March 4, 2008

Is There a Sweet Land of Property?: The History, Symbols, Rhetoric, and Theory Behind the Ordering o

Steven Semeraro, Thomas Jefferson School of Law

Available at: https://works.bepress.com/steven_semeraro/4/
Is There a *Sweet Land of Property*?: The History, Symbols, Rhetoric, and Theory Behind the Ordering of the Rights to Liberty and Property in the Constitutional Lexicon

by

Steven Semeraro*
Is There a Sweet Land of Property: The History, Symbols, Rhetoric, and Theory Behind the Ordering of the Rights to Liberty and Property in the Constitutional Lexicon

Table of Contents

Introduction ........................................................................................................................................5

I. Property and Liberty Rights in American Jurisprudence ..............................................................10
   A. Defining Property and Liberty Rights ..........................................................................................10
   B. Judicial Scrutiny of Property and Liberty Rights ......................................................................13

II. Historical Property Rights .........................................................................................................16
   A. Intellectual History of the Founding Era ..................................................................................17
   B. Constitutional Text ....................................................................................................................22
   C. Constitutional Interpretation ....................................................................................................25
      1. Early Republic .........................................................................................................................26
      2. Early 19th Century ..................................................................................................................26
      3. Late 19th Century ...................................................................................................................27
      4. 20th Century ..........................................................................................................................28
      5. Conclusion ..............................................................................................................................33
   D. Social History and Symbols .....................................................................................................33

III. Extending Strict Scrutiny to Property Cases .............................................................................40
   A. The Rhetoric of Parity in Judicial Opinions .............................................................................41
      1. Constitutional Knowledge ....................................................................................................41
      2. Comparing Property Regulation to First and Fourth Amendment Claims ............................43
3. Rent Control as a Taking .............................................................................................................44

B. Understanding the Rhetoric of Balance Between Liberty and Property Interests ........45
   1. Persuasion Through Reification ..........................................................................................45
   2. Illustrating and Explaining Reification’s Persuasive Force ...........................................46
   3. The Special Case of the Concept of a Legal Right .................................................................49

C. Liberty and Property in Concrete Cases ............................................................................51
   1. Equal Access To, and Free Speech In, Quasi-Public Areas ...........................................51
   2. Property and Liberty in Criminal and Quasi-criminal Proceedings .................................53
      a. Counsel and Juries ...........................................................................................................53
      b. Privilege Against Self-Incrimination ............................................................................55
      c. Civil Forfeiture of Property Used in the Commission of a Crime ..............................57

IV. Theoretical Analysis Supporting Strong Property Rights ..............................................57
   A. Natural Rights Justifications for Strong Property Rights ................................................58
      1. All or Nothing ..............................................................................................................60
      2. Natural Limits on Government Power .........................................................................64
      3. Respect for the Body and Derivatively Labor ...............................................................67
      4. Natural Rights in Personality .....................................................................................69

   B. Consequentialist/Utilitarian Justifications for Strong Property Rights ......................70
      1. Certainty and Incentives as a Consequential Benefit of Strong Property Rights ........70
      2. The Critique of the Certainty and Incentives Based
         Defense of Strong Property Rights .............................................................................72
      3. The Empirical Defense of Strong Property Rights .......................................................75
4. Considerations Cutting Against

   Empirical Justification of Strong Property Rights ..................................................78

a. The Nature of the Decision .....................................................................................78

b. The Nature of the Remedy for Unconstitutional Conduct ........................................80

c. Administrative Considerations When Enforcing Liberty and Property Rights ........80

Conclusion ..................................................................................................................82
For generations, school children sung Samuel Smith’s *America/My Country Tis’ of Thee*, reaffirming that they lived in a “sweet land of liberty.” And from early on, symbols embodying personal freedom, including the Liberty Bell and, later, the Statute 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 liberty infringing government action with the strictest care, while deferring to legislatures with respect to virtually all property-related claims.¹

Symbolically beginning with Richard Epstein’s 1985 book *Takings: Private Property and the Power of Eminent Domain*, a movement emerged contesting liberty’s primacy in social and constitutional ordering.² Despite limited success in the courts,³ or perhaps because of it,⁴ this

¹ James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 140 (3rd 2008) (explaining that the Supreme Court “instituted a double standard of constitutional review under which the [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 The United States Supreme Court has largely rejected the property rights movement’s arguments. They have met with greater success in some state courts. See, e.g., Norwood v. Horney, 853 N.E.2d 1115 (OH 2006); County of Wayne v. Hathcock, 684 N.W.2d 765 (MI.2004).

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. Jurists ranging from William Brennan to William Rehnquist to Janice Rogers Brown have authored opinions calling for equivalent scrutiny of liberty and property claims. And a steady stream of books with provocative titles – *The Guardian of Every Other Right*; *Property and Freedom*; and *Cornerstone of Liberty* – beat the movement’s drum. Epstein himself 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](http://www.freestarmedia.com/hotellostliberty2.html) (Last visited August 20, 2007).


See infra Part III.


relentlessly advocates for greater scrutiny of property claims, both in the courts,\textsuperscript{11} and the academy, recently reiterating his commitment to “parity between liberty and property in the constellation of constitutionality, and by implication, political values.”\textsuperscript{12}

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.\textsuperscript{13}

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,

\begin{footnotesize}
\begin{enumerate}
\item See Wolf, supra note 2, at 1242-43.
\item Epstein Liberty & Property, supra note 10, at 2 (questioning, but ultimately accepting, that there is a parity between liberty and property interests); see Epstein Author's Retrospective, supra note 10, at 408 (responding to recent commentary on Takings).
\item Pipes, supra note 8, at 287-88; Epstein Author’s Retrospective, supra note 10, 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 claimed to be articulating a radical theory without necessary historical support. Proceedings of the Conference on Takings and the Constitution, 41 Miami L. Rev. 49, 66 (1986) (“Proceedings”) (statement of Richard Epstein). In subsequent work, however, he has tied his belief in strict scrutiny to historical and jurisprudential roots. See generally Richard Epstein, How Progressives Rewrote the Constitution 115 (2006).\end{enumerate}
\end{footnotesize}
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. 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 have chosen to group in the same category, even though we could readily distinguish them. 14 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. 15 Justice White put it most succinctly, recognizing for the Court that “the stakes are higher” when personal liberty is threatened. 16

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 and utilitarian 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

14 See infra Part III.B.
15 See infra Part III.C.
of a strong property rights 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.”17 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 more than two decades since they began, however, casts some measure of doubt on the possibility that they ever will.

Part I identifies the concepts of property and liberty in constitutional jurisprudence and outlines the current state of constitutional law with respect to each right. Part II critiques the historic 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 III 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 IV summarizes and critiques the natural rights and utilitarian defenses of strong property rights, finding neither persuasive.

I. 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.

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 non-governmental 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 the property he has acquired.

Despite their common use in both everyday language and the Constitution, the terms property and liberty can be seen as interacting in at least four distinct ways. First, they can be understood 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. Under this view, the concept of liberty includes the personal freedom to obtain, use and dispose of property without outside interference. Property, similarly, can be understood simply as the liberty to acquire and enjoy things.

Second, property can be interpreted as the antithesis of liberty. Property rights in one person necessarily restrain the ability of others to live autonomously because they limit freedom of action. An extreme version of this approach views the concept of trespass as undermining liberty.

A third variant interprets the concepts of liberty and property as limits of 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 individual use and enjoyment from which all others can be excluded. Since individuals live in a social setting, the individual effort to maintain life and liberty is interdependent on the efforts of others. Sandefur, supra note 9, at 56; see id. at 52, 57 (deriving this view from Locke’s writing); see James Madison, Property, Nat'l Gazette, Mar. 5, 1792, reprinted in James Madison, The Mind of the Founder 186 (Marvin Meyer ed., 1981) (recognizing that property can be understood as anything of value, including opinions and ideas that are normally believed to be encompassed by liberty).

This argument has found a voice among those opposing the expansion of intellectual property rights. Lawrence Lessig, The Future of Ideas 11 (2001) (posing the question "Are we, in the digital age, to be a free society?").

however, the ideal forms cannot exist. Each concept must limit or set a boundary for the other. 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. 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 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, http://www.mises.org/LibProp/lpsec5.asp (1958) (last checked 1/30/08). 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.

See 1 Friedrich Hayek, Law, Legislation, and Liberty: Rules and Order 107 (1973) (defining property as the answer to the governmental need for a boundary “of the domains of freedom by laying down rules that enable each to ascertain where he is free to act”); Epstein Liberty & Property, supra note 10, 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.”); Nedelsky, supra note 17, at 90-93 (discussing the view that property is “the boundary to political liberty”).
The social definitions of the concepts of property and liberty are not inherent. They involve choices about how the individuals in a society want to live.\textsuperscript{24}

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 can be interpreted within a broad range while still fulfilling their constitutional role.\textsuperscript{25}

\textbf{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. Government action is generally upheld against constitutional challenge, despite the inevitable impact on individual liberty or property, as long as it is rationally related to a legitimate public interest.\textsuperscript{26} Under this standard, courts ask

\textsuperscript{24}This social understanding of liberty and property rights is perhaps best conveyed by Justice Frankfurter’s dissenting opinion in \textit{West Virginia Board of Education v. Barnette}, in which he 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. . . 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 \textit{community} is the ultimate reliance against unabated temptations to fetter the human spirit.” \textit{West Virginia Board of Education v. Barnette}, 319 U.S. 624, 670-71 (1943).

\textsuperscript{25}See generally Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 82-85 (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. \textit{See id.} at 91-95 (Marshall, J., concurring).

\textsuperscript{26}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, \textit{Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 Harv. L. Rev. 1, 8 (1972).
only “whether any state of facts either known or which could reasonably be assumed” support the
government actor’s judgment.27

The courts scrutinize much more strictly, however, the liberty interests specifically
enumerated in the Constitution, as well as certain other liberty interests thought to be
fundamental to American society.28 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.29

This form of strict scrutiny is not extended to property rights.30 The Court has invoked

27 United States v. Caroline Products, 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); Railway Express

28 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 n.15 (1994).

29 See, e.g., Johnson v. California, 543 U.S. 499, 505 (2005); Clingman v. Beaver, 544 U.S.

Gunther defined strict scrutiny as”“strict’ in theory and fatal in fact.” Gunther, supra note
26, at 8. A recent study indicates that strict scrutiny is no longer, if it ever was, “fatal in fact.”
See generally Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict
strict scrutiny standard has in fact been applied see Richard H. Fallon, Jr., Strict Judicial

30 See Caroline Products, 304 U.S. at 152 n.4 (1938). And placing a few dissenting
opinions to one side, Kelo, 545 U.S. at 505-23 (Thomas, J., dissenting); Tahoe-Sierra
(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 Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348
U.S. 26 (1954), and whether a regulation constitutes a taking, Penn Central Transportation Co. v.
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.\textsuperscript{31} The standard of review, however, has not strayed far from the permissive rational basis test.\textsuperscript{32} With the exception of cases involving permanent physical invasions of property\textsuperscript{33} or regulation that removes all economic value,\textsuperscript{34} land use regulation is presumed constitutional even when important use rights are eliminated and value is reduced dramatically.\textsuperscript{35} As a result, liberty and property claims are

\begin{itemize}
\item \textsuperscript{31} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
\item \textsuperscript{32} See, e.g., Ruckelshaus v. Monsanto Co, 467 U.S. 986, 1007 (1984) (holding that no taking occurred where the government disclosed a trade secret, explaining that where the owner “is aware of the conditions under which the data 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 a taking”); Corn Products Refining Co. v. Eddy, 249 U.S. 427, 431-32(1919) (“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”).
\item \textsuperscript{33} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
\item \textsuperscript{34} Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
\item \textsuperscript{35} Village 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”). Courts strongly presume constitutionality when determining whether (1) a regulation amounts to a taking, and (2) a taking promotes a public use. See supra n.30. A form of intermediate scrutiny is applied 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, 392 (1994) (requiring government to show a reasonable nexus and
subject to starkly different levels of scrutiny.

II. 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. The historic case for strong individual property rights is said to arise 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. To date, these efforts have failed. Examining the intellectual history of the founding era paints an ambiguous picture, 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 a number of statutes were held 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 it. See Fallon, supra note 29, at 1285-86. Cf, Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 554 (1935) (holding progressive gross sales tax violates equal protection clause), with Nordlinger v. Hahn, 505 U.S. 1 (1992) (upholding property tax regime imposing dramatically different tax liabilities on properties of equal value); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526-28 (1958) (holding states have wide flexibility in devising taxing regimes and must meet only rational basis test).

Prior to the close of the Lochner era, the argument goes, landowners, at least, 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 1, 140-41 (“given the framers’ concern with protecting property as well as nearly 150 years of Supreme Court activity in this field, the relegation of property rights to a lesser constitutional status is not historically warranted.”); Epstein Liberty & Property, supra note 10, at 16; Roger Pilon, Freedom, Responsibility, and the Constitution: On Recovering our Founding Principles, 68 Notre Dame L. Rev. 507, 543 (1993); Norman Karlin, Back to the Future: From Nollan to Lochner, 17 Sw.U.L.Rev. 627, 637-38 (1988); 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).

Richard Epstein, Takings: Private Property and the Power of Eminent Domain 26 (1985) (discounting an historical interpretation of the Takings Clause because “looking to those historical particulars is likely to generate more confusion than it eliminates”); Joseph L. Sax,
perhaps more surprisingly, virtually nothing in the Constitution itself; the case law interpreting it; and the surrounding social history convincingly support a claim that property rights were scrutinized with great care at any time in American history.  

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. 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*, for example, 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.” John Locke, *Of Civil Government* 82-85 (1924). The Court has quoted this phrase to support the decision to extend federal jurisdiction equally to liberty and

---


38 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. *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.

39 Ely, supra note, 1, at 28-29; Adam Mossoff, Locke’s Labor Lost, 9 Chi. Law School 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”); Epstein Liberty & Property, supra note 10, at 1 (“There is little doubt that this formulation of the matter has exerted profound influence over the structure of American thought and constitutionalism.”).
property claims, see Dennis v. Higgins, 498 U.S. 439, 446 (1991); Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972), but not to the level of scrutiny applied. Property rights adherents, however, tend to ignore that Locke’s absolutist language was tailored to bodily integrity, including the goods necessary for self preservation, both of which he held to be unalienable.\(^{40}\) One could neither dispose of oneself – suicide was impermissible – \(^{41}\) or sell oneself into slavery.\(^{42}\) By contrast, the framers,\(^{43}\) like modern lawyers, saw property as rights over alienable things.\(^{44}\)

Locke, of course, was not entirely silent with respect to state regulation of more modern forms of property. On that count, he can quite reasonably 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

\(^{40}\) Stephen Buckle, Natural Law and the Theory of Property: Grotius to Hume Buckle, 168, 180, 182 (1991). Even philosophers can fall victim to this interpretive error. Cf. id. at 179 (“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 modern philosophers regard as constituting property”).

\(^{41}\) John Locke, Two Treatises on Government ii 6 (“Everyone . . . is bound to preserve himself”); Buckle, supra note 40, at 170.

\(^{42}\) Id. at 168, 184.

\(^{43}\) Nedelsky, supra note 17, at 23 (explaining that “Madison did not use the term property to stand for all individual rights (as in the Lockean sense of life, liberty and estates”).

\(^{44}\) United States v. General Motors, 323 U.S. 373, 377-78 (1945) (describing property rights to include the ‘right to possess, use and dispose’); Epstein, supra note 37, at 59 (same); Lawrence Becker, Property Rights: Philosphic Foundations 19 (1977) (describing property rights to include the rights to “consume, waste, modify, or destroy”).
Governments the laws regulate the right of property, and the possession of land is determined by positive constitutions.\textsuperscript{45} 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 they do not radically undermine the core right of exclusive possession.\textsuperscript{46} For example, the right to destroy even those things that modern lawyers would understand to be property was limited to situations “where need requires.”\textsuperscript{47}

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.”\textsuperscript{48} Locke maintained that “Charity gives every Man a Title to so much out of another’s Plenty, as will keep him from extreme want, where he has no means to subsist otherwise.”\textsuperscript{49} 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

\textsuperscript{45} Locke, \emph{supra} note 41, at ii 50; Buckle, \emph{supra} note 40, at 189.

\textsuperscript{46} \textit{Id.} at 189-90 (“in . . . stable, developed societies, property becomes whatever the law makes of it . . . the precise character and extent of the rights encompassed in property become a matter of (tacit) general agreement, entrenched in legal 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.”).

\textsuperscript{47} Locke, \emph{supra} note 41, at i 92; see Buckle, \emph{supra} note 40, at 169 (“Locke . . . is committed to rejecting the view that property is a right of absolute control over things); \textit{id.} at 181 (“Wilful destruction is not within the purview of property rights; property does not bestow absolute control over a thing”).

\textsuperscript{48} Buckle, \emph{supra} note 40, at 159; \textit{id.} at 161 (“Locke provides a safety net in the form of the right of charity”).

\textsuperscript{49} Locke, \emph{supra} note 41, at I 42.
benevolence.”  

Further, Locke’s philosophy cannot simply be mapped onto the framers. Though he certainly had influence, the framer’s views were multi-dimensional. Civic republicanism stood side-by-side with individualism.  

As Frank Michelman has explained, the Constitution is thus both “a liberal document” and “a small ‘r’ republican document.”  

Because of these dual views, Michelman concluded, the “Constitution is not reducible to one unified coherent set of principles, but that 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.”

Buckle, *supra* note 40, at 159 (quoting Locke’s definition of charity from Two Treatises on Government as “a Right to the Surplusage of . . . Goods” and as something “that cannot justly be denied” when a person is in need). 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,” Tom Grey has explained, “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. . . . the American colonists brought with them [a system of poor relief], and it was firmly established in the colonies at the time of independence.”  


Proceedings, *supra* note 13, at 60 (statement of Frank Michelman); see Nedelsky, *supra* note 17, at 170-71.

Jennifer Nedelsky’s research supports Michelman’s belief that the framers had a quite nuanced understanding of property, and Carol Rose has emphasized that the framer’s saw property rights as critical to build a strong society, as much a foreign policy objective as an individual rights concern.

In the end, one who points to John Adams, who wrote “‘Property must be secured or liberty cannot exist,’” must 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 . . .” What we know of the framers’ thinking, and probably all that we could ever know about it, cannot settle this debate.

54 Nedelsky, supra note 17, at 12 (discussing the views of different influential framers with respect to property); id. at 30 (recognizing that the framers recognized that some regulation of property was necessary).


56 Ely, supra note 1, at 43 (Quoting “Discourses on Davila” in Charles Francis Adams, ed. The Works of John Adams, vol. 6, p. 280). Compare J. Madison, Property, Nat'l Gazette, Mar. 29, 1792, reprinted in 14 The Papers of James Madison 266 (1983) (land, merchandise, and money are property, but “in its larger and juster meaning” the term also includes “everything to which a man may attach a value and have a right,” e.g. opinions, religious beliefs, personal safety, etc.), with James Madison, Parties, in 6 The Writings of James Madison 86 (1906) (“the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity”).

57 Benjamin Franklin, Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania (1789), in 10 The Recognitions of Benjamin Franklin 54, 59 (Albert H. Smyth ed., 1907); see Nedelsky, supra note 17, at 33 (quoting a letter from Thomas Jefferson to James Madison, echoing Franklin’s point that property serves society’s interests); Gordon Wood, the Creation of the American Republic 1776-1787 62 (1969) (quoting Thomas Paine: “All property is safe under the people's protection.”). Early state governments incorporated this notion of property into their institutions and actions. For example, the Vermont constitution required that “[p]rivate property ought to be subservient to public use, when necessity requires it.” and regulations allowed hunting on unenclosed land. Ely, supra note 1, at 33. The government also confiscated loyalist property after the war without paying compensation. Id. at 34-37, 41.
B. Constitutional Text

The conflicted intellectual history of the founding era does not trouble many supporters of strong property rights, including those pre-dating the modern property rights movement, because they find the framer’s 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.58 A quarter century later, Raoul Berger responded with consternation to 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.”59 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.”60

These accounts appear to rely on the assumption that the plain meaning of the Constitution places liberty and property on the same footing.61 But if the text of the property clauses were the only guide, one might just as easily conclude that property is less important than life and liberty because it comes last in a non-alphabetical list, and compensation is required only when property is literally taken from its owner.62

60 Ely, *supra* note 1, at 140-41.
61 See, e.g., Sinaloa Lake Owners Ass’n v. City of Semi Valley, 882 F.2d 1398, 1408-09 (9th Cir. 1989) (citing the language of the Fourteenth Amendment to support the claim that the “due process clause protects property no less than life and liberty”).
62 Const. amend. V & XIV (“no person shall be denied life, liberty, or property without due process of law” and “[N]or shall private property be taken for public use, without just
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, demands equal treatment of liberty and property claims. Expanding the inquiry, however, only weakens the case for parity. The preamble extols “the blessings of liberty” with no mention of property. Article I grants Congress the power to take property in the form of taxes with no compensation requirement, and that Article’s original limitation – requiring proportionality based on population – was eliminated by the Sixteenth Amendment.

Even the Bill of Rights itself, although generally understood as a limit on government compensation.”

63 Broadening our basis of inquiry from the text to the intent of the framers, one might note that 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 decidedly different concept from property. See generally Linda M. Keller, The American Rejection of Economic Rights as Human Rights and 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 phrase “pursuit of happiness” was understood to include government protection of property acquisition. Ely, supra note 1, at 29.

64 Const. preamble.

65 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.” A tax is literally a taking of property, although government benefits could provide just compensation. Epstein, supra note 37, at 315-16; Lucas County v. State, 75 Ohio 114 (1906)(holding that taxes other than for the common good constitute a taking).

66 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.” Ely, supra note 1, at 117-18 (“In the long run, the Sixteenth Amendment fundamentally altered the constitutional scheme. It breached the laissez-faire protection of property rights by opening the door for tax policies designed to redistribute wealth.”)
power vis-a-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.\textsuperscript{67} And the required “just compensation” has long been understood as a fair-market-value standard,\textsuperscript{68} 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.”\textsuperscript{69}

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\textsuperscript{70} and reasonable searches.\textsuperscript{71} 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.

\textsuperscript{67} U.S. Const. Amend. V: “[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 part) (“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 . . .”).

\textsuperscript{68} United States v. 50 Acres of Land, 469 U.S. 24, 29-30 (1984).

\textsuperscript{69} Kimball Laundry Co. v. United States, 338 U.S. 1, 4 (1949); see 50 Acres of Land, 469 U.S. at 35-36; Epstein Author’s Retrospective, supra note 10, at 409.

An owner of non-investment property that is taken by the government will typically have 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.

\textsuperscript{70} 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.”

\textsuperscript{71} 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 . . .”
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. Liberty rights, by contrast are generally protected more categorically.  

C. Constitutional Interpretation

One might argue that judicial interpretation of the Constitution demonstrates a reverence for property that might not be apparent from the text alone. During no period in our history, however, has the Court strictly scrutinized property claims. 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. But these statements were tempered with the understanding that these rights were subject to “the limits prescribed by the terms of his right.” The Supreme Court cases of every historical era have recognized broad legislative authority to define these terms to serve the public interest.

72 The language of the speech, assembly, and religion clauses, U.S. Const. amend. I; the rights of the accused, U.S. Const. amend.V & VI; and the rights of those convicted of crimes, U.S. Const. amend. VIII are stated in categorical terms. To be sure, reasonable seizures of the person are permitted, 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.

73 Eric Claeys has argued that the state courts in the 19th Century articulated a strong, natural rights account of property. 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 Claeys Natural Property Rights, supra note 10, at 1569 (quoting Chancellor James Kent’s leading nineteenth-century treatise Commentaries on American Law, “[e]very 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)).

74 Stephen Martin Leake, 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.”)

75 Id.
1. Early Republic

The 18th Century case, Calder v. Bull, is often cited 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.” By contrast, the Court’s holding – that a resolution altering the standards for a valid will was not an impermissible ex post facto law – actually was 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.”

2. Early 19th 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, the Court rejected a challenge to a state bankruptcy law on the ground that debt relief interfered with property rights obtained through contractual agreement. As Justice Trimble perhaps most lucidly explained, “that, in 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

---

77 Id. at 394.
79 The case had no majority opinion. Ogden, 25 U.S. at 332 (Marshall, J., dissenting). The Court had previously stricken down a bankruptcy law as unconstitutional when applied to debts incurred before passage of the law. Sturges v. Crowninshield, 17 U.S. 122 (1819).
restrained, by the positive enactions of municipal law.” 80 The ability of a state to abrogate existing property interests was limited, but the states’ power to define the scope of prospective interests was much broader. 81

3. Late 19th Century

In the post-Civil War period, the Legal Tender Cases 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 theretofore been entitled to gold or silver worse off than they had been before the Act took affect. 82 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. 83 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.” 84

80 Ogden, 25 U.S. at 319-20 (per Trimble, J.).

81 Id. at 323 (per Trimble, J.); id. at 292 (per, Johnson, J.) (explaining that government power to alter property rights exists despite the risk that the power may be misused); see West River Bridge Co. v. Dix, 47 U.S. 507, 533 (1848) (holding that the authority to regulate property in the public interest “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.”).

82 Legal Tender Cases, 79 U.S. 457, 554 (1870). Some state courts did, controversially, recognize a broader right to compensation. See McCombs v. Town Council of Akron, 15 Ohio 474, 480 (1846)

83 Legal Tender, 79 U.S. at 551.

84 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
Although the Court recognized that many government actions – tariffs, embargos, wars – affect private property interests in significant ways, the Constitution does not restrict legislative action or compel compensation.85

In *Kelly v. Pittsburgh*, 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.86 “It may be true,” the Court explained that the taxes assessed to the plaintiff bore “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 absolute equality of burdens, and fairness in their distribution among those who must bear them?”87

4. 20th Century

In the 20th Century, the Court placed some limit on the direct effect of government regulation, requiring compensation when the regulation “goes too far.”88 At nearly the same exigencies of the occasion, demand.”). At least one state court prohibited explicit re-distributive legislation beyond aid to the destitute. *See, e.g.*, State v. Osawkee Township, 14 Kan. 418, 421-22 (1875).

85 *Legal Tender*, 79 U.S. at 551.

86 *Kelly v. Pittsburgh*, 104 U.S. 78, 82 (1882)

87 *Id*. 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 Waterworks 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.

88 *Mahon*, 260 U.S. at 415. 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. *Lynah*, 188 U.S. at 470.
time, however, the Court rejected takings challenges to zoning and rent control legislation, making clear that regulation must go very far indeed before compensation is required.\textsuperscript{89} 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\textsuperscript{90} or taxing property without paying compensation.\textsuperscript{91}

During this period, provisions of the Constitution affecting liberty came to be interpreted more strictly than claims relating to property. Cases raising first amendment claims are entitled to strict scrutiny,\textsuperscript{92} and the liberty protecting rights of criminal defendants are also carefully scrutinized.\textsuperscript{93} Jury trials, explicitly required in criminal cases where liberty is at stake,\textsuperscript{94} are not

\textsuperscript{89} Euclid, 272 U.S. at 384, 395 (upholding zoning regulation with the effect of reducing property values by 75%); Block v. Hirsch, 256 U.S. 135, 157-58 (1921) (rent controls).

\textsuperscript{90} Kelo, 545 U.S. 469.

\textsuperscript{91} City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 373-74 (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’”); see United States v. Sperry Corp., 493 U.S. 52 (1989) (rejecting takings clause challenge to imposition of a user fee on persons litigating before the Iran Claims Tribunal). 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”). But see id. at 61-62 (explaining constitutional limits on the levying taxing 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).

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 (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).


\textsuperscript{93} The Court has long required the “intentional relinquishment or abandonment of a known
constitutionally required against government intrusion on property interests in eminent domain cases.\textsuperscript{95}

One might argue that the probing scrutiny of search and seizure claims that emerged in the mid-20th Century tacitly\textsuperscript{96} 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 seen 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.\textsuperscript{97} The police engage “in the competitive enterprise of ferreting out crime,”\textsuperscript{98} which creates substantial institutional pressure to tread on individual right or privilege.” Johnson v. Zerbst, 304 U.S. 458, 464 (1938).


\textsuperscript{95} There is no constitutional right to a jury trial in eminent domain proceedings under the federal and most state constitutions. City of Monterey v. Del Monte Dunes, 586 U.S. 687, 711, 738 (1999) (explaining that as of 1791 “condemnation proceedings carried ‘no uniform and established right to a common law jury trial.’”); United States v. Reynolds, 397 U.S. 14, 18, (1970); Cobb v. South Carolina Department of Transportation, 618 S.E.2d 299, 301 (S.C. 2005); Department of Public Works and Buildings v. Kirkendall, 112 N.E.2d 611, 614 (Ill. 1953). But see Ohio Const. Art. 1, § 19 (requiring trial by jury); see Ely, supra note 1, at 27.

\textsuperscript{96} See Johnson v. United States, 333 U.S. 10, 13-14 (1948) (requiring a warrant to support the search of a home even if probable cause can later be shown to exist).


\textsuperscript{98} The famous phrase comes from Justice Jackson’s opinion for the Court in United States
rights in order to fulfil 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 does.\textsuperscript{99}

The Court has recognized the importance of this distinction in role when considering how the Constitution limits the conduct of parole officers. Unlike police officers, but like land use planners, a parole officer does \textit{not} bear “hostility . . . that destroys his neutrality” when dealing with a parolee.\textsuperscript{100} As the Court explained, “realistically the failure of the parolee is in a sense a failure for his supervising officer.”\textsuperscript{101} As a result, parole officers are granted more constitutional leeway than police.

The relationship between planners and property owners in the community is closer to that

\textsuperscript{99} \textit{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 \textit{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, \textit{see, e.g.}, Pennsylvania Bd. of Probation and Parole \textit{v. Scott}, 524 U.S. 357, 368 (1998) (using \textit{Johnson’s} phrase).

\textsuperscript{100} \textit{Cf.} Pennsylvania Bd. of Probation and Parole \textit{v. Scott}, 524 U.S. 357, 368 (1998) (holding that a parole officer is distinguishable from a police officer because the parole system is “more supervisory than adversarial”).

\textsuperscript{101} \textit{Id.}

\textit{Id.} (quoting Morrissey \textit{v. Brewer}, 408 U.S. 471, 485-86 (1972)).
of parole officers and parolees than to 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, would be a more appropriate governmental figure with whom to compare a planner.¹⁰² 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,¹⁰³ similar treatment for planners would seem appropriate.¹⁰⁴

¹⁰² First English Evangelical Lutheran Church of Glendale 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).

¹⁰³ 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 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).

¹⁰⁴ In some ways, a planning board might be entitled to even greater deference than an elected magistrate who is subject to electoral pressure weighing against the individual liberty of criminal defendants. By contrast, electoral pressure on planners likely weighs in favor of property owners. See supra nn. 2-3.
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 justifies 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 Counsel,*\(^{105}\) 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.”\(^{106}\) As Justice Scalia readily admitted, neither legal practice during the colonial era nor the language of the Takings Clause are in accord with the compact.\(^{107}\) He recognized, however,

---

\(^{105}\) 505 U.S. 1003 (1992)

\(^{106}\) Id. at 1028.

\(^{107}\) Id. at 1027 n.15 (recognizing that colonial America did not follow the rule proposed and that the language of the Takings Clause did not compel it). 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).
that a cultural history may develop outside the formal legal one. 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. But a desire to safeguard property interests did not animate the popular call for amendments protecting individual rights. Federal control over state government and individual liberty were the driving issues.

The same framers who had opposed the Bill of Rights were responsible for the property clauses. And Madison’s proposed preamble explicitly recognizing that the amendments protected “the right of acquiring and using property” along with the “enjoyment of life and liberty” was never ratified. Although subject to varying possible interpretations, the social history leading to the Bill of Rights provides little support for a grass roots property rights

108 Ely, supra note 1, at 51 (“The most compelling objection to ratification concerned the lack of a bill of rights.”).

109 William Michael Treanor, The Origin and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L. J. 694, 708-09 (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.”)

110 Nedelsky, supra note 17, 187-88.

111 Paul Finkelman, Intentionalism, The Founders, and Constitutional Interpretation 75 Tex. L. Rev. 435, 476-77 (1996) (describing Madison as a reluctant father of the Bill of Rights, because he was opposed to it); Treanor, supra note 109, at 708 (recognizing Madison as the author of the property clauses of the Fifth Amendment).

112 1 Annals of Congress 433 (Joseph Gales ed., 1789); Ely, supra note 1, at 54.
movement.

The long standing association between Americans and land ownership also fails to fill the bill. Opportunities to own land were surely important to colonial Americans, and they no doubt believed that government power to take private property should be circumscribed by law. At the same time, popularly elected colonial, revolutionary, and antebellum governments used eminent domain extensively to foster economic growth, and often placed “economic growth ahead of protecting the interests of landowners.”

Recent research has revealed that social perspectives, at least 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.” Barry Shain has concluded that

\begin{footnotes}
\footnotetext[113]{Id. at 12.}
\footnotetext[114]{Id. at 13 (quoting Laws and Liberties of Mass 1648 which read “no man’s goods or estate shall be taken away from him . . . unless it be by the vertue [sic] or equity of some expresse [sic] law of the Country.”).}
\footnotetext[115]{Id. at 24-25 (“Existing property arrangements were compelled to yield to the colony’s social and economic needs.”).}
\footnotetext[116]{Id. at 59, 77.}
\footnotetext[117]{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); Leslie Bender, The Takings Clause: Principles or Politics?, 34 Buffalo L. Rev. 735, 751 (1985); see 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 property clause should not limit regulation at all. Hart,}
\end{footnotes}
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.”

During the period of ratification, the framers rejected Madison’s attempt to impose a property qualification for electors to the Senate, and early efforts to establish property ownership requirements for lower elective office were typically opposed by popular movements. Moreover, states generally did not pay compensation for regulation that reduced the value of land, though they usually, but not always, did when they took property outright.

The 19th Century brought no significant change. At the century’s turn, only two state

---


119 Nedelsky, supra note 17, at 56-57, 303 n.5.

120 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 Revolutionary Era 158-59 http://books.google.com/books?id=sTSMmWQSR7UC&pg=PA157&lpg=PA157&dq=%22liberty%22+and+property%22+american+revolution&source=web&ots=85d1yASNkn&sig=1YaydeViS0lE95O6DyHmHPypXuU#PPA159,M1 (last checked 1/08/08). “Taxation” an early commentator argued, “only respects property, without regard to the liberty of a person . . . .” People the Best Governors, in Chase, History of Dartmouth College I 657-58.

121 Ely, supra note 1, at 77-78, 94 (quoting Mugler v. Kansas, 123 U.S. 623 (1887)).

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. Legislation abrogating property rights to serve the public interest regularly occurred, and the courts upheld it.

Even under Federal law, where 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. And although the Lochner Era constituted a judicial campaign to scrutinize innovative economic programs strictly, that legislatures continued to enact those programs cuts against a culture of strong property rights.

(explaining that into the 19th Century “there continued to be a strong current in American legal thought that regarded compensation simply as ‘bounty given . By the State’ out of ‘kindness’ and not out of justice”); Treanor, supra note 109, at 695.


See, e.g., M’Clenachan v. Curwin, 3 Yeates 362, 373 (PA 1802) (holding that individuals “were bound to contribute as much [land], as by the laws of the country were deemed necessary for the public convenience”); Commonwealth v. Fisher, 1 Pen. & W. 462, 465 (PA. 1830); State v. Dawson, 3 Hill 100, 103 (S.C. 1836).

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 1, at 60-61; 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. 1, 76 (1986).

See, e.g., Traux v. Corrigan, 257 U.S.312, 328-30 (1921) (striking down 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 1, at 107. The Lochner Era, however, may have been an historic break with earlier forms of Constitutional review. Wolf, supra note 2, at 1241-42.

See generally, Michael J. Phillips, How Many Times was Lochner Era Substantive Due
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 vain, James Ely contends that “the cry ‘Liberty and Property’ became the motto of the revolutionary movement.”¹²⁸

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.¹²⁹

An early symbol emblematic of the ideals of the new nation was the Liberty Bell.¹³⁰

---

¹²⁸ Ely, supra note 1, at 26.

¹²⁹ Coinage Act of 1792, Statutes at Large, 2nd Cong., Sess. 1, p. 246-51, § 10. This practice is no relic of our early history. The United States mint continues to inscribe “Liberty” on all its circulating coins. [http://www.usmint.gov/mint_programs/circulatingCoins/](http://www.usmint.gov/mint_programs/circulatingCoins/) (Last visited Aug. 16, 2007). Since 1986, the country has also minted bullion coins for investors bearing the word as well as various symbols of liberty and an eagle. [http://www.usmint.gov/mint_programs/american_eagles/index.cfm?action=american_eagle_bullion](http://www.usmint.gov/mint_programs/american_eagles/index.cfm?action=american_eagle_bullion) (Last visited Aug. 16, 2007).

¹³⁰ Cast in the 1750s, the symbolic bell did not receive its current name until the 1830s when it was associated with the abolitionist movement. [http://en.wikipedia.org/wiki/Liberty_Bell](http://en.wikipedia.org/wiki/Liberty_Bell) (Last checked 1/7/08); [http://www.nps.gov/history.nr/twhp/wwwlps/lessons/36liberty/36setting.htm](http://www.nps.gov/history.nr/twhp/wwwlps/lessons/36liberty/36setting.htm). The bell itself includes the biblical inscription “Proclaim liberty throughout the land and unto all inhabitants thereof.” *Id.* (quoting Leviticus 25:10) (last checked 1/7/08). 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. *Id.* In the mid-20th Century, it was used as the reverse of the half dollar coin. [http://www.coincommunity.com/coin_histories/half_dollar1948franklin.asp](http://www.coincommunity.com/coin_histories/half_dollar1948franklin.asp) (last checked 1/7/08).
1831, Samuel Smith penned *My Country tis of Thee/America*, 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.\footnote{131}{The first stanza refers to the “Sweet Land of Liberty”; the fourth to God as the “Author of Liberty”; and the sixth refers to the “Safeguard of Liberty.” \url{http://www.buchanan.org/h-005.html} (Last checked 1/16/2008).} In his Gettysburg address, Lincoln described the United States as “conceived in liberty”; he did not mention property.\footnote{132}{\url{http://www.loc.gov/exhibits/gadd/images/Gettysburg-2.jpg} (Last checked 2/15/2008).} Later came the Statue of Liberty and the poem, *The “New Colossus,”* with which it became entwined:

> “Keep, ancient lands, your storied pomp!” cries she,  
> With silent lips. “Give me your tired, your poor,  
> Your huddled masses yearning to breath free”\footnote{133}{\url{http://www.nps.gov/archive/stli/newcolossus/index.html} (Last checked 2/15/2008).}

And, of course, the Pledge of Allegiance recognizes “liberty and justice,” but not property, “for all.”\footnote{134}{\url{http://www.homeofheroes.com/hallofheroes/1st_floor/flag/1bfc_pledge.html} (Last checked 3/1/2008). The pledge, of course, has been recited by school children since the 1890s. Id. Interestingly, it is believed to have been drafted by a socialist who considered adding equality, but not property, to the “liberty and justice” phrase. \url{http://history.vineyard.net/pledge.htm} (Last checked 3/1/2008).}

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, the one well known reference to private property in popular culture, Woody Guthrie’s “This Land is Your Land,” has a negative connotation:

> Was a big 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
This land was made for you and me\textsuperscript{135}

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

\textbf{III. Extending Strict Scrutiny to Property Cases}

Even if there is no compelling historic support for strong property rights, a justification may emerge as the natural development of currently evolving jurisprudential models. The strict scrutiny applied to important liberty claims has a relatively short pedigree.\textsuperscript{136} One might thus argue that since the Court has heightened scrutiny for liberty claims with scant historic support, it should do the same for property claims.\textsuperscript{137}

A number of judges from across the political spectrum have advocated for this approach, analogizing property rights to other constitutional rights that are strictly scrutinized.\textsuperscript{138} This

\begin{itemize}
\item \textsuperscript{135} http://www.k-state.edu/english/nelp/american.studies.s98/god.bless.and.this.land.\html (Last checked 1/24/2008). Woody Guthrie’s son, Arlo, changed the lyrics of the \textit{private property} verse of \textit{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!


\item \textsuperscript{136} Fallon, \textit{supra} note 29, at 1274.

\item \textsuperscript{137} \textit{Cf.} Epstein, \textit{supra} note 13, at 115 ("[i]f [Justice] Stone is correct [in footnote 4 of \textit{Caroline 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.").

\item \textsuperscript{138} Although the specific use of this rhetorical move appears to be of relatively recent origin,
section sets out three leading examples articulated by Justice Brennan, Chief Justice Rehnquist, and Judge Janice Rodgers Brown, then a justice of the California Supreme Court and now a judge on the Federal Court of Appeals for the District of Columbia Circuit.

This Part describes each judge’s rhetoric and then shows that its persuasiveness depends on 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. 139

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, the Supreme Court took up the issue whether the government must compensate property owners for temporary takings, i.e. situations in which a land use limitation is determined to constitute a taking, and the government responds by repealing the regulation. 140 In a

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”).

Cf. Grey, supra note 50, at 47 (recognizing that “the 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”).

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

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,” he wrote, “a policeman must know the Constitution, then why not a planner?” By posing this question, Brennan sought parity in the scrutiny of liberty and property infringing claims.

---

141 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).

142 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).

143 *Id.* at 658.

2. Comparing Property Regulation to First and Fourth Amendment Claims

In 1994, the Court considered whether the Constitution required a municipality to compensate a developer when the government (a) exacts property as a condition of permitting a development project and (b) that exaction would constitute a taking were the government to demand it outside of the permitting process. The Court held that the government could escape paying compensation only by showing a reasonable proportionality between the exaction – i.e., the government’s demand – and the burdens imposed on the community as a result of the project.145

In an opinion for the Court, Chief Justice Rehnquist supported this holding by comparing the property clauses to the First and Fourth Amendments.146 Rehnquist reasoned that because the Court carefully scrutinized business regulations affecting speech and privacy, it should similarly scrutinize regulations that affect property value.147 “We see no reason,” he 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.”148 Like Brennan, Rehnquist recognized the appeal of balanced


147 Dolan, 512 U.S. at 392.

148 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
treatment for two concepts that both have the status of constitutional right.

3. Rent Control as a Taking

In a 1999 case challenging a Santa Monica rent control ordinance, the California Supreme Court held that no taking occurred because price controls are within the government’s police power. Justice Brown dissented. 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 greater deference than a restriction on a liberty interest. Economic freedoms are no different,” she argued, “from other freedoms protected by the Constitution.”


149 Santa Monica Beach, 968 P.2d at 962 (recognizing that “ordinary rent control statutes are generally constitutionally permissible exercises of governmental authority.”).

150 Santa Monica Beach, 968 P.2d at 1024-45 (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).

151 Santa Monica Beach, 968 P.2d at 1026 (Brown, J., dissenting). Judge Alex Kozinski has advanced a somewhat similar view, explaining that “the 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 v. City of Semi Valley, 882 F.2d 1398, 1408-09 (9th
B. Understanding the Rhetoric of Parity Between Liberty and Property Interests

This section explains that the persuasiveness of the judges’ rhetoric in the above examples rests on a metaphor of parity between property and liberty. The metaphor resonates for 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 over-inclusiveness 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.”\(^{152}\) 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 following

---

\(^{152}\) Kenneth Burke, *The Philosophy of Literary Form* 4 (1957). 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.”).
For us, the 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.” 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

This section identifies two well known cases in which 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 wrote, “then it is not possible to create a welfare obligation with the emergence of the state, given representative theory of government.” This reasoning is


Kelman, supra note 152, at 270.

Epstein, supra note 37, at 324.
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 would then be used systematically to support those who are in need.  
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. These include family homes, 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.

Justice Holmes identified such an example in his dissenting opinion in Traux v. Corrigan. 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. “By

---


157 Grey, supra note 50, 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 hand and the ordinary person's expectation of secure possession and free use of personal belongings on the other.”).

158 257 U.S. 312 (1921).

159 Id. at 328-30.
calling a business ‘property,’” Holmes explained, “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.”160 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.”161

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 applies 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.162 But the privacy concerns of homeowners are generally stronger than those of the business owner.163 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.164

160 Id. at 342-43.
161 Id. at 342-43 (Holmes, J., dissenting).
162 Kelman, supra note 153, at 1838.
163 Id.
164 “If property is fungible (for example, a large shopping center),” Radin 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.” Margaret Jane Radin, Diagnosing the Takings Problem in Reinterpreting Property 156 (1993).
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 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.”

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. 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 they serve the particular liberty interest being used as the basis for comparison.

---

165 Kelman, supra note 152, at 274. Of course, one can imagine defeasible rights. Grey, supra note 156, at 885. A related and more pervasive difficult often arises because legal terms tend to have lay meanings that influence their use even in legal contexts. Wesley Hohfeld, Some Fundamental Legal Conceptions as Applied to Judicial Reasoning, 23 Yale L.J. 16, 22-24 (1913).

166 Kelman, supra note 153, at 1837-38 (recognizing that there is “no reason why we should invariably apply arguments relevant to some instances of a category to all other situations arguably covered by the same category”).
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. But these rights seem to differ from property rights in a fundamental way. Although I am less confident of my ability to articulate this distinction than I am of the other points made in this article, I believe that each of these liberty rights mediates 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 are true individual interests that exist 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 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 analysis. Recognizing a difference, and 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.

This subsection demonstrates that 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 based on (1) 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 cases addressed by Brennan, Rehnquist, and Brown above. The right to exclude is central to an owner’s property rights. 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 explosion. Property rights trump any liberty interest.

167 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 rights that are commonly characterized as property.”).

168 See Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 161 (Wis. 1997) (awarding...
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.

With respect to access, courts widely rejected Due Process and Takings Clause challenges to state and federal civil rights acts that compelled owners of business property that was generally held open to the public to admit everyone regardless of race.169 With respect to free speech rights on quasi-public property, the situation has been more complex, but no less definitive. In *Marsh v. Alabama*, the Court upheld the right to distribute religious literature in a privately-owned company town. “When we balance the Constitutional 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.”170

Subsequently, the Court rejected the notion that free speech rights trump the property 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) (property rights not broad enough to prohibit trespass on business property operated as a farm to provide information and government services to migrant workers living on the property).

169 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. U.S., 379 U.S. 241, 259-60 (1964) (explaining that “[i]t has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment” and that at least 32 states had civil rights laws mandating access to private property); *id.* at 261 (rejecting takings claim).

interests of smaller scale owners of quasi-public property, such as shopping centers.\textsuperscript{171} 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 forbid governmentally required access to quasi-public property 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.\textsuperscript{172}

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

Criminal law raises interesting conflicts among rights because deprivations of liberty (prison sentences) and property (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 to cases in which only the defendant’s property is at stake. 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\textsuperscript{173} and trial by jury in a criminal


\textsuperscript{172} Pruneyard Shopping Center, 447 U.S. at 88 (upholding against property clause challenge state court decision finding a state law right to leaflet on private shopping center property).

\textsuperscript{173} See infra nn. 191-92.
case. Instead, both core rights apply only when the defendant’s right to liberty is threatened with at least some level of imprisonment.

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 does not apply to every criminal case. 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. By contrast, where the court limits its punishment to a deprivation of property – a criminal fine – denying appointed counsel to an indigent defendant is constitutional. “[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.”

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. The Supreme Court

---

174 See infra nn. 193-95.


177 Id. at 373.

178 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
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. 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 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 

---

179 Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) (explaining that there is “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.”).

180 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 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 to a belief that property rights were 
entitled to greater protection than liberty rights.

181 U.S. Const. amend. V (in pertinent part, “nor shall (any person) be compelled in any 
criminal case to be a witness against himself”).
protect the liberty interests at stake when an individual faces incarceration.\textsuperscript{182} Although the right applies in all criminal cases, no similar right exists in civil cases no matter how significant the potential damages.\textsuperscript{183}

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 the witness’s liberty interests in a threatened future criminal prosecution.\textsuperscript{184} In criminal cases, the prosecution is prohibited from urging the jury to draw a negative inference from the defendant’s failure to testify.\textsuperscript{185} 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{186} Liberty interests are scrupulously protected by the privilege; property interests in civil cases are not. In Justice White’s terms “in criminal cases, the stakes are higher.”\textsuperscript{187}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{182} Malloy, 378 U.S. 1, 9 (1964) (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”)).
\item\textsuperscript{183} Application of Gault, 387 U.S. 1, 49 (1967) (privilege only applies to criminal sanction).
\item\textsuperscript{184} Baxter, 425 U.S. at 316; 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).
\item\textsuperscript{185} Griffin v. California, 380 U.S. 609, 613 (1965).
\item\textsuperscript{186} 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).
\item\textsuperscript{187} Baxter, 425 U.S. at 318-19; Christopher V. Blum, Self-incrimination, Preclusion, Practical Effect and Prejudice to Plaintiffs: The Faulty Vision of SEC v. Greystone Nash Inc., 61
\end{enumerate}
\end{footnotesize}
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. Unlike criminal proceedings in which guilt must be proven beyond a reasonable doubt, the government need satisfy only a preponderance of the evidence standard. Further, the government may take without paying any compensation property owned by an individual who had no fault with respect to the criminal activity.

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.

IV. 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 pre-political rights to property that governments are morally obligated to protect regardless of the consequences of doing so.

Brooklyn L. Rev. 275, 275 (1995) (explaining that in a criminal prosecution, “the defendant may lose his freedom, not just property”).


189 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 the owner was not convicted of the underlying crime. Dowling v. United States, 493 U.S. 342 (1990); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972).


191 These theorists typically cite Locke’s philosophy in which “citizens retain certain inalienable rights, held in the pre-governmental state of nature, that the state may not abridge.” Paul Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 Penn. L. Rev. 1296, 1297 (1982). This view can be contrasted with a “Hobbesian or ‘positivist’
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 they in fact produce a society that is better for everyone.\textsuperscript{192}

\textbf{A. Natural Rights Justifications for Strong Property Rights}

Natural rights theorists define the concept of property as a pre-political, pre-social right to acquire, use, and dispose of things or intangibles.\textsuperscript{193} Adherents of this view contend that “[t]he government does not \textit{create} justice; it merely recognizes and enforces natural rules of right and wrong.”\textsuperscript{194} At least four variants of this theory have been advanced. First, commentators make a rather crude \textit{all-or-nothing} argument that since the failure to recognize any property rights would fail to respect individual human dignity, a strong property rights regime is morally compelled.\textsuperscript{195} A second version focuses on the legitimacy of government power, arguing that

\begin{itemize}
  \item \textsuperscript{192} For a judicial debate espousing these competing views of property compare, \textit{Traux}, 257 U.S. at 328-30 (per Taft, CJ) (striking down a statute permitting peaceful labor picketing on the ground that it infringes inherent property rights of business owners), with \textit{id.} at 342-44 (Holmes, J., dissenting) (arguing that government should have the constitutional flexibility to regulate business in the public interest), and \textit{id.} at 354-55 (Brandies, J., dissenting) (explaining that business property is subject to regulation setting the rules for competition and “[t]he rules governing the contest necessarily change from time to time [because] being merely experiments in government, must be discarded when they prove to be failures.”).
  \item \textsuperscript{193} Robert Nozick, \textit{Anarchy, State and Utopia} 167-74 (1974); Claeys Natural Property Rights, \textit{supra} note 10, at 1560-61, 1568.
  \item \textsuperscript{194} Sandefur, \textit{supra} note 9, at 52.
  \item \textsuperscript{195} \textit{See infra} IV.A.1.
\end{itemize}
government cannot possess powers that individuals do not.\textsuperscript{196} A third draws on Locke’s labor theory of property,\textsuperscript{197} and a fourth contends that strong property rights are essential to individual personality.\textsuperscript{198}

The standard counter arguments 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.\textsuperscript{199} 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.\textsuperscript{200}

\textsuperscript{196} See infra IV.A.2.

\textsuperscript{197} See infra IV.A.3.

\textsuperscript{198} See infra IV.A.4.

\textsuperscript{199} Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandies, J., dissenting) (“All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community.”); see, e.g., John Rawls, \textit{A Theory of Justice} 578 (1971) (explaining that “[f]or 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.”); Oliver Wendell Holmes, \textit{Natural Law} in Collected Legal Papers 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.”).

\textsuperscript{200} An accessible discussion of this point is contained in Cass Sunstein’s \textit{Democracy and the Problem of Free Speech}. Sunstein cites to Franklin Delano Roosevelt’s reference to “this man-made world of ours” which signifies that institutions such as private property and free markets that we experience as natural “pre-political and pre-social” are in fact products of legal systems that we have created. We tend to experience existing institutions as independent of government, and regulation of those institutions as government action. In fact, the existing institution is as much a product of government as a new regulation would be. Individual effort and voluntary agreement, of course, is far from irrelevant to ones property holdings. “But the reward of a certain definition of ‘effort,’[; what counts as voluntary]; and the protection of that reward by the state, were emphatically legal.” Cass Sunstein, \textit{Democracy and the Problem of Free Speech} 30-
This section sets out and critiques the specific natural law arguments advanced by strong
property rights advocates.

1. **All or Nothing**

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

   This argument conflates the correlation between the affront to human dignity in

31 (1993). To recognize that our understanding of property is shaped by law is *not* to say that it
should be rejected. On the contrary, our society created our system of property to better the
human condition. But just as it 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. The issue is
whether the change will in fact better society, not whether the change will undo some natural
arrangement. *Id.* at 31-32.

   This view is reflected in quotes such as “[h]istory 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) (depression era quote); Sandefur, *supra* note 9, at 49 (“diminishing 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 & Property, *supra* note 10, at 7-11 (arguing that we must
choose between awarding property exclusively to the one with the greatest claim or to face
arbitrariness that will lessen property’s value for all).

   Sandefur, *supra* note 9, at 14-19 (using the Shakers and Marxist Russia as counter-points
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, unable to rely on market pricing to distribute
resources).
totalitarian regimes and their lack of respect for property. 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, for example, in which labor was compensated extremely poorly – the antebellum southern United States comes to mind – had a regime of relatively strong property rights but nonetheless failed to respect human dignity. It is the humanity of the governmental system, not just the approach to property, that matters.

The notion that a society might develop some intermediate degree of property protection through its law, custom, and culture is rejected 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 declared that burglary is illegal – not because the victim’s personal rights have been violated. Society could just declare that burglary will be permitted, and then the victims would not feel violated.”

This form of reasoning adopts an unrealistically narrow view of the relationship of 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 will 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 attitude and law is much more complex, combining

---

203 Id. at 20.
both deep, if not inalterable, notions of morality with welfare analysis. Attitudes are not
ddictated instantaneously as legislatures pass laws and courts decide cases, but law, along with
culture and custom, nonetheless contribute to social attitudes about property. Once social
expectations develop with respect to a certain degree of property rights, they cannot be
eliminated simply by changing the law. That attachments are sticky, however, does not mean
that they are natural or that they could not change over time.

One might imagine a society in which theft was lawful. In such a society, property
owners would take greater steps to protect their own 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. A less extreme example

204 Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 Wm. & Mary L.
Rev. 1849, 1867 (2007) (explaining that “success 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”).


206 Umberto Eco explained the book buying process as follows:

antiquarian book dealers . . . have certain methods of procuring books . . . there 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
would be car dealers who make varying offers affected by race and/or gender. 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 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. Although Justice Scalia referenced common law nuisance, an historic ground, as the source of government power, it is now clear that these principles are not limited to the historic rules but can develop as society’s

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. After carefully searching, the dealer may find a few books of great value. The dealer than says to the owner that there is] a lot of stuff here, but none of it is worth much. [The dealer then makes a low ball offer, knowing it will be rejected, following up with an even lower offer for the 10 most valuable volumes. 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.]

Umberto Eco, The Mysterious Flame of Queen 56-59 (2004). The opening scene of the movie, The Ninth Gate, depicts such a book buying scam. See http://www.popmatters.com/film/reviews/n/ninth-gate.shtml (Last checked 2/02/08) (“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”).


Lucas, 505 U.S. at 1020-32.

Id. at 1030-31; 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).
view of property rights evolves.\textsuperscript{210}

2. Natural Limits on Government Power

A variant on the \textit{all or nothing} natural rights theory argues that even if regimes with intermediate levels of property protection are feasible, they would be illegitimate. 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. The government can act only as individuals authorize it to act \textit{and}, critically, that individuals can authorize no more than they could do themselves.\textsuperscript{211} “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

\textsuperscript{210} In \textit{Lucas}, there were indications that background property principles were not static. \textit{Id}. at 1027 (explaining that the decision to compel compensation for government regulation “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”); \textit{id}. at 1032 (Kennedy, J., concurring in judgment) (explaining the 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”). The Court confirmed the dynamic nature of background property principles nine years after \textit{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.” \textit{Palazzolo}, 533 U.S. at 630.

\textsuperscript{211} John Locke, Of Civil Government § 27 & §135 (1690); see Epstein, \textit{supra} note 37, at 36, 331 (explaining that “the 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”). In modern philosophy, Robert Nozick provides the classic defense of this view of government. Nozick, \textit{supra} note 193, 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 . . .); \textit{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
just as tort law regulates the way that private citizens may interact with us - their authority is limited by our rights.”

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.

So limited, the government can only protect property from trespass and conversion as 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.

This version of a 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. It is far from clear, however, why this must be so. Many individuals choose to give their life for the betterment of

\[\text{\textsuperscript{212}}\] Sandefur, supra note 9, at 22, 53; Epstein, supra note 37, at 12-13; id. at 36 (explaining that a governmental taking of private property occurs whenever a taking would occur if a private party had taken the same action).

\[\text{\textsuperscript{213}}\] Epstein, supra note 37, at 8-10.

\[\text{\textsuperscript{214}}\] Sandefur, supra note 9, at 120; Epstein, supra note 37, at 263-329.

\[\text{\textsuperscript{215}}\] This argument often finds support in dicta from the early case Calder v. Bull, 3 U.S. 386, 388 (1798) (“[i]t 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.”).

\[\text{\textsuperscript{216}}\] Support for this view is said to be found in the common law’s refusal to force partnerships. “[R]elationships of trust,” Epstein argues, “do not work well between individuals who are brought together by happenstance and chance.” Epstein Liberty & Property, supra note 10, at 13.
society (or even other societies, for example Mother Teresa or Albert Schweitzer). Though many
give from their excess, an appreciable number give from their need. Soldiers – not of fortune –
provide perhaps 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. 217 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 they 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 tax
money. 218

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

Baker, Counting Preferences in Collective Choice Situations, 25 UCLA L. Rev. 381 (1978); C.
Mark Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52
progressive taxation – particularly at current levels in the United States – seems a minor sacrifice compared with, say, forced military service in a combat zone.

3. **Respect for the Body and Derivatively 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.\(^{219}\) 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. As Adam Mossoff has explained “the right to one’s life, limbs and liberty is an exclusive right” that cannot “similarly be possessed by any other party.”\(^ {220}\) The property produced by one’s body is then seen as “morally equivalent to one’s (exclusive) right to life and liberty.”\(^ {221}\) Further, the production of property through labor, in Mossoff’s words, “creates the products necessary for him to live.”\(^ {222}\) Individuals are thus morally required to use their labor productively and morally entitled to keep the fruits of that labor.

   The traditional counter to Lockean labor theory is that it artificially imagines an

---

\(^{218}\) *Proceedings, supra* note 13, at 160-62 (statement of Mark Kelman).

\(^{219}\) John Locke, *supra* note 41, at ch. V, ¶ 27 (1689) (“Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his.” and “Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.”).

\(^{220}\) Mossoff, *supra* note 19, at 382 & n.47.

\(^{221}\) *Id.* at 382, 396 (“the 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”).

\(^{222}\) Mossoff, *supra* note 39, at 160.
individual alone with nature and postulates that what a lone individual creates is rightly his own. However compelling that logic may be, it bears little resemblance to a 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. That one may be entitled to keep what 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 the individual’s 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. We may substitute money for our own bodies because we are not all equivalent care givers, 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.

---

223 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 distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view.” Rawls, supra note 199, 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.

224 This duty is sometimes even legally enforced. See Swoap v. Superior Court, 516 P.2d 840, 852 (1973) (upholding the constitutionality of a law requiring support payments by adult
4. Natural Rights in Personality

An alternative natural rights theory posits property as essential to personality. 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. This position justifies the freedom to create, but not private property. Much of what we create is not propertizable. 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.

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. This approach replaces the 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.

---

225 G.W.F. Hegel, The Philosophy of Right 40 (“A person must translate his freedom into an external sphere in order to exist as Idea.”).

226 Id. at 45 (“property is the embodiment of my personality”).


228 Epstein Liberty & Property, supra note 10, at 28 (“for 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); Epstein Author’s Retrospective, supra note 10, at 417; Sandefur, supra note 9, at 31-38.
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.

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. Those commentators claiming to offer such a justification, however, tend to fall back on the debunked assumptions about certainty and fail to rebut empirical claims that strong property rights would have significant negative effects.

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

The 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 makes our creations possible. 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.229 “[T]he real task,” Epstein argues, “is to adopt a rule that requires as little labor as possible . . . so that the owner can be confident that he will be able, by holding on to the external

229 Epstein, supra note 37, at 11; Epstein Law & Property, supra note 10, at 11-12, 14; Sandefur, supra note 9, at 36-37 (“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.”). But see Terry L. Anderson & Peter J. Hill, Privatizing the Commons: An Improvement?, 50 S. Econ. J. 438, 441, 447 (1983) (arguing that competition for resources can be 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).
object, to keep the benefit of the labor that he creates.”\textsuperscript{230} This approach is thought 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.\textsuperscript{231} Since such a regime of strong property rights would, ex ante, benefit everyone, it’s adherents believe it to be Pareto superior to other regimes.

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

Any system that protects property rights may be Pareto superior\textsuperscript{232} to a state of nature.\textsuperscript{233}

\textsuperscript{230} Id. at 15; id. at 9-10 (arguing that “the consequentialist situation that 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 generally Richard Epstein, Simple Rules for a Complex World 59-63 (1995).

\textsuperscript{231} Epstein Liberty & Property, supra note 10, at 14-16; id. at 19 (seeking to reduce the cost of acquiring property because requiring “individuals to expend labor that is equal in value to the property acquired reduces the value of the property to zero. . . . 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 (The benefit comes from enabling society “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.”); id. at 14-16 (easy acquisition permits a proper assessment of temporal property development decisions).

But one making only Pareto optimal trades cannot choose among 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.\(^{234}\)

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.\(^{235}\)

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 an hypothesis, not an empirical truth. Individuals may work even harder in a less certain environment to be better

---

\(^{233}\) Whether a system of pure private property were more efficient than a state of nature would depend on a greater number of variables than the state of legal entitlement. Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 Hofstra L. Rev. 711, 715-39 (1980).

\(^{234}\) Eduardo M. Penalver, *Reconstructing Richard Epstein*, 15 Wm. & Mary Bill Rts J. 429, 435-36 (2006); Kennedy & Michelman, *supra* note 233, 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).

\(^{235}\) *Id.*
prepared if some of their property is lost through regulation.\textsuperscript{236} 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. By contrast, a regime in which the government compels parties to deal with each other may be considerably more certain.\textsuperscript{237} For example, a system in which the airspace over land held as private property was also treated as private property would be virtually non-administrable. 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:

\begin{itemize}
\item \textit{a privilege}, which is an individual entitlement with which the government may not interfere; and
\item \textit{a right}, which is an individual entitlement to call upon the government to stop others from doing something.
\end{itemize}

Individuals are thus privileged to engage in free speech, and individuals have a right to exclude trespassers from their real property. A privilege, then, is something that no other person has a right to call upon the government to stop. If person A has a privilege to speak in a public forum,

\textsuperscript{236} \textit{Id.} at 719.

\textsuperscript{237} \textit{Id.} at 728.
then person B might be said to have a non-right to call upon the government to stop A from speaking. The correlative legal entitlement to a right is a duty. If A has a right to exclude individuals from his real property, then B has a duty to stay off of A’s property unless invited.\textsuperscript{238}

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, because 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.\textsuperscript{239} 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 it from non-owners to owners. If owners are certain of their ability to stop others from invading their property, non-owners 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. The owner may permit others to use his property. A non-owner in a regime of strong property rights thus does not know when an owner will invoke his right.

As property rights become weaker, the owner’s certainty is reduced because situations arise in which he cannot call upon the government to exclude others. For example, the owner might be required to permit free speech activity on his property. But the non-owner’s certainty is

\textsuperscript{238} Hohfeld, \textit{supra} note 165, at 30-33, 35-37.

\textsuperscript{239} Kennedy & Michelman, \textit{supra} note 233, at 759-60 & n.54 (quoting Arthur L. Corbin,
increased as he now knows of situations in which he can use another’s property without fear that the state will intervene to exclude him. As Kennedy and Michelman concluded, “[t]he sum of the legally determined exposures is a constant.” Since we are virtually all property owners, and we all use the property of others for various purposes, we are all effected by whatever uncertainty permeates whatever 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 they must be measured 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.

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.” Strong rights to exclude, he recognizes, impose “heavy costs.” The alternative regulatory state, of course, would simply

---

240 Id. at 760.
241 Id. at 762.
242 Epstein Liberty & Property, supra note 10, at 28.
243 Id.
“impose[] heavy costs of governance.”244 One cannot say on a priori grounds which set of costs and benefits yield the greatest utility. In Epstein’s words, “[t]here is no magic solution for liberty or property that creates benefits without dislocations.”245

At the time that his Takings book was published 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.246 A number of scholars from across the political spectrum found his utilitarian case for strong property rights facially plausible, but wanting in specifics.247 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.248

---

244 Id.
245 Id.
246 The first possession rule is said to provide 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 37, at 61. A requirement of compensation to anyone who loses welfare as a result of a government action ensures that there are no rents to be gained by taking wealth from one party and transferring it to another. Id. at 199. Prohibiting redistribution is also necessary to reduce the moral hazard concern that individuals who can benefit from government action will reduce their level of productive behavior. Id. at 310 (unemployment insurance can create moral hazard that employees will seek to end employment); id. at 320 (same concern regarding welfare payments).
247 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 Miami L. Rev. 223 (1986). Others were less charitable. Tom Grey referred to Epstein’s utilitarian analysis as “a cocktail-party empiricism,” Grey, supra note 50, at 40 (arguing that Epstein 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 153, at 1852-58.
248 In this regard, Kelman addressed Epstein’s claims with respect to welfare, price controls, and land use. Id. at 1852-58.
In the nearly quarter century since *Takings*, neither Epstein, nor anyone else whose work that I have found, has made much progress.\(^{249}\) Epstein has acknowledged that regulation is a superior alternative in certain cases, such as administering waterways.\(^{250}\) 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.\(^{251}\)

4. Considerations Cutting Against Empirical Justification of Strong Property Rights

The following sub-sections address three empirical considerations that weigh in favor of deference to regulation. The first two were originally recognized by Justice Stevens in response to Justice Brennan’s rhetoric equating police officers and land use planners. They tend to show that the 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 have on the police. These sub-sections expand upon Stevens’ critique and respond to

---


\(^{250}\) Epstein Liberty & Property, *supra* note 10, at 12 (arguing that consequentialist grounds justify keeping some resources, such as waterways, as common property).

\(^{251}\) 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 upon in *Takings*. Epstein Liberty & Property, *supra* note 10, 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 naive 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.”).
likely counter arguments. The third section addresses administrative concerns with respect to strict scrutiny of property claims vis-a-vis first amendment and criminal procedure claims. It maintains that stricter scrutiny of property based claims will 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.\(^\text{252}\) By contrast, property rights are governed by much vaguer standards. 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.”\(^\text{253}\) 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 in which compensation was required for every regulation. But for good reason, no one argues for that.\(^\text{254}\) Property rights advocates recognize that some things must be regulated: nuisance control, strategic behavior,

\(^{252}\) 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).

\(^{253}\) First English, 482 U.S. at 340 n.17 (Stevens, J., dissenting).

\(^{254}\) See Robert Ellickson, Property in Land, 102 Yale L. J. 13151382-83 (1993) (discussing the economic case for creating exceptions to absolute rights of exclusion and showing that exceptions of this type have been adopted).
Justice Scalia’s background-property-principles approach is one attempt to encapsulate the necessary exceptions to a blanket compensation requirement into a clear rule. More than a decade after its adoption, however, no clear rules have emerged.

This distinction is critical to the ability of the public servant to do her 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. Were property rights claims strictly scrutinized within a regime without clear rules, planners would be required 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.

But if, as virtually all commentators recognize, some regulation

---

255 Tom 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, however, 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.


256 *Lucas*, 505 U.S. at 1027.

257 *Palazzolo*, 533 U.S. at 630.

258 See Epstein, *supra* note 37, at 95 (finding zoning to be an illegitimate function of government). As Margaret Radin has explained, ones view of the chilling impact of damage liability in inverse condemnation cases is a function of ones view of the legitimacy of governmental land use planning. Margaret Jane Radin, Evaluating Government Reasons for
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 in good faith. . . . [and] municipalities are not subject to civil liability for police officers’ routine judgment errors.” 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 every planning board decision is likely to be viewed as a municipal policy or practice. 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.

Changing Property Regimes, 55 Albany L. Rev. 597, 600-03 (1992); See Kelman, supra note 91, 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.”).

259 First English, 482 U.S. at 340 n.17 (Stevens, J., dissenting).
260 Id.
261 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).
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{262} – quite rare. One need not be concerned about restraining a legislator’s freedom to limit free speech, because she should only rarely be doing it, 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 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 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 – air space, water rights, public rights of way – and, in

\textsuperscript{262} Const. amend 1 (“Congress shall make no law . . .”).
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.

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 so that individuals and corporations could more fully pursue their own self interest. To date, the case remains unmade.