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There is no Right to Property: Clarifying the Purpose of the Property Clause

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ABSTRACT: In this article, I call for greater clarity on the meaning of constitutional property in the Constitutional Court's section-25 jurisprudence. I also urge the Court to provide more deliberate and substantive reasons for the grounds on which entitlements before the Court should enjoy constitutional protection. In its section-25 jurisprudence the Court either skims over the meaning of the word, or it treats the entitlement as self-evident. This lack of precision leads to a 'wide-open-gates' policy that has two negative consequences. First, in failing to articulate why an entitlement should enjoy constitutional protection, the Court moves the jurisprudence of section 25, the property clause, away from the purpose of the clause. Through an historical reading of the making of section 25, and a comparison with section 28 of the Interim Constitution, I argue that the property clause holds a transformative purpose. However, due to the wide berth accorded by the Court to the definition and scope of constitutional property, the transformative nature of the property clause remains largely underexplored. Second, in condoning an entrenchment of existing interests that cling to the property clause to resist legislative reform, the Court's approach has the potential to stultify the legislative regulation of property and interests deemed to be 'property'. Because it becomes so easy to tie an interest to property, the clause is put to work defending interests not envisaged at its inception. I conclude by arguing that the failure to provide sufficient scope and clarity to the meaning of property hinders the ability of the property clause to enact reform. This is especially concerning in a context in which land and resource inequality in South Africa pivots off property; in which livelihoods are marginalised through property's shadow; and in which the legitimacy of the property clause remains an issue given the epistemicide of indigenous land and resource governance systems and knowledge enacted through colonisation.

KEYWORDS: constitutional property, property jurisprudence, section 25, social function of property

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I INTRODUCTION

The title of this article may suggest to some that it is an anti-property critique. That reading would be a mistake: this article is intended to jolt the reader into requiring and articulating from South African jurisprudence far greater conceptual clarity of what we mean by 'property' under the property clause, section 25 of the Constitution. I argue in this article that our constitutional property jurisprudence takes the meaning of 'property' in section 25 for granted, treating it as self-evident or self-explanatory. Taken to its extreme, section 25 is referenced as incorporating a right to property. However, this 'right to property' is positioned incorrectly in the popular imagination, importing private law notions of absolute dominium in which property rights are treated largely as inviolable. In fact, a right to property is as much about *not* having a right to property. The right to property is not a self-evident *fait accompli*, but it is rather dependent on the purpose of the constitutional clause, and whether this purpose renders an interest capable of constitutional protection.

I therefore argue for a more deliberate reading of why entitlements should enjoy constitutional property protection. In this article I refer to these constitutional entitlements as 'constitutional property'. My central thesis is that this first component of section 25 has not received enough mileage in section-25 jurisprudence. The Constitutional Court either skims over the question, or treats an entitlement as self-evident. This 'wide-open gates' policy of allowing any entitlement that can be linked to property in terms of a tenuous legal fiction to enjoy constitutional protection has two negative consequences. First, the failure to give the entitlement substantive legal content moves the Court away from the purpose of the property clause Part I of this article, is to validate 'constitutional property' as holding a social function. Second, allowing any entitlement to receive constitutional protection potentially makes it that much more difficult for Parliament to exercise its regulatory powers given that an aggrieved party may seek the protection of the property clause to push back against the regulation of property. Because it becomes so easy to tie an interest to property, the property clause is put to work defending interests not envisaged at its inception. It is as though the Court is unaware of how property can produce and further entrench wealth inequality. This is contradictory considering the Court's approach in housing cases in which it pushes back against propertied interests in favour of housing rights. In turn, the Court's housing jurisprudence reveals a social function of property, but this is curiously absent in the Court's property jurisprudence.

There are four components to the article. First, my historical reading traces the arc of section 25 from its political underpinnings in section 28 of the Interim Constitution ('section 28 IC') to its incorporation in section 25 of the Final Constitution. I draw on this historical reading to argue that the purpose of the property clause is to promote the social function of property. Second, I trace a range of cases in which the Constitutional Court ostensibly dealt with the meaning and purpose of section 25. I put forward a number of reasons why the failure to give constitutional property any substantive content in these cases is problematic. Third, I explore the debate around limiting a property entitlement at the threshold stage of section 25, versus the justification stage later on in the inquiry. Finally, I provide a number of concluding thoughts on the negative consequences of this 'wide-open-gates' policy.

II A HISTORY OF THE CONSTITUTIONAL PROPERTY CLAUSE: DEVELOPING THE SOCIAL FUNCTION OF PROPERTY

In this part, I trace the history of the property clause in the Final Constitution. I employ this history as a way of understanding the intentions of our founding 'parents'. This process is useful in understanding the tensions at play at the time section 25 was drafted, and how we can begin the process of clarifying the purpose of section 25.[1] My argument throughout this article is that the Court's property jurisprudence reveals little about the purpose of the clause, and what it was and still is intended to achieve. It would appear section 25 is wielded by many as a bludgeon, either to insist that the property clause is sacrosanct and an inviolable check against the state regulation of property interests;[2] or that the clause lacks legitimacy and thus its transformative potential will remain limited or merely an illusion.[3] Both positions have value, but neither position seems particularly interested in working the property clause as it currently stands. Accordingly, I explore how our collective praxis thus far has not provided section 25 with sufficient oxygen to perform the purpose envisaged by its drafters.

Although this 'purpose' is contested and subject to change over time, as a starting point the Court should position itself relative to the making of the clause, The Court should interpret the intention of section 25 in light of the history that informed its development, which reveals an evolution from a position in which property rights are explicitly protected to one in which property is positioned relative to its social function. This reading of section 25 as embodying a social function of property – does not mean that property entitlements do

[1] H Klug 'Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-Apartheid South Africa' (2018) 34 *South African Journal on Human Rights* 469. Klug conducts a similar historical exercise in his article; and, based partly on this historical reading, concludes that the property clause is not a hindrance to land reform in particular.

[2] For example, South African Institute of Race Relations NPC (IRR) 'Submission to the Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution of the Republic of South Africa, 1996, regarding the Draft Constitution Eighteenth Amendment Bill of 2021' (13 August 2021) 34, available at https://bit.ly/3AlU7Ci. ('The IRR is opposed to any amendment to the Property Clause of the Constitution because it believes that state power viz. private property must be limited as much as possible, and because land reform is best achieved through facilitating the open market. Quoting the work of the Fraser Institute in Canada, the submission notes that 'the countries which do the best in upholding private property rights and limiting state power are the "most free", in the economic sense.'

[3] This position is perhaps best represented through the decolonial critique of constitutional rights. Further exploration of this pressing critique is needed relative especially to the popular and institutional legitimacy of the property clause, and as interpreted against the broader backdrop of the notion of a 'post'-apartheid South Africa. This is especially relevant for property considering how colonisation was, to use the language of the property clause, fundamentally an arbitrary deprivation of property, and that 'actual arrangements of… land and property ownership [and] spatial segregation… were all left untouched in the new constitutional dispensation.' JM Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34 *South African Journal on Human Rights* 300. I believe that opening the discussion to the purpose of the clause may lend itself to highlighting the erasure of indigenous resource governance systems through the colonial imposition of settler law, and the need to reinscribe land with a just meaning. However, I acknowledge the limits of my argument in that working *within* section 25 may achieve little in 'the recovery and restoration of full, integral and comprehensive sovereignty to the indigenous peoples conquered in the unjust wars of colonialisation' which is otherwise 'consigned to oblivion.' MB Ramose 'In Memoriam: Sovereignty and the "New" South Africa" (2007) 16 *Griffith Law Review* 310. See also M B Ramose 'Towards a Post-Conquest South Africa: beyond the Constitution of 1996' (2018) 34 *South African Journal on Human Rights* 326; M Lepuru 'The Youth of Our Time, Constitution and the Future of "South Africa"' (2021) *Alternate Horizons* 1; E Zitzke 'A Decolonial Critique of Private Law and Human Rights' (2018) 34 *South African Journal on Human Rights* 492.

not enjoy constitutional protection from arbitrary deprivation by the state (which includes expropriation without the awarding of just and equitable compensation). Rather, it means that such protection is not a primary concern of the clause; its primary purpose is, where necessary, to mediate the exercise of property rights in favour of a broader public interest.

A From a right to land, to a right to property

To trace this arc, I conducted archival research at the South African Historical Papers Archive at the University of the Witwatersrand. An ANC proposal for a new clause on land rights to be included in the draft Bill of Rights revealed no property clause, but instead in a clause entitled 'Land and the Environment', it included a Right to Land.[4] This right to land was grounded in the productive *use* of land, and obligated legislation providing for stable and secure tenure.[5] The existing system of property rights was positioned as 'the country's primary asset, the basis of life's necessities, and a finite resource.'[6] The proposal is significant in the way it positioned a reconfiguration of the current system of property, which appeared to be understood as a significant legal basis upon which the entire system of apartheid and colonialism existed. Indeed, like other colonised countries, South African land has been parcelled up as a project of enclosure by its white settler community. In the process, territory is reinscribed with new meaning, one bound up in the dominium of property. Property becomes a 'cultural force', cloaked in a perception of 'clarity and certainty' over what was ostensibly a 'disordered and ambiguous world.'[7] Thus, the system of property was far from regarded as an 'innocent' legal assemblage, and undoing apartheid and colonialism required an undoing of property. Although not explicitly stated, we can read a social function of property in these clauses and understand it as one such method of 'undoing' property: the equitable and shared distribution of finite resources, a privileging of use over title and, in place of a blunt right-to-property outlook, a legal system designed to provide stable and secure tenure.

Helena Alviar Garcia provides some background to the meaning of the social function of property in a chapter on Comparative Constitutional Law in Latin America. She quotes cases from the Colombian Constitutional Court that consider the social function of property as enshrined in the Colombian Constitution:

> In addition to including the social and ecological functions of property… Article 58 also establishes that the state has the duty of promoting associative and collective forms of property… 'The social function is, on the one hand, the meaning of moderating and restricting the scope of property rights, while on the other hand, it involves other types of property. [T]here is no doubt that in the Constitution individualistic theory is discarded and its exercise is given a highly social content,

[4] ANC National Conference, July 1991, Durban: Proposal for a New Clause on Land Rights to be put into the Draft Bill of Rights', available at Wits Historical Papers Archive/Transvaal Rural Action Committee Property Rights/Property Clause, AG2735). See, in particular: Article 11(3): 'South Africa belongs to all who live in it.' Article 11(4): 'Access to land or other living space is the birthright of all South Africans.'

[5] Ibid Article 11 (6): 'Legislation shall provide that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure.'

[6] Ibid Article 11(2).

[7] Blomley on urban land and the politics of property. N Blomley *Unsettling the City: Urban Land and the Politics of Property* (2004) 14.

which allows the law to impose limitations, in order for it to serve the community interests and social solidarity.'[8]

This view of property formed a backdrop to the negotiations for a new Constitution in South Africa, as part of both the Congress for a Democratic South Africa (CODESA) and the Multiparty Negotiation Forum (MPNF).[9] CODESA I took place in December 1991 and CODESA II in May 1992, after which negotiations broke down. The negotiations resumed in March 1993 amidst major violence in South Africa's cities. The Multiparty Planning Conference met on the 4 and 5 of March 1993, laying the foundations for the Multiparty Negotiating Forum on the 1 and 2 of April 1993.

Three versions of the draft Interim Constitution were produced as part of the MPNF – the first on 21 July 1993; the second on 6 August; the third on 20 August; and the final on 18 November 1993. This paved the way for South Africa's first democratic election on 27 April 1994, and its transition to a democracy. Property as outlined in the second and third drafts reflected the final position in section 28 of the Interim Constitution. Both drafts provided for a positive entitlement to acquire, hold, and dispose of rights in property, for the expropriation of property, and for a somewhat complicated land restoration clause.[10] Section 28 kept this positive entitlement, but added a subclause prohibiting deprivation unless in accordance with a law, and it dropped the land restoration clause altogether.[11] Land restitution was instead placed in chapter 8 of the Interim Constitution, delinked from the property clause.

[8] HA Garcia 'Looking beyond the Constitution: the Social and Ecological Function of Property' in R Dixon & T Ginsburg (eds.) *Comparative Constitutional Law in Latin America* 153, 159, quoting Ruling C-595 of 1999, MP C Gaviria, considerations 2b and 2c. The Social Function of Property stems from the work of the French jurist Léon Duguit writing in the early 20th century, concerning the evolution in French law compared to the Napoleonic Code. L Duguit 'Changes of Principle in the Field of Liberty, Contract, Liability, and Property' in Association of American Legal Schools *The Progress of Continental Law in the Nineteenth Century* (1918) 65–147. See also S Foster & D Bonilla 'The Social Function of Property: A Comparative Perspective' (2011) 80 *Fordham Law Review* 1003; N Davidson 'Sketches for a Hamiltonian Vernacular as a Social Function of Property' (2011) 80 *Fordham Law Review* 1053; L van Vliet & A Parise 'The Development of the Social Function of Ownership: Exploring the Pioneering Efforts of O von Gierke and LDuguit' in G Muller et al *Transformative Property Law: Festschrift in Honour of AJ Van der Walt* (2018).

[9] Compare this position to that of the National Party which, as Chaskalson has argued, ensured maximum protection for existing property rights in a future democratic South Africa: 'To the extent that the National Party could control the future, white South Africans were not going to be deprived of their property by a democratic state. Even in the grave whites would be able to keep their property safe from an ANC government.' M Chaskalson 'Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) 11 *South African Journal on Human Rights* 222, 224. See also M Chaskalson 'The Property Clause: Section 28 of the Constitution' (1994) 10 *South African Journal on Human Rights* 131.

[10] Draft Constitution, 6 August 1993, section 29(3): 'Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.'

[11] Section 28 of the Interim Constitution Act 200 of 1993 was entitled 'Property', and provided as follows: (1) 'Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights; (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law; (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.'

Section 25 of the Final Constitution is different. Part of my intrigue with how the Court has treated the purpose of the property clause lies in just how different it is to section 28 IC. That difference is not merely textual; those textual differences reveal a far deeper meaning about what the property clause is intended to achieve. I suggest three substantive differences below.[12]

First, section 28(1) IC provided that '[e]very person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.' This positive entitlement to acquire, hold, and dispose of propertied entitlements stands in stark contrast to the current design of section 25 of the final Constitution, which simply contains no positive entitlements. I go into this distinction later in the article, including arguments that the distinction makes no difference. However, I argue that it does make a difference, not because it is so difficult or unwise to define property so definitively,[13] but because a hesitancy to enter this terrain in the Court's jurisprudence has negative consequences for the clause as a whole, including both its purpose and how it is used by litigants to advance their interests.

Second, the expropriation subclause is similar to the final subclause, but it is now followed by and connected to six other subsections which oblige the state to redress land inequality in South Africa. This change is significant in the message and tone behind section 25. The integration of the land reform clause with the property clause reflects a far more reform-oriented view of property: section 25 is as much about protecting against arbitrary deprivation of property as it is about creating a positive obligation on the state to facilitate land reform – if not even more so. After all, there are six clauses that speak to propertied reform in South Africa, and only three clauses which protect existing propertied entitlements. More so, the land reform entitlements in the Interim Constitution were much weaker than they are in the final Constitution. A person or a community deprived of a right in land could claim restitution in section 121 of the Interim Constitution, but only from the state.[14] Section 25 specifically mandates the restitution of the property, or equitable redress, and does not position this right as applicable only against the state. Clearly, section 28 IC was structured quite deliberately to *not* disrupt the property status quo too radically.

Third, section 25 contains an internal limitation that is peculiar in how it doubles up on section 36 of the Constitution, and how it is obviated by the Court's proportionality standard of review under arbitrary deprivation. This limitation is contained in section 25(8) FC; and

[12] T Ngcukaitobi *Land Matters: South Africa's Failed Land Reforms and the Road Ahead* (2021) 95–104, who argues that '[s]everal provisions in the Interim Constitution severely limited the ability of the state to achieve expansive changes to apartheid's configuration of landownership: these included the right to hold property, the use of expropriation solely for public purposes, and the exclusion of land from the general property clause.' See also Bradley Slade '"Public Purpose or Public Interest" and Third Party Transfers' (2014) 17 *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* 167, 183–186, who undertakes a comparison of expropriation subclauses in the Final and the Interim Constitutions (and also provides interesting insight into previous expropriation laws applying during the Republic, Union, and colonial/settler administrations).

[13] *First National Bank of South Africa t/a Wesbank v Commissioner for the South African Revenue Services & Another; First National Bank of South Africa Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) ('*FNB*') at para 51.

[14] Section 121(2) IC: 'A person or a community shall be entitled to claim restitution of a right in land from the state if– (a) Such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and (b)Such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.'

provides that '[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provision of this section is in accordance with the provisions of s 36(1).' It is beyond the scope of this article to reflect more fully on the significance of section 25(8), suffice to suggest that its inclusion may point to the property clause as embodying the social function of property, and a reminder that property rights are not absolute; that they are as much subject to the limitations clause as any other right, if not 'more' so given the specific mention of section 36 in the property clause.[15] The 'hurdle' of a limitations clause is to be welcomed, not because it makes the regulation of property more difficult, but because it normalises the limitation of property.

B From a right to property, back to a right to land?

My three arguments above are bolstered by examining the history specifically of section 25, and how it came about. Of particular interest in this process was a collection of papers belonging to the National Land Committee ('NLC'), described in a 2003 submission to Parliament's Portfolio Committee on Agriculture and Land Affairs as a collection of land rights NGOs whose main objective involved the 'struggle for the transformation of land ownership' and who sought to bring about 'people centred rural development.'[16] The papers in the archive demonstrate a strong interest in how section 25 was drafted, and provide a window into some of the tensions that existed. I draw on these papers as a way of animating the discussion around the structure of section 25.

I begin with a memorandum drafted in January 1996 by the National Director of the NLC, Brendan Pearce, to the NLC affiliates. At this point, section 28 IC had been in effect since November 1993. In this memorandum, the NLC indicated its opposition to including a property clause *at all* in the final constitution because 'such a step merely reinforces the highly skewed and unjust distribution of land, which is the result of dispossession effected through colonialism and apartheid.'[17] The memorandum goes on further to illustrate the bone of contention between the political parties in the Constitutional Assembly. The National Party (NP) and the Democratic Party (DP) were 'adamant that present property rights be entrenched' in the Constitution, 'though in agreement with the general spirit of land reform.' The African National Congress (ANC) and the Pan Africanist Congress (PAC) were 'insistent that a property clause should not stand in the way of effective land reform that the state ought to pursue through legal and financial measures.'[18]

[15] In presenting these arguments around the internal limitation in section 25(8), I echo Klug's arguments that 'this section has, to date, never been relied upon politically, by the legislature or the executive, nor has it been subject to judicial interpretation by the courts; it is time that it is applied.' Klug (note 1 above) at 490.

[16] National Land Committee Submission on the Communal Land Rights Bill, Parliamentary Portfolio Committee on Agriculture and Land Affairs, Cape Town (11 November 2003), available at https://bit.ly/3Ai7KTi .

[17] B Pearce, 'The NLC argues in favour of the scrapping of the Property Clause from the Constitution' (16 January 1996) 1, available at the Wits Historical Papers Archive, AG2735 TRAC.

[18] Pearce Ibid at 3. Included in the papers is the Pan African Congress' final submission on the right to property, dated 30 January 1996. In this submission, signed in part by the current Minister of Public Works and Infrastructure, Patricia de Lille, the PAC advocates for a "broad" principle that "land belongs to the nation and cannot be owned by individuals"; in this regard, it advocated for expropriation with compensation only for improvements on the land, and that "legitimately acquired private property" could be regulated by legislation

Two months later, in March 1996, Brendan Pearce sent out another memorandum to the NLC affiliates. In this memorandum, Pearce reflected on the success of the NLCs efforts in bringing the debate around the property clause into the public arena, and that the ANC felt extreme pressure from the NLCs campaign.[19] His memorandum indicates the kind of tensions at play at that moment, and his reflection on the debate in the public arena is supported by other documents in the archive. However, the memorandum importantly includes a draft of a proposed section 25, and it is clear from the message of Pearce's memorandum that the present state of the clause lay at the intersection of intense negotiation between the ANC and the NP. There are three points of interest.

First, the clause begins with a statement that '[e]veryone has the right to have equitable access to land', and that the state must take steps to realise this right.[20] Note how the right to land was completely absent in section 28 IC. Its re-emergence in a draft of section 25 suggests a discomfort with section 28 IC, and that protecting the right to acquire, hold and dispose of property did not mean the same as the right to land. Second, subsection 2 of the proposed clause stated that '[t]he institution of property shall be respected' and that the 'nature, use, content and limits shall be determined by law.'[21] Again, here we witness the social function of property, an affirmation of a pluralist or progressive view that the institution of property is not a system innate to our being but rather a system to be regulated for the broader public interest.[22] Third, subsection 5 of the proposed clause contained many of the current considerations for calculating just and equitable compensation in the event of expropriation, but it included one factor not currently covered by section 25(3) – 'the ability of the state to pay [compensation].'[23]

or left to the common law. See RK Sizani & P de Lille, 'Final Submission of the PAC on the Right to Property' (30 January 1996), available at the Wits Historical Papers Archive, AG2735 TRAC.

[19] B Pearce, 'RE: Property Clause Campaign latest update' (11 March 1996), available at the Wits Historical Papers Archive, AG2735 TRAC.

[20] Ibid. 'Everyone has the right to have equitable access to land. The state must take reasonable and progressive legislative and other measures to secure this access.'

[21] Ibid.

[22] Van der Walt describes progressive property theory as 'descriptive insofar as they identify and explain ways in which the supposedly absolute power of property owners is in fact subject to significant restrictions and exceptions and normative insofar as they justify the existence, extent and effect of restrictions and exceptions that limit the power of property owners with reference to what they present as progressive values, such as social obligations, structural pluralism, virtue ethics, freedom, human flourishing and democratic governance.' AJ van der Walt 'The Modest Systemic Status of Property Rights' (2014) 1 *Journal of Law, Property, and Society* 15. See also GS Alexander *Property and Human Flourishing* (2018); JW Singer *The Edges of the Field: Lessons on the Obligations of Ownership* (2000); S Wilson *Human Rights and the Transformation of Property* (2021); Muller et al (note 8 above); GS Alexander 'The Social-Obgliation Norm in American Property Law' (2009) 94 *Cornell Law Review* 745; GS Alexander et al 'A Statement of Progressive Property' (2009) 94 *Cornell Law Review* 743; N Shoked 'The Duty to Maintain' (2014) 42 *Duke Law Review* 437; E Rosser (2013) 'The Ambition and Transformative Potential of Progressive Property' 101 *California Law Review* 107; S Viljoen 'Property and "Human Flourishing": A Reassessment in the Housing Framework' (2019) 22 *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* 1; N Sibanda 'Amending Section 25 of the South African Constitution to Allow for Expropriation of Land without Compensation: Some Theoretical Considerations of the Social-Obligation Norm of Ownership' (2019) 35 *South African Journal on Human Rights* 129; T Coggin '"They're not making land anymore": A Reading of the Social Function of Property in *Adonisi*' (2021) 138 (4) *South African Law Journal* (forthcoming).

[23] The full subclause reads as follows: '(5) When a court decides the amount of compensation, timing or manner by which payment must be made, the court must determine an equitable balance between the public interest, which includes land reform, and the interests of those affected, having regard to all factors, including – (a) the

Handwritten next to this proviso are the words, 'bargaining chip'. It is unclear who wrote this, but it again points to the social function of property; that even a lack of resources should not prevent the state from fulfilling its duty to enact land reform; and that factors such as the market-related value of property will not stand in the way of this programme. Of course, the suggestion that this factor was being used as a bargaining chip or a 'stick' implies that the negotiator was not that committed to the idea; but in wielding the stick in the first place they arguably were committed enough to achieving the desired 'carrot' received in exchange. That 'carrot' is a clause committed to the social function of property.

It was off the back of these initial discussions that in early April 1996, the Constitutional Assembly held a *bosberaad* to iron out details of the 5th Working Draft of the Constitution. On 22 April 1996, Jennie Samson, the Legislation Monitor of the NLC, sent out an update to NLC affiliates outlining how the property clause had developed since.[24] Attached to the memorandum was also a current draft of the clause. This draft begins to look more like section 25. It removed entirely the subclause providing that the institution of property must be protected.[25] The phrase 'the ability of the state to pay [compensation]' was removed from subclause 3 outlining factors to be considered in determining compensation, and the phrase 'just and equitable' was now inserted into the clause.[26]

Four days later, another version of the property clause was circulated to NLC affiliates. Two important aspects are worthy of mention: First, subclause 3 was again amended, this time removing the final factor for determining compensation – that of the nation's commitment to land and natural resource reform. The reason for this removal was that it was covered in subclause 4 under the notion of 'public interest', and so including it as a factor in determining a just and equitable balance between the public interest and the interests of those affected would seem to encompass a 'doubling-up'.

Second, subclause 8 remained in place, which provided that 'no provision of this section may unreasonably impede the state from taking reasonable legislative and other measures to achieve land reform [and in order to] redress the results of past racial discrimination.'[27] I highlight this latter point as, in the memorandum from Jennie Samson discussed above, she notes that as part of organised business' lobbying of the ANC during 'bi-laterals', they sought to subject subclause 8 to the limitations clause – which is the current position in section 25. In a subsequent memorandum on 8 May 1996, Samson expressed disappointment

current use of the property; (b) the nature of the property; (c) the history of its acquisition, occupancy and use; (d) its market value; (e) the ability of the state to pay; (f) the extent of state investment and subsidy; (g) the purpose of expropriation; (h) the nation's commitment to land reform and measures to bring about equitable access to water.'

[24] J Samson 'Property Clause' (22 April 1996), available at the Wits Historical Papers Archive AG2735 TRAC.

[25] Ibid at 6. Instead, the clause elevated the deprivation clause, providing that '[n]o one may be deprived of property except in accordance with law of general application, and no such law may permit arbitrary deprivation of property. This provision does not preclude reasonable measures to regulate property.'

[26] Ibid. The full subclause reads as follows: '(3) The amount, timing and manner of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors including – (a) the current use of the property; (b) the history of the acquisition and use of the property (c) he market value of the property; (d) the extent of state investment and subsidy in the acquisition and beneficial improvement of the property; (e) the purpose of the expropriation; and (f) the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.'

[27] B Pearce, 'Fax Sheets: This is the latest draft of the property clause with last amendments in brackets' (26 April 1996), available at the Wits Historical Papers Archive AG27325 TRAC.

that subclause 8 was made subject to the limitations clause – it was always viewed as 'the safety valve for the entire property clause.'[28] However, as noted above, there is underexplored value in section 25(8) and its invocation to limit property rights within the broader framework of section 36.

Although some may view the final clause as a compromise between two competing visions for the property clause, the evolution from section 28 IC to section 25 reveals something more transformative.[29] Both clauses were the product of negotiation, and the kind of tensions and debates visible in public discourse today are by no means new. In fact, they were a core component of a push to remedy the defects of section 28 IC in favour of a far stronger clause in section 25, one far more concerned with land and resource reform than the protection of existing property entitlements. In failing to develop and use the purpose of the property clause – in every domain, be it executive, legislative, or judicial; national, provincial, or local; *and* civil society, including public interest litigation – we have forsaken the transformative genesis of the clause, embodying it would seem a hesitancy or fear to *use the clause*.

III THE WIDE-OPEN GATES OF CONSTITUTIONAL PROPERTY

In this part, I lay out how constitutional property is presented in our jurisprudence.[30] There exists a lack of conceptual clarity in our constitutional jurisprudence as to the meaning of property and what the property clause is intended to achieve. The Constitutional Court has not given this question sufficient mileage in constitutional property clauses, and its 'wide-open gates' approach in respect of constitutional property serves not to enjoin a project of resource reform, but rather to solidify a private law mould in which any entitlement that can be tied tangentially to property is protected under section 25. The net effect is twofold. Firstly, it moves our jurisprudence away from the purpose of the property clause. The Court either skims over why the entitlement enjoys constitutional protection, or it treats the entitlement to property as self-evident. However, as I demonstrate with reference to case law, this fails to give these entitlements any kind of substantive content, a much-needed ingredient for a clause that is heavily contested.

Secondly, the Court's approach opens an avenue for legal challenges that make the public regulation of property *and* interests deemed property that much more difficult. This argument leads me to suggest that the property clause is being used as something it was never intended as. In each of the cases I survey below, the party claiming constitutional property is reacting against a move by the legislature to regulate that entitlement in the public interest. The party is allowed to do so because the Court is willing to let any entitlement through the gates of

[28] J Samson 'Property Clause Update' (10 May 1996), available at the Wits Historical Papers Archive AG2735 TRAC.

[29] J Dugard reaches a similar conclusion about the transformative potential of section 25. In her examination of legislation and case law relevant to the other components of section 25, including subsection (6) on advancing tenure security and subsection (7) on restitution, she notes with regard to the latter that in 'general, the courts and especially the Constitutional Court have pursued substantively transformative interpretations of the legal frameworks governing restitution.' J Dugard 'Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?' (2009) 9 *Constitutional Court Review* 9 135, 158.

[30] As a term, 'constitutional property' denotes the 'legitimacy of restrictive state powers, exercised in the public interest, that may conflict with absolute (or even strong) protection of private property.' AJ Van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 101.

constitutional property and only then is willing to limit the entitlement. This does not mean that the Court is incorrect to let the entitlement through, but the approach does not permit much space for the Court to pause and reflect on the invocation of the property clause by these interests for the long-term purpose and vision of the clause. In this regard, it may be worth considering the words of Baleka Mbete, who was an active observer of the negotiations around both section 28 IC and section 25:

> I had no appetite for the property clause inserted in the Interim Constitution given our history of dispossession and deprivation. I held the view that there should not be a property clause in the Final Constitution. My firm view was that the property clause unduly protected capital and prevented the state from taking appropriate steps in the reform, restitution and redistribution of land'[31]

This part is presented chronologically. I begin at the *First Ceritification of the Constitution* judgment handed down in 1994, and end with *South African Diamond Producers' Organisation v Department of Minerals and Energy* (SADPO) in 2017. [32] We witness little development in the Court's jurisprudence about the purpose of the clause over this 23-year period. Either it is taken for granted that the entitlement is constitutional property, or the Court skims over the issue, often noting how difficult it is to define property.

A A political hot potato? Constitutional property under the Interim Constitution

This position first emerged in the *First Certification* judgment, where the Constitutional Court established the precedent through which it would read property. Two objections were levelled against the formulation of section 25: first, that it did not protect a positive entitlement to acquire, hold and dispose of property, and second that the provisions governing expropriation and the payment of compensation were inadequate.[33] To some degree, the Court was stuck here given the dominium-centric approach in section 28 IC. The Final Constitution could only be certified in line with the Constitutional Principles ('CP') set out in Schedule 4 of the Interim Constitution. Constitutional Principle II required 'due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution', which included section 28 IC and its positive entitlement to acquire and hold rights in property. The objection that section 25 did not comply with section 28 IC was therefore not per se unwarranted: indeed, section 28 IC and section 25 read very differently regarding the purpose of property law. It is arguable, then, that the Court was cautious in the meaning it ascribed to property under section 25, and it said as much in the beginning of the judgment when it acknowledged that '[w]e may however be called upon in future and in the context of a concrete dispute to deal with constitutional provisions we have had to construe in the abstract for the purposes of the certification process.'[34]

In certifying section 25, the Court was not so abstract in its approach as it was indefinable: property is everything and nothing at all. After briefly covering an array of constitutions which span both negative and positive protections of property, it concluded that 'no universally

[31] B Mbete 'Property Rights Recreated' in *Reflections on the Bill of Rights: Theme Committee 4* (2016), available at https://bit.ly/3AjPkBz.

[32] *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26, 1994 (4) SA 744 (CC). *South African Diamond Producers' Organisation v Department of Minerals and Energy* [2017] ZACC 26, 2017 (6) SA 331 (CC) ('*SADPO*').

[33] Ibid at para 71.

[34] Ibid at para 3.

recognised formulation of the right to property exists.'[35] To avoid the impasse between section 25 and section 28 IC, the Court decreed that '[t]he provision contained in, which is a negative formulation, appears to be widely accepted as an appropriate formulation of the right to property.'[36] This may be so, but this entails problematic consequences for clarifying the purpose of the property clause. A positive formulation means something very different to a negative formulation, especially so in a Bill of Rights full of actual positive claims (such as a right of access to adequate housing in section 26). But, moreover, is there even a negative formulation of the right to property, or is there merely a positive entitlement against arbitrary deprivation of property and a positive entitlement against expropriation without just and equitable compensation? As such – and bearing in mind how controversial the issue is – could the Court really make a claim that a negative formulation is 'widely accepted' as an appropriate formulation of the right to property?

Van der Walt considered this argument in 1997 and, while labelling it as 'technically ingenious', dismissed it for two reasons.[37] His first argument was that the distinction between a negative and positive formulation is in practice inconsequential if we compare South Africa's approach to other jurisdictions that deal with similar distinctions. He predominantly maintained his focus on the German Constitutional Court and their interpretation of Article 14 of the *Grundgesetz,* which contains both a positive guarantee of existing property, and a negative formulation against uncompensated expropriation.[38] He noted that the German courts position this negative component of Article 14 as encompassing a positive entitlement, and that the positive component of Article 14 has a separate, different meaning.[39] This latter meaning is to protect the *institution* of property, whereas the former meaning is to protect individual entitlements to property. His second argument is that it would make no sense why section 25 would not protect a right to property, especially since 'the right to a clean and healthy environment and the right to housing are entrenched in the bill of rights.'[40] For these two reasons, he proceeded on the presumption that section 25 embodies a '*property guarantee*' and was not merely a property clause, and that the right is both one *in the Bill of Rights* for the purposes of section 36(1), but also was a right *'entrenched in the Bill of Rights* as meant in section 36(2).'[41]

My argument in this article is not that the property clause fails to protect property entitlements. But classifying section 25 as embodying a right to property and, in the process, assuming that every propertied entitlement before a court enjoys constitutional protection deprives the clause of its substance. There is no clear direction regarding the purpose of the

[35] Ibid at para 72.

[36] Ibid.

[37] Van der Walt (note 30 above) at 23–28.

[38] Article 14(1) *Grundgesetz* (trans.): Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. Article 14(3) *Grundgesetz* (trans.): Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

[39] Van der Walt (note 30 above) at 24.

[40] Ibid at 23.

[41] Ibid at 26.

clause and, instead, it is put to work protecting entitlements not ideally suited to constitutional property.

It is probable that the Court's sense of caution was because it was acutely cognisant of how political the issue was at the time, and that a compromised solution would necessitate this 'wide-open-gates' articulation of section 25. Since then, however, the Court has not fared much better in giving its conception of 'property' greater clarity. It offers 'glimpses' into the meaning of section 25 before retreating into a position of deference, saying no more than it perceives necessary. Consider, for example, how the Court in *Transvaal Agricultural Union v Minister of Land Affairs* faced a challenge to the Restitution of Land Rights Act (RLRA).[42] Decided a few months after *First Certification*, the applicant in this case challenged provisions of the RLRA partly on the basis that they infringed their members' rights to acquire, hold, and dispose of rights in property in terms of section 28 IC, which prevailed at the relevant time. On the one hand, the Court found that it was clear from sections 121, 122 and 123 of the Interim Constitution (which provided for land restitution) that 'existing rights of ownership do not have precedence over claims for restitution' and that the conflicting interests between claimants and current registered owners 'are to be resolved on a basis that is just and equitable'.[43] But then, when drilling down to the sections in question – subsections 11(7) and (8) of the RLRA, which are intended to maintain the status quo of the parties pending the determination of the claim for restitution – the Court backtracked, declaring that it is 'not clear that these status quo provisions' infringe section 28 IC and that it is 'not desirable to say more in regard to the argument'.[44] The Court continued that the 'restitution of land rights is a complex process' and that 'Parliament is given a discretion by the Constitution to decide how this process is to be carried out.'[45] In other words, it appeared that the Court was treading a fine line between upsetting the traditional status quo in which property rights were a root cause of inequality, and affirming the need for land restitution.

As with the *First Certification* judgment, one can accept that the Court here was in its institutional infancy and was dealing with a political 'hot potato.' But, again, treading this line between the two interests revealed a hesitancy in giving substantive content to the property clause, and it planted the seed for future indecision as to the meaning of property and the kind of entitlements protected by section 25 FC.

In fact, the Court seems to adopt an unexpressed sigh of relief when it can skip through the question of the constitutional interpretation of 'property', and head straight to considerations of subsections 25(1) and (2) FC. This is either because the entitlement was so 'obviously' property for the purposes of section 25 FC, or because this was common cause between the parties. In *Harksen v Lane*, for example, there was simply no question that Jeanette Harksen's assets constituted property worthy of protection under section 28 IC,[46] which was relevant as the application for referral of the matter to the Court was made prior to the coming into force of section 25 FC on 4 February 1997. Instead, the property angle in the case turned on whether section 21 of the Insolvency Act 24 of 1936 constituted an uncompensated expropriation of assets belonging in title to the spouse of an insolvent estate. The Court ruled that it did not,

[42] Act 22 of 1994; *Transvaal Agricultural Union v Minister of Land Affairs & Another* [1996] ZACC 22, 1997 (2) SA 621 (CC).

[43] Ibid at para 33.

[44] Ibid at para 35.

[45] Ibid at para 36.

[46] *Harksen v Lane* [1997] ZACC 12, 1998 (1) SA 300 (CC).

and that the Insolvency Act constituted merely a deprivation of Harksen's property as the taking was not permanent.[47] It may be obvious that Harksen's assets embody constitutional property but because this assumption was made, we do not have a sense of why these interests should have been afforded constitutional protection nor the incidences of ownership that should be afforded protection. The former is an important exercise because it reveals why we should afford any one entitlement constitutional protection (as opposed to, for example, common law or legislative protection); the latter is important because it aids in the subsequent steps of the process, such as whether we are dealing with a deprivation or simple government regulation of a propertied entitlement.

B Setting the groundwork for everything and nothing at all: *FNB*

The above cases concerned the Interim Constitution. Four years later, after the Final Constitution had come into force on 7 February 1997, the Constitutional Court in *First National Bank v South African Revenue Services* (*FNB*)[48] finally had the opportunity to articulate the substantive vision behind section 25. In *FNB*, the Court set out 'the framework for all future constitutional property cases[49] and, in doing so, the Court had the opportunity to provide an unambiguous articulation of what section 25 might want to achieve in the reformation of land law and policy.[50]

Although the Court spent much of its effort clarifying the tests it would use for determining the lawfulness of a subsection 25(1) deprivation, it nevertheless considered the meaning of property. In spite of that, the Court continued to frame this meaning with a potential for ambiguity. It held that whether an entitlement is entitled to constitutional protection will depend on the facts of a particular case. The Court began its interpretation by noting that '[c]onstitutional property clauses are notoriously different to interpret' but that, fortunately, it had at its disposal a considerable body of work produced by South African scholars in the field.[51] It cited a body of work in footnote 79 written predominantly in the early to mid-1990s in South Africa. The works spanned an array of jurisprudential outlooks on property law and which considered the meaning of property in both an historical context and in a comparative law setting. Before continuing with my analysis of *FNB*, I set out some of these outlooks to demonstrate why there are diverse interpretations of property and its moral value.

Carole Lewis advocated for a specific inclusion of the Right to Property in the Constitution because, she argued in quoting Nozick, '[f]reedom requires private property, and freedom for all requires private property for all. Nothing less will do.'[52] She accepted there were notional difficulties in realising this right for everyone, not least that it would continue to entrench wealth inequality brought about through land ownership vested in the hands of a few.[53]

[47] Ibid at para 35.

[48] *FNB* (note 13 above).

[49] Ts Roux 'The "Arbitrary Deprivation" Vortex: Constitutional Property Law After *FNB*' in S Woolman & M Bishop (eds.) *Constitutional Conversations* (2008) 265.

[50] I focus on land here given that it is the historical and contemporary contestation over this particular resource that shapes much of the discourse on section 25. However, I fully accept that the section protects a diversity of claims to multiple resources that go beyond land and incidences of ownership in relation thereto.

[51] *FNB* (note 13 above) at para 47.

[52] C Lewis 'The Right to Private Property in a New Political Dispensation in South Africa' (1992) 8 *South African Journal on Human Rights* 389, 418.

[53] Ibid at 418.

However, drawing on the work of Stephen Munzer, she was insistent that these difficulties could be overcome through a pluralist set of 'irreducible principles that sometimes conflict'; and, when they do, certain priority rules are employed to solve some but not all.[54] These principles – utility, efficiency, justice, and equality – would work as follows: the first two principles would be important in the distribution of private property, although would not necessarily favour a strictly equal distribution. A jurisprudential valuation would first lie in how utility is maximised in the use and possession of resource, and secondly how individual welfare is maximised in the use, possession, and transfer of the property.[55] These principles would justify certain claims on different types of property. Lewis demonstrated this through examples: state-owned property needed for the stockpiling of resources in the eventuality of natural disaster, or private property in the form of 'intimate articles' needed as a basis for personality.[56]

Lewis argued that where a court is faced with competing conceptions of utility and individual welfare, principles of justice and equality would qualify this analysis by invoking a 'basic needs and capabilities' philosophy.[57] The argument portended that because people 'have vastly different talents and needs' property is only one factor in determining equal moral worth (along with personality, health and friendships).[58] This basic-needs-and-capabilities philosophy arises firstly from the principle that everyone should have a minimum amount of property ('justice') – that which is necessary for a decent human life taking into account certain basic human needs, such as food, clothing, shelter and health care.[59] Where some have so much property that inequalities of wealth exist ('equality'), this is remedied through 'considerable government intervention in the form of welfare distribution' which 'does not require equal treatment for all' but rather a Rawlsian 'fair equality of opportunity.'[60]

Lewis clearly believed that a right to property could achieve a level of reformation similar to the envisaged aspirations as the housing right. Her articulation of property was not radically disruptive of the existing status quo, but nevertheless articulated a situation in which slow and incremental reform could take place. A very broad conception of 'property' was central to this argument, in which very few (if any) entitlements would not enjoy the privilege of constitutional property protection. For example, at the end of her piece she considered that '[s]quatters, labour tenants and those who lay claim to land on the basis of a historical right are examples of people who might be regarded as having property rights warranting protection.'[61] Lewis argued that it was through the express recognition of the right to property that this could take place, not because (in response to her critics) this would mummify existing property rights but because it would leave room for the *conception* of property to 'develop and change to meet the different needs of society from time to time.'[62]

Van der Walt would not appear to have disagreed with Lewis, but nevertheless situated an articulation of the property clause within a broader rights-based value system, suggesting that

[54] Ibid at 419. Quoting S Munzer *A Theory of Property* (1990) 31–35.
[55] Ibid at 419–420.
[56] Ibid at 420.
[57] Ibid at 421.
[58] Ibid at 421–422.
[59] Ibid at 424.
[60] Ibid at 423–425.
[61] Ibid at 430.
[62] Ibid.

some entitlements might not enjoy constitutional property protection. He argued that 'property is not protected by the property clause in the sense that every entitlement that is recognised or protected by private law is guaranteed against or insulated from state interference… Existing entitlements can be changed, restricted, and subjected to new or stricter controls, limitations and levies without compensation, if the change is justified by the public interest.'[63] At the same time, there is no reason why property interests *not* recognised or protected by private law could be 'acknowledged and protected by the property clause.[64] The determinant, however, as to whether an entitlement enjoys protection is by reference to the 'fundamental purpose' of the Constitution and the Bill of Rights more broadly, and the property clause more particularly.[65] This purpose, he argued earlier on in his book, was not 'logical or self-evident', but rather required a 'just and equitable balance between existing, private property interests and the public interest in the transformation of the current property regime.'[66] Achieving this balance entailed two components: first, purposively reading, understanding, interpreting and applying the property clause 'with due regard for the tensions between the individual and society, between the privileged and the underprivileged, between the haves and the have-nots, between the powerful and the powerless'; and, secondly, to do so in a way that is not 'influenced unwittingly' by 'unsuitable, private-law presuppositions.'[67]

Van der Walt's position on property would appear to de-emphasise the inviolability of the property clause. Although he understood the property clause to protect propertied entitlements, his link between the individual entitlement and social responsibility entailed consideration of what the property system 'should look like and what it should do in view of the spirit, purport and objects of the Bill of Rights'[68] – which Michelman and Marais summarise as a recognition not of 'current holdings as an independent end but rather protection as a means to the end of a society based on human dignity, equality, and freedom for all.'[69] Thus, it would seem that Van der Walt would have erred on the side of caution, preferring to recognise an entitlement as constitutional property and thereafter limiting its protection at later stages of the inquiry, notably under subsection 25(1). I return to this argument at the end of this article.

The Court in *FNB* adopted this Van der Waltian view of property, and it is explicit that it will follow a case-by-case approach to the determination of constitutional property and whether a specific entitlement enjoys protection under section 25.[70] On the face of it, this approach offers the court room to recognise a diversity of propertied entitlements. This is an important goal in a context where private law conceptions of property dominate, working to erase in the process marginalised claims to resource governance through, for example, indigenous claims to land, informal land tenure security, or claims of access to adequate housing. But this generous approach must be articulated in reference to the purpose of the property clause, and within a clearer cogency on the nature of the entitlement and the consequences of granting the entitlement access to the 'wide open gates' of constitutional property.

[63] Van der Walt (note 30 above) at 70.
[64] Ibid.
[65] Ibid at 71.
[66] Ibid at 7–8.
[67] Ibid at 13.
[68] AJ Van der Walt *Property and Constitution* (2012) 122.
[69] FI Michelman & E Marais 'A Constitutional Vision for Property: *Shoprite Checkers* and Beyond' in Muller et al (note 8 above) at 130.
[70] *FNB* (note 13 above) at para 51.

This twinned argument takes its cue from Theunis Roux's point about the arbitrary deprivation vortex.[71] His critique focuses on the arbitrary deprivation test set out in *FNB*: specifically, he argues that the test, which oscillates between rationality and proportionality, allows the Court discretion 'to adjust the level of review to fit the circumstances of the case.'[72] This allows the Court in some cases to be deferential towards the State in regulating property interests, and to provide adequate protection in other cases where 'the state overzealously regulates property in pursuit of questionable goals.'[73] But one problem Roux highlights in this case-specific approach is that it does not provide sufficient guidance to the state *in advance* of the regulatory measure: 'Fact-specific tests like these are good for courts but bad for rule-setting.'[74]

Another problem he highlights is that consolidating the inquiry within the arbitrary deprivation stage leads to a vortex, which he defines as 'a system, occupation, pursuit, etc, viewed as swallowing up or engrossing those who approach it.'[75] The other stages of the *FNB* inquiry, including deprivation,[76] the distinction between deprivation and expropriation,[77] and the applicability of the section 36 limitations clause[78] to section 25 are all subsumed in the vortex of the arbitrary deprivation inquiry. So, too, is constitutional property. This not only fails to clarify 'why certain types of property are more constitutionally valued than others', but also de-emphasises 'the importance of these considerations at the first stage of the constitutional inquiry.'[79] Roux does not seem to regard this latter consequence as particularly problematic, however, partly because it opens the door for an easier rejection of property interest at play, and partly because this consideration would be factored into the vortex of arbitrary deprivation.[80]

My argument is not only that in respect of constitutional property has Roux's vortex thesis come to bear, but that the wide-open gates afforded to constitutional property protection is, in fact, problematic. The Court's case-specific approach to 'constitutional property' fails to give the purpose of section 25 substantive meaning, and in the process, it further entrenches the private law static approach it ostensibly moves away from. By defining property so broadly, the Court does not engender or promote a project of resource reform in South Africa, even though this may be its intention in conferring a wide berth on the definition of the property that the Constitution will protect. In fact, it holds the potential to condone an entrenchment of existing interests that cling to private law conceptions of property law to resist legislative reform. Consequently, regulatory authority may be made that much more 'distant', placing an onus on the state that may serve to dissuade the regulation of interests deemed property – even where such regulation may be necessary in redressing inequality in South Africa.[81] As the

[71] Roux (note 49 above) at 274.
[72] Ibid.
[73] Ibid.
[74] Ibid at 275.
[75] Ibid, quoting the *Concise Oxford Disctionary* (1982).
[76] Ibid at 276.
[77] Ibid.
[78] Ibid at 278–280.
[79] Ibid at 274–275.
[80] Ibid at 275–276.
[81] J Robbie & E Van der Sijde 'Assembling a Sustainable System: Exploring the Systemic Constitutional Approach to Property in the Context of Sustainability' (2020) 66 *Loyola Law Review* 553, 590 make a similar argument: 'If the effect of the constitutional protection of an entitlement as 'property' is to shield it from legitimate State control, the effect is a skewed concept that unjustifiably prioritizes private interests above the public interest.'

cases demonstrate below, it is this legislation that is challenged before the Court, and the prior entitlements that are affected by the regulatory change are readily accepted as constitutional property.

There are two reasons why the Court falls into this trap: firstly, because it adopts a self-evident, 'you-know-property-when-you-see-it' approach to property, and secondly because it is unclear or unwilling to specify *why* an entitlement is being afforded constitutional protection. In both cases, it proceeds on the assumption that the entitlement is 'constitutional property' and, if these entitlements are limited (which they often are), then this occurs at the arbitrary deprivation stage of the inquiry.[82] I now move to considering both of these reasons in turn through a chronological examination of selected case law implicating constitutional property.

C Property as self-evident

We see this property-as-self-evident approach clearly in *FNB*. This case concerned a bank's ownership of two vehicles – one in terms of a lease agreement, and one in terms of an instalment sale agreement with reservation of ownership remaining with the bank until payment of the final instalment. Both vehicles were impounded by the Commissioner for the South African Revenue Services exercising a lien in terms of s 114 of the Customs and Excise Act 91 of 1964 for unpaid customs and excise duties.[83] The Commissioner put forward the argument that FNB's ownership of the vehicles were not protected by section 25, and that this ownership was merely a contractual device which, together with other clauses in the contracts, were designed merely to protect the Bank.[84] In making this argument, it appears the Commissioner relied on the object of ownership, which did not encompass the full effects of ownership but rather a form of security for the value extended to the parties concerned. It relied on a judgment of the European Court of Human Rights ('ECHR') to make this argument, in which the ECHR argued that 'it is apparent that whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods themselves *as in receiving the purchase price*' (my emphasis).[85] A secondary argument relied upon by the Commissioner is that FNB did not use the property and, as such, could not claim constitutional protection under section 25.

The Court's self-evidentiary approach to property is apparent in the way it dealt with both arguments, and its net effect is an imbalance between individual entitlement and social obligation, thereby working against Van der Walt's articulation of property. The Court

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See also EJ Marais 'Narrowing the meaning of "deprivation" under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection' (2018) 34 *South African Journal on Human Rights* 167, 174, who argues in the context of conceptual severance (see discussion in part IV below) that a court should guard against limiting possibilities for the regulation of propery interests: this, he argues, 'holds serious threats for transformative contexts, like South Africa, because it can be (ab)used either to insulate existing property interests from state intervention or to subject the state to endless compensation claims.'

[82] EJ Marais 'Expanding the Contours of the Constitutional Property Concept' (2016) 3 *Journal of South African Law/Tydskriff vir die Suid-Afrikaanse Reg* 576, 586 for why this approach is to be welcomed, as well as my discussion of Marais' arguments below.

[83] *FNB* (note 13 above) at paras 1–10.

[84] Ibid at para 53.

[85] Ibid at para 53, quoting *Gasus Dosier–und Fördertechnik FmbH v Netherlands* [1995] ECHR 7; [1995] EHRR 403 at para 68.

approached an entitlement assuming it would enjoy constitutional protection, and either proceeded on the assumption without stating its basis, or it evaded the assumption by preferring the individual entitlement over the social obligation. In *FNB*, the Court preferred the latter, arguing in response to the Commissioner's argument that '[n]either the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership' determine whether the interest constitutes property for purposes of section 25.[86] It went on to say that a 'speculator has no less a right of ownership in goods purchased exclusively for resale merely because she has no subjective interest in them but sees them only as objects that will produce on resale.'[87] Both these statements reveal a highly dominium-centric view of property: what Carol Rose would understand as 'discolouring' the inherent characteristics of owned object in which the system of private property 'quite unabashedly refers to property in the language of domination, that ultimate form of objectification… To be sure, there is a transaction of sorts in this reduction to dominium, but it is a pretty one-sided one, in which the perspective of the claimed thing is entirely ignored.'[88]

But these are the exact kind of considerations the Court should draw on when determining whether an entitlement enjoys constitutional protection. This is predominantly because such considerations elevate the inquiry from above the narrow confines of the individual entitlement, and towards positioning the inquiry within the 'social obligation' Van der Walt speaks of. The *FNB* Court's statement in favour of speculation does not bode well in a capitalist economy built partly on land speculation despite a glaring gap in access to land and housing.[89] But, even beyond this, it ignores the rest of section 25, which provides specific clues about the purpose of the clause. Although concerned with the determination of just and equitable compensation in instances of expropriation, section 25(3) speaks specifically about the current and the historical use of the property, which suggests an approach to property lending itself more to resource productivity and less to resource speculation. Section 25(3) speaks also of the market value of the property, but section 25 (3) situates this within considerations of what is just and equitable. The Court is accordingly incorrect to suggest that the subjective interest of the owner in the thing, or its economic value, play no part in whether an entitlement enjoys constitutional protection. This is not to argue that FNB's reservation of ownership should not enjoy constitutional protection, but it is a call for greater conceptual clarity as to *why* its entitlements should be allowed beyond the threshold of section 25 in light of this balance between individual entitlements and social obligation. By treating the entitlement as self-evident, the Court evades clarifying the purpose of the property clause and, in the process, entrenches a private law orientation to the property clause in which every entitlement positioned by an applicant as constitutional property is afforded this privilege.

It is perplexing why the Court adopts this self-evident approach to property, especially because in setting out the section-25 'test' in paragraph 46, it positioned the first part of the test as an explicit inquiry into whether the entitlement amounts to property for the purpose of section 25.[90] Clearly, the court in *FNB* foresaw the possibility that an entitlement might

[86] Ibid at para 56.

[87] Ibid.

[88] C Rose *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994) 271–272

[89] *FNB* (note 13 above) at para 56.

[90] Ibid at para 46: 'The following questions arise: (a) Does that which is taken away from FNB by the operation of section 114 amount to "property" for the purpose of section 25? (b) Has there been a deprivation of such property by the Commissioner? (c) If there has, is such deprivation consistent with the provisions of section 25(1)? (d) If

not be classified as constitutional property, thus ending the inquiry as that first stage. But it has never done this. More often than not, this is in practice not an issue, predominantly because whether the entitlement enjoys protection is resolved at the third stage of the inquiry – by asking whether the deprivation of the entitlement is consistent with the provisions of section 25(1). However, as I demonstrate further in this piece, this conceptual distortion does not provide a fully substantiated view of the entitlement as understood in relation to the purpose of the clause.

D But, *why* is it Constitutional property?

The second approach – an unwillingness or lack of clarity in specifying why an entitlement is being afforded constitutional protection – is clearly visible in *Law Society*, where the Court is asked to consider whether legislative amendments to the Road Accident Fund Act ('RAF Act')[91] constituted an infringement of the 'right to property under section 25(1) of the Constitution'.[92] In this case, the applicants – who included members of the Law Society of South Africa, many of whom practised in the area of road accident litigation – challenged an amendment to the RAF Act that allowed a third party in common law to claim compensation from the Fund in respect of loss or damage suffered by the victim of a road accident. Such compensation, for example, could be in the form of loss of income or support, which was especially relevant when the victim was deceased and had been a breadwinner in the family. Prior to the amendment, however, the liability of the Fund to a third party was unlimited. The amendment consequently limited the obligations of the Fund to the following: calculating the costs of medical and healthcare services based on a national tariff; calculating compensation for loss of earning or of support based on a set maximum annual income, regardless of actual loss; and, limiting non-pecuniary loss to instances of 'serious injury', paid once off in a lump sum and as determined by a medical practitioner based on a prescribed method.[93]

The question before the Court for the purposes of this article were: are the subsequent losses, as a result of these amendments, protected under section 25 of the Constitution? The applicants argued they were, while the Court's approach is an instance of it sidestepping the issue. The applicants argued that these entitlements were part of 'a "bundle of rights and assets" or "rights with a monetary value" or "new property" all of which the constitutional clause protects.'[94] The respondents' argument appeared muddled, and conflated deprivation with whether the entitlements are property, but it did include the assertion 'that one's earning capacity does not constitute property protected under section 25 [because] earning capacity is an element of security of the person protected under section 12.'[95]

not, is such deprivation justified under section 36 of the Constitution? (e) If it is, does it amount to expropriation for purposes of section 25(2)? (f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)? (g) If not, is the expropriation justified under section 36?'

[91] Act 56 of 1996.

[92] *Law Society of South Africa & Others v Minister of Transport & Another* [2010] ZACC 25, 2011 (1) SA 400 (CC) ('*Law Society*') at para 80.

[93] Ibid at para 27.

[94] Ibid at para 81.

[95] Ibid at para 82. Section 12(1) of the Constitution protects the right to freedom and security of the person, and it includes rights (a) not to be deprived of freedom arbitrarily or without just cause, (b) not to be detained without trial, (c) to be free from all forms of violence from either public or private sources, (d) not to be tortured in any

In response to these arguments, Moseneke DCJ fell back on a familiar refrain that defining property is difficult and that '[h]appily, in this case, given the conclusion I reach, it is unnecessary to resolve the debate whether a claim for loss of earning capacity or for loss of support constitutes "property."'[96] Nevertheless, he assumed without deciding that a claim for loss of earning capacity or of support would constitute 'property', but because he had already found the amendment to be rational, it could not be considered an arbitrary deprivation of property.[97]

Undoubtedly, it is difficult for the Court to consider the entitlement in relation to the purpose of section 25 of the Constitution. If the Court was explicit in its argument that the entitlements do not embody constitutional property, it would need to argue why so, which may cause problems in later cases in which it is faced with similar entitlements. It is easier to 'answer' this question indirectly by focusing instead on the lawfulness of a deprivation as the dispute concentrates on the narrower effect of the relevant law rather than the purpose or ambit of the property clause. But as the question of constitutional property remains vexed, this conceptual distortion neither aides our jurisprudence, nor does it invite consideration of how other components of the Bill of Rights protect monied entitlements. Perhaps the respondents in *Law Society* had a valid argument when they suggested that the loss of earning capacity should be protected by section 12? Instead, because it becomes so easy to tie an interest to property, the property clause is put to work protecting interests that are or maybe protected best elsewhere in the Bill of Rights.[98] In the process, the meaning and transformative potential of the property clause is diluted, and the 'wide open gate' into section 25 serves not to open up avenues towards resource reform, but rather to protect entrenched interests within a private law mould.

Two years later, in *National Credit Regulator v Opperman*, the Court continued its case-by-case approach to defining constitutional property. In this case, the Court was faced with a claim grounded in unjustified enrichment.[99] The respondent, Mr Opperman, lent his friend a sum of R7-million for property development in Cape Town, concluded through three written loan agreements.[100] At the time of the agreement, however, Mr Opperman had not registered as a credit provider in terms of the National Credit Act ('NCA'), and so the credit agreement was regarded as unlawful in terms of s 89(5) of the NCA.[101] It found that it was 'logical and realistic' to protect the claim under constitutional property because such claims, despite being a personal right, have 'become important in modern-day society and *property* should not be so narrowly interpreted as to diminish the worth of the protection given by section 25.'[102] In

way, and (e) not to be treated or punished in a cruel, inhuman or degrading way. There is a second component of the right too, which includes the right to bodily and psychological integrity.

[96] *Law Society* ibid at paras 83–84.

[97] Ibid at para 85.

[98] Note Van der Walt (note 22 above) at 37, who argues that 'a liberal modern constitution can provide adequate grounds for the protection of core non-property rights on their own terms; they do not have to be protected under the rubric of property.'

[99] *National Credit Regulator v Opperman & Others* [2012] ZACC 29, 2013 (2) SA 1 (CC) ('*Opperman*').

[100] Ibid at para 4.

[101] Act 34 of 2005. Section 89(5) provides that if a credit agreement is unlawful in terms of the NCA, a court is required to order that (a) the credit agreement is void as from the date it is entered into; that (b) the credit provider must return any money paid by the consumer together with interest, and that (c) any purported rights of the credit provider are either cancelled or forfeited to the state, if a court determines the consumer was unjustly enriched.

[102] *Opperman* (note 99 above) at para 63.

part, it was not difficult for the Court to arrive at this conclusion as it was common cause between the parties that the claim was for property under section 25.[103] But the Court and litigants allowing these entitlements so willingly through the gates of section 25 do so at the peril of the property clause.

Classifying the entitlement in *Opperman* as 'property' may have been correct, but saying it is so because it is 'logical and realistic' or because such entitlements are 'important' in modern-day society say very little about the purpose of the clause. The effect of this approach is not to avoid diminishing the worth of section 25, but instead depoliticises the purpose of the clause. Consider an argument positioned by Frank Michelman in which he reflects on the purpose of protecting property as a constitutional right in the American Bill of Rights.[104] Michelman begins his piece by outlining an argument penned a week before delivering his paper at the Washington and Lee School of Law in 1981 and published in the *New York Times*. In this piece, the author – William Safire – responds negatively to a decision of the Michigan Supreme Court in which it upheld a decision by the Detroit City Council to acquire properties by eminent domain for resale to General Motors, who would use the site for a manufacturing plant.[105] Safire's argued that the decision struck at the heart of 'the sanctity of private property' – 'as if "property" or "ownership" comprised a talismanic limit – self-defining, general, and absolute – on the means by which popular government may pursue public goals.'[106] Michelman's argued that this view – far from protecting property entitlements – served in fact to empty property of content. Judges, he argued, have the important role of supplying this content, with the fundamental goal of resolving the tension that lies at the heart of defining 'property': the protection of governmental regulation of interests on the one hand, and the protection of rights in property on the other.[107] This means that it is a mistake to see property as something lying beyond the reach of political action.[108] The Court in *Opperman* would not disagree with this articulation and, as I demonstrated in my discussion above of the housing right, was perfectly happy to explain why it was limiting propertied entitlements in pursuit of broader public interests. What the *Opperman* Court did not achieve, however, was an articulation of why property is to be valued for the purposes of section 25. This approach, per Michelman, would regard 'property an "essential component of individual competence in social and political life," as a "material foundation" for "self-determination and self-expression" [and] as "an indispensable ingredient in the constitution of the individual as a participant in the life of the society, including not least the society's processes for collectively regulating the conditions of an ineluctably social existence."'[109]

If we transpose this thinking to the facts of *Opperman*, we begin to see why the entitlement should enjoy constitutional protection. Much turns on the fact that Opperman was not a formal credit provider, but instead was simply a friend lending money to another friend. His entitlement to restitution on the basis of unjustified enrichment would be different to that of a traditional credit provider. The latter's entitlement should not enjoy constitutional protection under section 25 because the purpose of the legislation is to regulate credit providers. Extending

[103] Ibid at para 59.
[104] FI Michelman 'Property as a Constitutional Right' (1981) 38 *Washington & Lee Law Review* 1097.
[105] Ibid at 1096–1097.
[106] Ibid at 1098.
[107] Ibid at 1109.
[108] Ibid at 1112.
[109] Ibid at 1112.

these entitlements to credit providers may have the effect of frustrating the purpose of the legislation, and the net effect of treating Opperman and other credit providers as holding the same entitlement to constitutional protection of property as rendered the entirety of s 89(5)(c) of the NCA unconstitutional. Opperman may be entitled to the protection because he fell into what was essentially a drafting error.[110] It is *this* error – rather than the nature of the entitlement – that rendered his interest capable of constitutional property protection. The manner in which the Court treated Opperman's entitlement in the same way as it treated any other credit provider meant that it left little space to consider the respondent's proposal to remedy the clause, which was to read in a discretion on the part of a court to distinguish 'between credit providers who intentionally exploit consumers and those who fail to register because of ignorance, and therefore lend money to a friend on an ad hoc basis.'[111]

The argument I have positioned above is essentially to enjoin the Court to consider at the first stage of the inquiry what it is 'that the constitutional property clauses are meant to serve'?[112] The Constitutional Court has up to this point been reticent to consider this question, and their hesitancy to do so is illuminated by the Supreme Court of Appeal's more deliberate account in *Minister of Minerals and Energy v Agri SA* (SCA) of why the right to mine under the Mineral and Petroleum Resources Development Act ('MPRDA') should *not* be considered constitutional property.[113] This is another case in which constitutional protection was assumed as being applicable to the entitlement in question. In this case, the extinguishment of the right to coal in, under, and in respect of two properties in Mpumalanga was challenged as invoking an uncompensated expropriation. The extinguishment occurred because the original holder of the right failed to convert its 'old order' rights under the previous 1991 Minerals Act 50 to 'new order' rights in terms of the MPRDA.[114] The applicants in the case – who had been ceded the rights to ground their interest in this test case – argued that the extinguishment constituted an expropriation because the transfer which occurred was an original acquisition, as opposed to a derivative form of acquisition of ownership. In other words, it did not matter whether the state *acquired* these rights; what mattered was that the MPRDA extinguished the rights which, in the process, vested in the state.[115] The respondents' argument was that state acquisition was indeed a hallmark of expropriation but that the state had not acquired these rights; there had merely been a deprivation.[116]

The SCA judgment could have been more explicit in grounding its reasoning on constitutional property. Rather, it approached the issue by effectively arguing there could be no expropriation if the right to mine was never the property of the rights-holder to begin with. The SCA conducted an extensive overview of mining rights legislation in South Africa,

[110] Justice Cameron's view in his dissenting judgment – that the NCA is the product of 'dismal drafting' – suggests that this particular provision of the Act was never intended to apply in the way it did against the likes of Mr Opperman. Cameron J's remedy would have been to declare the provision 'constitutionally void for vagueness,' to 'acknowledge the drafting error, and to leave Parliament to correct it.' *Opperman* (note 99 above) at paras 104–105.

[111] Ibid at para 76.

[112] Michelman (note 104 above) at 1114.

[113] Act 28 of 2002; *Minister of Minerals and Energy v Agri South Africa* [2012] ZASCA 93, 2012 (5) SA 1 (SCA).

[114] Minerals Act 50 of 1991; *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9, 2013 (4) SA 1 (CC) at para 15.

[115] Ibid at para 17.

[116] Ibid at para 16.

beginning with pre-Union proclamations in the Cape Colony in 1813,[117] and included pre-Union statutes,[118] an apartheid-era statute,[119] and a pre-democracy statute in the form of the 1991 Act. The 1991 Act altered the position of mineral rights over the 150 years preceding it in that its genesis 'was a policy of privatisation and deregulation announced by the government of the day in 1987.'[120] Nevertheless, through a close reading of the 1991 Act the SCA found the 'exercise of mineral rights was still closely regulated,'[121] leading to its conclusion based on a cumulative reading of legislation preceding the MPRDA that '[u]nderpinning the development of varying forms of mineral rights over the years has been the *basic philosophy that the right to mine is under the suzerainty of the State* and its exercise is allocated from time to time, as the State deems appropriate' (my emphasis).[122]

Despite this (admirable) jurisprudential search through the history of mineral rights, the SCA, as with the Constitutional Court, finds it difficult to declare that mineral rights are beyond the purview of section 25, even though this is effectively what the SCA was arguing. It achieved this not only by positioning the issue as primarily one of expropriation (rather than constitutional property), but also by skipping over *constitutional* property and denying the applicants relief on the basis that there has been no deprivation.[123] Their reason for denying this relief was because the old order rights were never extinguished during the two-year conversion period; instead, 'they were entitled, but not obliged – they were free to allow the right to lapse if they wished – to lodge the right for conversion in terms of item 6(2) and the Minister was obliged to convert the right into a prospecting right under the MPRDA.'[124] In other words, there was no deprivation.

But the SCA was however correct to hone the case on the nature of the mineral rights, and that it was necessary first to consider this question and thereafter to compare the position of the holders of mineral rights before and after the MPRDA.[125] Its analyses of the former

[117] Ibid at para 36. The SCA drew attention to section 4 of Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure of 6 August 1813, which stated that 'Government reserves no other rights but those on mines of precious stones, gold, or silver; as also the right of making and repairing public roads, and raising materials for that purpose on the premises: Other mines of iron, lead, copper, tin, coal, slate or limestone belong to the proprietor.'

[118] *Agri SA* (SCA) (note 114 above) at para 53. The SCA referred to section 123 of the South Africa Act, 1909, which provided that 'All rights in and to mines and minerals, and all rights in connection with the searching for, working for, or disposing of minerals or precious stones, which at the establishment of the Union are vested in the Government of any of the Colonies, shall on such establishment vest in the Governor-General-in-Council.'

[119] Ibid at para 56. The SCA referred to section 2(1) of the Mining Rights Act 20 of 1967, which provided that mining title was defined as 'any right to mine granted or acquitted under this Act', contemplating that 'all mineral rights would flow from a statutory grant or be acquired by virtue of statutory provisions.'

[120] Ibid at para 62.

[121] Ibid at para 66.

[122] Ibid at para 69.

[123] *Agri SA* (SCA) at para 85: 'It seems to me that the key issue is not whether, as a result of the exercise of the power to allocate the right to mine, that right was placed in the hands of persons in the private sector, which is inevitable unless the mines are nationalised. It is rather whether the right vested in the State, along with the power to allocate the right to others, or whether it vested in individuals arising from their ownership of land or some other private source. In my view it was the former. That being so *the MPRDA is merely the latest in a long line of legislation and statutory instruments in South Africa that affirms the principle that the right to mine is controlled by the State, and allocated to those who wish to exercise it*' (my emphasis).

[124] Ibid at para 77.

[125] Ibid at para 76.

question certainly assisted its answer to the latter question, but it could have reached a stronger crescendo had it grounded its judgment on the reason why the entitlement should enjoy section 25 protection.

The Constitutional Court decided that mineral rights were constitutional property because they have 'economic value' and because although the state could regulate the exploitation of minerals it 'could only compel exploitation by expropriation against payment of compensation'[126] – which, it would appear, suggests the mineral rights would ordinarily have been considered as constitutional property. But neither reason is convincing and they reveal little about why the entitlement should enjoy constitutional protection as understood in relation to the purpose of section 25. Glaring questions remain about why the entitlement should enjoy constitutional protection: If such rights were the product of the 1991 legislative framework that was indeed characterised by deregulation and privatisation, then is it an entitlement that should enjoy constitutional protection in a democratic era of economic redress? If mineral rights vest within the custodianship of the state, and if section 24(5)(a) of the Constitution itself defines public interest as bringing about equitable access to South Africa's natural resources, then should we really be giving private mineral rights holders access to section 25? If we problematise the current ownership of mineral resources as skewed in favour of South Africa's white minority – as the Constitutional Court does in the first paragraph of *Agri SA* (CC) – then why should section 25 protect mineral rights if its constitutional protection is to further entrench those rights? Is it the *function* of the property clause to entrench these interests, or is its function to enact resource reform? And, if indeed the state 'is a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised'[127], then is treating the entitlement as constitutional property the best way to give effect to this aim?

The Court does not answer these questions and, as a result, it fails to give content to the purpose of section 25. These questions are policy-oriented, and they require the Court to enter terrain it is probably uncomfortable in, but they are nevertheless necessary in providing South African society with broader direction for the property clause.

E Some clarity: *Shoprite*

The Court began to move towards giving the property clause some direction in *Shoprite*, a case concerning the constitutionality of ss 71(2) and 71(5) of the Eastern Cape Liquor Act 10 of 2003.[128] Shoprite, a nationwide grocery store, could under a previous regulatory framework hold a licence to sell wine *with* food in its grocery stores. The Act changed this: there was a period of five years after the commencement of the Act during which holders of this licence were entitled to apply for registration to sell different kinds of liquor, but in separate premises. If the holder did not apply for this registration, the previous licence would lapse ten years after the commencement of the Act.[129] Shoprite argued that this change of regulatory regime amounted to an arbitrary deprivation of property. However, instead of proceeding directly to the question of deprivation, and skimming over whether such licences were constitutional property, the court honed the case on this exact issue, and all three judgments presented a deep

[126] Ibid at paras 33–46.

[127] *Agri SA* (CC) at para 68.

[128] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & Others* [2015] ZACC 23, 2015 (6) SA 125 (CC) ('*Shoprite*').

[129] Ibid at para 2.

analysis of the purpose of section 25. The main judgment, per Froneman J, and the dissenting, per Madlanga J, found that the entitlement should be protected as constitutional property, whereas the concurring judgment, per Moseneke J, found otherwise.

The main judgment evoked a purposive interpretation of the property clause, one leaning towards a progressive or pluralist interpretation of property and grounded explicitly in the recognition that the Court must 'determine what kind of property deserves protection under the property clause.'[130] Froneman considers the function of holding property which, he argues, is the attainment of 'socially-situated individual self-fulfilment.'[131] The purpose of the property clause is thus 'not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others.'[132] Froneman noted further than entitlements which enjoyed protection in the past would not necessarily enjoy protection in the future.[133]

Swemmer provides a strong critique of justice Froneman's judgment.[134] Firstly, she argues that Froneman J conflates an individual's subjective interest in constitutional property with an objective consideration of the purpose behind the clause.[135] This occurred when Froneman J denouncing a subjective approach, then claiming to adopt an objective approach, but tacitly relying on the subjective approach in his outcome that a grocer's wine licence embodies constitutional property.[136] Froneman's reliance on other rights (such as the right to freedom of trade, occupation, or profession, and the right to dignity) to achieve this outcome serves not to inform a principled, objective approach to the determination of constitutional property, but rather to force Shoprite's interest into the property clause without meaningfully expanding upon why it should be considered constitutional property. Swemmer positions Froneman's 'socially-situated individual self-fulfilment' as the embodiment of Froneman's subjective approach; by prefacing individual self-fulfilment, this approach serves to disregard the *FNB* dicta that 'the subjective interest of neither the property holder not the economic value can determine whether something should be characterised as constitutional property.'[137]

Secondly, Swemmer argues that Justice Froneman's use of constitutional rights to inform the property clause has the potential to dilute these rights rather than ensuring they act in concert with one another. Her argument is not anti-purposive. On the contrary, she offers a cautionary argument around purposive interpretation and argues, for example, that extending the right to freedom to freedom of trade, occupation or profession to a juristic entity 'ignores the purpose of that right' which at its core 'is the facilitation of transformation and not mere commercial gain.'[138] In the process, then, it would seem that rather than providing further clarity on the property clause, Justice Froneman's judgment ends up diluting the purpose of *other* rights.

[130] Ibid at para 50.
[131] Ibid at para 50.
[132] Ibid at para 50.
[133] Ibid at para 51.
[134] S Swemmer 'Muddying the Waters – The Lack of Clarity Around the Use of Section 25(1) of the Constitution: *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape*' (2017) 33 *South African Journal on Human Rights* 286.
[135] Ibid at 287–290.
[136] Ibid at 288.
[137] Ibid at 288, referring to *FNB* (note 13 above) at para 56.
[138] Ibid at 292.

The dissenting judgment per Madlanga J struck an essentialist tone around the purpose of the property clause.[139] Referring explicitly to section 25 as the right to property, Madlanga J argued that the right inheres 'as a self-standing unit', that is 'worthy of protection as a stand-alone right.'[140] Madlanga took issue with the manner in which Froneman J connected section 25 to other rights in the Constitution, arguing that this did not correlate with prior jurisprudence of the Court, and that this approach 'waters down the potency of the right to property to the point where it does little more than ride on the coat-tails of rights such as human dignity and freedom of trade, occupation and profession.'[141] Because the licence granted its holder an entitlement to sell wine, the wine licence was 'something in hand', and so could be considered constitutional property.[142] Additionally, the licenced endured definitely, could only be suspended or cancelled under circumscribed grounds, and moreover held a transferrable and objective commercial value.[143]

The contribution of both judgments to section-25 jurisprudence should not be downplayed, principally because both provide avenues for content to the purpose of the property clause.[144] Their divergent interpretations of the purpose of the property clause should serve to animate further decisions, although Froneman's progressive or pluralist approach is to be preferred for three reasons. Firstly, it strikes a chord with the Van der Waltian approach the Court articulated in *FNB,* pushing back against property as a self-standing or self-affirming right. While there is an attempt to provide content through this purposive approach, Swemmer's critique is apt that this process must be carefully orchestrated. Secondly, by examining other rights *within* property, the approach serves to awaken experiences of property in the law. No longer is property law left relatively undisturbed in its slumber of abstract rights and duties, divided uncontroversially according to a series of boundaries and permissions, but instead it is embraced for its complexity of narrative, a lived legal institution that reflects everyday life rather than imagines it.[145] And, thirdly, Justice Froneman's approach (and not

[139] Dana & Shoked explain an essentialist approach to property as a legal category with a well-defined essence, this being the right to exclude: 'the correct representation of property is not the bundle of sticks, or even the abstract right to exclude, but the physical piece of property – the house on a lot – which everyone in the world knows is off-limits.' DA Dana & N Shoked 'Property's Edges' (2019) 60 *Boston College Law Review* 753, 765. They quote TW Merrill, H E Smith, and J Penner as the principal proponents of the essentialists view of property. See TW Merrill & HE Smith 'What Happened to Property in Law and Economics' (2001) 111 *Yale Law Journal* 357; HE Smith 'The Persistence of System in Property Law' (2015) 163 *University of Pennsylvania Law Review* 2055; JE Penner *The Idea of Property in Law* (2000).

[140] *Shoprite* (note 128 above) at para 139.

[141] Ibid at para 139.

[142] Ibid at para 143.

[143] Ibid at para 143.

[144] Note the following commentary on *Shoprite*: PJ Badenhorst & C Young 'The Notion of Constitutional Property in South Africa: An Analysis of the Constitutional Court's Approach in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23, 2015 6 SA 125 (CC)' (2017) 1 *Stellenbosch Law Review* 26; M du Plessis & T Palmer 'Property Rights and their Continued Open-Endedness – a Critical Discussion of *Shoprite* and the Constiitutional Court's Property Clause Jurisprudence' (2018) 1 *Stellenbosch Law Review* 73; IM Rautenbach 'Dealing with the Social Dimensions of the Right to Property' (2015) 4 *Journal of South African Law/Tydskriff vir die Suid-Afrikaanse Reg* 822.

[145] These complexities – which Dana & Shoked might refer to as Property's Edges – are not about denying the quest for certainty that tends to inhere in either essentialist or progressive/pluralist approaches to property, but rather that property law's 'imagination' can be artificial or reductive of how entitlements actually operate, and that entitlements may vary across any one single property: 'Whether they emphasize the thing owned, the

his interpretation given Swemmer's critique) offers up innumerable opportunities for further development of other rights as influenced by rights in property. Specifically, there remains significant space to develop the meaning of property in the unique circumstances of both a contemporary South African urban and spatial environment, and a Bill of Rights framework that recognises a panoply of spatially-oriented rights, such as the right to an environment, the right to freedom of movement, and the right to security of the person.[146] The realisation and the experience of these rights in everyday space is shaped by rights in property, and so the power dynamics that inhere in property relations can and where necessary must inform the interpretation of other rights.

For the purposes of this article, however, I find Justice Moseneke's judgment to be the most useful in clarifying the reasons why a court would *refuse* an applicant's interest access to constitutional property. As far as I am aware, his is the only judgment in the Court's jurisprudential history that would deny an applicant access to section 25. His reasoning for doing so, however, is less about illuminating the purpose of the property clause, and more so because it is difficult to define property.[147] Nevertheless, his judgment provides valuable inroads into considering the policy-oriented consequences of adopting a wide-open-gates approach to defining constitutional property. Broadly stated, Moseneke J provides four considerations about why a court should be hesitant in granting constitutional protection to every entitlement.

His main consideration is whether the entitlement in question is simply a function of state largesse, and that this example of largesse does not deserve protection. As Moseneke J noted, Shoprite's 'real grievance is not that it lost the licences and the ability to conduct a liquor business but that it may no longer pursue a business strategy and model that it prefers and cherishes.'[148] This does not necessarily mean that entitlements grounded in state largesse would not enjoy protection, but whether the entitlement deserves protection 'must be seen through the lenses of our history and constitutional scheme.'[149] Justice Moseneke's case-specific consideration – of whether liquor licences deserve constitutional protection – demonstrates that he is effectively arguing for a more deferential approach at this stage of the property inquiry, one that would consider the policy objectives of the legislation first and foremost in deciding whether the entitlement constitutes property. He argues that the legislative framework at play in *Shorpite* is designed to control regulation over the access to use of a dangerous substance; that this is important because alcohol has negative socio-economic consequences and indirect effects on health; that although there are economic benefits of trading in liquor, such licence holders are 'often powerful and influential companies' and that recognising a licence as constitutional property creates a strong entitlement in the hands of the licence holder; and that this, in turn,

right to exclude, or relationships, theorists proceed with the often-undeclared presumption that once a right is recognized with respect to a thing, the scope of that right does not vary across the thing.' Dana & Shoked (note 139 above) at 767.

[146] T Coggin 'Recalibrating Everyday Space: Using Section 24 of the South African Constitution to Resolve Contestation in the Urban and Spatial Environment' (2021) 24 *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* 2; Coggin (note 22 above); *Adonisi & Others v Minister for Transport and Public Works: Western Cape* [2020] ZAWCHC 87, [2021] 4 All SA 69.

[147] *Shoprite* (note 128 above) at para 94.

[148] Ibid at para 103.

[149] Ibid at para 115.

would 'tip the scales and arguably diminish the ability of the legislature to effectively regulate an industry where regulation is of paramount importance.'[150]

His second consideration, linked to the first, is whether recognising the entitlement would make legislative regulation impossible.[151] A licence, he argues, is 'a bare permission to do something that would otherwise be unlawful', issued to 'overcome a statutory prohibition', subject to 'administrative withdrawal and change', and is never 'absolute, often conditional and frequently time-bound.'[152] The licence holder may at some point in the future 'cease to be suitable to hold the licence', and it cannot transfer the licence.[153] Moseneke J suggests in the process that the property clause is not intended to make state regulation of commercial interests difficult or impossible, and although he does not close the door entirely to section 25, his words offer a strong caution for the Court's wide-open-gates policy to classifying any entitlement as constitutional property.

Justice Moseneke does not offer much detail for what can be understood as his third and fourth considerations, nevertheless they opened the door for future decisions to consider these questions. His third consideration was whether the right vested in the titleholder; if it did, it would more likely be considered constitutional property. Because the liquor licence in *Shoprite* did not vest in the holder and was derived from state largesse, it could not be considered constitutional property. Froneman J in his majority judgment disagreed, finding it retrogressive to treat the vesting of an entitlement as indicative of constitutional property.[154] Froneman J compares this position to pre-constitutional jurisprudence, which meant that only limited interests were recognised in the common law, allowing for greater abuse by the state of similar entitlements.[155] While it is unfortunate that Moseneke J does not engage substantively with this argument, his dissent nevertheless opens up the question of the extent to which vesting should be determinative of constitutional property and what consequences may arise.

His fourth consideration is that the 'wider the definition of property, the tighter our understanding of deprivation and arbitrariness will have to be.'[156] Again, Moseneke does not offer much here, except to suggest that the wide-open-gates policy would place too much institutional pressure on the Court's test for arbitrary deprivation. In the process, he identifies the Court's approach since *FNB*, which is essentially to decide the question of constitutional property through the prism of arbitrary deprivation. My article offers two reasons why this is problematic, but it would be interesting for the Court to consider this question too if indeed that is the approach adopted.

His fifth consideration comes through at numerous points in the judgment, and that is to question why the property clause has to perform the same inquiry as that of administrative justice. He notes that because South African law can 'boast of administrative justice protections that are truly expansive and meant to police and curb executive excesses' that our 'jurisprudence need not convert every conceivable interest, with or without commercial value, as a few other

[150] Ibid at para 120.
[151] Ibid at para 124.
[152] Ibid at para 122.
[153] Ibid at para 122.
[154] Ibid at para 59.
[155] Ibid at fn 94. Froneman, J refers to *Natal Bottle Store-Keepers and Off-Sales Licenses Association v Liquor Licensing Board for Area 31 & Others* 1965 (2) SA 11 (D) at 16H–17A.
[156] *Shoprite* (note 128 above) at para 125.

jurisdictions have done, into protectable property.'[157] Justice Moseneke's arguments here offer up a crucial question for the Court to consider: why is it that entitlements are offered access to section 25 so readily when alternative avenues may exist? – avenues, in fact, which may be more constitutionally in line with questions of state regulation. But his arguments also suggest that the purpose of the property clause has been diluted by allowing every entitlement into section 25. It has become a constitutional space in which commercial interests seek solace and, although in practice the same result may be achieved were the Court to decide the matter in administrative law, the Court is perhaps not being true to the social function of property when it allows these interests through the gates of section 25.

F The sad case of *SADPO*

The case of *SADPO* was handed down two years after Justice Moseneke's concurring judgment in *Shoprite*.[158] In this case, the applicant – the South African Diamond Producers Organisation, representing the interests of the diamond producers' industry – issued a challenge to the constitutionality of s 20A of the Diamonds Act 56 of 1986. Section 20A(1) provided that no licensee may be assisted by a non-licensee during the viewing, purchasing, or selling of unpolished diamonds. The business practice prior to the amendment was that non-licensed experts – often representing foreign buyers of unpolished diamonds – assisted licensed purchasers. It seems that the net effect of this business practice was essentially to provide foreign buyers with deeper pockets an unfair advantage over local buyers. As the Court noted in its summary of the facts: 'Non-licensed "experts", who attended on behalf of prospective foreign buyers, "assisted" the licensed purchasers. The experts were themselves often from abroad. The ultimate sale was concluded between the producer or licensed dealer and the South African licensed purchaser … the result was that a prospective foreign purchaser was already lined up, should the decision be made that parcels purchased be exported and sold on.'[159]

The respondent's argument was that the amendment was intended to curtail this practice. This was to ensure the local beneficiation of South African diamonds; to tighten the regulation of the diamond industry and to eliminate illegal activities that were occurred in the diamond trade; and to comply with the Kimberley Process Certification Scheme. Illegal transactions are a concern in the global diamond industry, and a tightly controlled verification process reveals

[157] Ibid at para 115. See also para 94: 'It is needless, I think, to characterise Shoprite's grocer's wine licence as constitutional property. The same outcome may be arrived at without deciding the difficult and fluid question whether it is property. It should suffice to test the challenged provisions for rationality. In that event, one simply asks whether the provisions pursue a legitimate government purpose, and if so, whether the statutory means resorted to are arbitrary or reveal naked preference or another illogical or irrational trait.' And see para 128: 'Courts, as some foreign jurisdictions have done, would tend to throw the protection wide if there were no other effective remedies. Administrative law in this country provides ample redress against arbitrary executive decisions on whether to grant, renew, cancel, or alter a liquor licence… This, in my view, is a powerful consideration in an enquiry whether our Constitution requires us to extend the meaning of property to liquor licences.' See also Noko's critique of the judgment, which concludes that 'commercial licences which are essential for the practice of one's trade must instead be protection under the most specific right which is the right to freedom of trade, occupation and profession' or, in the case of juristic persons, 'through the rule of law and the principle of legality.' KK Noko 'A Critical Analysis of the Constitutional Concept of Property in light of the judgment in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 1025 (CC)' (MA thesis, University of Kwazulu-Natal, 2018).

[158] *SADPO* (note 32 above).

[159] Ibid at para 8.

an important government purpose in maintaining oversight over the diamond supply chain, and in ascertaining the origin of diamonds.[160] As Justice Khampepe noted herself, '[t]he more involvement unlicensed persons are permitted to have in the process of buying, selling and exporting unpolished diamonds, the greater the risk of illegal transactions going unnoticed.'[161]

Somewhat predictably, SADPO argued that the business practice embodied constitutional property worthy of protection. But rather than following its admirable approaches under *Shoprite*, the Constitutional Court confined *Shoprite* to a footnote and defaulted back to its previous *modus operandi* of failing to explain why this business practice should constitute property. SADPO's argument was that its members had been deprived of the right to realise the full market value of the diamonds they own; this formed part of their *ius disponendi* (right to alienate their property).[162] It also argued that additionally, dealers had been deprived of their right to receive full market value for their diamonds when selling, as they can only market to local licensees.'[163]

Note how SADPO was not claiming its ownership of diamonds and the ownership of the licences as the issue. It was essentially claiming that its business practice – of having unlicensed persons acting informally as agents for foreign buyers and, consequently, receiving a larger price for the diamonds – was protected as part of its *ius disponendi*. The Court did not consider whether a) this practice would indeed form part of the *ius disponendi*, or b) even if it were, why the constitutional property clause should protect the practice. Instead, the Court considered two approaches at its disposal. The one approach would be to enquire what was taken away, which they specified as 30 per cent of the previous market value; secondly, what the entitlement to engage in business in a particular way had been, and, thirdly, whether these interests embodied constitutional property. The second approach would be to 'proceed on the basis that "property" in issue is the diamonds and the licences', and then to consider at the arbitrary deprivation stage whether the interest is worthy of constitutional protection.[164]

The Court chose the latter approach, moving back to its pre-*Shoprite* position. However, in doing so, the Court mischaracterised the nature of the claim: not even the applicants were arguing that the ownership of the diamonds or licences was at issue. Indeed, these entitlements were not the problem: the amendment did not deprive anyone of the freedom either to purchase diamonds, or to apply for a licence to do so. The amendment simply circumscribed the manner in which unpolished diamonds were viewed, purchased, and sold. Nevertheless, the Court declared that 'the "property" at issue here is the ownership of the diamonds, and the ownership of the licences (assuming the licences are property). That ownership brings with it certain rights and entitlements.'[165]

Even if we assume that the ownership of unpolished diamonds means you are entitled to constitutional protection with regard to the way in which you go about viewing and purchasing or selling them, that still does not tell us *why* the clause should provide this protection. Why is it that section 25 is allowed to protect business practices that the legislature has determined may be connected to illegal practices in the diamond industry? Why is it that the clause is

[160] For example, A Moodie 'African Nations Work Together to Rid Supply Chains of Conflict Materials' *Guardian* (14 September 2015).
[161] *SADPO* (note 32 above) at para 79.
[162] Ibid at para 20.
[163] Ibid at para 20.
[164] Ibid at para 38.
[165] Ibid at para 39.

allowed to protect someone's intention to extract the highest price for the goods that they sell? Is this simply a power the law gives you – a legal position which no one else is under a duty to honour if they regard the price as too high? Is it the purpose of the clause to protect this power? By letting the entitlement in, the Court not only conflates the legal relationships at play, but it moves constitutional property jurisprudence a great distance away from the purpose of the property clause.

The most unfortunate aspect of *SADPO,* however, is that the Court highlighted the absurdity of the applicant's claim. It did so at the end of the judgment when it considered whether SADPO's members were arbitrarily deprived of their property. Justice Khampepe noted:

> What SADPO seeks to protect is their members' interest in conducting their business in terms of their licences according to a particular preferred strategy. There can be no deprivation in a change of regulation that alters the strategies licensees are entitled to pursue in the course of conducting licensed activities. Favourable business conditions, including favourable regulatory conditions, are transient circumstances, subject to inevitable changes. It cannot be that every time a government decision or regulation makes a particular business strategy unlawful, persons who preferred to conduct their business in accordance with that strategy have been deprived of property.[166]

Khampepe J is correct but, in allowing SADPO's entitlement through the gates of constitutional property, the Court does exactly what it cautions against, and the net effect may be to stultify the regulation of interests deemed property because these entitlements are sure to be put through the golden ring of section 25.

IV THRESHOLD OR JUSTIFICATION?

Justice Khampepe's treatment of the entitlement within the justification stage of the judgment in *SADPO* may, however, be explained through Marais' analysis of the *Shoprite* decision,[167] and his analysis of the *SADPO* decision.[168] In this section, I consider Marais' arguments as they reveal strong reasons for the approach the Court adopted. It is the approach I critique in the article, namely, to limit the property entitlement in the justification rather than the threshold stage of the section 25 inquiry.

In his discussion of *Shoprite*, Marais addresses a similar issue to this article, namely which entitlements should be accorded constitutional protection. He argues, however, that the 'real difficulty lies not in establishing which interests *should* enjoy constitutional protection, but rather to determine the *level* of protection they should be afforded.'[169] Marais would perhaps caution against my approach because it has the potential to exclude entitlements from constitutional protection at the threshold stage, rather than at the justification stage.[170]

Marais' argument is persuasive, and courts would need to exercise caution were they to refuse access to the entitlement at the threshold stage. There is a tension at play here: on the one hand, disregarding the entitlement at the threshold stage may 'result in the exclusion

[166] Ibid at paras 60–61.
[167] Marais (note 82 above).
[168] Marais (note 81 above). See also W Freedman 'The Constitutional Right not to be Deprived of Property: the Constitutional Court Keeps its Options Open' (2006) *Journal of South African Law/Tydskriff vir die Suid-Afrikaanse Reg* 84.
[169] Marais (note 82 above) at 586.
[170] Ibid at 583.

of certain valuable interests from constitutional protection without permitting a court to conduct a substantive balancing between the protection of the individual holder and the public interest.'[171] But, on the other hand, subsuming the threshold question into the justification stage serves to obfuscate and dilute the claim which, in process, fails to give clarity and meaning to the purpose of the property clause.

Marais further explains the Court's approach in *SADPO* as a welcome rejection of a conceptual severance approach to the protection of property. The notion of conceptual severance emerges from the work of Margaret Radin, a US property law scholar who coined the term to describe a strategy by US Supreme Court justices to read a substantive regulation of property entitlements as a taking whereas, in fact, the regulation 'may not go that far'. Instead, a plaintiff arguing conceptual severance isolates certain entitlements or 'strands' of ownership affected, and then 'hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.'[172] In other words, this strategy 'consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken.'[173] So, rather than treating the owner's land parcel as a whole, it severs entitlements and treats these entitlements as the whole, even though the effect of the regulation diminishes physically, temporally, or functionally only a certain level of ownership.[174]

While I also regard conceptual severance as inappropriate to the interpretation of constitutional property, the *SADPO* Court in my view does not reject the notion. Instead, in its inattention to the actual entitlement before it in relation to the purpose of the property clause, it potentially embraces conceptual severance. A conceptual severance approach would focus on the *ius disponendi*, and thereafter would elevate the right by treating it as the sum of the entitlement. This is what the *SADPO* Court achieved: by leapfrogging the question of the *ius disponendi* through the mischaracterisation of the claimed entitlement as ownership of the diamonds and of the licences, the claimed entitlement (the *ius disponendi*) is sucked into Roux's vortex and, although the Court ends up rejecting the entitlement at the justification stage, the net effect is to elevate the claimed entitlement to constitutional property. Whilst a *ius disponendi* could, of course, be protected by the property clause, the legislation being challenged did not target the ownership of diamonds or licences; rather, it targeted only the manner in which licencees operated in the marketplace. By unquestioningly subsuming this business practice as a component of ownership, without interrogating whether it is the purpose of the property clause to protect the business practice, the Court in fact drew closer to an approach embodying conceptual severance, elevating the business practice and, as Marais warns, exacerbating 'the extent of the interference' and frustrating 'the state's attempts to regulate property by subjecting those regulations to unaffordable compensation claims.'[175]

[171] Ibid at 587. Marais' arguments around South Africa's 'history of forced dispossession and disregard of indigenous land rights' is especially apt here: 'it serves no purpose to limit the range of interests that may qualify for constitutional property protection.'

[172] M Radin 'The liberal conception of property: cross currents in the jurisprudence of takings' (1988) 88 *Columbia Law Review* 1667, 1676.

[173] Ibid at 1676.

[174] A Chang 'Demystifying Conceptual Severance: A Comparative Study of the United States, Canada, and the European Court of Human Rights' (2013) 98 *Cornell Law Review* 965, 966.

[175] Marais (note 82 above) at 592.

Accordingly, I argue that at a minimum we should regard the 'threshold' question less as an actual threshold issue but one of justification. After all, whether an entitlement enjoys constitutional protection goes to the core of the property clause. A court must be explicit about the *scope* of the entitlement it is letting through the 'wide open gates' of section 25, and must ideally be specific about the *reasons* for doing so in relation to. the property clause.[176] A failure to do so does not necessarily mean the entitlement is lost in Roux's famed vortex, but as highlighted in this article, the current approach serves to dilute the purpose of the property clause and, consequently, may stultify legislative regulation of property and interests deemed property.

V CONCLUSION

In conclusion, my analysis of selected Constitutional Court case law has revealed that the Court does not give sufficient mileage to the purpose of the property clause as mediated through the meaning of constitutional property. I provide four concluding thoughts about why this is problematic.

First, in giving constitutional property such an obtuse definition, the effect is not to transform the ownership of resources in South Africa, but instead it continues to privilege the law's validation of entrenched, private law-oriented interests. In the process, this prefaces an individualist mode of entitlement, one that goes against understanding the property clause as embodying a social function of property. Rather, the approach lends itself to a dominium-centric understanding of property law, encapsulated in the inviolable view that section 25 encapsulates a right to property. Far from protecting existing entitlements in property, this view serves rather to continue excluding the non-propertied from gaining entitlements in property. This becomes especially problematic in the contemporary urban and spatial environment in which property law becomes a dominant assemblage through which inequality manifests. Capital on both a global and local level is tied in with propertied entitlements, and the Court failing to sufficiently question why these interests should enjoy constitutional property entails somewhat of a complicity on the part of the Court in shoring up that inequality. It is perplexing why the Court is unable or unwilling to subject constitutional property with such scrutiny when confronted with a challenge based on section 25, especially when it has proven itself adept in challenges to property based on other areas of the Constitution, notably section 26.[177]

[176] Marais' argument ibid at 583–586 in which he draws on Radin's differentiation between personal property and fungible property to argue that certain types of property could enjoy greater constitutional protection than other types of property: 'personal property, which permits property holders to achieve a greater level of self-fulfilment as moral agents in the social sphere, enjoys stronger constitutional protection than fungible property. However, despite the fact that fungible property enjoys a lower level of protection because it is aimed at increasing one's wealth, it is still regarded as *constitutional property*'. Ibid at 585, referring to M Radin 'Property and Personhood' (1982) 34 *Stanford Law Review* 957.

[177] For example, Justice Sachs captured the Court's position regarding housing rights in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) at para 15, signifying a decisive shift away from a dominium-centric view of property rights and towards validating a social function of property: 'There are three salient features of the way the Constitution approaches the interrelationship between land, hunger, homelessness and respect for property rights. In the first place, the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing. For the main part they presuppose the adoption of legislative and other measures to strength existing rights of tenure, open up access to land and progressively provide adequate housing. Thus, the Constitution is strongly supportive of orderly land reform, but does not purport to effect transfer of title by constitutional fiat. Nor does it sanction arbitrary seizure

Second, in failing to give meaning to the purpose of the clause, the Court endorses a particular narrative of property law in South Africa. Such narrative primes an individualist view of resource ownership, but it is not clear whether such narrative is universally held. South African property law continues to be defined by its Roman-Dutch law origins. As a system foisted upon the South African legal system through colonial conquest, we must consider the kind of resource governance and knowledge systems erased in the process of colonial conquest. Did our multiple legal cultures in existence prior to the import of colonial law hold an affinity for individualist entitlement or dominium? Alternatively, can we trace similarities in the experiences of the Kluane First Nation in Canada who have had to rethink their relationship between people and things as more parasitical than symbiotic in order to benefit from Canada's dominium-centric land restitution process?[178] How we view our relationship to resources is seminal to our *use* of such resources – it takes us beyond the human and into a realm of semiosis. As Eduardo Kohn argues in his book, *How Forests Think*, recognising how we inhabit an 'ever-emerging world beyond the human' serves to challenge the idea that we are 'the exceptional kinds of beings that we believe we are.'[179] What would the property clause say? More so, what would its neighbour in the Bill of Rights say – section 24 of the Constitution, the environmental right? Viewing our relationship to things as symbiotic is arguably an important and necessary component of the social function of property. An unquestioning approach to property lends itself, in fact, to an inefficient and unsustainable manner of resource use, one premised on immediate and individualised gratification rather than inter- and intragenerational equity in resource distribution and use.[180]

Third, viewing property as an individualist entitlement obscures how many people relate to resource use in South Africa in their everyday lives. Our current system of property law is a construct in which we delineate access using various material and symbolic assemblages – lines on cadastral maps; words in a title deed; walls, gates, signs, and locks. To be sure, we make real this construct in our everyday lives, and the construct is often necessary as a way of governing the use of resources. But the increasing difficulty of attaining access to these resources – land, in

of land, whether by the state or by landless people. The rights involved in section 26(3) are defensive rather than affirmative. The land-owner cannot simply say: this is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers.' Stuart Wilson has demonstrated how section 26 of the Constitution has meant ownership rights are often treated as subservient to housing rights. See S Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 *South African Law Journal* 270. See also Wilson (note 22 above) at 11: 'In South Africa, some of the most basic structures of property law have undergone substantial alteration since the end of apartheid, and that these alterations have created spaces in which ordinary people have begun to reshape the terms on which they access land, tenure, and credit.'

[178] P Nadasdy, 'Property and Aboriginal Land Claims in the Canadian Subarctic: some theoretical considerations' (2008) 104 *American Anthropologist* 247, 258: 'Just to engage in land claim negotiations, [Kluane First Nation] people have had to learn a very different way of thinking about land and animals, a way of thinking that to this day many Kluane people continue to regard with disapproval. Despite this, many of them have put aside their discomfort with the idea of 'owning' land and animals, electing to participate in the land claim process because they see it as the only realistic chance they have to preserve their way of life against increasing encroachment by Euro-Canadians.'

[179] E Kohn *How Forests Think: Towards an Anthropology beyond the Human* (2013) 66.

[180] Robbie & Van der Sijde (note 81 above) at 592–603, who position the regulation of property within sustainable development: not only in terms of environmental sustainability, but 'the continuation of the legitimacy of the property system within the broader constitutional legal system… the need for real transformation remains evident; without actual social and economic transformation that provides tangible benefits to the poor and marginalised, the system [of property law] will become increasingly unstable and lose any claim to legitimacy.' Ibid at 591.

particular – means that, of necessity, many people begin to move beyond those systems which constrain their participation.[181] The proliferation of informal settlements globally demonstrates this very point – where do you live if you simply cannot afford to play in the construct? Conceptualising constitutional property so broadly obscures from view these fundamental questions of resource access. It obscures from view the interests of the non-propertied, who are relegated to the literal, metaphoric, and aesthetic margins of our cities. Property law is revealed in the process as a tool of control, characterised by binary of insiders and outsiders, and the definition of constitutional property becomes the preserve of the insiders.[182]

The above points echo Tshepo Madlingozi's argument raised in an essay on the property clause, which amplifies the decolonial critique of the Bill of Rights as this halcyon imaginary of a new society.

> The enduring marginalization of *Ubuntu/Botho* and African jurisprudences is symptomatic of the fact that African lifeways, their epistemologies and systems of social ordering (misnamed 'customary law') are still deemed inferior in the "new South Africa". A constitution cannot be regarded as decolonizing if it does not [sic] reflect the living philosophy and mores of the majority of its citizens; if instead of being a 'mirror of society,' it continues to be experienced by most of its subjects as a petrifying and alienating deity… The crucial point here is that the marginalisation of "non-western" grammars of dignity and cosmologies often means that land restitution claimants often experience epistemic, cultural and spiritual violence during processes that are supposed to redress and remember them.[183]

Madlingozi's argument raises a significant issue around the legitimacy of the property clause. My article does not address whether this legitimacy was ever there in the first place, but it does highlight the pressing need to address the purpose of the clause as a bare minimum, lest its legitimacy be further eroded. What is this purpose?

[181] We see these examples beyond property law as well. I offer two in this footnote: the first deals with urban governance, and follows research conducted by Caroline Wanjiku Kihato on the experiences of migrant women in Johannesburg. She argues that understanding our relationships in everyday space as conditioned by the state or civil society 'misses other forms of sociality organised around informal, temporary and ephemeral institutions.' Kihato recognises these institutions as 'alternative registers of sociality', activated 'when individuals negotiate socio-economic and political forces in the city', and which complicate or challenge ingrained assumptions of urban governance. CW Kihato, 'The City from its Margins: Rethinking Urban governance through the Everyday Lives of Migrant Women in Johannesburg' in E Pieterse & A Simone (eds.) *Rogue Urbanism* (2013) 325, 329. The second example deals with the rules of pedestrianism and its relationship with formal law. As Nicholas Blomley argues in his book, *Rights of Passage*, '[p]edestrianism is clearly a form of legal practice and knowledge, but it is also distinct, eschewing a rights frame in favour of an attention to placement and flow. Thus, perhaps it is better to think of it as a particular legal knowledge, with its own networks, logic and internal truth.' See N Blomley *Rights of Passage: Sidewalks and the Regulation of Public Flow* (2011) 4.

[182] EM Peñalver & SK Katyal *Property Outlaws: How Squatters, Pireates, and Protesters Improve the Law of Ownership* (2010).

[183] T Madlingozi 'The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonisation?' *Critical Legal Thinking* (6 April 2018), available at https://bit.ly/2YtT71J. Lungisile Ntsebeza offers a more technical critique of section 25 as a whole and in the context of land reform: 'The starting point in [the debate on land reform] should be whether a comprehensive land redistribution programme in South African can take place if it ignores colonial conquest, land dispossession and the fact that commercial farming triumphed as a result of the naked exploitation of African labour. Above all, the debate would have to engage with the fundamental proposition in this chapter, namely, that ther is a contradiction between the protection of private property rights to land and a commitment to fundamental land redistribution.' See L Ntsebeza 'Land Redistribution in South Africa: the Property Clause Revisited' in L Ntsebeza & R Hall (ed.) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 107, 129.

The final point in my article relates to one of the consequences of failing to clarify this purpose and allowing almost any entitlement through the 'wide-open gates' of the property clause. All the cases surveyed in this article involved a fundamental interest on the part of capital, and were a response to regulatory moves on the part of the state. By defining constitutional property so broadly, the Court has widened the avenue through which these regulatory moves are challenged. As was held by Moseneke J in *Shoprite,* the Court should consider closing the avenue off in a more principled manner, one that is cognisant of the purpose of the property clause. This opportunity may arise should large credit providers decide to challenge an amendment to the National Credit Act 34 of 2005. Coetzee and Brits note how the amendment will, 'subject to strict requirements, provide debt relief to over-indebted persons who earn a relatively low monthly gross income and who owe a rather small amount of unsecured debts. *One* of the remedial measures that the application of the measure to a consumer's financial circumstances could result in is the extinguishing (discharge) of qualifying unsecured debt.'[184] Coetzee and Brits state that it is not necessary for 'present purposes' to investigate the question of whether such interests on the part of credit providers constitute property, and that whether such parties would enjoy the full benefits of section 25 would be decided under arbitrary deprivation.[185] However, if we consider that the reason the legislature enacted the change was to reform a part of South African insolvency law – 'which heavily subscribes to the advantage-of-creditors principle' – then we have to ask why we allow such parties access to section 25, and what doing so reveals about the purpose of the entitlement and the legitimacy of the constitutional property clause.

All four of my concluding thoughts above point to one critical question that the law must address: what is *our* narrative of property? It is uncontroversial to claim that this narrative, at least on the face of the Court's jurisprudence, is *not* a simplistic and reductive 'right to property'. But it is imperative for a far deeper and more deliberate engagement in our collective praxis as to the purpose of the property clause: partly given significant land and resource inequality globally and in South Africa that pivots off property; partly given the many livelihoods marginalised through property's shadow; partly in light of the use of the property clause to entrench existing propertied interests, potentially stultifying the state's power to regulate commercial interests in favour of a public interest; and partly given the epistemicide of indigenous land and resource governance systems and knowledge enacted through colonisation, the significance of which largely remains under-researched and underexplored.

[184] H Coetzee & R Brits 'Extinguishing of debt in terms of the debt intervention procedure: some remarks on "arbitrariness"' in D Van der Merwe (ed.) *Magister: Essays vir/for Jannie Otto* (2020) 11, 12. See also R Brits 'The National Credit Act's Remedies for Reckless Credit in the Mortgage Context' (2018) 21 *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* 1, 16–18; R Brits 'The impact of constitutional property law on insolvency law in South Africa' (2021) 30 *International Insolvency Review* 34.

[185] Coetzee & Brits ibid at 18.