

# Demsetzian Property Theory and America's Border Lands

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## INTRODUCTION

On August 24, 2022, then-Arizona governor, Doug Ducey, placed 130 shipping containers along the United States–Mexico Border (the “Border”).<sup>1</sup> These shipping containers blocked 3,820 feet of the Border in places where there were previously gaps in the Border wall.<sup>2</sup> Some of the containers were placed on federal land.<sup>3</sup>

While this was not explicitly a fight over land ownership, these actions, at their core, arguably sought state ownership of federal land. One way of thinking about property ownership is as a bundle of rights.<sup>4</sup> The rights to use, develop, and manage property are rights in this bundle,<sup>5</sup> so by forcibly placing objects on the federally owned property without permission, Ducey essentially claimed ownership in the property.<sup>6</sup> He exercised the rights to use, develop, and manage the property, and violated the federal government's right to exclude others from its property.<sup>7</sup> Further, the goal of these actions aligned with the goals of past federal–state land ownership controversies.<sup>8</sup> Arizona wanted control over the federal lands within its border and believed

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1. Nick Phillips, *Ducey's Shipping Containers Aid Lake's Plans*, ARIZ. CAPITOL TIMES (Aug. 25, 2022), <https://azcapitoltimes.com/news/2022/08/25/duceys-shipping-containers-aid-lakes-plans> [<https://perma.cc/2ZCV-ECSC>].

2. *Id.*

3. *Id.*

4. *See infra* Section I.B.

5. *See infra* note 40 and accompanying text.

6. *See* Phillips, *supra* note 1.

7. *Id.*

8. *See* CAROL HARDY VINCENT, CONG. RSCH. SERV., R44267, STATE MANAGEMENT OF FEDERAL LANDS: FREQUENTLY ASKED QUESTIONS 8 (2016) (describing the goals of the Sagebrush Rebellion and other more recent state actions to obtain more control over their lands).

the management of these lands should benefit the state and thus be managed according to its own priorities rather than federal priorities.<sup>9</sup>

Prior to placing the shipping containers on federal land, Arizona built the wall on state-owned lands or private property owned by individuals who supported the Border wall.<sup>10</sup> This was not an issue because the property owners were validly exercising their ownership rights.<sup>11</sup> However, once Ducey placed the shipping containers on federal land without approval or permission from the landowner (the federal government), the state's actions violated property law.<sup>12</sup> Since the federal government owns the land, the federal government has the right to use, develop, and exclude people from the land; if a state exercises or impedes any of these rights without permission, it commits trespass.<sup>13</sup>

States are trespassing or taking other actions contrary to federal government orders on federal land at the Border, and there are no consequences—or at least no consequences harsh enough—to stop states once they have trespassed or to discourage states from doing so in the first place.<sup>14</sup> While not an issue in the past, changing social and political circumstances have turned these trespasses into a major problem, specifically in this area of Border disputes.<sup>15</sup> Further, while this Comment focuses on addressing the federal–state land dispute at the Border, this problem may arise in any place where federal and state land borders abut, including national parks, national forests, national monuments, and federal military reservations.<sup>16</sup> Therefore, this Comment's proposed solution may be more widely applicable, though that is beyond the scope of this Comment.

This Comment argues that states trespassing or using federal land for their own benefit without consequence is a problem that can be remedied by enacting federal legislation to: (1) clarify federal–state land boundaries and the property rights incident to respective ownership; and (2) impose penalties for trespassing or otherwise violating another party's property rights. Part I of this Comment provides context, overviewing the history and evolution of federal–state land ownership, property law, and Harold Demsetz's *Toward a*

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9. *See id.*

10. Phillips, *supra* note 1.

11. *Id.*

12. *Id.*

13. *See* RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965) (detailing when an individual may be liable for trespass).

14. *See, e.g.,* Phillips, *supra* note 1.

15. *See infra* Section I.D.

16. *See* CAROL HARDY VINCENT & LAURA A. HANSON, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 4–6 (2020).

*Theory of Property Rights* (“Demsetz’s *Theory*”), as well as the growing conflict at the Border. Part II applies Demsetzian theory to the federal–state conflict at the Border. Part III provides suggestions and considerations for this Comment’s proposed federal legislation to resolve the Border conflict. Part IV briefly concludes.

## I. UNDERSTANDING PROPERTY RIGHTS AND THE BORDER CONFLICT

This Part discusses how the federal government came to own land in the United States, what powers the federal government has as the owner of this land, and the effects of federal government ownership on the states.<sup>17</sup> Further, this Part summarizes important property law concepts<sup>18</sup> and introduces Demsetz’s *Theory*.<sup>19</sup> Lastly, this Part describes the history of the federal–state relationship regarding land ownership and discusses the current, ongoing conflict between states and the federal government at the Border.<sup>20</sup>

### A. Federal–State Land Ownership: The History and Evolution

Federal lands played an important role in American history and continue to be a great asset. From the time of the nation’s forming to now, there have been debates about federal versus state ownership of the country’s lands.<sup>21</sup> Federal land ownership began when the original thirteen states ceded title to over forty percent of their western lands.<sup>22</sup> As a condition to the western states joining the United States, many of the statehood acts gave up rights to claim lands retained by the federal government within the respective state’s boundaries.<sup>23</sup> Following this cession of western lands, the federal government continued acquiring land from foreign countries, including through the Louisiana Purchase and treaties with Great Britain and Spain.<sup>24</sup>

In the mid-to-late 1800s Congress enacted laws like the Homestead Act of 1862<sup>25</sup> that disposed of federal lands to encourage and accelerate settlement

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17. See *infra* Section I.A.

18. See *infra* Section I.B.

19. See *infra* Section I.C.

20. See *infra* Section I.D.

21. See VINCENT, *supra* note 8, at 7–8 (detailing the Sagebrush Rebellion and more current state efforts to obtain more control over lands within their boundaries).

22. *Id.* at 2.

23. *Id.*

24. *Id.*

25. Homestead Act of 1862, ch. 75, 12 Stat. 392.

in the West.<sup>26</sup> Between 1781 and 2010, about 816 million acres of public domain lands were transferred to private ownership, and another 328 million acres were granted to the states.<sup>27</sup> However, during the late nineteenth century, Congress shifted its focus and began to emphasize retaining and managing the remaining federal lands rather than continuing to dispose of it.<sup>28</sup> This shift originated from the growing concern that development was threatening the nation's "scenic treasures . . . [and] resources that would be needed for future use."<sup>29</sup> In 1976, Congress enacted the Federal Land Policy and Management Act ("FLMPA"), expressly declaring the remaining public domain lands would remain in federal ownership.<sup>30</sup>

The FLMPA was a significant driver in the Sagebrush Rebellion,<sup>31</sup> a movement arising in the 1970s centered on state versus federal land ownership conflicts.<sup>32</sup> The states sought to foster divestiture of federal lands through state and local legislation, court challenges, federal administrative challenges, and proposals for federal legislation.<sup>33</sup> The states' primary goal was to obtain more control over lands and resources within their boundaries.<sup>34</sup> However, since the states generally agreed to disclaim their right and title to federal land within their boundaries as a condition of statehood, these efforts were largely unsuccessful.<sup>35</sup>

### B. Property Ownership and Property Rights

To fully grasp the federal–state conflict over ownership of land at the Border, one must understand property law and the definition of "property." There are two major conceptions of property.<sup>36</sup> The common, everyday conception is that property is a "right to a thing good against the world."<sup>37</sup> However, a common understanding of property among theorists is that property is a collection of rights, or a "bundle of sticks."<sup>38</sup> The "bundle of

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26. VINCENT & HANSON, *supra* note 16, at 2.

27. *Id.*

28. *See id.*

29. *Id.*

30. *Id.* at 3; Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.

31. VINCENT & HANSON, *supra* note 16, at 3.

32. *See* VINCENT, *supra* note 8, at 8.

33. *Id.*

34. *Id.*

35. *Id.*

36. THOMAS W. MERRILL ET AL., PROPERTY PRINCIPLES AND POLICIES 1 (4th ed. 2022).

37. *Id.*

38. *Id.*; 63C AM. JUR. 2D *Property* § 31, Westlaw (database updated Jan. 2025).

sticks” is a metaphor for all the different property rights incident to ownership.<sup>39</sup> Some of the common sticks in the bundle, or property rights, include the right to possess, use, enjoy, change, improve, manage, alienate, develop, and exclude.<sup>40</sup> Fee simple owners of property own all the sticks in the bundle—they have all the property rights.<sup>41</sup> Property owners may also choose to give some of the sticks away, so their rights are more limited.<sup>42</sup>

Property rights, and maintenance of those rights through enforcement, are extremely important in balancing competing interests and incentivizing productive land use. For one, secure property rights give owners and potential owners assurance that if they invest in property, they will be able to fully use it as they desire without interference from others.<sup>43</sup> Property rights incentivize people to invest in land—to buy, develop, and maintain it.<sup>44</sup> Additionally, clear property rights help prevent a tragedy of the commons situation.<sup>45</sup> If there is no clear owner of property, anyone who has access to it can use it however they please, and since it is not theirs to lose, people tend to overuse it, damage it, or fail to take adequate care of it.<sup>46</sup> To the contrary, when someone actually owns the property, they have an incentive and reason to take care of it and make sure it is used efficiently.<sup>47</sup> For these reasons and others, establishing and maintaining clear property rights is important to ensure property owners can fully enjoy their rights without those rights being diminished by non-owners.<sup>48</sup>

Property rights must be enforced to be effective, and property owners have causes of action against those who violate their rights.<sup>49</sup> For example, if someone comes onto a property owner’s land, the owner can file a trespass

39. *Id.*

40. *Id.*; see MERRILL ET AL., *supra* note 36, at 22–25.

41. 63C AM. JUR. 2D *Property* § 31, Westlaw (database updated Jan. 2025).

42. MERRILL ET AL., *supra* note 36, at 22.

43. See Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2054 (2001) (“The central justification for enforceable property rights is to encourage investment.”).

44. F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 721 (2001).

45. Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, in MERRILL ET AL., *supra* note 36, at 65, 65–70.

46. *See id.*

47. *See id.* at 66 (“Both the economic analysis of common property resources and Hardin’s treatment of the tragedy of the commons’ led Robert J. Smith [] to suggest that ‘the *only* way to avoid the tragedy of the commons is . . . by creating a system of private property rights.’”).

48. *See supra* notes 43–47 and accompanying text.

49. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 158 (AM. L. INST. 1965) (stating that trespass is an example of a cause of action property owners may use to enforce their rights).

complaint against them.<sup>50</sup> Because property owners have the right to exclude others from their land, a trespass claim allows them to fully exercise the right to exclude.<sup>51</sup> There are also numerous other causes of action against individuals who violate an owner's property rights.<sup>52</sup>

### C. Foundations of Demsetz's Toward a Theory of Property Rights

Property theories can be used to help demonstrate ideal outcomes of property controversies. One theory in particular, Harold Demsetz's *Toward a Theory of Property Rights*, uses an efficiency perspective to determine when property rights should develop.<sup>53</sup> Demsetz wrote *Toward a Theory of Property Rights* in 1967, drawing on and developing ideas from R.H. Coase's *The Problem of Social Cost*.<sup>54</sup> Throughout his life, "Demsetz pursued these 'Chicago'-style concerns [including] locating the emergence of institutions such as property rights, contracts, firms, [and] oligopolistic behavior [] in transactions costs and information problems."<sup>55</sup>

In *Toward a Theory of Property Rights*, Demsetz argued that property rights are expensive to enforce, so once the benefit of secure property rights outweighs the costs of enforcing such rights, enforcement institutions will arise efficiently.<sup>56</sup> More specifically, Demsetz theorized that "property rights

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50. *Id.* (stating that trespass occurs when one "intentionally enters land in the possession of the other[,]. . . remains on the land, or fails to remove from the land a thing which he is under a duty to remove").

51. *See id.*; MERRILL ET AL., *supra* note 36, at 22–25.

52. MERRILL ET AL., *supra* note 36, at 33–43. In addition to civil actions, including trespass, which protect *real* property, civil actions also protect *personal* property.

53. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967). *See generally* Harold Demsetz, *Distinguished Fellow 2013*, AM. ECON. ASS'N, <https://www.aeaweb.org/about-aea/honors-awards/distinguished-fellows/harold-demsetz> [<https://perma.cc/VA44-3P7B>].

54. Goncalo L. Fonseca, *Harold Demsetz, 1930–*, HIST. ECON. THOUGHT, <https://www.hetwebsite.net/het/profiles/demsetz.htm> [<https://perma.cc/P74K-SPXA>]; Demsetz, *supra* note 53, at 349 n.1.

55. Fonseca, *supra* note 54; Goncalo L. Fonseca, *The Chicago School*, HIST. ECON. THOUGHT, <https://www.hetwebsite.net/het/schools/chicago.htm> [<https://perma.cc/3923-R44U>] ("[T]he 'Chicago School' is associated with a particular brand of economics which adheres strictly to Neoclassical price theory in its economic analysis, 'free market' libertarianism in much of its policy work and a methodology which is relatively averse to too much mathematical formalism and willing to forego careful general equilibrium reasoning in favor of more results-oriented partial equilibrium analysis.").

56. AM. ECON. ASS'N, *supra* note 53.

develop to internalize externalities when the gains of internalization become larger than the cost of internalization.”<sup>57</sup>

Externalities are “positive or negative outcome[s] of a given economic activity that affect[] a third party that is not directly related to that activity.”<sup>58</sup> For example, water pollution caused by chemical runoff from building roads is a negative externality.<sup>59</sup> Internalizing means accounting for or solving the externality problem.<sup>60</sup> In the above example, internalizing the externality may include figuring out how to stop chemical runoff or de-pollute the water.<sup>61</sup> There are two situations in which the gains from internalization could exceed the costs of internalization. Assuming all else equal, the gains will exceed the costs if: (1) the gains increase, or (2) the costs decrease.<sup>62</sup>

Demsetz illustrated his theory using the development of private property rights in American Indian land.<sup>63</sup> Before the fur trade was established, hunters primarily hunted for the food and furs their families needed.<sup>64</sup> These hunting practices created externalities because hunters hunted freely without assessing their impacts on other hunters.<sup>65</sup> However, the externalities had only a small effect since the hunting was done on a small scale.<sup>66</sup> Therefore, it was not worth it for anyone to account for, or internalize, the externalities.<sup>67</sup> At the time, no private land ownership existed because the gains of internalization had not yet exceeded the cost of internalization.<sup>68</sup> However, once the fur trade developed, hunting activity and the value of fur to the Indians both greatly increased.<sup>69</sup> These consequences made the externalities associated with free hunting more important.<sup>70</sup> Thus, the property rights system started changing, and the changes accounted for the economic effects

57. Demsetz, *supra* note 53, at 350.

58. *What Is an Externality?—Sustainable Asset Valuation (SAVi)*, INT’L INST. FOR SUSTAINABLE DEV., <https://www.iisd.org/savi/faq/what-is-an-externality> [<https://perma.cc/PS6S-AWU8>].

59. *Id.*

60. See Demsetz, *supra* note 53, at 348; *Indirectly Correcting Externalities*, BCCAMPUS, <https://pressbooks.bccampus.ca/vicecon103/chapter/5-2-correcting-externalities> [<https://perma.cc/894Y-JSNE>].

61. See BCCAMPUS, *supra* note 60; INT’L INST. FOR SUSTAINABLE DEV., *supra* note 58.

62. See Demsetz, *supra* note 53, at 348–350.

63. *Id.* at 351.

64. *Id.*

65. *Id.*

66. *Id.* at 351–52.

67. *Id.* at 352.

68. See *id.* at 351–52.

69. *Id.* at 352.

70. *Id.*

made important by the fur trade.<sup>71</sup> There is evidence of “an unmistakable correlation between early centers of fur trade and the oldest and most complete development of private hunting territory.”<sup>72</sup> Because the amount of hunting activity rose, there were greater impacts on other hunters, and the likelihood for overhunting increased.<sup>73</sup> Because the value of the furs increased, the value of accounting for, or internalizing, the above-described externalities also increased.<sup>74</sup> Therefore, because the gains from internalization increased (gains from preventing over-hunting and collecting furs’ value), the gains from internalization exceeded the costs of internalization (costs to establish boundaries to private hunting territories), and property rights developed in the area.<sup>75</sup>

Another common illustration drawing on Demsetz’s *Theory* is the privatization of grazing lands due to the invention of barbed wire. Before barbed wire was invented, the American West was open range, and cattle roamed freely.<sup>76</sup> This created externalities because ranchers allowed their cattle to roam and graze without thinking about the effects on other ranchers or farmers in the area.<sup>77</sup> At the time, farmers were responsible for protecting their crops from the free-roaming cattle, and they could not receive damages for trampled fields unless they erected a fence.<sup>78</sup> However, fencing materials were prohibitively expensive.<sup>79</sup> Therefore, it was not worth it to internalize the externalities (buying fencing materials and building fences) because the gains from internalizing (not having trampled crops or over-grazed land) did not yet exceed the high cost of internalizing.<sup>80</sup> After barbed wire was invented and produced in large quantities, farmers had a much cheaper way to fence their land.<sup>81</sup> Because the costs of internalization became much lower, the gains from internalization (not having trampled crops or over-grazed land) exceeded the costs of internalization (buying fencing materials and building fences), so the land became increasingly privatized.<sup>82</sup>

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71. *Id.*

72. *Id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. Carl A. Miller, *Barbed Wire: A Revolution in Property Rights*, J. DUPAGE CNTY. BAR ASS’N, <https://www.dcba.org/mpage/v333-Carl-A-Miller> [<https://perma.cc/ZBX3-YTYT>].

77. *See id.*

78. *Id.*

79. *Id.*

80. *See id.*

81. *Id.*

82. *See id.*



Further, Demsetz expanded his theory in *Toward a Theory of Property Rights II* to include three additional factors that have led to increased private property and the associated rights.<sup>83</sup> One of these factors is “compactness.”<sup>84</sup> Demsetz theorized that private property emerges as groups become less close-knit, which “relates to the number and closeness of persons involved in a resource allocation problem.”<sup>85</sup> For instance, “[a] small isolated village within the boundaries of which residents remain for most of their lives” is a compact society.<sup>86</sup> It is practical for such a village’s residents to communally own the property and collectively decide what to do with the property because they are “compact”—the residents are connected, important to one another, and sympathetic to each other’s needs.<sup>87</sup> However, as people become more distant, which can be measured biologically or socially, they are less connected, less important to one another, and less sympathetic to each other’s needs.<sup>88</sup> Thus, these more distant people are less likely to collectively agree on a common plan and more likely to look out for themselves,<sup>89</sup> so it is much more likely that private ownership will be more prominent.<sup>90</sup>

Demsetz’s *Theory* has traditionally been used to support the development of new property rights.<sup>91</sup> However, even where property rights are already established, this Comment argues that Demsetzian theory applies and may be expanded to support the notion that clearer property rights are needed.<sup>92</sup> Further, Demsetzian theory has been used both as a normative and descriptive theory.<sup>93</sup> This Comment uses a normative understanding of Demsetzian theory—that in these circumstances, because the gains from internalizing externalities exceed the costs of internalizing externalities, clearer property rights should develop at the Border.<sup>94</sup>

83. Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 J. LEGAL STUD. S653 (2002).

84. *Id.* at S658.

85. *Id.* The other two factors Demsetz added are “productivity” and “organizational complexity.” *Id.*

86. *See id.* at S661.

87. *See id.* at S660–61.

88. *Id.* at S660.

89. *See id.* at S660–61.

90. *See id.* at S658.

91. *See Demsetz, supra* note 53, at 350–52.

92. *See Brett M. Frischmann & Mark A. Lemley, Spillovers*, 107 COLUM. L. REV. 257, 265 n.23 (2007) (explaining that Demsetz’s *Theory* has been extended to make normative arguments for “increased propertization and privatization of valuable resources”).

93. *Id.* at 264 n.21.

94. *See id.* (discussing that the emergence of private property rights to enable the internalization of externalities is desirable).

#### D. *The Rise of the Border Conflict*

Concerns over the management of federal lands along and near the Border historically created, and still create, tension between state and federal governments.<sup>95</sup> Because the federal government owns most of the land along the Border, it has control over that land even though it is located within the respective states' boundaries.<sup>96</sup> This scheme has led to conflicts between the states and the federal government, especially as Border policy has become increasingly partisan, because they do not agree on the best way to manage this land.<sup>97</sup>

##### 1. Ownership and Control of Border Lands

Federal lands along the Border are extensive.<sup>98</sup> Whether calculated by number of parcels or acres, the federal government is the largest owner of land along the Border.<sup>99</sup> The federal government owns 1,426 land parcels along the Border.<sup>100</sup> The second-largest owner owns 991 parcels.<sup>101</sup> The federal government owns 1,229,928 acres along the Border, and the next highest number of acres owned is 201,198.<sup>102</sup> Another estimate provides that along the Border, 693 of the 1,965 miles (about 35%) is federal or Indian land.<sup>103</sup> Of the four states along the Border, Arizona has the most federal land, and California has the least.<sup>104</sup> Arizona has about 299 linear miles of federal land on the Border, Texas has approximately 252, New Mexico has close to 82, and California has 61.<sup>105</sup> “In Arizona, New Mexico, and California, the

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95. See VINCENT & HANSON, *supra* note 16, at 22–23 (explaining how multiple federal agencies must manage border lands in southwestern states according to different laws and objectives). See generally Colleen Long, *Biden Inspects US–Mexico Border in Face of GOP Criticism*, ASSOCIATED PRESS (Jan. 9, 2023, 5:32 AM), <https://apnews.com/article/biden-politics-united-states-government-mexico-el-paso-2e30ea26bbc55c7af509a6e60ad3d33c> [<https://perma.cc/3993-X8WL>] (discussing Biden's recent policy implementations regarding border crossings and the tensions over immigration).

96. See *infra* Section I.D.1.

97. See *infra* Sections I.D.2–3.

98. CAROL HARDY VINCENT, CONG. RSCH. SERV., IF10832, FEDERAL AND INDIAN LANDS ON THE U.S.–MEXICO BORDER 1–3 (2018). Within 100 miles of the southwestern border, there are about 26.7 million acres of federal land. VINCENT & HANSON, *supra* note 16, at 22.

99. Nick Downer et al., *Analysis: Land Along the US–Mexico Border*, REGRID, <https://app.regrid.com/pages/border> [<https://perma.cc/J2DX-LGQ4>].

100. *Id.*

101. *Id.*

102. *Id.*

103. VINCENT, *supra* note 98, at 1.

104. *Id.* at 2 tbl.1.

105. *Id.*

federal government controls a sixty-foot-wide strip of land along the Border, making fencing easier to build.”<sup>106</sup> By comparison, “[t]he Texas border is mostly unfenced because of treaty provisions, private-property rights, litigation and floodplains.”<sup>107</sup> Almost half of federal Border land is managed by the Bureau of Land Management, and the remaining half is managed by other federal agencies.<sup>108</sup>

For federally owned lands, Congress has the power to exercise its property rights incident to ownership.<sup>109</sup> The Property Clause of the U.S. Constitution provides Congress with broad authority over lands owned by the federal government.<sup>110</sup> Congress has statutorily given individual federal agencies specific authority to manage federal land.<sup>111</sup> These statutes generally grant authority “short of the ‘furthest reaches of the power granted by the Property Clause,’ leaving certain aspects of management to states.”<sup>112</sup> However, if Congress chooses to leave management power over federal lands to the states, it does so by statute and generally permits management only in areas of traditional state concern.<sup>113</sup> For example, Congress enacted the Endangered Species Act, which concerns wildlife, but most management of wildlife on federal lands is left to the states because wildlife is traditionally an area of state concern.<sup>114</sup> Essentially, the Property Clause reinforces that the owner of the property, the federal government, has certain property rights incident to owning the land.

Section I.D.3 discusses state government actions to manage and control the Border lands.<sup>115</sup> However, the federal government owns and has management authority over a substantial amount of the Border lands.<sup>116</sup> The states thus have management authority only to the extent granted by Congress.<sup>117</sup> Congress has not granted management of federal Border lands

106. *US-Mexico Interactive Border Map*, USA TODAY: THE WALL, <https://www.usatoday.com/border-wall/us-mexico-interactive-border-map> [https://perma.cc/D3TM-8SVK].

107. *See id.* (discussing difficulties with fencing the Texas border and explaining that fencing was easier in Arizona, New Mexico, and California because the federal government’s strip of land was sixty feet wide).

108. *See* VINCENT & HANSON, *supra* note 16, at 22–23.

109. *See* U.S. CONST. art. IV, § 3, cl. 2; VINCENT, *supra* note 8, at 3.

110. VINCENT, *supra* note 8, at 3. The U.S. Supreme Court has described Congress’s broad power over federal lands as “without limitations.” *Id.*

111. *Id.*

112. *Id.* (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976)).

113. *Id.* at 5.

114. *Id.* at 3; Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884.

115. *See infra* Section I.D.3.

116. *See supra* notes 98–109 and accompanying text.

117. VINCENT, *supra* note 8, at 5.

to the states within which the Border lands are located.<sup>118</sup> Thus, the federal government, as the owner, still has its property rights in this land, including the right to use, develop, manage, and exclude.<sup>119</sup>

## 2. Disagreement over Border Control and Enforcement

Beginning in the mid-1900s, the United States Border Patrol implemented a national Border enforcement strategy.<sup>120</sup> The strategy initially focused on deterring illegal entry through traditional crossing areas.<sup>121</sup> However, this channeled illegal traffic into more remote locations, and as a result, federal lands along the Border saw an increase in illegal immigration, smuggling, and other illicit activities.<sup>122</sup> Border security on public lands has been the subject of congressional hearings and legislation,<sup>123</sup> and Border security in general has since become a political hot button.<sup>124</sup>

In 2000, there was a noticeable partisan distinction in support for increased or decreased immigration.<sup>125</sup> After 2001 and throughout the decade, the gap in party support increased, and between 2012 and 2016, the partisan gap continued widening.<sup>126</sup> In his 2016 presidential campaign, Donald Trump made his strong position on immigration very clear, promising to build a wall along the Border and deport millions of undocumented immigrants.<sup>127</sup> Trump's campaign was certainly a source of the heightened interest and

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118. *See id.* (discussing what powers to manage federal lands Congress has either granted to federal agencies or left to the states).

119. 63C AM. JUR. 2D *Property* § 31, Westlaw (database updated Jan. 2025).

120. *See Border Patrol History*, U.S. CUSTOMS & BORDER PROT. (May 10, 2024), <https://www.cbp.gov/border-security/along-us-borders/history> [<https://perma.cc/F3Z7-YPLD>].

121. *See id.*

122. *See id.*

123. VINCENT & HANSON, *supra* note 16, at 23.

124. *See, e.g.*, James G. Gimpel, *Immigration Policy Opinion and the 2016 Presidential Vote*, CTR. FOR IMMIGR. STUD. (Dec. 4, 2027), <https://cis.org/Report/Immigration-Policy-Opinion-and-2016-Presidential-Vote> [<https://perma.cc/7AZE-HAPH>].

125. *Id.*

126. *Id.*

127. Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html>; John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), <https://www.pewresearch.org/short-reads/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump> [<https://perma.cc/K96N-86LN>].

polarization surrounding immigration and the Border.<sup>128</sup> In the years since, actions and policies related to immigration and the Border have been and continue to be largely contested.<sup>129</sup>

During the 2024 presidential election, immigration and Border problems remained a central, dividing issue.<sup>130</sup> Both the Trump and Biden (and later, Harris) campaigns tried to use the Border problems to their own political advantage.<sup>131</sup> On October 4, 2023, the Biden Administration announced that it was waiving environmental laws in order to allow the Border wall construction to continue.<sup>132</sup> While at first glance it may have appeared that the Biden Administration endorsed efforts to build the Border wall, President Biden stated that because Congress already appropriated money for it, he was required by law to continue certain construction.<sup>133</sup> Biden said he attempted to persuade Congress to reappropriate the money, but because Congress would not do so, he had no other choice.<sup>134</sup> Thus, even though the Biden Administration cleared the way for the Border wall's construction to continue, the political dissonance surrounding the issue did not cease.<sup>135</sup>

128. Alec Tyson & Shiva Maniam, *Behind Trump's Victory: Divisions by Race, Gender, Education*, PEW RSCH. CTR. (Nov. 9, 2016), <https://www.pewresearch.org/short-reads/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education> [<https://perma.cc/E3JD-Y8K6>]; Gimpel, *supra* note 124.

129. Long, *supra* note 95.

130. Colleen Long et al., *On the Rio Grande, 300 Miles Apart, Biden and Trump Try to Use Immigration to Election Advantage*, ASSOCIATED PRESS (Feb. 29, 2024, 5:25 PM), <https://apnews.com/article/border-immigration-biden-trump-42c945d02742b169bde40601a27fde02> [<https://perma.cc/39MC-AM9V>].

131. *Id.* Vice President Harris replaced President Biden as the Democratic candidate in the 2024 presidential election. Robert Yoon, *Harris Wins Democratic Presidential Nomination in Virtual Roll Call. Here's How the Process Worked*, ASSOCIATED PRESS (Aug. 6, 2024, 6:00 PM), <https://apnews.com/article/kamala-harris-nomination-virtual-roll-call-explainer-c42bbf87ac85f359b84607ea55d1ca4a> [<https://perma.cc/ZG55-GTN2>].

132. Press Release, Ctr. for Biological Diversity, *Biden Administration Waives Laws to Rush Border Wall Construction Through Texas Wildlands* (Oct. 4, 2023), <https://biologicaldiversity.org/w/news/press-releases/biden-administration-waives-laws-to-rush-border-wall-construction-through-texas-wildlife-refuge-2023-10-04> [<https://perma.cc/HE92-QC9J>].

133. Sergio Mendoza Reyes et al., *Biden Administration Presses Forward with Border Wall Plans in Texas, Angering Allies*, TEX. TRIB. (Oct. 5, 2023, 5:00 PM), <https://www.texastribune.org/2023/10/05/biden-border-wall-texas-starr-county> [<https://perma.cc/XS6G-86EX>].

134. *Id.*

135. *See, e.g., id.* (stating that, when asked whether the Border wall works, Biden answered, “[n]o,” and that Homeland Security Secretary Alejandro N. Mayorkas said the Biden Administration “has not changed its policy on border barriers” and “believes that effective border security requires a smarter and more comprehensive approach”); Press Release, Ctr. for

### 3. Border Conflict Between the Federal Government and States

As this issue has become increasingly partisan, there are guaranteed to be state governments that disagree with the federal government.<sup>136</sup> State government actors have already taken actions inconsistent with the federal government's attitude and directions;<sup>137</sup> and after the 2024 presidential election, many anticipate that this dispute will continue to garner attention.<sup>138</sup> This Comment's Introduction provided a notable example—when then-Governor Ducey used federal lands along Arizona's Border to further the state's goals of deterring illegal immigration.<sup>139</sup> Federal agencies informed Arizona that the placement of the shipping containers on United States land was unlawful and ordered it to stop.<sup>140</sup> However, Ducey said Arizona would “not back[] down”<sup>141</sup> and he filed suit against the federal government, seeking to prevent it from interfering with his plans to use the containers as a “makeshift border wall.”<sup>142</sup> In response, the United States Department of Justice sued Ducey and other Arizona officials, alleging that the containers interfered with federal control of that land.<sup>143</sup> In December 2022, Ducey

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Biological Diversity, *supra* note 132 (“It’s disheartening to see President Biden stoop to this level . . .”).

136. See Kyle Kondik & J. Miles Coleman, *Notes on the State of Politics: March 1, 2023*, CTR. FOR POL. (Mar. 21, 2023), <https://centerforpolitics.org/crystalball/articles/notes-on-the-state-of-politics-march-1-2023> [<https://perma.cc/QY49-THEY>]. Map 1 shows the states in blue and red, depending on which president received the state’s electoral vote. *Id.* When the president is elected, there will inevitably be states that disagree with the president’s policies implemented in the federal government. *See id.*

137. *See* Phillips, *supra* note 1 (discussing actions related to the Border by Arizona’s former governor).

138. Jonathan J. Cooper, *Biden Is Left with Few Choices as Immigration Takes Center Stage in American Politics*, ASSOCIATED PRESS (Feb. 2, 2024, 3:27 PM), <https://apnews.com/article/biden-trump-border-immigration-election-c37b1596ecf27d208e94bef592e7e616> [<https://perma.cc/46HN-SE8N>] (discussing immigration’s role in the “forefront” of the 2024 election).

139. Phillips, *supra* note 1; Anita Snow & Ross D. Franklin, *Arizona Gov. Ducey Stacks Containers on Border at Term’s End*, ASSOCIATED PRESS (Dec. 11, 2022, 10:29 AM), <https://apnews.com/article/politics-arizona-doug-ducey-united-states-government-katie-hobbs-4e5730c50ba665b51a6d6afaf99c46ee> [<https://perma.cc/UB68-GNJU>].

140. Snow & Franklin, *supra* note 139.

141. *Id.*

142. *The Fight over Arizona’s Shipping Container Border Wall Ends with Dismissal of Federal Lawsuits*, ASSOCIATED PRESS (Sept. 22, 2023, 1:12 PM), <https://apnews.com/article/arizona-mexico-border-shipping-containers-9c39f308e027ac1951c1eaa7cc052142> [<https://perma.cc/VA9R-V22C>].

143. *Id.*

agreed to remove the container wall.<sup>144</sup> After Arizona paid the United States Forest Service just over two million dollars, the Department of Justice determined the lawsuits were no longer necessary since the problem was resolved, and the District Court dismissed the cases in September 2023.<sup>145</sup>

Another important example is Texas Governor Abbott's ongoing fight with the federal government over control and use of lands along Texas's Border.<sup>146</sup> On June 7, 2023, Governor Abbott revealed his plans to install a floating barrier on the Rio Grande to stop illegal immigration,<sup>147</sup> and on July 7, 2023, the buoys that would make up the floating barrier arrived in Texas, and the installation began.<sup>148</sup> Later in July, Abbott refused to comply with the United States Department of Justice's demand to remove the barrier, so the Department of Justice sued Texas and Governor Abbott.<sup>149</sup> While waterways implicate their own set of laws, which are beyond the scope of this Comment, Abbott's actions demonstrate the strong disagreement and misalignment between state governments and the federal government.<sup>150</sup> One of the issues that the Department of Justice brought up in its suit was that the barrier was installed without appropriate federal authorization.<sup>151</sup> The United States District Court for the Western District of Texas ordered Texas to remove the

144. *Id.*; *Feds End Legal Fights Against Arizona's Shipping Container Border Wall*, ARIZ. FAM. (Sept. 21, 2023, 2:54 PM), <https://www.azfamily.com/2023/09/21/cases-involving-arizona-shipping-container-border-wall-dismissed-doj-announces> [<https://perma.cc/9W7M-4CDW>].

145. ASSOCIATED PRESS, *supra* note 142; ARIZ. FAM., *supra* note 144.

146. Victor Nava, *Texas Begins Installing Buoy Barrier Along Rio Grande to Deter Migrant Border Crossings*, N.Y. POST (July 7, 2023, 9:42 PM), <https://nypost.com/2023/07/07/texas-begins-installing-buoy-barrier-along-rio-grande-to-deter-migrant-border-crossings> [<https://perma.cc/WA5Z-6RTG>] (discussing Texas governor's installation of a floating barrier in the Rio Grande).

147. Briana Zamora-Nipper, *Timeline: The Floating Barrier on the Texas-Mexico Border*, CLICK 2 HOUS. (Sept. 8, 2023, 4:16 PM), <https://www.click2houston.com/news/texas/2023/09/08/timeline-the-floating-barrier-on-the-texas-mexico-border> [<https://perma.cc/SLS6-N9CN>].

148. Texas DPS (@TxDPS), X (July 7, 2023, 12:41 PM), <https://x.com/TxDPS/status/1677402476880842753> [<https://perma.cc/H2FB-F9R9>].

149. Zamora-Nipper, *supra* note 147.

150. *See id.*

151. Sneha Dey, *U.S. Justice Department Argues for Removal of Texas' Floating Border Barrier in Federal Court*, TEX. TRIB. (Aug. 22, 2023, 6:00 PM), <https://www.texastribune.org/2023/08/22/texas-border-barrier-justice-department-court-hearing> [<https://perma.cc/D9WR-HWLM>].

floating barrier,<sup>152</sup> and the Fifth Circuit Court of Appeals affirmed.<sup>153</sup> Following the ruling, Abbott continued to publicly declare that the ruling was wrong, that he would seek immediate rehearing, and that he would go to the United States Supreme Court if needed.<sup>154</sup>

## II. APPLYING DEMSETZIAN THEORY TO THE BORDER CONFLICT

Using Demsetz's *Theory* as a lens to analyze the federal–state conflict at the Border—illustrated by Ducey's and Abbott's actions in Arizona and Texas, respectively—this Comment argues that clearer property rights should develop at the Border because the gains from internalizing the externalities are now higher than the costs of internalizing the externalities. This Comment expands the application of Demsetzian theory from situations in which property rights develop for the first time to the development of clearer property rights where property rights already exist. This Comment proposes using federal legislation to develop clearer property rights by clarifying property ownership boundaries and the associated rights and imposing penalties for violating such property rights. In defining the boundaries and rights that come with ownership, the proposed legislation will clarify and strengthen the owner's rights to use, manage, and develop the land. In imposing penalties for violations of those rights, the proposed legislation will explicitly grant the right to exclude and enforce the rights.

### A. Current Federal–State Land Ownership Disputes Through the Lens of Demsetz's Theory

To analyze this issue through the lens of Demsetz's *Theory*, it is necessary to sort the externalities, costs, and implications of the dispute into the appropriate categories. Once the externalities, costs, and other implications of the property ownership disputes at the Border are appropriately categorized, the inadequacy of the present scheme becomes apparent.

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152. Robert Arnold, *Judge Orders Texas Must Move River Buoys by Sept. 15*, CLICK 2 HOUS. (Sept. 6, 2023, 5:01 PM), <https://www.click2houston.com/news/investigates/2023/09/06/judge-orders-texas-must-move-river-buoys-by-sept-15> [<https://perma.cc/N97X-8W2S>].

153. Kevin Vu, *Texas Must Remove Floating Barrier from Rio Grande, Fifth Circuit Court Orders*, TEX. TRIB. (Dec. 1, 2023, 4:00 PM), <https://www.texastribune.org/2023/12/01/texas-border-floating-barrier-fifth-circuit-court-ruling-remove> [<https://perma.cc/GD82-QBW8>].

154. *Id.*



### 1. What Can Be Gained from Internalizing Externalities?

There is much to gain from internalizing the externalities created by these property disputes at the Border because the disputes create numerous negative externalities. It is essential to understand the negative externalities because only then can one see how much can be gained from internalizing, or fixing, them. Actions and policies related to the handling of the Border have been hotly contested for many years.<sup>155</sup> Additionally, in the past few years, it has become clear that some state governments, including Arizona and Texas, and the federal government do not have aligned beliefs and agendas regarding this increasingly partisan issue.<sup>156</sup> In the wake of these actions, the number of negative externalities developing out of this dispute is arguably at an all-time high.

First, judicial enforcement and resolution resources are being used inefficiently.<sup>157</sup> As demonstrated by Ducey and Abbott, because the states and federal government do not agree on what should be done at the Border, their fights tend to culminate in lawsuits. Ducey sued the federal government in October 2022, and the federal government responded by filing its own suit.<sup>158</sup> The two cases were dismissed in September 2023.<sup>159</sup> Therefore, this fight resulted in court involvement for about a year.

Additionally, in July 2023, the federal government sued Abbott for refusing to comply with its order to remove the buoy barrier.<sup>160</sup> In January 2024, after hearing the case a second time, the Fifth Circuit Court of Appeals ruled in favor of Abbott.<sup>161</sup> This case has already resulted in over six months of court involvement, and it remains unknown whether the federal government will appeal again. Further, while beyond this Comment's scope, Abbott and the federal government are involved in additional lawsuits concerning Border and immigration measures, which are somewhat related to the issues discussed here.<sup>162</sup>

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155. See generally Long, *supra* note 95 (discussing Biden's recent policy implementations regarding border crossings and the tensions over immigration).

156. See *supra* Section I.D.3.

157. See, e.g., *supra* notes 141, 153 and accompanying text.

158. See *supra* notes 141–43 and accompanying text.

159. See *supra* note 142.

160. See *U.S. v. Abbott*, 110 F.4th 700, 706–07 (5th Cir. 2024).

161. Angela Shen, *Texas Border Floating Barrier Can Stay for Now, Court Rules*, FOX 7 AUSTIN (Jan. 17, 2024, 10:20 PM), <https://www.fox7austin.com/news/texas-border-floating-barrier-can-stay-for-now-court-rules> [https://perma.cc/V3JR-735Y].

162. See, e.g., Press Release, Ken Paxton, Att'y Gen. of Tex., Attorney General Ken Paxton Files Response with SCOTUS Opposing Biden Administration's Effort to Resume Destruction

Based on these situations, it seems like judicial enforcement, or the threat of potential judicial enforcement, is inadequate to handle these disputes. Litigation is costly.<sup>163</sup> It requires paying attorneys' fees and court costs, and it takes up the time and focus of the parties involved.<sup>164</sup> Further, the losing party will inevitably have to pay in some way—in actual fees or to comply with the court's orders.<sup>165</sup> Arguably, the threat of winding up in litigation may be seen as something that affects a party's decision *ex ante*. If a party does not want to be involved in litigation, pay the associated costs, and potentially pay the cost of losing, it should not take actions that have a high chance of ending in litigation. However, here, it seems these parties disregard this consideration.<sup>166</sup> Both Ducey and Abbott have threatened litigation, and when litigation is started against them, they declare they will not back down until all measures are exhausted.<sup>167</sup>

Second, the federal government may lose credibility if the public sees that the states, or any other party, can do whatever they want without consequences. Because the federal government owns this property at the Border, the federal government either controls it, or has delegated control to a federal agency.<sup>168</sup> Since the federal government has control over the land, it should be in control of what is happening there. Thus, when a party acts contrary to federal government orders on its own land, the federal government should be able to adequately and efficiently take control of the situation. However, rather than being able to maintain or quickly reestablish clear control, the federal government has gone back and forth with opposing parties, arguing about control. In one situation, the federal government

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of Texas Border Barriers (Jan. 11, 2024), <https://texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-files-response-scotus-opposing-biden-administrations-effort-resume> [<https://perma.cc/W3A8-6MEE>]; J. David Goodman & Edgar Sandoval, *Texas' Sweeping Immigration Law: What to Know and Where It Stands*, N.Y. TIMES (Mar. 21, 2024), <https://www.nytimes.com/article/texas-border-law-challenge-explainer.html>.

163. See generally Lyle Moran, *Companies' Legal Spend Has Risen Nearly 30%, Survey Finds*, LEGAL DIVE (June 16, 2023), <https://www.legaldive.com/news/legal-spend-benchmarking-outside-counsel-association-of-corporate-counsel-major-lindsey-and-africa/653260> [<https://perma.cc/TX8S-S22B>].

164. *How Much Does Litigation Cost?*, DEBLASIO L. GRP., <https://dglc.net/how-much-does-litigation-cost> [<https://perma.cc/H4C7-YNTE>].

165. See *Post-Judgment Guide: The Potential Costs of Losing Your Case in Federal Court*, PUB. COUNS. (Oct. 2023), <https://publiccounsel.org/wp-content/uploads/2024/01/Guide-The-Potential-Costs-of-Losing-Your-Case-in-Federal-Court-2023.pdf> [<https://perma.cc/96JM-KZCR>].

166. See *supra* Section I.D.3.

167. *Id.*

168. See *supra* notes 108, 110 and accompanying text.

regained control by getting Arizona to remove the shipping containers from its land.<sup>169</sup> But, in Texas, the fight is still ongoing.<sup>170</sup>

To have credibility, one must be trusted and believable.<sup>171</sup> Therefore, when trust is broken, one's credibility will suffer.<sup>172</sup> There are three drivers of trust—logic, authenticity, and empathy.<sup>173</sup> When one of these drivers goes “wobbly,” the likelihood that trust will be broken increases.<sup>174</sup> Logic encompasses a party's ability to deliver.<sup>175</sup> Here, the federal government has control over these contested lands, but it is not delivering on its responsibility to control them.<sup>176</sup> Therefore, the logic piece is the “trust wobble” here—it is the piece most likely to contribute to failing trust in the federal government.<sup>177</sup> Currently, public trust in the federal government is nearing historic lows.<sup>178</sup> So, it is important now for the federal government to do whatever it can to increase this level of trust. Here, because logic is the “trust wobble,” following through and delivering on its responsibilities will likely aid in reestablishing trust.<sup>179</sup>

Third, there are negative externalities associated with increased partisan attitudes surrounding the issue.<sup>180</sup> According to a Gallup poll, sixty-five percent of Republicans think the situation at the United States Border with Mexico is a “crisis,” while only seventeen percent of Democrats would agree.<sup>181</sup> Further, there is a fairly large disparity in Republicans' and Democrats' level of sympathy for migrants and immigrants.<sup>182</sup> When issues are partisan, there are many detrimental effects. For example, if Congress is

169. See sources cited *supra* note 144.

170. Vu, *supra* note 153.

171. Lindsey Zajac, *Building Trust and Credibility*, AHERN, MURPHY & ASSOCS. (June 2, 2021), <https://ahernmurphy.com/building-trust-and-credibility> [<https://perma.cc/39K5-TF38>].

172. See *id.*

173. Frances X. Frei & Anne Morriss, *Begin with Trust*, HARV. BUS. REV., <https://hbr.org/2020/05/begin-with-trust> [<https://perma.cc/5ND2-UYFJ>].

174. *Id.*

175. *Id.*

176. See *supra* Section I.D.3; see also *supra* notes 108, 110 and accompanying text.

177. See Frei & Morriss, *supra* note 173.

178. Joe Davidson, *Government Trust Falls, Democracy Erodes, Yet Feds Still Appreciated, Reports Find*, WASH. POST (Nov. 3, 2023, 11:53 AM), <https://www.washingtonpost.com/politics/2023/11/03/public-trust-government-democracy-federal-workers>.

179. See Frei & Morriss, *supra* note 173.

180. See Megan Brenan, *Plurality in U.S. Says Southern Border Situation Is 'Crisis,'* GALLUP (July 14, 2023), <https://news.gallup.com/poll/508565/plurality-say-southern-border-situation-crisis.aspx> [<https://perma.cc/RN9G-KYRV>].

181. *Id.*

182. *Id.*

divided, it may not be able to pass any laws.<sup>183</sup> This can be evidenced by Congressional disagreements causing looming government shutdowns and Congress racing to pass bills.<sup>184</sup>

Additionally, there are personal consequences.<sup>185</sup> Nineteen percent of voters said that partisan or political issues have hurt their friendships or family relationships.<sup>186</sup> While the harm coming from these “soft” externalities may be more difficult to quantify, it is still important to consider because it does have a concrete effect on society and the market at large.<sup>187</sup> Political instability may make policies more volatile, resulting in negative impacts on macroeconomic performance.<sup>188</sup>

## 2. What Are the Costs to Internalize Externalities?

While there are costs associated with internalizing externalities created by the property disputes at the Border, they do not outweigh the gains from doing so. Here, the proposed solution for internalizing the negative externalities is introducing federal legislation that clarifies property rights. Therefore, the costs of internalizing externalities include costs associated with implementing and enforcing federal legislation, costs of potential disagreements over legislation, and potential costs to federalism. The cost to internalize the externalities discussed above is arguably low.

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183. See, e.g., Long, *supra* note 95 (“[A]ny enduring solution will require action by the sharply divided Congress, where multiple efforts to enact sweeping changes have failed in recent years.”).

184. See, e.g., *House Fails to Pass Short-Term Funding Bill as Shutdown Looms*, WASH. POST (Sept. 29, 2023, 7:55 PM), <https://www.washingtonpost.com/politics/2023/09/29/government-shutdown-updates/>; Richard Cowan & David Morgan, *US Senate Passes Spending Bill, Averts Imminent Shutdown*, REUTERS (Mar. 8, 2024, 11:32 PM), <https://www.reuters.com/world/us/us-senate-poised-pass-spending-package-averting-governme-nt-shutdown-2024-03-08/> [<https://perma.cc/B7EP-MVFR>].

185. Charles Homans & Alyce McFadden, *Today’s Politics Divide Parties, and Friends and Families, Too*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/us/politics/political-division-friends-family.html>.

186. *Id.* (relying on data from a poll conducted in October 2022 by *The New York Times* and Sienna College).

187. See Ari Aisen & Francisco Jose Veiga, *How Does Political Instability Effect Economic Growth?* 9–17 (IMF Working Paper, WP/11/12, 2011), <https://www.imf.org/external/pubs/ft/wp/2011/wp1112.pdf> [<https://perma.cc/FX7Y-7LX7>] (discussing the effects of political stability on a nation’s economic prosperity).

188. *Id.* at 3.

First, the costs of rulemaking cannot be ignored. There are many steps to pass a law.<sup>189</sup> The process is time-consuming, and there can be many associated expenses such as research and lobbying costs.<sup>190</sup>

Second, it is important to consider enforcement costs. In addition to placing clearer markers at the boundary lines, an enforcement agency or group must be established.<sup>191</sup> In placing markers to delineate ownership boundaries more clearly, there will be costs associated with the marker materials themselves, labor costs for placing the markers, and labor costs for surveying the land to ensure the markers are placed in the right places.

Additionally, there will be costs for the actual enforcement of the boundaries. Someone needs to be responsible for discerning violations of property rights, and thus violations of the legislation.<sup>192</sup> There may need to be enforcers who go to the Border and check for violations; there may be a tool for individuals or entities to report violations; there may also be a potential camera system or another type of technology-backed solution. Regardless of what the enforcement mechanism is, there will be actual costs associated with it. Further, after catching the violations, enforcers will need to find the violating party, communicate with them about the violation, and impose the punishment. While surely not exhaustive of all the actual, “hard” costs that will come with enacting the proposed legislation, the above costs must be weighed with the gains from internalizing the externalities.

Third, there will likely be social costs stemming from disagreement amongst people regarding whether the federal government should interfere and have more power through enacting legislation.<sup>193</sup> The United States’ political parties have differing views on federal government intervention.<sup>194</sup> Conservatives typically believe in smaller, state or local governments and less government intervention, while Democrats tend to support more

189. *How Laws Are Made*, USA GOV (Aug. 28, 2024), <https://www.usa.gov/how-laws-are-made> [<https://perma.cc/W4ZT-EYWR>].

190. *See How States Define Lobbying and Lobbyist*, NAT’L CONF. STATE LEGISLATURES (Sept. 3, 2021), <https://www.ncsl.org/ethics/how-states-define-lobbying-and-lobbyist> [<https://perma.cc/R43X-XC4N>] (discussing different state definitions of the terms “lobbying” and “lobbyist”).

191. *See generally Agency Enforcement Actions Authorized by Law*, JUSTIA, <https://www.justia.com/administrative-law/enforcement-actions> [<https://perma.cc/F66Z-TZBF>] (discussing the role of federal agencies in enforcing federal law).

192. *See generally id.*

193. *See generally Ideologies of Political Parties: Lesson Overview*, KHAN ACAD., <https://www.khanacademy.org/humanities/us-government-and-civics/us-gov-american-political-ideologies-and-beliefs/us-gov-ideologies-of-political-parties/a/lesson-summary-ideologies-of-political-parties> [<https://perma.cc/MR3H-D4RR>].

194. *Id.*

government intervention.<sup>195</sup> Because of these differences in beliefs, trying to enact the proposed federal legislation may contribute to the partisan tensions already existing around this dispute, and thus create the same kinds of negative externalities as discussed above.<sup>196</sup> However, this may be characterized as a shorter-term cost, assuming that the main point of contention here is whether the federal government should enact the legislation. Once the legislation is enacted, the disputes about whether it should be enacted become moot.

Fourth, there may be costs to federalism in giving the federal government more power over property rights, which is typically left to the states.<sup>197</sup> Federalism is typically thought of as the “division and sharing of power between the national and state governments.”<sup>198</sup> At the founding, the Framers of the Constitution implemented federalism to eliminate possible federal tyranny—it served as a check on the federal government.<sup>199</sup> Therefore, if the federal government impedes on an area of state concern, the federalism balance may be upset.

While these are important costs to consider, the economic costs of major federal rules are “significantly and consistently” less than the benefits of regulations.<sup>200</sup> For example, the Congressional Budget Office Cost Estimate of the Private Property Rights Protection Act of 2017 detailed some increased costs, such as the costs of reporting by and to the Department of Justice, but concluded that enacting the legislation “would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.”<sup>201</sup> The Private Property Rights Protection Act would protect property rights by forbidding state and local governments as well as

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195. *Id.*

196. *See id.*; *see also supra* Section I.D.3.

197. 73 C.J.S. *Property* § 2, Westlaw (database updated Dec. 2024); *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (“In the absence of any controlling federal law, ‘property’ and ‘interests in property’ are creatures of state law.”).

198. *Federalism and the Constitution*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/intro.7-3/ALDE\\_00000032](https://constitution.congress.gov/browse/essay/intro.7-3/ALDE_00000032) [<https://perma.cc/33NH-54BM>].

199. John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 111 (2004).

200. Isaac Shapiro, *A Quick Guide to EPI’s Research on the Costs and Benefits of Regulations*, ECON. POL’Y INST. (Nov. 22, 2011), <https://www.epi.org/publication/quick-guide-epi-research-regulation> [<https://perma.cc/EAU2-JPU2>]; OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 9 (Dec. 23, 2016) (reporting the economic costs and benefits of major federal rules in the ten-year period when both benefits and costs have been estimated).

201. CONG. BUDGET OFF., COST ESTIMATE H.R. 1689 PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2017, at 2 (2018).

federal agencies from using their eminent domain powers against property owners for economic development purposes.<sup>202</sup> The Act would also require the Department of Justice to educate the states and the public about the legislation's effect on property rights and to inform Congress of the private rights of action brought against state and local governments each year.<sup>203</sup> This Comment's proposed legislation would likely have similar costs because, like the Private Property Rights Protection Act, it will create stronger property rights, educate property owners about their rights, and enforce those rights.<sup>204</sup>

### 3. What Are the Effects of Less "Compact" Parties?

Demsetz added the "compactness" factor in *Toward a Theory of Property Rights II* and theorized that when parties become less compact, private property rights will emerge.<sup>205</sup> As parties are less compact, they are less likely to collectively agree on what is best for the property, so private property rights become necessary.<sup>206</sup> Because the parties involved here are much less compact, it follows that clearer property rights should develop.

Compactness refers to how many parties are in a problem and how closely related those parties and their interests are to one another.<sup>207</sup> For example, people living in a small, isolated village are compact because there are only a few of them, and their lives are likely intertwined, so they depend on and support one another.<sup>208</sup> However, in a big city, there are many people living their own separate lives, and they are much less likely to have dependent and supportive relationships.<sup>209</sup> When there are more people, their interests, beliefs, and lives diverge or become less compact.

Here, there are arguably at least fifty-one parties involved, each with its own beliefs and interests—the federal government and each of the fifty states' governments. It could be argued that there are fewer than fifty-one parties if the parties are divided based on more general opposing interests, such as strong versus lenient Border enforcement. For example, assessing general opposing interests alone, Arizona and Texas may be seen as a singular party because both states acted at the Border and opposed the federal

202. H.R. 1689, 115th Cong. § 2(a) (2017); see also CONG. BUDGET OFF., *supra* note 201, at 1–2.

203. H.R. 1689 § 6; CONG. BUDGET OFF., *supra* note 201, at 12.

204. See *id.*; see also *infra* Part III.

205. See *supra* note 85 and accompanying text.

206. See *supra* notes 88–90 and accompanying text.

207. Demsetz, *supra* note 83, at S659–60.

208. See *supra* notes 86–87 and accompanying text.

209. See *supra* note 88 and accompanying text.

government's stance.<sup>210</sup> In other words, they may be seen as a singular party in favor of strong Border enforcement. However, a closer look reveals they can be seen as two distinct parties—Arizona eventually settled with the federal government and removed the shipping containers from federal land,<sup>211</sup> while Texas continues to fight with the federal government.<sup>212</sup> Although Arizona and Texas agree on strong Border enforcement generally, they disagree on how exactly to further this interest. This analysis can continue for the rest of the states, resulting in fifty separate parties. Adding the federal government to the list, there are fifty-one distinct parties.

Additionally, the parties' interests are becoming increasingly far apart. In the past, even if interests were not aligned and states disagreed with the federal government's approach, there was not such blatant disagreement and disputes between the states and federal government.<sup>213</sup> However, now, at least two states expressly took actions demonstrating their opposing beliefs.<sup>214</sup>

Because there are many parties involved with many distinct interests, this more closely resembles the big city discussed above than the small village. The states and federal government have their own interests and priorities, and as Border policy becomes more partisan, their interests will likely continue to diverge. Therefore, the parties are less compact, so clearer property rights should develop.

### *B. Demsetz Theorizes that Clearer Property Rights Should Develop at the Border*

By fitting the above discussion into the framework of Demsetz's *Theory*, it appears that clearer property rights should develop because the gains from internalization exceed the costs of internalization, and the compactness factor lends increased support for such a development.<sup>215</sup> There are many negative

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210. See Snow & Franklin, *supra* note 139; Nava, *supra* note 146.

211. See *supra* note 144.

212. Vu, *supra* note 153.

213. See *A Brief Legislative History of the Last 50 Years on the U.S.-Mexico Border*, UNIV. ARIZ.: MEX. INITIATIVES (Apr. 28, 2020), <https://mexico.arizona.edu/revista/brief-legislative-history-last-50-years-us-mexico-border> [<https://perma.cc/LZ2P-VHAZ>] (mentioning the first explicit disagreement between the states and Federal Government while discussing the Trump Administration: California Attorney General Xavier Becerra filing a lawsuit alleging the Trump Administration overstepped its powers).

214. See generally Phillips, *supra* note 1 (discussing the disagreement between state and federal governments regarding Arizona border control); Nava, *supra* note 146 (discussing Texas's implementation of its own border control efforts).

215. See *supra* Sections II.A.1–3; Demsetz, *supra* note 53; Demsetz, *supra* note 83, at S659–62.



externalities associated with this issue, and thus, much to gain from internalizing the externalities.<sup>216</sup> While there are costs associated with internalizing these externalities, comparatively, the potential gains exceed the costs.<sup>217</sup> Further, adding the compactness factor increases support for the development of clearer property rights.<sup>218</sup>

Here, the potential gains from internalizing the externalities include increased efficiency in the use of judicial resources, strengthened trust in the federal government, and decreased partisan polarization.<sup>219</sup> These issues are visible throughout society generally, so taking steps to resolve them, even in this specific area, is critical.

While there are costs from internalizing the externalities, they seem much less significant than the gains. Most of the costs appear to be more short-term or immediate, as the actual economic and social costs of enacting legislation will be non-issues once the legislation is in place.<sup>220</sup> While the enforcement cost and potential costs to federalism principles will be ongoing, the benefits from internalizing the externalities still outweigh those drawbacks.<sup>221</sup>

Further, even assuming the gains and costs are equal or that the costs only slightly outweigh the gains, Demsetz's additional "compactness" factor further strengthens the argument in favor of clearer property rights in this scenario.<sup>222</sup> Federal and state governments do not agree on their approaches as their interests are not aligned. And because at least two states feel so strongly that they will oppose orders and continually fight in lawsuits to further their own interests as opposed to following the federal government's interests, the misalignment appears to be extreme.<sup>223</sup> Because federal and state governments—the parties involved in this resource-allocation problem—are increasingly less compact, Demsetz would theorize that this factor also suggests emergence of clearer property rights.<sup>224</sup>

Because the gains from internalization exceed the costs of internalization and the federal and state governments are increasingly less compact, clearer property rights should develop at the Border.<sup>225</sup>

216. *See supra* Section II.A.1.

217. *See supra* Section II.A.2.

218. *See supra* Section II.A.3.

219. *See supra* Section II.A.1.

220. *See supra* Section II.A.2.

221. *See supra* Sections II.A.1–2.

222. *See* Demsetz, *supra* note 83, at S659.

223. *See supra* Section I.D.3.

224. *See* Demsetz, *supra* note 83, at S661–62.

225. *See generally* Demsetz, *supra* note 53; Demsetz, *supra* note 83; *supra* Sections II.A.1–3 (explaining Demsetz's ideas and applying them to the situation at the Border).

### III. PROPOSED FEDERAL–STATE LAND OWNERSHIP BOUNDARY LEGISLATION

Because it appears that clearer property rights should develop, there must be a mechanism to support such development. Property rights are already established in this situation. This can be seen from the fact that Arizona's actions along the Border were not an issue until the state affected property it did not own.<sup>226</sup> Further, federal authorities knew when then-Governor Ducey placed the shipping containers on federal land.<sup>227</sup> Thus, property ownership is already established, but by applying Demsetzian theory, the property rights associated with the ownership should be clearer.<sup>228</sup> To develop clearer property rights in this scenario, this Comment proposes enacting federal legislation. The legislation should describe property ownership boundaries, detail the property rights associated with the ownership, and impose penalties for violating any of the property rights.

#### A. Overview of the Proposed Legislation

First, the legislation must describe property ownership boundaries. To describe real property, legal descriptions are typically used.<sup>229</sup> Legal descriptions very accurately provide the precise location and measurement of real property and help prevent boundary disputes.<sup>230</sup> The United States uses a rectangular survey system.<sup>231</sup> The legislation should reference the appropriate legal description or survey for the real property at issue. Further, as a more practical approach, the boundaries should be marked on the real property itself, and the legislation should detail what the markers look like. The markers need not be anything extravagant or specific. Rather, it is important they are appropriate for the type of property and adequate to make the boundaries known.<sup>232</sup>

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226. See Phillips, *supra* note 1.

227. *Id.*

228. See *supra* note 215 and accompanying text.

229. *What Is a Legal Description?*, BLUEPRINT, <https://blueprinttitle.com/what-is-a-legal-description-in-real-estate> [<https://perma.cc/D9E3-D2HV>].

230. *Id.*

231. *Id.* Common elements of this system include meridian, parallel, range, tier, township, sections, and subsections. *Id.*

232. See Elinor Ostrom, *Design Principles of Robust Property-Rights Institutions: What Have We Learned?*, in PROPERTY RIGHTS AND LAND POLICIES 25, 39 (Gregory K. Ingram & Yu-Hung Hong eds., 2009) (“It is not reasonable to put up fences to clearly demark all boundaries in large pastoral or forest areas, but most such resources in the field do use some kind of stone or plant species to mark the boundaries on the various paths used frequently.”).

Additionally, the associated property rights should be sufficiently detailed to provide extra clarity and avoid any confusion. Because property rights can be given away by the property owner,<sup>233</sup> it is important for the legislation to note who, or what entity, has what rights on the respective properties. For example, the federal government may own land, and Congress may have given the rights to manage or use the land to a federal agency or a state.<sup>234</sup> It will be important for the new legislation to implement a procedure or database for keeping track of these rights.

Second, penalties need to be imposed. Graduated sanctions are appropriate and will likely be effective in this situation.<sup>235</sup> The initial sanction may be a warning or some small penalty, and serve to inform the violator that they are in the wrong and it has been noticed.<sup>236</sup> The initial sanction will also serve as a notice to others that the violations are being taken seriously, and they will not be able to get away with doing the same or similar things.<sup>237</sup> As additional violations occur, or as violations continue in disregard of the initial penalty or warning, the severity of the sanctions will be increased.<sup>238</sup> There are many options for what the specific penalties may be, however because of the complexities that arise when the federal government interacts with states in this way,<sup>239</sup> specific penalty proposals exceed this Comment's scope. Whatever the specific penalties may be, they need to be severe enough to deter or reverse violations—something more than warnings without follow-up or lawsuits.<sup>240</sup> The penalties should apply equally to any party who violates another's property rights. Rather than apply one-sided federal legislation without state input, both parties should be protected and have confidence in any legislation that clarifies and strengthens their respective property rights.

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233. See *supra* note 42 and accompanying text.

234. See, e.g., *supra* note 111 and accompanying text.

235. See Ostrom, *supra* note 232, at 35, 41–42.

236. See *id.* at 35.

237. See *id.*

238. See *id.*

239. See generally KEVIN J. HICKEY ET AL., CONG. RSCH. SERV., R45323, FEDERALISM-BASED LIMITATIONS ON CONGRESSIONAL POWER: AN OVERVIEW (2023) (discussing the limits, many of which may be applicable here, on Congress's power to enact laws that exceed its power or infringe on state sovereignty).

240. See *supra* notes 141–42, 154 and accompanying text.

*B. How the Legislation Will Remedy the Problems Caused by the Property Disputes at the Border*

This proposed legislation will provide a way for clearer property rights to develop in this context. Property rights will be expressly stated, and the right to exclude will both be strengthened and have teeth because there will be meaningful penalties in place for violations of the rights.

With this legislation, the negative externalities will be internalized, and gains will be realized. Instead of focusing on judicial remedies that have failed,<sup>241</sup> the legislation will provide a more meaningful way to approach disputes and hold parties accountable for noncompliance and violations of property rights.

Additionally, the legislation will help ensure the federal government does not lose credibility in a time when its perceived integrity is already faltering.<sup>242</sup> By clarifying property ownership boundaries and rights and providing meaningful, effective penalties for violation of those boundaries and rights, the legislation will provide the federal government a more effective, straight-forward way to handle disputes. If the federal government has the power to maintain and enforce the areas it controls, its logic “trust wobble” can be stabilized, which will in turn increase its credibility.<sup>243</sup> If states wholly ignore the legislation and its sanctions, the federal government may lose more credibility as people point to its inability to enforce its own legislation. However, if lawmakers devote sufficient time and attention to understanding what would serve as meaningful, effective penalties, the likelihood that a party wholly ignores them will be small.<sup>244</sup> Ultimately, to ensure the legislation is successful and helps rebuild the federal government’s credibility, the federal government will be responsible for adequate enforcement.

Lastly, the partisan nature of the dispute can be lessened. While the partisan nature will likely never be completely eliminated, the legislation may be able to reframe the issue as more of a pure property ownership issue. As mentioned above, there are other areas in the country where federal and state land abut.<sup>245</sup> Enacting legislation that applies to all such areas, rather than

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241. *See supra* notes 151–54 and accompanying text.

242. Davidson, *supra* note 178.

243. *See* Frei & Morriss, *supra* note 173; *see also supra* notes 168–79 and accompanying text.

244. *See generally* Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451 (2003) (discussing what types of civil penalties and enforcement procedures increase compliance amongst corporate actors).

245. *See supra* note 16 and accompanying text.

only at the Border, may help shift the emphasis and messaging away from Border policy and toward pure property rights. Focusing on the property itself will likely eliminate the gamesmanship of using property rights to further unrelated policy issues. If this dispute is less partisan-focused, Congress may be less divided and thus more effective. The dispute will then no longer have such a large effect on the political instability in the country generally, leading to less volatility in the macroeconomy.<sup>246</sup>

#### IV. CONCLUSION

As evidenced by former Governor Ducey's actions in Arizona and Governor Abbott's actions in Texas, there are property ownership and control problems at the Border. There are currently no meaningful penalties for these states impeding on areas the federal government controls—orders have been defied and lawsuits continue to be fought and have seemingly no deterrent effect. As a result, there are many negative externalities, including inefficient use of judicial resources, lack of federal government credibility, and an increasing partisan divide. Thus, there is much to gain from internalizing these externalities—more efficient use of judicial resources and an effective penalty for these violations, increased trust in the federal government, and decreased partisan polarization.

There are costs of internalizing these externalities, including those associated with enacting and enforcing the proposed legislation, broader social costs stemming from potential disagreements over whether the federal government should intervene in this way, and costs to the values of federalism. However, the gains from internalizing the externalities exceed the costs—according to Demsetzian theory, when this is true, clearer property rights should be developed. Additionally, Demsetz's added "compactness" factor supports clearer property rights here because the federal government and the states are increasingly misaligned in their views of the situation. Thus, to internalize the externalities and receive the gains from doing so, federal legislation should be enacted that allows for clearer property rights and facilitates the enforcement of those rights.

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246. See *supra* notes 183–84 and accompanying text; Aisen & Veiga, *supra* note 187.