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Liberty's Equal?: An Essay on Property's Rhetoric

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Liberty’s Equal?: An Essay on Property’s Rhetoric

by

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Rhetoric has replaced analytics as the basis for Takings Clause analysis. The golden age of analytic takings scholarship ended more than a decade ago. From the early 1960s into the 1990s, the best and the brightest in the legal academy constructed models for determining when the Federal Constitution required a regulating government to compensate a property owner for lost value. Unfortunately, they proved to be wildly inconsistent, proposing rules that compelled

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1 Analytic analysis of the takings clause peaked in the 1960s when Frank Michelman and Joseph L. Sax (twice) offered sophisticated models to determine when a government should pay compensation when a regulation reduces property values. Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1227 (1967) (proposing that compensation be paid when the demoralization costs suffered by property owners plus the administrative cost of determining and paying compensation do not outweigh the benefit of the regulation); Joseph L. Sax, Takings and The Police Power, 74 Yale L. J. 36, 67 (1964) (“Sax I”) (proposing that compensation be paid when the government acts in its enterprise capacity, but not in its capacity as a mediator or arbiter of private interests); Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L. J. 149, 173-76 (1971) (“Sax II”) (expanding category of non-compensable regulation to include any regulation of a property use that has affects beyond the bounds of the owner’s property holdings, unless the regulation is discriminatory).

In the 1970s, Bruce Ackerman introduced the concept of assessing the compensation question based on the ordinary conceptions of property held by laymen. Bruce A. Ackerman, Private Property and the Constitution 149, 176 (1977) (describing an “ordinary observer’s” view of the law that does not seek “a judicial effort to generate a coherent conception of state involvement from a set of highly abstract principles but an attempt to explicate the evaluative structure into which middle-class Americans are in fact socialized”; put another way ordinary observers insist “on grounding legal concepts upon those developed in daily life”).

In the 1980s, Richard Epstein sought to define property in broad formal terms to require compensation whenever government regulation reduced property value outside the context of common law nuisance and instances in which the regulation itself provided relatively specific in-kind compensation. See generally Richard Epstein, Takings: Private Property and the Power of Eminent Domain (1985). In addition, Margaret Jane Radin developed a personhood theory of property pursuant to which compensation questions should take account of the extent to which the property taken was (a) constitutive of its owner’s personhood or (2) fungible. The former should be valued higher and in some cases excluded from the taking power altogether. Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 1002-12 (1982) (“Radin, Property and Personhood”) (defining the concept of “personal property” by recognizing “that to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment”and discussing the implications of the theory of property as constitutive of personhood in takings law); Margaret Jane Radin, The Liberal Conception of Property:
compensation virtually all the time,² almost never,³ and a few places in between.⁴ Legal doctrine, not surprisingly, has remained uncertain. Question asked decades ago -- such as (1) whether to apply a per se rule; (2) how to determine the percentage of a parcel taken by regulation; and (3) the relevance of whether the regulation existed prior to the current owner’s acquisition of the property – all remain unanswered.⁵

Crosscurrents in the Jurisprudence of Takings, 88 Columbia L. Rev. 1667, 1687-92 (1988) ("Radin, Liberal Conception") (applying the analysis of “personal” property to the takings compensation question and explaining that recognizing property’s constitutive role in constitutional law “would result in two important changes in our jurisprudence of property: it would engender different constitutional statuses for personal and fungible property, and it would undergird limits on the eminent domain power to take personal property, even if compensation is paid”).

² Epstein, supra note 1, at 95 (asserting that “all regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state”).

³ Ackerman’s analysis to the extent that it articulates a coherent basis for current law would only rarely call for compensation absent a physical taking of title or possession. Ackerman, supra note 1.

⁴ Sax would require compensation only when the government acted in its enterprise capacity and the taking did not limit a use with affects beyond the owner’s own holdings. Sax I & II, supra note 1. Michelman would require an elaborate balance of demoralization and administrative costs against the social value of the taking. Michelman, supra note 1. Radin’s analysis would call for greater protection – i.e., increased compensation or perhaps a prohibition on any taking – for personal property, but considerably less protection for fungible property. Radin, Liberal Conception, supra note 1.

⁵ In its most recent takings cases, the members of the U.S. Supreme Court remain bitterly divided on the compensation question and unable to agree on basic principles. Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (disagreement as to whether to apply per se rule or ad hoc balancing to extended development moratoria); Palazzolo v. Rhode Island, 533 U.S. 606, 631-32 (2001) (leaving open the question of how to determine the percentage of a parcel taken by regulation); id. at 632-36 (O’Connor, J., concurring) (leaving undecided the extent to which a law enacted prior to acquisition of property is relevant to the compensation question); id. at 636-37 (Scalia, J., concurring).
Perhaps because of these failures, legal analysis of the compensation problem has shifted its focus from the welfare economics and traditional philosophy on which the analytic scholars relied to a more or less self-conscious linguistic investigation of the rhetorical devices used to convey the concept of property through language.\textsuperscript{6} Insight comes from understanding the signs and categories that our society uses to communicate about and understand property, rather than from a comprehensive view of what is best for society.\textsuperscript{7}

This essay focuses on a partially concealed rhetorical device that has been repeatedly used by courts to justify the appropriateness of compensating individuals whose property loses some value as a result of regulation. This device compares the Takings Clause, which protects individual property rights, to the strictly scrutinized clauses in the Bill of Rights, particularly

\textsuperscript{6} This essay critiques three rhetorical examples used by the judiciary. Although lawyers tend to think of rhetorical devices as rather blunt tools of persuasion, Austin v. Mich Chamber of Commerce, 494 U.S. 652, 684 (1989) (Scalia, J., dissenting) (“It is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.”); Berkey v. Third Arv. Ry. Co, 155 N.E. 58, 61 (NY 1926) (per Cardozo, J.) (“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it”); Engel v. Bitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting) (“the Court’s task . . . is not responsibly aided by the uncritical invocation of metaphors like the ‘wall of separation’”); Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting) (“It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis”)), legal scholars have also begun to employ rhetorical analysis in the study of the Takings Clause, see Louise A. Halper, Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings, 8 Yale J.L. & Human. 31 (1996), as well as other constitutional principles see Linda L. Berger, Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation, 58 Mercer L. Rev. 949, 952 (2007).

\textsuperscript{7} Ackerman and Radin did examine the way Americans talk about property in their models, seeing language as another piece of observed behavior through which social understandings of property might be better understood. This use of language differs from the rhetorical analysis discussed in this essay in that it treats property talk as one type of behavior rather than as a primary force that not only reflects, but also creates, our understanding of property.
Although the specific use of this rhetorical move appears to be of relatively recent origin, more general declarations that all Constitutional rights should receive equal treat were advanced and debated much earlier. Compare Ullmann v. United States, 350 U.S. 422, 428 (1956) (per Frankfurter, J.) (“As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.”), with id. at 439-40 (Reed, J., concurring) (joining opinion “except as to the statement that no constitutional guarantee enjoys preference”). See also Lynch v. Household Finance Corp., 450 U.S. 538, 553 (1972) (procedural due process case in which the Court explained that “the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The 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, whether the ‘property’ in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defense of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries, *138-140”).

Justice Brennan, the first of the three judges to employ this technique, compared the Takings Clause to the Fourth Amendment, posing the rhetorical question, “After all, a policeman must know the Constitution, then why not a planner?” Thereafter, Chief Justice Rehnquist expanded the analogy to include the First Amendment, declaring that the Takings Clause is not a “poor relation” among the Bill of Rights and should thus be scrutinized just as carefully. Finally, Judge Janice Rodgers Brown, then of the California Supreme Court and now the District of Columbia Circuit, argued that “[n]othing in the text or structure of [the Takings Clause] suggests an infringement of a property interest ought to be accorded greater deference than a
restriction on a liberty interest.”

All three judges failed to explain why property interests and the rights that protect them should be treated similarly to liberty interests and rights. Instead, they allowed the power of their rhetoric – a metaphor of balance among similarly named concepts – to speak for them. Analyzing why linguistic devices of this type are inherently so persuasive may ultimately prove fruitful in working out a coherent view of the Takings Clause. True insight, however, will require deep rhetorical analysis self-consciously aware of both (1) the social revelation embedded in language, and (2) the extent to which the analyst’s machinations alter that revelation. Insufficient attention to the latter can result, however unwittingly, in social manipulation masquerading as description.

The Brennan-Rehnquist-Rodgers-Brown (“BRR-B”) rhetoric manipulates on two levels. First, it reifies the concept of an individual constitutional right. To reify is to call by a single name things that could be conceptualized separately. Our society has made the linguistic choice to use the name “right,” inter alia, to refer to both an individual freedom to (a) enjoy liberty and (b) hold private property. By choosing to use a single term, we rhetorically create a sense that all concepts captured by the name belong in the same category and thus should be treated similarly. We tend to forget that no inherent rule binds us to that choice in all future interaction with the concept. Rights protecting liberty and rights protecting property can be conceived differently even though they have the same name.

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11 Santa Monica Beach, LTD v. Superior Court, 968 P.2d 993, 1026 (Cal. 1999) (Brown, J. Dissenting).

12 See infra note 21.
Second, the BRR-B rhetoric appeals to a metaphor of balance that compels us to treat what we perceive to be like cases alike. By comparing the compensation question to police-citizen encounters (Brennan), speech and privacy rights (Rehnquist), and liberty broadly defined (Rodgers Brown), this metaphor highlights an aspect of property rights that is shared with liberty rights – *i.e.* the extent to which the right protects an individual from governmental interference – while masking other aspects of property, *e.g.* the role it plays in constituting a community. To call the notion through which we recognize and protect both liberty and property interests by a single term, rights, and then explicitly comparing the two concepts, rhetoric creates similarity and masks difference between them.

What is most extraordinary about the three examples of rhetoric explored here is *not* that the authors (and presumably many readers) failed to appreciate that we are capable of understanding property and liberty rights differently, but that they ignored that we have in fact understood them differently, and acted accordingly, throughout our nation’s history and in our lives today. The government as a matter of course takes a third of our income and reduces the value of our real property through zoning and property taxes, but it cannot search our things or prohibit us from speaking or practicing our religions except in the most extraordinary circumstances. Rhetoric’s ability to mask what should be obvious makes it a most powerful tool in shaping our understanding of abstract concepts.

Part I of this essay summarizes how rhetorical analysis might be used to shed new light on the compensation question. Part II sets out the BRR-B rhetoric in some detail, and Part III shows that the overly individualistic right to compensation evoked by the BRR-B rhetoric 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 we have enacted, Americans have held property and liberty in separate spheres. Those who seek to unify property and liberty must either reveal some deeper truth about how we experience property or demonstrate instrumentally how treating property like liberty would make our society better. Rhetorical analysis has a role to play in such a project. But full awareness of the manipulative power of rhetoric is essential.

I. Rhetorical Analysis of the Takings Clause

Whether one describes property as a thing (land, automobiles, jewelry), an intangible (businesses, copyrights, patents), or the relative rights of persons in things and intangibles against particular persons or against the world, the description is incomplete. To speak of things, intangibles, or rights is not to speak of property. That which is property can be revealed only by experiencing how our society’s law connects an owner to whatever may be owned in a particular set of circumstances.

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14 Shifting the discourse from property itself to rights in property does not change anything. Rights are also an abstraction that we understand through an object metaphor. We speak of rights as something we possess and hold as we do objects. Like the concept of property, however, the concept of a right is bound up in our social understanding of law and how it mediates relationships among persons.

15 Bentham’s often quoted “Property and law are born together and die together. Before laws were made there was no property; take away laws and property ceases,” Jeremy Bentham, Theory of Legislation 112-113 (4th ed. 1882), is the classic articulation of this point. In focusing on law rather than language generally, however, Bentham may have been locating property in formal legal structure rather than in the organic linguistic structure on which this essay focuses. Benjamin Franklin captures more closely the central premise of this essay: “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 . . .” Benjamin Franklin, Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania (1789), in 10 The Writings of Benjamin Franklin 54, 59 (Albert H. Smyth ed., 1907).
In an important sense that connection cannot be observed. Even where we can see a physical event associated with property, such as the possession of an owned object, we cannot communicate the full meaning of the abstract concept by describing the physical possession. One can possess an object that she does not own, and thus describing the observed event must be an incomplete account. Something more is required to separate the concept of property from mere possession.

In a meaningful sense, a society can never discover its property, it has to create it through language. Like any abstract concept, however, property has no true language of its own. To understand it, we require rhetorical comparison to concrete experiences and other abstractions already given life through metaphors of their own. We grasp property’s essence – it lives for us – only through the language we have created to give it meaning. The following sub-sections explain how metaphor and reification contribute to this project and explore ways that they can both advance and distort Takings Clause analysis.

A. The Role of Metaphor & Reification in Understanding Abstract Concepts

Linda Berger instructively summarizes the literature surrounding the role rhetoric plays in legal reasoning and in our language more generally. Through metaphor, she has explained, we “account for abstract and unfamiliar concepts by making connections to things that we already

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16 George Lakoff & Mark Johnson, Metaphors We Live By 115 (1980) (explaining that “metaphor pervades our normal conceptual system. Because so many of the concepts that are important to us are either abstract or not clearly delineated in our experience (the emotions, ideas, time, etc.), we need to get a grasp on them by means of other concepts that we understand in clearer terms (spatial orientations, objects, etc.”).

17 Id. at 56-68, 115.

18 Berger, supra note 6, at 954-57.
Metaphor sheds light on an abstract concept by comparing it to a more familiar one. We refer to the scales of justice because there are elements of balancing the evidence at a trial that can be better understood by imagining a physical scale balancing the weight of two objects.

Although metaphor compares concepts, it does more than expose similarity. As Berger has written, “metaphor . . . shapes our thoughts about the new concept because it maps on top of the new experience the structures, inferences, and reasoning methods of the old.” The rhetoric we choose plays a role in creating the world we see.

Reification broadens rhetoric’s creative power by stacking metaphor upon metaphor, and thereby extending rhetoric’s creative scope from observable concepts to abstractions already structured through metaphor. We reify when we use the same name to refer to concepts that we could imagine categorizing separately. Although this process is inherent in language and probably thought itself, its rhetorical power comes from our tendency to assume that once society has assigned the same name to two concepts, the outside world requires us to treat them

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19 Id. at 952.

20 Id. at 955; see I.A. Richards, The Philosophy of Rhetoric 94 (1936) (defining metaphor as “two thoughts of different things active together and supported by a single word or phrase, whose meaning is a resultant of their interaction”); Max Black, Models and Metaphors: Studies in Language and Philosophy 44-45 (1962) (“The metaphor selects, emphasizes, suppresses, and organizes features” of one concept in terms of another).

21 In this context, Mark Kelman has been a leading exponent exploring the role of reification in legal analysis. He explained that “[a]ll our thoughts are language mediated; thus, as soon as we name, we invariably reify, that is, we ascribe identical traits to objects or situations we could differentiate simply because we have given them the same name.” Mark Kelman, Taking Takings Seriously, 74 Cal. L. Rev. 1829, 1837-38 (1986) (“Kelman Takings”); see Mark Kelman, A Guide to Critical Legal Studies 269-70 (1987) (“Kelman Guide”) (“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.”).
similarly. This effect enables us to use one abstract concept to describe another through ever more complex chains.

For example, we understand the abstract concept of secret through metaphoric comparisons to keepsakes, small articles that we hide away from the world but that have special unique meaning for us. One can thus keep and protect a secret. Liberty in turn is understood partially through stacked metaphoric comparison to secrets. We protect our liberty in much the same metaphoric way that we protect secrets. That is, one holds a right to liberty, much as one keeps a secret. The courts protect our liberty by prohibiting laws that infringe it, just as one can protect secrets against the efforts of nosey people to discover them. Although liberty is a more social and less private concept than secret, the metaphor instructively helps shape our understanding of liberty.

By categorizing property, like liberty, as a right, we instinctively pull into the concept of property the individualistic protective qualities of secrets through liberty. The reification enables us to, or perhaps tricks us into, mapping concepts helpful in understanding one abstraction onto another. To ensure that the device is illuminating our understanding, we must constantly reflect on whether our decision to reify the two concepts is enlightening or simply clouding our ability

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22 Id. at 270 (explaining that we tend to ascribe “false concreteness to the categories we have in fact invented”). The classic example of language tricking us into thinking that we are locked into a particular way of seeing the world is Wittgenstein’s investigations into the idea that we can know our own thoughts but not those of others. He recognized that belief was entirely the product of a linguistic choice to use the word “know” to describe two entirely different concepts: (1) knowledge of the external world in which it makes sense to know, or not know, certain facts; and (2) knowledge of our own thoughts which we simply have and could not not have. Ludwig Wittgenstein, Philosophical Investigations 220-22 (G.E.M. Anscombe trans. 1958) (“It is correct to say ‘I know what you are thinking’, and wrong to say ‘I know what I am thinking”).
to distinguish them.

Analyzing the use of metaphor and reification cannot expose some transcendental abstract concept. Rather, these devices create, build, and shape our understanding. Studying rhetoric helps reveal the vision of reality that a people create, but the revelation is always imbued with a continuing process of creation. As George Lakoff and Mark Johnson explain, rhetoric makes “our experiences of [the abstract] coherent . . ., provid[ing] . . . structure, highlighting some things and hiding others.”

B. Metaphor and Reification in Takings Clause Analysis

Property lives through language, and, through creative use of rhetoric, one can impart structure to the concept of property speaking openly or covertly through metaphor and reification. Common property metaphors include property as: object (“to have and to hold”), tool (“to use”), market exchange/money (“to sell”), and fence building, or more generally, container (“to exclude”). Just as the concept of theory would be mysterious without the metaphor theory as building with a foundation and structure, we experience property through metaphoric comparison to physical objects and activities that together allow us to conceptualize property in the way that we do.

Through reification’s masking effect, these metaphors can project ways of understanding that are inconsistent with, or incompletely revealing of, our existing understanding of a property. A well known example extends the container metaphor to different types of property. The U.S. Supreme Court was unable to imagine a category of property that was neither fully private nor

23 Lakoff & Johnson, supra note 16, at 139.

24 Berger, supra note 6, at 957.
fully public, leading it to equate (1) a homeowner’s right to exclude a pamphleteer from her living room with (2) a shopping center owner’s right to exclude a similar pamphleteer from a common area of the center.\(^{25}\) We tend to forget that we have chosen to categorize both a residence and shopping center as private property despite the obvious difference that one is restricted to the family and personally invited guests while the other is held open to the public at large. As Mark Kelman explains, “[w]e treat the external world as if it determines our ideas, ascribing false concreteness to the categories we have in fact invented.”\(^{26}\) In a meaningful sense, as Lakoff and Johnson put it, our rhetoric is capable of “determining what is real for us.”\(^{27}\)

But that result is not inevitable. The California Supreme Court, after all, was able to conceive of different rights to exclude with respect to homeowners and shopping center owners, permitting the very sort of political activity on shopping center property that the U.S. Supreme Court had refused to protect.\(^{28}\) Our choice to place two concepts in the same category for some

\(^{25}\) Lloyd v. Tanner, 407 U.S. 551, 569 (1972) (“Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.”); see Hudgins v. NLRB, 424 U.S. 507, 520-21 (1976) (“if the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the picketers in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.”).

\(^{26}\) Kelman Guide, supra note 21, at 270.

\(^{27}\) Lakoff & Johnson, supra note 16, at 146.

\(^{28}\) Pruneyard Shopping Center v. Robbins, 474 U.S. 74, 82-85 (1980) (upholding against Takings Clause challenge a California decision to permit free speech activity on private shopping center property as a matter of state constitutional right).
purposes in no way binds us to place the them in the same category for other purposes.\textsuperscript{29} With proper reflection, we can use our knowledge of rhetoric to illuminate as well as to manipulative.

Rhetoric illuminates to the extent that it helps us communicate shared understandings, especially those that have gone relatively unnoticed. A good example is Margaret Radin’s importing the abstract concept of personal constitutiveness through objects, such as a wedding ring,\textsuperscript{30} within a meta-concept of property that also includes ownership of property for purely

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“assumes that our capacity or desire to particularize is minuscule in the rights-defining project. . . . [I]t does not consider whether or not justifications of the right to exclude that might be germane in some ‘property’ cases are applicable in others. . . . [I]t is clear that some of the substantive arguments applicable to the claim a homeowner would make to be allowed to toss out unwelcome visitors would be inapplicable to a shopping center owner desiring to toss out picketers. For example, protection of the homeowner's privacy may be far more compelling than the protection of the shopping center owner's privacy. On the other hand, some arguments could be applicable to both, such as our desire not to make someone devote resources we have generally protected his control over to advancing a cause he does not favor.”
\end{quote}

\textit{Id.} at 1838.

Radin uses her insight into the constitutive aspects of property to illustrate a distinction between homeowner and shopping center owner. The property right might well prevail in the former case, but not the latter, because the former “appear[s] more closely connected with personhood.” Margaret Jane Radin, \textit{Diagnosing the Takings Problem} in Reinterpreting Property 156 (1993). “If property is fungible (for example, a large shopping center),” she argued, “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 similar statute directed against homeowners might more readily be understood as a taking.” \textit{Id.}

\textsuperscript{30} Radin, Property and Personhood, \textit{supra} note 1, at 959-60.
investment purposes. In using the same name for both concepts, Radin made a choice. One could readily understand similarly constitutive connections to objects that are not one’s own property, such as a family vacation home owned by other members of the family. Radin could have grouped all constitutive relationships with objects – property or otherwise – together and called them by a different name. Her decision to reify the concept of a person’s relationship with objects as constitutive of personality within the term property helped her, and her readers, understand a previously under-appreciated aspect of property ownership inherent in the language through which American society currently understands the concept of property.

Seeing that rhetorical devices both illuminate (help us see) and manipulate (create what we see) is critical to our understanding property’s rhetoric. A final illustrative example is the common metaphor property as money. It highlights our understanding of property as something that has value in a marketplace and can be exchanged for money. It downplays our understanding of property as something that makes society better for the individuals within it. And it hides our understanding of property as a product of communal decisions expressed

31 Radin called the constitutive relationship of person and object “personal property,” defining it to mean the type of property in which human personality is bound up. Margaret Jane Radin, Reinterpreting Property 2-4 (1993). She contrasts this form of property with “fungible property” which is important solely because of its exchange value. Id. at 2. She suggested that “constitutive property” would have been a better term because the term personal property was already understood to mean chattel ownership. Id.

32 Lakoff & Johnson, supra note 16, at 145 (“New metaphors have the power to create a new reality. This can begin to happen when we start to comprehend our experience in terms of a metaphor, and it becomes a deeper reality when we begin to act in terms of it. If a new metaphor enters the conceptual system that we base our actions on, it will alter that conceptual system and the perceptions and actions that the system gives rise to.”); id. at 146 (“Since much of our social conception of the physical world is metaphorical, metaphor plays a very significant role in determining what is real for us.”).
through democratic processes.\textsuperscript{33}

So long as one understands its limited role, the \textit{property as money} metaphor can be an exceedingly useful device for the legal analyst who seeks to resolve the compensation question. But if one takes the metaphor to suggest that property is \textit{only} money, our vision of property is skewed toward a world in which the individual property owner is pitted against the government in a battle over a commodity. Our strong sense that each property owner is part of a community that defines property to advance societal interests is suppressed.

This exclusively commodified vision of our social understanding of property has never actually existed outside the dreams of adherents to the agenda of the property rights movement. A case might be made that such an individualistic property regime would benefit society. But shifting our conception of property requires the lucid analysis of the language creating that conception rather than obfuscation by the unacknowledged rhetoric of metaphor and reification.

II. The BRR-B Rhetoric

This section places the BRR-B rhetoric in context, showing that Brennan, Rehnquist, and Rogers Brown each allowed their rhetoric to stand on its own, apparently confident that no analysis would be required to convince the reader of the validity of the comparison between property rights and liberty rights. Rights are rights, after all.\textsuperscript{34} Of course, as the final section

\textsuperscript{33} Consider, for example, how our concept of property would change absent the tort and criminal law rules and public enforcement thereof that prevent the taking of property by force or fraud. Would we even understand it as property? It brings to mind Wittgenstein’s observation: “If a lion could talk, we could not understand him.” Wittgenstein, \textit{supra} note 22, at 223.

\textsuperscript{34} Kelman Guide, \textit{supra} note 21, at 274 (“In some sense, as we generally use the term, a \textit{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
addresses, a moment’s reflection reveals that property and liberty have always stood on different footings and there are good reasons for keeping them there. Absent the manipulative power of rhetoric, none of these arguments would stand a chance.

A. Brennan’s Rhetorical Question

In 1981, the Supreme Court took up the issue whether the government must compensate property owners for temporary takings, i.e. situations in which a court determined that a regulation constituted a taking, but the government responded by repealing the regulation. In a dissenting opinion that actually commanded a majority of the justices, Brennan argued that simply repealing a regulation that constitutes a taking is an insufficient remedy. Compensation

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in each case covered by the right.


36 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 Steward, Marshal, 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 the dissenting opinion of Justice Brennan.”).

Six years later, the Court adopted Brennan’s view. First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304 (1987) (holding that repeal of an ordinance is insufficient and requiring that the government compensate a property owner when the government takes property).

37 Brennan’s principle 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 an of itself, does not balance accounts. Compensation must still be paid for the benefit the public received during the period in which the regulation applied. San Diego Gas & Electric, 450 U.S. at 656 (Brennan, J., dissenting). This line of reasoning is not relevant to the issue addressed in this essay.
must be paid for the time that the regulation was in effect.\footnote{Id. at 658.}

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 rights prohibiting unreasonable searches and seizures: “After all,” he wrote, “a policeman must know the Constitution, then why not a planner?”\footnote{Id. at 661.}

The question was entirely rhetorical in the sense that Brennan understood that to ask it was to answer it. Although never acknowledging his use of rhetoric, Brennan must have realized that readers would find the answer obvious because of the powerful metaphor of balance among the similarly named concepts, property rights and liberty rights. He appears completely unaware, however, that his analysis rested on a contestable metaphor that while intuitively appealing, may have been creating rather than reflecting the conception of property that he sought.\footnote{Lower courts and individual judges have used Brennan’s rhetoric with only the most conclusory supporting analysis. See Sinaloa Lake Owners Ass’n v. City of Simi Valley, 882 F.2d 1398, 1409 (9th Cir.1989) (per Kozinski, J.); Santini v. Connecticut Hazardous Waste Management Service, 739 A.2d 680, 696 (Conn.1999) (Berdon, J., dissenting); Palmer v. City of Ojai,178 Cal.App.3d 280, 294 (1986).}

**B. Rehnquist’s Family of Constitutional Rights**

In 1994, the Court held that when a municipality exacts payment, or some other concession, from a developer, the municipality must show a reasonable proportionality between the exaction – \textit{i.e.}, the public’s demands – and the burdens imposed on the community by the development project.\footnote{Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).} In an opinion for the Court, Chief Justice Rehnquist supported this
holding by expanding Justice Brennan’s analogy to include the First Amendment as well as the Fourth. 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,” he then wrote, “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.”

And there Rehnquist’s reasoning ended. Because they shared a place in the Bill of Rights, taking claims logically had to be scrutinized as strictly as liberty claims. Rights are rights, after all.

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44 Dolan, 512 U.S. at 392.

45 Id. Rehnquist’s rhetoric may have been a reaction to Carol Rose’s description of United States v. Caroline Products, 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.” Carol M. Rose, Property Rights, Regulatory Regimes and the New Takings Jurisprudence-- an Evolutionary Approach, 57 Tenn. L. Rev. 577, 580 (1990) (emphasis added). For a discussion of the potential impact of the “poor relation” metaphor see Daniel A. Crane, A Poor Relation? Regulatory Takings After Dolan v. City of Tigard, 63 Chi. L. Rev. 199, 218-20 (1996).

46 Several lower courts and individual judges have employed Justice Rehnquist’s rhetoric. N.L.R.B. v. Windemuller Elec., Inc., 34 F.3d 384, 394 n.8 (6th Cir. 1994); San Remo Hotel L.P. v. City And County of San Francisco, 41 P.3d 87, 128 (Cal. 2002); Santa Monica Beach, LTD v. Superior Court, 968 P.2d 993, 1026 (Cal. 1999) (Brown, J., dissenting); L.A. Ray Realty v. Town Council of Town of Cumberland, 698 A.2d 202, 216 (R.I. 1997) (Flaunders, J., concurring); Sintra, Inc. v. City of Seattle, 935 P.2d 555, 574 (Wash.1997) (Durham, C.J.,
C. Judge Brown Extends the Family

In a 1999 case challenging a Santa Monica rent control ordinance as a taking, Judge Brown argued in favor of requiring the city to compensate the landlord.\(^{47}\) The majority upheld the ordinance based on the principle that price controls are within the government’s police power.\(^{48}\) Judge Brown disagreed, expanding on Justice Rehnquist’s evocative “poor relation” phrase by adding 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 greater deference than a restriction on a liberty interest. Economic freedoms are no different from other freedoms protected by the Constitution.”\(^{49}\)

To her credit, Judge Brown went a step beyond Brennan and Rehnquist, supporting her assertion with a paragraph explaining that property rights are an aspect of liberty and thus the two concepts are inherently related.\(^{50}\) The notion that one can understand liberty to include the freedom to own property, however, hardly amounts to a reasoned basis to decide that liberty and

\(^{47}\) Santa Monica Beach, LTD v. Superior Court, 968 P.2d 993, 1024-45 (Cal. 1999) (Brown, J. Dissenting). Judge Brown would repeat this argument before leaving the California Supreme Court. San Remo Hotel L.P. v. City And County of San Francisco, 41 P.3d 87, 120-28 (Cal.  2002).

\(^{48}\) Santa Monica Beach, LTD, 968 P.2d at 962 (“We begin by recognizing the well-established case law of the United States Supreme Court and of this court holding that ordinary rent control statutes are generally constitutionally permissible exercises of governmental authority.”).

\(^{49}\) Id. at 1026 (Brown, J., dissenting). Judge Brown was “wrong.” Cf. id. at 1027 (asserting “Wrong.” in response to the majority’s decision to apply rational basis review to a rent control statute).

\(^{50}\) Id. at 1027.
property rights should receive equivalent forms of judicial review. Unless, of course, rights are rights.

Three distinguished jurists found this metaphor of balance and the reified concept of right so persuasive that they used it with at best minimal supporting analysis. Given that, one would expect a strong historical, or at least modern, social consensus favoring balanced treatment of property and liberty rights. In fact, just the opposite is true. As the following section demonstrates, there is a strong consensus favoring vastly different approaches to property and liberty in American society.

III. Evaluating the Balance Metaphor

Many academic commentators have accepted the metaphor of balance between the reified property and liberty protecting rights as self evident. Richard Epstein has referred to the “obvious appeal for those who operate within the classic liberal tradition” of an “ostensible parity between liberty and property in the constellation of constitutionality, and by implication, political values.” Raoul Berger, for example, responded with a noticeable measure of consternation to

51 The tradition goes back to Locke. John Locke, Of Civil Government 82-85 (1924) (“Property does not have rights. People have rights. The 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.”). His commentary on the relationship of property rights and liberty, however, is not inconsistent with a more vigorous judicial defense of liberty interests. Property in some form may be essential to liberty, but that form may be the sort of property we recognize in American society now – important, but not on a par with liberty – rather than an idealized form of property that is treated as liberty’s equal.

the suggestion that liberty and property should be treated differently, writing “[b]ut liberty and property are on a par in the Due Process Clauses; the Clauses make no distinction whatsoever between them.”

In thinking historically, as well, there is a strong academic account of both the framers’ intent and pre-Twentieth Century practice concluding that a regime in which property and liberty held equal status in fact existed in the United States. This view has been expressed most popularly by Justice Scalia in his opinion for the Court in *Lucas v. South Carolina Coastal Lake Owners Ass’n*, 882 F.2d at 1408-09.

53 Raoul Berger, Liberty and the Constitution, 29 Ga. L. Rev. 585, 593 (1995). Berger’s views were presaged by Learned Hand a half century earlier. Learned Hand, The Bill of Rights 51 (1962) (publishing Hand’s 1958 Holmes Lectures) (asserting that “there is no constitutional basis for asserting a larger measure of judicial supervision over” liberty than property). Judge Alex Kozinski has made the identical point in the context of substantive due process and property rights. “[T]he fourteenth amendment’s due process clause 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*, 882 F.2d at 1408-09.


Careful historical research into Eighteenth Century understandings of property law has undermined this account. Jennifer Nedelsky’s research indicates that the framers had a quite nuanced understanding of property interests, expressing great concern, for example, about the effects of debt relief and the inflationary tendencies of paper money on property values. Carol

55. 505 U.S. 1003 (1992)

56. Id. at 1028.

57. Id. at 1020-32. Interestingly, Scalia rested this notion in modern understandings of the community rather than on purely historical grounds. Id. at 1031 (referring to “background principles of nuisance and property law”).

58. 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).

Rose has emphasized the framer’s understanding of property rights as critical to build a strong society, as much a foreign policy objective as an individual rights concern.⁶⁰

John Hart’s research 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.”⁶¹ 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.”⁶²

The historical evidence yields a very complex picture of the meaning of property in the late Eighteenth Century. The simplistic modern interpretation of the framers’ intent as favoring a regime of vigorous property rights enforcement may ultimately rest on little more than the power of the metaphor of balance between concepts with the same name. Perhaps surprisingly, virtually

Madison meant things, such as land and personal property, but it also encompassed “everything to which a man may attach a value and have a right,” including things that we would ordinarily associate with liberty such as religious beliefs).

⁶⁰ Rose, supra, note 45, at 582-83.


nothing in the Constitution itself; the popular symbols associated with it; or its subsequent application supports the claim that property and liberty rights should rest on equal footing.\textsuperscript{63} Looking beyond the Constitution to the practicalities of administering a system of strict Takings Clause scrutiny of government regulation, the argument in favor of equal treatment remains extremely weak. In short, liberty draws the long straw at every turn.\textsuperscript{64}

\section{A. Language and Structure of the Constitution}

The case for equality between liberty and property rights often starts with the assertion that the Constitution makes no distinction between them.\textsuperscript{65} The Due Process Clause’s “life, liberty and property” phrase,\textsuperscript{66} however, appears to convey a measure of equality among the three terms only if one is predisposed to read a metaphor of balance upon them. One might just as easily conclude that property is the least important of the three because it comes last in a non-alphabetical list. Of course, property is also the late comer to the party. The Declaration of Independence had previously referred to life and liberty along with the pursuit of happiness, a

\textsuperscript{63} One aspect of constitutional interpretation might be taken to support the view that property rights should be treated 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. \textit{Malloy v. Hogan}, 378 U.S. 1, 4 (1964) (citing Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 241 (1897)). This fact has not been accorded any significance in the incorporation debate or by those who seek greater protection of property rights, and there seems to be no particular reason why it should be.

\textsuperscript{64} How’s that for a mixed metaphor, or is it?

\textsuperscript{65} \textit{See, e.g., Sinaloa Lake Owners Ass’n}, 882 F.2d at 1408-09 (per Kozinski, J.) (Citing the language of the Fourteenth Amendment to support the claim that the “due process clause protects property no less than life and liberty”).

\textsuperscript{66} Const. amend. V & XIV (“no person shall be denied life, liberty, or property without due process of law”).
decidedly different concept from property.\textsuperscript{67}

Examining the Constitution more broadly adds no support to the argument for parity. Of course, it includes property protecting provisions. But in context, they appear to have been less important than the liberty protecting provisions. The preamble extols “the blessings of liberty” with no mention of property.\textsuperscript{68} James Madison drafted a preamble to the Bill of Rights that explicitly recognized it as protecting “the right of acquiring and using property” along with the “enjoyment of life and liberty.”\textsuperscript{69} But this preamble was never ratified.

Most explicitly, Article I granted Congress the power to take property in the form of taxes,\textsuperscript{70} and that Article’s original limitation on taxation, requiring proportionality based on population, was eliminated by the Sixteenth Amendment.\textsuperscript{71} Interpreting the extent of this power, the Supreme Court has virtually exempted all taxation from scrutiny under the property clauses.\textsuperscript{72}

\begin{itemize}
\item \textsuperscript{68} Const. preamble.
\item \textsuperscript{69} 1 Annals of Congress 433 (Joseph Gales ed., 1789).
\item \textsuperscript{70} U.S. Const. Art. I, § 9: “No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.”
\item \textsuperscript{71} 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 without regard to any census or enumeration.”
\item \textsuperscript{72} City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 374 (1974) (“the Court held that ‘the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress’”). “[T]he Court,” Justice White explained, “has consistently refused either to undertake the task of passing on the reasonableness’ of a tax that
\end{itemize}
Even discrimination among potential taxpayers is generally permissible so long as “any state of facts reasonably can be conceived that would sustain it.”

Even the Bill of Rights itself, although generally understood as a limit on government power vis-a-vis the individual, in fact sanctions, if not creates, government powers over property that no individual can possess. The Takings Clause presupposes the government’s right to force the sale of private property while paying compensation, a right that individuals do not hold.

Moreover, as a practical matter, even a compensated taking under the fair-market-value standard is a partial taking without compensation. This is so because fair market value, in many cases, provides less than full compensation. As Justice Frankfurter explained in an opinion for the Court “loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power is properly treated otherwise is within the power of Congress or of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable.” id. at 373. Mark Kelman, Strategy or Principle?: The Choice Between Regulation and Taxation 60-61 (1999) (explaining that “[c]ourts 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” and giving examples). But see id. at 61-62 (explaining constitutional limits on the levying taxing (1) based “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).

73 Allied Stores of Ohio, Inc. V. Bowers, 358 U.S. 522, 528 (1985). For example, the Court upheld California’s Proposition 13 which mandated that property be reassessed for tax purposes only upon sale resulting in dramatically different tax bills for properties of equivalent value. Nordlinger v. Hahn, 505 U.S. 1 (1992).

74 U.S. Const. Amend. 5: “[N]or shall private property be taken for public use, without just compensation.” Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in party) (“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 . . .”).
as part of the burden of common citizenship.” An owner of non-investment property that is taken by the government will typically have idiosyncratic attachment to it. This is so because if a property owner would be satisfied with fair market value, he would voluntarily sell to the government, avoiding the expense and delay of eminent domain proceedings.76

The third and fourth amendments also permit government to exploit private property in the form of reasonable searches and seizures,77 and the compulsory quartering of soldiers during wartime when prescribed by law.78 Like the taking power, neither of these recognized government powers over private property has a private analog. As a result, with respect to private parties, our concept of property generally includes a right to exclude trespassers intent on searching one’s private things or spending the night at one’s home. The Constitution simply permits the government to do what no private party can.

B. Constitutional Symbols

As important as the wording of the Constitution itself are the symbols that reflect its meaning in the everyday lives of the people for whom the document constitutes their


76 In some cases, property owners may refuse to sell to the government because they desire to hold out for a better offer. 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.

77 U.S. Const. Amend. 4: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”

78 U.S. Const. Amend. 3: “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 the manner prescribed by law.”
community. From early on liberty, not property, has been the dominant symbol. The early Congress chose to enshrine a nation’s love for 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, a symbol that is surely more emblematic of liberty than property. This practice is no relic of our early history. The United States mint continues to inscribe “Liberty” on all its circulating coins, and since 1986 has minted bullion coins for investors bearing the word as well as various symbols of liberty and an eagle.

An early symbol emblematic of the ideals of the new nation was the Liberty Bell. Later came the Statue of Liberty. The notion of a property bell or statue is simply incredible. Liberty, not property, continues to be a popular symbol by which Americans live. Property in word or emblem bears no similar special place.

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79 Radin Liberal Conception, supra note 1, at 1688 (“A constitution is only a constitution if we find ‘in’ it our best conception of human flourishing in the context of political order; that is, it can be appropriately constitutive of us as a polity only if it embodies our commitments to notions of personhood and community. This is a view of constitutional interpretation that treats our Constitution as a ‘normative hermeneutic object.’”).

80 Coinage Act of 1792, Statutes at Large, 2nd Cong., Sess. I., p. 246-51, § 10 (“Upon one side of each of the said coins there shall be an impression emblematic of liberty, with an inscription of the word Liberty . . .” and a depiction of an eagle).


82 http://www.usmint.gov/mint_programs/american_eagles/index.cfm?action=american_eagle_bullion (Last visited Aug. 16, 2007). Other circulating coins continue to bear the depiction of an eagle, including the quarter, half dollar, and some dollar coins. See supra note 81.

C. Constitutional Interpretation

    Evocative of the essence of a society as constitutional language and symbols may be, they
do not prove that liberty rights have been more carefully scrutinized than property rights, much
less that they should be. The actual working rhetoric of a society may differ from the most
visible words and symbols. A deeper look into constitutional interpretation and the instrumental
arguments that guide it, however, reinforces the words and symbols: Property is no liberty.

1. Property and Liberty in Criminal Trials

    The BRR-B rhetoric disregards explicit criminal law examples in which the Court has
protected liberty interests more vigorously than property interests. These include the bedrock
rights of appointed counsel, trial by jury, and the privilege against self-incrimination.

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
give rise to the core constitutional rights to appointed counsel84 and trial by jury.85 Instead, both
are triggered when one’s right to liberty is threatened with imprisonment.

    With respect to counsel, 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 provide appointed counsel to indigent defendants or the conviction cannot stand.86 Where

84 See infra note 86.

85 See infra note 89.

have appointed counsel to receive a suspended or probated prison sentence); Glover v. United
States, 531 U.S. 198, 203 (2001) (“any amount of actual jail time has Sixth Amendment
the court limits its punishment to a deprivation of property, by contrast, counsel need not be provided. “[W]e believe,” Justice Rehnquist wrote for the Court, “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.”87 And, of course, there is no right to appointed counsel whatsoever in civil cases.

    In deciding whether a jury is appropriate, a court must decide whether society finds the crime serious enough to trigger the right.88 The Supreme Court uses an objective test that asks whether the legislature has set the maximum punishment upon conviction at a length of imprisonment greater than six months.89 The Court has not looked to the level of any fine or other governmental deprivation of property. “In evaluating the seriousness of the offense,” Justice O’Connor explained for the Court, “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

87 Scott, 440 U.S. at 373.

88 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)).

89 Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) (“Since that time, 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.”).
indicator of whether the legislature considered an offense to be ‘petty’ or ‘serious.’”

b. Privilege Against Self-Incrimination

The Constitution provides a privilege against self-incrimination in federal criminal cases, and that provision was extended to state prosecutions because it was deemed essential to protect the liberty interests at stake when an individual faces incarceration.

One could imagine a similar provision that would protect the property interests at issue in civil tort, contract, and property cases. But the rules of evidence applicable in civil cases have never included such a privilege for civil defendants threatened with the loss of their property. To be sure, the privilege against self-incrimination is sometimes available to defendants in non-criminal cases. The privileged is extended, however, only to the extent necessary to protect the

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90 Lewis v. U.S., 518 U.S. 322, 326 (1996). In civil trials, juries tend to be required 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). Unlike criminal cases, however, where the guilt decision is essentially the same irrespective of remedy, civil actions at law and civil actions in equity raise different types of 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 to a belief that property rights were entitled to greater protection than liberty rights.

91 U.S. Const. amend. V (in pertinent part, nor shall (any person) be compelled in any criminal case to be a witness against himself”).

92 Malloy, 378 U.S. at 9 (incorporating the privilege against self-incrimination into the Due Process Clause of the Fourteenth Amendment and quoting Boyd v. United States,116 U.S. 616, 631-32 (1886) (explaining that compelled testimony “is contrary to the principles of a free government. It . . . is abhorrent to the instincts of an American. It . . . cannot abide the pure atmosphere of political liberty and personal freedom”)).

93 Application of Gault, 387 U.S. 1, 49 (1967) (privilege only applies to criminal sanction).
witness’s liberty interests in a threatened future criminal prosecution.\textsuperscript{94}

The Supreme Court has confirmed that the privilege protects liberty by distinguishing between civil and criminal cases with respect to argument urging the jury to draw a negative inference from a defendant’s failure to testify. In criminal cases, the prosecution is prohibited from urging the jury to draw a negative inference.\textsuperscript{95} In a civil case, by contrast, the jury may be urged to rule in favor of the plaintiff, and thereby to impinge the defendant’s property rights, because the defendant failed to testify.\textsuperscript{96} Liberty interests are scrupulously protected by the privilege; property interests are not. Or in Justice White’s terms “‘In criminal cases, the stakes are higher.’”\textsuperscript{97}

\textbf{B. Property and Liberty in Criminal Investigatory Procedure}

Brennan’s rhetoric – "[a]fter all, if a policeman must know the Constitution, then why not a planner?"\textsuperscript{98} – specifically invoked the constitutional protections embodied in the Fourth

\textsuperscript{94} Baxter v. Palmigiano, 425 U.S. 308, 316 (1976); cf. Ullmann v. United States, 350 U.S. 422, 430-31 (1956) (rejecting argument that immunity should not overcome the privilege because property-based ramifications such as loss of job may still occur).

\textsuperscript{95} Griffin v. California, 380 U.S. 609, 613 (1965).

\textsuperscript{96} \textit{Baxter}, 425 U.S. at 318 (“the 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. F.R.C.P. 13(a) (requiring certain claims to be filed as a counter-claim or waived).


Amendment that govern the day-to-day conduct of police investigating crime. Even with respect to these aspects of liberty, the metaphor of balance cannot be sustained.

1. The Nature of the Decision-maker

As an initial matter, police and planners are situated quite differently with respect to their governmental status. The police officer is “engaged in the competitive enterprise of ferreting out crime,” which creates substantial institutional pressure to tread on individual liberty rights in order to fulfill a governmental duty of bringing the guilty to justice.

By 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 conflicts with


100 The famous phrase comes from Justice Jackson’s opinion for the Court in United States v. Johnson, 333 U.S. 10, 13-14 (1948) (“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 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 sentiment, of course, has been expressed many times both before, United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (“the 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.”), and after, see, e.g., Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 368 (1998) (using Johnson’s phrase); Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) (quoting Johnson); Agular v. Texas, 378 U.S. 108, 111 (1964) (same).
individual liberty rights.\textsuperscript{101}

The Court has recognized the importance of this distinction in role when considering the constitutional limits on the conduct of parole officers. Unlike police officers, the Court has observed, a parole officer should not be expected to bear “hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer.”\textsuperscript{102} As a result, parole officers are granted more constitutional leeway than police. The same rationale applies to planners.

A state magistrate deciding whether to issue a warrant, rather than a policeman on the beat, would be a more appropriate governmental figure with whom to compare a planner.\textsuperscript{103} Both types of official assume neutral positions with respect to the individuals that their decisions will affect. Magistrates are not responsible for catching criminals and thus have a duty to remain neutral in considering warrant applications. Similarly, planners are required to consider and balance the property interests of all constituents in making land use decisions. Because federal courts grant magistrates issuing search warrants considerable deference,\textsuperscript{104} similar treatment for

\textsuperscript{101} Cf. Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 368 (1998) (holding that a parole officer is distinguishable from a police officer “engaged in the competitive enterprise of ferreting out crime” because the parole system is “more supervisory than adversarial”).

\textsuperscript{102} Id. (quoting Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972)).

\textsuperscript{103} First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 338 (1987) (Stevens, J., dissenting) (“The States’ interest in controlling land-use development and in exploring all the ramifications of a challenge to a zoning restriction should command the same deference from the federal judiciary as state court decisions on criminal matters.”).

\textsuperscript{104} Illinois v. Gates, 462 U.S. 213 (1983) (explaining that “[a] magistrate’s determination of probable cause should be paid great deference by reviewing courts”). The good
planners would seem appropriate.

In some ways, a planning board might be entitled to even greater deference, because to the extent that a magistrate is subject to electoral pressure, that pressure will weigh against the individual liberty of criminal defendants. Most voters will never imagine themselves as criminal defendants, and they are thus likely to object to a magistrate’s decisions when they perceive those decisions as overly protective of liberty rights. By contrast, electoral pressure on planners likely weighs in favor of at least some individual property rights. Most voters can imagine themselves being subject to regulation or the exercise of eminent domain, and they are thus likely to object to a planner’s decisions when they are insufficiently protective of property rights.105

2. The Nature of the Decision

The nature of the constitutional inquiry is very different in criminal investigatory procedure and Takings Clause cases. As Justice Stevens has argued, “the Court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation becomes

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).

105 Many responded with outrage to the Court’s decision in Kelo v. City of New London, 545 U.S. 469 (2005), permitting a taking and transfer of the property to a private owner in order to stimulate economic growth. See Nicole Stelle Garnett, The Neglected Political Economy of Eminent Domain, 105 Mich. L. Rev. 101 (2006) (explaining that “the opinion set off a firestorm of popular outrage, prompting federal and state efforts to impose legislatively the restrictions on eminent domain that the Supreme Court rejected in Kelo”) A potentially tongue-in-cheek response sought to develop a hotel on New Hampshire property owned by Justice Souter who 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. http://www.freestarmedia.com/hotellostliberty2.html (Last visited August 20, 2007).
By contrast, the Court has made a concerted effort to adopt clear rules of criminal procedure in at least some circumstances. One could thus expect greater knowledge of the relevant constitutional rules by police than planners.

3. The Nature of the Remedy for an Unconstitutional Decision

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 in good faith. . . . [and] municipalities are not subject to civil liability for police officers' routine judgment errors.” Every official land use planning decision, however, could give rise to substantial liability in the form of compensation to every landowner affected by the unlawful regulation as well as damages because every planning board decision is likely to be viewed as a municipal policy or practice.

This distinction suggests that the chilling effect on governmental conduct – the extent to which government officials shy away from performing their duties in service of the public for fear of monetary liability – would be considerably greater in the planning department than in the

106 First English, 482 U.S. at 340 n.17 (Stevens, J., dissenting).

107 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).

108 First English, 482 U.S. at 340 n.17 (Stevens, J., dissenting).

109 Id.
police department.\textsuperscript{110}

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\textsuperscript{111} – quite rare. One need not be concerned about restraining a legislator’s freedom to limit free speech, because she should not be doing it at all, and in the rare cases in which a government body contemplates enacting such a restriction, that body 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

\[\text{\textsuperscript{110} Id. at 340-41 (Stevens, J., dissenting) (“The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area.”). John Mixon, Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication, 20 Urb. Law 675, 686 (1988). If one views law enforcement as a legitimate function of government, and land use planning as an illegitimate one, then this result might be acceptable. See Epstein, supra note 1, at 95 (finding zoning to be an illegitimate function of government). As Margaret Radin has explained, one’s view of the chilling impact of damage liability in inverse condemnation cases is a function of one’s view of the legitimacy of governmental land use planning. Margaret Jane Radin, Evaluating Government Reasons for Changing Property Regimes, 55 Albany L. Rev. 597, 600-03 (1992); See Kelman, supra note72, at 35 n.64 ("Whether one believes the state is really solving a problem or engaging in a plan of extortion depends in significant part on whether one believes the state is fundamentally benevolent or a roving thief.").}\]

\[\text{\textsuperscript{111} Const. amend 1 (“Congress shall make no law . . .”).}\]
incremental burden on an existing judicial system.

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 piggy-back on an existing system. An entirely new block of cases would be thrust upon the federal courts imposing significant administrative costs. These costs may well be justifiable. But the BRR-B rhetoric makes no effort to justify them.

**Conclusion**

Before rejecting the rhetoric of balance among property and liberty rights, one must face up to Mr. Justice Frankfurter’s admonition – on which Judge Brown explicitly, albeit indirectly, relied\(^{112}\) – that “[t]he right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom.”\(^{113}\)

Frankfurter made these assertions while defending legislative authority on matters of legitimate societal debate. His essay stands as one of the great defenses of legislative responsibility for upholding the Constitution and most importantly for legislating wisely.\(^ {114}\) His

\(^{112}\) Santa Monica Beach, LTD, 968 P.2d at 1026 (Brown, J., dissenting).


\(^{114}\) Coming at the height of the holocaust, Frankfurter’s ability to put aside his personal sympathy for the plaintiff and vote to uphold a statute compelling school children to pledge allegiance to the flag makes his words worthy of great respect. The language is so moving that it bears quoting at some length. I cannot imagine a modern justice writing that:

“[o]ne who belongs to the most vilified and persecuted minority in history is not likely to be insensitive to the freedoms guaranteed by our Constitution. Were my purely personal
The notion that government actors assume great responsibility is more akin with those advocating a restrained view of the Takings Clause than with the aggressive view espoused by the BRR-B rhetoric. Indeed, Frankfurter’s motivating fear was that constitutional laws would become synonymous with wise ones. His words movingly conveyed the need for society to face its challenges, struggling for the wisdom to decide correctly. As Frankfurter wrote:

“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. . . . Particularly in legislation affecting freedom of thought and freedom of speech much 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.”

Meditation on the words of a document written by authors generations removed was, for Frankfurter, an unacceptable substitute for open and meaningful political debate. That position, if anything, applies more strongly to Takings Clause issues than to the First Amendment claims on which Frankfurter was explicitly focused.

For me, Justice Frankfurter’s more concise sentence – “I think I appreciate fully the objections to the law before us” – is most powerful of all. Id. at 666.

115 Id. at 670-71 (emphasis added).
The language we use provides a window to our understanding of the concept of property, and the study of our rhetoric thus holds great promise for shedding light on the heretofore untamable compensation question. But nothing in our language suggests, much less compels, the particular balance between property and liberty rights sought by the BRR-B rhetoric. We can and do conceive of property rights and liberty rights differently, and we provide greater protection to the latter.

Nothing said in this essay establishes that strict scrutiny of regulation affecting property value is unwise. Its more humble point is that the power of rhetorical analysis must be harnessed if it is to be used productively in developing a coherent takings-compensation scheme. In property cases, as in cases involving economic regulation generally, the Court has allowed the community, in Frankfurter’s terms, to persist in advancing a free society. He would likely have agreed with that restrained approach in takings cases, and refused to share the stage with property’s modern rhetoricians.