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WASHINGTON LAW REVIEW JURISPRUDENTIAL
LECTURE SERIES*

“PROPERTY RIGHTS” IN CONSTITUTIONAL
ANALYSIS TODAY

James L. Oakes**

Yesterday the active area in this field was concerned with “property.” Today it is “civil liberties.” Tomorrow it may again be “property.” Who can say that in a society with a mixed economy, like ours, these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom?

Justice Felix Frankfurter¹

The concept of “property rights” in Supreme Court constitutional analysis today is in flux. It has been and is undergoing change—a change more rapid than those of us who have concentrated our attention on other personal rights can imagine. That this process of change raises anew some fundamental issues of justice is not surprising; the institution of property has always done so.

Perhaps the change is simply a swing of the pendulum, as the quote from Justice Frankfurter suggests: individual “property rights” assume greater importance as a state moves toward a laissez-faire economy or away from a regulated one; they tend to have less significance when the state takes on a welfare cast. Perhaps change in viewing “property rights” under the Constitution is inevitable since the very philosophical concepts underlying “property rights,” if they are not mutually conflicting, at least constitute a spectrum of relationships between the individual and the state which secures those rights. This spectrum inevitably reflects political ebb and flow.

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1. OF LAW AND MEN 19 (1956).

MADISON AND JEFFERSON: THE SPECTRUM OF MODELS OF PROPERTY RIGHTS

Madison and the Dominion View

The views of Madison and Jefferson reflect the contrasting ends of this spectrum. Madison, in 1787, recommended a property qualification for electors of the House of Representatives.² While he was to modify this view over three decades later, he nevertheless maintained the basic capitalistic view of property rights, a view derived from Locke³ and Blackstone.⁴ Madison wrote in 1821:

In civilized communities, property as well as personal rights is an essential object of the laws, which encourage industry by securing the enjoyment of its fruits: that industry from which property results, & that enjoyment which consists not merely in its immediate use, but in its post-humous destination to objects of choice and of kindred affection.

In a just & a free, Government, therefore, the rights both of property & of persons ought to be effectually guarded.⁵

In the conception of John Locke, property was an attribute of a man's personality that was instrumental in giving him a political character. It was that estate or substance which a person possesses exclusive of the right of others.⁶ Property thus was dominion, it was an absolute, it was to be treated no differently from, and with at least as much respect as, other rights.

This view is reflected by the fact that property was mentioned with other personal rights in, for example, the Virginia Bill of Rights,⁷ the

2. Speech before the Constitutional Convention (Aug. 7, 1787), reprinted in 2 THE RECORDS OF THE FEDERAL CONVENTION 203 (M. Farrand ed. 1911).

3. See J. LOCKE, *The Second Treatise of Government* ch. 5, in TWO TREATISES OF GOVERNMENT (London 1698). This simplistic view does not, of course, take into account, *inter alia*, gains reflecting values wholly socially created by expenditure, *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 328, 397 N.Y.S.2d 914, 916 (1977), *aff'd*, 438 U.S. 104 (1978), or by tax exemption or other subsidy.

4. See I W. BLACKSTONE, COMMENTARIES *139.

5. Note on Madison's Speech of Aug. 7, 1787 (ca. 1821), reprinted in THE MIND OF THE FOUNDER 503 (M. Meyers ed. 1973).

6. J. LOCKE, *supra* note 3; see G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 219 (1969). Locke, of course, conceived of the earth and its contents as given by God to men in common, but as appropriated by labor to individuals. J. LOCKE, *supra* note 3, §§ 27-30.

7 VA. CONST. arts. 1, 6, 11.

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Massachusetts Bill of Rights,⁸ and the Northwest Ordinance.⁹ This grouping is consistent with the view that rights concerning property are themselves rights of persons. As Learned Hand, the former great Chief Judge of my court, remarked in his essay on *Chief Justice Stone's Conception of the Judicial Function*, "Just why property itself was not a 'personal right' nobody took the time to explain. . . ."¹⁰ It is not a little ironic that it had been Justice Stone's famous footnote in *United States v. Carolene Products Co.*¹¹ that set the stage for a constitutional double standard between economic rights and personal rights.¹² Even so, the right to "property" was recognized at the very time to which Hand's remark was directed as one of several personal rights. The right to "property" was even said to be "fundamental" in Justice Jackson's monumental opinion in 1943 on religious freedom, *West Virginia State Board of Education v. Barnette*.¹³

While "property" is not mentioned specifically in the Constitution proper, it is of course in the fifth and fourteenth amendments, and one property right is referred to in the "obligation of contracts" clause in

8. MASS. CONST. art. 1.

9. Ordinance of July 13, 1787, art. 2, reprinted in DOCUMENTS OF AMERICAN HISTORY 130–31 (8th ed. H. Commager 1968). The Northwest Ordinance went one step further. It recognized that protection of property rights required that laws should not "interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed," *id.* at 131, thereby establishing a basis for the concept later called "freedom of contract."

10. Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946).

11. 304 U.S. 144, 152 n.4 (1938). Dean Wellington points out correctly that footnote four is an explanation of, not a justification for, a constitutional double standard. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 278–79 (1973). But the *Carolene Products* footnote is often thought of as having created the double standard. Perhaps it would be as well to say it simply recognized the double standard. See Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 20–21 (1942); note 56 *infra*.

12. See McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36. But see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 56 (Supp. 1979) ("[T]here can be no bright line between 'economic rights' and 'personal rights'.").

13. 319 U.S. 624 (1943). According to Justice Jackson's classic statement:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638.

It is ironic that Chief Judge Hand made his remark, quoted in text, probably with an eye towards *Barnette*, because Justice Frankfurter's dissent in that case took the majority to task for its loose approach to the due process clause and its lack of judicial restraint. *Id.* at 647–49, 666. Hand was to refer in his essay on Stone to the fact that "when 'personal rights' were in issue, something strangely akin to the discredited attitude towards the Bill of Rights of the old apostles of the institution of property, was regaining recognition." Hand, *supra* note 10, at 698.

article I, section 10.¹⁴ The historical basis of property rights is clear.¹⁵ More recently, after lower federal courts had wrestled, rather unsuccessfully I fear,¹⁶ with the dilemma posed in Judge Hand's statement, Justice Stewart, in *Lynch v. Household Finance Corp.*,¹⁷ sought to lay to rest the "false" dichotomy between "personal liberties" and "property rights": "Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."¹⁸

Jefferson and the Social View

Contrast this view, and Madison's statements concerning the basis of property rights, with the social view held by Jefferson. In a letter to Madison from Fontainebleau in 1785, after reflecting that the property of pre-Revolutionary France was "absolutely concentrated in a very few hands" with the poor unable to work and the lands kept idle mostly for game, Jefferson wrote:

I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind. The descent of property of every kind therefore to all the children, or to all the brothers and sisters, or other relations in equal degree is a politic measure, and a practicable one. Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise. Whenever there is in any country, uncultivated lands and unemployed poor, it is clear

14. "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . ." U.S. CONST. art I, § 10, cl. 1.

15. See Corwin, *Introduction to THE CONSTITUTION OF THE UNITED STATES OF AMERICA* at xxviii—xxxii (U.S. Gov't Printing Office 1973). See also *Marsh v. Alabama*, 326 U.S. 501 (1946); *Associated Press v. United States*, 326 U.S. 1 (1945); *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

16. See, e.g., *Eisen v. Eastman*, 421 F.2d 560, 564–66 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970) (holding that enactment of rent control act does not give rise to jurisdiction under 28 U.S.C. § 1343(3), relying upon Stone's formulation in *Hague v. C.I.O.*, 307 U.S. 496, 518, 531 (1939), applying the jurisdictional statute "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights").

17. 405 U.S. 538 (1972).

18. *Id.* at 552.

that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on.¹⁹

Thus viewed, property—“given as a common stock for man”—is subject to regulation for the benefit of persons, to progressive taxation, and to certain higher rights in the public at large. Property is, so to speak, held in trust by a person not just for his own benefit but for the benefit of others and of the state. Property rights are viewed not in the abstract but as significantly determined by what Frank Michelman has called “existing conditions of economic resource employment within [the rights-holder’s] social universe.”²⁰

Put another way, one view of “property” emphasizes the concept that we are independent individuals; the other emphasizes that we are also parts of a social whole.²¹ Obviously, under the former, or “dominion,” view of property, the legal system will tolerate a lesser degree of interference from the state by way of taxation or regulation than would be the case under the latter, or “social” view of property. Most judges, including those on the Supreme Court, with which this article deals, commence analysis with both views as part of their value apparatus.

These ambivalent, often opposing, views of property have been present throughout our political, economic, social and, therefore, legal or constitutional history. Perceiving them as distinct analytical tools, sometimes intertwining, sometimes contrary, often conflicting, gives insight, I believe, into some of the knottier problems of our constitutional thinking of the past, and hence to a clearer concept of the present, if not the future.

19. Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), reprinted in *THE PORTABLE THOMAS JEFFERSON* 395, 396–97 (M. Peterson ed. 1975). Jefferson’s view doubtless had input from Rousseau, who had observed the same scene a few years previously. See 7 *ENCYCLOPEDIA OF PHILOSOPHY* 214–20 (1972 ed.). See generally L. BECKER, *PROPERTY RIGHTS* ch. 8 (1977).

20. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation”* *Law*, 80 *HARV. L. REV.* 1165, 1167 (1967).

21. See also B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977). Ackerman looks principally towards two philosophic justifications—he calls them “Comprehensive Views”—the Utilitarian, *id.* ch. 3, and the Kantian, *id.* ch. 4, and contrasts the perspectives of the Scientific Policymaker, who looks to these two normative theories, with the perspective of the Ordinary Observer, who looks to Layman’s Things in a simplistic way. Ackerman’s concentration on the importance of philosophic theory is criticized in Soper, *On the Relevance of Philosophy to Law: Reflections on Ackerman’s Private Property and the Constitution*, 79 *COLUM. L. REV.* 44 (1979), as not deciding hard cases, even though Professor Soper also sees Utilitarianism as emphasizing our membership in society and Kantianism our individuality. *Id.* at 64.

PREMISES—MORE VARIATIONS ON THE THEME OF PROPERTY RIGHTS

So stated, our analysis requires temporary digression from these matters which have intrigued philosophers from Aristotle to the present.²² We must agree upon a language,²³ or at least a few semantic premises, unless we are to be, in Professor Ackerman's terms, "mere 'Ordinary Observers' without any semblance of 'Scientific Policymaking.'"

First, we must recognize that the term "property rights" is used in two different senses, often interchangeably. One sense in which we use property rights is generic. It refers not just to land or to possessions or things, but includes what might best be termed "economic rights." In this sense, then, the term "property rights" encompasses not only rights to land, to possessions, and to things, but to incorporeal "entitlements"; it includes stock ownership, the so-called "new property,"²⁴ and it includes, from a constitutional point of view, the right to make contracts in reference to property. Its use inevitably raises questions not only of "substantive due process," but also questions of the construction of forbidding the states from impairing the obligation of contracts. Each of these two methods of constitutionally analyzing questions of property rights has, in its time, been declared a dead letter. One purpose of this paper will be to examine the status today of substantive due process and the contract clause in Supreme Court analysis.

The other meaning of property rights is more particular, a special legal language used by property lawyers, sometimes even by judges, certainly by commentators, principally in the field of "takings" or "just compensation" law. This field of law has taken on an entirely new dimension in this era of land-use and environmental controls brought about by increased public awareness of the finite quality of many, perhaps all, resources. In this language, familiar to most I am sure, one must discard "ownership" or "the owner" as insufficient abstractions and speak

22. See, e.g., B. ACKERMAN, *supra* note 21; L. BECKER, *supra* note 19; Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976); Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975) [hereinafter cited as Costonis, "Fair" Compensation]; Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977) [hereinafter cited as Costonis, *The Disparity Issue*]; Michelman, *supra* note 20, at 1202-27; Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter cited as Sax I]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter cited as Sax II]; Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980).

23. See Snare, *The Concept of Property*, 9 AM. PHILOSOPHY Q. 200 (1972).

24. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-9 (1978); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

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rather of relationships among persons with respect to things. “Property,” in this sense, is a set of legal relations, and includes the following:²⁵

- 1) the right of a person to *possess* the thing or, in the case of incorporeal things, to *exclude others* from possessing it;
- 2) the right to *use* the thing;
- 3) the right to *manage* the thing;
- 4) the right to the *income or profits* from use of the thing;
- 5) the right to the *capital* in the thing, *i.e.*, the power to consume, waste, modify, sell or alienate, or even destroy it;
- 6) the *immunity* from expropriation of the thing by another or the state; and
- 7) the power to *transmit* the thing by gift, bequest, or devise.

But this does not end the bundle of rights or relationships, for there are or may be at least four limitations upon them, including:

- 1) the term of tenure, which in a universe of human beings is, at least in most cases, life, except as modified by the power to transmit;
- 2) a duty not to use the thing so as to harm others;
- 3) a liability to execution on the thing, *e.g.*, for debts; and
- 4) a liability to reverter or abandonment of the thing. There may be other limitations on individual rights in the bundle, *e.g.*, against perpetuities in the case of the right to transmit or for taxation in the case of income or alienation.

Thus property rights are, as Professor Lawrence Becker has said, “typically aggregates of different sorts of rights and rights-correlatives,”²⁶ that is, sets of rights. And property law is, or should be, an examination and resolution of the conflicts between or among the different holders of the sets of rights. Constitutional analysis of property rights in his sense involved an examination of when the Constitution, through the fifth and fourteenth amendments, either precludes a reassignment of one or more of those rights from one person’s bundle to another’s (“due process law”) or requires in connection with reassignment of one or more of those rights to the state the payment of “just compensation” (“taking law”). This may include the further examination, as that fifth amendment

25. This analysis is essentially based upon A. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107–47 (A. Guest ed. 1961). See also *Introductory Note* to RESTATEMENT OF PROPERTY ch. I (1936); L. BECKER, *supra* note 19, at 18–19; Michelman, *supra* note 20, at 1185 n.41. Plainly, “ownership” does not always imply the same set of sticks in the bundle of rights.

26. L. BECKER, *supra* note 19, at 21.

clause implies, of what is "just" or what will serve the purposes of justice.²⁷

And to complicate matters somewhat further, property lawyers have for centuries been able to devise permutations and combinations of the foregoing bundle of rights and qualifications which even as above mentioned come to 2047 in number,²⁸ but when added to by the medieval lawyers' Rule in Shelley's Case, or springing and shifting uses, or today's land-use technicians' transferable development rights,²⁹ become almost infinite in number.

THE SUBSTANTIVE PROTECTION OF PROPERTY RIGHTS

The Contract Clause

Using property rights in the generic sense, the history of constitutional treatment before the 1970's may be divided into three very broad phases. The first, exemplified by the cases of *Dartmouth College v. Woodward*³⁰ and *Fletcher v. Peck*,³¹ was the contract clause³² phase, in which obligations in state charters and private agreements were protected from impairment by state legislation. During this era, commencing with *Fletcher v. Peck* and ending in 1887 with *Seibert v. United States ex rel. Lewis*,³³ the Court invalidated state legislation, much of it pro-debtor legislation,³⁴ on the basis of the contract clause.³⁵ This phase of American constitutional law saw the American corporation arise; corporate property rights were

27. See B. ACKERMAN, *supra* note 21, at 28-29; Costonis, "Fair" Compensation, *supra* note 22, at 1038-45; Michelman, *supra* note 20, at 1168-69. Norman Williams has pointed out to me that a substantial body of state case law deals with the rights neighbors have to prevent zoning relaxation. Land use regulation plainly may fall into either due process or taking law categories; at least the transfers it causes are not always to the government. See Stoebuck, *supra* note 22, at 1092.

28. L. BECKER, *supra* note 19, at 21.

29. See Berger, *supra* note 22, at 802; Costonis, "Fair" Compensation, *supra* note 22, at 1061-70. See also 3 N. WILLIAMS, AMERICAN PLANNING LAW § 71A.11 (Cum. Supp. 1980).

30. 17 U.S. (4 Wheat.) 518 (1819) (New Hampshire could not change private college into public institution in violation of 1769 charter from George III).

31. 10 U.S. (6 Cranch) 87 (1810) (contract clause prevented Georgia from annulling land titles vested in good faith purchasers from state's original grantees).

32. U.S. CONST. art. I, § 10, cl. 1. I am informed by Norman Williams that Professor Fuller of Columbia used to refer to the contract clause as a "buzz saw which has some very unusual characteristics—it is very sharp, it is invisible, and it is ambulatory, so that you never can tell when it is going to come by and take your finger off."

33. 122 U.S. 284 (1887) (law, requiring petitions before taxes could be levied to amortize previously issued bonds, held invalid).

34. *E.g.*, Walker v. Whitehead, 83 U.S. (16 Wall.) 314 (1872) (law restricting remedies for obtaining judgment held invalid as to prior contracts).

35. According to Bernard Schwartz, in the Chase and Waite Courts alone there were 49 cases in which state laws were invalidated under the contract clause. Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 SUP. CT. REV. 95, 98.

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protected and corporations flourished.³⁶ Even after *Seibert*, the Court continued to rely on the contract clause from time to time, in a dozen or so cases, until *Home Building & Loan Association v. Blaisdell*.³⁷ The Court there upheld Minnesota's depression-engendered mortgage moratorium law by reading into contracts "the reservation of essential attributes of sovereign power . . . as a postulate of the legal order."³⁸ Plainly, if that reservation is always read into contracts, the contract clause has little if any meaning. It became in this understanding simply superfluous.

Substantive Due Process

The second phase of property rights treatment, overlapping somewhat with the first, was that of substantive due process. It commenced with *Chicago, Milwaukee & St. Paul Railway v. Minnesota*,³⁹ where the Court subjected railroad rate regulation to judicial review for reasonableness, and reached its zenith—or nadir—in *Allgeyer v. Louisiana*,⁴⁰ *Lochner v. New York*,⁴¹ and *Coppage v. Kansas*.⁴²

Substantive due process rested on the fourteenth and fifth amendments; as in the case of the contract clause, property rights were protected

36. *Id.* at 97.

37. 290 U.S. 398 (1934).

38. *Id.* at 435. Analogously, under the theory of *Mugler v. Kansas*, 123 U.S. 623 (1887), and progeny, "the institution of private property ownership is generally viewed as being necessarily subject to the implied condition that the state, through exercise of its police power, may impose appropriate regulations to ensure that such property will not be used in a way that unreasonably causes injury to others." Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 5 (1971). See also Stoebuck, *supra* note 22, at 1069 ("[under one line of cases] no exercise of the police power is a taking; police power is one thing, eminent domain another").

39. 134 U.S. 418 (1890).

40. 165 U.S. 578 (1897). The "liberty of contract" era really commenced with *Allgeyer*, in which the Supreme Court unanimously held that a Louisiana statute prohibiting effectuation of marine insurance contracts in Louisiana with companies not licensed to do business in Louisiana exceeded the state's police power and violated the due process clause of the fourteenth amendment by infringing upon liberty of contract. The Court equated liberty of contract with property rights by stating: "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto. . . ." *Id.* at 591. This statement relied in large part upon a similar proposition adopted by the first Justice Harlan in *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888).

41. 198 U.S. 45 (1905). The era of substantive due process is best known by the decision in *Lochner*, which invalidated a New York statute limiting bakery employees' hours to 60 per week, and 10 per day. The Court in *Lochner* rejected New York's claim that the statute was significantly and directly related to the promotion of employee health.

Anti-*Lochner* literature is enormous, with one of my favorites being Felix Frankfurter's first signed law review article, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916).

42. 236 U.S. 1 (1915) (Kansas law proscribing "yellow dog" contracts deprived employers of liberty of contract).

against substantive legislation detrimentally affecting those rights. Appealing to higher law, the Court harked back to Locke's dictum that "the supreme power cannot take from any man any part of his property without his own consent,"⁴³ a passage clearly reflecting the dominion view of property. This was done, however, in the name of "liberty"—freedom of contract—which is one of the sticks in the bundle of property rights to which we have previously referred, as was recognized by the Court in *Allgeyer*.⁴⁴

So too there was conceived an interrelationship, an equation, between the due process clause and the takings clause. Justice Harlan wrote in *Smyth v. Ames*,⁴⁵ "the question whether [rates] are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law [is a matter for judicial review]." William Stoebuck has perceptively pointed out that "[c]onfusion over the proper role of substantive due process and over the relationship between due process and takings is a pervasive problem in judicial decisions and in scholarly writing."⁴⁶ Perhaps much confusion could be eliminated by following his analysis of first examining whether a governmental regulation is void on due process grounds as unreasonable, unduly oppressive or arbitrary and capricious, and only then examining whether there has been a taking or confiscation. But by virtue of the fact that in some police power cases a given exercise of that power may be thought to be both unreasonable and to constitute a taking, substantive due process and takings law frequently have had an overlapping, if not equivalent content. The former has been applied principally to invalidate governmental regulation of business, working conditions, and the like, the latter, as we shall see, to invalidate governmental redistribution of rights from one aggregate holder to another.

In any event, the established doctrine has been that substantive due process came to a dead end with the New Deal Court, commencing with

43. J. LOCKE, *supra* note 3, § 138.

44. 165 U.S. at 591. *See* note 40 *supra*.

45. 169 U.S. 466, 526 (1898).

46. Stoebuck, *supra* note 22, at 1081. Professor Stoebuck views substantive due process as involving, under *Lawton v. Steele*, 152 U.S. 133, 137 (1894), a three prong test: 1) whether the interests of the public require the police power exercise; 2) whether the means are reasonably necessary for the accomplishment of the purpose; and 3) whether the means are "unduly oppressive" on the individuals. So limited, substantive due process may not be the evil creature many of us have been trained to think it is; rather it involves merely a "public purpose" examination, followed by classic means-end analysis. This lends support to Professor Tribe's view that *Lochner*'s true error was not in terms of the Court's intervening to protect liberty (or property in the name of liberty) but in not understanding the requirements of liberty in an industrialized age. *See* notes 54 & 55 and accompanying text *infra*.

West Coast Hotel Co. v. Parrish.⁴⁷ The Court reverted to the thinking of *Munn v. Illinois*,⁴⁸ the rate regulation decision, the revolutionary nature of which helped to precipitate its converse, the constitutional adoption of the doctrine of laissez faire.⁴⁹ *West Coast Hotel* re-established that courts do not substitute their social and economic beliefs for the judgment of legislative bodies.⁵⁰ After *West Coast Hotel*, the law schools, the lower courts, and the commentators treated freedom of contract certainly, and substantive due process with it, as unsound constitutional doctrine and as, for all practical purposes, dead law.

There is, of course, hard truth in this assessment. *Lochner* and friends did involve unwarranted judicial fact-finding.⁵¹ Implicit in this was a second-guessing of the legislature as to its purpose in enacting the law. This second-guessing was doubtless undemocratic in addition to being unresponsive to the needs of an industrial society. As Justice Holmes said in his *Lochner* dissent, the fourteenth amendment did “not enact Mr. Herbert Spencer’s Social Statics.”⁵² The economic realities of the Great Depression, the whole movement towards legal realism and away from natural rights and common law theory, and internal Supreme Court doctrinal change, among other things, culminated in abandonment of *Lochner*-type adjudications.⁵³ Judging *Lochner* solely in institutional terms, as Professor Laurence Tribe has persuasively pointed out,⁵⁴ the doctrine exempli-

47. 300 U.S. 379 (1937). By 1949 the Court expressly repudiated the “*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine.” *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949). But Robert Stevens reminds me that Alexander Bickel saw *Griswold v. Connecticut*, 381 U.S. 479 (1965), as a return to substantive due process.

48. 94 U.S. 113 (1876) (upholding Illinois’ regulation of grain elevator charges, as affecting “the public interest”). *Munn* is, of course, the foundation of 100 years of regulation in the “public interest,” or what has been supposed as such.

49. See Corwin, *supra* note 15, at xxx. B. TWISS, *LAWYERS AND THE CONSTITUTION* (1942), which has the subtitle “How Laissez Faire Came to the Supreme Court,” discusses the reaction of the business-legal establishment to *Munn v. Illinois*, culminating in *Allgeyer*, *Lochner*, et al. History continues to repeat itself.

50. See *Munn v. Illinois*, 94 U.S. 113, 134 (1876). See also *Nebbia v. New York*, 291 U.S. 502, 537, 538 (1934), quoted in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937).

51. See *Lochner*, 198 U.S. at 64: “[T]he limitation of the hours of labor . . . has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really health law.”

52. *Id.* at 75 (Holmes, J., dissenting). In answer to a latter-day *Lochner*-type argument, the author was to borrow from Holmes by saying, “the Equal Protection Clause of the same amendment did not enact Professor Milton Friedman’s economics of the marketplace.” *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1202–03 (2d Cir. 1977) (footnotes omitted), *cert. denied*, 440 U.S. 979 (1979).

53. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum working hours provisions for women). See also U.S. CONST. amend. XVI, overruling the result reached in *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895); *Nebbia v. New York*, 291 U.S. 502 (1934).

54. L. TRIBE, *supra* note 24, § 8–7.

fied by that case was discredited, as was the doctrine of judicial review generally. But it may be that the true error in decisions like *Lochner*, as Tribe suggests, lies in the fact that the Court had intervened to protect liberty (or property in the name of liberty) "in a misguided understanding of what liberty actually required in the industrial age."⁵⁵ If we look only to the classical means-end analysis used by the Court in *Lochner*, substantive due process may not be the evil we have all supposed.

Phase Three: The Segregation of Property and Civil Rights

The third phase of property rights was recognized in footnote four of *United States v. Carolene Products Co.*⁵⁶ The Court there observed that giving legislatures totally free sway in the economic area was to permit them free sway in other areas as well, and that this could not be done in a system of justice for all. The footnote suggested a "narrower scope for operation of the presumption of constitutionality" when courts are determining the validity of "statutes directed at particular religious . . . or national . . . or racial minorities."⁵⁷ This is because "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."⁵⁸ As Dean Sandalow was to say, "[f]orty years later, that cautious suggestion has ripened into an attitude."⁵⁹ What we have had since *Carolene Products*, the third phase of property rights, is a judicial double standard, with the courts feeling more free to protect the civil rights other than property rights of minorities, political and otherwise, even while there has been great restraint upon protection of property rights in the broad sense.

Under this double standard there has in fact been a succession of cases in which the Supreme Court has reviewed, under the due process clause, the substantive validity of state and federal laws as they pertain to rights other than those of property and found them wanting. For example, in *Skinner v. Oklahoma*⁶⁰ the Court held that a state cannot sterilize repeated

55. *Id.* § 11-1, at 564. *See id.* §§ 8-6, 8-7.

56. 304 U.S. 144, 152 n.4 (1938). For an interesting article mentioning the vast literature surrounding this footnote, see Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977). *See also* note 11 *supra*.

57. *Carolene Products*, 304 U.S. at 152 n.4.

58. *Id.*

59. Sandalow, *supra* note 56, at 1162. Sandalow goes on to say that the footnote has been read "as an open-ended invitation to extend similar protection to an ill-defined assortment of groups that have failed to attain their objectives through the political process." *Id.* *But see* N. DORSEN, *THE RIGHTS OF AMERICANS* (1971).

60. 316 U.S. 535 (1942).

larcenists while merely imprisoning repeated embezzlers; in *Robinson v. California*⁶¹ that a state cannot make narcotics addiction a crime; in *Griswold v. Connecticut*⁶² that a state cannot punish a married couple's use of contraceptives; in *Roe v. Wade*⁶³ that a state cannot proscribe procuring the abortion of a human fetus except when necessary to save the life of the mother.

However, if the same institutional standards that put economic matters beyond judicial competence are applied to the decisions invalidating legislation regulating civil rights other than those pertaining to property, must not those decisions—*Brown v. Board of Education*⁶⁴ perhaps foremost among them—be judged to have exceeded judicial competence? Are they not an undemocratic usurpation of government power by the judiciary, irrespective of the clause in the fourteenth amendment to which the given case refers?⁶⁵ This implies one of two conclusions. The first is that there is a double standard for property rights in the generic sense on the one hand and other civil rights on the other—but we have already seen, or have we, that since *Lynch* there should no longer be any such double standard. The alternative, if we are to believe that *Brown* was sound, is that our application of the institutional standards of judicial competency to *Lochner* and friends has been wrong. Perhaps this dilemma does not admit of any clear-cut resolution. But to confront it directly gives us insight into the status of property rights in constitutional analysis and the judicial process today.⁶⁶ Can it be that *Lochner* quite

61. 370 U.S. 660 (1962).

62. 381 U.S. 479 (1965). Of course, other clauses of the Constitution were used in the Court's analysis.

63. 410 U.S. 113 (1973). Here too other clauses were used in the opinion of the Court but at least one Justice acknowledged that substantive due process was the key. See *id.* at 170 (Stewart, J., concurring).

64. 347 U.S. 483 (1954); see generally R. KLUGER, *SIMPLE JUSTICE* (1976).

65. Substantive due process and "strict scrutiny" under the equal protection clause often overlap. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973). Indeed, equal protection arguments can be made in terms of economic rights. See, e.g., *Dieffenbach v. Attorney Gen.*, 604 F.2d 187, 195–98 (2d Cir. 1979); *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1202–03 (2d Cir. 1977), *cert. denied*, 440 U.S. 979 (1979).

Purporting to argue from history, Raoul Berger is in the forefront of the institutional-standards criticism of *Brown* and, I take it, the entire expansion of civil liberties in the last 25 years. See his *GOVERNMENT BY JUDICIARY* (1977), subtitled "The Transformation of the Fourteenth Amendment," and especially pages 269–82. For a criticism of Berger's arguments, see Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U.L. Rev. 651 (1979). And yet, even Archibald Cox has said in *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 50 (1976) that, in reference to free speech decisions, "the Warren Court behaved even more like a Council of Wise Men and less like a court than the *laissez-faire* Justices."

66. See Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U.L. Rev. 911, 923–24 (1979) (footnotes omitted):

While the ghost of *Lochner v. New York* probably has been laid to rest, we recognize certain

correctly and properly used a rational means-end test in examining challenged legislation⁶⁷—a test which has been subsumed in modern equal protection analysis?⁶⁸ Can it be that what was wrong with *Lochner* was not that it examined legislation substantively but that it overly limited the legitimate ends that government might have so as to accord with laissez-faire philosophy and economics of the day (including redistribution of wealth), or that it did not correctly read the underlying legislative facts?⁶⁹ Or is the dilemma one essentially caused by the underlying dualistic view of property rights that we have previously discussed—as being social or common—held in trust on the one hand and pertaining to individuals as a part of their dominion on the other? This view translates itself readily into a correlative right-duty analysis, finding a short-hand phrase on the other side of the liberty-property coin in Chief Justice Jay's first charge to a grand jury as a federal judge, while sitting in the Eastern Circuit:

[C]ivil liberty consists not in a right to every man to do just what he pleases, but it consists in an equal right to all the citizens to have, enjoy, and to do, in peace security and without molestation, whatever the equal and constitutional laws of the country admit to be consistent [*sic*] with the public good.⁷⁰

SUPREME COURT DECISIONS

The decade just past has seen a series of decisions by the Supreme

fundamental personal interests with substantive content, which are subject to treatment under the equal protection clause, with its emphasis on the equal citizenship values of respect, participation, and responsibility, as well as under the due process clause, viewed as a provision protecting individual "personhood" and the coordinate interests in being free from governmental intrusion, in "avoiding disclosure of personal matters," and in preserving "independence in making certain kinds of important decisions." There are, in short, both "liberty" and "entitlement" interests that have substantive content and are not subject to governmental deprivation; and to hold this view is not inconsistent with holding a latitudinarian view as to the powers of government with respect to economic matters, at least where there is some rational relationship to a legitimate governmental objective.

67. The Court in *Lochner* stated:

The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

198 U.S. at 57–58.

68. See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

69. See L. TRIBE, *supra* note 24, § 8–3.

70. Charge to Grand Juries on Eastern Circuit, (Apr. 4, 1790–May 20, 1790) (Document in Papers of John Jay in the Columbia University Library). I am indebted to Columbia University's Richard Morris, historian and collector of the Papers of John Jay, for this reference.

Court suggesting that we are entering a fourth phase, in which substantive constitutional content will once again be given to property rights, some would say restoring property rights to their “rightful place.” I have already mentioned the opinion in *Lynch v. Household Finance Corp.*,⁷¹ treating—properly I think—property rights as personal rights.

Accompanying *Lynch*, and with some shuffling back and forth, a series of other decisions in the 1970’s recognized persons having property rights as entitled to minimal requirements of procedural regularity despite contrary state law. *Fuentes v. Shevin*⁷² required notice and hearing before prejudgment replevin despite state law, in effect when the conditional sales contract was signed, permitting ex parte prejudgment replevin. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,⁷³ garnishment of a corporate bank account without a probable cause hearing was invalidated despite a contract conditioning the corporation’s property interest in the bank account upon relinquishment of the right to demand such a hearing. In each of these cases, the Court held that the fact “[t]hat the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause.”⁷⁴ I will not belabor the other cases recognizing the “new property,” which include entitlements to public assistance payments,⁷⁵ driver’s licenses,⁷⁶ and government employment,⁷⁷ because the protections afforded were procedural—for example, a right to a hearing⁷⁸—rather than substantive in nature, though the line is often difficult to draw.⁷⁹ But it is significant that these opinions spoke in terms of property rights. In *Board of Regents v. Roth*,⁸⁰ Justice Stewart’s majority opinion defined property interests as being “created and . . . defined by existing rules or understandings that stem from an independent source such as

71. 405 U.S. 538 (1972).

72. 407 U.S. 67 (1972). *But see* *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) (upholding Louisiana sequestration statute permitting prejudgment seizure of consumer goods without prior notice or hearing).

73. 419 U.S. 601 (1975).

74. *Id.* at 606 (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972), with approval).

75. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

76. *Bell v. Burson*, 402 U.S. 535 (1971).

77. *Compare* *Perry v. Sindermann*, 408 U.S. 593 (1972), with *Board of Regents v. Roth*, 408 U.S. 564 (1972). *See also* *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974) (plurality opinion, suggesting that “where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right,” the litigant “must take the bitter with the sweet”).

78. *See* Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267 (1975).

79. *See* *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *Lindsey v. Normet*, 405 U.S. 56 (1972).

80. 408 U.S. 564, 577 (1972). *See* *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (sufficiency of claim of entitlement to continued employment must be decided by reference to state law).

state law.” While speaking only of “[t]he Fourteenth Amendment’s procedural protection of property,” it existed as a “safeguard of the security of interests that a person *has already acquired* in specific benefits.”⁸¹

One immediate question raised, but certainly not answered,⁸² by these decisions involving relations between government and individual is why there should be a distinction between substantive and procedural protections afforded. This is what the plurality in *Arnett v. Kennedy*⁸³ addressed in referring to cases “where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right.”⁸⁴ This is the central problem of property rights generally, an unresolved problem which I suggest is inherent in our dualistic view of property as individual dominion on the one hand and social commonalty on the other. When is a governmental limitation on the exercise of a right in respect to “property” beyond governmental power because there is a residue of personal dominion which the state cannot touch? When will we view the governmental limitation as within the reach of governmental power because inherent in the expectations of the person holding the right(s) is the possibility (or probability, or condition) that government will impose the limitation in question?⁸⁵

To resolve this question with a single answer in favor of property as, speaking generally, the Court did for the better part of 140 years, is to put property rights beyond legislative reach. Given a failure of the market to operate freely and fairly, such a resolution invites destruction of the state by revolution or otherwise. To answer the question generally the other way to permit governmental regulation, as the Court has done for the last forty years, is ultimately to make the state all powerful and to deny personal rights—part of freedom—which our government was established to protect.⁸⁶

81. 408 U.S. at 576 (emphasis added).

82. See Van Alstyne, *Cracks in “The New Property”*: *Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977), which suggests that thinking of relationships as “property rights” is unsound; instead of “new property,” old liberty leads to preferable results. Professor Tribe appears to agree. L. TRIBE, *supra* note 24, § 10–12, at 538. *But see* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (right of grandparent to have grandchild live in same house is a “property right”).

83. 416 U.S. 134 (1974).

84. *Id.* at 153–54.

85. See *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 521, 542 P.2d 237, 247–48, 125 Cal. Rptr. 365, (1975), *cert. denied*, 425 U.S. 904 (1976) (land investors know that environmental controls may be imposed at any time). See also note 38 and accompanying text *supra*.

86. There is obviously no single answer—legal or otherwise—to the problem of governmental regulation and individual property rights. The case law, which is totally conflicting, provides two opposing lines of authority, sometimes referring to one clause, sometimes another. As William Stoeckel has pointed out in determining whether there is a police power taking, for example, there are

The Contract Clause

As I hope by now is abundantly clear, one aspect of property rights is the right to contract with others regarding the use of property,⁸⁷ a phase of human activity dealt with in the contract clause. A second signpost of a new phase of property rights is that the contract clause, after a dormancy of at least four decades, is no longer a “dead letter,”⁸⁸ but rather has, in the words of Bernard Schwartz, had a veritable “renaissance.”⁸⁹ In the first of two key cases, *United States Trust Co. v. New Jersey*,⁹⁰ the Supreme Court struck down under the contract clause state laws repealing a statutory covenant that revenues of the Port Authority of New York and New Jersey would not be used to subsidize mass transit. The Court held the repeal to have impaired the states’ obligation to Port Authority bondholders. And despite the fact that one rationale of *United States Trust* was that stricter scrutiny would be given to statutes affecting a state’s own contracts,⁹¹ in the second case, *Allied Structural Steel Co. v. Spannaus*,⁹² the contract clause was held to have been violated by a statute affecting only private contractual arrangements, viz., a statute charging employers who terminate pension plans involving employees of ten years or more without vested pension rights.

Though the statute invalidated in *United States Trust* was only arguably an exercise of the police power by the states, the statute invalidated in *Allied Structural Steel* was clearly such an exercise. No longer under the contract clause is there to be total judicial deference to economic and social legislation affecting property rights. Justice Brennan, in dissent in *United States Trust*, said: “[T]oday’s case signals a return to substantive constitutional review of States’ policies, and a new resolve to protect property owners whose interest or circumstances may happen to appeal to

“two basic contending doctrines”—that “no exercise of the police power is a taking” (*Mugler v. Kansas*, 123 U.S. 623 (1887)) and that “police power regulation amounts to a taking if it goes ‘too far’ in diminishing the regulated landowner’s property rights” (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)). Stoebeck, *supra* note 22, at 1069. Analogously, so-called two-tier analysis under the equal protection clause permits of opposite results depending on whether a given value system views a right as “fundamental” or a classification as “suspect.” Each era I suspect will have its own value system and individuals in the era will differ.

87. See Kronman, *Contract Law and Distribution Justice*, 89 YALE L.J. 472 (1980).

88. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

89. See Schwartz, *supra*, note 35.

90. 431 U.S. 1 (1977).

91. *Id.* at 25–26 & n.25. This “double standard” was criticized in Justice Brennan’s dissent. *Id.* at 53 n.16. But see Schwartz, *supra* note 35, at 106–07 (suggesting that the gold clause cases, *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935), and *Perry v. United States*, 294 U.S. 330 (1935), provide such a dual standard).

92. 438 U.S. 234 (1978).

Members of this Court. . . .⁹³ The criteria used by the majority in *Allied Structural Steel* included whether the legislation was aimed at a generalized social problem⁹⁴ or at protecting “a broad societal interest rather than a narrow class,”⁹⁵ whether the legislation was of an emergency nature.⁹⁶ or operated in an area “already subject to state regulation.”⁹⁷ Justice Brennan in dissent was to say that “these rather vague criteria . . . vest judges with broad subjective discretion to protect property interests that happen to appeal to them.”⁹⁸ His language is surely reminiscent of the criticism of *Lochner*. It also is reminiscent of, for example, Justice Black’s criticism of the Frankfurter majority’s “shocks the conscience” due process test in *Rochin v. California*;⁹⁹ John Hart Ely’s criticism of the abortion case *Roe v. Wade*;¹⁰⁰ or of the neo-criticism of the Warren

93. 431 U.S. at 61. See note 32 *supra*: the “invisible buzz saw” took off the Port Authority’s mass transit finger.

94. *Allied Structural Steel*, 438 U.S. at 247.

95. *Id.* at 249.

96. *Id.* Cf. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) (upholding mortgage foreclosure moratorium during economic emergency).

97. 438 U.S. at 250.

98. *Id.* at 261.

99. 342 U.S. 165 (1952) (forcible pumping of a suspect’s stomach violated due process clause). Justice Black’s criticism of the vagueness of the test included the following:

These cases and others show the extent to which the evanescent standards of the majority’s philosophy have been used to nullify state legislative programs passed to suppress evil economic practices. What paralyzing role this same philosophy will play in the future economic affairs of this country is impossible to predict. Of even graver concern, however, is the use of the philosophy to nullify the Bill of Rights. I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. Reflection and recent decisions of this Court sanctioning abridgment of the freedom of speech and press have strengthened this conclusion.

Id. at 176–77 (Black, J., dissenting) (footnotes omitted).

100. 410 U.S. 113 (1973). Professor Ely in *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973), said of the decision invalidating the Texas criminal abortion statute:

Of course a woman’s freedom to choose an abortion is part of the “liberty” the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone’s freedom to do what he wants. But “due process” generally guarantees only that the inhibition be procedurally fair and that it have some “rational” connection—though plausible is probably a better word—with a permissible governmental goal. What is unusual about *Roe* is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus’s existence is unable to overcome it—a protection more stringent, I think it fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment. What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-a-vis the interest that legislatively prevailed over it. And that, I believe—the predictable early reaction to *Roe* notwithstanding (“more of the same Warren-type activism”)—is a charge that can responsibly be leveled at no other decision of the past twenty years. At times the inferences the Court has drawn from the values the Constitution marks for special

Property Rights

Court's handling of civil rights generally.¹⁰¹ Justice Brennan reiterates in his *Allied Structural Steel* dissent the point that the majority decision "threatens to undermine the jurisprudence of property rights developed over the last 40 years"¹⁰²—a "jurisprudence" which, I would add, consisted principally of abstention. Is it possible that, meaning no offense to Justice Brennan, whom I deeply admire, whether another's views are "threatening" or his principles "subjective" depends on one's own value system?

Free Speech

Other signs of a "renaissance" of property rights are also evident. One of the foremost American civil libertarians, Norman Dorsen, has perceptively suggested that since 1972 the first amendment cases decided by the Supreme Court have had a distinct property rights tinge—even an underlying property rights rationale.¹⁰³ I will only suggest his analysis here. Dorsen points not just to the "private property" language in decisions upholding free speech claims—for example, the flag desecration case,¹⁰⁴ or the New Hampshire license plate case¹⁰⁵—but also to the increasing recognition of corporate rights of free speech¹⁰⁶ and the protection of commercial speech.¹⁰⁷ He goes on to contrast these cases where private property interests have coincided with free speech interests with cases where the two interests have been in conflict, and property interests have prevailed. The latter include the shopping center cases,¹⁰⁸ the Army mili-

protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.

Id. at 935–37 (footnotes omitted).

101. *E.g.*, R. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION ch. 8 (1977).

102. 438 U.S. at 259.

103. Dorsen & Gora, *The Burger Court and Free Expression: Property Interests or Maximum Protection* (Feb. 6, 1979) (unpublished lecture in The Thomas M. Cooley Lectures series delivered at Michigan Law School).

104. *Spence v. Washington*, 418 U.S. 405, 408–09 (1974) (per curiam): "First, this was a privately owned flag. . . . Second, appellant displayed his flag on private property."

105. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977):

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

106. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

107. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

108. *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *Cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding that a state may interpret its own

tary post case,¹⁰⁹ the municipal ordinance banning political advertising but permitting commercial advertising in city-owned buses,¹¹⁰ the broadening of defamation law liability,¹¹¹ the Detroit ordinance on adult-use zones,¹¹² and others.¹¹³ One does not have to agree with all of Professor Dorsen's examples to perceive that property rights have, as he puts it, "played a surprisingly significant role in this Court's free speech decisions."¹¹⁴ There are in fact decisions inconsistent with his thesis.¹¹⁵ I add only that Dorsen is critical not of the role of private property in the society—the importance of which is recognized by other civil libertarian commentators¹¹⁶—but rather of the use of property rights considerations to determine free speech cases.

I am not sure that I fully agree with my friend Professor Dorsen that this is what the Court has been doing. I suspect he would agree with me that, all other things being equal, property rights considerations might rightly have a bearing. If I cannot force picketers away from the street outside my house,¹¹⁷ for instance, surely I can keep them off "my" land however protected their speech *qua* speech may be. I leave this point for what it is worth. I do not suggest that property rights orientation underlies all Supreme Court constitutional analysis today. I think, however, that Dorsen's suggestion is a useful one, and that the level of property rights in the present Court's scale of values is very high.

CASES UNDER THE JUST COMPENSATION CLAUSE

Rather than look at other areas—and we could, for instance, examine securities law—I think it more fruitful to turn directly to the "takings law," the law under the compensation clause, to determine where we are. It may give us the best glance at where we are bound. The major Supreme

constitution's free speech guarantees so as to prevent a privately owned shopping center from excluding certain speakers and handbillers).

109. *Greer v. Spock*, 424 U.S. 828 (1976).

110. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

111. *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

112. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

113. *E.g.*, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

114. Dorsen & Gora, *supra* note 103, at 19.

115. *E.g.*, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

116. *E.g.*, *L. TRIBE*, *supra* note 24, § 8-7, at 453, § 11-4, at 573-74; *L. TRIBE*, *supra* note 12, at 56.

117. *See Carey v. Brown*, 447 U.S. 455 (1980).

Property Rights

Court cases have over the years delved, it seems, somewhat shallowly into takings theory.¹¹⁸ Several reasons for this suggest themselves; I leave them until later. The body of Supreme Court takings law, however, by and large has consisted largely of ad hoc line drawing based upon a determination whether a person's "thing" has been "taken" by the state without proper justification, rather than an examination of whether the transfer of a person's rights are compensable, and if so, what is "just" compensation.

In this scenario, one written for us over a hundred years and more, the preliminary question under the just compensation clause of the fifth amendment (subsumed in the fourteenth amendment¹¹⁹) has been whether the taking is for a public purpose; absent that, the "taking" is void, "tak[ing] *property* from A. and giv[ing] it to B."¹²⁰ This question, William Stoebuck has suggested, is really a substantive due process question, judicial analysis to the contrary.¹²¹ Yet the fifth amendment says not only that no person shall "be deprived of . . . property, without due process of law" but also that "nor shall private property be taken for public use, without just compensation." Since the words of the Founders overlap, it is not surprising that the Court has treated the public use question as a preliminary one in takings analysis.

The principal question around which Supreme Court takings law has revolved, however, is whether property has been "taken." This is a matter of dispute in the decided cases: physical invasion is clear in principle, as in the case of flooding of land.¹²² But, in application, in determining when a physical invasion has taken place, the Supreme Court has, for example, distinguished between those living less than 100 feet under a flight path of an airplane¹²³—their property is taken—and those living along a railroad, with trains emitting smoke, soot, and sparks—their property is not.¹²⁴

When we come to the exercise of the police powers, determining when land use regulation becomes a taking, we have an extraordinary situation.

118. B. ACKERMAN, *supra* note 21, at 113–14.

119. See *Hairston v. Danville & W. Ry.*, 208 U.S. 598 (1908) (condemnation of land for spur track to private business is for public purpose where state law so holds and hence is not forbidden under fourteenth amendment).

120. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis added). See generally Michelman, *supra* note 20, at 1183–84.

121. See Stoebuck, *supra* note 22, at 1066. See also notes 45 & 86 and accompanying text *supra*. Professor Stoebuck does, however, take the position that the "public use" language of the fifth amendment read properly implies that "a taking includes a transfer." Stoebuck, *supra* note 22, at 1087–89.

122. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177–78 (1871).

123. *United States v. Causby*, 328 U.S. 256, 261–62 (1946).

124. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914).

Probably the central taking case, the one cited and quoted ad infinitum, criticized by almost every commentaor, and setting the stage for all subsequent discussion, is *Pennsylvania Coal Co. v. Mahon*,¹²⁵ written by Justice Holmes, dissented to only by Justice Brandeis. The opinion contains one of Holmes's most famous aphorisms and discusses the central question—whether there is a taking when there is a governmental limitation on use—a question confronting the basic property rights dilemma to which I have already alluded. The case arose in a very narrow context, that of a deed from a coal company of the land surface over its mine, with the coal company reserving all mining rights and the grantee taking the premises with all risks and waiving all damages claims. The Commonwealth of Pennsylvania enacted a law forbidding mining which caused the subsidence of structures used for human habitation, with certain exceptions inapplicable here. Justice Holmes, discussing the constitutionality of the statute, first referred to the qualification made by the police power upon what he called the “seemingly absolute protection”—shades of Locke—afforded to private property by the just compensation clause, and noted “the natural tendency of human nature . . . to extend the qualification more and more until at last private property disappears.”¹²⁶ His aphorism followed, of course, as a “but” to the “natural tendency”: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹²⁷

Now this startling announcement, coming from one who decried the Court's use of substantive due process analysis, contains within it a significant element of truth. The truth is that the Pennsylvania statute, which prohibited coal mining where it would affect surface habitation, did rewrite the parties' expectations, at least the mineowners'. It thus reduced the value of the mining rights. In the words of the opinion, the statute admittedly “destroy[ed] previously existing rights of property and contract.”¹²⁸ Thus, by causing a diminution in value of the mine, the statute, were it to be enforced, would amount in the Court's opinion to a taking. True, Holmes acknowledged, requiring pillars of coal to be left along the line of adjoining property to protect miners' safety was a matter of public interest which the Court had previously declared was proper for the legislature to enact.¹²⁹ But, as the friend of William James so often put legal

125. 260 U.S. 393 (1922).

126. *Id.* at 415.

127. *Id.*

128. *Id.* at 413.

129. *Id.* at 415 (citing *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914)). Holmes did not say “public interest”; he referred rather to “an average reciprocity of advantage that has been recognized as a justification of various laws.” *Id.*

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propositions, it was “a question of degree—and therefore [could] not be disposed of by general propositions.”¹³⁰ The statute was unconstitutional as “going beyond” any of the decided cases.¹³¹

Only six years later, in *Miller v. Schoene*,¹³² however, a unanimous Court reminded us¹³³ that the majority opinion in *Pennsylvania Coal* did not contain the whole truth. In *Miller* the Court upheld a Virginia statute requiring owners of diseased red cedar trees to cut them down without receiving compensation from the state because the contagion might spread to neighboring apple orchards. The “public” interest was equated with the “private” interest of apple orchard growers. Redistribution of property from cedar tree owners to apple orchard owners was justified in the public interest.¹³⁴ Beyond this, the Court recognized that whichever way the state (or the Court) decided the case, “[i]t would have been none the less a choice.”¹³⁵ The Court “none the less” permitted the state to choose *without* its constituting a taking. Why was such a legislative choice not permissible in Pennsylvania? Do the seemingly conflicting re-

130. *Id.* at 416. Compare *id.* with W. JAMES, PRAGMATISM (1907).

131. 260 U.S. at 416. Justice Brandeis, in dissent, sounding like Holmes in *Lochner*, stated: Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious—as it may because of further changes in local or social conditions—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

Id. at 417.

132. 276 U.S. 272 (1928).

133. I say “remind us” because *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), had already permitted a city to close a brickyard, originally located beyond city limits, as a nuisance or noxious use, without compensation for a decline in property value of about 92% (\$800,000 to \$60,000). This case is much criticized. *E.g.*, L. BECKER, *supra* note 19, at 113, 129 n.14. But it is often followed. *E.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

134. The unanimity of the Court should be contrasted with the powerful argument of the cedar tree owners that, of the two species of valuable *private* property involved, one was simply selected for destruction in order to protect the other. See *Miller*, 276 U.S. at 273–76. This latter argument has support today in R.H. Coase’s seminal article *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

135. 276 U.S. at 279.

sults in these two cases simply reflect the economic fact that the statute condemned in *Pennsylvania Coal* took from a profitable state industry, anthracite coal mining,¹³⁶ while the statute in *Miller* gave to a profitable state industry, apple orchards?¹³⁷

One hesitates to think that Justice Holmes would adopt a constitutional double standard as between property owners, although one may be disturbed as a matter of intellectual candor that the *Miller* opinion did not cite *Pennsylvania Coal*. One reason for this, suggested by the Court, is that the cedar tree owners are like the brickyard owner whose factory lies well beyond the city limits when built, but is finally incorporated within them.¹³⁸ He was said to be making a "noxious use," as by selling beer,¹³⁹ exporting unripe oranges,¹⁴⁰ or emitting dense smoke,¹⁴¹—other property uses regulated under the police power without being considered takings. But the mining of coal under a person's house is quite noxious to the house-owner, at least if the house falls in. And, as Justice Brandeis pointed out in dissent to *Pennsylvania Coal*, "uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare."¹⁴² The previously decided brickyard case, *Hadacheck v. Sebastian*,¹⁴³ comes quickly to mind.

Pennsylvania Coal has suggested that a taking occurs when a prop-

136. There is language in *Pennsylvania Coal* that suggests the importance of coal mining. See 260 U.S. at 413–14.

137. There is language in *Miller* that explicitly notes the economic importance of apple growing in Virginia. See 276 U.S. at 279.

Professor Stoebuck considers *Miller* an "emergency" case, involving a governmental power different from and historically superior to the eminent domain power. Stoebuck, *supra* note 22, at 1067 n.51. I remain unconvinced. If *Miller* was an emergency case, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), remain as police power takings without just compensation. See note 133 *supra*.

138. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Cf. *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (upholding the banishment of a well-established livery stable from one section of a city); *Northwestern Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) (upholding the outlawing of transporting putrid animal matter through the streets of Chicago). But see *Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904) (arbitrary and discriminatory exercise of police power amounted to a taking of property).

139. *Mugler v. Kansas*, 123 U.S. 623 (1887) (destroying beer business by enforcing state prohibition on sale of alcohol). *Contra*, *Wynehamer v. People*, 13 N.Y. 378, 390-92 (1856) (invalidating state liquor prohibition statute). See generally *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1873). I agree with Stoebuck that the "noxious use" test is not a "taking" test but is a test of "whether the regulatory measure addresses a problem that the government might legitimately try to solve." Stoebuck, *supra* note 22, at 1062.

140. *Sligh v. Kirkwood*, 237 U.S. 52 (1915).

141. *Northwestern Laundry v. City of Des Moines*, 239 U.S. 486 (1916). Stoebuck analyzes the "noxious use" theory as being a "false" theory of taking law; rather it is a part of substantive due process. I agree.

142. 260 U.S. at 417.

143. 239 U.S. 394 (1915).

erty's value has been virtually destroyed. This suggestion has been called by some the "dominant doctrinal model of takings law."¹⁴⁴ In *Hada-check*, however, the loss of the brickyard owner who had built in the country, but whose land was incorporated within the Los Angeles city limits, was eighty-eight percent of the value of his land, but was held not to constitute a "taking."¹⁴⁵ A zoning ordinance was upheld in the landmark case of *Village of Euclid v. Ambler Realty Co.*¹⁴⁶ despite a seventy-five percent loss of value to the landowner. Or was, as some insist,¹⁴⁷ the brickyard case itself wrongly decided, and *Miller* with it? Is what is "noxious" dependent on the subjective view of every Justice? Or is it a shorthand way of stating an analytical formula to resolve, in particular property cases that involve effects upon others, the underlying philosophical dilemma to which I have pointed? In any event, is not the formula totally unsatisfactory, merely an after-the-fact justification for a predetermined result?

The inconsistencies contained in these cases have been alluded to by the commentators.¹⁴⁸ The law of takings, at least as expressed by the Supreme Court, has essentially been without doctrinal advance for fifty years,¹⁴⁹ and the two opposing and inconsistent lines of authority have not been explained or resolved; they are simply there.

144. Sax II, *supra* note 22, at 151. See Michelman, *supra* note 20, at 1190.

145. *Hadacheck*, 239 U.S. at 405, 409–11.

146. 272 U.S. 365, 384 (1926).

147. *E.g.*, L. BECKER, *supra* note 19, at 113, 129 n.14.

148. See, *e.g.*, B. ACKERMAN, *supra* note 21, at 113–15, 153–55; Michelman, *supra* note 20, at 1196–1201; Sax II, *supra* note 22, at 151–55; Stoebuck, *supra* note 22, at 1070, 1079.

149. Ackerman says:

The Court has made no important doctrinal advance since *Pennsylvania Coal v. Mahon*, n.2 *supra*. In most recent cases it has not attempted to improve upon Holmes's *obiter* glorification of ad hoc decision making, and has instead proceeded immediately to a particularistic weighing-up of factors whose character and weight are never clearly assessed. Even Professor Dunham, who sees patterns in some Supreme Court decisions, confesses perplexity when confronted with other holdings, declaring, "Older tests and guides have given way, and there is a tendency in the opinions to substitute a vague ethical standard for any objective standard." Allison Dunham, "Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law," 1962 *Supreme Court Rev.* 63, 73.

B. ACKERMAN, *supra* note 21, at 236 n.9.

Michelman says:

Examination of judicial decisions and of legal commentary focused on them indicates that one of four factors has usually been deemed critical in classifying an occasion as compensable or not: (1) whether or not the public or its agents have physically used or occupied something belonging to the claimant; (2) the size of the harm sustained by the claimant or the degree to which his affected property has been devalued; (3) whether the claimant's loss is or is not outweighed by the public's concomitant gain; (4) whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.

There follow some brief comments on each of these four "tests." The discussions are, at this point, tentative and incomplete. Their purpose is the limited one of showing that none of the

This may all have been well during a time of expanding social legislation when property rights were essentially confined to a legal dust bin. But we think, as suggested at the beginning of this article, of property rights as consisting of relationships among persons with respect to things, and we add to that the extraordinary awakening of the public in the last twenty years to the interdependence of human beings and resources—objects, things, property if you will—transcending city, state, or even national boundary lines. Can we any longer afford to be thinking constitutionally in the simplistic, ad hoc terms of the past? Leaving aside the considerable risk of continuous inconsistency, are we simply to be left with the “non sequitur”—having its origin in Holmes’ *Pennsylvania Coal* aphorism—implied by John Costonis’ phrase, the “loose language of innumerable zoning opinions,” that “overregulation is a ‘taking,’ hence remediable *exclusively* through eminent domain proceedings”?¹⁵⁰ Would it not be just as easy to say, as suggested by John Costonis and the New York Court of Appeals,¹⁵¹ that regulation beyond the limits of the police power is simply invalid as such unless the property owner is injured in ways that cannot be rectified through noncompensatory relief? And, on the other side of the coin, does not the “overregulation equals

standard criteria yields a sound and self-sufficient rule of decision—that each of them, when attempts are made to erect it into a general principle, is either seriously misguided, ruinously incomplete, or uselessly overbroad. The discussions tend to overlook certain redeeming qualities in the criteria—their cores of valid insight and their embodiment (and concealment) of quite relevant, even if not necessarily conclusive, inquiries. These aspects are developed at a later point.

Michelman, *supra* note 20, at 1183–84.

Sax says:

The wetlands cases, cited in note 4 *supra*, exemplify [the] approach [of asking only whether and to what extent the owner’s ability to profit from the piece of property in question, considered by itself, has been impaired]. To be sure, one finds the seeds of contextual analysis in the cases occasionally, as in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926), or in Justice Holmes’ famous opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Holmes notes, for example, that “some values are enjoyed under an implied limitation and must yield to the police power.” *Id.* at 413. He also indicates that in some circumstances there might be found “a public interest sufficient to warrant . . . a destruction . . .” of the owner’s opportunity to profit from his property. *Id.* at 414. Holmes’ observations are, however, only suggestive and tantalizingly vague. He never explored the question of context systematically nor did he treat it as more than an inevitable practical exception to the obvious rule that for government to make it “commercially impracticable” to profit from one’s property is, constitutionally, to take it. See note 18 *infra*. Subsequent judicial authority has focused on the rule and rarely explores the implications of the “exception” Holmes observed. Courts do some balancing of interests to avoid the extreme implications of the dominant rule, but there is a hierarchy in which the right to profit stands first, with a grudging exception for exigent public need.

Sax II, *supra* note 22, at 151 n.7.

150. Costonis, *The Disparity Issue*, *supra* note 22, at 405 (emphasis added).

151. *Id.* at 405–06; *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976). See Stoebuck, *supra* note 22, at 1097–99.

taking” syllogism, insofar as it implies that the regulation is proper if the property owner is compensated for the decline in value of his property, become a method in ambiguous or gray-area cases of requiring the public to bear costs that are really private in nature? If so, to this extent, *Pennsylvania Coal* may even be said to be an encroachment upon *Lochner*-theory private property and contract rights.¹⁵²

When, then, must a diminution in value caused by governmental overregulation be compensated for as a “taking”? Or does any “taking” require compensation, not just for lost value, but for the entire value of the property taken? And if “taking law” is insufficient to handle the complex matter of legislation affecting property, should we—despite the supposed demise of *Lochner*—look back again to the due process clause for protection of property rights in a substantive sense? After virtual judicial abdication, are we coming full circle to substantive due process? Would this be bad in light of the chaotic state of takings law?

It may be anticlimactic to note that most recent takings cases in the Supreme Court only begin to address these questions without, unfortunately, adding much new insight to takings law. There is, however, one very interesting exception.

MODERN SUPREME COURT TAKINGS CASES

The first of these commenced truly as a classic—one of the more complicated takings cases ever to reach the Supreme Court, *Penn Central Transportation Co. v. New York City*.¹⁵³ A six–three majority upheld New York City’s Landmarks Preservation Law against fifth amendment attack¹⁵⁴ by the owner of Grand Central Terminal. The owner had planned to construct a multistory office building over the Terminal, which had been designated an historic “landmark,” but the plan was rejected by the City Landmarks Preservation Commission as destructive of Grand Central’s historic and aesthetic features. Typical of many, New York

152. See L. TRIBE, *supra* note 24, § 8–5, at 444–46. *Pennsylvania Coal* thus viewed is a two-edged sword, and its dicta are frequently quoted to support opposing results.

153. 438 U.S. 104 (1978).

154. Actually, the attack was as a “taking” under the fifth amendment as made applicable to the states by the fourteenth amendment. See *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 239 (1897). The New York Court of Appeals had also decided the case in part on the basis of a social increment theory of valuation. Under that theory, the “publicly created” components of the value of the property—those elements of its value attributable to the “efforts of organized society” or to the “social complex” in which the terminal is located—had to be excluded from the base value on which a reasonable return is to be calculated. See Costonis, *The Disparity Issue*, *supra* note 22, at 416–17. The Supreme Court did not address the question whether it is permissible or feasible to separate out the “social increments” of the value of property. See 438 U.S. at 121 n.23. See generally 3 N. WILLIAMS, *AMERICAN PLANNING LAW* § 71A.11 (Cum. Supp. 1980).

City's landmark law was designed to preserve the site in private as opposed to public ownership and to permit the "reasonable" use of it, subject to the ultimate sanction of securing advance approval from the Preservation Commission to alter exterior architectural features or construct exterior improvements. New York zoning laws did, however, permit landmark-site owners to transfer development rights from their parcel to neighboring property, employing a novel concept that may have been specifically designed with Grand Central in mind. Thus the Terminal owner had marketable rights in lieu of the right to develop the landmark site, a form of zoning compensation transferable in a commercialized area into dollars and cents as an offset to the diminution in value of the basic parcel.¹⁵⁵

The majority opinion, by Justice Brennan, first reviewed what he called the "jurisprudence" of takings law under the fifth amendment. After disavowing that "takings" necessarily involve a transfer of physical control,¹⁵⁶ the opinion conceded that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons,"¹⁵⁷ and that the Court was engaged in one of "these essentially ad hoc, factual inquiries."¹⁵⁸ The opinion then listed the "factors" which it considered significant, but these were only two: (1) "economic impact," including that on "investment-backed expectations";¹⁵⁹ and (2) "the character of the governmental action," that is, whether the interference arises from some public social program or is simply a physical invasion by the government.¹⁶⁰ The "jurisprudence" first referred to is the group of the governmental laws or programs, held legitimate, that necessarily, though adversely, affect recognized economic values.¹⁶¹ This group included exercises of the taxing power,¹⁶² actions causing economic harm but not interfering with "reasonable ex-

155. Evidently some of these marketable rights were sold for two million dollars. N. WILLIAMS, *supra* note 154, at 194.

156. 438 U.S. at 123 n.25.

157. *Id.* at 124.

158. *Id.*

159. *Id.* "Investment-backed expectations," a new and loose phrase, is bound to be used by developers, *see* N. WILLIAMS, *supra* note 154, at 190, or by courts supporting those expectations. *But see* note 198 and accompanying text *infra*.

160. 438 U.S. at 124.

161. *See* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

162. *Penn Central*, 438 U.S. 104, 124 (1978). No examples are cited, nor is reference made to Marshall's proposition that "the power to tax involves the power to destroy," and "that the power to destroy may defeat and render useless the power to create." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

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pectations,”¹⁶³ and zoning and other land-use cases, such as *Miller and Hadacheck*.¹⁶⁴ Then the countervailing “jurisprudence” was cited, including cases such as *Pennsylvania Coal*, where a statute is held so to frustrate “distinct investment-backed expectations as to amount to a ‘taking,’”¹⁶⁵ and *United States v. Causby*,¹⁶⁶ where “acquisitions of resources to permit or facilitate uniquely public functions . . . constitute ‘takings.’”¹⁶⁷ I have recited the *Penn Central* opinion’s cataloging of the “jurisprudence” to demonstrate that the “jurisprudence” is static, confused and conflicting, as it has been at least since *Pennsylvania Coal*.¹⁶⁸

The Court then went on to consider the specific arguments by the Terminal owner. The first argument was based upon the physical invasion of the airspace above the Terminal and relied on *United States v. Causby*.¹⁶⁹ The Court disposed of this argument by reference to earlier decisions upholding laws which restricted development of air rights or which prohibited subjacent or lateral development of particular parcels.¹⁷⁰ The Court also stated:

In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”¹⁷¹

The second argument by appellants was based upon diminution of value, and was rejected by the Court, which cited *Euclid*, where there was a seventy-five percent diminution in value caused by the zoning law, and *Hadacheck*, where there was an eighty-eight percent diminution in value.¹⁷² The Court rejected as well further arguments by the appellants. For example, the claim that, unlike historic-district legislation,¹⁷³ the

163. 438 U.S. at 124–25 (citing, e.g., *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (no property interest can exist in navigable waters)).

164. *Id.* at 125–27.

165. *Id.* at 127–28.

166. 328 U.S. 256 (1946).

167. *Penn Central*, 438 U.S. at 128.

168. See notes 122–152 and accompanying text *supra*.

169. 328 U.S. 256 (1946).

170. 438 U.S. at 130. The Court added: “‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” *Id.* One may be pardoned, I hope, for asking “why”? The answer is not to be found in the next and concluding sentence in this section of the opinion, quoted in the text.

171. *Id.* at 130–31. How the air space above the Terminal can be distinguished from the pillars of coal below the surface in *Pennsylvania Coal*, is, to me, a mystery.

172. *Id.* at 131. There is no mention of the possibility that both cases, or at least *Hadacheck*, might have been wrongly decided.

173. See generally *Maier v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

New York law was selective was met by reference to New York's comprehensive plan to preserve structures of historic interest, in which over 400 landmarks and thirty-one districts had received historic designation.¹⁷⁴ The claim that the New York law was "inevitably arbitrary or at least subjective" was met by reference to Penn Central's failure to seek review of the original designation;¹⁷⁵ and the claim that the law was discriminatory was met by reference to *Goldblatt v. Town of Hempstead*,¹⁷⁶ *Hadacheck*, and *Miller v. Schoene*,¹⁷⁷ all of which parenthetically were also in a very real sense discriminatory.¹⁷⁸ Finally, the Court rejected appellants' argument based on *Causby*, that they deserved compensation because the government was acting in an enterprise capacity. The Court noted that the law in question neither exploited appellants' parcel for city purposes nor facilitated any entrepreneurial operations of the city.¹⁷⁹ Thus, the Court held there was no invalidity by virtue of a failure to provide "just compensation."¹⁸⁰

The Court then went on to consider, as a wholly separate question, the *Pennsylvania Coal* question whether there was such regulation—here said to be an "interference . . . of such a magnitude"—as to amount to an exercise of eminent domain.¹⁸¹ Answering this negatively, the Court found that there was no interference with present use, that present use permits a reasonable return on the investment, that some vague use of the air rights might be permissible, and that the development rights would mitigate any financial burden imposed by the regulation.¹⁸²

The dissent in *Penn Central* added little to the "jurisprudence," except a quote from *United States v. General Motors Co.*,¹⁸³ explicitly recognizing the bundle-of-rights theory of property law.¹⁸⁴ The dissent basically

174. 438 U.S. at 132.

175. *Id.* at 132–33.

176. 369 U.S. 590 (1962) (owner of sand and gravel quarry enjoined from continuing the use to which the property had been devoted).

177. 276 U.S. 272 (1928).

178. *Penn Central*, 438 U.S. at 133–34. Of these three cases, the Court said that they: are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Id. at 133 n.30. If the laws were designed to produce a widespread public benefit, why should not the victims receive public compensation?

179. *Id.* at 135. *But see The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 229 n.46 (1978). See also Sax I, *supra* note 22, and Stoebuck, *supra* note 22, at 1091–99, which would make this the "true" test of a taking.

180. 438 U.S. at 136.

181. *Id.* at 136–37. One had thought this question already answered.

182. *Id.*

183. 323 U.S. 373, 377–78 (1945).

184. *Penn Central*, 438 U.S. at 142–43 (Rehnquist, J., dissenting).

adopted the opposing line of cases, inconsistent with those cited by the majority, and distinguished *Hadacheck* and progeny as involving “noxious” uses.¹⁸⁵ The dissent would have, unobjectionably, remanded on the question whether development rights constitute “just” compensation, as they would probably only partially offset value diminution.¹⁸⁶ And the dissent concluded, not surprisingly, with a quote from Holmes in *Pennsylvania Coal*, warning that the courts guard against taking “a shorter cut than the constitutional way of paying for”¹⁸⁷ improvement in the public condition.¹⁸⁸ Such a phrase is neat, if a bit rhetorical.

I have gone into *Penn Central* in some detail in order to make two points:

1. The takings “jurisprudence” of the Supreme Court is still in an unsatisfactory ad hoc stage, with a lack of development of analytical principle or reconciliation of conflicting lines of precedent; and

2. As a result, in a gray-area case like *Penn Central*, that jurisprudence permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit pre-existing value judgments as to the relative worth of the legislation as opposed to the importance or dollar value of the property rights at stake.¹⁸⁹

The second recent and important case is *Andrus v. Allard*,¹⁹⁰ a unanimous decision, with the opinion again written by Justice Brennan. There the Court upheld, against attack by sellers of Indian artifacts, regulations of the Secretary of the Interior prohibiting the sale of feathers or other parts of protected birds obtained prior to the enactment of the Migratory Bird Treaty and Eagle Protection Acts. Justice Brennan noted that in the district court the argument of the sellers was “cast . . . in terms of economic substantive due process,” but before the Supreme Court the sellers

185. *Id.* at 145 & n.8. In the process, Justice Rehnquist makes two arguments some might consider irrelevant, if not rhetorical: (1) that *Penn Central* is being penalized because “*too good* a job was done in designing and building it,” *id.* at 146 (this argument applies as well to historic districts); and (2) that there is “a multimillion dollar loss” that is “uniquely felt and is not offset by any benefits flowing from” other landmarks preservation in New York, *id.* at 147. This second argument involves highly debatable fact-finding, contrary to that in the New York courts and is worrisome insofar as it implies that only *big* property holders suffer “takings,” or that wealth is somehow equated with property.

186. *Id.* at 150–52.

187. *Pennsylvania Coal*, 260 U.S. at 416.

188. 438 U.S. at 153 (Rehnquist, J., dissenting).

189. I disagree with the editors of the Harvard Law Review who said about the case: “With the tests upon which many courts have come to rely no longer controlling, the protection of private property from governmental interference will depend more than ever on each court’s subjective interpretation of ‘fairness and justice.’ ” *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 232 (1978). The “controlling” tests, however relied upon by the courts, have *always* permitted subjective interpretations. *Penn Central* merely shows that they still do.

190. 444 U.S. 51 (1979).

have used “the terminology of the Takings Clause.”¹⁹¹ The Court then referred to its *Penn Central* exposition on the takings clause. It is worth repeating here what the Court said because it summarizes in a nutshell, for a unanimous Court, the present state of Supreme Court takings law, in essence equating it with substantive due process, and reemphasizing its substantive nature:

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123–128 (1978), is our most recent exposition on the Takings Clause. That exposition need not be repeated at length here. Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*. “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); see *Penn Central*, *supra*, at 124.

The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of “‘justice and fairness.’” *Ibid.*; see *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. See *Penn Central*, *supra*, at 123–128. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.¹⁹²

The Court then engaged in a bundle-of-rights analysis, emphasizing the lack of physical invasion or expropriation, and the denial of only the right to sell and not the right to possess, transport, donate, or devise the artifacts.¹⁹³ The loss of future profits was said to provide, absent “any physical property restriction, . . . a slender reed upon which to rest a takings claim,” since “[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to per-

191. *Id.* at 64 n. 21.

192. *Id.* at 65.

193. *Id.* at 65–66. The right to sell is certainly high on the scale of any listing of rights in the “bundle.”

form.”¹⁹⁴ And reference was made to *Mugler v. Kansas*¹⁹⁵ and other cases in which the Court upheld, against fifth amendment challenge, statutes forbidding the sale of liquors manufactured before the statutes were passed.¹⁹⁶ The late Professor Thomas Reed Powell would have found some amusement in analogizing the eagle feathers to that most “noxious” of beverages—firewater.

The third in our series of recent takings cases is *Kaiser Aetna v. United States*.¹⁹⁷ Justice Rehnquist wrote the opinion for the Court in this land development case and Justices Blackmun, Brennan, and Marshall dissented. A private lessee of a Hawaiian lagoon—Kuapa Pond—converted the pond, by dredging and filling operations done with the acquiescence of the Corps of Engineers, into a marina, and thereby connected it to a navigable bay and the Pacific Ocean. The Court held that petitioners were entitled to compensation if the Government wanted to allow the public free access to the lagoon. The Court, in its factual statement, emphasized the “millions of dollars” invested in making the improvements “on the assumption that it was a privately owned pond leased to them.”¹⁹⁸ The Court also mentioned that waterfront and other lessees and non-resident boat owners pay maintenance and security fees.¹⁹⁹ It did not mention how many “investment expectations” had already been realized by development of the land adjacent to the pond into some 1,500 marina and eighty-six non-marina lots, with some 22,000 people housed in the community. Nor was any other favorable economic impact from opening of the marina to the sea mentioned.

On the takings issue the Court referred to *Penn Central* and followed

194. *Id.* at 66. This reliance on uncertainty, especially by way of citation to a contract damages article, Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936), is interesting.

The Court also makes a “throw-away” argument, or better suggestion, that the sellers might exhibit the artifacts for an admissions charge. This is reminiscent of the any-conceivable-fact type of speculation that rests on nothing in the record, which is not to condemn it, but only to equate it with the moribund state of substantive due process law after *Lochner*. See *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

195. 123 U.S. 623 (1887). Stoebeuck treats *Mugler* as the leading case in the line of authority contrary to *Pennsylvania Coal*. Stoebeuck, *supra* note 22, at 1069. I prefer *Miller*, see note 137 *supra*, since I consider *Mugler* as involving the peculiarly regulable object of intoxicating spirits. But logically there is not much difference; destruction of the bar business helped out the soft-drink people.

196. *E.g.*, *James Everard’s Breweries v. Day*, 265 U.S. 545 (1924); *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264 (1920).

197. 444 U.S. 164 (1979).

198. *Id.* at 169. Since it appears that the developer had a marina-style community of some 22,000 people and approximately 1,500 marina waterfront lot lessees, *id.* at 167, one would suppose that the investment in dredging was to make the land more salable, and that whether or not the dredged pond would be open to the public was not the most important, let alone the exclusive, factor behind the petitioners’ decision to invest in improvements.

199. *Id.* at 168.

its “ad hoc, factual inquiries” method of analysis.²⁰⁰ The Court also referred to several cases upholding navigational servitudes in the public.²⁰¹ But Justice Rehnquist’s opinion for the Court distinguished these navigational servitude cases by talking about the investment of “substantial amounts of money in making improvements” to “what was once a private pond” and concluded—again shades of John Locke—that “the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.”²⁰² The right to exclude is emphasized throughout the opinion as “universally held to be a fundamental element of the property right,”²⁰³ reminiscent of William M. Evarts’ argument in *Lochner*’s state court predecessor, the so-called Tenement House Cigar Case:²⁰⁴ “Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provisions.”²⁰⁵ The *Kaiser Aetna* opinion adhered closely to the Holmes aphorism in saying: “This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners’ private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.”²⁰⁶

The *Kaiser Aetna* dissent, written by Justice Blackmun, first made the point that the pond was now navigable in fact and that how it became that way was immaterial.²⁰⁷ The dissent then relied upon the federal government’s servitude with respect to navigable waters²⁰⁸ and concluded that the developers “have acted at their own risk” and that “[t]he chief value of the pond in its present state obviously is a value of access to navigable water.”²⁰⁹

The fourth recent case is *Agins v. City of Tiburon*.²¹⁰ There the Court

200. *Id.* at 174–175.

201. *Id.* at 175–176 (citing *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Scranton v. Wheeler*, 179 U.S. 141 (1900)).

202. *Id.* at 176. This is the first case I have seen suggesting that some “sticks” are more fundamental than others. Of course, in the abstract, the stick here can hardly compare with those for which no compensation was ever received, as in *Hadacheck*.

203. *Id.* at 179–80.

204. *In re Jacobs*, 98 N.Y. 98 (1885).

205. *Id.* at 106.

206. 444 U.S. at 180. This is, strictly speaking, not true; it results in “invasion” of the waters, not of the marina itself.

207. *Id.* at 183–84.

208. *Id.* at 186–87.

209. *Id.* at 190. It is fascinating to me that neither majority nor dissent refer to the probable fact that access to the pond enhanced the value of the adjoining land to a degree more than sufficient to offset the cost of the dredging.

210. 447 U.S. 255 (1980). I omit *United States v. Clarke*, 445 U.S. 253 (1980), a takings case which is irrelevant here because it simply construed a federal statute, 25 U.S.C. § 357 (1976), per-

upheld a residential zoning ordinance enacted after the appellants had acquired five of California's finest acres in the heights of the City of Tiburon, overlooking beautiful San Francisco Bay. The zoning ordinance limited development according to a formula to from one to five single-family residences on the five acre tract—what for practical purposes is at best one-acre zoning. Until recently it had been surprising to me that the Court took the case at all since one-acre zoning has been in effect in thousands upon thousands of American towns, cities, and villages for decades.²¹¹ The much more interesting case, Professors Charles Haar or Norman Williams would suggest, would be a more stringent "exclusionary zoning" case²¹²—zoning with a five acre or fifteen acre per one-residential-lot restriction, or no mobile homes or other multiple dwelling housing, or permitting or requiring, say, 2,500 square feet minimum area for a residence. It was to be totally expected, therefore, that a unanimous Supreme Court upheld the Tiburon ordinance as a valid exercise of the police power to protect Tiburon residents from the perceived ill-effects of urbanization,²¹³ and to provide "careful and orderly development of residential property with provision for open-space areas."²¹⁴ The Court, of course, cited *Euclid*, the first zoning case, which permitted the exclusion of commercial uses, as well as *Penn Central* and *Village of Belle Terre v. Boraas*.²¹⁵ The Court, in *Tiburon*, concedes the obvious, that the zoning

taining to Indian lands. The construction permitted condemnation only by judicial proceeding, as opposed to an "inverse condemnation" action by a landowner (recovering compensation for a taking by a physical intrusion).

211. See Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971). Perhaps the Court took the case because the California court thought that the zoning deprived the owner of any reasonably beneficial use. *Agins v. City of Tiburon*, 80 Cal. App. 3d 255, 145 Cal. Rptr. 476, 481 (1978); see *Agins v. City of Tiburon*, 24 Cal. 3d 266, 274, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 376 (1979). See also *San Diego Gas & Elec. Co. v. City of San Diego*, 101 S. Ct. 1287, 1292 n.8 (1981).

212. The first commentators to call attention to the problem of exclusionary zoning were Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953), and Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317 (1955). See also Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963).

Reminded by Norman Williams, I note that zoning for minimum building size is probably the clearest case of explicitly exclusionary zoning.

213. The Court stated:

The City Council of Tiburon found that "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." Ordinance No. 124 N.S. § 1(c).

447 U.S. at 261 n.8.

214. *Id.* at 262.

215. 416 U.S. 1 (1974) (upholding anti-commune zoning). This is an equal protection rather than a takings case, though it was written in the nature of an environmental protection opinion. *But*

ordinance “limit[s] development”²¹⁶ but points out that it does not “extinguish a fundamental attribute of ownership,”²¹⁷ evidently a future battle ground given *Kaiser Aetna*. Finally the Court noted that “appellants are free to pursue their reasonable investment expectations,” and, therefore, they have not been denied “the ‘justice and fairness’ guaranteed by the Fifth and Fourteenth Amendments.”²¹⁸ What the “reasonable investment expectations” of the Tiburon developers were is a matter for some speculation, however; obviously those expectations were high enough to warrant appeal to the Supreme Court. The conclusion that the appellants were not denied the “justice and fairness” guaranteed by the amendments is purely a conclusion—correct because the Court said it was—stating the Supreme Court’s decision in the case. I would concede that any contrary decision in this case would have stunned the real estate world to its foundations.

The mystery about *Tiburon* that the Court took the case at all is solved by reading a case that has come down since almost all of the foregoing was originally written. That is yet another “inverse condemnation” case, *San Diego Gas & Electric Co. v. City of San Diego*.²¹⁹ The case involved a suit for just compensation by a utility company for rezoning of its land, acquired for a nuclear facility but abandoned as such, from industrial to open-space lands. It is interesting because it shows the state of the art in Supreme Court takings law and suggests the unlikely result that under the fifth amendment there may be no such thing as a police power or land-use regulation that is merely invalid as such without requiring just compensation.

The plurality, with the concurrence of Justice Rehnquist, considered that the state court decree was not final and therefore dismissed the appeal, because “ ‘the federal constitutional question embraces not only a taking, but a taking on payment of just compensation,’ ” so that “ ‘[a] state judgment is not final unless it covers both aspects of that integral problem.’ ”²²⁰ In doing so the plurality said, with reference to the California Court of Appeal’s holding on the merits that monetary compensation

cf. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down anti-extended-family zoning). *Belle Terre* was the first zoning case taken by the Supreme Court in 46 years, so that the great mass of zoning law has evolved in the state courts. One wonders whether he can credit the story that Justice Douglas’ opinion in that case was affected by a large group of noisy students moving onto his street just before the case was argued.

216. 447 U.S. at 262.

217. *Id.* (citing *Kaiser Aetna*, presumably because the right to exclude there was a “fundamental attribute of ownership,” thus perpetuating the thought that there are preferred sticks in the bundle).

218. *Id.* at 262–63. See note 159 *supra*.

219. 101 S. Ct. 1287 (1981).

220. *Id.* at 1294 (quoting *North Dakota Bd. of Pharmacy v. Snyder’s Drug Stores, Inc.*, 414 U.S. 156, 163 (1973)).

is not an appropriate remedy for any taking of appellant's property that may have occurred,²²¹ "we are frank to say that the federal constitutional aspects of that issue are not to be cast aside lightly. . . ." ²²²

Justice Brennan, writing also for Justices Marshall, Stewart, and Powell, read the California Court of Appeal's decision somewhat differently in terms of availability of remedy, to find its judgment final and hence appealable.²²³ That is immaterial for our purposes since the decision will be resolved on remand when the court of appeal or the California Supreme Court tells the high Court what it meant. What is important is that Justice Brennan's plurality²²⁴ read the court of appeal's decision, along with that of the California Supreme Court in *Agins v. City of Tiburon*²²⁵ and the New York Court of Appeals' decision in *Fred F. French Investing Co. v. City of New York*,²²⁶ all as standing for the dual proposition (a) that a police power regulation may be examined only under the due process clause of the fifth and fourteenth amendments and not the just compensation clause,²²⁷ and (b) that therefore a regulatory police power exercise can never effect a taking²²⁸ so as to require the awarding of compensation. In other words the Brennan plurality read the California and New York decisions as the escape from the regulatory-taking dilemma which had plagued the law since *Pennsylvania Coal*. This escape was visualized with joy by notable commentators, including but not limited to the University of Washington's William Stoebuck,²²⁹ who perceived that the taking issue is reached only after the substantive due process issue has been determined and then only when a transfer to the city or state is effected.

It may come as no surprise at this point that the Brennan plurality held that the California (and New York) decisions "flatly [contradict] clear

221. *Id.*

222. *Id.*

223. *Id.* at 1296-1301 (Brennan, J., dissenting). As to the problems with plurality decision-making, see Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981).

224. Since Justice Brennan's group of four were the only Justices to reach the merits of the case, it was a "plurality" as to those issues reached. I shall, therefore, hereinafter refer to their views on the merits as those of a "plurality."

225. 24 Cal. 3d 266, 277, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378 (1979).

226. 39 N.Y.2d 587, 594-96, 350 N.E.2d 381, 384-86, 385 N.Y.S.2d 5, 8-9, *cert. denied*, 429 U.S. 990 (1976).

227. 101 S. Ct. at 1298 n.4.

228. *Id.*; see *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 120-21 (1978) (referring to the New York Court of Appeals in *Penn Central* as so holding).

229. Stoebuck, *supra* note 22, at 1097; see Costonis, "Fair" Compensation, *supra* note 22; Marcus, *A Grand Slam Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and A Resolution of the Regulatory/Taking Impasse*, 7 ECOL. L. Q. 731, 749 n.97 (1978); Sax I, *supra* note 22.

precedents of this Court.’’²³⁰ That is inevitable, given that the precedents are conflicting. But what was surprising was that the Court, instead of overruling the *Pennsylvania Coal* line of precedents, or treating it as the New York Court of Appeals had as involving due process only and Justice Holmes’ taking language as metaphorical, gave that line full weight and found it wholly governing, down to directly quoting the Holmes opinion as the ‘‘source.’’²³¹ The aphorism with all of its ambiguities and cross-purposes would thus be enshrined as the law of the 1980s:

It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a ‘taking,’ and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.²³²

What of *Mugler*, *Miller*, and *Hadacheck*? They are not mentioned. Would they be overruled? I do not know. The question may be asked because, while the Brennan opinion was only for a plurality of four, Justice Rehnquist in his concurrence made it clear that he in his words ‘‘would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan.’’²³³

Does it follow that *full* compensation had to be paid the San Diego utility? The answer given by the Brennan plurality is affirmative, but qualified in a judicial *tour de force* by limiting the compensation to a time period—‘‘commencing on the date the regulation first effected the ‘taking,’ and ending on the date the government entity chooses to rescind or otherwise amend the regulation.’’²³⁴ Property ‘‘taken,’’ then, can be given back by amending the regulation; only interim damages, whatever those are, may be awarded. Precedent for this novel approach is found in cases where the government has taken only temporary use of an easement, building, land or equipment.²³⁵ Full compensation is not required; a regulatory taking may be rescinded with the measure of compensation analogized to the rules of valuation already devised for formal temporary exercises of the eminent domain power. Flexibility to government is written in because it may always choose formally to condemn or to pay full

230. 101 S. Ct. at 1301.

231. *Id.* at 1302. Justice Brennan viewed Justice Brandeis’ position in dissent in *Pennsylvania Coal* as taking ‘‘the absolute position.’’ *Id.* at 1303 n.16.

232. *Id.* at 1304.

233. *Id.* at 1294.

234. *Id.* at 1304.

235. *Id.* at 1306–07 and cases cited. There is no indication that the San Diego open-space ordinance was temporary in nature except as it was made so by the Supreme Court decision.

compensation.²³⁶ The due process clause is relegated to operation where there is no public purpose or public use and even then, of course, the landowner may have an action for damages under 42 U.S.C. § 1983 for a due process violation.²³⁷

Could the same result, even with the same damages, have been reached under the due process clause? Does this approach show prescience by expanding the just compensation clause in an era of expanding property rights, even while limiting operation of the due process clause? The unique doctrine advanced by Justice Brennan,²³⁸ making police-power takings compensable under the just compensation clause but on a *temporary* basis only, is proof positive that property rights law is in flux; the sand has shifted even as I have written this paper over a period of six months. It is not yet established Supreme Court law; it is, however, at the cutting edge. My conclusions follow.

CONCLUSION

The contracts clause, the due process clause, and the just compensation clause have each been applied from time to time to the problem of property rights in our Republic. The three clauses and the constitutional arguments made under them overlap and are often interchangeable. Relief upon application of the clauses may differ, to be sure. Both the contracts and due process clauses may invalidate laws that either regulate the exercise of those rights or transfer one or more of those rights to others (including the public at large); the just compensation clause on the other hand goes one step further and makes the state, in effect, purchase rights being regulated or transferred from the previous holder. Yet the damages awarded may be the same.

All three constitutional clauses, however, ultimately address the same analytic problem: When does the legislative act, which by definition has the support of a majority of the representatives of the particular governmental body involved, constitute such a great degree of interference with the property right or rights affected as to be unfair or unreasonable, or to constitute a "taking" and be unjust, and to require, if the interference is to be permitted, the payment of compensation, temporary or permanent, by the government?

236. *Id.* at 1308.

237. *Id.* at 1306 n.23.

238. One commentator has recently discussed the question of remedies in "inverse condemnation" cases without suggesting that Justice Brennan's new-found doctrine did, or should, exist. Kaner, *Inverse Condemnation Remedies in an Era of Uncertainty*, in *PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN* (1980).

The Supreme Court decisions under all three clauses have been inconsistent, going from time to time in entirely different directions. We are now entering a fourth phase of property rights analysis. The contracts clause has had its day in the sun; after a long period of darkness, it is seeing light again. The due process clause, used substantively to support *laissez faire* for one-half a century after 1890, was used not at all for the next half; now it is used procedurally to protect selective property entitlements as one right of persons and, at times, used substantively to protect other kinds of personal rights. We have seen the creation of a dilemma not yet finally resolved by the Court and plaguing constitutional commentators to this very instant: If property rights are personal rights, as the procedural cases say they are, why should they not have substantive protection like other personal rights? Or is substantive protection to be given only to some personal rights and not others, or to none at all? If the latter, who is to say which view is more subjectively based? Whose value system do we accept? Is that all there is to constitutional law?

We have seen the takings or just compensation clause used in an essentially *ad hoc* fashion over many decades. The clause has been hung up, as it were, on the dilemma²³⁹—a *non sequitur*—stemming from an oversimplification of the problem in the case law whether the governmental regulation or transfer is a taking, in which case there must be full compensation, or is not, in which case there is no compensation. Instead, consideration might be given to more flexible approaches that would look at what compensation is just or fair so as to accommodate both the public and personal interests involved—a sliding scale rather than what has been a two-tier approach. But is a sliding-scale approach²⁴⁰ any less subjective, or is it rather simply more descriptive? And, rather than follow the commentators, a hefty body of Supreme Court Justices has recently taken the view that the takings clause applies but permits the award of temporary just compensation;²⁴¹ while doing so it has left wholly in the air the question of when there is a taking.

I have suggested that one inherent problem with respect to all three clauses and their related but differing interpretations lies in an underlying dualistic view of property as both personal and public, private and social—what I have called, respectively, the “dominion” and the “social”

239. Justice Brennan's dissenting opinion in *City of San Diego* notes Charles Haar's comment that the attempt to differentiate “regulation” from “taking” is “the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark.” 101 S. Ct. at 1302 n.15 (quoting C. HAAR, *LAND-USE PLANNING* 766 (3d ed. 1977)).

240. See generally Amsterdam, *Perspectives on the Fifth Amendment*, 58 MINN. L. REV. 349, 376 (1974) (referring to the University of Pennsylvania Law School's “peachy-keen” grading scale).

241. See notes 224–237 and accompanying text *supra*.

views of property. This dualistic perception of property rights has been present prior to and throughout the history of the Republic. The other side of the Janus-faced property-rights coin is governmental regulation or taking. Here I note that the role of government has not only varied from time to time but varies depending on what government is involved, federal, state, or local.

In the case of the Federal Government, we have seen a basic attitude of “hands-off” property rights in the early days of the Republic slowly become, through exercises of the regulatory and taxing powers, somewhat more forceful until the Great Depression ushered us into the era of a full-scale, big welfare-type government, only recently, perhaps, beginning to be cut back. In the case of state governments, on the other hand, one or more of the states has, at one time or another over the years, favored debtors, mortgagees, farmers, consumers, laborers, women, or other groups with interests antithetical to property rights, and run into judicial intervention on the side of property. And many state and local governments have in the name of open space, property-value preservation, or other laudable objects of support for the last fifty years or so regulated property rights within their own borders with little regard to impact beyond those borders and very little restraint from without. It is, therefore, not surprising that in the Supreme Court there have been varying responses to governmental action affecting property rights.

I do not mean to say that this varying response has depended solely on what place property rights are given, or the role government takes, or the value structure of any particular Justice or of the Justices on any particular Supreme Court. That value structures play an important role is obviously a truism. But the jurisprudential problem is a deeper one.

Property rights involve, as the Court has recently begun to put it, “investment expectations.”²⁴² If those expectations invariably include one that government may act at will to regulate or restrict or transfer the property rights in question, plainly there is no limit to what government can do, unless some interest other than “expectations” is being served.²⁴³ At least it will be only in the extreme case—one perhaps of very arbitrary, very capricious, very selective governmental conduct—that the Court will intervene in favor of the property-rights holder.

On the other hand if there is some other interest or there are some “expectations” that are protected in any event against governmental action—that are beyond the reach of the government—that interest is, or those expectations are, to be found, by definition, outside the framework of the

242. See notes 159 & 198 *supra*.

243. See note 38 and accompanying text *supra*.

particular governmental action involved. And outside that framework is some value judgment, some set of morals, some economic theory, that is, if not a "higher" law, one sufficiently "high" as to be read into the Constitution itself as a part of the commands of that document or the system of government it embodies and represents. The state has not given protection, by hypothesis, to the property rights in question; if they are to be protected at all, therefore, it is only by the process of judicial review in the courts by constitutional interpretation. And not to give them protection is, in the words of the cedar tree case, also to make a choice.

In the early days of the Nation the protection afforded property derived from natural law, a higher law, as observed by Locke, as acknowledged by Madison, and many others.²⁴⁴ This higher law, simply stated, was that Man had a right to some things that no one, not even the state, could take from him; it was rationalized on the basis of either morals or utility. After the Civil War and in reaction, as it were, to the agrarian movement culminating in *Munn v. Illinois*, the "Higher Law" became the doctrine of laissez-faire, based on the principle of free trade being valuable as an end in itself. When that principle, applied in an industrial society, did not work well, or at all, property rights became second-class rights.

Today we see the justification for protection of property rights as having moral as well as utilitarian or economic grounds. The moral grounds are John Stuart Mill's, that where one's labor has produced the property, some or all of its benefits are deserved. The utilitarian grounds are that acquisition and use of some things is necessary, to a reasonable degree, for individual happiness and general welfare.²⁴⁵ The economic grounds remain Adam Smith's, as modified by the Chicago School: through aggregation of resources, efficiency can be achieved, and production and distribution of goods improved.²⁴⁶ And, now quite properly I think, property rights can again be recognized as among other personal rights—we may perceive a liberty element in their protection.²⁴⁷ Put another way, elimination of property right protection would result in, and where elimination has occurred, does result in, abridgement of an individual's liberty, repression of his personality, deprivation of her "personhood."²⁴⁸ This, I suggest, is one of the very same ethical concepts that underlies the equal

244. The leading judicial decision is *Gardner v. Trustees of Newburgh*, 2 Johns. 162 (N.Y. Sup. Ct. 1816). See Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931).

245. See L. BECKER, *supra* note 19, at 57-74.

246. See generally *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

247. I see Justice Brennan's formulation in *City of San Diego* as a resolution of the basic property right dilemma on this basis.

248. See L. BECKER, *supra* note 19, at 102, 105

protection clause, what Rawls has called an ethic of “mutual respect”²⁴⁹ and “self-esteem.”²⁵⁰ To use an argument that also justifies the equal protection clause comes hard to those of us who have been brought up on the double standard of footnote four of *Carolene Products*. But not to acknowledge the validity of the argument for liberty as a justification for protecting property rights is, I suggest, to suffer from tunnel vision. Unless one is a genuine Marxist who acknowledges no rights in the person at all,²⁵¹ one is forced to accept these propositions, I believe.

But of course each of these arguments for property rights protection has its own limitations, and this is why we have courts and lawyers and, if I am not irreverent, jurisprudential lectures. The moral dissent argument does not justify protection where disproportionate harm or loss to others is caused; the utility argument requires for protection a net social utility, not merely a benefit for one if offset by detriment to others; and the liberty argument requires that others’ liberties are not abridged by the protections involved.

There is a concern, overriding at times, that goes to the very security of the system of government—or at least to the trust of people in it—and that cuts entirely away from protection under the economic argument. Property rights do come to be held disproportionately; if too few people hold too many property rights, if too many people are socially and economically disadvantaged by too much protection of property rights, then, as Jefferson observed in the France of 1785, the very state may be endangered, or life in it may become very fearsome. There is no doubt in my mind that it was an implicit recognition of this last point by the Executive (Franklin D. Roosevelt’s political genius), the Court, and the public at large that caused the forty-plus year decline of property rights protection that I have spoken of so many times in this article. The Watts riots of the 1960’s, the Brooklyn and Bronx of the mid-1970’s blackout, and the Miami of 1979 riot fame are reminders of the ultimate limitation on property rights protection.

Now, however, in the ebb and flow of human events, there are various signs that we are approaching a new judicial era. I see nothing in the political happenings, the mood of the country, the economic or philosophic makeup of judges and judicial appointing process, to indicate that a new era will not be here sooner than we think. It may already be here. I make no value judgment on this; I state it simply as a fact. We are but a very short step from a new recognition of substantive due process in the

249. J. RAWLS, *A THEORY OF JUSTICE* 511 (1972).

250. *Id.* at 544.

251. *But see* L. BECKER, *supra* note 19, at 121 (ch. 4 n.2).

property rights field; it may offer flexibility, at least where governments have limited financial resources, that the takings clause does not. Yet the takings clause has suddenly come to the fore.²⁵² Substantive due process also covers non-contractual obligations and thus has broader scope than the contracts clause. Before condemning this out of hand, consider that it may permit environmental, historical, and other protection to take place without full compensation but with some form of compensation that is fair; prominent thinkers have suggested this, though they have thought of "fair compensation" or "the accommodation power" in term of "just compensation" rather than substantive due process. The Supreme Court has yet to take a determinative stand.

There is another possibility, of course, which is that the government itself will keep its hands off property rights altogether and return us to the nineteenth century era of *laissez-faire*. This would entail letting private bargainers, as in the case of Houston, Texas, work out *de facto* zoning, letting the principles of Adam Smith and Milton Friedman operate full sway, giving us business not as usual but totally deregulated and unsubsidized. The danger, of course, is that to reduce by so much the role of government will produce disparities which will become so great as to cause another reaction. In that case, property rights may receive the same degree of protection, or less, than they did from 1937 to 1977.

On what will happen I make no judgment. I only express the hope that, on the part of the courts at least, and the Supreme Court in particular, it will be done with value judgments identified, with analysis clarified, with candid acknowledgment of inconsistency with precedents and avoidance of the tyranny of labels, in short with all the finest tools of the judicial trade.

252. See notes 224-37 and accompanying text *supra*.