“Property” in the Constitution: The View from the Third Amendment

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20 WILLIAM & MARY BILL OF RIGHTS J. ___ (2012) (forthcoming; invited)

Abstract

During World War II, after Japan attacked the Aleutian Islands off Alaska’s coast, the United States forcibly evacuated the islands’ natives and quartered soldiers in private homes. That hitherto unremarked violation of the Third Amendment gives us a fresh perspective on what “property” means in the U.S. Constitution. As a general legal matter, property includes not just real estate—land, fixtures attached thereto, and related rights—but also various kinds of personal property, ranging from tangibles such as books to intangibles such as causes of action. That knowledge would, if we interpreted the Constitution as we do other legal documents, tell us just about everything we need to know about the scope of constitutional property. Case law and commentary do not speak as plainly, however, raising troubling questions about what “property” means each of the four times it appears in the Constitution. In particular, some authority suggests that the Takings Clause protects personal property less completely than it does real property. The unjust treatment of Aleutian natives during World War II shows the risk of giving constitutional property so peculiar and narrow a definition. This paper describes the troubling inconsistencies that afflict the law of constitutional property and invokes the Third Amendment, that oft-forgotten relic of the American Revolution, to argue for giving “property” a plain, generous, and consistent meaning throughout Constitution.
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Outline

Introduction: The Search for Constitutional Property

I. “Property” in the Constitutional Text
   A. The Property Clause of Article IV, Section 3, Clause 2
   B. The Due Process Clause of Amendment V
   C. The Takings Clause of Amendment V
   D. The Due Process Clause of Amendment XIV

II. Property, Generally

III. Constitutional Property in Case Law and Commentary
   A. The Property Clause of Article IV, Section 3, Clause 2
   B. The Due Process Clause of Amendment V
   C. The Takings Clause of Amendment V
      1. Stretching “private Property” to include public property
      2. Protecting personal property less than real property
   D. The Due Process Clause of Amendment XIV

IV. The Problem of Constitutional Inconsistency

V. The View from the Third Amendment

Conclusion: Constitutional Property by Common Consent
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Introduction: The Search for Constitutional Property

In 1942, as Japanese forces swept toward the mainland, the United States government forcibly evacuated natives from the Aleutian Islands off the southwest coast of Alaska. In some cases, pursuing a burnt-earth policy, U.S. military officials razed entire villages. In other cases, the natives suffered vandalism of their empty homes, destruction of their irreplaceable craftwork, and theft of their religious icons. Most significantly for present purposes, a few of the Aleuts had U.S. soldiers quartered in their homes. Though it hardly ranked among the worst wrongs inflicted on the residents of the Aleutian Islands in the early 1940s, that hitherto unremarked instance of quartering offers a telling example of how constitutional interpretation affects real people. Why were the Aleuts not protected against the trespasses of their own government? The Constitution plainly required better control over the occupying forces and compensation for the property rights they violated, yet it took decades for the federal government to admit to maltreating the Aleutians, apologize, and pay damages.1 Those injustices might never have occurred if federal officials had been bound to the bold, clear language of the Third and Fifth Amendments. Alas for clarity, though, courts and commentators have cast great uncertainty on the meaning of “property” in the Constitution. This paper documents that troubling state of affairs and turns to the Third Amendment for help.

What does “property” mean in the U.S. Constitution? The word appears four times in the text, at crucial junctures. Its definition steers the great machinery of federal and state government. Yet it remains uncertain whether “property” in the Constitution includes both real and personal property. If the latter, moreover, does it include tangibles (such as cars or guns) as well as intangibles (such as future estates or negotiable instruments)? The question of what “property” means in the Constitution seems simple enough. The answer is not.

More precisely, the answers are not simple. Perhaps, after all, “property” means something different each time it appears in the U.S. Constitution. A good deal of case law and

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commentary suggests as much. Judging from the precedents, “property” means one thing in Art. IV, § 6, cl. 2 (the Property clause), another in the Fifth Amendment’s (where “property” appears twice), and yet another in the Fourteenth Amendment’s Due Process clause. Though originalism bears little blame for those innovative readings, it bears noting that to interpret the Constitution by light of its public meaning at ratification would not guarantee uniformity either, given that “property” arguably meant one thing in the late 1780s, when the Constitution and the Bill of Rights were ratified, and another in 1868, when the 14th Amendment was.2

It should give us pause that both major schools of constitutional interpretation, living constitutionalism and originalism, deny that “property” has a uniform meaning in the founding document of the U.S. federal government. Elsewhere in legal interpretation, courts routinely favor giving one term the same meaning throughout the same text.3 That sound principle would appear more important in Constitution law than in merely statutory or private matters. If ordinary Americans cannot trust the Constitution to speak boldly and true—if its words instead twist and shade from clause to clause according to the hermeneutical wizardry of robed judges and cloistered academics—the rule of law cannot fare well.4

Given its modest scope, this paper does not aim to remedy all the inconsistencies that afflict the meaning of “property” in the Constitution. Instead, it focuses on countering precedents suggesting that the Takings Clause protects personal property less completely than it does real property. Toward that end, it invokes the Third Amendment.

The Third Amendment reads in full: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Logic and history strongly suggest that, in the event of quartering, compensation would be due for any taking of any property, whether real or personal. Quartering in violation of the Third would merit damages, not to mention equitable relief. Quartering permitted under the Third, moreover—quartering done in war “in a manner to be prescribed by law”—would also have to provide for just compensation. The Taking Clause makes no exception for war, after all, and the Ninth Amendment guarantees that the enumeration of the right to just compensation

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2 See infra Part IV (discussing the problem of constitutional inconsistency).
3 See, e.g., Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (relating as a principle of statutory construction that, ordinarily speaking, "identical words used in different parts of the same act are intended to have the same meaning.") (quoting Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986)); see also Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932).
4 See, Akil Amar, Intratextualism, 112 Harv. L. Rev. 747, 767 (1999) (decrying as “inherently exclusionary” theories of constitutional interpretation that require “intimate familiarity with vast amounts of case law and the subtle arts of doctrinal analysis, or mastery of history writ large and writ small, or fluency in abstruse political philosophy.”). But see, Adrian Vermeule & Ernest A. Young, Commentary: Hercules, Herbert, and Amar: The Trouble With Intratextualism, 113 Harv. L. Rev. 730, 731 (2000) (“Amar's assumption of constitutional coherence is also descriptively implausible in light of the heterogeneity of the Constitution, a document whose component provisions were enacted at different times, in different circumstances, and for different reasons, and whose interpreters generally read different types of provisions in different ways.”).
5 U.S. Const., Amend. III.
“shall not be construed to deny or disparage” other rights retained by the people. As a matter of pure logic, the Third creates no loophole for the law of Takings, and the right to just compensation covers both real and personal property. It beggars belief, after all, that those who suffer quartering would receive recompense for the loss of rents but not for food, furnishings, or other chattels lost to the depredations of quartered soldiers. History gives us a bitter lesson on that count.

The surprising and tragic treatment of Aleutian natives during World War II demonstrates the dangers of giving “property” in the Takings Clause an unduly narrow definition. Far worse than quartering, those residents and subjects of the United States suffered vandalism of their empty homes, destruction of their personal effects, and defilement of their religious icons. Only years later did the federal government, after extensive hearings, recant, apologize, and offer recompense. Though only belatedly and impliedly, the natives finally won the right to receive just compensation, which evidently aimed to remedy not only quartering and other trespasses to real property but also the destruction and theft of the natives’ personal property. By compensating for the full range of losses caused by quartering soldiers, modern lawmakers rose toward the standard set by Colonial Americans who, when legislatively regulating quartering, routinely provided for compensation not just for lost rents but also for personal property taken or destroyed by troops. Viewed from the Third Amendment, therefore, the Taking Clause does not and should not discriminate between real and personal property. Plain language, logic, history, and simple justice demand that “property” in the Fifth Amendment have its ordinary and generous reach.

Herewith a guide to the paper that follows: Part I briefly reviews each appearance of “property” in the Constitution, offering a reference guide for the discussion that follows. Part II reviews property’s meaning in the law as a general matter. In a simpler and perhaps better world, those two discussions would tell us all we need to know about “property” in the Constitution, because its meaning there would equate to its legal meaning elsewhere. As Part III details, however, case law and commentary suggest a very different result, one in which the meaning of “property” varies from place to place in the Constitution depending on the vagaries of precedent and history. To partially remedy that troubling state of affairs, Part IV invokes the Third Amendment to argue for giving “private Property” in the Takings Clause a broad and uniform definition. More work remains if we want to effectuate a similar cure throughout the Constitution. Ultimately, however, and as the present effort suggests, we should aim to give “property” its plain, present, public meaning no matter where it appears in the Constitution.

I. “Property” in the Constitutional Text

The word “property” appears four times in the U.S. Constitution and its amendments. It appears once in the body of the text, in the so-called “Property Clause,” and three times in the amendments: the Due Process Clause of Amendment V, the Takings Clause of Amendment V, and the Due Process Clause of XIV. This Part briefly recounts each of those references to

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6 U.S. CONST., Amend. IX.
7 See, Tom W. Bell, The Third Amendment: Forgotten But Not Gone, 2 Wm. & Mary Bill of Rights J. 117, 137 (1993) (describing legislation passed during the Revolutionary War by Delaware, Maryland, and New Jersey).
constitutional property, providing a useful reference for the paper’s subsequent analysis. Although this Part discusses context, it leaves a discussion of related case law and commentary for Part II.

A. The Property Clause of Article IV, Section 3, Clause 2

Although “property” appears elsewhere in the Constitution, article IV, section 3, clause 2 has alone won the moniker, “the Property Clause.”\(^8\) It reads, in relevant part: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .”\(^9\) This provision became effective with the rest of the original Constitution when New Hampshire, the ninth and last requisite state, ratified it on June 21, 1788.\(^10\) As discussed below in more detail, case law and commentary on the Property Clause has focused on the scope of federal power over real estate owned by the U.S. government. Nothing in the plain text limits it to real property, however, and “other” arguably suggests a broader meaning. Furthermore, practical considerations suggest that Congress would need the power to “make all needful Rules and Regulations respecting” not only for federally owned land but also for federally owned property such as desks, tanks, or notes payable. The debate on that point, discussed in more detail below, turns primarily on whether the Property Clause amounts to an all-purpose spending clause.\(^11\)

B. The Due Process Clause of Amendment V

The first of two references in the Constitution to due process, this portion of Amendment V guarantees, “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”\(^12\) The Fifth Amendment became effective on December 15, 1791, almost three and a half years after the original Constitution, after winning approval by three-fourths of the then-extant state legislatures.\(^13\) The clause evidently aims to ensure that no one will suffer loss of property absent certain procedural protections. As discussed more fully below, however, a long line of precedents has also read the due process clause to protect substantive rights.\(^14\)

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\(^8\) See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976).
\(^9\) U.S. CONST., Art. IV, § 3, cl. 2. Significantly or, more likely, not, this is the only of the four appearances of the word in the Constitutional text to be capitalized in the original.
\(^11\) See infra Part III.A.
\(^12\) U.S. CONST., Amend. V.
\(^14\) See infra Part III.B.
C. The Takings Clause of Amendment V

After forbidding affronts to a variety of rights, the Fifth Amendment concludes with the Takings Clause, which provides, “nor shall private property be taken for public use, without just compensation.”\(^{15}\) Along with the rest of the Fifth Amendment, the Takings Clause became effective on December 15, 1791.\(^ {16}\) Only this appearance of “property” in the Constitution comes modified with “private.” Though perhaps just a rhetorical flourish, that adjective arguably excludes public property from the protection of the Takings Clause, meaning that the federal government could condemn a state highway or park without paying just compensation. Courts have effectively ignored the limitation, however, instead holding that the federal government must compensate even for the taking of public property.\(^ {17}\) That interpretive question does not interest courts and commentators, however, so much as do questions about which sorts of property rights—or what amounts to much the same thing, which sorts of takings—require compensation. As we will see below (and see criticized thereafter) recent authority and years of ordinary practice give real property more protection than personal property under the Takings Clause.\(^ {18}\)

D. The Due Process Clause of Amendment XIV

The second of the Constitution’s two references to due process provides, “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”\(^ {19}\) Apart from focusing on states rather than the federal government, this due process clause reads almost exactly like the first,\(^ {20}\) and therefore presumably has the same goal of ensuring that no one will suffer loss of property absent certain procedural protections. As with its counterpart in the Fifth Amendment, however, and as discussed more fully below, courts have also read the due process of the Fourteenth Amendment to protect substantive rights.\(^ {21}\)

Despite the similarities between two due process clauses, they were not ratified at the same time. Whereas the Fifth Amendment became effective along with the rest of the original the Bill of Rights, in 1791,\(^ {22}\) the Fourteenth Amendment won ratification in 1868, during the

\(^{15}\) U.S. CONST., Amend. V.


\(^{18}\) See infra Part III.C.

\(^ {19}\) U.S. CONST., Amend. XIV, § 1, cl. 3.

\(^ {20}\) Cf. U.S. CONST., Amend. V.

\(^ {21}\) See infra Part III.D.

\(^ {22}\) NATIONAL ARCHIVES, supra note [[cite]].
Reconstruction era. Query whether that might lead an originalist to claim that “property” means one thing in the Fifth Amendment and another in the Fourteenth. Presumably, the answer would depend on whether the word’s definition changed during that almost-80 year span. With regard to the meaning of “intellectual property,” as discussed below, it arguably did.

II. Property, Generally

What does “property” mean? Definitions vary, of course, but Black’s Law Dictionary offers a fairly standard version: “That which is peculiar or proper to any person; that which belongs exclusively to one.” It includes “everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate.” John Lewis, in his classic treatise on eminent domain, put it this way: “Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of the user, the right of exclusion and the right of disposition.” Unless “property” comes with a limiting adjective, then, it covers anything of value subject to an owner’s exclusive rights of use and transfer.

Written definitions will only get us so far in understanding the scope of “property,” though. We can better understand it by reasoning from cases. Like most legal concepts (indeed, like most concepts generally), the meaning of “property” ranges from a solid core of paradigmatic examples to a misty border of mere analogs and near misses. Tangibles such as real estate and personal moveables come to mind first and most naturally when we think of property. Indeed, laypeople may not think of much else. Those trained in the law, after only a little reflection, also include nearby suburbs within property’s territory, areas populated by intangible rights such as future interests and choses in action, mysterious to laypeople but long familiar to common law courts.

Still farther afield, at the far and fuzzy border of “property,” lie purely statutory creations such as copyrights, patents, and welfare benefits. Because they lack the imprimatur of custom and fail to embody many of property’s defining features, these positive rights arguably qualify as mere privileges. Consider copyrights, for instance, which rely on a federal statute for their very existence, expire after a limited time, and cover goods that, because they do not suffer rivalry in

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24 See infra Part III.D.
26 Ibid.
28 See generally, See Albert R. Jonsen & Stephen Toulmin, The Abuse of Casuistry (1988) (defining and defending reasoning from cases as opposed to analytical approaches to ethical and legal reasoning).
29 See Bruce A. Ackerman, Private Property and the Constitution 97-10 (Yale Univ. Press 1977) (discussing lay conceptions of property).
consumption, do not even qualify as “private” to economists. Patents, which arise from one and the same constitutional clause, submit to a similar critique. As for welfare, although the Supreme Court mused in Goldberg v. Kelly that “[i]t may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity,’” it did not equate the two. Instead, it merely held that welfare recipients facing termination of benefits had certain due process rights under the Fourteenth Amendment.

We can also understand “property” the way a biologist might understand a phylum or species—as something that fits within a taxonomy of greater and lesser kinds. Viewed in that light, property includes two broad categories: real property and personal property. Each of those two includes various subtypes, both tangible and intangible. Real property includes not only solid things such as land, buildings, and crops, but also future interests, mortgages, and other abstract rights that touch and concern the land. Personal property includes not only moveable chattels like cars and computers, but also intangibles like annuities, accounts receivable, and contract rights. Again, and as in biology, there remain disputed cases. For instance, does copyright more closely resemble a form of intangible personal property or a mere privilege, such as a welfare entitlement, that lives or dies by statutory enactment? Still, though, a taxonomic approach to property shows both a solid core of indisputable family members and a wide-ranging set of distant kin.

III. Constitutional Property in Case Law and Commentary

Judging from case law and commentary on the matter, the meaning of “property” in the Constitution varies both from its ordinary meaning and from place to place in the text. In the Property Clause, the word undoubtedly applies to realty, and probably applies to most chattels, but arguably does not apply to money. In the Due Process Clauses of the Fifth and Fourteenth Amendments, which courts largely read in parallel, “property” reaches broadly enough to encompass welfare benefits. Courts have read the Taking Clause, in contrast, to protect real property more completely than personal property, suggesting yet another clause-specific definition of the word. This Part reviews how legal authorities have interpreted the Property

31 See Tom W. Bell, Copyright as Intellectual Property Privilege, 58 SYRACUSE L. REV. 523 (2007) (arguing that copyright more closely resembles a statutory privilege than common law property).
32 U.S. CONST., art I, § 8, cl. 8.
34 Id. See also Atkins v. Parker, 472 U.S. 115, 128 (1985) (stating in dictum that hearings determining eligibility for food stamps must meet same standard); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 578 (1972) (conjecturing that employee of public university could have “property” interest in his employment sufficient to give him due process rights).
36 Id. at 1263 (defining “real property”).
37 Id. at 236 (defining “chattel”).
38 For one view of that question, see Tom W. Bell, Copyright as Intellectual Property Privilege, 58 SYRACUSE L. REV. 523 (2007) (arguing that copyright more closely resembles a statutory privilege than common law property).
Clause, the Due Process Clause of the Fifth Amendment, the Takings Clause, and the Due Process Clause of the Fourteenth Amendment, each in its turn, to reveal the peculiar and fractured nature of constitutional property.

A. The Property Clause of Article IV, Section 3, Clause 2

Although “property” appears elsewhere in the Constitution, only Article IV, Section 3, Clause 2 has won the moniker of the “Property Clause.”39 It reads, in relevant part: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .”40 What does “Property” mean here? Given that “Territory” describes federal lands falling outside the boundaries of any state, “other Property belonging to the United States” must include federal lands in a state, such as military bases or the vast Western tracts controlled by the Bureau of Land Management. On that point, courts and commentators agree.41

Does “other Property” go beyond real estate to include personal property such as chattels or negotiable instruments? Nothing in the plain text limits it to real property. Moreover, the addition of “other” suggests that anything fairly described as “property”—real or personal, tangible or otherwise—falls within the scope of the Property Clause. Practical considerations suggest that Congress would need the power to “make all needful Rules and Regulations respecting” not only federally-owned land but also federally owned paperclips, chairs, or debt claims. Perhaps because it holds obviously true, however, courts do not appear to have tested that claim.

Indeed, the Property Clause has seen relatively little judicial interpretation on any question.42 The most recent Supreme Court case to deal with it, Kleppe v. New Mexico, dates from over thirty years ago.43 Kleppe raised the question of federal authority over wild horses and burros inhabiting federal land, facts that would appear ripe for a determination of whether “other Property” in Article IV, Section 3, Clause 2 includes chattels. The Court allowed that “it is far from clear that . . . Congress cannot assert a property interest in the regulated horses and burros superior to that of the State.”44 Ultimately, though, it dodged the question of the scope of “other Property” and instead decided the case on the grounds that “the ‘complete power’ that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.”45

Anyone who, as part of their legal education cum hazing, has struggled with the role ferae naturae play in that old chestnut of a case, Pierson v. Post, can perhaps sympathize with

40 U.S. Const., Art. IV, § 3, cl. 2.
41 See infra, text accompanying notes [[cite]].
42 John D. Leshy, A Property Clause for the Twenty-First Century, 75 U. COLO. L. REV. 1101 (2004) (“As constitutional provisions go, it has had a relatively tame history in the courts.”).
44 537 (footnote omitted).
45 Id at 540-41 (footnote omitted).
the Court’s unwillingness to resolve the property status of wild animals on public lands.\textsuperscript{46} The Court in \textit{Kleppe v. New Mexico} sat out that chase, instead simply decreeing that the federal government’s power over its \textit{real} property gives it like power over any \textit{ferae naturae} found there. \textit{Kleppe} thus does not stand reliably tell us whether “other property” in the Property Clause encompasses more than real property.

Other court opinions do not appear to have expressly answered the question, much less asked it. Litigation over the proper scope of the Property Clause has focused on real property rather than personal property, giving judges little reason to expound on the full scope of “other Property.” Granted, the Supreme Court claimed in \textit{Ivanhoe Irrigation District v. McCracken} that “beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges.”\textsuperscript{47} The case did not implicate federal real property, however, and the Court did not cite the Property Clause—or, indeed, any provision of the Constitution—as supporting authority. Instead, the Court relied on its own precedents, one of which raised Property Clause issues only to resolve them via the same real property-based gambit employed in \textit{Kleppe}.\textsuperscript{48} In sum, it appears that judicial opinions have held that the Property Clause encompasses personal property \textit{sub silentio}, at most.

Few commentators have considered the question of whether the Property Clause covers anything beyond real property, either; discussions of the clause typically slip immediately from the constitutional text to discussions of “federal land.”\textsuperscript{49} The most extensive originalist analysis of the clause—an entire article devoted to the question—does not even consider the question of whether the clause ever spoke of anything beyond real property, concluding simply that “‘other Property’ was land within the boundaries of a state, owned by the federal government, but not qualifying as an enclave.”\textsuperscript{50}

One exception to that lacuna in the commentary: A minor academic skirmish over whether “Property” in Article IV, § 3, cl. 2 includes money. The debate began when Professor David Engdhal argued that an all-purpose spending power could be found, in part, in the Property Clause’s authorization of Congress “to dispose of . . . Property belonging to the United States.”\textsuperscript{51} Against that, Professors Gary Lawson and Guy Seidman argued that the Property Clause’s placement in Article IV, among “a grab bag of miscellaneous provisions” rather than among the express enumerations of Congressional power in Article I, demonstrates that it does not establish a general power to spend federal funds.\textsuperscript{52} They added that the clause’s reference to making “all needful Rules and Regulations respecting” the property shows that it refers primarily

\begin{footnotes}
\item[46] Pierson v. Post, 3 Caines 175, 2 Am. Dec. 264 (N.Y. 1805) (holding that property rights in a wild fox, \textit{ferae naturae}, are acquired only by possession).
\item[49] Leshy’s paper, for example, \textit{supra} note [[cite]], does paper does not even use the words “chattel,” “personal,” or “moveable.”
\item[52] \textit{Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History} 28 (Yale University Press, 2004)
\end{footnotes}
to real property—hence the express reference to territorial lands.\textsuperscript{53} Lawson and Seidman conceded that tangibles such as filing cabinets and desks, so useful for administering government power, might also qualify as the sort of property the disposal of which should adhere to “needful Rules and Regulations,” but they concluded that “money is a much poorer fit.”\textsuperscript{54}

To sum up their debate, Engdhal contends that “Property” in the Property Clause means all manner of property, whereas Lawson and Seidman contend that it covers only real and tangible chattels with the exception of money.\textsuperscript{55} We need not pick a winning side in their contest, however. For present purposes, it suffices to offer the dispute as yet another example of how commentators have given “property” in the Constitution specialized definitions that vary from clause to clause.

\textbf{B. The Due Process Clause of Amendment V}

But for its focus on the federal government, rather than on state ones, the due process provisions in the Fifth Amendment do not materially differ from those of the Fourteenth Amendment. Courts\textsuperscript{56} and commentators\textsuperscript{57} have thus tended to treat the two as identical when puzzling over the interpretation of their common terms, among them the word “Property.” In the interest of efficiency, therefore, this paper discusses the subject once, under the heading of the Fourteenth Amendment’s Due Process Clause, below.\textsuperscript{58}

\textbf{C. The Takings Clause of Amendment V}

Courts and other authorities have interpreted “private Property” in the Takings Clause to sometimes speak more broadly, and at other times and more narrowly, than the ordinary meaning

\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid.
\textsuperscript{55} For an interestingly parallel view of the scope of the Takings Clause’s coverage, see Mark R. Jundt & Vernon R. Pederson, \textit{A Vexatious Problem Among Many: In Light of the Conflict Between the Fifth And Sixteenth Amendments, is Taxation an Uncompensated Taking?} 84 N. DAKOTA L. REV. 365, 371-72 (2008), discussed more fully in note [[cite]], below.
\textsuperscript{56} See, McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 (2010) (noting that the Bill of Rights generally applies to the federal government the same standards that the Fourteenth Amendment applies to the states); Bolling v. Sharpe, 347 U.S. 497, (1954) (imposing on the federal government under the Fifth Amendment the same standards of due process that apply to states under the Fourteenth Amendment); Hurtado v. California, 110 U.S. 516, 534 (1884) (explaining that the Fourteenth Amendment Due Process Clause restrains states in the same way that the Fifth Amendment Due Process Clause restrains the federal government).
\textsuperscript{57} See, Thomas W. Merrill, \textit{The Landscape Of Constitutional Property}, 86 VA. L REV. 885, 886 n. 1 (2000) (calling the Fifth Amendment’s Due Process Clause “substantively identical” to its counterpart in the Fourteenth Amendment). \textit{But see} Ryan C. Williams, \textit{The One and Only Substantive Due Process Clause}, 120 YALE L.J. 408 (2010) (arguing on originalist grounds that the Due Process Clauses in the Fifth and Fourteenth Amendment have different meanings).
\textsuperscript{58} See infra, Part III.D.
of the phrase. On the one hand, they claim that government-owned property falls within the scope of the Takings Clause; on the other, that public officials need not pay just compensation when they outlaw, confiscate, or destroy personal property. This section describes each of those paradoxes in turn, amply demonstrating that the law has given “property” in the Takings Clause an extraordinary meaning.

1. Stretching “private Property” to include public property. In *U.S. v. 50 Acres of Land*, the Supreme Court held that the Takings Clause’s protection of “private Property” covers property owned by state and local governments. The Court admitted that “the language of the Amendment only refers to compensation for ‘private property,’ and one might argue that the Framers intended to provide greater protection for the interests of private parties than for public condemnees.” The Court nonetheless went on to hold that “private” includes “public”:

> When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to ‘private property’ in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.

We might well doubt the Court’s logic in equating inter-governmental transfers with takings of private property, as well as the truth of the claim that a taxpayer feels the loss of local public property as keenly as the loss of a home. We might likewise doubt the *50 Acres* court’s invocation of *U.S. v. Carmack*, a case the Court had decided nearly 40 years earlier. In fact, the Court in *Carmack* merely took note that the federal government had conceded its obligation to pay for taking locally-owned public property. Because the parties did not contest the claim, *Carmack* could hardly have decided it. The Court in *50 Acres of Land* thus had only itself to credit or blame for giving “private” an extraordinarily broad meaning.

In retrospect, following the controversial holding of *Kelo v. City of New London, Connecticut*, we can see a sort of perverse logic at work in how the Supreme Court reads the Takings Clause. Whereas the Court in *50 Acres* held that the protections afforded to “private Property” extend to public property, the Court in *Kelo* held that “for public use” extends to takings for private use done “pursuant to a ‘carefully considered’ development plan.” To the Supreme Court, in other words, “private” includes “public” and “public” includes “private.”

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60 *Id.* at 31.
63 329 U.S. at 242 (“[T]he Federal Government recognizes its obligation to pay just compensation for [the state public property] and it is conceded in this case that the Federal Government must pay must compensation for the land condemned.”) (footnote omitted).
64 545 U.S. 469 (2005).
65 *Id.* at 478 (quoting 268 Conn. 1, 54, 843 A.2d 500, 536 (2004)).
2. Protecting personal property less than real property. Ample authority teaches what the plain language of the Taking Clause suggests: Personal property enjoys the same protection under the Takings Clause that real property does. The Supreme Court has defined the scope of “private Property” in the Takings clause very broadly, saying it includes “the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.” Courts have often recognized that the taking of personal property for public use requires just compensation under the Takings Clause. Relatively, the Supreme Court has also given “taken” a broad meaning, clarifying that it includes not just cases where the government takes possession of private property, but also cases where, by destruction, it deprives another of possession. Despite all that, however, the Supreme Court has given less protection under the Takings Clause to personal property than it has to real property.

Does a taking occur when a government regulation forbids the sale of property, thereby depriving it of all market value? Judging from Supreme Court precedents, the answer evidently depends on the sort of property involved. The Court in Andrus v. Allard grappled with that question in the context of personal property and held that no taking of person property occurred when the Eagle Protection and Migratory Bird Treaty Acts forbade the sale in whole or in part of legally captured gold or bald eagles. “The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them,” the Court explained. It conceded that “a significant restriction has been imposed on one means of disposing of the artifacts,” and that “the regulations here prevent the most profitable use of appellees' property.” The property owners complaining of the regulations could still give away their chattels, the Court reasoned, and might even earn some economic benefit from charging customers to view the now unmarketable goods.

Would the Supreme Court treat real property the same way? We do not have to wonder; Lucas v. South Carolina Coastal Council answered the question with a full-throated, “No.” Apart from the fact that it involved real rather than personal property, Lucas bears a startling

66 See, e.g., Jundt & Pederson, supra note [[cite]] at 370-71. But see id. at 371-72 (arguing that money may fall outside the scope of the Takings clause because it is a fungible asset). The article goes on to argue that the question of fungibility is but one factor courts should consider in assessing a potential taking, id. at 373-75, and that a tax that took 30% of the value of an asset might qualify as a taking under the analysis of Lucas. Id. at 373-75. That conclusion seems doubtful, though; Lucas involved a taking of almost all the value of the property in question—far, far more than a mere 30%.


69 323 U.S. at 378.

70 444 U.S. 51 (1971).

71 Id. at 65.

72 Ibid.

73 Id. at 66.

74 Ibid.

resemblance to *Andrus*. Like that earlier case, *Lucas* concerned a regulation that effectively stripped the subject property of all marketable value. Only the right to enjoy the property undeveloped or to sell it in like condition remained. In that regard, the regulation at issue in *Lucas* burdened the property owner less than the regulations at issue in *Andrus*, which forbade sales entirely. Unlike *Andrus*, however, the *Lucas* court required just compensation for so radical a reduction of property rights. It emphasized, in so holding, that a taking occurs whenever regulation “denies an owner economically viable use of his land.”

It did not escape the *Lucas* court that its holding stood somewhat in tension with that of *Andrus*—that it had, in effect, created a two-tier Takings Clause. In anticipation of such an objection, the Court observed that “by reason of the State's traditionally high degree of control over commercial dealings,” the owner of personal property “ought to be aware of the possibility that new regulation might even render his property economically worthless,” and cited *Andrus* in support of that claim. In effect, the Court held that because the government had in practice so often disregarded property rights in chattels, they no longer enjoyed the full protection of the Takings Clause. Many commentators, and at least one court, have found the distinction made by the *Lucas* Court unconvincing.

Given that Justice Scalia, a self-proclaimed originalist, wrote the opinion, it proves somewhat surprising that *Lucas* does not address whether the Founders thought it appropriate to destroy the market value of personal property without providing just compensation. Scholars have addressed the question, however. Professor Eduardo M. Penalver concluded that “it seems unlikely that the uncompensated taking of personal property was somehow less offensive to the

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76 See id. at 1044 (Blackmun, J., dissenting) (observing that the aggrieved property owner “can picnic, swim, camp in a tent, or live on the property in a movable trailer,” as well as to “alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.”).
77 Id. at 1016, quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (emphasis added in *Lucas*).
78 505 U.S. at 1027-28.
79 See, e.g., Eduardo M. Penalver, *Is Land Special?* 31 ECOL. L.Q. 227 (2004) (exhaustively criticizing the *Lucas* Court’s attempt to distinguish between the treatment of personal and real property); STEVEN J. EAGLE, REGULATORY TAKINGS 88 (2d ed. 2001) (arguing that the implication “that 'personal property' should have less protection than land under regulatory takings doctrine flies in the face of long precedent that both tangible and intangible personality are as subject to condemnation as realty.”); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1441 n.48 (1993) (calling the *Lucas* Court's distinction between personal property and land "one of the opinion's least artful efforts").
80 See Maritrans Inc. v. United States, 342 F.3d 1344, 1350 (Fed. Cir. 2003) (regarding the *Lucas* Court’s claims about the regulatory taking of personal property as dicta and expressing a belief that a taking of personal property occurs whenever a government regulation deprives an owner of all economically viable use). The court declined to find that such a taking had occurred in the case before it, however. *Id.*
81 See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).
Framers than the uncompensated taking of land."\(^{82}\) Most relevantly for present purposes, Henry St. George Tucker, writing nearly contemporaneously with the ratification of the clause, surmised that it was “probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressments, as was too frequently practiced during the revolutionary war, without any compensation whatever.”\(^{83}\) The Founders meant for the Takings Clause to remedy not simply the taking of real property, and not simply the taking personal property, but the taking of personal property by quartered troops.

The Lucas Court relied on Andrus for the claim that personal property merits less protection under the Takings Clause than real property does. It bears noting, however, that Andrus did not go as far as prior courts had in derogating the right to receive just compensation for takings of chattels. Consider the 1924 case of Everard's Breweries v. Day, which questioned the constitutionality of regulations forbidding not just the sale of previously legal liquor, but also the transport or possession thereof.\(^{84}\) Does so complete a destruction of a property’s value constitute a compensable taking? The Everard Court summarily dismissed the notion: “It cannot be said that [Congressional] action in this respect violated any personal rights of the appellants protected by the Constitution. That it did not take their property in violation of the Fifth Amendment, is clear.”\(^{85}\) The Court offered nothing more by way of analysis, but earlier cases, upholding prohibitions on the use or enjoyment of liquor under the guise of the police power, had already evidently settled the question.\(^{86}\)

Notwithstanding claims that the Takings Clause protects all forms of property, therefore, and notwithstanding the text’s blanket reference to “private Property,” the Supreme Court has failed to extend to personal property the same rights that they recognize in real property. Perhaps we could reframe that unequal treatment as not so much a question of the meaning of “property” as of “taking,” explaining that while the Court fully recognizes the ontological status of personal property, it declines to regard the destruction of all the market value of personal property (as opposed to the destruction of all the market value of real property) as an actionable taking. Focusing on “taking” rather than “property” makes little difference as a practical matter, however, and at all events simply shifts the problem of discriminatory interpretation a few words away. After all, nothing in “taking” supports the distinction, developed by courts, between permitted the uncompensated destruction of economic value in the case of personal property and forbidding it in the case real property.\(^{87}\) For all intents and purposes then, according to the

\(^{82}\) Penalver, supra note [[cite]] at 249.

\(^{83}\) 1 HENRY ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES at 305-06 (Philadelphia Birch & Small 1803). See also, Jed Rubenfeld, Usings, 102 YALE L.J. 1077, 1122-23 (1993) (arguing that "the appropriation of private [and presumably personal] property to supply the army during the Revolutionary War" numbered among the "paradigm case[s]" of government misbehavior that the Founders meant for the Takings Clause to remedy).

\(^{84}\) 265 U.S. 545 (1924).

\(^{85}\) Id. at 563.


\(^{87}\) In fact, the unequal treatment of personal property goes farther than that, as courts have declined to order just compensation even when governments exercise their police powers to prohibit all use and enjoyment of personal property, a restriction on property rights that goes far beyond those classified as a taking in Lucas.
Supreme Court, “private Property” in the Takings Clause embraces personal property less completely than it does real property.

D. The Due Process Clause of Amendment XIV

The Supreme Court has given “property” in the Fourteenth Amendment a very broad definition. 88 By its own account, “The Court has [] made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.” 89 How far beyond? The Supreme Court summed up its decisions in the area with the explanation that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” 90 Alas for clarity, however, that formulation defines “property” in a circular manner, in effect saying that the Fourteenth Amendment’s Due Process clause protects entitlement claims that the Court recognizes as legitimate. It leaves unanswered the crucial question: What marks such claims as legitimate?

No one seems to doubt that common law rights to real and personal property win Fourteenth Amendment protection. “It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined,” 91 the Supreme Court explained. The Court has taken “property” in the Fourteenth Amendment far beyond it traditional boundaries, however.

With reasonable reliance in an entitlement as the test, the Supreme Court has held that the Fourteenth Amendment’s Due Process clause protects welfare benefits, 92 tenured employment, 93 and employment under an clearly implied promise of continuation. 94 “The procedural component of the Due Process Clause does not protect everything that might be described as a ‘benefit,’” the Court cautioned in Town of Castle Rock. 95 More specifically, “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” 96 Nor do the Fourteenth Amendment’s protection for property apply “when the identity of the alleged entitlement is vague,” 97 or if it lacks “ascertainable monetary value.” 98 Despite those caveats,

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88 As discussed above, supra Part III.B, the discussion here of the Fourteenth Amendment’s Due Process Clause applies equally to the nearly identical language of the Fifth Amendment’s Due Process Clause, a parallelism supported by case law and commentary.
89 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571-72 (1972) (holding that interest in reemployment under a year-to-year contract did not merit protection under the Fourteenth Amendment’s due process clause) (footnote omitted).
90 Id. at 577.
91 Ibid.
95 Town of Castle Rock, Colo. v. Gonzales 545 U.S. 748, 756 (2005)
96 Ibid.
97 Id. at 763.
98 Id. at 766, quoting
however, “property” in the Fourteenth Amendment still covers a great deal more than it does elsewhere in the law.

In defense of extending the Fourteenth Amendment to rights won under a contract of employment, courts long ago recognized that contract rights may win protection under the Takings Clause. A contract is property, and, like any other property, may be taken under condemnation proceedings for public use. Its condemnation is of course subject to the rule of just compensation, the Supreme Court has observed. Welfare benefits represent a different matter, however. The Supreme Court could not cite law developed under the Fifth Amendment when, in Goldberg v. Kelly, it held that a state cannot terminate welfare benefits without satisfying due process of law.

The Goldberg Court justified its broad reading of the Fourteenth Amendment in terms of principles rather than text. “Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights,” the Court explained. The text of the Fourteenth Amendment refers not to “important rights,” however, but to “property” rights. Do welfare benefits really qualify as such? The Court avoided that prickly question, instead raising a different and rather easier one. “The constitutional challenge cannot be answered by an argument that public assistance benefits are ‘a privilege’ and not a ‘right,’” said the Court.

That hardly suffices to show welfare benefits equate to property, though, given that something can qualify as a right—the right to a jury trial, for instance—and yet still not qualify as property.

At the same time that it shied away from grappling with the plain text of the Fourteenth Amendment, the Goldberg Court did not go quite so far as equating welfare rights as “Property.” That would have proven controversial. Beyond inducing dependence on its continuation, welfare has few property-like features. Would be welfare recipients cannot simply demand or purchase the right to benefits but rather must apply for permission to receive them, and neither federal nor state law permits welfare benefits to be divided, transferred, or bequeathed like ordinary property.

100 Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 690 (1897) (citation omitted). See also Omnia Commercial Co. v. United States, 261 U.S. 502, 508 (1923) (“The contract in question was property within the meaning of the Fifth Amendment . . . and if taken for public use the Government would be liable.”) (citations omitted).
102 Id. at 262 (footnote omitted).
103 Ibid. (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n. 6 (1969)).
Rather than simple calling welfare benefits “Property,” therefore, the Goldstein Court limited itself to opining, “It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’” Justice Black, dissenting, accused the majority of juridical legerdemain: “It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.”

At all events, despite the pioneering holding of Goldberg, the case may represent something of a dead letter, today. Some decades after the decision, federal lawmakers stipulated that the provision of welfare benefits “shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.” That provision evidently aimed at denying welfare recipients good claim to reasonably relying on the continuation of benefits, thereby arguably obviating due process claims based on the modification or denial of federally-funded welfare benefits.

On that view, Goldberg remains good but ineffectual law, and the Fourteenth Amendment’s Due Process Clause still in theory includes government benefits under the heading of “Property.”

Before closing out this discussion about the meaning of “property” in the Fourteenth Amendment, it bears noting that some authority claims that the Due Process Clause includes not simply one extraordinarily broad definition of the word, but rather two different meanings, depending on whether procedural due process or substantive due process is at issue. Our discussion of the Fourteenth Amendment has thus far focused on procedural due process, a context in which, as Professor Thomas Merrill has phrased it, courts protect property-as-entitlement. Merrill argues, however, that when due process functions in its substantive capacity, it protects a different conception of property—one that includes “everything relevant to calculating a person's material wealth or net worth.” He confesses that it remains difficult “to

105 Id. at 262, n. 8. In support of that claim, the Court cited then-cutting-edge legal research: Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965). Nowhere, though, does Reich’s article equate welfare benefits to property rights.

106 Id. at 275 (Black, J., dissenting).


108 See Sylvia Law, Review Essay, Ending Welfare as we Know It, 49 Stan. L. Rev. 471, 487 (1997) (reviewing five texts) (“While Congress has abolished the concept of 'entitlement' at the federal level, it is not yet clear what this will mean in terms of poor people's ability to obtain due process when their benefits are terminated.”) (footnotes omitted). But see Carolyn Goodwin, Comment, "Welfare Reform" and Procedural Due Process Protections: The Massachusetts Example, 48 Buff. L. Rev. 565, 572-74 (2000) (arguing that due process protections continue to apply at the state level).

109 See, e.g., Vandevore v. Lloyd, 644 F.3d 957, 969 (9th Cir. 2011) (rejecting due process claim founded on cancellation of fishing rights because they could be modified or revoked by the legislature without compensation).

110 Merrill, supra note [cite] at 960-68.

111 Id. at 982.
flesh out this conception with a more specific definition,” as substantive due process itself resists a neat description.\textsuperscript{112}

Merrill’s argument for reading two meanings of “property” into the Fourteenth Amendment offers yet another example of how cases and commentary risk interpreting the various applications of the word farther and farther from its ordinary and uniform meaning. Given the interpretive variations described in this Part, one might fairly say that four appearances of “property” in the Constitution generate five distinct meanings. So baroque a reading of the Constitution does not conduce well to the rule of law; the next part describes that problem and suggests interpreting “Property,” and the rest of the Constitution, according to its plain, present, public meaning.

\textbf{IV. The Problem of Constitutional Inconsistency}

As the prior Part detailed, courts and commentators have given “property” in the Constitution peculiarly specialized definitions, and ones that vary from place to place within the document. On the very face of it, that looks problematic. The rule of law demands that we generally interpret words in statutes\textsuperscript{113} contracts\textsuperscript{114} and deeds\textsuperscript{115} according to their plain meanings, so that they will remain accessible to the ordinary people allegedly bound by those words. That same rationale arguably applies with even greater force to that most public and powerful of legal documents, the Constitution.\textsuperscript{116} As Justice Souter colorfully put it, “[P]lain text is the Man of Steel” in fights over legal meaning.\textsuperscript{117} “An argument rooted in the text of a constitutional provision may not be guaranteed of carrying the day, but insubstantiality is not its failing.”\textsuperscript{118}

\begin{footnotesize}
\textsuperscript{112} \textit{Id.} at 983.
\textsuperscript{114} \textit{See}, e.g., Rains v. Becton, Dickinson and Co., 246 Neb. 746, 750, 523 N.W.2d 506 (Neb. 1994) (explaining that a contract’s “terms are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.”); Alexander v. Buckeye Pipe Line Co. 53 Ohio St.2d 241, 245, 374 N.E.2d 146 (Ohio 1978) (explaining that ordinarily “common words appearing in a written instrument are to be given their plain and ordinary meaning . . .”).
\textsuperscript{115} \textit{See}, e.g., McAbee Const. Inc. v. U.S., 97 F.3d 1431, 1435 (Ct. App. Fed.,1996) (treating a deed for an easement indistinguishably from a contract and explaining, “We begin with the plain language.”).
\textsuperscript{118} \textit{Ibid.}
\end{footnotesize}
Notably, Justice Souter’s voiced his paean to plain meaning in a dissent. The Supreme Court does not always speak or act consistent with his well-founded views, concededly; appeals to plain language often appear in dissents or concurrences that chide other justices for adopting unduly esoteric readings of the text.\(^{119}\) “As its prior cases clearly show,” Justice White once observed with approval, “this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the ‘plain meaning’ of the Constitution's text . . . .”\(^{120}\)

The Supreme Court pays homage to plain meaning often enough, however, to support the view that the same rules that apply to statutes generally also apply to that ur-statute, the Constitution.\(^{121}\) In either case, as Karl N. Lewellyn put it in his famous catalog of canons of construction, “Words are to be taken in their ordinary meaning unless they are technical terms or words of art.”\(^{122}\) It should thus at least raise eyebrows when, as with regard to the cribbed meaning of “property” in the Takings Clause\(^{123}\) or the expansive meaning of “property” in the Fourteenth Amendment,\(^{124}\) constitutional property does not equate to ordinary property.

As a corollary, it should also trouble us that the definition of “property” varies from spot to spot in the Constitution.\(^{125}\) If ordinary meaning serves as our lodestar, after all, we would expect it to point in the same direction no matter where we travel in the document. Canons of construction demand likewise, as they teach that we should presume that repeated occurrences of a word within the same legal document have a uniform meaning throughout.\(^{126}\) There is, as the

\(^{119}\) See, e.g., Walker v. City of Birmingham 388 U.S. 307, 344 (1967) (Brennan, J. dissenting) (appealing to the plain meaning of the Supremacy Clause); Mazer v. Stein, 347 U.S. 201, 220 (1954) (Douglas, J., concurring) (arguing that the case should be reargued in order to address concerns that sculpture does not fall within the scope of “Writings” in Art. I, § 8, cl. 8); Schick v. U.S. 195 U.S. 65, 79 (1904) (Harlan, J., dissenting) (complaining that the majority’s interpretation “is unauthorized by the Constitution if its words be interpreted according to their ordinary meaning.”); Munn v. People of State of Illinois, 94 U.S. 113, 144 (1876) (Field, J., dissenting) (citing prior authority in support of plain meaning of Contracts Clause).


\(^{121}\) See, e.g., Solorio v. U.S. 483 U.S. 435, 441 (1987) (justifying its reading of Art. I, § 8, cl. 14 as the “plain meaning” of the text); Dillon v. Gloss, 256 U.S. 368, 374 (1921) (adopting the plain meaning of Article 5); Bronson v. Kinzie, 42 U.S. 311, 318 (1843) (observing of the Contracts Clause, “[I]t would but ill become this court, under any circumstances, to depart from the plain meaning of the words used . . . .”); U.S. v. Ortega, 24 U.S. 467, 469 (1826) (disposing of an issue pertaining to Art. III, § 2, cl. 1 on grounds that “this is not a case affecting a public minister, within the plain meaning of the constitution.”).


\(^{123}\) See supra Part III.C.

\(^{124}\) See supra Part III.D.

\(^{125}\) See, Akil Amar, Intratextualism, 112 Harv. L. Rev. 747, 796 (1999) (describing how preserving the consistency of constitutional terms from spot to spot in the document promotes “democratic virtues”).

\(^{126}\) See, Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (citing the “normal rule of statutory construction that “identical words used in different parts of the same act are intended to have the
Supreme Court said in *Atlantic Cleaners & Dryers v. U.S.*, “a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”

Llewellyn put it this way: “The same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute.”

Although it appears problematic that courts and commentators have given constitutional property meanings inconsistent with ordinary usage and from place to place in the text, that does not end the inquiry. Perhaps, after all, we can excuse those facial wrongs as cases special enough to overcome the presumptions in favor of ordinary and uniform meaning. As Lewellyn famously pointed out, every canon of construction has its counterpart; “Hence there are two opposing canons on almost every point.” Against the presumption of ordinary meaning, in particular, he set up this counter-canon: “Popular words may bear a technical meaning and technical words may have a popular signification and they should be so construed as to agree with evident intention or to make the statute operative.” The presumption in favor of uniformity “will be disregarded where it is necessary to assign different meanings to make the statute consistent.” Lewellyn explained. The Court in *Atlantic Cleaners* gave the excuse a slightly different twist, focusing on context, when it said that the presumption in favor of uniformity “readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

What Lewellyn did not point out so clearly, however, is that these dueling canons do not meet on a level playing field. Instead, we ordinarily presume that a legal document speaks in ordinary and uniform terms, leaving the burden of proof on those who would urge technical and variable meanings. Query, then, whether “property” must mean something other than its ordinary meaning—must not include cash in the Property Clause, must not fully embrace


See, *Atlantic Cleaners & Dyers v. U.S.*, 286 U.S. 427, 433 (1932) (referring to “a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”).

Llewellyn, *supra* note [[cite]] at 404 (footnote omitted).

See, Merrill, *supra* note [[cite]] at 956 (“[A]lthough legal interpreters should resist attributing multiple meanings to the same word in a single document, there are contexts where this may be unavoidable, at least if our objective is to accommodate settled doctrine and to reach results that are normatively defensible.”).

Id. at 401.

Id. at 404 (footnote omitted).

Ibid. (footnote omitted).

Ibid.

He does, however, concede that the ultimate selling point for adopting a particular canon in a given instance is to win “a simple construction . . . by tenable means,” ibid., a test that supports the presumptions in favor of ordinary and uniform meaning.

See *supra* Part III.A (discussing case law and commentary pertaining to meaning of “Property” in the Property Clause).
chattels in the Takings Clause, or must reach as far as welfare benefits in the Fourteenth Amendment—in order “to agree with evident intention or to make the [Constitution] operative” (to paraphrase Lewellyn’s exception to the meaning rule). Suffice it to say for now neither the survey above of the plain text and context of the four appearances of “property” in the Constitution, nor the case law and commentary interpreting the word, gives convincing reasons to overturn the presumptions in favor of ordinary and uniform meaning.

If we find fault with the way that courts have given “property” in the Constitution extraordinary and inconsistent meanings, we can fairly blame the interpretative theory that judges should read the text loosely and favor their own precedents over plain meaning. Originalism does not seem to have had much effect on the case law pertaining to constitutional property, at any rate. But that is not to say that judges devoted to reading the constitution according to its public meaning at ratification would necessarily have settled on the present meaning of “property” or on the same meaning for every appearance of the word in the Constitution. After all, the meaning of “property” might have changed since ratification or in the years between the ratification of the Bill of Rights and the Fourteenth Amendment.

Consider copyrights and patents, for instance. Because they exist solely thanks to federal legislation, first enacted in 1790, copyrights and patents were probably not on the Founders minds when they ratified the Bill of Rights. Indeed, those statutory privileges did not even win the appellation of “property” in American legal usage before the mid-1800s. From a purely originalist point of view, then, older uses of “property” in the Constitution—in the Property Clause, the Due Process Clause of the Fifth Amendment, and the Takings Clause—do not include copyrights and patents, whereas the more Fourteenth Amendment’s more recent reference to “Property,” dating from 1868, arguably does. Furthermore, if originalism assigns different meanings to the various appearances of “property” in the Constitution, it must also thereby sometimes mandate a meaning not in accord with the plain meaning of the word.

Both living constitutionalism and originalism, the two main contenders for the title of reigning theory of constitutional interpretation, thus admit the possibility (and sometimes

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136 See supra Part III.C.2 (discussing case law and commentary pertaining to meaning of “Property” in the Takings Clause).
137 See supra Part III.D (discussing case law and commentary pertaining to meaning of “Property” in the Fourteenth Amendment).
138 See Llewellyn, supra note [[cite]] at 404 (footnote omitted).
139 See supra Part II.
140 See supra Part II.
144 As some evidence of the first proposition, see Zoltek Corp. v. United States, 442 F.3d 1345, 1352 (Fed. Cir. 2006) (declining to recognize patent rights as property protected by Takings Clause claim against the United States government), Gal-Or v. United States, 97 Fed.Cl. 476, 480 (Fed. Cl. 2011) (accord).
embrace the actuality) that the meaning of “property” in the Constitution varies from ordinary usage and from clause to clause in the text. That should trouble anyone concerned about the rule of law, to say nothing of elegance and logic. Happily, there exists a third alternative: Give “property” its plain, present, public meaning everywhere it appears in the Constitution. On that view, the word would have its ordinary and broad meaning, comprising both real and personal property but excluding mere statutory privileges, in each of its four constitutional appearances. For now, though, that approach to the Constitution remains largely unknown and undeveloped.  

V. The View from the Third Amendment

The jurisprudence of the Third Amendment has seen little activity in the twenty-odd years since this fine journal last published my thoughts on the topic. This part briefly surveys the new case law and commentary before revealing what amounts to a blockbuster in this somewhat neglected field: A hitherto unnoted, though in retrospect quite blatant, violation of the Third Amendment that occurred in the Aleutian Islands during World War II. The sad particulars surrounding that unconstitutional quartering does more than remind us of the Third’s continuing (if still rare) relevance, however; it also illustrates why the Founders doubtless meant to include chattels within the scope of the Taking Clause and why we should continue, today, to give “property” in the Constitution its plain and broad meaning.

In updating my research I uncovered only one new case interpreting the Third since I last canvassed the field: *Custer County Action Ass’n v Garvey*, wherein the petitioners complained of military aircraft flying through the airspace above their properties. Judicial interpretation of the Third Amendment is nearly nonexistent,” admitted the court. It found guidance in *Engblom v. Carey*, however, the only case that has given the provision sustained attention. The *Engblom* court had held that “property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others.” Applying that principle to the claims before it, the court in *Custer County* held that the petitioners’ exclusive rights did not extend to navigable airspace over their land. Ironically or not, the court concluded, “We simply do not believe the Framers intended the Third Amendment to be used to prevent the military from regulated, lawful use of...
airspace above private property without the property owners' consent."

Unhappily for the refinement of Third Amendment jurisprudence, the Supreme Court denied certiorari. Outside the case law, the Third has in recent years occasionally popped up in bizarre (and therefore futile) complaints, and in humorous riffs about the amendment’s seeming irrelevance. Scholars have given it more serious but speculative treatment, suggesting that the Third might apply to the U.S. troops lodged on foreign soil, to military recruiting on college campuses, and to the Endangered Species Act. Assessments of the Third have ranged from dismissing it as “an interesting study in constitutional obsolescence,” to this timely warning, well founded in light of many apparent (but nonetheless unlitigated) instances of the quartering of National Guard troops following hurricane Katrina: “If Americans ignore the Third Amendment, or dismiss it as trivial, they implicitly condone military incursion into their homes during domestic disasters when the rule of law has failed.” The Third Amendment has even touched the heights of constitutional theory; Professor Nicholas Quinn Rosenkranz explained in

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151 256 F3d at 1043.
159 See, James P. Rogers, Note: Third Amendment Protections in Domestic Disasters, 17 CORNELL J.L. & PUB. POL’Y 747, 750 (2008). The author makes a convincing case that the behavior of National Guard troops following hurricane Katrina resulted in many violations of the Third Amendment. Id. at 761-78.
a recent paper that Third Amendment’s use of the passive voice makes it “grammatically and structurally, a model for the rest of the Bill of Rights.”

Though I do not go quite so far as Professor Rosenkranz in describing the proper scope of the Third Amendment’s influence, I will argue that it can teach us about the scope of “property” in the Takings Clause in particular and throughout the Constitution in general. The lesson begins with a surprising, and more than a little distressing, tale of hitherto unremarked quartering. In 1942, as Japanese forces swept across the Aleutian Islands off of Alaska’s far southwestern coast, U.S. officials evacuated natives from the region and moved in military equipment and personnel. Among the many (and typically worse) abuses the natives suffered was at least one instance of quartering, which occurred when, “a small Army force was sent to the Pribilofs on September 19 [1942], billeted in the departed villagers’ dwellings, and ordered to construct an airstrip.”

It bears emphasizing that the native Aleutians suffered wrongs worse than mere quartering. They were forcibly removed from their homes and interred in distant and unhealthy camps, an ordeal in which “[t]hey fell victim to an extraordinarily high death rate, losing many of the elders who sustained their culture.” Worried about Japanese invaders, and pursuing a burnt earth policy, the U.S. military completely destroyed some evacuated villages. Other empty villages, though left standing, “were pillaged and ransacked by American military personnel.” When about a year later they were finally returned to their homes, “All household effects and equipment the Aleuts had left behind were missing.” The occupying forces took more than just the market value of the destroyed property. As reported in PERSONAL JUSTICE DENIED, the official report of the Commission on Wartime Relocation and Internment of Civilians, “Through the insult of massive looting and vandalism of their homes and places of worship by American military forces, the Aleuts lost invaluable tangible ties to their past. Houses can eventually be rebuilt and refurnished, but stolen family mementos, heirlooms and religious icons . . . cannot be recovered.” Quartering was thus not the only or worse thing that the Aleuts suffered at the hands of their government.

On any fair accounting, though, the Aleuts did suffer unconstitutional quartering. Note first that the natives of the Aleutians enjoyed all the constitutional rights of other Americans.

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162 Id. at 330 (footnote omitted).
163 Id. at 316.
164 Id. at 328-29.
165 Id. at 318 (footnote omitted).
166 Id. at 356.
167 Id. at 359.
The Supreme Court has held that “the Constitution applies in full in incorporated Territories surely destined for statehood,”\(^{168}\) a classification that Alaska doubtless satisfied in 1942.\(^{169}\) Beyond even that, the natives of the Aleutians would have enjoyed the “guaranties of certain fundamental personal rights declared in the Constitution” that the Supreme Court provided as early as 1922—including rights expressly protected by the Third Amendment.\(^{170}\)

Did that 1942 quartering on the Aleutian natives violate the Third Amendment? Consider the provision in full, “No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”\(^{171}\) By 1942, the United States had entered into “time of war” with Japan, making the second clause of the Third Amendment applicable. But lawmakers evidently passed no statute regulating the quartering of soldiers on the natives of the Aleutian Islands. The amendment’s closing mandate—“in a manner to be prescribed by law”—therefore went unmet, giving rise to a violation of the Third Amendment.

Far from following a manner prescribed by law, much of the evacuation and internment was executed in a slapdash and \textit{ad hoc} manner, in the heat of war and far from officials on the mainland.\(^{172}\) \textbf{Personal Justice Denied} complained that “the government agencies (the Department of Interior and the military) responsible for protecting the Aleut residents failed to coordinate their activities internally or with each other.”\(^{173}\) Nor did contemporary officials set things right once the immediate threat of Japanese attack had passed. “The evacuated Aleuts suffered material losses for which they were never fully recompensed, either in kind or in cash,” and officials interviewed after the fact “did not recall any expectation that the Aleuts' personal possessions would be replaced or that some type of monetary compensation would be received.”\(^{174}\)

The federal government thus unlawfully quartered soldiers on the Aleuts and, through the depredations of the occupying soldiers, took private property without providing just compensation.\(^{175}\) That much we can tell from the facts. But though it reported facts that let us call the evacuation and internment of the Aleuts unconstitutional, the Commission on Wartime

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\item \(^{170}\) Balzac v. Porto Rico, 258 U.S. 298, 312 (1922).
\item \(^{171}\) U.S. CONST., Amend. III.
\item \(^{172}\) \textit{Commission on Wartime Relocation and Internment of Civilians}, supra note \([\text{cite}]\) at 318-19 (explaining that “the evacuation of the Aleuts was not planned in a timely or thoughtful manner,” and was marked by “official indifference . . . ”).
\item \(^{173}\) \textit{Id.} at 323. \textit{See also} \textit{id.} at 326-28 (describing confusion and neglect of duty among responsible government officials).
\item \(^{174}\) \textit{Id.} at 356-57 (footnote omitted).
\item \(^{175}\) The Commission on Wartime Relocation and Internment of Civilians found a contemporary entry in the federal budget of $31,441 for “refunds, award and indemnities” but could not recover any further details of the expenditures and obviously regarded it as grossly insufficient to cover the natives’ losses. \textit{Id.} at 357.
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Relocation and Internment of Civilians did not name any legal wrongs.  Nor did the Aleutian and Pribilof Islands Restitution Act, passed in response to the Commission’s report, explain why the federal government was offering compensation to wronged Aleutians.  To the contrary, the Act made recipients of its largess agree to a blanket waiver of “all claims against the United States arising out of the relocation” they had suffered.  Each qualifying native willing to make that concession qualified for a payment of $12,000.

What does all this have to do with “property” in the Constitution?  Note the sorts of wrongs that the relocated Aleuts suffered to their personal property: destruction by arson and malice, theft by ill-disciplined soldiers, and sacrilege of objects honoring family and religion.  All qualify among the foreseeable results of loosing armed and uprooted young men upon civilian populations.  The Founding generation knew those, the characteristic marks of quartering, all too well.  They ratified the Third to prevent such offenses and the Fifth to remedy them.

The prospect of quartering inspired fear and outrage among Colonial Americans not simply, or even primarily, because they feared the loss of implied leasehold rents.  Quartered troops represented a more pointed threat to persons and personal property.  Consider, for instance, the plea of Joseph Galloway, warning his fellow Americans rebellion would bring war, that war would bring quartering, and that quartering would find soldiers, "travelling over your estates, entering your houses--your castles . . . seizing your property . . . ravishing your wives and daughters, and afterwards plunging the dagger into their tender bosoms."

In a reversal of the scenario painted by the Court in Lucas v. South Carolina Coastal Council, it seems likely that concern for the protection of personal property, rather than of real property, originally inspired the Takings Clause.  As Galloway’s warning illustrates, the threat that quartering posed to real property—loss of leasehold values and damage to buildings—probably counted among the least of the concerns that the Third Amendment aimed to address.  And while the historical record leaves much about the motivations behind the Takings Clause obscure, Henry St. George Tucker described it as “intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressments . . . without any compensation whatever.” The Founders thus probably meant the Takings Clause to remedy, foremost among other wrongs, the taking of personal property by quartered troops.

176 Neither was the Commission asked to reach legal conclusions; rather, it was tasked solely with collecting the facts and recommending a remedy.  Id. at 1 (describing the Commission’s mandate).
178 Id. at § 1898c-5(e) (“The payment to an eligible Aleut under this section shall be in full satisfaction of all claims against the United States arising out of the relocation . . . .”).
179 Id. at 1898c-5(a).
180 See supra, Part III.D.
183 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES at 305-06 (Philadelphia Birch & Small 1803).  See also, Jed Rubenfeld, Usings, 102 YALE L.J. 1077, 1122-23 (1993) (calling
Originalists should find that argument persuasion enough to give real and chattel property equal treatment under the Takings Clause. Those who prefer a more flexible approach to Constitutional interpretation, one designed to keep it in step with modern needs, should take due note of the offenses committed against the Aleuts during World War II. The federal government eventually admitted that it had acted wrongly and paid compensation. The entire tragedy might have been avoided, however, if the Aleuts had been able to invoke the plain meaning of the Constitution, limiting quartering to lawful manners and winning just compensation for all private property—personal and real—lost to occupying soldiers. Those who want to give the Constitution a living meaning should care about what it means to those who live under it.

Conclusion: Constitutional Property by Common Consent

The evacuation and occupation of the Aleutian Islands during World War II shows only too well the results of ignoring the Constitution’s words. Though the federal government quartered soldiers contrary to the plain meaning of the Third Amendment, it seems nobody has noticed until now. And though the Aleut’s lost chattels fully qualified as “private Property,” officials never admitted to violating the Takings Clause and took over forty years to pay any compensation. We can explain (if not excuse) the former oversight as a consequence of the Third Amendment’s obscurity. But how could anyone have overlooked so massive a violation of the Takings Clause? Perhaps confusion over the scope of constitutional property bears some of the blame.

As this paper has documented, courts and commentators have cast undue uncertainty on the meaning of “property” in the Constitution. They have tortured the word’s four textual appearances into four—or, on one accounting, five—distinct meanings. Such a disjointed interpretation cannot help but obscure the bold truth about our constitutional rights. We do not have the wonder whether that legal befuddlement might have tragic results; the wartime treatment of the Aleuts gives proof enough.

Adding irony to tragedy, the Aleuts went uncompensated for the very type of wrong that inspired the Takings Clause: Occupying soldiers stealing and destroying personal property. The plain text of the Constitution required that Aleuts receive just compensation for the loss of their chattels in like circumstances. Given the historical background of the Takings Clause, true originalists should likewise read it to protect chattels (Justice Scalia’s dicta in Lucas to the contrary notwithstanding). What about those who aim to keep the Constitution alive by reading it flexibly? They should learn from the Aleut’s maltreatment how the least advantaged among us benefit the most from steadfast respect for property rights. Given that poorer people are less likely to own much wealth in the form of real property, a just Constitution must protect chattel property to the utmost.

Even apart from the Constitution’s plain language, its original meaning, and our concern for the poor, personal property deserve our highest regard. Unlike real property, it does not come typically come freighted with claims, dating back to feudal law, that title ultimately vests in the King or other sovereign. There can be no more absolute form of fee simple absolute than that which we enjoy in personal property—a form of property that can arise quite literally out of taking of supplies by quartered troops among the "paradigm case[s]" that the Founders meant for the Takings Clause to remedy).

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thin air.\textsuperscript{184} How curious, then, that some authority treats it as less deserving of protection under the Takings Clause than real property.\textsuperscript{185}

In the grand struggle to protect individual rights against government trespass, the Third Amendment plays a role akin to the provision, in Van Halen’s standard performance contract, requiring a bowl of M&Ms in band’s hospitality room with all the brown ones removed.\textsuperscript{186} Though sometimes touted as an example of rock star excess, the clause in fact served to test whether the band’s contractual partner, providing the concert venue, had read the terms of their agreement.\textsuperscript{187} Finding brown M&Ms backstage warned Van Halen to look out for more serious breaches, such as in the contract’s provisions on wiring, security, and ticketing. Quartering serves as a forbidden M&M in the Constitution’s bowl of rights and violations of the Third Amendment signal more serious problems. Consider that the Third Amendment saw violation in the War of 1812, the Civil War, World War II, during a 1979 New York prison guards’ strike, and Hurricane Katrina—consider, and worry.\textsuperscript{188}

Disrespect for the Third Amendment shows a more general and dangerous disregard for property rights. The Constitution’s protections of property have served us long and well, and today they still sharply limit State power. In recent years, however, wayward threads of judicial precedent have infected the law of constitutional property with dangerous inconsistencies and manifest absurdities. The time has come to shake off those misreadings, view the text with fresh eyes, and give “property” its plain and broad meaning throughout the Constitution.

\textsuperscript{184} Consider, someone drawing oxygen from the atmosphere, bottling it, and selling it.

\textsuperscript{185} See supra, Part III.C.2 (describing Takings Clause jurisprudence).


\textsuperscript{188} For background on violations during the War of 1812, the Civil War, and the New York guards' strike, see Bell, supra note [[cite to, 2 WM. & MARY BILL OF RIGHTS J. 117]] at 136-39, 142-43. For an account of the Katrina violations, see Rogers, supra note [[cite to 17 CORNELL J.L. & PUB. POL'Y 747 (2008)]].