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Sweet Land of Property?: The History, Symbols, Rhetoric, and Theory Behind the Ordering of the Rights to Liberty and Property in the Constitutional Lexicon

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SWEET LAND OF PROPERTY?: THE HISTORY, SYMBOLS, RHETORIC, AND THEORY BEHIND THE ORDERING OF THE RIGHTS TO LIBERTY AND PROPERTY IN THE CONSTITUTIONAL LEXICON

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I. INTRODUCTION

For generations, school children have sung Samuel Smith's *America*, reaffirming that they lived in a "sweet land of liberty."[1] And from early on, symbols embodying personal freedom, including the Liberty Bell and, later, the Statue of Liberty, have been omnipresent in American life. Property, though ostensibly granted equal billing in the Constitution, has long played a less inspiring role. There is no property bell. But the differences are not merely symbolic. By the latter half of the twentieth century, courts were scrutinizing

1. Samuel F. Smith, *America*, *in* POEMS OF AMERICAN PATRIOTISM: 1776–1898, at 1 (R.L. Paget ed., 1898) (1831).

liberty-infringing government action with the strictest care, while deferring to legislatures with respect to virtually all property related claims.[2]

Symbolically beginning with Richard Epstein's 1985 book *Takings: Private Property and the Power of Eminent Domain* (*Takings*),[3] a movement emerged contesting liberty's primacy in social and constitutional ordering.[4] Despite limited success in the courts,[5] or perhaps because of it,[6] this movement has lost none of its vigor. Activists continue to sponsor federal, state, and local legislative reforms and constitutional amendments designed to strengthen property rights.[7] Jurists ranging from William Brennan to William Rehnquist to Janice Rogers Brown authored opinions calling for equivalent scrutiny of liberty

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2. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 140 (3d ed. 2008) ("[The Supreme Court] instituted a double standard of constitutional review under which [it] afforded a higher level of judicial protection to the preferred category of personal rights. Economic rights were implicitly assigned a secondary constitutional status.").

3. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

4. *See, e.g.*, Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 510 (1998) (noting the influence of Epstein's *Takings* in doctrinal development); Michael Allan Wolf, *Looking Backward: Richard Epstein Ponders the "Progressive" Peril*, 105 MICH. L. REV. 1233, 1235 (2007) (stating that Epstein's *Takings* "launched the modern private-property-rights movement").

5. The United States Supreme Court has largely rejected the property rights movement's arguments. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 490 (2005) (holding that the City of New London's proposed condemnations were for a "public use" within the meaning of the Takings Clause). They have met with greater success in some state courts. *See, e.g.*, County of Wayne v. Hathcock, 684 N.W.2d 765, 770 (Mich. 2004) (concluding that a county's condemnations, while authorized under statute, did not "pass constitutional muster" under the Michigan Constitution); City of Norwood v. Horney, 853 N.E.2d 1115, 1129 (Ohio 2006) ("Ohio has always considered the right to property to be a fundamental right.").

6. Many responded with particular outrage to the Court's decision in *Kelo*, 545 U.S. 469, which permitted a taking and transfer of the property to a private owner in order to stimulate economic growth, *id.* at 490. *See, e.g.*, Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 103 (2006) ("[T]he opinion set off a firestorm of popular outrage . . . ."). In a potentially tongue-in-cheek response, a developer sought to develop a hotel on New Hampshire property owned by Justice Souter, who had joined the *Kelo* majority. The developer argued that the Lost Liberty Hotel, as it was to be called, would generate more tax revenue and provide greater economic benefits to the town than Souter's home. Freestar Media, LLC, http://www.freestarmedia.com/hotellostliberty2.html (last visited Oct. 24, 2008).

7. More than 100 bills limiting the government's taking power were introduced in the wake of *Kelo*. Patricia E. Salkin, *Swift Legislative (Over)Reaction to Eminent Domain: Be Careful What You Wish For*, PROB. & PROP., July–Aug. 2006, at 44, 44. *See generally* Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527 (2000) (exploring legislation addressing compensation requirements). A property rights group, the Castle Coalition, claims that forty-two states adopted restraints on the use of eminent domain for economic development after *Kelo*. CASTLE COALITION, 50 STATE REPORT CARD 1 (2007) http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf (last visited Oct. 29, 2008).

and property claims.[8] And a steady stream of books with provocative titles—*The Guardian of Every Other Right*,[9] *Property and Freedom*,[10] and *Cornerstone of Liberty*[11]—beat the movement's drum.[12] Epstein himself relentlessly advocates for greater scrutiny of property claims, both in the courts[13] and in the academy, recently reiterating his commitment to "parity between liberty and property in the constellation of constitutionality, and, by implication, political values."[14]

Taken together, this body of work casts the property rights movement conservatively as either (1) an effort to recapture an historic America in which judges, unlike modern courts, vigorously scrutinized property claims; or (2) as a jurisprudential imperative, in the sense that rights equally positioned in the Bill of Rights must be accorded the same level of judicial protection.[15]

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8. *See infra* Part IV.

9. ELY, *supra* note 2.

10. RICHARD PIPES, PROPERTY AND FREEDOM (1999).

11. TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA (2006).

12. Academic conferences and law review articles addressing the property rights debate are as popular as ever. Over the last three years, the William and Mary and University of San Diego law schools have hosted property rights symposia and published numerous law review articles. *See, e.g.*, Eric R. Claeys, Takings*: An Appreciative Retrospective*, 15 WM. & MARY BILL RTS. J. 439 (2006) (evaluating the legacy of Richard Epstein's book *Takings*); James W. Ely, *Impact of Richard A. Epstein*, 15 WM. & MARY BILL RTS. J. 421, 422–23 (2006) (discussing the prominence of Epstein's work in court opinions); Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005) [hereinafter Epstein, *Liberty Versus Property?*] (detailing the tension between liberty and property in copyright law); Richard A. Epstein, *Taking Stock of* Takings*: An Author's Retrospective*, 15 WM. & MARY BILL RTS. J. 407, 407 (2006) [hereinafter Epstein, *Author's Retrospective*] (responding to other authors' comments about *Takings*); Eduardo M. Peñlaver, *Reconstructing Richard Epstein*, 15 WM. & MARY BILL RTS. J. 429 (2006) (disagreeing with Professor Epstein's ideas about property). Interesting recent articles include Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003) [hereinafter Claeys, *Natural Property Rights*] (reexamining federal takings law in light of eminent domain cases decided in the nineteenth century), and Joseph L. Sax, *Why America Has a Property Rights Movement*, 2005 U. ILL. L. REV. 513 (2005) (discussing factors to consider when land use rules are created after substantial development occurs).

13. *See* Wolf, *supra* note 4, at 1242–43.

14. Epstein, *Liberty Versus Property?*, *supra* note 12, at 2; *see also* Epstein, *Author's Retrospective*, *supra* note 12, at 408–09 (responding to recent commentary on *Takings*).

15. PIPES, *supra* note 10, at 287–88; Epstein, *Author's Retrospective*, *supra* note 12, at 413 ("Justices on all sides of the intellectual spectrum do not want to own up to the breadth of the Takings Clause, by reading it in parity with, say, the First Amendment protection of freedom of speech."). In *Takings*, Epstein appears to rely on history, but he claimed that he was articulating a radical theory without necessary historical support. *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 66 (1986) [hereinafter *Proceedings*] (statement of Richard Epstein addressing criticisms of *Takings*). In subsequent work, however, he has tied his belief in strict scrutiny to historical and jurisprudential roots. *See, e.g.*, RICHARD A.

This Article critiques the movement's self-conscious conservatism, showing that history, modern jurisprudence, and existing property rights theory all fail to support strict judicial review of property regulation. Despite considerable searching, no one has convincingly identified an era in which property rights were strictly protected. If there has been an historical, intellectual, judicial, or social tradition that supports scrutinizing property rights in the manner that courts now review liberty claims, it has hidden itself extremely well.

The case for extending modern strict scrutiny of liberty claims to property claims is no less problematic. To be sure, the rhetoric of balance between liberty and property resonates with many judges.[16] After all, the Framers protected both in the Bill of Rights. But this appeal is a vestige of the linguistic decision to categorize both liberty and property as rights. The structure and techniques of legal argument lead us to equate concepts that we choose to group in the same category, even though we could readily distinguish them.[17] When courts have faced a concrete choice between substantive property and liberty interests, the persuasive power of the rhetoric of parity has evaporated, and the courts have privileged liberty.[18] Justice White put it most succinctly, recognizing for the Court that "the stakes are higher" when personal liberty is threatened.[19]

Because neither history nor current jurisprudential practice supports elevating property to liberty's level in the constitutional lexicon of rights, a strong property rights adherent must articulate theoretical grounds for creating a new social and legal regime. The movement's proponents have articulated both natural rights[20] and utilitarian[21] models. Neither has been successful. The natural rights theories cannot counter the critique that property achieves its value through collective action and thus should be subject to collective limit in ways that liberty should not. The utilitarian argument relies on false assumptions about the certainty and incentive effects of a strong property rights

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EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 115 (2006) (discussing historical support for Epstein's theory).

Some commentators outside the traditional property rights movement call for greater scrutiny of property rights claims based on an evolution in the law that is neither historical nor derivative of the existing scheme of strict scrutiny for enumerated constitutional rights. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 327 (2004) (citing Lockean political theory); JOHN RYSKAMP, THE EMINENT DOMAIN REVOLT: CHANGING PERCEPTIONS IN A NEW CONSTITUTIONAL EPOCH 117–20 (2007) (applying the "how not why" analysis). These arguments are beyond the scope of the critique in this Article.

16. *See* discussion *infra* Part IV.A.

17. *See* discussion *infra* Part IV.B.

18. *See* discussion *infra* Part IV.C.

19. Baxter v. Palmigiano, 425 U.S. 308, 318–19 (1976).

20. *See* discussion *infra* Part V.A.

21. *See* discussion *infra* Part V.B.

regime, while failing to provide an empirical response to claims that increased scrutiny would have significant costs.

At its root, the debate over the proper degree of scrutiny for property rights claims is a debate about the appropriate scope of a society's freedom to organize and reshape itself in search of a greater good. As Jennifer Nedelsky has written, our definition of property "reflects judgments about the nature of freedom and justice, about the good society, and about what sorts of values a government can and should foster."[22] Strong individual property rights and strict scrutiny of regulation truncate that fundamental debate, demanding that we privilege what *has been* to guard against the hazards of the unknown. Social betterment must come from individuals pursuing their own self-interest, for no other interest is legitimate. Greater judicial deference, by contrast, frees us to seek, through governmental actors pursuing the public interest, a better, more fulfilling society at the risk that we will fail.

This Article's critical assessment of the property rights movement cannot establish that judicial deference to legislative judgment in property rights cases is necessarily morally superior to more probing scrutiny. That the property rights movement's adherents have gained no ground in the more than two decades since they began, however, casts some measure of doubt on the possibility that they ever will.

Part II identifies the concepts of property and liberty in constitutional jurisprudence and outlines the current state of constitutional law with respect to each right. Part III critiques the historical case for a regime of strong property rights within American intellectual, constitutional, and social history, concluding that property rights adherents have failed to show that such a regime has ever existed in the United States. Part IV identifies three examples of judicial rhetoric in modern case law advocating equivalent scrutiny of liberty and property rights and shows that this rhetoric loses its persuasive force when judges face a concrete choice between liberty and property interests. Part V summarizes and critiques the natural rights and utilitarian defenses of strong property rights, finding neither persuasive.

II. PROPERTY AND LIBERTY RIGHTS IN AMERICAN JURISPRUDENCE

This Part explores the range of concepts that the terms property and liberty can encompass and identifies those that best fit within constitutional jurisprudence. It then summarizes existing law concerning judicial review of liberty and property claims.

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22. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 198 (1990).

A. *Defining Property and Liberty Rights*

The definition of liberty in constitutional terms starts by recognizing (1) an individual right prohibiting government interference with freedom of thought and action coupled with (2) a power to call upon the government to protect individuals from liberty-limiting harm (i.e., physical restraint) inflicted by nongovernmental actors. Property recognizes (1) an individual right to acquire things and intangibles for individual use or disposition without government interference and (2) the power to call upon the government to enforce a property owner's right to exclude others from using or disposing of his acquired property.

Despite their common use in both everyday language and in the Constitution, the terms property and liberty can be seen as interacting in at least four distinct ways. First, some scholars understand the terms as a unified concept describing the relationship between individual and government power. For example, Timothy Sandefur has described liberty and property as two tenses of the same right.[23] Under this view, the concept of liberty includes the personal freedom to obtain, use, and dispose of property without outside interference. Similarly, one understanding of property defines it simply as the liberty to acquire and enjoy things.[24]

Second, others interpret property as the antithesis of liberty. Property rights in one person necessarily restrain the ability of others to live autonomously because property rights limit freedom of action.[25] An extreme version of this approach views the concept of trespass as undermining liberty.[26]

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23. SANDEFUR, *supra* note 11, at 52, 56 (deriving this view from Locke's writings).

24. *See, e.g.*, JAMES MADISON, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* THE MIND OF THE FOUNDER 186, 186 (Marvin Meyers ed., rev. ed. 1981) (recognizing that the meaning of property embraces anything of value, including opinions and ideas that the definition of liberty normally encompasses). Adam Mossoff's description of property as an integrated concept to acquire, use, and dispose of things fits within this understanding. Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 402–03 (2003) ("The substantive role of acquisition, use and disposal derive from the fact that property is a consequent of the actions necessary to maintain life and liberty. . . . The liberty and use of one's life and limbs are as much a part of property as the power to exclude others from the objects to which one claims entitlement).

25. This argument has found a voice among those opposing the expansion of intellectual property rights. See LAWRENCE LESSIG, THE FUTURE OF IDEAS 11 (2001), for a discussion of constitutional rights and the freedom to innovate.

26. *See* G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 55–56 (1995); Claeys, *Natural Property Rights*, *supra* note 12, at 1560–61, 1567–68; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923). But see RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 110–14, 132–38 (2003), for a critique of this position.

A third variant interprets the concepts of liberty and property as limits on each other. In this sense, liberty ideally means absolute freedom of thought and action, while property ideally means the absolute freedom to reduce the external world into segments for an individual's use and enjoyment and from which all others can be excluded. Since individuals live in a social setting, however, the ideal forms cannot exist.[27] Each concept must limit or set a boundary for the other.[28] The liberty rights of others limit the individual's ability to acquire property interests, and the property rights of others limit the individual's exercise of liberty.

The fourth understanding of property and liberty interprets them as components in a social system. Rather than focus on an absolute individual right that must be limited because we happen to live with others, this definition starts with the notion that the concepts of liberty and property exist only because we live with others. Just as an individual living in the Amazon rain forest has little need for a concept of snow, an individual living alone needs no concept of liberty and property.[29] Such a person can exercise absolute freedom of action or acquisition.

Within a society, any notion of absolute freedom to exercise liberty or acquire property is senseless because the concept of society necessitates limits. But liberty and property do not bound each other. Rather, each forms a separate sphere within the society employing the concepts. One does not have less liberty because others have property. Liberty is simply not so broad as to transgress the property of others, and vice versa. There is some play in the joints. The social definitions of the concepts of property and liberty are not

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27. The Austrian economist and philosopher Ludwig von Mises has articulated this view. In his lecture *Liberty and Property*, he describes liberty as "always freedom from the government. It is the restriction of the government's interference." Ludwig von Mises, Liberty and Property (Oct. 1958), http://mises.org/libprop.asp. But he recognizes that perfect liberty cannot exist: "[S]ociety cannot realize the illusory concept of the individual's absolute independence. Within society everyone depends on what other people are prepared to contribute to his well-being in return for his own contribution to their well-being." *Id.*

28. *See* 1 F.A. HAYEK, LAW, LEGISLATION, AND LIBERTY 107 (1973) ("Law, liberty, and property are an inseparable trinity. There can be no law in the sense of universal rules of conduct which does not determine boundaries of the domains of freedom by laying down rules that enable each to ascertain where he is free to act."); NEDELSKY, *supra* note 22, at 90–93 (discussing the view that property is "the boundary to political liberty"); Epstein, *Liberty Versus Property?*, *supra* note 12, at 16 ("That liberty includes the ability to go where one wills, and this right of movement is necessarily limited by the creation of any system of private property, which converts free movement into trespass.").

29. *See* BARNETT, *supra* note 15, at 84 ("[Liberty] rights would be entirely unnecessary if individuals were not in society with each other, or if the actions of some persons did not adversely affect the welfare of others.").

inherent. They involve choices about how the individuals in a society want to live.[30]

This fourth understanding of liberty and property best describes how these terms are used in constitutional adjudication. The Constitution's language and the cases interpreting it are most comfortably read to recognize two separate concepts that do not strictly limit each other but rather that can be interpreted within a broad range while still fulfilling their constitutional role.[31]

B. Judicial Scrutiny of Property and Liberty Rights

The modern concept of federal constitutional review of government action allegedly impinging liberty and property rights is now well settled. Despite the inevitable impact on individual liberty or property, the courts generally uphold government action against constitutional challenge, so long as the action is rationally related to a legitimate public interest.[32] Under this standard, courts ask only "whether any state of facts either known or which could reasonably be assumed" support the government actor's judgment.[33]

The courts scrutinize much more strictly, however, the liberty interests specifically enumerated in the Constitution, as well as certain other liberty

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30. Justice Frankfurter's dissenting opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), perhaps best conveys this social understanding of liberty and property rights. Justice Frankfurter argued that all Constitutional rights required breathing space:

> The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. . . . [M]uch which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a *community* is the ultimate reliance against unabated temptations to fetter the human spirit.

Id. at 670–71 (Frankfurter, J., dissenting) (emphasis added).

31. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82–84 (1980) (recognizing that the state has the positive power to extend freedom of speech, a liberty interest, onto certain forms of private property without violating constitutionally protected property rights). There may be a limit to this flexibility, however. *See id.* at 93–95 (Marshall, J., concurring).

32. Gerald Gunther, in his classic article on the Court's differing levels of constitutional scrutiny, described this approach as "minimal scrutiny in theory and virtually none in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

33. United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938). And the Court has proven itself willing to imagine justifications for economic regulation beyond those put forward by the state itself. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 490 (1955) (justifying sales of eyeglasses for advertising purposes); Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (stating that authorities could conclude that certain advertisements on trucks did not present traffic problems).

interests thought to be fundamental to American society.[34] In these cases, the government must show that infringing the individual interest in question is necessary to serve, and narrowly tailored to promote, a compelling government interest.[35]

The Court does not extend this form of strict scrutiny to property rights.[36] It has invoked the Takings Clause to compel compensation in limited cases where the government regulates in a way that dramatically limits the use and reduces the value of private property.[37] The standard of review, however, has not strayed far from the permissive rational basis test.[38] With the exception of cases

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34. These include the rights protected in the Bill of Rights as well as the right to vote, assemble, travel, marry, and procreate. *See* Sherry F. Colb, *Freedom from Incarceration: Why Is this Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 786–87 n.15 (1994).

35. *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 586 (2005) (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)) ("Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest."); Johnson v. California, 543 U.S. 499, 505 (2005) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)) (discussing the government's burden of proof for racial classification cases); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)) (stating that regulations overriding the freedom of expressive association must survive strict scrutiny).

Gunther defined strict scrutiny as "'strict' in theory and fatal in fact." Gunther, *supra* note 32, at 8. A recent study indicates that strict scrutiny is no longer, if it ever was, "fatal in fact." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006). For a recent discussion of how courts have in fact applied the strict scrutiny standard, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274 (2007).

36. *See Carolene Prods.*, 304 U.S. at 152–53 n.4 (1938). And placing a few dissenting opinions to one side, Kelo v. City of New London, 545 U.S. 469, 505–23 (2004) (Thomas, J., dissenting); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 343–54 (2002) (Rehnquist, C.J., dissenting); *id.* at 355–56 (Thomas, J., dissenting), the Supreme Court has given no indication that one should expect dramatic change in the near future. The Court has adopted and repeatedly affirmed highly deferential tests for determining whether a taking is for a public use, *Kelo*, 545 U.S. at 480–83; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007, 1014–16 (1984); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239–41 (1984); Berman v. Parker, 348 U.S. 26, 33 (1954), and whether a regulation constitutes a taking, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978). In *Penn Central*, the Court refused to find a taking despite a large loss in value where "[t]he restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford . . . opportunities further to enhance not only the [regulated] site proper but also other properties." *Id.*; *see also Tahoe-Sierra*, 535 U.S. at 342 (rejecting a per se analysis and reaffirming the *Penn Central* test in a case involving an extended moratorium); Palazzolo v. Rhode Island, 533 U.S. 606, 630–31 (2001) (stating the same where a regulation reduced the value of property by more than 90%).

37. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

38. *Compare Ruckelshaus*, 467 U.S. at 1007 ("[Where the owner] is aware of the conditions under which the data [required under federal law for pesticide registration] are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called

involving permanent physical invasions of property[39] or regulation that removes all economic value,[40] the Court presumes that a land use regulation is constitutional even when it eliminates important use rights and dramatically reduces value.[41] As a result, the courts subject liberty and property claims to starkly different levels of scrutiny.

III. HISTORICAL PROPERTY RIGHTS

Many commentators have argued that the current structure of constitutional review of liberty and property interests is misguided because the Framers placed property and liberty on equal footing.[42] The historical case for strong individual

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a taking."), *with* Corn Prods. Ref. Co. v. Eddy, 249 U.S. 427, 431–32 (1919) (citations omitted) ("The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth.").

39. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

40. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992) ("[T]he Fifth Amendment is violated when land-use regulation '. . . *denies an owner economically viable use of his land.*'" (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980))).

41. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." (citing Radice v. New York, 264 U.S. 292, 294 (1924))). Courts strongly presume constitutionality when determining whether (1) a regulation amounts to a taking, and (2) a taking promotes a public use. *See supra* note 36. However, courts apply a form of intermediate scrutiny in cases where the government seeks to take property as a quid pro quo for permitting a development project violating local zoning ordinances. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring the government to show a reasonable nexus and a rough proportionality between the exaction and the harm imposed on the community by a development project to avoid paying compensation).

During the *Lochner* era, the Supreme Court applied something like strict scrutiny to legislation affecting commercial economic interests. The scrutiny applied was strict in that the Court held a number of statutes unconstitutional, but some have argued that during this era the Court may have been seeking to divide private and governmental functions rather than assess the need for the statute and the means of achieving that need. *See* Fallon, *supra* note 35, at 1285–86. *Compare* Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 554 (1935) (holding that a state statute imposing a progressive gross sales tax violated the Fourteenth Amendment's Equal Protection Clause), *with* Nordlinger v. Hahn, 505 U.S. 1, 17 (1992) (upholding a property tax regime imposing dramatically different tax liabilities on properties of equal value), *and* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526–28 (1958) (citations omitted) (holding that states have wide flexibility in devising taxing regimes and must meet only the rational basis test).

42. Prior to the close of the *Lochner* era, the argument goes, landowners—and probably property owners of all sorts—could use their property as they wished so long as they avoided harming others in ways long recognized by the common law as nuisances. ELY, *supra* note 2, at 9 ("[G]iven the framers' concern with protecting property as well as the nearly 150 years of Supreme Court activity in this field, the relegation of property rights to a lesser constitutional status is not historically warranted."); Lynton K. Caldwell, *Rights of Ownership or Rights of Use?—The need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 761–64 (1974); Epstein, *Liberty Versus Property?*, *supra* note 12, at 16; Norman Karlin, *Back to the Future: From*

property rights supposedly arises from the intellectual history of the Founding Era, the language of the Constitution itself, the case law interpreting it, and the social understandings of American society.[43] To date, these efforts have failed. Examining the intellectual history of the Founding Era paints an ambiguous picture,[44] and—perhaps more surprisingly—virtually nothing in the Constitution itself, the case law interpreting it, or the surrounding social history convincingly supports a claim that the judiciary closely scrutinized property rights at any time in American history.[45]

A. Intellectual History of the Founding Era

Commentators, noting the influence of John Locke's philosophy, argue that the Framers viewed property and liberty with equal reverence.[46] Excerpts of Locke's writing do support the view that property and liberty form a unified concept and thus, one might contend, should receive similar judicial scrutiny. In his essay, *Of Civil Government*, Locke wrote that "[t]he right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right . . . . [A] fundamental interdependence exists between the personal right to liberty and the personal right [to] property. Neither could have meaning without the other."[47] The Court has quoted this

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Nollan *to* Lochner, 17 SW. U. L. REV. 627, 637–38 (1988); Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 543 (1993).

43. EPSTEIN, TAKINGS, *supra* note 3, at 25–26 (noting the practice of using social history to interpret the Constitution).

44. *Id.* (discounting an historical interpretation of the Takings Clause because such an inquiry will likely lead to "more confusion than it eliminates"); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 58 (1964).

45. One aspect of constitutional interpretation might support the view that courts should treat property rights equivalently with liberty rights. The Takings Clause was the first of the individual rights in the first eight Amendments to be applied to the states through the Fourteenth Amendment's Due Process Clause. Malloy v. Hogan, 378 U.S. 1, 4 (1964) (citing Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897)). Neither the incorporation debate nor those seeking greater protection of property rights have accorded this fact any significance, and there seems to be no particular reason why they should.

46. ELY, *supra* note, 2, at 28–29; Epstein, *Liberty Versus Property?*, *supra* note 12, at 1 ("There is little doubt that this formulation of the matter has exerted profound influence over the structure of American thought and constitutionalism."); Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155, 155 (2002) ("A mere listing of the primary and secondary sources—from the Founding Fathers to today—that explicitly refer to Locke or implicitly invoke his ideas would rival the Encyclopedia Britannica in length. His labor argument for property, in particular, has been especially influential.").

47. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (citing JOHN LOCKE, OF CIVIL GOVERNMENT, TWO TREATISES 82–85 (Ernest Rhys ed., J.M. Dent & Sons Ltd. 1924) (1690); John Adams, *A Defence of the Constitutions of Government of the United States of America*, *in*

proposition to support the decision to extend federal jurisdiction equally to liberty and property claims[48] but has not used it to justify scrutinizing the two types of claims equally.

Property rights adherents tend to ignore that Locke was tailoring this absolutist language to bodily integrity, including the goods necessary for self-preservation, two forms of property that he held to be unalienable.[49] One could neither dispose of oneself—suicide was impermissible[50]—or sell oneself into slavery.[51] By contrast, the Framers,[52] like modern lawyers, saw property as rights over alienable things.[53]

Locke, of course, was not entirely silent with respect to state regulation of modern forms of property. On that count, Locke can be read to support both government regulation generally and redistribution of wealth specifically as necessary to ensure that basic needs were met. With respect to government regulation, Locke acknowledged that "in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions."[54] Although Locke does not address the extent of regulation in great detail, he seemingly accepts the power of legislatures operating with the consent of the people to shape "the nature and extent of property" so long as the legislatures do not radically undermine the core right of exclusive possession.[55]

DEMOCRACY, LIBERTY, AND PROPERTY 121–32 (Francis W. Coker ed., 1942); WILLIAM BLACKSTONE, 1 COMMENTARIES *138–40).

48. *See* Dennis v. Higgins, 498 U.S. 439, 446 (1991); *Lynch*, 405 U.S. at 552.

49. STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME, 168, 180 (1991). Even philosophers can fall victim to this interpretive error. *Cf. id.* at 179–80 ("It is not uncommon for modern philosophers, concerned with the contemporary political question of the justifiability of modern systems of private property, to begin their enquiries by examining 'traditional' arguments for property . . . . Approaches to Locke's theory from this sort of perspective commonly go astray . . . . It is a mistake to assume, then, that Locke's arguments for property are arguments for that cluster of rights which many modern philosophers regard as constituting property.").

50. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 271 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("Every one . . . is *bound to preserve himself* . . . ."); *see* BUCKLE, *supra* note 49, at 170 (citation omitted).

51. BUCKLE, *supra* note 49, at 168.

52. NEDELSKY, *supra* note 22, at 23 ("Madison did not use the term property to stand for all individual rights (as in the Lockean sense of life, liberty and estate) . . . .").

53. United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1945) (describing property rights to include the "right to possess, use and dispose"); LAWRENCE BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 19 (1977) (describing property rights to include the rights to "consume, waste, modify, or destroy" (citing A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 118 (A.G. Guest ed., 1961))); EPSTEIN, *supra* note 3, at 59 (stating the same).

54. LOCKE, *supra* note 50, at 302.

55. BUCKLE, *supra* note 49, at 189–90 ("[I]n . . . stable, developed societies, property becomes whatever the law makes of it . . . . [T]he precise character and extent of the rights encompassed in property become a matter of (tacit) general agreement, entrenched in legal

For example, the right to destroy even those things that modern lawyers would understand to be property was limited to situations "where need requires."[56]

With respect to redistribution, Stephen Buckle explains, "Locke does not ignore the plight of those in serious need. . . . [H]e directly invokes the right of charity all men can legitimately claim against one another . . . ."[57] Locke maintained that, "*Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise . . . ."[58] Importantly, Locke uses "charity" to convey an enforceable power to call on government to enforce a right to life's basic needs, not mere voluntary "humane benevolence."[59]

Further, Locke's philosophy cannot simply be mapped onto the Framers. Though he certainly had influence, the Framers' views were multidimensional. Civic republicanism stood side by side with individualism.[60] As Frank Michelman has explained, the Constitution is thus both "a liberal document"

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rules. . . . Property arises naturally through the self-preserving activities of human beings, and the more sophisticated notions of property that develop in civil society are a continuation of this natural process, being adaptations to changed circumstances or refinements introduced for the further improvement of human life.").

56. LOCKE, *supra* note 50, at 209; *see* BUCKLE, *supra* note 49, at 169 ("Locke . . . is committed to rejecting the view that property is a right of absolute control over things."); *id.* at 181 ("Wilful destruction is not within the purview of property right[s]; property does not bestow absolute control over a thing.").

57. BUCKLE, *supra* note 49, at 159; *see also id.* at 161 ("Locke provides a safety net in the form of the right of charity . . . .").

58. LOCKE, *supra* note 50, at 170.

59. BUCKLE, *supra* note 49, at 159 (noting that Locke understood charity as "a Right to the Surplusage of . . . Goods" and as something "that cannot justly be denyed" when a person is in need (quoting LOCKE, *supra* note 50, at 170) (alteration in original)). Historical practice since Locke's day has incorporated some form of public support for the poor:

> The fundamental lesson of the history of public relief in the West is that the modern welfare state, while an important innovation in scope, is not one in principle. One of the most consistent elements in the history of Western political and legal thought and practice has been the acceptance of a communal duty of public support for the destitute, paid for out of taxation or its functional equivalent. Both Jewish and Christian traditions proclaim a duty of support and a corresponding right to subsistence, to be implemented not merely through the appeal to conscience but through law. . . . [T]he American colonists brought with them [a system of poor relief], and it was firmly established in the colonies at the time of independence.

Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 41 (1986).

60. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1502 (1988); *see* ELY, *supra* note 2, at 48–49 (explaining that the Federalist Papers included both natural rights and economic justifications for property rights); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548–49 (1988).

and "a small 'r' republican document."[61] Because of these dual views, Michelman concluded:

> [The] Constitution is not reducible to one unified coherent set of principles, but . . . instead it's at war with itself in the deepest possible way. The incoherence that you see in the takings decisions, among others, is a reflection of a conflict that was built into the Constitution, that was in the heads of the people who created it, and that remains with the people who construe it.[62]

Jennifer Nedelsky's research supports Michelman's belief that the Framers had a quite nuanced understanding of property,[63] and Carol Rose has emphasized that the Framers saw property rights as critical to building a strong society, as much a foreign policy objective as an individual rights concern.[64]

In the end, one who points to John Adams, who wrote, "Property must be secured or liberty cannot exist,"[65] must also take account of Benjamin Franklin, who wrote that, "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing . . . ."[66] What we know of the Framers' thinking, and probably all that we could ever know about it, cannot settle this debate.

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61. *Proceedings*, *supra* note 15, at 60 (statement of Frank Michelman); *see* NEDELSKY, *supra* note 22, at 170–71.

62. *Proceedings*, *supra* note 15, at 60 (statement of Frank Michelman).

63. NEDELSKY, *supra* note 22, at 12 (discussing the views of different influential Framers with respect to property); *id.* at 30 (acknowledging that the Framers recognized that some regulation of property was necessary).

64. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 582–83 (1990).

65. JOHN ADAMS, DISCOURSES ON DAVILA (1790), *reprinted in* 6 THE WORKS OF JOHN ADAMS 223, 280 (Charles Francis Adams ed., 1851). *Compare* JAMES MADISON, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland et al. eds., 1983) (stating that land, merchandise, and money are property, but noting that "[i]n its larger and juster meaning" the term also includes "every thing to which a man may attach a value and have a right," including opinions, religious beliefs, and personal safety), *with* JAMES MADISON, *Parties*, NAT'L GAZETTE, Jan. 23, 1792, *reprinted in* 6 THE WRITINGS OF JAMES MADISON 86, 86 (Gaillard Hunt ed., 1906) ("[T]he silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity . . . .").

66. BENJAMIN FRANKLIN, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania*, FED. GAZETTE, Nov. 3, 1789, *reprinted in* 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (Albert Henry Smyth ed., 1907); *see* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 62 (1969) ("'All property . . . is safe under [the people's] protection.'") (quoting THOMAS PAINE, The Forrester's Letter IV (May 8, 1776), *in* THOMAS PAINE: COLLECTED WRITINGS 85, 89 (Eric Foner ed., 1995)); NEDELSKY, *supra* note 22, at 33 (echoing Franklin's point that property serves society's interests) (citing Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *in* 8 THE PAPERS OF JAMES MADISON 385, 386–87 (Robert A. Rutland et al. eds., 1973)). Early state governments incorporated this notion of property

B. Constitutional Text

The conflicted intellectual history of the Founding Era does not trouble many supporters of strong property rights, including those predating the modern property rights movement, because they find the Framers' intent self-evident in the wording of the Constitution. In his 1958 Holmes Lectures, for example, Learned Hand declared that "there is no constitutional basis for asserting a larger measure of judicial supervision over" liberty than property.[67] A quarter century later, Raoul Berger responded with consternation to the suggestion that liberty and property should be treated differently: "But liberty and property are on a par in the Due Process Clauses; the Clauses make no distinction whatsoever between them."[68] And in the 2008 edition of his book, *The Guardian of Every Other Right*, James Ely contends that "[t]he Constitution does not divide rights into categories."[69]

In recent years, a new form of constitutional interpretation has emerged. Known as semantic originalism,[70] it contends that modern courts should interpret the Constitution consistently with its public meaning at the time it was ratified, rather than according to the intent of the Framers or the manner in which they anticipated that courts would apply the document.[71] Adherents to this theory have not positioned themselves as part of the property rights movement; instead, they focus more broadly on articulating an overarching theory of constitutional interpretation. A key player in the semantic originalism movement, Randy Barnett, however, has articulated a theory of judicial

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into their institutions and actions. For example, the Vermont Constitution required that "[p]rivate property ought to be subservient to public uses, when necessity requires it," and regulations allowed hunting on unenclosed land. ELY, *supra* note 2, at 33 (internal quotation marks omitted). The government also confiscated loyalist property after the Revolutionary War without paying compensation. *Id.* at 34–37, 41.

67. LEARNED HAND, THE BILL OF RIGHTS 51 (Atheneum 1964) (1958).

68. Raoul Berger, *Liberty and the Constitution*, 29 GA. L. REV. 585, 593 (1995).

69. ELY, *supra* note 2, at 141.

70. Lawrence B. Solum, *Semantic Originalism* 3 (Univ. of Ill. Coll. of Law, Ill. Pub. Law Research Paper No. 07–24, 2008), *available at* http://ssrn.com/abstract=1120244 ("The central claim of Semantic Originalism is that constitutional law includes rules with content that are fixed by the original public meaning of the text—the conventional semantic meaning of the words and phrases in context.").

71. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 92 (2004) (discussing original intent originalism versus original meaning originalism); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) (discussing how originalism prevails as an approach to constitutional interpretation); Solum, *supra* note 70, at 3–11 (explaining four theses that elaborate on the central meaning of semantic originalism); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004) ("[T]he new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted.").

interpretation that he calls "The Presumption of Liberty."[72] This approach is consistent with the property rights movement in its calling for equal scrutiny of property and liberty claims, though it may differ in proposing an overarching scheme of means–ends review rather than extending strict scrutiny to property claims.

Whether one focuses on intent, anticipated applications, or public meaning, each theory faces an uphill battle. If the text of the property clauses was the only guide, one might conclude that property is less important than life and liberty because it comes last in a nonalphabetical list, and the clauses require compensation only when property is literally taken from its owner.[73]

The commentators who claim to find parity between rights must therefore mean that the Constitution as a whole, rather than the text of the individual property clauses, requires equal treatment of liberty and property claims.[74] Expanding the inquiry, however, only weakens the case for parity. The preamble extols "the Blessings of Liberty" with no mention of property.[75] Article I grants Congress the power to take property in the form of taxes with no compensation requirement,[76] and the Sixteenth Amendment eliminated that Article's original limitation that required proportionality based on population.[77]

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72. BARNETT, *supra* note 71, at 259–60 ("[T]he Ninth Amendment and the Privileges or Immunities Clause can be viewed as establishing a general Presumption of Liberty, which places the burden on the government to establish the necessity and propriety of any infringement on individual freedom.").

73. *See* U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

74. Broadening our basis of inquiry from the text to the intent of the Framers, one might note that property is also the latecomer to the party. The Declaration of Independence had previously referred to life and liberty along with the pursuit of happiness, a decidedly different concept from property. *See generally* Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 564–85 (2003) (exploring the American commitment to non-property economic rights as exemplified by the Declaration's reference to the "pursuit of happiness" rather than "property"). Property rights advocates claim that the Declaration's drafters understood the phrase "pursuit of happiness" to include government protection of property acquisition. ELY, *supra* note 2, at 28–29.

75. U.S. CONST. pmbl.

76. U.S. CONST. art. I, § 9, cl.4, *amended by* U.S. CONST. amend XVI ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."). A tax is literally a taking of property, although government benefits could provide just compensation. Auditor of Lucas County v. State *ex rel.* Boyles, 78 N.E. 955, 956 (Ohio 1906) (holding that taxes other than for the common good constitute a taking); EPSTEIN, *supra* note 3, at 315–16.

77. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and

Even the Bill of Rights itself, although generally understood as a limit on government power vis-à-vis the individual, in fact sanctions, if not creates, significant government powers over property. The Takings Clause presupposes the government's right to force the sale of private property.[78] And the Court has long understood the required "just compensation" as a fair market value standard,[79] which excludes, in Justice Frankfurter's words, "loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it."[80] Historians have not presented compelling evidence that this clause was understood differently either at the time of the initial ratification or in the 1860s when the Fourteenth Amendment extended the Constitution's liberty and property protections to the states.

The Third and Fourth Amendments also permit the government to exploit private property in the form of the compulsory quartering of soldiers during wartime when prescribed by law[81] and in the form of reasonable searches.[82] Although our general concept of property includes a right to exclude trespassers intent on spending the night at one's home or searching or seizing one's private things, the Constitution permits the government to transgress those interests in appropriate circumstances. In sum, the Constitution fairly read accepts government power to invade property interests, including the most important ones, in order to serve the public interest. By contrast, the Constitution generally protects liberty rights more categorically.[83]

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without regard to any census or enumeration."); ELY, *supra* note 2, at 118 ("[T]he Sixteenth Amendment opened the door for tax policies designed to redistribute wealth.").

78. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also* Eastern Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (citation omitted) ("The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional . . . .").

79. *E.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) ("[J]ust compensation normally is to be measured by 'the market value of the property at the time of the taking contemporaneously paid in money.'" (quoting Olson v. United States, 292 U.S. 246, 255 (1934))).

80. Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949); *see* Epstein, *Author's Retrospective*, *supra* note 12, at 409.

An owner of noninvestment property that the government takes will typically have an idiosyncratic attachment to it. Were that not so, a property owner would voluntarily sell to the government, avoiding the expense and delay of eminent domain proceedings. In some cases, property owners may desire to sell but hold out for an offer above fair market value. In such cases, fair market value may in some sense constitute full compensation. But surely many exercises of eminent domain do not involve hold outs.

81. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

82. *Id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

83. The Bill of Rights states the rights of free speech, assembly, and religion, *id.* amend. I; the rights of the accused, *id.* amends. V–VI; and the rights of those convicted of crimes, *id.* amend

C. *Judicial Interpretation*

One might argue that judicial interpretation of the Constitution demonstrates a reverence for property that is not apparent from the text alone. During no period in our history, however, has the Court strictly scrutinized property claims.[84] To be sure, one can find statements of black letter law to the effect that individuals had the exclusive right to use and dispose of their property.[85] But the understanding that these rights were subject to "the limits prescribed by the terms of his right tempered these statements."[86] The Supreme Court cases of every historical era have recognized broad legislative authority to define these terms to serve the public interest.[87]

VIII, in categorical terms. To be sure, the Constitution permits reasonable seizures of the person, but it is unclear how a law enforcement system could operate otherwise. As relating to liberty, then, the Fourth Amendment seems as limited as possible given the government's duty to enforce the criminal law.

A key element of semantic originalism is the distinction between constitutional *interpretation*, which involves uncovering the original public meaning of the words of the document, and constitutional *construction*, which involves answering constitutional questions by applying the full array of legal and policy devices to reach a decision that does not conflict with the original public meaning. BARNETT, *supra* note 71, at 128; *see* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 1 (1999); KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION 5 & 211 n.3 (1999) (citing FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17 (Roy M. Mersky & J. Myron Jacobstein eds., Hein & Co. 1970) (1839)). *See generally* Solum, *supra* note 70, at 20, 69–89 (exploring the distinction between interpretation and construction and explaining how the distinction "expresses an important insight of New Originalism"). Barnett relies largely on construction, albeit limited by his understanding of the original meaning of the Fourteenth Amendment, to support his view that the police power, on which states generally base property regulation, is narrower than many courts have thought. BARNETT, *supra* note 71, at 328. A strict fidelity to the constitutional text thus does not dictate Barnett's general "Presumption of Liberty" or its particular application to property rights claims. In this sense, he relies on neither historical imperative nor an inevitable progression from modern jurisprudence to support his argument for equal scrutiny of all constitutional claims. His theory thus falls outside the scope of the critique presented in this Article.

84. Eric Claeys has argued that the state courts in the nineteenth century articulated a strong, natural rights account of property. Claeys, *Natural Property Rights*, *supra* note 12, at 1574–77. This account permitted a good deal of government regulation, however, and would have been an unlikely forbearer of the modern property rights movement. *See generally id.* at 1569 ("Every individual has as much freedom in the acquisition, use, and disposition of his property, *as is consistent with good order, and the reciprocal rights of others*." (emphasis added) (internal quotation marks omitted) (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 328 (2d ed., 1832))).

85. STEPHEN MARTIN LEAKE, AN ELEMENTARY DIGEST OF THE LAW OF PROPERTY IN LAND 2 (1874) ("Rights to things, *jura in rem*, have for their subject some material thing, as land or goods, which the owner may use or dispose of in any manner he pleases within the limits prescribed by the terms of his right.").

86. *Id.*

87. *See* Christopher W. Smart, *Legislative and Judicial Reactions to* Kelo: *Eminent Domain's Continuing Role in Redevelopment*, PROB. & PROP., Mar.–Apr. 2008, at 60, 60–61 (discussing

1. Early Republic

Courts and commentators often cite the eighteenth century case *Calder v. Bull*[88] for its dicta asserting that no legislature would have the power to enact "a law that takes *property* from A. and gives it to B."[89] By contrast, the Court's holding—that a resolution altering the standards for a valid will was not an impermissible ex post facto law[90]—was actually quite deferential. Justice Chase explained that "the *right*, as well as the *mode*, or *manner*, of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; is regulated by *civil* institution, and is always subject to the rules prescribed *by positive law*."[91]

2. Early Nineteenth Century

In the antebellum period, the Court squarely rejected the notion that the Constitution enshrined some version of natural property rights that no legislature could alter. In *Ogden v. Saunders*,[92] the Court rejected a challenge to a state bankruptcy law on the ground that debt relief interfered with property rights obtained through contractual agreement.[93] As Justice Trimble perhaps most lucidly explained, "[I]n general, men derive the right of private property . . . from the principles of natural, universal law . . . yet, it is equally true, that these rights, and the obligations resulting from them, are subject to be regulated, modified, and, sometimes, absolutely restrained, by the positive enactions of municipal law."[94] A state's ability to abrogate existing property interests was limited, but a state's power to define the scope of prospective interests was much broader.[95]

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courts' recognition of the government's ability to take property under the power of eminent domain "so long as the property so acquired would be open for general 'public use'").

88. 3 U.S. (3 Dall.) 386 (1798).

89. *Id.* at 388.

90. *Id.* at 394–95.

91. *Id.* at 394.

92. 25 U.S. (12 Wheat.) 213 (1827).

93. *Id.* at 313. The case had no majority opinion. *Id.* at 332 (Marshall, C.J., dissenting). The Court had previously declared a bankruptcy law unconstitutional when applied to debts incurred before passage of the law. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 131–32 (1819).

94. *Ogden*, 25 U.S. (12 Wheat.) at 319–20 (Trimble, J.).

95. *See id.* at 322–23 (Trimble, J.); *id.* at 292 (Johnson, J.) (explaining that government power to alter property rights exists despite the risk that the government may misuse the power); *see also* W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 533 (1848) ("[T]he power in question . . . remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity.").

3. *Late Nineteenth Century*

In the post-Civil War period, the *Legal Tender Cases*[96] reiterated the same deferential tone toward legislative regulation of property rights. Congress had declared treasury notes valid tender for certain debts, leaving creditors who had been entitled to gold or silver worse off than before the law took effect.[97] The plaintiffs argued that this government action violated the spirit of the property clauses by reducing the value of their property without due process or just compensation.[98] The Court rejected the claim, explaining that the clauses had "always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals."[99] Although the Court recognized that many government actions—tariffs, embargoes, wars—affect private property interests in significant ways, the Constitution does not restrict legislative action or compel compensation.[100]

In *Kelly v. Pittsburgh*,[101] the Court held that a state or municipality has the authority to directly appropriate property in the form of taxes that do not proportionally benefit the payor.[102] The Court explained:

> It probably is true . . . that [the plaintiff's] tax bears a very unjust relation to the benefits received . . . . But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect

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96. 79 U.S. (12 Wall.) 457 (1870), *abrogated by* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922).

97. *See id.* at 463. Some state courts did, controversially, recognize a broader right to compensation. *See, e.g.*, McCombs v. Town Council of Akron, 15 Ohio 474, 480 (1846) (holding that municipal corporations could be liable for consequential injuries caused by non-negligent acts authorized by the legislature).

98. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 551.

99. *Id.*; *see* United States v. Lynah, 188 U.S. 445, 465 (1903) ("All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand."), *overruled in part by* United States v. Chi., M., St. P. & P.R. Co., 312 U.S. 592, 598 (1941), *modified on reh'g*, 313 U.S. 543 (1941). At least one state court prohibited explicit redistributive legislation beyond aid to the destitute. *See* State *ex rel.* Griffith v. Osawkee Twp., 14 Kan. 322, 329–30 (1875) (citing Lowell v. City of Boston, 111 Mass. 454, 473 (1873)), *overruled in part by* Beck v. Bd. of Comm'rs of Shawnee County, 182 P. 397, 402 (Kan. 1919).

100. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 550–51.

101. 104 U.S. 78 (1881).

102. *Id.* at 82–83.

absolute equality of burdens, and fairness in their distribution among those who must bear them?[103]

4. Twentieth Century

In the twentieth century, the Court placed some limit on the direct effect of government regulation, requiring compensation when the regulation "goes too far."[104] At nearly the same time, however, the Court rejected takings challenges to zoning and rent control legislation, making clear that a regulation must go very far indeed before compensation is required.[105] And when paying compensation, there is virtually nothing that the government cannot do so long as it pursues the public interest either with respect to taking property and paying compensation[106] or taxing property without paying compensation.[107]

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103. *Id.* at 82. In a subsequent case, the Court explained that all public officials "are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule." Spring Valley Water-Works v. Schottler, 110 U.S. 347, 354 (1884). Altering rights with an impact on property value, the Court recognized, is a power that "bad men may abuse," but when the legislature acts within its powers, the courts are powerless to interfere. *Id.* at 355.

104. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Prior to *Mahon*, the Court applied the Takings Clause only to explicit appropriations of property and the physical equivalent, such as government action that floods private property. *See, e.g.*, *Lynah*, 188 U.S. at 470 ("[W]here the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment.").

105. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (upholding zoning regulation with the effect of reducing property values by 75%); Block v. Hirsh, 256 U.S. 135, 158 (1921) (citing Chi., Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 569) (upholding rent control legislation).

106. *See* Kelo v. City of New London, 545 U.S. 469, 489–90 (2005).

107. City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 374 (1974) ("[T]he due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress . . . ." (internal quotation marks omitted) (quoting A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934))); *see* United States v. Sperry Corp., 493 U.S. 52, 63 (1989) (citing Massachusetts v. United States, 435 U.S. 444, 462 (1978)) (rejecting a Takings Clause challenge to the imposition of a user fee on persons litigating before the Iran Claims Tribunal); MARK KELMAN, STRATEGY OR PRINCIPLE?: THE CHOICE BETWEEN REGULATION AND TAXATION 61 (1999) ("Courts have upheld all sorts of classifications that tax persons differently depending on factors distinct from their wealth, income, spending, or ownership of equally valuable resources."). *But see id.* at 61–62 (explaining constitutional limits on levying taxes based on "ascriptive status" such as race or gender, the out of state origin of the taxpayer, or arbitrary distinctions with no basis in state law or that unduly burden some other constitutional right such as free speech).

Even discrimination among potential taxpayers is generally permissible so long as "any state of facts reasonably can be conceived that would sustain it." Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959) (citing four of its prior cases stating the rule). For example, the Court upheld California's Proposition 13, which mandated that the government reassess property for tax

During this period, courts came to interpret provisions of the Constitution affecting liberty more strictly than claims relating to property. Cases raising First Amendment claims are entitled to strict scrutiny,[108] and the Court carefully scrutinizes liberty-protecting rights of criminal defendants.[109] Jury trials, explicitly required in criminal cases where liberty is at stake,[110] are not constitutionally required against government intrusion on property interests in eminent domain cases.[111]

One might argue that the probing scrutiny of search and seizure claims that emerged in the mid-twentieth century[112] tacitly supports similar scrutiny of claims under the property clauses. Searches and property seizures, after all, impact property interests, and the Fourth Amendment's reasonableness standard may be viewed as analogous to the property clauses, which presumably permit reasonable regulation of property.

Although the Court has never specifically addressed why it reviews Fourth Amendment claims more strictly than property claims, a careful analysis of the two situations reveals clear grounds for the distinction. Police and land use planners are situated quite differently with respect to their governmental status.[113] The police engage "in the often competitive enterprise of ferreting out crime,"[114] which creates substantial institutional pressure to tread on individual

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purposes only upon sale resulting in dramatically different tax bills for properties of equivalent value. Nordlinger v. Hahn, 505 U.S. 1, 4, 18 (1992).

108. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321–22 (1988) ("[A] *content-based* restriction on *political speech* in a *public forum* . . . must be subject to the most exacting scrutiny.").

109. The Court has long required the "intentional relinquishment or abandonment of a known right or privilege" for waivers. Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *overruled in part by* Edwards v. Arizona, 451 U.S. 477, 482 (1981).

110. Lewis v. United States, 518 U.S. 322, 334–35 (1996) (Kennedy, J., concurring).

111. There is no constitutional right to a jury trial in eminent domain proceedings under the federal Constitution and most state constitutions. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 738 (1999) (Souter, J., concurring in part and dissenting in part) ("[C]ondemnation proceedings carried 'no uniform and established right to a common law jury trial . . . [when] the Seventh Amendment was adopted.'" (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 38.32[1] (2d ed. 1996))); United States v. Reynolds, 397 U.S. 14, 18 (1970); Dep't of Pub. Works & Bldgs. v. Kirkendall, 112 N.E.2d 611, 614 (Ill. 1953); Cobb v. S.C. Dep't of Transp., 365 S.C. 360, 364–65, 618 S.E.2d 299, 301 (2005). *Contra* OHIO CONST. art. I, § 19 (requiring trial by jury). *See generally* ELY, *supra* note 2, at 27 (noting that parliamentary revisions to admiralty court procedures in the 1770s caused complaint in the colonies because the admiralty courts functioned without a jury).

112. *See* Johnson v. United States, 333 U.S. 10, 13–15 (1948) (requiring a warrant to support the search of a home even if the police can later show the existence of probable cause).

113. *See* Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL'Y 203, 214–16 (2000) (describing how government employees choose to accept duties to serve the public).

114. *Johnson*, 333 U.S. at 14. The famous phrase is from Justice Jackson's opinion. *Id.* at 13–14 ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from

rights in order to fulfill a governmental duty of bringing the guilty to justice. In contrast, a planning board is a politically accountable body that makes land use decisions to benefit the public. The duty of the planner does not encompass an incentive to trample individual property rights in the same way that the duty of a police officer does.[115]

The Court has recognized the importance of this distinction in role when considering how the Constitution limits the conduct of parole officers.[116] Unlike police officers, but like land use planners, a parole officer does *not* bear "hostility . . . that destroys his neutrality" when dealing with a parolee.[117] As the Court explained, "realistically the failure of the parolee is in a sense a failure for his supervising officer."[118] As a result, courts grant parole officers more constitutional leeway than police.

The relationship between planners and property owners in the community is closer to that of parole officers and parolees than to that of police and suspects. Just as the parole officer's role is to assist the parolee, and the parolee's success translates to the success of the parole officer, the planner's role is to improve the community, and the planner's success depends upon the satisfaction of property owners in the community.

A state magistrate deciding whether to issue a warrant, rather than a policeman on the beat, is a more appropriate governmental figure with whom to compare a planner.[119] Both types of officials assume neutral positions toward the individuals that their decisions will affect. Magistrates are not responsible

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evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."). The Court has of course expressed this sentiment many times both before, *see, e.g.*, United States v. Lefkowitz, 285 U.S. 452, 464 (1932) ("[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." (citing Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931); United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926))), and after, *see, e.g.*, Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 368 (1998) (quoting United States v. Leon, 468 U.S. 897, 914 (1984)) (using *Johnson*'s phrase).

115. *Cf. Scott*, 524 U.S. at 368 (holding that a parole officer is distinguishable from a police officer because the parole system is "more supervisory than adversarial" (citing Griffin v. Wisconsin, 483 U.S. 868, 879 (1987))).

116. *Id.*

117. *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 485–86 (1972)).

118. *Id.*

119. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 338 (1987) (Stevens, J., dissenting) (arguing that federal courts should defer to state court decisions on land use matters).

for catching criminals and thus have a duty to remain neutral in considering warrant applications. Similarly, planners have a duty to balance the property interests of all constituents when making land use decisions. Because federal courts grant considerable deference to magistrates issuing search warrants,[120] similar treatment for planners is appropriate.[121]

5. Conclusion

This brief-like rejection of strong property rights is not intended to be a definitive statement of constitutional history. Surely, one can locate Supreme Court language expressing greater reverence for property rights in particular circumstances than the examples given here. The point is that the case law history does not definitively favor strong property rights in any era to such an extent as to justify dramatically changing modern jurisprudence.

D. Social History and Symbols

Commentators seeking to justify strong property rights might argue that irrespective of the written opinions of judges in property cases, the American citizenry has always had great reverence for property in its collective heart. And this reverence would justify strong property rights, even if some courts in the past have failed to recognize it.

Justice Scalia, in his opinion for the Court in *Lucas v. South Carolina Coastal Council*,[122] claimed to find support for strengthening property rights in what he called an "historical compact recorded in the Takings Clause that has become part of our constitutional culture."[123] As Justice Scalia readily admitted, neither legal practice during the Colonial Era nor the language of the Takings

120. Illinois v. Gates, 462 U.S. 213, 236 (1983) ("A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969), *abrogated by Gates*, 462 U.S. at 238–39 (1983))). The good faith exception to the exclusionary rule effectively grants total deference to a magistrate's probable cause determination unless (1) the magistrate is not neutral and detached; or (2) the police officer was dishonest or completely unreasonable in seeking the warrant. United States v. Leon, 468 U.S. 897, 922–23 (1984) (citing Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326–27 (1979); Franks v. Delaware, 438 U.S. 154, 171–72 (1978); Brown v. Illinois, 422 U.S. 590, 610–11 (1975)), *superseded by* FED. R. CRIM. P. 41(e).

121. In some ways, a planning board might be entitled to even greater deference than an elected magistrate who is subject to electoral pressure that weighs against the individual liberty of criminal defendants. By contrast, electoral pressure on planners likely weighs in favor of property owners.

122. 505 U.S. 1003 (1992).

123. *Id.* at 1028.

Clause is in accord with the compact.[124] He recognized, however, that a cultural history may develop outside the formal legal one.[125] One looking for such a history of strong property rights might look to social movements and symbols as evidence of societal attitudes not reflected in the law. An early, successful popular movement led to the inclusion of the Bill of Rights, including the property clauses, in the Constitution.[126] But a desire to safeguard property interests did not animate the popular call for amendments protecting individual rights.[127] Federal control over state government and individual liberty were the driving issues.[128]

James Madison, who had originally opposed the Bill of Rights, authored the property clauses,[129] and his proposed preamble, which explicitly recognized that the amendments protected "the right of acquiring and using property" along with the "enjoyment of life and liberty," was never ratified.[130] Although subject to varying possible interpretations, the social history leading to the Bill of Rights provides little support for a grassroots property rights movement.

The longstanding association between Americans and land ownership also fails to fill the bill. Opportunities to own land were surely important to colonial Americans,[131] who no doubt believed that government power to take private

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124. *Id.* at 1028 n.15 (recognizing that colonial America did not follow the rule proposed and that the language of the Takings Clause did not compel it). Justice Scalia seems to share the view of some commentators that the Framers' failure to foresee future land use regulation does not mean that they would not have required compensation. *Cf.* Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 595–96 (1995) (arguing that while Blackstone may not have foreseen taking by regulation, his views on protecting private property from government confiscation apply equally to regulation).

125. *See Lucas*, 505 U.S. at 1027–28.

126. *See* ELY, *supra* note 2, at 52 ("The most compelling objection to ratification concerned the lack of a bill of rights.").

127. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985) ("While at least two states had requested every other provision contained in the ratified Bill of Rights, none had sought the imposition of a just compensation requirement. In fact, to the extent that the compensation issue entered the ratification debate at all, the concern was on the other side: Some opponents of the Constitution expressed their fear that federal courts would make the states pay individual claims." (citing EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 161–63 tbl.1 (1957)))

128. NEDELSKY, *supra* note 22, at 186–187.

129. Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 476 (1996) (book review) (describing Madison as a "reluctant father of the Bill of Rights" because he was opposed to it); Treanor, *supra* note 127, at 708 (recognizing Madison as the author of the property clauses of the Fifth Amendment).

130. 1 ANNALS OF CONG. 433 (Joseph Gales ed., 1834); ELY, *supra* note 2, at 54.

131. ELY, *supra* note 2, at 12.

property should be circumscribed by law.[132] At the same time, popularly elected colonial, revolutionary, and antebellum governments used eminent domain extensively to foster economic growth[133] and often placed "economic growth ahead of protecting the interests of landowners."[134]

Recent research has revealed that social perspectives, as reflected by local legislation, cut against an early "constitutional culture" favoring strong property rights. John Hart's work has revealed an extensive array of colonial land use regulation that in "its volume and variety, evidences a once-conventional concept of private property according to which the right of landowners to control and utilize their land remained subject to an obligation to further important community objectives reflected in legislation."[135] Barry Shain has concluded that property ownership at the time of the framing was seen as "a right of stewardship that the public entrusted to an individual, for both private and public benefit."[136]

During the period of ratification, the Framers rejected Madison's attempt to impose a property qualification for electors to the Senate,[137] and popular movements typically opposed early efforts to establish property ownership requirements for lower elected office.[138] Moreover, states generally did not pay

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132. *Id.* at 13 ("'[N]o mans goods or estate shall be taken away from him . . . unless it be by the vertue or equity of some expresse law of the Country.'" (quoting LAWS AND LIBERTIES OF MASSACHUSETTS 1 (Harvard University Press 1929) (1648))).

133. *Id.* at 24–25 ("Existing property arrangements were compelled to yield to the colony's social and economic needs.").

134. *Id.* at 77.

135. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1257 (1996); *see* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 807–08 (1995); *see also* Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFFALO L. REV. 735, 751 (1985) (arguing that land use regulations were common in colonial America) (citing LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 66–68 (1973)).

Hart concludes that this evidence is so powerful that, pursuant to an originalist understanding of the Constitution, the Takings Clause should not limit regulation at all. Hart, *supra*, at 1292 ("The evidence concerning the Framers' experience with land use regulation suggests that the Takings Clause means what it says about land use regulation: nothing."); Sax, *supra* note 44 ("[C]ontemporaneous commentary upon the meaning of the compensation clause is in very short supply. . . . [F]ew authorities which are available . . . [indicate] that the clause was designed to prevent arbitrary government action, . . . [not to protect economic value].").

136. BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM 183 (1994). This interpretation is consistent with common law understandings of government power over property. FRED BOSSELMAN ET AL., THE TAKING ISSUE 80–81 (1973) (quoting The Case of the King's Prerogative in Saltpetre, (1606) 77 Eng. Rep. 1294 (K.B.)).

137. NEDELSKY, *supra* note 22, at 56–57, 303 n.5.

138. The struggle over whether to base political representation on the property tax base or the population was usually decided in favor of the latter. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 162 (1980) ("Taxation only respects property, without regard to the

compensation for regulation that reduced the value of land, though they usually, but not always, did when they took property outright.[139]

The nineteenth century brought no significant change.[140] At the century's turn, only two state constitutions, Vermont and Massachusetts, required the government to compensate landowners when it lawfully took private property for public use, and even as late as 1868, five of the original states still had no compensation requirement.[141] Legislation abrogating property rights to serve the public interest regularly occurred, and the courts upheld it.[142]

Even under federal law, when a constitutional mandate was in place, the courts refused to compel compensation for anything less than the functional equivalent of the government's literal taking of title to one's property.[143] And although the *Lochner* Era constituted a judicial campaign to scrutinize innovative economic programs strictly,[144] that legislatures continued to enact those programs cuts against a culture of strong property rights.[145]

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liberties of a person . . . .") (quoting THE PEOPLE THE BEST GOVERNORS, *reprinted in* 1 FREDERICK CHASE, A HISTORY OF DARTMOUTH COLLEGE AND THE TOWN OF HANOVER NEW HAMPSHIRE 657–58 (John K. Lord ed., 1891)).

139. ELY, *supra* note 2, at 77–78, 94 (quoting Mugler v. Kansas, 123 U.S. 623, 668–69 (1887)).

140. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 63–65 (1977) ("[Into the nineteenth century] there continued to be a strong current in American legal thought that regarded compensation simply as a 'bounty given . . . by the State' out of 'kindness' and not out of justice." (quoting Commonwealth v. Fisher, 1 Pen. & W. 462, 465 (Pa. 1830))).

141. J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, *in* 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 912, 915–916 (1938) (citing MASS. CONST. of 1780, art. X; VT. CONST. of 1777, ch. I § 2).

142. *See, e.g.*, *Fisher*, 1 Pen. & W. at 465 ("What the government conceives is for the public good, it may do; what that public good requires, it may claim . . . ."); M'Clenachan v. Curwin, 3 Yeates 362, 373 (Pa. 1802) ("[A]s to the land which lay in a state of nature, [individuals] were bound to contribute as much [land], as by the laws of the country, were deemed necessary for the public convenience."); State v. Dawson, 21 S.C.L. (3 Hill) 100, 103–04 (S.C. 1836) (recognizing that the legislature has exercised the power to appropriate property for public use for 150 years).

143. During the antebellum period, "few questioned the authority of state governments to regulate the use and enjoyment of private property. Antebellum jurists agreed that the interests of the community prevailed over the claims of unfettered private dominion." ELY, *supra* note 2, at 60–61; *see* Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 3, 76 (1986).

144. *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 328–30 (1921) (striking down a state statute permitting peaceful picketing of a business on the ground that it unconstitutionally interfered with the business owner's property rights); ELY, *supra* note 2, at 107–08 ([T]he majority of Supreme Court justices remained leery of economic regulations that altered free-market ordering or infringed on property rights."). The *Lochner* era, however, may have been a historic break with earlier forms of constitutional review. Wolf, *supra* note 4, at 1241–42.

145. *See generally* Michael J. Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1050 (1997) (stating that the Supreme Court

Drawing definitive conclusions about societal views from legislative policy is an inexact science. Looking beyond official policy, a historian might find that a society's symbols and mottos convey a social view supporting strong property rights that is not otherwise apparent. In this vein, James Ely contends that "the cry 'Liberty and Property' became the motto of the revolutionary movement."[146]

This early motto, however, appears to have had little traction. From early on liberty, not property, has been the dominant symbol. The early Congress chose to enshrine liberty in the design of its coinage, mandating that all coins bear "an impression emblematic of liberty"; "an inscription of the word Liberty"; and a depiction of an eagle.[147]

Another early symbol emblematic of the ideals of the new nation was the Liberty Bell.[148] In 1831, Samuel F. Smith penned *America*, popularly known as *My Country, 'tis of Thee*, a multi stanza hymn to the United States that is famous for the phrase "Sweet Land of Liberty" and refers to liberty two additional times without mentioning property.[149] In his *Gettysburg Address*, Lincoln described the United States as "conceived in liberty"; he did not mention property.[150] Later came the Statue of Liberty and the poem, *The "New Colossus,"* with which it became entwined:

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reviewed state regulation of economic or property interests on constitutional grounds in over 200 cases during the *Lochner* era).

146. ELY, *supra* note 2, at 25.

147. Act of April 2, 1792, ch. 117, § 10, 1 Stat. 246. This practice is no relic of our early history. The United States mint continues to inscribe *Liberty* on all its circulating coins. U.S. Mint, Circulating Coins, http://www.usmint.gov/mint_programs/circulatingcoins/ (last visited Oct. 9, 2008) (follow hyperlink for each denomination to view). Since 1986, the country has minted bullion coins for investors bearing the word *Liberty* as well as various symbols of liberty and an eagle. The American Eagles Program of the United States Mint, http://www.usmint.gov/mint_programs/american_eagles/index.cfm?action=american_eagle_bullion (last visited Oct. 9, 2008).

148. Cast in the 1750s, the symbolic bell did not receive its current name until the 1830s when it was associated with the abolitionist movement. The Liberty Bell—Setting the Stage, http://www.nps.gov/history/nr/twhp/wwwlps/lessons/36liberty/36setting.htm (last visited Oct. 9, 2008). The bell itself includes the biblical inscription, "Proclaim liberty throughout all the land unto all inhabitants thereof." The Liberty Bell, *supra* (quoting *Leviticus* 25:10). Over time, the bell was adopted as a symbol for the women's rights and civil rights movements as well as the struggle against all manner of political oppression. The Liberty Bell, *supra.* In the mid-twentieth century, the U.S. Mint used it as the reverse of the half dollar coin. History of the Liberty Bell, http://www.coincommunity.com/coin_histories/half_dollar_1948_franklin.asp (last visited Oct. 9, 2008).

149. The first stanza refers to the "Sweet Land of Liberty"; the fourth refers to God as the "Author of Liberty"; and the sixth refers to the "Thy Safeguard, Liberty." Smith, *supra* note 1.

150. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), http://www.loc.gov/exhibits/gadd/images/Gettysburg-2.jpg.

"Keep, ancient lands, your storied pomp!" cries she,
With silent lips. "Give me your tired, your poor,
Your huddled masses yearning to breathe free . . . ."[151]

And, of course, the Pledge of Allegiance recognizes "liberty and justice," but not property, "for all."[152]

The notion of a *property* bell, hymn, or statue is simply incredible. Liberty, not property, has always been and continues to be the emblem of America. Property bears no similar special place. On the contrary, one of the few well known references to private property in popular culture, Woody Guthrie's *This Land is Your Land*, has a negative connotation:

Was a high wall there that tried to stop me
A sign was painted said: Private Property,
But on the back side it didn't say nothing—
That side was made for you and me[153]

Taken together, the intellectual history, case law, and social history are simply too ambiguous to support a claim that a regime of strong property rights existed in law or in social understanding at any time in the nation's history. A case for strong property rights must be derived from some other source.

IV. EXTENDING STRICT SCRUTINY TO PROPERTY CASES

Even if there is no compelling historical support for strong property rights, a justification may emerge as the natural development of currently evolving jurisprudential models. The strict scrutiny the Court applies to important liberty

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151. Emma Lazarus, *The "New Colossus,"* Nov. 2, 1883, http://www.nps.gov/archive/stli/newcolossus/index.html.

152. RICHARD J. ELLIS, TO THE FLAG: THE UNLIKELY HISTORY OF THE PLEDGE OF ALLEGIANCE 1 (2005). Of course, school children have recited the Pledge since the 1890s. *Id.* at 19. Interestingly, some authors believe it was drafted by a socialist who considered adding *equality*, but not *property*, to the "liberty and justice" phrase. *Id.* at 28–29.

153. Woody Guthrie, *This Land is Your Land*, *in* HOWARD ZINN & ANTHONY ARMORE, VOICES OF A PEOPLE'S HISTORY OF THE UNITED STATES 353–54 (2004). Woody Guthrie's son, Arlo, changed the lyrics of the private property verse of *This Land is Your Land* without changing its relevance for this article. Arlo's version reads:

As I was walkin'—I saw a sign there
And that sign said—no tress passin'
But on the other side . . . . it didn't say nothin!
Now that side was made for you and me!

Lyrics to Arlo Guthrie's version of *This Land is Your Land*, http://www.arlo.net/resources/lyrics/this-land.shtml (last visited Oct. 9, 2008).

claims has a relatively short pedigree.[154] One might thus argue that because the Court uses heightened scrutiny for liberty claims despite scant historical support, it should do the same for property claims.[155]

A number of judges from across the political spectrum have advocated for this approach, analogizing property rights to other constitutional rights that the Court strictly scrutinizes.[156] This Part sets out three leading examples articulated by Justice Brennan, Chief Justice Rehnquist, and Judge Janice Rogers Brown, then a justice of the California Supreme Court and now a judge on the United States Court of Appeals for the District of Columbia Circuit.

This Part describes each judge's rhetoric and then shows that its persuasiveness depends on the linguistic decision to use a single word—right—to refer to the concepts of liberty and property, even though we understand the two concepts to fulfill different social roles. As a result, when courts move beyond the general rhetoric of rights and face concrete situations in which liberty and property interests are at stake, the metaphor loses much of its persuasiveness and courts nearly invariably privilege liberty interests over property interests.[157]

A. The Rhetoric of Parity in Judicial Opinions

This section sets out three leading examples in which judges have sought to strengthen property rights by equating property with liberty.

1. Constitutional Knowledge

In 1981,[158] the Supreme Court took up the issue of whether the government must compensate property owners for temporary takings—situations in which a court determines land use limitation to constitute a taking and the government responds by repealing the regulation.[159] In a dissenting opinion that actually

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154. Fallon, *supra* note 35.

155. *Cf.* EPSTEIN, *supra* note 15, at 115 ("If [Justice] Stone is correct [in footnote 4 of *Carolene Products*], then a set of *uniform* standards should make it more likely that judicial intervention will respond to the risks to discrete and insular minorities.").

156. Although the specific use of this rhetorical move appears to be of relatively recent origin, jurists advanced and debated more general declarations that all constitutional rights should receive equal treatment much earlier. *Compare* Ullmann v. United States, 350 U.S. 422, 428 (1956) (Frankfurter, J.) ("As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion."), *with id.* at 439–40 (Reed, J., concurring) (citations omitted) (joining opinion "except as to the statement that no constitutional guarantee enjoys preference.").

157. *Cf.* Grey, *supra* note 59, at 47 ("[T]he history of both institutional practice and speculative and casuistic thought in the West converges on the conclusion that where claims to life and property collide, life must take precedence.").

158. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

159. *Id.* at 630.

commanded a majority of the Court,[160] Justice Brennan argued that repealing a regulation that had taken private property could not undo the constitutional harm.[161] The government had to compensate the owner for loss suffered during the time that the law was in effect.[162]

In response to the argument that his proposed rule would overly inhibit land use planners in performing their public function, Brennan analogized the Takings Clause to constitutional rules governing the conduct of police officers: "After all, if a policeman must know the Constitution, then why not a planner?"[163] By posing this question, Brennan sought parity in the scrutiny of liberty- and property-infringing claims.

2. *Comparing Property Regulation to First and Fourth Amendment Claims*

In 1994,[164] the Court considered whether the Constitution required a municipality to compensate a developer when the government (1) exacts property as a condition of permitting a development project and (2) that exaction would constitute a taking were the government to demand it outside of the permitting process.[165] The Court held that the government could escape paying compensation only by showing a rough proportionality between the

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160. Brennan wrote on behalf of four justices, and Justice Rehnquist, although concurring in the majority opinion on procedural grounds, agreed with Justice Brennan's substantive analysis. *Id.* at 636 (Brennan, J., dissenting) (joined by Justices Stewart, Marshall, and Powell); *id.* at 633–34 (Rehnquist, J., concurring) (explaining that if he believed that the Court had jurisdiction, he "would have little difficulty in agreeing with much of what is said" in Justice Brennan's dissent).

Six years later, the Court adopted Brennan's view. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 306–07 (1987).

161. Brennan's principal reasoning on the merits of the case was that, by definition, a regulatory taking unfairly benefits the public at the expense of the burdened landowner. The point of compensation is to ensure that the public shares in the expense required to produce the benefit. Because the public benefits during the period that the regulation is in effect, its repeal, in and of itself, does not balance accounts. The government must still pay compensation for the benefit the public received during the period in which the regulation applied. *San Diego Gas & Elec.*, 450 U.S. at 656–57 (Brennan, J., dissenting).

162. *Id.* at 658.

163. *Id.* at 661 n.26. In subsequent years, lower courts and individual judges repeated Brennan's rhetoric. *See* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1409 (9th Cir. 1989) (Kozinsky, J.), *overruled by* Armendariz v. Penman, 75 F.3d 1311, 1325–26 (9th Cir. 1996); Santini v. Conn. Hazardous Waste Mgmt. Serv., 739 A.2d 680, 696 n.9 (Conn. 1999) (McDonald, J., dissenting); Palmer v. City of Ojai, 223 Cal. Rptr. 542, 550 (1986), *superseded by statute*, CAL. GOV'T CODE § 65,965 (West. Supp. 2008).

164. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

165. *Id.* at 386.

exaction—the government's demand—and the burdens imposed on the community as a result of the project.[166]

In an opinion for the Court, Chief Justice Rehnquist supported this holding by comparing the property clauses to the First and Fourth Amendments.[167] Rehnquist reasoned that because the Court carefully scrutinized business regulations affecting speech and privacy, it should similarly scrutinize regulations that affect property value: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[168] Like Brennan, Rehnquist recognized the appeal of balanced treatment for two concepts that both have the status of constitutional rights.

3. *Rent Control as a Taking*

In a 1999 case challenging a Santa Monica rent control ordinance,[169] the California Supreme Court held that no taking occurred because price controls are within the government's police power.[170] Justice Brown dissented.[171] Expanding on Justice Rehnquist's evocative poor relation metaphor, she argued that "[n]othing in the text or structure of either [the Takings or Due Process Clauses] suggests an infringement of a property interest ought to be accorded

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166. *Id.* at 391.

167. *Id.* at 392 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 570 (1980); Marshall v. Barlow's Inc., 436 U.S. 307, 311 (1978)).

168. *Id.* Rehnquist's rhetoric may have been a reaction to Carol Rose's description of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), as "suggesting that property rights were *poor relations* in the world of rights and, as such, much more subject to governmental intrusion than the rights that more directly safeguard political liberty and equality to insulated minority groups." Rose, *supra* note 64, at 580 (emphasis added). For a discussion of the potential impact of the poor relation metaphor, see Daniel A. Crane, Comment, *A Poor Relation? Regulatory Takings After* Dolan v. City of Tigard, 63 U. CHI. L. REV. 199, 218–20 (1996).

Several lower courts and individual judges have quoted Justice Rehnquist's rhetoric in arguing for more exacting scrutiny of property claims. *See* NLRB v. Windemuller Elec., Inc., 34 F.3d 384, 394 n.8 (6th Cir. 1994); San Remo Hotel L.P. v. City & County of San Francisco, 41 P.3d 87, 128 (Cal. 2002) (Brown, J., dissenting); Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1042 (Cal. 1999) (Brown, J., dissenting); Steel v. Cape Corp., 677 A.2d 634, 651–52 (Md. Ct. Spec. App. 1996); L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 216 (R.I. 1997) (Flanders, J., concurring in part and dissenting in part); Sintra, Inc. v. City of Seattle, 935 P.2d 555, 574 (Wash. 1997) (Durham, C.J., concurring).

169. *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993 (Cal. 1999).

170. *Id.* at 998 ("[O]rdinary rent control statutes are generally constitutionally permissible exercises of governmental authority.").

171. *Id.* at 1040–47 (Brown, J., dissenting). Justice Brown would repeat this argument before leaving the California Supreme Court. *San Remo Hotel*, 41 P.3d at 120–28 (Cal. 2002) (Brown, J., dissenting).

greater deference than a restriction on a liberty interest. Economic freedoms are no different than other freedoms protected by the Constitution."[172]

B. *Understanding the Rhetoric of Parity Between Liberty and Property Interests*

The persuasiveness of the judges' rhetoric in the above examples rests on a metaphor of parity between property and liberty. The metaphor resonates with us because of the tendency to treat as inherently identical concepts that we could logically distinguish simply because our society has placed them in the same category. Because property and liberty are both characterized as rights, a metaphor of parity between them is initially quite persuasive. When one moves from the general case to more specific consideration of particular property and liberty interests, however, the distinctions between the concepts become clearer and the metaphor loses its rhetorical power.

1. *Persuasion Through Reification*

The overinclusiveness of categorization cannot be avoided if language is to simplify the world sufficiently to make communication possible. The rhetorician Kenneth Burke has explained that "[m]en seek for vocabularies that will be faithful *reflections* of reality. To this end, they must develop vocabularies that are *selections* of reality. And any selection of reality must, in certain circumstances, function as a *deflection* of reality."[173] Although we can recognize that linguistic categorization deflects reality by lumping together distinguishable concepts, the ability rarely comes naturally, particularly to lawyers trained to reason by analogy and follow precedent.[174] For us, the

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172. *Santa Monica Beach*, 968 P.2d at 1041 (Brown, J., dissenting). Judge Alex Kozinski has advanced a somewhat similar view, explaining that "the [F]ourteenth [A]mendment's [D]ue [P]rocess [C]lause protects property no less than life and liberty. . . . To the extent that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other governmental powers from similar constitutional constraints." Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1408–09 (9th Cir. 1989) (citation omitted), *overruled by* Armendariz v. Penman, 75 F.3d 1311, 1325–26 (9th Cir. 1996).

173. KENNETH BURKE, A GRAMMAR OF MOTIVES 59 (Cal. ed., University of California Press 1969) (1945). For a discussion of this phenomenon in a legal context, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 269–70 (1987) ("All our thoughts are, and seemingly must be, language mediated, and as soon as we name, we invariably reify in the sense of ascribing identical traits to objects or situations we could otherwise imagine differentiating simply because we have given them the same name.").

174. Mark Kelman, *Taking* Takings *Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829, 1847 (1986) (reviewing EPSTEIN, *supra* note 3) ("[T]he appeal of falsely general categorization

societal decision to group concepts under a single name communicates a powerful social commitment to the similarities that led us to create the category in the first place.

Once embedded in language, categorization easily reifies. We tend to assume without careful reflection that the outside world somehow dictates the categorical treatment of separate concepts for all purposes that our society has chosen to group together for some purposes. "We treat the external world," Mark Kelman has explained, "as if it determines our ideas, ascribing false concreteness to the categories we have in fact invented."[175] Careful reflection on the interests advanced by a particular categorization is thus required to ensure that the appeal of balance between similarly named concepts in particular circumstances in fact has substantive underpinnings.

2. *Illustrating and Explaining Reification's Persuasive Force*

Two well known cases illustrate how reified legal concepts have been used to support similar treatment for quite different propositions. First, Richard Epstein reified the concept of a legal obligation to argue that welfare payments are unconstitutional takings: "If an individual does not have any obligation to rescue those in imminent peril when he can do so at little or no cost," Epstein argued, "then it is not possible to create a welfare obligation with the emergence of the state, given the representative theory of government."[176] This reasoning is persuasive precisely because we assume that the justifications for limiting positive Good Samaritan legal obligations necessarily apply to legal obligations to pay taxes that support welfare payments. In fact, however, the sort of disfavored, open ended legal duty to help whenever one observes someone in need is quite different from a precise obligation to pay taxes to generate a fund that the government would then use systematically to support the needy.[177] Welfare payments may nonetheless be a bad idea, but not because our notion of a legal obligation can refer to both Good Samaritan laws and redistributive taxation.

Second, the concept of property itself refers to a number of distinct relationships between people and the world,[178] including family homes,

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grows in a culture committed to arguments by analogy, slippery slopes, following 'precedent,' and generalization—the standard 'virtues' of legalism.").

175. KELMAN, *supra* note 173, at 270.

176. EPSTEIN, *supra* note 3, at 324.

177. Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 890–91 & n.38 (1976).

178. Grey, *supra* note 59, at 28 ("In general, to consider property rules in either functional or historical terms tends to demystify what remains a powerfully evocative idea, one that if left unexamined can subsume under the single term 'private property' such very different social and political phenomena as the immunity of large corporations from government regulation on the one

businesses, personal property, and intellectual property. This broad categorization has led commentators and courts to assume that aspects of property law doctrine applicable to one type of property are necessarily applicable to another, despite readily understandable differences between types.[179]

Justice Holmes identified such an example in his dissenting opinion in *Truax v. Corrigan*.[180] In that case, the Court struck down a statute permitting peaceful labor picketing on the ground that it unconstitutionally intruded upon the business owner's property rights.[181] "By calling a business 'property,'" Holmes argued, "you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed."[182] Although a business is property, Holmes maintained it can be differentiated from typical real estate holdings: "[Y]ou cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm."[183]

A proper analysis of the right to exclude with respect to business property should not simply assume that the reasons that society, for example, permits homeowners to exclude people from their living room apply to business owners. To be sure, there are similarities. The general understanding that one need not dedicate private property to advance the cause of another applies to a homeowner and a business owner.[184] But the privacy concerns of homeowners are generally stronger than those of business owners.[185] The right to exclude might also be more applicable to the homeowner because, in Margaret Radin's words, a personal residence "appear[s] more closely connected with personhood" than business property generally opened to the public.[186]

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hand and the ordinary person's expectation of secure possession and free use of personal belongings on the other.").

179. *See supra* Part IV.A.

180. 257 U.S. 312, 342 (1921) (Holmes, J., dissenting).

181. *Id.* at 328, 330.

182. *Id.* at 342 (Holmes, J., dissenting).

183. *Id.* at 342–43.

184. Kelman, *supra* note 174, at 1837–38.

185. *Id.* at 1837.

186. MARGARET JANE RADIN, *Diagnosing the Takings Problem*, *in* REINTERPRETING PROPERTY 146, 156 (1993). Radin argues:

> If property is fungible (for example, a large shopping center), we might find that a statute permitting political speech on the claimant's property is not a taking, even though it appears to be literally a government action permitting a physical incursion into the claimant's space and a limit on the claimant's right to exclude. On the other hand, a

3. *The Special Case of the Concept of a Legal Right*

The ability of language to mask differences between similarly named concepts is at its most powerful when we deal with concepts grouped together as rights. This is true because categorizing something as a right necessarily discourages careful reflection on the merits of a particular claim. If one has a right to an attorney, for example, it matters little that a particular guilty defendant wants to exercise that right to avoid lawful punishment for a crime. A right can be used for any purpose, good or bad. As Mark Kelman has explained, "a *right* is that sort of claim that trumps particularistic dialogue about the purpose of allowing or disallowing a claim or (falsely) presupposes that some general purpose is in fact met in each case covered by the right."[187]

Although treating the right to counsel, for example, as inviolate, and strictly scrutinizing any alleged infringement may well be appropriate given the content of that right, property rights serve very different purposes. That we categorize both as rights does not conclusively establish that similar scrutiny is appropriate for each.[188] Strong property rights advocates must go further and grapple with the distinct interests involved, demonstrating that strict judicial scrutiny will serve the particular property interests at issue as well as it serves the particular liberty interest they are using as the basis for comparison.

Brennan, Rehnquist, and Brown do not meet this test. They equate the compensation question under the Takings Clause with liberty interests threatened by police–citizen encounters, limitations on free speech, and invasions of privacy.[189] But these rights differ from property rights in a fundamental way. Although I am less confident of my ability to articulate this distinction than of the other points raised in this Article, each of these liberty rights seems to mediate a one-to-one relationship between person and government. The extent to which government can detain us, cut off avenues for speech, and invade private areas is a true individual interest that exists whether or not we are interacting with others. Property rights, by contrast, are communal. Although some personal property may be truly private, much of it is shared in fundamental ways. Our homes are on view for the neighborhood, and friends and door-to-door solicitors regularly visit. We share rides in our cars and

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> similar statute directed against homeowners might more readily be understood as a taking.

Id. (footnote call number omitted).

187. KELMAN, *supra* note 173, at 274. Of course, one can imagine defeasible rights. Grey, *supra* note 177, at 885. A related and more pervasive difficulty often arises because legal terms tend to have lay meanings that influence their use even in legal contexts. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 21–23 (1913).

188. Kelman, *supra* note 174, at 1838.

189. *See supra* Part IV.A.

interact with others driving their cars in the street. The lines between what must be shared and what can be separated permeate everything that we do. In truncating their conception of property as a function of individual–government interaction, the Justices effectively mask the role that property plays in constituting a community.

C. Liberty and Property in Concrete Cases

The prior section criticizes the Brennan–Rehnquist–Brown rhetoric for failing to take account of differences between the property rights and the liberty rights subsumed in their analyses. Recognizing a difference—particularly one that may not be fully articulated—does not establish that different treatment is appropriate. Strict scrutiny could, in theory, be appropriate for both property and liberty claims despite the differences between them.

As discussed below, the Court itself has effectively rejected that possibility. When faced with cases requiring the Court to apply property and liberty interests in concrete situations, the rhetoric of parity has lost much of its persuasiveness and the Court has accorded greater protection to liberty interests.

1. Equal Access to and Free Speech in Quasi-Public Areas

When business owners generally permit the public to use their property, but seek to exclude a particular individual (1) based on an immutable trait such as race or (2) because the individual seeks to engage in free speech, liberty and property rights clash in a much more concrete way than in the three cases addressed in Part IV.A. The right to exclude is central to an owner's property rights.[190] Individual liberty generally does not permit one to invade the property of another. A homeowner may thus exclude some and admit others to the home for any reason at all and regulate the behavior of those who are admitted with the threat of expulsion.[191] Property rights trump any liberty interest.

When dealing with business property generally held open to the public (i.e., quasi-public property), the liberty interests of those wishing to use the property may be stronger and the property interests of the owners weaker. In these types of cases, the Supreme Court has privileged liberty by refusing to find a federal constitutional mandate protecting the property owner's right to exclude.

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190. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (describing the right to exclude as "one of the most essential sticks in the bundle" of property rights).

191. *See* Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 161 (Wis. 1997) (awarding punitive damages for trespass on non-business property despite no actual damage); *cf.* State v. Shack, 277 A.2d 369, 372–73 (N.J. 1971) (finding property rights not broad enough to prohibit trespass to provide information and government services to migrant workers living on business property operated as a farm).

With respect to access, courts have widely rejected Due Process and Takings Clause challenges to state and federal civil rights acts that compel owners of business property generally held open to the public to admit everyone regardless of race.[192] With respect to free speech rights on quasi-public property, the situation has been more complex but no less definitive. In *Marsh v. Alabama*,[193] the Court upheld the right to distribute religious literature in a privately owned company town.[194] "When we balance the [c]onstitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here," Justice Black wrote for the Court, "we remain mindful of the fact that the latter occupy a preferred position."[195]

Subsequently, the Court rejected the notion that free speech rights trump the property interests of owners of small scale quasi-public property, such as shopping centers.[196] These decisions, however, held only that the scope of the liberty interest embodied by the First Amendment did not, of its own force, extend the right to speak to small scale quasi-public property. Importantly, the Court did not hold that the Constitution forbids governmentally required access for free speech purposes. The Court made this distinction clear by unanimously upholding California's decision to permit free speech activity within privately owned shopping centers.[197]

2. *Property and Liberty in Criminal and Quasi-Criminal Proceedings*

Criminal law raises interesting conflicts among rights because deprivations of liberty (e.g., prison sentences) and property (e.g, fines) are both part of the criminal process. In cases dealing with the bedrock rights of the accused—appointed counsel, trial by jury, and the privilege against self-incrimination—the Court has often considered whether criminal procedure rights apply equally

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192. The Court has specifically rejected both Due Process and Takings Clause challenges to civil rights acts mandating access to private property. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259–60 (1964) (explaining that the Court has repeatedly held that "such laws do not violate the Due Process Clause of the Fourteenth Amendment" and that at least thirty-two states had civil rights laws mandating access to private property); *id.* at 261 (rejecting takings claim).

193. 326 U.S. 501 (1946).

194. *Id.* at 509.

195. *Id.* (citing Follett v. Town of McCormick, 321 U.S. 573, 577 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Jones v. City of Opelika, 316 U.S. 584, 608 (1942), *vacated by* 319 U.S. 103 (1943)).

196. Hudgens v. NLRB, 424 U.S. 507, 518–20 (1976) (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 556–70 (1972)), *overruling* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

197. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (upholding a state court decision against a property clause challenge and finding constitutional a state law permitting distribution of leaflets on private shopping center property).

to cases in which only the defendant's property is at stake.[198] In each situation, the Court has protected liberty more vigorously.

a. Counsel and Juries

Criminal prosecutions seeking to impose fines—no matter how large—and the reputational injury commensurate with a criminal conviction—no matter how severe—do not trigger the core constitutional rights to court appointed counsel[199] and trial by jury in a criminal case.[200] Instead, both core rights apply only when at least some level of imprisonment threatens the defendant's right to liberty.

With respect to counsel, the Constitution provides no right to court appointed legal assistance in civil cases even though large property interests are at stake. In criminal cases, the right to appointed counsel[201] does not apply to every case.[202] Where a defendant is sentenced to serve time—or to probation that could result in the deprivation of liberty—no matter how short the duration, the government must have provided appointed counsel to an indigent defendant or the conviction cannot stand.[203] By contrast, where a court limits its punishment to a deprivation of property, a criminal fine denying appointed counsel to an indigent defendant is constitutional. Justice Rehnquist wrote for the Court, "[W]e believe . . . that actual imprisonment is a penalty different in kind from fines . . . and [thus] warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel."[204]

In deciding whether the Constitution requires a jury in a criminal case, a court must decide whether society finds the crime serious enough to trigger the right.[205] The Supreme Court uses an objective test that asks whether the

198. *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that the Constitution requires the right to counsel only if a state actually incarcerates a defendant).

199. *See* cases cited *infra* notes 202–204.

200. *See infra* notes 205–207 and accompanying text.

201. *See* Gideon v. Wainwright, 372 U.S. 335, 339–45 (1963).

202. *Scott*, 440 U.S. at 373.

203. Alabama v. Shelton, 535 U.S. 654, 662 (2002) (holding that a defendant must have appointed counsel to receive a suspended or probated prison sentence); Glover v. United States, 531 U.S. 198, 203 (2001) ("[A]ny amount of actual jail time has Sixth Amendment significance."); Nichols v. United States, 511 U.S. 738, 746 (1994) ("[T]he [constitutional] line [is] between criminal proceedings that resulted in imprisonment, and those that did not." (citing *Scott*, 440 U.S. at 372)); *Scott*, 440 U.S. at 373–74.

204. *Scott*, 440 U.S. at 373.

205. Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968) ("Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for *serious offenses* is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.") (emphasis added).

legislature has set the maximum punishment upon conviction at a length of imprisonment greater than six months.[206] In making this inquiry, the Court has not looked to the level of any fine or other governmental deprivation of property:

> In evaluating the seriousness of the offense, we place primary emphasis on the maximum prison term authorized. While penalties such as probation or a fine may infringe on a defendant's freedom, the deprivation of liberty imposed by imprisonment makes that penalty the best indicator of whether the legislature considered an offense to be "petty" or "serious."[207]

b. Privilege Against Self-Incrimination

The Constitution provides a privilege against self-incrimination in federal criminal cases,[208] and the Court extended that provision to state prosecutions because the Court deemed the provision essential to protect the liberty interests at stake when an individual faces incarceration.[209] Although the right applies in all criminal cases, no similar right exists in civil cases no matter how significant the potential damages.[210]

To be sure, the privilege against self-incrimination is sometimes available to defendants in non-criminal cases, but only to the extent necessary to protect

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206. Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) ("Our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." (citing Baldwin v. New York, 399 U.S. 66, 69 (1970); Frank v. United States, 395 U.S. 147, 149–50 (1969))).

207. Lewis v. United States, 518 U.S. 322, 326 (1996) (citing Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989)). In civil trials, courts tend to require juries in cases involving damages, obviously a property issue, but not in cases seeking equitable relief, which may involve liberty interests (e.g., an equitable order to refrain from certain conduct) or property interests (e.g., an order to surrender a particular piece of property). *See* Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1179–80 (1961). Unlike criminal cases, however, where the guilty decision is essentially the same irrespective of remedy, civil actions at law and civil actions in equity raise different remedial questions. The distinction with respect to juries in civil cases probably resulted from a sense that chancellors could respond more appropriately than juries to equitable claims rather than from a belief that property rights were entitled to greater protection than liberty rights. *Id.* at 1179–82.

208. U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . .").

209. Malloy v. Hogan, 378 U.S. 1, 9 (1964) (incorporating the privilege against self-incrimination into the Due Process Clause of the Fourteenth Amendment and noting the privilege as one of the "principles of a free government" (quoting Boyd v. United States, 116 U.S. 616, 632 (1986), *abrogated by* Fisher v. United States, 425 U.S. 391, 407–08 (1976))).

210. *In re* Gault, 387 U.S. 1, 49 (1967) (privilege only applies to criminal sanction).

the witness's liberty interests in a threatened future criminal prosecution.[211] In criminal cases, the prosecution is prohibited from urging the jury to draw a negative inference from the defendant's failure to testify.[212] In a civil case, by contrast, an attorney may urge the jury to rule in favor of the plaintiff and thereby impinge the defendant's property rights because the defendant failed to testify.[213] The privilege scrupulously protects liberty interests; property interests in civil cases do not receive similar protection. In Justice White's terms, "in criminal cases . . . the stakes are higher . . . ."[214]

c. Civil Forfeiture of Property Used in the Commission of a Crime

In civil forfeiture proceedings, the government takes possession and ownership of private property used in the commission of crime.[215] Unlike criminal proceedings, in which the government must prove guilt beyond a reasonable doubt,[216] in civil forfeiture proceedings the government need satisfy only a preponderance of the evidence standard.[217] Further, the government may take property owned by an individual who had no fault with respect to the criminal activity without paying any compensation.[218]

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211. Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)); *cf.* Ullmann v. United States, 350 U.S. 422, 430–31 (1956) (quoting Hale v. Henkel, 201 U.S. 43, 67 (1906)) (rejecting the argument that immunity should not overcome the privilege because property-based ramifications such as loss of job may still occur).

212. Griffin v. California, 380 U.S. 609, 615 (1965).

213. *Baxter*, 425 U.S. at 318 ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . . ."). Civil litigants may also lose their property right to assert a claim if they remain silent about it during civil litigation. FED. R. CIV. P. 13(a) (requiring certain claims to be filed as a counterclaim or waived).

214. *Baxter*, 425 U.S. at 318–19; *see* Christopher V. Blum, Comment, *Self-incrimination, Preclusion, Practical Effect and Prejudice to Plaintiffs: The Faulty Vision of* SEC v. Graystone Nash, Inc., 61 BROOK. L. REV. 275, 275 (1995) ("[In a criminal prosecution] the defendant may lose his freedom, not just property." (citing *Baxter*, 425 U.S. at 318–19)).

215. *See* Davis v. United States, 328 U.S. 582, 618–20 (1946) (listing federal statutes authorizing seizure of contraband).

216. *In re* Winship, 397 U.S. 358, 364 (1970).

217. The Court has repeatedly affirmed the legitimacy of differing burdens of proof in permitting civil forfeiture to proceed over double jeopardy and collateral estoppel objections where an owner was not convicted of the underlying crime. Dowling v. United States, 493 U.S. 342, 359–60 (1990); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235–36 (1972).

218. Bennis v. Michigan, 516 U.S. 442, 446–50 (1996) (basing decision on precedent dating back to 1827).

Each of these examples confirms that the Court scrutinizes claims more carefully when individual liberty is at stake than when the government threatens property interests.

V. THEORETICAL ANALYSIS SUPPORTING STRONG PROPERTY RIGHTS

Although neither history nor current legal doctrine compels a regime of strong property rights, legal scholars have increasingly sought to justify one on both natural law and utilitarian underpinnings. Natural law theorists argue that individuals have prepolitical rights to property that governments are morally obligated to protect regardless of the consequences of doing so.[219] Coincident with the rise of the modern property rights movement, an explicitly consequentialist, utilitarian justification has emerged for strong property rights. Adherents to this view maintain that even one who believes that all rights flow from government should favor strong property rights because these rights in fact produce a society that is better for everyone.[220]

A. Natural Rights Justifications for Strong Property Rights

Natural rights theorists define the concept of property as a prepolitical, presocial right to acquire, use, and dispose of things or intangibles.[221] Adherents to this view contend that "government does not *create* justice; it merely recognizes and enforces natural rules of right and wrong."[222] Commentators have advanced at least four variants of this theory. First, commentators make a rather crude all-or-nothing argument that since the failure to recognize any property rights would fail to respect individual human dignity, a strong property

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219. These theorists typically cite Locke's philosophy, in which "citizens retain certain inalienable rights, held in the pregovernmental state of nature, that the state may not abridge." Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1296–97 (1982). Theorists contrast this view with a "Hobbesian or 'positivist' version, [in which] citizens entering into civil society relinquish all natural rights and possess only those rights granted by legislatures and other lawmaking institutions." *Id.* at 1297.

220. The Court has debated these competing views of property. *Compare* Truax v. Corrigan, 257 U.S. 312, 328–30 (1921) (Taft, C.J.) (striking down a statute permitting peaceful labor picketing on the ground that it infringes inherent property rights of business owners), *with id.* at 342–44 (Holmes, J., dissenting) (arguing that government should have the constitutional flexibility to regulate business in the public interest), *and id.* at 354–55 (Brandeis, J., dissenting) (explaining that the right to carry on business may be property but is subject to legislative and judicial regulations which set the rules for competition and noting that these rules change with changing conditions).

221. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 171 (1974); Claeys, *Natural Property Rights*, *supra* note 12, at 1560–61, 1568.

222. SANDEFUR, *supra* note 11, at 52.

rights regime is morally compelled.[223] A second version focuses on the legitimacy of government power, arguing that government cannot possess powers that individuals do not.[224] A third argument draws on Locke's labor theory of property,[225] and a fourth contends that strong property rights are essential to individual personality.[226]

The standard counterarguments to natural rights theories are well known and apply fully to each of the arguments for strong property rights. First, there cannot be natural rights because there is no objective way to determine what they are; there is no agreement among individuals.[227] Second, even if there were agreement on a particular set of core rights, it would be contingent on the culture, law, and custom of a particular society rather than inherent or natural.[228]

This section sets out and critiques the specific natural law arguments advanced by strong property rights advocates.

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223. *See infra* Part V.A.1.

224. *See infra* Part V.A.2.

225. *See infra* Part V.A.3.

226. *See infra* Part V.A.4.

227. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting) ("All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community."); OLIVER WENDELL HOLMES, *Natural Law*, *in* COLLECTED LEGAL PAPERS 310, 312 (1920) ("The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."); JOHN RAWLS, A THEORY OF JUSTICE 578 (1971) ("For while some moral principles may seem natural and even obvious, there are great obstacles to maintaining that they are necessarily true, or even to explaining what is meant by this. . . . There is no set of conditions or first principles that can be plausibly claimed to be necessary or definitive of morality and thereby especially suited to carry the burden of justification.").

228. Cass Sunstein's *Democracy and the Problem of Free Speech* contains an accessible discussion of this point. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 30–32 (1993). Sunstein cites Franklin Delano Roosevelt's reference to "this man-made world of ours" which signifies that institutions such as private property and free markets, which we experience as naturally "prepolitical and presocial," are in fact products of legal systems that we have created. *Id.* at 30. We tend to experience existing institutions as independent of government and regulation of those institutions as government action. *See id.* at 31. In fact, the existing institution is as much a product of government as a new regulation would be. *See id.* Individual effort and voluntary agreement, of course, are far from irrelevant to one's property holdings, *see id.* at 30, "[b]ut the reward of a certain definition of 'effort,' and the protection of that reward by the state, were emphatically legal." *Id.* at 30–31. To recognize that law shapes our understanding of property is not to say that we should reject it. *See id.* at 32. On the contrary, our society created our system of property to better the human condition. But just as society made the choice to construct the property system we have today, it can choose to alter that system. There is no law of nature preventing the change. *See id.* The issue is whether the change will in fact better society, not whether the change will undo some natural arrangement. *See id.* at 31–32.

1. All-or-Nothing

A surprisingly prevalent defense of strong property rights conceptualizes only two potential legal regimes: one of extremely strong protection and one with virtually no protection at all.[229] The argument generally proceeds as follows: (1) societies with little regard for private property, such as socialist Eastern Europe, experienced shortages of goods because market forces could not operate efficiently; (2) to live in conditions of scarcity regardless of individual effort is an affront to human dignity; and therefore, (3) strong private property protection is a moral imperative.[230]

This argument conflates the correlation between the affront to human dignity in totalitarian regimes and the lack of respect for property that those regimes generally demonstrated. But the two are not necessarily dependent on each other. One can imagine a regime of strong property rights that showed little respect for human dignity. A wildly inegalitarian society such as the antebellum South, for example, had a regime of relatively strong property rights but nonetheless compensated labor extremely poorly and obviously failed to respect human dignity.[231] It is the humanity of the governmental system, not just the approach to property, that matters.

This defense of strong property rights rejects the notion that a society might develop some intermediate degree of property protection through its law, custom, and culture as just a slip away from a regime of no property rights at all. "Played out to its logical conclusion," Sandefur has argued, the notion that property rights are contingent

> means that when a burglar breaks into a person's house, that person's feelings of humiliation and fear exist only because our society has

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229. This view is reflected in the following quote: "History furnishes no instance where the right of man to acquire and hold property has been taken away without the complete destruction of liberty in all its forms." WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 347 (1973) (quoting Letter from John W. Davis to C.E. Berridge (Sept. 13, 1934) (on file with the Sterling Library of Yale University)); *see also* SANDEFUR, *supra* note 11, at 49 ("[D]iminishing property rights causes many of the same effects as abolishing them, only on a smaller scale."). Epstein's declaration that law cannot fairly apportion property among those contributing to its creation arises from a similar all-or-nothing view. Epstein, *Liberty Versus Property?*, *supra* note 12, at 7–10 (arguing that we must choose between awarding property exclusively to the one with the greatest claim or face arbitrariness that will lessen property's value for all).

230. *See* SANDEFUR, *supra* note 11, at 14–19 (using the Shakers and Marxist Russia as counterpoints to a private property regime); *id.* at 38 (suggesting that a society that takes property from one and gives to another is like Communist East Germany in that it is unable to rely on market pricing to distribute resources).

231. *See* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 226–27 (1999).

> declared that burglary is illegal—not because the victim's personal rights have been violated. Society could just declare that burglary will now be permitted, and then the victims would not feel violated.[232]

This form of reasoning adopts an unrealistically narrow view of the relationship between society and law. It posits a false choice: Either society plays no role whatsoever because all rights are innate and natural, or existing social structures perfectly and fully determine individual personality at the moment that they are enacted. Any change in law would thus instantaneously transform societal attitudes. Those advancing this argument presumably intend the latter option to appear so preposterous that the former must be true.

The relationship between societal attitudes and law is much more complex, combining both deep, if not inalterable, notions of morality with welfare analysis.[233] Attitudes are not dictated instantaneously as legislatures pass laws and courts decide cases, but law, along with culture and custom, nonetheless contributes to social attitudes about property.[234] Once social expectations develop with respect to a certain degree of property rights, simply changing the law cannot eliminate them.[235] That attachments are sticky, however, does not mean that they are natural or that they could not change over time.[236]

One might imagine a society in which theft was lawful. In such a society, property owners would take greater steps to protect their property. A victim of a burglary would regret not taking more effective precautions, but would not necessarily feel violated in the way that burglary victims do in American society today.

Such a society might seem far-fetched. But it has existing analogs. Consider the approach used by some high-end dealers in antiquarian books: paying a small fraction of market value for a collection by exploiting the current owner's ignorance.[237] A less extreme example is car dealers who make varying offers

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232. SANDEFUR, *supra* note 11, at 20.

233. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1866–67 (2007) ("[S]uccess in justifying an institution on utilitarian grounds does not foreclose a role for deontology in the institution. This can be seen in the case of those rights that have even stronger prelegal moral intuitions backing them—civil and human rights. Rights not to be killed or subject to violence clearly serve an important function in society and are obviously welfare-increasing. But this is not to say that this is all there is to such rights, that people generally think about them in these terms, or that they make decisions involving them using utilitarian calculus.").

234. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 60–65 (1984).

235. *See* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 641–42 (1996).

236. *See id.* at 642.

237. Umberto Eco explained the book buying process as follows:

depending on race or gender.[238] One who is exploited by a book buyer or car dealer would likely feel foolish, but not violated in the way that a victim of a burglary does.

Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Council*[239] demonstrates that a society has choices with respect to how strongly to protect property rights. There, the Court held that even where a regulation strips property of all economic value, an exception to the compensation requirement exists where background property principles support the regulation.[240] Although Justice Scalia referenced common law nuisance, an historical ground, as the source of government power,[241] it is now clear that these principles are not limited to historical rules but can develop as a society's view of property rights evolves.[242]

> [A]ntiquarian book dealers . . . have certain methods of procuring books. . . . [T]here is the vulture method. You identify the great families in decline, with . . . the ancient libraries, and you wait for a father to die, a husband, an uncle, at which point the heirs already have their hands full selling the furniture and the jewels, and they have no idea how to appraise that hoard of books they have never examined. . . . Then you go look at the books, spend two or three days in those great shadowy rooms, and formulate your strategy. . . . Typically you find two or three hundred volumes of no value: you immediately spot the various [books of little or moderate value].

UMBERTO ECO, THE MYSTERIOUS FLAME OF QUEEN LOANA 56–59 (Geoffrey Brock trans., Harcourt, Inc. 2005) (2004). Eco continues that after carefully searching, the dealer may find a few books of great value. *Id.* at 57–58. The dealer then says to the owner that there is "a lot of stuff here, but none of it [is] worth much." *Id.* at 58. The dealer then makes a low ball offer, knowing the buyer will reject it, following up with an even lower offer for the ten most valuable volumes. *Id.* at 58–59. The owner accepts it because it seems like a lot of money for a small number of books compared with the prior offer for the entire library. *Id.* at 59. The opening scene of *The Ninth Gate* also depicts such a book buying scam. *See* Todd R. Ramlow, *Ars Diavoli*, POPMATTERS, http://www.popmatters.com/film/reviews/n/ninth-gate.shtml (last visited Oct. 10, 2008) ("Dean Corso (Johnny Depp) is an unscrupulous rare book dealer who, in the opening scenes, we first see swindling (what we presume is) an Alzheimer victim's family out of a priceless edition of Cervantes' *Don Quixote*.").

238. *See* Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 110 (1995) ("[D]ealers systematically offer lower prices to white males . . . .").

239. 505 U.S. 1003, 1024–25 (1992).

240. *Id.* at 1027–28 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

241. *Id.* at 1030–31; *see also id.* at 1054–55 (Blackman, J., dissenting) (suggesting that the Court intended to look historically to common law nuisance and perhaps other similarly well established common law doctrines).

242. In *Lucas*, the Court indicated that background property principles were not static. *Id.* at 1027 ("[O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."); *id.* at 1035 (Kennedy, J., concurring in judgment) ("[Citizens'] reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962))). The Court confirmed the dynamic nature of background property principles nine

2. *Natural Limits on Government Power*

A variant of the all-or-nothing natural rights theory argues that, even if regimes with intermediate levels of property protection are feasible, they would be illegitimate.[243] Within a natural rights framework, the role of the government is the minimalist one of ensuring that individuals can enjoy their property without outside interference.[244] The government can act only as individuals have authorized it to act and, critically, individuals can authorize no more than they could do themselves.[245] "Government officials," Sandefur explains, "must obey the same rules when dealing with us that other people must obey; constitutional law limits their treatment of us just as tort law regulates the way that private citizens may interact with us—their authority is limited by our rights."[246] Put another way, the government can ask individuals to cover the cost of the services the government provides, but it may not exact payment for the benefits of having a government.[247]

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years after *Lucas* when Justice Kennedy explained for the Court that a property principle could arise from any regulation or common law rule that relied on "those common, shared understandings of permissible limitations derived from a State's legal tradition." Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).

243. LOCKE, *supra* note 50, at 378.

244. *Id.*

245. *Id.* at 305–06, 375–76; *see* EPSTEIN, *supra* note 3, at 331 ("[T]he state's rights against its citizens are no greater than the sum of the rights of the individuals whom it benefits . . . . All questions of public right are complex amalgams of questions of individual entitlements . . . ."); *see also id.* at 36 ("On Lockean principles the government stands no better than the citizens it represents on whether property has been taken . . . ."). In modern philosophy, Robert Nozick provides the classic defense of this view of government. NOZICK, *supra* note 221, at ix ("[A] minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified . . . ."); *id.* at 32–33 ("Why not . . . hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good? . . . [Because t]here are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. . . . To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.") (footnote call number omitted).

246. SANDEFUR, *supra* note 11, at 53; *see also* EPSTEIN, *supra* note 3, at 12–13 ("Every transaction between the state and the individual can thus be understood as a transaction between private individuals . . . .") (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980); LOCKE, *supra* note 50, at 375); *id.* at 36 (explaining that a governmental taking of private property occurs whenever the same action, if performed by a private party, would be treated as a taking); SANDEFUR, *supra* note 11, at 22 ("Each person is in charge of his own life and the fruits of his labor[, and] the government exists simply to ensure that people respect each other's rights.").

247. *See* EPSTEIN, *supra* note 3, at 9–10.

So limited, the government can only protect property from trespass and conversion because the individual has the right to protect his own property. Just as an individual has no claim on the property of another, the government cannot legitimately redistribute income either through progressive taxation and welfare payments or through its use of the Takings Clause to eliminate blighted property or spur economic development.[248]

This version of the natural rights theory of property must rest on the notion that individuals would never consent to empower a government to do what individuals cannot for fear that the government would exploit that power to the detriment of the individual.[249] It is far from clear, however, why this must be so.[250] Many individuals (for example, Mother Teresa or Albert Schweitzer) choose to give their life for the betterment of their society or even other societies. Though many give from their excess, an appreciable number give from their need. Soldiers, not of fortune, provide the most common example.

Further, individuals tend to be less willing to spend what they have in order to advance a social cause than they would agree to defer to advance that same cause.[251] For example, many people would refuse to give up half of their net worth to provide AIDS medicine to sick people in Africa. Yet, these same individuals would reject an offer of the same amount of money if they knew that, as a consequence of their accepting, the AIDS medication would not be distributed. This offer–asking price difference could lead reasonable people to prefer government redistribution of property because these people know that once they control the resources, they will not use them to advance social causes that they are happy to have the government support with their tax dollars.[252]

Since individual sacrifice is conceivable and admirable, and enlisting the government to do good works on one's behalf is a reasonable option, an alternative to the natural rights world view is also conceivable. Under this alternate view, individuals might recognize their own weakness—their own inability to make personal sacrifice for the betterment of their society.

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248. *See id.* at 179, 296–303, 324; SANDEFUR, *supra* note 11, at 120.

249. This argument often finds support in dicta from the early case *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.").

250. Support for this view is said to be found in the common law's refusal to force partnerships. *See* Epstein, *Liberty Versus Property?*, *supra* note 12, at 13 ("[R]elationships of trust do not work well between individuals who are brought together by happenstance and chance.").

251. *See* E.J. MISHAN, *A Survey of Welfare Economics, 1939–1959*, *in* WELFARE ECONOMICS: FIVE INTRODUCTORY ESSAYS 3, 68–72 (1964); C. Edwin Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381 (1978); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 26–27 (1975); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 678–95 (1979).

252. *Proceedings*, *supra* note 15, at 160–61 (statement of Mark Kelman).

Nevertheless, they may see the virtue in sacrifice and thus agree to extend powers to the government, allowing it to compel some contribution from individuals for the betterment of society. In this regard, progressive taxation—particularly at current levels in the United States—seems a minor sacrifice compared with something like forced military service in a combat zone.

3. Respect for the Body and Derivative Labor

A more sophisticated version of the natural rights theory of strong property rights draws on Locke's theory of property, under which individuals are entitled to retain what they produce.[253] Adherents of this view argue that individuals have a moral entitlement to their own person and capabilities and a moral obligation to use their talents to produce that which is necessary for humans to fully flourish.[254] As Adam Mossoff has explained, "the right to one's life, limbs and liberty is an *exclusive right*" that "*cannot be similarly possessed* by any other party."[255] The property produced by one's body is then seen as "morally equivalent to one's (exclusive) right to life and liberty."[256] Further, the production of property through labor, in Mossoff's words, "creates the products necessary for him to live."[257] Individuals are thus morally required to use their labor productively and morally entitled to keep the fruits of that labor.[258]

The traditional counter to Lockean labor theory is that it artificially imagines an individual alone with nature and postulates that what a lone individual creates is rightly his own.[259] However compelling that logic may be, it bears little resemblance to the real world in which no one stands alone. Anything that an individual creates builds on the labor of others and adds to the foundation on which others will build.[260] That one may be entitled to keep what

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253. LOCKE, *supra* note 50, at 305–06 ("Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.").

254. Mossoff, *supra* note 24, at 383.

255. *Id.* at 384 & n.47 (quoting Hugo Grotius, De Iure Praedae Commentarius, *in* 1 THE CLASSICS OF INTERNATIONAL LAW 227 (James Brown Scott ed., 1995) (1604)).

256. *Id.* at 384; *see id.* at 396 ("[T]he integrated theory explains why we are interested in excluding people from these possessory rights: because they represent fundamental entitlements pre-existing civil society and legal rules.").

257. Mossoff, *supra* note 46, at 160.

258. Mossoff, *supra* note 24, at 383 (quoting Grotius, *supra* note 249, at 322).

259. *See id.*, at 389–91.

260. John Rawls recognized that the distribution of goods depends on talents and abilities that are shaped "by social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious injustice of the system of natural liberty is that it permits

he needs to survive or even flourish does not mean that one is morally entitled to all of the excess that he generates.

This critique can be extended by recognizing that even our bodies are not exclusively our own. In a shallow sense, of course, we cannot literally share a part of our body with another. It surely seems natural that no one may cut off another's arm without consent. But in a more practical and fully formed sense, we are morally compelled to share our bodies. Our babies have a moral claim on our arms to carry them and a mother's breast to feed them. We are obliged to care for the sick members of our families.[261] We may substitute money for our own bodies because we are not all equivalent caregivers, but the moral obligation is real nonetheless. We are thus morally compelled to share our own bodies with others in an intimate way, and one, therefore, cannot reason to an exclusive right to the product of one's labor from some theory of absolute right to our own bodies.

4. Natural Rights in Personality

An alternative natural rights theory posits property as essential to personality.[262] Only by using our capabilities to create do we constitute ourselves as free individuals. Without property rights in our creations, this argument runs, we cannot be ourselves in the fullest possible sense.[263] This position justifies the freedom to create, but not private property. Much of what we create is not property. Like a drawing in the sand, erased by the wind and surf, our impression on our children, and indeed everyone around us, is most fundamental to self-creation. Yet, it leaves us as soon as we act. Our inability to capture our effect on the world is not fatal to our ability to form our personality. The same is true for tangible creations.[264]

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distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view." RAWLS, *supra* note 227, at 72. Even if efforts are made to control socially contingent factors such as educational opportunity, the distribution of wealth is still "to be determined by the natural distribution of abilities and talents. . . . [D]istributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective." *Id.* at 74.

261. Courts sometimes even legally enforce this duty. *See* Swoap v. Superior Court, 516 P.2d 840, 852 (1973) (upholding the constitutionality of a law requiring support payments by adult children for government aid given to their needy parents).

262. G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT 48 (S.W. Dyde trans., Prometheus Books 1996) (1896) ("A person must give to his freedom an external sphere, in order that he may reach the completeness implied in the idea.").

263. *Id.* at 53 (explaining that property is the embodiment of personality).

264. *See* Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, *in* COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 43, 57–68 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2002).

B. Consequentialist–Utilitarian Justifications for Strong Property Rights

In part because of weaknesses in natural rights theories, movement adherents now advance a consequentialist–utilitarian defense of strong property rights.[265] This approach replaces a sense of moral entitlement to the fruits of one's labor with a confidence that strong property rights will in fact redound to the benefit of society in more explicit welfare terms.[266] Adherents of this view sometimes reason that a strong property rights regime creates certainty that benefits society directly by reducing risk bearing costs and indirectly by spurring greater productive efforts than would occur in a regime with more uncertain government intervention.[267]

Alternatively, a consequentialist may articulate empirical evidence that a strong property rights regime in fact serves a society's interest better than a more interventionist scheme.[268] Those commentators claiming to offer such a justification, however, tend to fall back on debunked assumptions about certainty and fail to rebut empirical claims that strong property rights would have significant negative effects.[269]

1. Certainty and Incentives as a Consequential Benefit of Strong Property Rights

A consequentialist proponent of strong property rights concedes that productive creativity cannot be attributed to individual effort alone. Rather, each of us stands on the shoulders of the giant that is our society and that makes our creations possible.[270] Nevertheless, we assign property rights based on mere possession, regardless of individual effort, to create a more certain regime that provides incentives for individuals to convert unproductive assets into property.[271] "[T]he real task," Epstein argues, "is to adopt a rule that requires as

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265. SANDEFUR, *supra* note 11, at 31–38; Epstein, *Author's Retrospective*, *supra* note 12, at 417; Epstein, *Liberty Versus Property?*, *supra* note 12, at 28 ("[F]or years now, my own private campaign has been to insist that the strength of the natural law theories rested on their implicit utilitarian (broadly conceived) foundations, which require some empirical evaluation of why given institutions promote human flourishing, and through it—general social welfare.").

266. Epstein, *Liberty Versus Property?*, *supra* note 12, at 28.

267. *See infra* Part V.B.1.

268. *See infra* Part V.B.3.

269. *See infra* note 295.

270. RAWLS, *supra* note 227, at 72.

271. EPSTEIN, *supra* note 3, at 11; SANDEFUR, *supra* note 11, at 37 ("By rewarding people for their hard work, private property rights create incentives for people to exchange those rights in productive pursuits that ultimately benefit society in general."); Epstein, *Law Versus Property?*, *supra* note 12, at 12–14. *But see* Terry L. Anderson & Peter J. Hill, *Privatizing the Commons: An Improvement?*, 50 S. ECON. J. 438, 444–48 (1983) (arguing that competition for resources can be

little labor as possible . . . so that the owner can be confident that he will be able, by holding on to the external object, to keep the benefit of the labor that he creates."[272] Consequentialist proponents find this approach to be certain because once one passes the relatively modest stage of taking possession, he knows that increases in the value of the property will redound to him. By maximizing the retained value, the strong property rights regime optimizes the incentives to use property productively, thereby benefitting society. Requiring additional effort to obtain property rights, by contrast, would prolong the period of uncertainty and reduce the value of the rights so obtained, thereby reducing the incentive to make the effort.[273] Since such a regime of strong property rights would, ex ante, benefit everyone, its adherents believe it to be Pareto superior[274] to other regimes.

2. *Critique of the Certainty and Incentives Based Defense of Strong Property Rights*

Any system that protects property rights may be Pareto superior to a state of nature.[275] But one making only Pareto optimal trades cannot choose among

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inefficient because it encourages excessive expenditure); Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 395–409 (1995) (modeling conditions under which first possession rules can instigate wasteful racing behavior).

272. Epstein, *Liberty Versus Property?*, *supra* note 12, at 15; *see also id.* at 9–10 ("[T]he consequentialist situation . . . seeks, as I would have it, to create rules that in the long run create win-win situations—call these Pareto improvements—for the vast run of the population. Each of us, ex ante, is better off waiving any inchoate claims against the labor of others on condition that they waive their claims in return. The purpose of this massive renunciation of weak class claims is not to guarantee some perfect allocation of the goods of the universe. It is the more mundane task to identify at low cost clear owners of labor so as to assure the security of investment and exchange that promotes long-term productive wealth."); *see* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 59–63 (1995) [hereinafter EPSTEIN, COMPLEX WORLD].

273. Epstein, *Liberty Versus Property?*, *supra* note 12, at 19 ("[T]he key task of the system is to reduce the [cost] that is required to [obtain] private ownership [because requiring] individuals to expend labor that is equal in value to the property acquired reduces the value of the property to zero . . . [, and] from an ex ante perspective, it is in society's best interest to have as few barriers to the creation of private ownership as possible."); *id.* at 9–10 ("[I]dentify[ing] at low cost clear owners of labor . . . assure[s] the security of investment and exchange that promotes long-term productive wealth."); *id.* at 14–16 (discussing how easy acquisition permits a proper assessment of temporal property development decisions) (citing Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805); LOCKE, *supra* note 50, at 306–07, 316–17).

274. A Pareto superior regime is said to be efficient and stable because no further mutually beneficial trades can be made. Vilfredo Pareto, *Manuel D'Economie Politique*, *in* UTILITY THEORY: A BOOK OF READINGS 168, 175 (Alfred N. Page ed., 1968); *see also* AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 21–22 (K. Arrow et al. eds., 1970) (explaining the concept of Pareto optimality).

275. Whether a system of pure private property was more efficient than a state of nature would depend on a greater number of variables than the state of legal entitlement. *See* Duncan

various property regimes because any move will make some members of the society worse off. For example, those without the means to accumulate substantial amounts of private property would likely be better off in a regime with welfare rights, and those who would fund welfare rights would likely be better off, at least monetarily, in a regime without them.[276]

One might interpret the utilitarian defense of strong property rights as, though perhaps not efficient in the strict Pareto sense, nevertheless providing greater overall utility as a result of systemic benefits in the form of certainty, which is desirable in itself and which facilitates incentives to engage in productive activity. As Duncan Kennedy and Frank Michelman demonstrated in the early 1980s, however, a regime that protects property rights rigorously is not more certain—nor does it necessarily provide greater incentives toward productive activity—than a system with extensive government regulation.[277]

Starting with the incentives point, property rights adherents assert that individuals will work harder if they are certain of keeping what they produce. But that is a hypothesis, not an empirical truth. Individuals may work even harder in a less certain environment to be better prepared if regulation causes them to lose some of their property.[278] Most likely, people will respond to varying degrees of property rights protection in different ways depending on their position in society and tolerance for risk.

As for certainty itself, property rights adherents tend to ignore that a capitalist market economy requires a great deal of coordination to operate efficiently. Where individual property owners have complete control over their property interests, they can act strategically in ways that disrupt the necessary coordination.[279] By contrast, a regime in which the government compels parties to deal with each other may be considerably more certain.[280] For example, a system in which the government treated the sky over privately held land as

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Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 715–39 (1980) (citing JEREMY BENTHAM, THE THEORY OF LEGISLATION 111–14 (C.K. Ogden ed., Fred B. Rothman & Co. 1987) (1931); WILLIAM BLACKSTONE, 2 COMMENTARIES *1, *2; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1, at 27–28 (2d ed. 1977); JEAN JACQUES ROUSSEAU, *A Discourse on the Origin of Inequality*, *in* THE SOCIAL CONTRACT AND DISCOURSES 175, 249–52 (G.D.H. Cole trans., 1950)).

276. Kennedy & Michelman, *supra* note 275, at 716 n.7 (concluding that "it is plain without argument" that Pareto optimality cannot select among state of nature, private property, and enforced sharing government regimes); Peñalver, *supra* note 12, at 435–36 (quoting Richard A. Epstein, *One Step Beyond Nozick's Minimal State: The Role of Forced Exchanges in Political Theory*, 22 SOC. PHIL. & POL'Y 286, 299 (2005)).

277. Kennedy & Michelman, *supra* note 275.

278. *Id.* at 719.

279. *Id.* at 728.

280. *Id.*

private air space would be virtually nonadministrable. Yet, with a regime of government enforced sharing, air space rights are quite stable and certain.

More fundamentally, one system of legal entitlements cannot be inherently more certain than another. As Wesley Hohfeld first explained, lawyers tend to use the term *right* to encompass at least two separate concepts: a privilege, which is an individual entitlement with which the government may not interfere; and a right, which is an individual entitlement to call upon the government to stop others from doing something.[281] Individuals have a privilege to engage in free speech, and individuals have a right to exclude trespassers from their real property.[282] A privilege, then, is something that no other person has a right to call upon the government to stop.[283] If person *A* has a privilege to speak in a public forum, then person *B* might be said to have a non-right to call upon the government to stop *A* from speaking.[284] The correlative legal entitlement to a *right* is a *duty*.[285] If *A* has a right to exclude individuals from real property, then *B* has a duty to stay off of *A*'s property unless invited.[286]

By focusing on the scope of rights and privileges, one can see that if *A* has a property right in relation to some thing, then others cannot have a privilege in relation to that same thing; a right means that the holder may call upon the government to stop another from interfering with the right, and a privilege means that no one can invoke government assistance in the event of a dispute.[287] If *A*'s property right is weakened—others may use a thing that *A* owns in some ways and *A* cannot call upon the government to stop the use—the original no-privilege position of others with respect to *A*'s property is strengthened as they acquire a privilege that precisely maps *A*'s loss of a right.

By increasing the strength of private property rights, a government does not increase certainty, it merely shifts uncertainty from owners to nonowners. If owners are certain of their ability to stop others from invading their property, nonowners are uncertain of the extent to which they can use owned property. This uncertainty results because the holding of a right does not require its use. A nonowner in a regime of strong property rights does not know when an owner will invoke his right.

As property rights become weaker, owners' certainty is reduced because situations arise in which they cannot call upon the government to exclude others. For example, the government might require owners to permit free speech

281. *See* Hohfeld, *supra* note 187, at 30–33.
282. *See id.*
283. *See id.* at 32–33.
284. *See id.*
285. *Id.* at 31.
286. *Id.* at 32.
287. Kennedy & Michelman, *supra* note 275, at 759–60 (quoting Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 166 (1919)).

on their property. But this increases the certainty of nonowners because they now know of situations in which they can use another's property without fear that the state will intervene to exclude them. As Kennedy and Michelman concluded, "[t]he sum of the legally determined exposures is a constant."[288] Since we are virtually all property owners and we all use the property of others for various purposes, we are all affected by whatever uncertainty permeates whichever system that we have.

3. The Empirical Defense of Strong Property Rights

That legal entitlements cannot fundamentally alter the level of uncertainty over property use does not mean that all entitlement schemes yield an equal level of social utility. On the contrary, some will be better than others. But one must measure the schemes empirically based on how people feel about their lives under particular legal regimes. One cannot simply conclude that certainty and productive incentives render a strong private property rights regime superior to one permitting extensive regulation.[289]

Epstein has recently acknowledged the shortcomings of the certainty-incentive defense of strong property rights. A property rights regime resting on broadly conceived utilitarian foundations, he acknowledges, "require[s] some empirical evaluation of why given institutions promote human flourishing, and through it—general social welfare."[290] Strong rights to exclude, he recognizes, impose "heavy costs."[291] But the alternative regulatory state, he contends, would simply "impose[] heavy costs of governance."[292] One cannot say on a priori grounds which set of costs and benefits yields the greatest utility. In Epstein's words, "[t]here is no magic solution for liberty or property that creates benefits without dislocations."[293]

At the time that he published *Takings* in the mid-1980s, Epstein's empirical defense of its thesis was quite general, focusing on the benefits of certain ownership claims that facilitate market transactions and the harms of rent seeking and moral hazard implicit in government regulation.[294] A number of

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288. *Id.* at 760.

289. *Id.* at 762.

290. Epstein, *Liberty Versus Property?*, *supra* note 12, at 28.

291. *Id.*

292. *Id.*

293. *Id.*

294. Epstein argues that the first possession rule provides certainty because it requires a sufficient expenditure of resources to permit clear identification of claims of exclusive ownership while permitting the maximum feasible flexibility for voluntary transactions. EPSTEIN, *supra* note 3, at 61. A requirement of compensation to anyone who loses welfare as a result of a government action ensures that no individual can gain rents by the government taking wealth from one party and transferring it to another. *Id.* at 199. Prohibiting redistribution is also necessary to reduce the

scholars from across the political spectrum found his utilitarian case for strong property rights facially plausible but wanting in specifics.[295] Although certainty may in general be good and rent seeking and moral hazard bad, one cannot universally conclude that the negative effects of regulation will always outweigh the benefits.[296]

Since *Takings*, neither Epstein, nor anyone else whose work that I have found, has made much progress.[297] Epstein has acknowledged that regulation is a superior alternative in certain cases, such as administering waterways.[298] His conclusion that strong property rights are still appropriate most of the time, however, has continued to fall back on the same assumptions that have motivated the consequentialist defense of strong property rights for nearly a quarter century.[299]

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moral hazard concern that individuals who can benefit from government action will reduce their level of productive behavior. *Id.* at 310 (noting that unemployment insurance can create a moral hazard that employees will seek to end employment); *id.* at 320 (expressing the same concern regarding welfare payments).

295. Larry Alexander argued that Epstein's use of a natural rights framework limited his utilitarian analysis, and he thus concluded "[t]here is a chance the utility thesis is correct, but it is surely unproven." Larry Alexander, *Takings of Property and Constitutional Serendipity*, 41 U. MIAMI L. REV. 223, 232 (1986). Others were less charitable. Thomas Grey referred to Epstein's utilitarian analysis as "a cocktail-party empiricism," Grey, *supra* note 59, at 40 (arguing that Epstein's utilitarian theory is as vague as those he rejects). Mark Kelman described it as "a wholly ungrounded assertion of faith that is almost surely wrong." Kelman, *supra* note 174, at 1852.

296. In this regard, Kelman addressed Epstein's claims with respect to welfare, price control, and land development. Kelman, *supra* note 174, at 1852–58 (citing Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972)).

297. *See, e.g.*, EPSTEIN, COMPLEX WORLD, *supra* note 272, at 67–70 (recognizing the need for some common property but not drawing a line) (citing JUSTINIAN'S INSTITUTES § 2.1, at 55–51 (Peter Birks & Grant McLeod trans., 1987) (535 A.D.); Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261, 263–67 (1990)); Richard A. Epstein, *Let "The Fundamental Things Apply": Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1311–12 (2002) (identifying "the optimal mix between private and common property" as a critical question but offering no specific empirical arguments for determining the mix).

298. Epstein, *Liberty Versus Property?*, *supra* note 12, at 12 (arguing that consequentialist grounds justify keeping some resources, such as waterways, as common property) (quoting LOCKE, *supra* note 50, at 309).

299. For example, Epstein's recent justification for assigning property individually based on first possession, rather than proportionally based on creative effort, relies on the same general assumptions that he relied on in *Takings*. *Id.* at 9 ("It would be so defective that it is in the long-run interest of everyone to abandon any effort to isolate and reallocate the *unearned increment* (or decrement) that attaches to human labor. Therefore, a rough and ready rule that follows the naïve sense of desert works better in practice than any overt system that seeks to divert wealth to other individuals, who are less deserving than the person whose labor created the wealth in question within the rules of the game.").

4. *Considerations Cutting Against Empirical Justification of Strong Property Rights*

Three empirical considerations weigh in favor of deference to regulation. Justice Stevens originally recognized the first two in response to Justice Brennan's rhetoric equating police officers and land use planners. These two considerations tend to show that strict scrutiny of land use decisions would have a greater inhibiting effect on the ability of planners to perform their governmental function than strict review of Fourth Amendment claims has on the police. The third consideration addresses administrative concerns with respect to strict scrutiny of property claims vis-à-vis First Amendment and criminal procedure claims. It maintains that stricter scrutiny of property based claims would impose a greater administrative burden on the courts than it has in other areas.

a. The Nature of the Decision

The nature of the constitutional inquiry differs in property rights cases and criminal proceedings. The Court has managed to work towards relatively clear, enforceable rules in criminal cases.[300] By contrast, the Court uses much vaguer standards with regard to property rights. As Justice Stevens has argued, "the Court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation becomes a taking."[301] Strict scrutiny in property rights cases would simply convert the discretion now placed in expert land use planners, or legislatures with access to broad fact finding authority through the legislative hearing process, to inexpert courts with more limited fact finding tools.

One could, of course, imagine a clear, administrable rule that required compensation for every regulation. But for good reason, no one argues for that.[302] Property rights advocates recognize that some things require regulation, for instance nuisance and strategic behavior, and thus a more nuanced rule

300. *See* New York v. Belton, 453 U.S. 454, 458–63 (1981) (discussing the need for clear rules in criminal procedure cases and adopting such a rule to cover searches incident to the arrest of the occupant of a car).

301. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 341 n.17 (1987) (Stevens, J., dissenting).

302. *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1382–83 (1993) (discussing the economic case for creating exceptions to absolute rights of exclusion and showing that the law has adopted exceptions of this type) (citing McKee v. Gratz, 260 U.S. 127, 136 (1922); WILLIAM BLACKSTONE, 3 COMMENTARIES *208, *212–13).

would be required.[303] Justice Scalia's background-property-principles approach is one attempt to encapsulate the necessary exceptions to a blanket compensation requirement into a clear rule.[304] More than a decade after its adoption, however, no clear rules have emerged.[305]

This distinction is critical to the ability of public servants to do their job. With relatively clear rules, the police can operate within a framework in which they can readily distinguish permissible conduct from conduct that raises constitutional questions. Strictly scrutinizing property rights claims within a regime without clear rules would require planners to truncate the scope of their regulatory conduct significantly to ensure against successful constitutional challenge. If one has already determined that regulation is a social harm, then this result may not be a bad thing.[306] But if some regulation is necessary, then inhibiting planners with uncertainty may have significant negative consequences.

b. The Nature of the Remedy for Unconstitutional Conduct

Justice Stevens has also identified a significant difference in the remedies applied when police and planners violate liberty and property rights, respectively: Fourth Amendment violations rarely give "rise to civil liability[, because] police officers enjoy individual immunity for actions taken

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303. Thomas Grey made this point in a debate with Epstein shortly after Epstein's *Takings* book came out:

> The oldest trick in the book is the one he just elucidated. You make the affirmative case relatively formal and then you build in defenses that are highly informal and you claim that you have a formal standard. . . . What we're interested in is ultimate liability. Now it's one thing to have a rule that is formally realizable and has a little exception that is vaguely phrased. It's another thing to do what he does. The first step in his analysis is the taking step, which is vast and covers almost everything the government might do. But he then has an enormous exception—implicit in-kind compensation—which covers most of the interesting and politically controversial cases, and which is grossly informal. At that point you have an informal doctrine, and you have lost the rule of law virtues.

Proceedings, *supra* note 15, at 84 (commentary of Thomas Grey).

304. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

305. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001) (citing *Lucas*, 505 U.S. at 1029–30; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 & n.2 (1987)).

306. *See* EPSTEIN, *supra* note 3, at 95 (finding zoning to be an illegitimate function of government). As Margaret Radin has explained, one's view of the chilling impact of damage liability in inverse condemnation cases is a function of one's view of the legitimacy of governmental land use planning. Margaret Jane Radin, *Evaluating Government Reasons for Changing Property Regimes*, 55 ALBANY L. REV. 597, 600–03 (1992) (citing *Nollan*, 483 U.S. at 837; *id.* at 842–64 (Brennan, J., dissenting)); *see also* KELMAN, *supra* note 107, at 45 n.64 ("Whether one believes the state is really solving a problem or engaging in a plan of extortion depends in significant part on whether one believes the state is fundamentally benevolent or a roving thief.").

in good faith. . . . Moreover, municipalities are not subject to civil liability for police officers' routine judgment errors."[307] At the municipal level, however, where much of land use planning occurs, every official decision could give rise to substantial liability in the form of compensation to every landowner affected by the unlawful regulation as well as damages, because courts would likely view every planning board decision as a municipal policy or practice.[308] Although planners would not be personally liable, the potential for massive, potentially community crippling public liability would nonetheless chill governmental land use programs much more severely than careful scrutiny of police conduct affects the officers' behavior.[309]

c. Administrative Considerations When Enforcing Property and Liberty Rights

Enforcing the Takings Clause in the same fashion that the Court currently scrutinizes free speech and privacy claims under the First and Fourth Amendments, respectively, would create significant additional administrative costs. Government restrictions on speech are—and should be given the Constitution's language[310]—quite rare. One need not be concerned about restraining, for example, Congress's ability to limit free speech because a legislator should only rarely consider such a provision. In the rare case in which a governmental body contemplates enacting such a restriction, it should plan for the time and expense of searching judicial review.

Prosecutions raising criminal procedure questions, by contrast, are commonplace. But they arise within an established judicial system in which the underlying liability of the defendant must in all events be subject to careful judicial scrutiny. Incorporating regular judicial review of searches, seizures, and interrogations thus imposes what has proven to be a manageable incremental burden on an existing judicial system.

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307. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 341 n.17 (1987) (Stevens, J., dissenting).

308. *Id.*

309. *Id.* at 340–41 & n.17 (Stevens, J., dissenting) ("The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area."); Corwin W. Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559, 594 (1981) ("The chaotic state of taking law makes it especially likely that availability of the damages remedy will induce land-use planning officials to stay well back of the invisible line that they dare not cross."). *See* John Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication*, 20 URB. LAW. 675, 686 (1988).

310. U.S. CONST. amend. I ("Congress shall make no law . . . .").

Regulation affecting property value, like criminal procedure issues, but unlike speech restricting legislation, is quite common. Were courts to strictly scrutinize every regulation affecting property value, they could not piggyback on an existing system. An entirely new block of cases would be thrust upon the courts, imposing significant administrative costs.

One might respond that the whole purpose of a strong property rights regime is to reduce government intervention and, thus, ultimately the number of potential disputes. As the above discussion makes clear, however, eliminating all regulation is not a realistic option. In some areas, a regulated regime seems essential—airspace, water rights, public rights of way—and, in many others, the in-kind benefits would justify a collective approach under any measure. The notion that one could impose a regime of strong property rights that could quickly identify the legitimate areas of government regulation from the illegitimate ones would require explication which to date does not exist.

VI. CONCLUSION

A regime of strict judicial scrutiny of property regulation has never been part of American society's understanding of property. From the wording of the Constitution itself, to our choice of symbols, to the laws our federal, state, and local legislatures have enacted, Americans have held property and liberty in separate spheres. Those who seek to unify property and liberty must demonstrate empirically why we would be better off in a world where government actors were prevented from affirmatively seeking to better our society. To date, the case remains unmade.

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