 (2012).

<sup>98</sup> *Id.* ¶ 37 (citing *Holy Monasteries v. Greece*, 301 Eur. Ct. H.R. (ser. A) at 8 (1994) and *Former King of Greece v. Greece*, 2000-XII Eur. Ct. H.R. 119).

<sup>99</sup> *James*, 98 Eur. Ct. H.R. at 32.

<sup>100</sup> *Jahn*, 2005-VI Eur. Ct. H.R. (ser. A) 55.

<sup>101</sup> *Id.* at 84–85.

<sup>102</sup> *Id.* at 88 ("Having regard to . . . the uncertainty of the legal position of heirs and the grounds of social justice relied on by the German authorities, the Court concludes that in the unique context of German reunification" zero compensation is acceptable.).

<sup>103</sup> *Former King of Greece v. Greece*, 2000-XII Eur. Ct. H.R. 119.

the circumstances of a change in the political regime from a monarchy to a republic was not sufficiently exceptional to support a total lack of compensation for property of the former Greek king.<sup>104</sup> Despite these varying applications, the margin of appreciation doctrine was the determinative question in *Grainger*.

#### IV. *GRAINGER V. UNITED KINGDOM*

##### A. Domestic Court Cases

After the Independent Valuer announced the Compensation Scheme Order for the nationalization of Northern Rock, shareholders mobilized to seek some sort of remedy for their lost shares. They filed suit claiming that the Compensation Scheme Order violated Article 1 of Protocol No. 1 because it prevented the Independent Valuer from considering all of the relevant facts, including the regulatory failures of the U.K. government.<sup>105</sup>

The trial court dismissed the case in February of 2009, finding that the required assumptions “reflected the fact that, but for the support provided by the Bank of England, Northern Rock would have been unable to pay its debts as they fell due and would have had to cease carrying on business.”<sup>106</sup> Thus, the U.K. government’s actions were not “manifestly without reasonable foundation,” and there was no violation.<sup>107</sup>

The appellate court followed the same line of argument and held that the context in which the U.K. government was acting called for a “wide margin of appreciation.”<sup>108</sup> The appellate court dismissed the applicants’ arguments that the Government was motivated by profit.<sup>109</sup> Instead, the appellate court found that the government was acting to “protect[] the banking system as a whole” and thus was trying to “preserve for the sake of the national economy the benefits of the LOLR [Lender of Last Resort] operation at the least possible cost to the taxpayer.”<sup>110</sup>

The applicants’ appeal to the Supreme Court was denied in December 2009.<sup>111</sup>

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<sup>104</sup> *Id.* at 148–49.

<sup>105</sup> *Grainger v. United Kingdom*, App. No. 34940/10, Eur. Ct. H.R. ¶ 19 (2012).

<sup>106</sup> *Id.* ¶ 20.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* ¶ 39.

<sup>109</sup> *Id.* ¶ 21.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* ¶ 22.

## B. *Grainger v. United Kingdom* Before the European Court of Human Rights

The ECtHR began its analysis with a description of the parties. The plaintiffs included two investment funds: SRM Ltd Global Master Fund Partnership (SRM Ltd) and RAB Special Situations.<sup>112</sup> The ECtHR noted that SRM Ltd was the largest single shareholder in Northern Rock, owning 11.5% of the stock and headquartered in the Cayman Islands.<sup>113</sup> RAB Special Situations was an investment company, also headquartered in the Cayman Islands, which held 8.18% of the total Northern Rock stock.<sup>114</sup>

The second group of plaintiffs consisted of individual shareholders. They obtained their shares (1) when the Northern Rock Building Society dissolved, (2) “as employees under an approved profit share scheme or share incentive plan, or other incentive schemes, or by contributions to the company pension fund,” or (3) by purchasing shares on the stock market.<sup>115</sup> The ECtHR noted that “[a]t the date of nationalisation there were some 150,000 small shareholders.”<sup>116</sup>

The plaintiffs changed their arguments over the course of the litigation. Before the ECtHR, the plaintiffs advanced three arguments and a solution:

1. Zero compensation was the inevitable result of the Compensation Scheme Order’s required assumptions.

The applicants argued that Northern Rock’s shares had a value of 0.9 GBP right before the bank was nationalized, a fact which the required assumptions rendered meaningless for valuation purposes.<sup>117</sup> The applicants believed that the government could “be entitled to an equitable award” from the shareholders, but that it should not be able to take over their shares completely.<sup>118</sup>

2. The Compensation Scheme Order did not account for the state’s financial regulation responsibilities.

Key to the plaintiffs’ argument here was that the other central banks had taken measures in August 2007 to prevent runs on banks and other financial miscues.<sup>119</sup> A U.K. Treasury report from early 2008 found that due to concerns about “moral hazard,” the Bank of England neglected to take action.<sup>120</sup> The

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<sup>112</sup> *Id.* ¶ 2.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* ¶ 30.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* ¶ 31.

<sup>120</sup> *Id.*; *See also* TREASURY COMMITTEE, THE RUN ON THE ROCK, 2007-08, H.C. 56-1 at 338 (U.K.).

applicants also alleged that the U.K. Financial Services Authority failed to properly regulate Northern Rock; the failings by the agency and the Bank were “highly relevant” to the question of proportionality.<sup>121</sup>

3. Given the conditions of the deal, it was “manifestly disproportionate and inconsistent with any notion of ‘fair balance’ for the state to deny compensation to the shareholders.”<sup>122</sup>

Finally, the applicants argued that given the fact that the British Government (1) could expect Northern Rock to pay back the loans, (2) did not have to provide the guarantees of savings accounts, (3) received fees and interest from the transaction, (4) recognized Northern Rock’s value at the time of nationalization, and (5) expected to see profit from the sale of Northern Rock, the Compensation Scheme Order did not strike a fair balance under Article 1 of Protocol No. 1.<sup>123</sup> Furthermore, the applicants felt that Northern Rock had been treated differently than the Royal Bank of Scotland and HBOS, two large banks that had received support from the government in 2008.<sup>124</sup>

4. The independent valuer should have been given no assumptions and considered all relevant facts.

Instead, the applicants argued, the independent valuer should have been able to come to his own conclusions about the value of Northern Rock prior to nationalization.<sup>125</sup>

The ECtHR dismissed all of these arguments and instead found that the U.K. government acted within its margin of appreciation in trying to achieve a legitimate aim of stabilizing the national economy, keeping costs low for taxpayers, and dissuading strategic firms from relying on state bailouts.<sup>126</sup> Neither party contested that shares of Northern Rock were possessions under Article 1 of Protocol No. 1, that the applicants were deprived of those shares, that the nationalization of Northern Rock was in the public interest, or that the nationalization of Northern Rock was lawful.<sup>127</sup> The only question for the ECtHR to decide was whether the nationalization of Northern Rock, and the ensuing Compensation Scheme Order, were proportionate.

Because the nationalization of Northern Rock was an act of economic strategy during a period of national turbulence, the ECtHR determined that the

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<sup>121</sup> Grainger, App. No. 34940/10, Eur. Ct. H.R. ¶ 31 (2012).

<sup>122</sup> *Id.* ¶ 32.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* ¶ 33.

<sup>126</sup> *See generally id.* ¶ 34–43.

<sup>127</sup> *Id.* ¶ 38.

U.K. government should be afforded a “wide margin of appreciation.”<sup>128</sup> Key to this finding were the “exceptional circumstances” in which the U.K. government was acting, and the fact that the U.K. government’s actions with regard to Northern Rock were “integrally linked to the series of support measures . . . focus[ed] [] on protecting a key sector of the national economy.”<sup>129</sup>

Under a wide margin of appreciation, the Court’s review of compensation terms, the unit by which it was measuring proportionality, was limited to determining whether the U.K.’s “policy choice . . . [wa]s ‘manifestly without reasonable foundation.’”<sup>130</sup>

The ECtHR rejected the applicants’ assertion that the Compensation Scheme Order’s assumptions “inevitably” lead to zero compensation, finding that the independent valuer could have chosen to consider the company’s assets, and that the finding of zero compensation “indicated that, in the light of the events of the preceding few months, the company’s assets did not offset its losses.”<sup>131</sup> Additionally, the ECtHR found that the applicants “ha[d] not established” that the British Government was negligent in its regulation of either Northern Rock or its general “handling of the financial turmoil of the Autumn of 2007.”<sup>132</sup>

Instead, the ECtHR found that the government had a legitimate aim in protecting “depositor confidence” in banks, and thus the national economy as a whole.<sup>133</sup> This aim had to confront the danger that other banks would engage in strategic and unscrupulous behavior, “making bad business decisions on the assumption that the State would provide a safety net.”<sup>134</sup> In that context:

In the Court’s view, the decision taken in the legislation that the former shareholders of Northern Rock should not be entitled to take the value which had been created by the Bank of England’s loan was far from being “manifestly without reasonable foundation”. Instead, it was clearly founded on the policy of avoiding “moral hazard”, which is at the heart of the principles which regulate the provision of LOLR [lending of last resort].<sup>135</sup>

The ECtHR emphasized that nothing in Article 1 of Protocol No. 1 or domestic law required the state to provide a “safety net” to businesses.<sup>136</sup> Instead,

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<sup>128</sup> *Id.* ¶ 39.

<sup>129</sup> *Id.* The ECtHR’s use of the term “exceptional circumstances,” which permits an uncompensated taking under Article 1 of Protocol No. 1, is somewhat confusing here. This seems to be a blend between two different parts of the legal analysis, but the use of the term here emphasizes the Court’s belief that these really were exceptional circumstances in which a *very* wide margin of appreciation was appropriate and, consequently, lack of compensation was legal.

<sup>130</sup> *Id.* ¶ 36; *see also* Jahn v. Germany, 2005-VI Eur. Ct. H.R. at 81; James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) at 32 (1986).

<sup>131</sup> Grainger, App. No. 34940/10, Eur. Ct. H.R. ¶ 40 (2012).

<sup>132</sup> *Id.* ¶ 41.

<sup>133</sup> *Id.* ¶ 42.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

the government was free to make decisions about how to best constrain an economic crisis.

The ECtHR's analysis used a broader lens than the plaintiffs' arguments: it considered the entire economy and powerful actors within the economy. The plaintiffs' arguments were cemented in their specific experience and the financial consequences of nationalization for them. The fact that the plaintiffs were comprised of diverse types of legal persons prevented the ECtHR from engaging in its usual consideration of the individual burden faced by applicants. Instead, some of the plaintiffs were exactly the type of actors at whom the Compensation Scheme Order was aimed—those that may make or push for risky business decisions, betting that the government will bail them out. Other plaintiffs had been forced to shoulder the excessive and individual burden that Article 1 of Protocol No. 1 doctrine tries to avoid.<sup>137</sup> Furthermore, the individual plaintiffs, as shareholders of relatively few shares, did not pose the same risks of moral hazard because they did not carry the same type of weight within the bank's internal decision-making.

If the ECtHR were able to discriminate between these parties and apply its analysis separately to each, it would result in a decision that better vindicates Article 1 of Protocol No. 1's principle of balance between individual good and common good. In short, party identity matters.

## V. PARTY IDENTITY MATTERS

Both individuals (natural persons) and corporate bodies (legal persons) have rights under the ECHR.<sup>138</sup> SRM Ltd and RAB Special Situations were fully within their rights to sue under the Convention. However, the ECtHR could treat SRM Ltd and RAB Special Situations differently than Dennis Grainger and the other individual shareholders because individuals face a different type of burden from the state's interference with their property. The excessive burden they would bear violates the values the ECtHR has sought to uphold when determining what "possessions" should be protected under Article 1 of Protocol No. 1.<sup>139</sup> The

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<sup>137</sup> *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 34 (1986) (citing *Sporrong v. Sweden*, 52 Eur. Ct. H.R. (ser. A) at 26 (1982)). *See also* *Jahn v. Germany*, 2005-VI Eur. Ct. H.R. at 82.

<sup>138</sup> ECHR, *supra* note 2, art. 34. *See also* MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* 4 (2006).

<sup>139</sup> In addition, an excessive and individual burden is cause for the ECtHR to find that an interference is disproportionate and therefore a violation of Article 1 of Protocol No. 1. *See James*, 98 Eur. Ct. H.R. (ser. A) at 34 (1986) (citing *Sporrong*, 52 Eur. Ct. H.R. (ser. A) at 26 (1982)). All this Comment suggests is that the Court always consider the excessive and individual burden prong, instead of using the margin of appreciation doctrine, to skip past that part of the analysis. Whether or not a plaintiff is an individual is a relatively easy finding of fact—are they suing as an individual or as a corporation? If they are suing as an individual, then the Court should not use the margin of appreciation doctrine to wipe out its balancing test of whether the interference was justified and should consider whether or not there was an individual or excessive burden.

precedent around “possessions” suggests that the ECtHR is concerned with an individual’s livelihood. Furthermore, the individual shareholders are far less likely to engage in strategic behavior that puts the government in danger of having to bail out more banks, primarily because they wield much less influence within the bank than a large shareholder. Thus, but for the margin of appreciation doctrine, the individual plaintiffs who lost their retirement investments may have had a better legal argument than corporate plaintiffs.

#### A. Survival and Stability As Inherent Values in the ECtHR’s “Possessions” Precedent

The ECtHR has held that “possessions” protected under Article 1 of Protocol No. 1 include things such as a pension or welfare benefits,<sup>140</sup> clientele,<sup>141</sup> and goodwill,<sup>142</sup> and a license to sell alcohol.<sup>143</sup> All of these examples illustrate that the ECtHR is validating possessions that represent an investment in future financial stability, which allow individuals to survive and support themselves. Stability and survival are important values to property theory. John Locke believed that self-preservation and the preservation of other humans was the primary value that law should seek to affect.<sup>144</sup> When an individual makes an investment in their future preservation, there is heightened protection of those assets.

The ECtHR recognizes that when small businesses make investments into their ability to operate in the future, there is a laden value to those investments. It has recognized that a business’ “goodwill” or “clientele” is a possession protected by the Article 1 of Protocol No. 1; when the state action disrupts the business’ ability to take advantage of that goodwill, it is an interference with the business’ possession.<sup>145</sup> Likewise, when accountants who had been working as such for many years were denied the title of “accountant” under subsequent legislation, they lost their clientele, an “asset” which they had “built up.” This interference constituted an “interference with their right to peaceful enjoyment of their possessions.”<sup>146</sup>

Furthermore, the ECtHR is not shy about calling on fundamental values preventing hardship and social justice in its Article 1 of Protocol No. 1 doctrine.

<sup>140</sup> See *Stec v. United Kingdom*, 2005-X Eur. Ct. H.R. at 323–24.

<sup>141</sup> *Iatridis v. Greece*, 1999-II Eur. Ct. H.R. at 96.

<sup>142</sup> *Tre Traktörer Aktiebolag v. Sweden*, 159 Eur. Ct. H.R. (ser. A) 7, 21 (1989).

<sup>143</sup> *Id.*

<sup>144</sup> See Gregory S. Alexander & Eduardo M. Peñalver, *An Introduction to Property Theory* 37 (2012).

<sup>145</sup> *Iatridis*, 1999-II Eur. Ct. H.R. at 96 (“[B]efore the applicant was evicted, he had operated the cinema for eleven years . . . as a result of which he had built up a clientele that constituted an asset.”).

<sup>146</sup> *Van Marle v. the Netherlands*, 101 Eur. Ct. H.R. (ser. A) 4, 13 (1986) (finding that although a clientele and business constituted an asset under Article 1 of Protocol No. 1, the state’s action was justified).

As noted earlier, in *Solodyuk v. Russia*,<sup>147</sup> the ECtHR found that delay of pension payments in the context of high inflation constituted an unjustified interference with the right to property.<sup>148</sup> The interference was unjustified because the pension represented the applicants' "sole or main income" and the state's delay meant that the "pensions fell significantly in value" resulting in an "individual and excessive burden on the applicants."<sup>149</sup> The ECtHR has supported state action that aimed to "right the injustice which was felt to be caused to occupying tenants."<sup>150</sup>

While there is no general right to a pension, a legitimate claim to a public benefit is a possession under Article 1 of Protocol No. 1.<sup>151</sup> The ECtHR has held that "[i]n the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits."<sup>152</sup> In the first case on public benefits, *Gaygusuz v. Austria*,<sup>153</sup> the ECtHR found that the plaintiff had a right to emergency assistance benefits, in part because money came from funds to which he and his former employer had

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<sup>147</sup> *Solodyuk v. Russia*, App. No. 67099/01, Eur. Ct. H.R. (2005).

<sup>148</sup> *See id.* ¶ 28, 35–36.

<sup>149</sup> *Id.* ¶ 35–36. The Court's reference to "individual and excessive burden" suggests that the Court does consider party identity to some degree in its decision, even if not overtly. In a decision about welfare benefits, the language was overwhelmingly that of the "individual" and "individuals...completely dependent for survival on...welfare benefits." *Stec v. United Kingdom*, 2005-X Eur. Ct. H.R. at 341. Likewise, in *Grainger* itself, the Court specifically notes that plaintiffs SRM Ltd and RAB Systems were both investment funds "incorporated in the Cayman Islands." *Grainger v. United Kingdom*, App. No. 34940/10, Eur. Ct. H.R. ¶ 2 (2012). While the ECtHR doesn't seem to have overtly incorporated plaintiff identity into its doctrinal framework in Article 1 of Protocol No. 1 cases, the Court does seem to be considering identity in its analysis, particularly when it contemplates whether there is an "individual and excessive burden" in determining whether an interference is "justified."

<sup>150</sup> *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 33 (1986) ("Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature.").

<sup>151</sup> *See Müller v. Austria*, App. No. 5849/72, Eur. Comm'n H.R. Dec. & Rep. 374 (1974); *Stec*, 2005-X Eur. Ct. H.R. 321. *Goldberg v. Kelly*, 397 U.S. 254 (1970), was the first American case that recognized an individual's interest in some government benefits could qualify for protection as property under the due process clause of the Fourteenth Amendment. Similarly to the requirement that an individual have a cognizable claim to the benefit, *see Stec*, 2005-X Eur. Ct. H.R. at 341, *Goldberg* required that an individual meet the statutory requirements for a benefit before their interest in that benefit was legally valid. *Goldberg*, 397 U.S. at 262 n.8. The idea that government benefits, in all of their forms, could be a form of personal property came to prominence with Charles A. Reich's article, *The New Property*, 73 Yale L.J. 733 (1964), in which he examined how government benefits fall on so many sectors of the economy and the population. Reich included in his discussion of government-granted property many of the same items or benefits that the ECtHR considers "possessions" such as a pension, public benefit, and license, among others. *Id.* at 734–35. Reich also criticized courts' institutional competence to make judgments about the merit of government action done in the "public interest," arguing that such a characterization is "simplistic." *Id.* at 774.

<sup>152</sup> *See Stec*, 2005-X Eur. Ct. H.R. at 341.

<sup>153</sup> *Gaygusuz v. Austria*, 1996-IV Eur. Ct. H.R. 1129.

contributed.<sup>154</sup> While there is no right to a pension in a particular amount, the contributory amount constitutes a floor.<sup>155</sup> The admissibility decision in a more recent case, *Stec v. United Kingdom*,<sup>156</sup> makes clear that contributory benefits are still protected: “Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.”<sup>157</sup> Thus, as long as the individual qualifies for a benefit according to domestic law, their claim to that benefit is a “possession” under Article 1 of Protocol No. 1.<sup>158</sup> The ECtHR’s language in *Stec* and other benefits cases belies an interest in ensuring the economic support and stability of an individual, especially when that individual has made some sort of an investment to ensure that she will have financial stability.

What do the items ruled to be “possessions” have in common? They are important to someone’s livelihood, to their ability to survive into the future. Welfare benefits are fundamentally about ensuring the stability and survival of humans. Goodwill of clients and alcohol licenses represent investments that an individual has made in their ability to make a living in the future. Likewise, a bank employee has made an investment in their future by purchasing stocks through the bank’s “profit share scheme or share incentive plan.”<sup>159</sup> These types of investments, made by individuals, can be differentiated from the investments of hedge fund managers for whom these investments are only one of many and are smaller relative to their entire wealth. Concern with *an individual’s survival* is not at stake with a hedge fund, whereas it is directly called into question when an individual’s retirement savings are wiped out.

One may argue that the identity of plaintiffs is not the real question here—individuals can make speculative investments that, when they go sour, do not threaten their livelihood. It is the effect of the investment, or the investment’s relative worth to the individual that really matters. That is true; however, the identity of plaintiffs is an easy-to-prove fact that can trigger the court to put aside the margin of appreciation doctrine and get to work on the trickier questions of livelihood and survival. There are also reasons to believe that party identity is a

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<sup>154</sup> *Id.*

<sup>155</sup> *See Domalewski v. Poland*, 1999-V Eur. Ct. H.R. 573, 583 (“The applicant did [ ] retain all the rights attaching to his ordinary pension under the general social insurance system. Consequently, the applicant’s pecuniary rights stemming from the contributions paid into his pension scheme remained the same.”).

<sup>156</sup> *Stec*, 2005-X Eur. Ct. H.R. 321.

<sup>157</sup> *Id.* at 341.

<sup>158</sup> *Id.* at 342 (“If [ ] a Contracting State has in force legislation providing for the payment as of right of a welfare benefit—whether conditional or not on the prior payment of contributions—that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.”) (internal citation omitted).

<sup>159</sup> *Grainger v. United Kingdom*, App. No. 34940/10, Eur. Ct. H.R. ¶ 2 (2012).

good predictor of whether an investment is the result of speculation or long-term planning. There are not that many individuals who have the means to make speculative investments, and of those that can, there are fewer still who would do so as individuals, without the protection of incorporation or some other business organization.

## B. Moral Hazard

Even though the ECtHR did not overtly consider the identity of the plaintiffs, it did note that two of the plaintiffs were investment funds headquartered in the Cayman Islands.<sup>160</sup> This implies that the ECtHR knew that plaintiffs were not U.K. taxpayers, which played into the ECtHR and the U.K. government's concern with strategic actors. The ECtHR described the moral hazard issue as one of the primary reasons it determined the compensation scheme to be reasonable:

Instead, [the compensation scheme] was clearly founded on the policy of avoiding “moral hazard” . . . In the Court's view, it was entirely legitimate for the State authorities to decide that, had the Northern Rock shareholders been permitted to benefit from the value which had been created and maintained only through the provision of State support, this would encourage the managers and shareholders of other banks to seek and rely on similar support, to the detriment of the United Kingdom economy.<sup>161</sup>

If the pool of plaintiffs who are entitled to some sort of remedy is narrowed to individual plaintiffs, the risk of moral hazard is lessened because there are so few individual shareholders who can actually exert influence over how a bank is managed. Concerns about groups of individual shareholders grouping together to exert influence over management can be ameliorated with two further solutions. First, only shareholders who are bank employees that have taken part in a company retirement plan could qualify as “special” plaintiffs, entitled to getting past the margin of appreciation stage. This would make bank nationalization cases much more similar to government pension cases and would recognize private retirement schemes as substitutes for public pensions.<sup>162</sup> Second, without narrowing the field of individual shareholders to quite that degree, we could design a remedy scheme that gets at exactly what the shareholders lost—their financial

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* ¶ 42.

<sup>162</sup> Somewhat beyond the scope of this piece, but linked to its thesis, is a discussion of the role of investment retirement schemes as the replacement or supplement to traditional pensions and public retirement programs. If that is the case, then the question of how to treat investors in these programs implicates a nation's financial health in a very meaningful way. Furthermore, it is unlikely that most of the covered employees are savvy enough to be thinking about diversification of their retirement investment, or really have the savings to diversify. In some ways, the legal rule should be aimed at the architects of the retirement schemes, rather than the investors, and reward those companies who set up retirement investment plans that require diversification.

stability into the future—but without incentivizing anti-social behavior. This would mean that instead of money damages, individual shareholders in bank nationalization cases could get entry into a public pension program, perhaps with the time they have already worked counting for them in the public pension scheme.

Finally, although there are many international banks, giving individual shareholder plaintiffs the opportunity to move past the wide margin of appreciation does not implicate international moral hazards in the way the ECtHR was worried about in *Grainger*. It is far more likely that individual shareholder plaintiffs (especially if we only consider individuals who are former employees of the bank) are citizens of the same country that nationalized the bank. Therefore, the plaintiffs are taxpayers and have made some investment in the national government's ability to nationalize the bank in the first place. This is quite different than a Cayman Island hedge fund reaping the rewards of not paying U.K. taxes *and* being rescued by U.K. taxpayers. Furthermore, if the individual shareholder is a citizen of the nationalizing country, they have the ability to communicate their feelings about bank nationalization policies to their representative government.

### C. Wealth-Sensitive Legal Rules

In their article, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, Louis Kaplow and Steven Shavell argue that as compared to an income tax, wealth-sensitive legal rules are less efficient methods of redistributing wealth to the poor.<sup>163</sup> Assuming, for the moment, that the highest level of economic efficiency is indeed the most welfare-maximizing rule, there is an important distinction to be made between Kaplow and Shavell's argument and the ideas raised in this Comment.

Kaplow and Shavell are primarily focused on different damages awards as between wealthy and poor parties.<sup>164</sup> This Comment is not solely about rich and poor, although wealth is an important consideration. There will be many wealthy bank employees who may stand to profit from a rule that allows individual shareholder plaintiffs to proceed to a balancing test.<sup>165</sup> In fact, to be a shareholder requires some modicum of wealth in the first place. That fact changes the scope of this analysis to be about *at least* middle-income individuals. These cases are not

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<sup>163</sup> Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

<sup>164</sup> *Id.* at 669.

<sup>165</sup> Although, wealthy bank employees may not fare as well at the balancing of the equities stage if they do not face the same type of disproportionate burden that a less wealthy bank employee would face.

about wealth transfers from the rich to the poor. Instead, the interests that may be vindicated by a party-sensitive rule are about how a government incentivizes steady employment and saving. In some ways, the real question is whether a government wants a rule that protects private retirement programs or relies on public retirement programs. In a bank nationalization case, the government will probably end up paying for an individual's financial future whether through damages or a welfare benefit.<sup>166</sup> There are arguments to be made about which outcome is better. But the rule will have implications for how individuals think *ex ante* about becoming and staying employed and investing in private retirement programs. The ECtHR should engage with the idea that individuals' employment and future financial stability is at stake in these cases. Giving individual plaintiffs the ability to move beyond the margin of appreciation doctrine forces the ECtHR to engage with that idea.

To the extent that allowing individual plaintiffs to advance to a balancing test in Article 1 of Protocol No. 1 cases will increase the amount of damages awarded above what the economically efficient legal rule would award, Kaplow and Shavell's proof shows that a higher income tax would benefit the government by giving it more resources with which to pay for a public pension program.<sup>167</sup>

Finally, it is worth noting that straight economic efficiency is not necessarily the only aim of our legal system. Especially in a tort-like lawsuit, retributive, compensatory, and corrective justice are worthy of consideration.<sup>168</sup> The bank nationalization cases are tort-like in that someone has suffered a harm, but they lack a "faulty-party."<sup>169</sup> This means that retributive and corrective justice have little sway. The most applicable theory behind the bank nationalization cases is that the victims should be compensated for their loss. It does not matter *who* is paying, as long as someone is paying.

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<sup>166</sup> This point is well illustrated by Kaplow and Shavell's point that only parties to a lawsuit will be advantaged by a legal rule. See Kaplow & Shavell, *supra* note 163, at 675. Any individual shareholder who is not party to the suit will not recover any of their retirement savings, and therefore, will not benefit from a doctrine that allows cases brought by individuals to move to the balancing stage. However, the non-party shareholder who has lost their savings will end up depending on a government benefit anyway. Thus, the government is in the same place as it would have been if the individual shareholder had filed suit.

<sup>167</sup> *Id.* at 674.

<sup>168</sup> See Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 312, 331–35 (1990) (explaining these three as possible theoretical foundations for tort law, as well as a deterrence).

<sup>169</sup> This point reveals the one aspect of these cases that has not been covered in this comment—whether former bank leaders should be held personally responsible for their mismanagement. That kind of suit would implicate more of Kaplow and Shavell's concerns regarding wealth transfers, but since it would be a fault-based suit, it would implicate the other theories of "justice" in legal rules.

## VI. CONCLUSION

The ECtHR's decision in *Grainger* may have been a foregone conclusion. To decide otherwise would be to take bank nationalization out of the toolbox of state leaders facing economic crisis.<sup>170</sup>

The ECtHR's decision may have been correct for the time and place, but it neglected to entertain the values that the ECtHR has recognized as implicit in a right to property—one's livelihood and stability. Because the ECtHR does not distinguish between individual plaintiffs and corporate plaintiffs, it misses out on the different interests at stake. Individual plaintiffs' cases implicate the values of survival that the ECtHR has focused on in its precedent on the right to possessions. The ECtHR should recognize that those values are at stake in a case like *Grainger*, and should speak to them in their decision.

If compensation for lost stock can be narrowed to only certain types of plaintiffs, then compensation may be a financial possibility for states. Furthermore, if the remedy to individual plaintiffs is something that goes to what they actually lost—financial stability into the future—then compensation could be even more feasible. The state authority will have responsibility for the individual's well-being into the future anyway, whether through old-age pensions or health and social services costs to dealing with the homeless and indigent. It may be cheaper for the government to make rules that incentivize individuals who are working to save for the future. The rule in *Grainger* does nothing to assure that their long-term investments in things like stocks will be respected by the state government if there is another financial crisis.

In facing a case like *Grainger*, the ECtHR is stuck between very large-scale problems and questions of equities on a smaller scale. In deferring completely to the national government, the ECtHR fails to even consider the question of the small-scale equities. But protecting the individual against the state is part and parcel of the ECtHR's mission, and it should not put those values to the side so easily.

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<sup>170</sup> One interesting exercise is to consider solutions to the financial crisis that exist entirely outside of the litigation context. Sweden is implementing a “stability fee” or direct tax on banks so that they pay for their own bailouts.” See Matthew Saltmarsh, *Swedish Bank Fee Sets Example for America*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/business/global/22levy.html>.