

Splitting the Atom of Property: Rights Experimentalism as Obligation to Future Generations

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*The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.*¹

I. Introduction

Justice Kennedy's deft metaphor for our Constitution's treatment of sovereignty might have been better used to explain its concept of property. He accentuated the fact that sovereignty, once thought untouchable and indivisible, has since been pulverized into innumerable pieces. Sovereignty's reinvention under the conditions of democratic constitutionalism has been remarkably productive, facilitating innovation upon innovation within our political culture.² But much the same can be said of property, and I shall argue that, for the sake of future generations, we must quickly improve our system to anticipate and harness—rather than complicate and mismanage—property's highest potential. For something Blackstone famously called a “sole and despotic dominion,”³ most forms of property have turned out to be astonishingly fragile, interconnected, and constantly in need of definition, reorganization, and affirmative protection. Indeed, modern property's elusive essence and plasticity have become its signature attrib-

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¹ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

² See, e.g., BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

³ 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

utes.⁴ And its most contested dimension is that which it shares with sovereignty: its status under the Constitution. Property is at its highest potency in our society as a family of constitutional norms. Perhaps not accidentally, then, Justice Kennedy finds himself positioned to influence some of our most pressing public questions today. As one of a handful of “swing” votes in our fractious federal judiciary,⁵ we have witnessed his influence in a run of cases involving constitutional property (not unlike recent cases on dual sovereignty).⁶ If *lasting* influence is sought, however, I argue that judges like Kennedy must work to establish individual rights that not only permit, but that actively facilitate and sustain deliberation over time among the citizens of the jurisdictions backing those rights. Without motivationally effective deliberation, modern electorates have proven all too susceptible to manipulation, lapses of judgment, and spiteful politics.⁷ Yet we are also in the process of reinventing our institutions of property (especially property in land) in this “age of ecology.”⁸ It is part of a much larger trend in our societies toward identifying and valuing the Earth’s

⁴ See *infra* Parts III–IV; see, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988); Jeremy Waldron, *What is Private Property?*, 5 OXFORD J. LEGAL STUD. 313, 317 (1985) (arguing that property is a “concept” whose particulars vary among societies).

⁵ See Adam Cohen, *Editorial Observer; Anthony Kennedy Is Ready for His Close-Up*, N.Y. TIMES, Apr. 3, 2006, at A16.

⁶ Justice Kennedy has often been the voice for a splintered court and has not hesitated to write separately in closely divided constitutional property cases. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring); *Palazzolo v. Rhode Island*, 533 U.S. 606, 610 (2001) (5–4 decision); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 692 (1999) (plurality opinion in part); *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (writing separately to ground the analysis on Due Process principles, not the Takings Clause); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 466 (1993) (plurality opinion) (Kennedy, J., concurring in the judgment); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 (1992) (Kennedy, J., concurring in the judgment).

⁷ I base this claim on others’ research into the power of intensely interested minorities to sway majority opinion, if only temporarily and imperfectly, at election time. The major complication in such research, of course, is proving that voters were, in some non-trivial sense, *manipulated* and not *persuaded*. General presentations of, and general attacks on, that research include MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* (1981); DONALD GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994); GERRY MACKIE, *DEMOCRACY DEFENDED* 23 (2003) (arguing that “the accurate and fair amalgamation of individual opinions and wants” is possible); JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986); Gerry Mackie, *All Men Are Liars: Is Democracy Meaningless?*, in *DELIBERATIVE DEMOCRACY* 69, 73 (Jon Elster ed., 1998) (arguing that public discussion in legislatures “is generally credible”); Peter C. Ordeshook, *Engineering or Science: What is the Study of Politics?*, 9 CRITICAL REV. 175 (1995). I offer modest suggestions in Part IV on how this research might be incorporated into the judicial process.

⁸ See, e.g., DONALD WORSTER, *NATURE’S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS* 306 (2d. ed. 1994) (defining the age of ecology as “the appearance of a wide consciousness of

natural systems and their integrity. Thus far, it has been a politically disruptive and threatening process, characterized most often as a bitter struggle. Property has lately become one of the most richly theorized legal concepts in the English-speaking world,⁹ and yet it still lacks fundamentally practical underpinnings like criteria by which to distinguish it from other legal rights. A philosophy of *rights experimentalism* is, I shall therefore argue, fast becoming the most constructive of approaches to the crafting of legal doctrine—especially with respect to property rights.

In this Article I try to map rights experimentalism onto our most recent (re)constructions of constitutional property and show why we owe it to future generations to start thinking about property more experimentally. Ironically, many of the troubles at the interface of modern environmental law and constitutional property law demonstrate precisely what our legal system owes to future generations. Three givens emerge immediately upon inspection. First, we lack a suitably resilient model of ownership in an age of ecology. Our cognitive capacities to grasp interconnection and change have exploded well out in front of our institutions of property, which still operate on presumptions of severability, boundedness, and stasis.¹⁰ Any such model of ownership needs to connect with our deeper self-understanding as a people (whatever our sciences reveal), but that imperative can be tested later. Second, our insistence that collective governance be the product of both democratic authority *and* sound judgment makes even the simplest broadscale collective actions into contentious societal conflicts with high decision costs and uncertain payoffs. This compounds our need for more clarity on ownership and its function in an interconnected world but, if anything, only further obstructs the evident paths toward that end. Finally, legal analysis remains at an inexplicable remove from the wider study of practical reason, a rich field that, if better integrated with law and legal analysis, would almost cer-

ecological concepts in popular environmental thought”); *id.* at 333 (describing many individuals’ perception of the age of ecology as the idea that “humanity is not an island unto itself”).

⁹ See generally Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004).

¹⁰ This is not to say that boundaries are necessarily anathema to ecology or vice versa. But boundaries will profoundly influence the ways in which we conceive of a resource and its governance and consumption. See, e.g., Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1166 (1999); see also Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) [hereinafter Heller, *Tragedy*].

tainly enable legal actors to make better choices regarding scarce resources, ownership, and governance.

Parts II and III survey property as a constitutional right in the modern era from jurisdictional, doctrinal, and remedial standpoints. The takeaway from that descriptive project is that constitutional property is overburdened by its own vocabulary and conceptual structure. Part IV, rather than offering yet another account of ownership, sovereignty, or rights as legal categories (work that is being done today at a blistering pace), sketches the beginnings of an updated judicial ethic toward property rights in an age of ecology. That update is, however, methodologically modest. Its principal target is the authoring of judicial opinions that cloak rather than parse and describe their authors' convictions, intuitions, motives, and information. Judicial opinions must be written, I argue, such that they dampen the possibilities of strategic action and its corrosive influences to the maximum possible extent. Part V concludes with a cautiously optimistic and sympathetic assessment of judges and judgments, suggesting that important reforms are both possible and needed.

II. *Constitutional Property in the Supreme Court, 1922–2005*

Property and the right to one's property were arguably the subject of more "creative destruction"¹¹ than any other legal institution or legal right in the rise of our regulatory state.¹² The period under consideration, 1922–2005, is framed entirely by two of our Supreme Court's more momentous Terms in the history of constitutional property. The Court repeatedly rejected claims in 1922 that government had confiscated someone's property by means other than ejection,¹³

¹¹ One especially romantic view of capitalism sees it as an organic system that constantly creates and destroys wealth (and capitalists). See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 81–86 (1942). If this is true, government's presence in that system (helping to create and to destroy) has been a constant throughout American history, long predating what we think of as the regulatory state. See, e.g., STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION* 4 (1971).

¹² See EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 296–329 (2005). The rise of risk regulation and, in particular, the regulation of environmental risks, played a leading role in our structural shift toward administrative governance. See generally Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 *UCLA L. REV.* 703 (2000) (arguing that it is the type of risk being regulated that differentiates environmental law from other fields).

¹³ The Court heard and denied relief in *Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125 (1922), *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922), and *Morrisdale Coal Co. v. United States*, 259 U.S. 188 (1922). A fourth majority opinion authored by Holmes, *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), reversed a demurrer and remanded to the Court of Claims with instructions to hear the case. *Id.* at 330. The claim was for

and it also decided the famous case of *Pennsylvania Coal Co. v. Mahon*.¹⁴ In *Pennsylvania Coal*, the Court not only validated a non-ejectment claim but offered an account of constitutional property that has inspired owner-plaintiffs ever since.¹⁵ Unfortunately, the paradoxes of that account have sharpened more over time than its explanatory powers. The Term ending in 2005, where the Court authored three constitutional property opinions, *Lingle v. Chevron U.S.A. Inc.*,¹⁶ *San Remo Hotel, L.P. v. City of San Francisco*,¹⁷ and *Kelo v. City of New London*,¹⁸ merely extended the seductive but ultimately problematic reasoning of twentieth-century opinions like *Pennsylvania Coal*. This Part describes how that reasoning has set the agenda for constitutional property in our time. Section A offers a structural overview, and Section B parses and describes some of its doctrinal wreckage. Finally, Section C argues that the Court's own conception of rights and the judicial power are to blame for most of the vulnerabilities from which property still suffers.

A. Creating Constitutional Property: A Time-Elapsed View

The “new property” revolution of the 1970s, for a time at least, conceived of public transfer payments like Social Security and Aid to Families with Dependent Children as property within the meaning of the Due Process Clause.¹⁹ It solidified our era's core consensus on

repeated invasion of the hotel's airspace by the military's shelling of a nearby target, rendering the hotel unfit for business. *Id.* at 329. Holmes wrote that the facts alleged would, if proven, “warrant a finding that a servitude had been imposed” and remanded with instructions to try the case as a potential “taking.” *Id.* at 330.

¹⁴ *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). *Pennsylvania Coal* has come to dominate the constitutional property discourse in the U.S., largely for suspect reasons. See Robert Brauneis, “The Foundation of Our ‘Regulatory Takings’ Jurisprudence”: The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co. v. Mahon*, 106 *YALE L.J.* 613, 664–65 (1996); *infra* notes 104–09 and accompanying text.

¹⁵ *Pa. Coal Co.*, 260 U.S. at 415 (“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.”).

¹⁶ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

¹⁷ *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005).

¹⁸ *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁹ The paradoxes set up by this set of holdings have been explored *ad infinitum*. See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 113–32 (1985); Edward L. Rubin, *Due Process and the Administrative State*, 72 *CAL. L. REV.* 1044, 1065–76 (1984); Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 *J. LEGAL STUD.* 3, 4–14 (1983). Not long after such government benefits were first considered property for purposes of the Due Process Clause, however, the Supreme Court began retreating from the proposition. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976) (holding that the plaintiff's interest in his good reputation was not property protected by the Due Process Clause); cf. *Arnett v. Kennedy*, 416 U.S. 134, 152–56 (1974) (Rehnquist, J., for Burger, C.J., and Stewart, J., announcing the

property more directly than any other single influence. For it was in *Board of Regents v. Roth*,²⁰ *Perry v. Sindermann*,²¹ *Goss v. Lopez*,²² and other cases involving governmental support payments, discretionary permissions, and the like,²³ that the Court confirmed that the Constitution cannot create or set the *content* of property.²⁴ Decades later, though, we still seem unable even to distinguish property from other legal things well enough to say with much certainty what merits being called a property right.²⁵ Our shared conviction on property has been that it is expressed—is only recognizable—in a myriad of legal dimensions each one of which has its own discrete set of contingencies.²⁶

judgment of the Court) (stating that any property right the civil service statutes created for the plaintiffs in their jobs included the statutes' suggestion of summary removal powers, which should have precluded expectations to the contrary).

²⁰ *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

²¹ *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

²² *Goss v. Lopez*, 419 U.S. 565, 572–72 (1975).

²³ See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (access to a state employment commission); *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (interest in horse training license); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9–10 (1978) (entitlement to public utilities).

²⁴ See, e.g., *Roth*, 408 U.S. at 577 (“Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law or rules, or understandings that secure certain benefits and that support claims of entitlement to those benefits.”).

²⁵ Property's orthodox interpretation is one of “disintegration.” See Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69, 74 (J. Roland Pennock & John W. Chapman eds., 1980). Another way of viewing property is as being *multi-dimensionally* vague, i.e., the criteria that supposedly distinguish property from other things are both uncertain and of uncertain value. See Kenneth B. Bley & Tina R. Axelrad, *The Search for Constitutionally Protected “Property” in Land-Use Law*, 29 *URB. LAW.* 251 (1997) (examining circuit split on whether and when zoning permissions trigger due process protections in part by deciding whether the particular zoning permission counts as “property”); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972) (discussing how concepts of “economic efficiency, distributional preferences, and other just considerations” affect society's determinations of property entitlements); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 *COLUM. L. REV.* 773, 777 (2001); David H. Armistead, Note, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 *GA. L. REV.* 769 (1995) (examining whether recognition of substantive due process violations is affected by the nature of the state-created property right).

²⁶ So that I am not misunderstood, my claim is not that the Court failed to recognize property's “disintegration” prior to the 1970s. Some of its most oft-cited recognitions, indeed, predate the ‘new property revolution.’ See, e.g., *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945) (recognizing that the term property in the Fifth Amendment has been “addressed to every sort of interest the citizen may possess”). I am making the more synthetic claim that the fullest implications of property's disintegration were not realized until the 1970s and after.

Property has its positive sources,²⁷ its characteristic rights and obligations,²⁸ its judicially patterned remedies,²⁹ its historical arc,³⁰ its allocation and social meaning at any given moment,³¹ and its constitutional protections.³² Property has everything but its own conceptual or normative anchors. Decomposing it into its constituents for granular analysis is like unbaking a cake.

This dimensionality, of course, has complicated property's protection by constitutional right. By the 1970s, the Court had long disavowed its earlier plan to protect property (and wealth) against redistributive legislation it thought unwise or unreasonable.³³ By then, however, the Court had a bigger problem than its own imperial past. For, if it is only positive sources of law that define property's content, it stands to reason that valid changes in that underlying law, e.g., a statute forbidding uses of land that contribute to the degrada-

²⁷ See, e.g., ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 13–14 (2007) [hereinafter FREYFOGLE, ON PRIVATE PROPERTY]; ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 2 (2003) [hereinafter FREYFOGLE, THE LAND WE SHARE].

²⁸ See, e.g., J.E. PENNER, THE IDEA OF PROPERTY IN LAW 24–25 (1997) (discussing the correlation between property rights and duties); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (same); see also A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 112–24 (A.G. Guest ed., 1961). To say that property has characteristic rights, though, is not to say that any one of these rights is necessary to property's identity. Compare JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 9–10 (1999) (arguing that property law would suffer minimal disruption if a select number of rights to “destroy,” recognized at common law, were extinguished), with Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 822 (2005) (arguing that the common law right to destroy may be very different from property type to property type, but that owners ought to have at least the right to destroy any property that generates “negligible positive externalities”).

²⁹ See, e.g., Calabresi & Melamed, *supra* note 25.

³⁰ See, e.g., GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 1–17 (1997); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 3–9 (3d ed. 2008).

³¹ Whether property or property rules cause or prefigure lopsided distributions of wealth is a matter of timeless controversy. See, e.g., JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 268 (1990). On property's wider social meaning, see MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); and Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990).

³² See, e.g., GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 942–54 (2000).

³³ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729–31 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

tion of the state's waters, cannot per se confiscate property.³⁴ Such rearrangements are a necessary incident of the authority to legislate, the authority of "the people" to serve and protect themselves.³⁵ Much more than rights of speech or privacy, though, property renders the view of rights as "trumps"³⁶ self-evidently problematic. Modern environmental law, for example, is nothing if not a constant rearrangement of property rights by statute, regulation, order, guidance, and so forth.³⁷

Thus, not surprisingly, our disjointed constitutional property precedents since the 1970s display several basic, seemingly insoluble tensions.³⁸ The Court has, at turns, held that a sovereign may not legislate just *any* rearrangement of rights it chooses,³⁹ but that great deference is due political judgments "adjusting the benefits and burdens of economic life to promote the common good."⁴⁰ It has held that some rights of ownership, such as the rights to exclude, are categorically more significant than others,⁴¹ but that even rights to exclude can

³⁴ The conventional dichotomy of property versus the police power was the purest expression of the point for much of the period preceding *Pennsylvania Coal*. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 70–75, 208–16 (2004). See generally Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964).

³⁵ Utility (efficiency) and fairness (justice) have long been aligned as competitors in constitutional property doctrine. See generally Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *HARV. L. REV.* 1165, 1171–72 (1967) (stating that judicial decisions regarding when compensation is or is not required are "ethically unsatisfying" and fail to adequately address basic notions of fairness). Historically speaking, the Takings Clause probably holds efficiency and justice as its two "central," if perhaps also opposing, "concerns." Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 *HARV. L. REV.* 997, 997 (1999). To what extent these two concerns are directly and necessarily opposed to one another, however, is at least presumptively context-specific. *Id.*

³⁶ See Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153, 153 (Jeremy Waldron ed., 1984) ("Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.").

³⁷ See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 178–207 (2004).

³⁸ Useful overviews can be found in BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* (2002); and WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995).

³⁹ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016–18 (1992); *Hodel v. Irving*, 481 U.S. 704, 717–18 (1987).

⁴⁰ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . .").

⁴¹ Compare *Andrus v. Allard*, 444 U.S. 49, 51 (1979) (upholding federal prohibitions criminalizing the use, sale, or transfer of legally titled eagle parts because "the denial of one

be abridged without relief.⁴² It has held that resources as intangible as interest on principal⁴³ and causes of action⁴⁴ can be constitutional property, but that land is ordinarily the benchmark “property interest.”⁴⁵ It has held that rights grounded in the common law may be protected by the Takings Clause where rights grounded in legislation would not be,⁴⁶ but that even venerated common law rights may be extinguished without relief.⁴⁷ And, perhaps most strikingly of all, the Court has noted that establishing jurisdiction in the federal courts in order to grapple with any of these antinomies in actual cases is normally as much or more of a test for plaintiffs than actually making their case.⁴⁸ Yet, the Court has also said that this merely reflects the nature of the rights themselves.⁴⁹

traditional property right does not always amount to a taking”), *with* *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (invalidating federal rule requiring owners to suffer public use of their property in what had been a private waterway because “the ‘right to exclude[]’ [was] so universally held to be a fundamental element of the property right . . .”).

⁴² See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (rejecting takings claim brought by owner forced to admit parties whom it did not welcome on its land).

⁴³ See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 165 (1998) (“The rule that ‘interest follows principal’ has been established under English common law since at least the mid-1700’s.”).

⁴⁴ See *Martinez v. California*, 444 U.S. 277, 281–82 (1980) (“Arguably, the cause of action for wrongful death that the State has created is a species of ‘property’ protected by the Due Process Clause.”).

⁴⁵ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992).

⁴⁶ See, e.g., *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); see also *Bowen v. Gilliard*, 483 U.S. 587, 605 (1987). Real property, property in land, has dominated Takings Clause jurisprudence. Some property interests other than real property have triggered Takings Clause scrutiny. See, e.g., *Phillips*, 524 U.S. at 172 (interest income in unclaimed trust accounts); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164–65 (1980) (interest on principal kept in an administrative judicial account); see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002–03 (1984) (noting a “general perception” that trade secrets are property and assuming “[t]hat intangible property rights protected by state law are deserving of the protection of the Taking Clause”). The vast majority of takings precedents, however, involve land or fractional interests in land, and this preferential treatment has been the source of continuing conceptual troubles. See *infra* Part III.B.

⁴⁷ See, e.g., *United States v. Causby*, 328 U.S. 256, 260–61 (1946) (recognizing that a federal statute, the Civil Aviation Act, had effectively asserted title to the navigable airspace above the territorial United States, notwithstanding the common law maxim that owners’ property extends “to the periphery of the universe”). But cf. *id.* at 266–68 (holding that the military overflights under challenge—flights invading the air column immediately above a chicken farm—combined with local law entitling landowners to quiet enjoyment of their land, was a taking requiring the United States to pay for a prescriptive easement for the use of plaintiff’s airspace if the easement was found to be permanent).

⁴⁸ See *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733–34 (1997) (reviewing the conditions for establishing jurisdiction for a Takings Clause claim); see also *infra* notes 123–27 and accompanying text.

⁴⁹ Most of the Court’s takings jurisdiction cases make the point in one way or another.

The Federal Constitution's protections of property are notoriously vague, not least because the kinds of property to which they apply remain deeply uncertain.⁵⁰ The Fifth Amendment guarantees that any person being deprived of their "liberty" or "property" will be afforded "due process of law" and that any person whose "private property" is "taken for public use" will be afforded "just compensation."⁵¹ Conventional legal training impels one to individuate these protections as discrete rights and to translate them into doctrinal rules: one for "takings," another for due process "deprivations," etc. Only this sort of approach supposedly reflects the plurality and force of our variegated constitutional texts.⁵² Indeed, in 2005, the Court in *Lingle v. Chevron U.S.A. Inc.*⁵³ moved decisively to resegregate takings and due process doctrines after three decades of inattentive commingling.⁵⁴ According to *Lingle*, whether or not a law "substantially advances" a legitimate governmental objective is for due process adjudication only; takings analysis requires other constitutional tests.⁵⁵ It

See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 9–10 (1988); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186–87, 190–91, 195–96 (1985).

⁵⁰ The Court has reserved some of its regulatory takings doctrine solely for property in land, *see, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992), but has never squarely held that personal property is categorically different for constitutional purposes, *see* Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 *ECOLOGICAL L.Q.* 227, 231 (2004).

⁵¹ The Fifth Amendment provides in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

⁵² *See, e.g.*, *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (stating that the act at issue "must be invalidated as contrary to essential due process principles, without regard to the Takings Clause of the Fifth Amendment"). Of course, the Due Process and Takings Clauses are not the Constitution's only protections of property. The Third Amendment, forbidding the quartering of troops during peacetime and requiring an owner's consent even during wartime, for example, arguably protects property as much as privacy in the home. *See* U.S. CONST. amend. III. As with other similar protections, though, the Third Amendment's desuetude has tended to spotlight the Due Process and Takings Clauses.

⁵³ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

⁵⁴ The *Lingle* Court blamed *Agins v. City of Tiburon*, 447 U.S. 255 (1981), for its confusion of due process and takings clause scrutiny, *see Lingle*, 544 U.S. at 531–32, 542–44, and suggested that *Agins* means/ends doctrines had never been used to invalidate a law in the Court's takings cases, *id.* at 545–48. This was simply untrue. *See infra* notes 152–57 and accompanying text.

⁵⁵ Indeed, the Court even suggested that the tests have a logical priority:

Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.

is hardly clear, though, what *Lingle*'s doctrinal limning was worth in a system as jurisdictionally complex and remedially ambiguous as our own. Three major challenges are apparent.

First, a principal source of uncertainty over the years, wholly apart from the vagueness of the constitutional guarantees themselves, has been our theories of sovereignty. Our paradigmatic form of property, land, has always been governed by a fractionated system of local, county, and state authorities, all of which operate under a duty to protect and govern their own constituencies.⁵⁶ The fabric of this system is localist through and through. So the Fourteenth Amendment's separate due process guarantee against the states—a text making no coordinate “just compensation” or “public use” guarantees—complicated matters immensely.⁵⁷ What is the significance of the Fourteenth Amendment's missing takings clause? Should it be significant? *Ought* there be differences in property's (federal) constitutional protections turning on whether it is a federal or a state (or local) confiscation? Answers to these questions lead directly to our federalism's foundational purposes.⁵⁸

Long before the Court began using “due process of law” as its all-purpose filter in Fourteenth Amendment judicial federalism, it was using it to overturn state legislation rearranging markets in, titles to, and lawful uses of, property.⁵⁹ Today, now that the Fifth Amendment

Lingle, 544 U.S. at 543.

⁵⁶ The vast majority of authority over land use and land title in the United States is vested in municipal and county governments. See generally JESSE DUKEMINIER ET AL., PROPERTY 821–71 (6th ed. 2006). And in the last Census of Governments in 2002, there were almost 39,000 such general purpose local governments. See U.S. CENSUS BUREAU, GOVERNMENT ORGANIZATION: 2002 CENSUS OF GOVERNMENTS V (2002).

⁵⁷ See generally U.S. CONST. amend. XIV.

⁵⁸ See generally Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 252 (2004) [hereinafter Sterk, *Federalist Dimension*]; see also Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 292–300 (2006) [hereinafter Sterk, *Demise*]. On the same, or at least similar, questions beyond property rights, see Louis Henkin, “*Selective Incorporation*” in the Fourteenth Amendment, 73 YALE L.J. 74 (1963).

⁵⁹ Recall that *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), held that the Takings Clause (if not the whole Bill of Rights) applied solely to the federal government. *Id.* at 250–51. Recall further that it was not until a generation after 1868, when the Fourteenth Amendment was ratified, that the Court even suggested the Amendment might serve as a kind of portal through which the Bill of Rights' guarantees could operate against the states as well. See, e.g., Earl M. Maltz, *The Concept of Incorporation*, 33 U. RICH. L. REV. 525, 532–36 (1999). Compare *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 66, 82 (1872) (holding that neither the Due Process Clause nor the Privileges or Immunities Clause of the Fourteenth Amendment prohibited state-granted monopolies), with *Fiske v. Kansas*, 274 U.S. 380, 387 (1927) (holding that a state's regulation of speech was a denial of due process of law because it “unwarrantably

has been made applicable against the states,⁶⁰ though, it is very hard to know what independent protection “due process of law” should provide aggrieved owners.⁶¹ Indeed, as owner-plaintiffs struggle to find relief from the unceasing torrent of legislative and bureaucratic rearrangements of traditional property law, the minutiae of history and doctrine—and of our judicial federalism—are now more directly influencing outcomes than all of the merits arguments combined for or against the rights in question.⁶² Rights whose content depends so directly on positive sources that are themselves constantly decomposing into ever smaller jurisdictions,⁶³ and which are adjudicated in state or federal fora irrespective of their source under distinctly asymmetrical constitutional guarantees, each with its own checkered doctrinal past, create unparalleled opportunities for jurisdictional controversy. Call this property’s “jurisdictional density.”

Second, one of our federalism’s original objects—permitting a property regime as evil as slavery in a nation with so much disdain for it⁶⁴—was blunted violently in our Civil War and the constitutional

infring[ed] the liberty of the defendant”). See also *Palko v. Connecticut*, 302 U.S. 319, 323, 328 (1937) (holding that being tried twice for the same offense was “not in derogation of any privileges or immunities that belong to [a defendant] as a citizen of the United States”), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969). Finally, recall that it was not until the Warren Court that the Justices considered applying the explicit guarantees of the Bill of Rights against the states en masse and in the same manner as they are applied against the federal government. Before that, “substantive” due process was the norm, not the exception. Cf. *Powell v. Alabama*, 287 U.S. 45 (1933) (holding that the denial of counsel in capital cases is a denial of due process).

⁶⁰ The case cited by the Court as having made the Takings Clause of the Fifth Amendment applicable to the states is *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897). See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994). *Contra* Bradley C. Karkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 829–31 (2006) (disputing that proposition).

⁶¹ For an unforgiving accounting of the Court’s cases on this structural question, see generally Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003).

⁶² See Sterk, *Demise*, *supra* note 58, at 255–70; see also Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199, 200 (2006).

⁶³ I have elsewhere argued that this jurisdictional fragmentation is a tragedy of the anticommons, at least to the extent that biodiversity is considered a precious resource. See Jamison Colburn, *Bioregional Conservation May Mean Taking Habitat*, 37 ENVTL. L. 249, 256–57 (2007).

⁶⁴ The relative acceptance of slavery in the so-called “free” states is a matter of enduring historical controversy. As of the beginning of the nineteenth century, slavery had been or was being outlawed either by constitutional provision, precedent, or statute in eleven northern states. See LEON F. LITWACK, *NORTH OF SLAVERY* 3 n.1 (1961). Thus, the posit in text is structural, not empirical, in nature. The original Constitution put slavery on the same plane of immunity as the states’ equal suffrage in the Senate: outside the scope of constitutional “Amendment” under Article V. U.S. CONST. art. V (prohibiting amendments affecting “the first and fourth Clauses in

transformation it catalyzed.⁶⁵ Today, federalism's protection of state-based moral diversity in general flirts with obsolescence.⁶⁶ At best, it possesses no more than a tiny fraction of its original salience in a world of global media and information markets, global retail and supply chains, global environmental disruption and degradation, and the saturating prevalence of American popular culture.⁶⁷ Finding a genuine and productive narrative for our federalism—an animating theory of subnational autonomy when so much authority has been absorbed by the federal government—is a necessity for any usable model of constitutional property.⁶⁸ Yet, when so much problem-solving innovation is the product of collaboration among public, private, and hybrid actors, neatly confining federalism to the struggles of the past makes about as much sense as abandoning our historical traditions altogether. Call this our ambivalent progression toward what the rest of the world knows as “subsidiarity.”⁶⁹

the Ninth Section of the first Article” “prior to the Year One thousand eight hundred and eight”).

⁶⁵ For a developmental account of popular sovereignty in the antebellum period, showing how seriously citizens took their state's sovereignty, see generally CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008).

⁶⁶ See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 818 (1992); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 393–94 (1998). This is not to say that our moral differences have become spatially homogenous, but rather that the relevant gradients have little to do with state lines.

⁶⁷ For a variety of perspectives on this erosion of difference, see Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 75–85 (1996) (discussing the spread of transnational norms); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1557–58 (1994) (listing “factors [that] helped make national identity more important than state identity”). See also generally Gardner, *supra* note 66; Schapiro, *supra* note 66.

⁶⁸ There are, of course, exemplary theories of subnational sovereignty in circulation today. See, e.g., ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* ix (2008) (arguing “that federalism [can] be reinvented as being about empowering government at all levels”); DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* xi (1995) (arguing that “democracy can only be adequately entrenched if democratic public law is enacted in the affairs of nation-states and in the wider global order . . . and if a division of powers and competence is recognized at different levels of political interaction and interconnectedness”); THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995) (discussing major issues confronting minority cultures such as group rights, self-determination, secession, and immigration); JAMES M. TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 1 (1995) (exploring whether cultural diversity can be accommodated by a modern constitution). The problem is that none of these approaches seems markedly more attractive to the citizens or officials of our particular federation.

⁶⁹ Most federal, confederal, and consociational constitutions of the modern era have been predicated on notions of subsidiarity, i.e., presumptions that the smallest collective entity or

Finally, our many constitutional protections of property seem increasingly beset by their own abundance. State constitutionalism took a discernibly positivistic turn in the 1970s and now routinely serves as a source of individual rights denied protection by the federal courts.⁷⁰ Property rights have been no exception.⁷¹ Generally, as federal court plaintiffs lose their property rights cases, state law and state courts are their next recourse.⁷² State constitutional norms protecting property raise a troubling question, though. If property is so abundantly protected by both federal and state constitutions, yet state and local law are the dominant source of property's existence and content, how is it that, not just one, but *two or three* sovereigns, are supposed to resolve the conflicts that arise in modern, interconnected societies? *This* is the question lurking within any adjudication of property in constitutional litigation today.⁷³ It pushes judges, whatever their jurisdiction

jurisdiction that is able ought to be in charge of the collective governance demanded. See LESLIE FRIEDMAN GOLDSTEIN, *CONSTITUTING FEDERAL SOVEREIGNTY* (2001) (chronicling numerous cases of local or state resistance to assertions of authority by national governments or supranational organizations); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338–39 (1994). Within our own union, a blend of statutes and state constitutional provisions have steadily allocated so much jurisdiction over property in land to municipal, county, and regional authorities, see *supra* note 56, that the system is perhaps best explained as functionally subsidiarist—to the extent it is not governed by (federal) constitutional property law. This form of subsidiarity, however, is mostly neutral between different theories of justice and is perhaps best justified itself as a means of managing information costs. Cf. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) (defending subsidiarity as a way of coping with dispersed information about individual preferences); see *infra* notes 274–307 and accompanying text.

⁷⁰ See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498–504 (1977); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 354–55 (1984). On the overall evolution of this positivistic turn, see generally JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS IN A FEDERAL SYSTEM* (2005).

⁷¹ See ELY, *supra* note 30, at 157–58; see also Mark Caira, *Developments State Constitutional Takings Jurisprudence*, 23 RUTGERS L.J. 792 (1992).

⁷² See, e.g., Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings"*, 46 S.C. L. REV. 613, 615 (1995). *Kelo's* outcome by itself ignited a firestorm of state constitutional and legislative activity expanding the legal protections against so-called eminent domain abuse. See Hannah Jacobs Wiseman, *Partial Regulatory Takings: Stifling Community Participation Under the Guise of Kelo Reform*, 117 YALE L.J. POCKET PART 60 (2007), <http://thepocketpart.org/2007/09/16/wiseman.html> (collecting state legislative and state constitutional "property rights" initiatives since 2005). For a more detailed understanding of the impetus for and consequences of takings legislation in a few states, see JOHN D. ECHEVERRIA & THEKLA HANSEN-YOUNG, *THE TRACK RECORD ON TAKINGS LEGISLATION: LESSONS FROM DEMOCRACY'S LABORATORIES* (2008), available at <http://www.law.georgetown.edu/gelpi/TrackRecord.pdf>.

⁷³ This is as much a question about sovereignty as about property. Cf. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 257 (2005) (arguing that a separate-sovereigns theory of federalism traps its agents into false choices of having to

or disposition, to mind the scope of constitutional protections of property without ever being foregrounded as the core issue.

Sections B and C ignore the noise that has engulfed these three dilemmas of constitutional property in order to begin from as clear a picture as possible of what is at stake, and to sketch the doctrinal and jurisdictional landscape of constitutional property that has been mapped over the last three decades.

B. Creating Constitutional Property: A Snapshot of the Present

Distinguishing confiscation from regulation and taxation has grown harder the more property has seemed like an aggregate of highly contingent rights and privileges—the proverbial “bundle of sticks.”⁷⁴ But the asymmetry of our Constitution’s property protections almost certainly worsened matters. For, long before the Court had found that the Fourteenth Amendment meant to “incorporate” the bulk of the Bill of Rights’ guarantees against the states,⁷⁵ it had confronted state actions rearranging the rights and owners of property and found many of them inconsistent with “due process of law.”⁷⁶ It

allocate power to one sovereign or the other and that a more flexible interpretation of authority is needed). And it has been addressed by previous generations. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (“Although this court has refrained from any attempt to define the limits of that power, . . . it has distinctly recognized the authority of a State to enact quarantine laws and ‘health laws of every description;’ indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”).

⁷⁴ Credit is usually given to the legal philosopher Wesley Hohfeld for the famous bundle of sticks metaphor. As a metaphor for property, though, it had its beginnings long before him and was well on its way to dominating the legal imagination during his (tragically short) career. *See ALEXANDER, supra* note 30, at 319–23.

⁷⁵ Incorporation of the Bill of Rights through the Fourteenth Amendment’s Due Process Clause was explained most famously by Justice Cardozo as the uptake of those rights “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937); *see also Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting). Incorporation itself has had a profoundly homogenizing effect on our legal system and the nation. *See WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN* 237–58 (1995). Whatever else “ordered liberty” encompasses, however, it cannot—at least *prima facie*—encompass constitutional *property*.

⁷⁶ *See, e.g., Norwood v. Baker*, 172 U.S. 269, 277, 296 (1898) (holding that Fourteenth Amendment’s Due Process Clause and precedent require that condemnation proceedings adjudicate the specific conditions of an owner’s property in setting the compensation owed); *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 241 (1897) (holding that Fourteenth Amendment’s Due Process Clause requires that a state condemning a person’s property pay them “just compensation”); *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896) (holding that Fourteenth Amendment’s Due Process Clause invalidated the state’s effort to take property from owner just to transfer it to another owner); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S.

had, in many cases, held that due process of law required states pay “just compensation” for any private property taken for public use.⁷⁷ It had even held that due process of law meant private property could only be taken for genuinely *public* use, although a special measure of deference to legislative judgments was given in that context.⁷⁸ Indeed, these precedents became the most prominent formation of “substantive due process,” a doctrine that has been in turmoil all its life.⁷⁹ What the Court did *not* do is (1) distinguish constitutional property from constitutional *liberty* for purposes of incorporation, or (2) impede the rise of preemptive zoning and other municipal land use controls on common law real property.⁸⁰

The irregular path that eventually collapsed the Fifth Amendment guarantees into the much broader doctrinal web extending out from the Fourteenth Amendment is well-worn ground.⁸¹ But if we are trying to update our models of ownership for the world today, we should be clear why those paths forked and then later merged as they did. The record shows that our conception of property has been con-

112, 158 (1896) (noting that Fourteenth Amendment’s Due Process Clause required that property being condemned and taken must be taken for “public use”); *cf.* *Wight v. Davidson*, 181 U.S. 371, 383–84 (1901) (refusing to apply *Norwood v. Baker* in a takings case against the United States and questioning its relevance).

⁷⁷ See, e.g., *Chi., Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 456, 458 (1890); *Chi., Burlington & Quincy R.R.*, 166 U.S. 241; *Norwood*, 172 U.S. at 283.

⁷⁸ See, e.g., *Bradley*, 164 U.S. at 161; *Mo. Pac. Ry.*, 164 U.S. at 417.

⁷⁹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564–67, 578 (2003) (overruling the Court’s less-than-two-decade-old decision that states could criminalize sodomy); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (finding a “not unqualified” right to an abortion and striking down a state criminal statute); *Lochner v. New York*, 198 U.S. 45, 53 (1905) (invalidating a state labor law because it conflicted with “[t]he general right to make a contract” guaranteed by due process), *abrogated* by *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1936). Justice Blackmun’s opinion in *Roe* opened with a quotation from Holmes’s “now-vindicated dissent” in *Lochner*, without a trace of irony. See *Roe*, 410 U.S. at 117.

⁸⁰ See, e.g., ELY, *supra* note 30, at 119–21, 160–64; FISCHEL, *supra* note 38, at 355–68.

⁸¹ See, e.g., RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* 24–29, 280–81 (1981); Brauneis, *supra* note 14, at 681; Karkkainen, *supra* note 60 (arguing that *Penn Central* was the first Supreme Court case to adjudicate an actual takings claim against a state which had not sought to condemn the land at issue and that, despite prior due process precedents bearing striking similarities to modern takings scrutiny, *Penn Central* wrongly assumed that the Takings Clause had already been “incorporated” against the states through the Fourteenth Amendment). Several justices have acknowledged (when not writing for a majority) that the Court has meandered confusingly on the incorporation/due process boundary. Justice Stevens’s dissent in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), credited the initial confusion to *Pennsylvania Coal*, see *Dolan*, 512 U.S. at 405–07 (Stevens, J., dissenting) (“The so-called ‘regulatory takings’ doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified.”), as did Chief Justice Rehnquist’s dissent in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting).

torted by the institutions of our judicial power and their interpretations of our federalism. What had been fuzzy boundaries separating eminent domain, regulation, and taxation became, in the hands of modern courts, utterly imperceptible and seemingly meaningless.

In 1978, in *Penn Central Transportation Co. v. City of New York*,⁸² the Court began from the conclusion that the Fifth Amendment's guarantees had been "made applicable" against the states through the Fourteenth Amendment.⁸³ The Court then proceeded to collapse two nominally different legal doctrines into a single, multi-factor test.⁸⁴ *Penn Central* seemed to assume that the many substantive due process precedents it invoked⁸⁵ were actually incorporation precedents.⁸⁶ Technically, of course, that is precisely what they were *not*.⁸⁷ And although the two bodies of doctrine approached each other in substance

⁸² *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁸³ *Id.* at 122. Interestingly, the *Penn Central* Court never used the term "incorporation."

⁸⁴ See *infra* notes 93–96 and accompanying text.

⁸⁵ The majority opinion in *Penn Central* cited *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944), *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and numerous other substantive due process precedents while at the same time citing over a dozen Fifth Amendment Takings Clause precedents. See *Penn Cent.*, 438 U.S. at 124–25.

⁸⁶ Besides abrogating *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), incorporation of the Fifth Amendment finally united substantive due process precedents with Takings Clause precedents. See CORTNER, *supra* note 81, at 24–29. On at least one occasion prior to *Penn Central*, the Justices seemed to recognize a need to tread lightly around *Chicago, Burlington & Quincy Railroad* and its successors as "incorporation" precedents. See TINSLEY E. YARBOROUGH, JOHN MARSHALL HARLAN: THE GREAT DISSENTER OF THE WARREN COURT 281 (1992) (describing Harlan's influence on Justice Douglas's opinion in *Griggs v. Allegheny County*, 369 U.S. 84 (1962), and his efforts to minimize what was said about the scope of the Fourteenth Amendment in *Griggs*).

⁸⁷ As late nineteenth century takings cases made explicit, in declaring state actions invalid for having taken property without paying just compensation, the Court held that this was a wrong because it was a "deprivation" of "property" without "due process of law"—not that "just compensation" for private property taken for public use was somehow "implicit in the concept of ordered liberty." See *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896) ("The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 594 (1896) ("[J]ustice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."); *Chi., Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 456–57 (1890) (holding that a rate regulation capping railroad rates without a hearing to challenge them "deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice").

throughout the twentieth century, they were always very different jurisdictionally⁸⁸—until 1978. Opinions still vary on the degrees of deference the federal courts paid to states and municipalities as compared to the deference they paid to agents of the federal government before *Penn Central*.⁸⁹ Since 1978, though, there has been little if any explicit or deliberate differentiation between the authorities under challenge or the precise constitutional rights being asserted.⁹⁰ Even in cases testing the reasons and “public use” behind true condemnations, the courts paid less and less attention to the precise authority or constitutional clause(s) at issue.⁹¹

Indeed, the Court’s account of constitutional property in *Penn Central* has become a gaudy monument, a foreign yet familiar architectural crossbreed signifying that divided sovereignty makes no difference to constitutional property. Faced with a local ordinance empowering a city commission to designate property as a landmark and thereafter subject any changes to its façade to protective review,⁹² the Court recounted and purported to balance a variety of considerations that had appeared in scores of prior due process and takings

⁸⁸ To the extent eminent domain proceedings were the exclusive venue for measuring and awarding just compensation, as opposed to the provision of other equitable relief from official action, takings traditionally arose in a unique cause of action. *Cf.* *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885) (denying due process challenge to a New Hampshire mill act on the grounds that it was “not a right to take and use the land of the [owner] against his will, but [rather] . . . a provision by law, for regulating the rights of [owners] on one and the same stream”) (citation omitted); Karkkainen, *supra* note 60, at 862–74 (drawing several parallels between twentieth century Fifth and Fourteenth Amendment property cases prior to *Penn Central* but arguing they remained separate and distinct).

⁸⁹ *See* Sterk, *Federalist Dimension*, *supra* note 58, at 218–37.

⁹⁰ *See, e.g.*, *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1988). Note, however, that the only two instances in which the Court has purported to apply *Penn Central* and find for an owner have both been cases against the United States. *See* *Hodel v. Irving*, 481 U.S. 704, 714–718 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 174–80 (1979).

⁹¹ *See, e.g.*, *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239 (1982) (finding that the statute in question satisfied “the ‘public use’ requirement of the Fifth and Fourteenth Amendments”) (emphasis added); *Richardson v. City of Honolulu*, 124 F.3d 1150, 1156–66 (9th Cir. 1997) (analyzing a condemnation suit under the Public Use, Just Compensation, Due Process, Equal Protection, and Takings Clauses). State high courts became similarly deferential and uninterested in the variety of condemning authorities and justifications for condemnation. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 511, 520–21 (2005); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding a condemnation by an economic development corporation and devoting most of a brief opinion to extolling deference to the legislature).

⁹² In contextualizing the complaint, the Court carefully detailed the sudden prevalence of architectural preservation laws nationally. *See* *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107–09 (“Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.”).

precedents.⁹³ The Court's analysis has since been confined by two categorical rules⁹⁴ and abbreviated into three now-familiar "factors": (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with *reasonable*⁹⁵ investment-backed expectations; and (3) the "character" of the governmental regulation.⁹⁶ Everything else in the opinion has either been reformed or ignored. Most obviously, *Penn Central*'s loose references to the means/ends rationality of New York City's landmarking ordinance (implying that the social utilities involved were somehow relevant to assessing whether the owner's property had been confiscated) have since been repurposed to due process, a move that occurred only after they shaped a generation of takings precedents.⁹⁷ What *Penn Central* has come to embody, notwithstanding (or perhaps because of) such confusion, is an incorrigible antinomy opposing property to local, state, and federal action regardless of scale or authority.⁹⁸ The more

⁹³ See *id.* at 122–25.

⁹⁴ Two "categorical" rules usually broken out of the *Penn Central* default are those governmental actions requiring that an owner suffer "permanent physical occupation," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), and those governmental actions that deprive an owner of "all economically beneficial or productive use" of the property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). "Exactions," by which a governmental agent withholds a required permission of some kind on condition the owner dedicate some specified right or title, are a third type of governmental action the Court has placed outside *Penn Central*'s framework. See *Dolan v. City of Tigard*, 512 U.S. 374, 388–89 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836–37 (1987). How any of these categorical rules—but especially how *Nollan* and *Dolan*—relate to the theory behind *Penn Central* has remained mysterious. See *infra* notes 147–95 and accompanying text.

⁹⁵ That investment-backed expectations must still be *reasonable* has been made clear on numerous occasions. Cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–06 (1984) (rejecting a takings claim brought against disclosure of commercial data by finding no "reasonable expectation" that data would be kept confidential under statute providing for its release); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (observing that "a mere unilateral expectation or an abstract need is not a property interest entitled to protection").

⁹⁶ See *Penn Cent.*, 438 U.S. at 124. The Court has tweaked and enhanced different parts of the test over time. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005) (noting that the "character" of governmental action depends on whether it amounts to a physical intrusion or merely affects some property interest). Thus, what the "character" factor amounts to remains quite murky. The Court relied on it to create the per se rule for physical invasions in *Loretto*, see 458 U.S. at 434–35, and emphasized it in *Hodel v. Irving*, 481 U.S. 704 (1987), to invalidate the parts of the Indian Land Consolidation Act that prohibited the descent or devise of small fractional interests in Indian land allotments as an *extraordinary* governmental action, *id.* at 716–18. But it seems that the overall thrust and point of this factor has yet to be fully developed. See *infra* note 308 and accompanying text.

⁹⁷ See *Lingle*, 544 U.S. at 542, 548 (holding that whether a law serves its ends and whether those ends are sufficiently important to justify the governmental action are doctrinal tests for the Due Process Clause and not the Takings Clause).

⁹⁸ See ALEXANDER, *supra* note 32, at 70–73; FREYFOGLE, ON PRIVATE PROPERTY, *supra*

this antinomy surfaces, though, the less coherent it seems. For if property is synonymous with reasonable expectations, and reasonable expectations are some function of what local law secures to owners, expectations should be little more than a trailing indicator of the governing law in the jurisdiction in which property is located.⁹⁹

Thus, as many times as *Penn Central*'s test has been deployed, related to other constitutional norms, and refined, it has mostly been a verbose disguise for intuition: has the challenged regulation gone past some (ineffable) threshold of burden upon an owner—the quality or quantity of burden that “in all fairness and justice[] should be borne by the public as a whole”?¹⁰⁰ Now, this was almost certainly the same reasoning that gave us *Pennsylvania Coal*—a theory picturing constitutional property in the following (equally familiar) terms:

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. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.¹⁰¹

Constitutionally, Holmes's reasoning is little more than so many “intratextual”¹⁰² inferences and, with provisos like “in most if not in

note 27, at 72–79. See generally JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000).

⁹⁹ Cf. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (“[I]nterference with investment-backed expectations is one of a number of factors that a court must examine . . . [and] the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.”). The Court's inconsistent approach to individual expectations, indeed, might be one of the chief sources of trouble in its regulatory takings doctrines. See Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 106–17 (1995); *infra* notes 239–42 and accompanying text.

¹⁰⁰ *Penn Cent.*, 438 U.S. at 123–24 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). *Armstrong*'s fairness threshold is so often mentioned that it is one of the takings principles “most readily acknowledged by the courts.” *Heller & Krier*, *supra* note 35, at 1000.

¹⁰¹ *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

¹⁰² See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). Amar never raised *Pennsylvania Coal* as an example of intratextualism, an approach to the Constitution he says “takes seriously the document as a whole rather than as a jumbled grab bag of assorted

all cases,” our expectations should probably start low. But it is worth noting how the *Penn Central* Court held *Pennsylvania Coal* up as a “leading” precedent establishing that even government action which “substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”¹⁰³ Well before *Penn Central*, Holmes’s opinion did seem to stand for just this proposition.¹⁰⁴ Property in this picture is just whatever cannot, in fairness and justice, be taken without compensation. The first problem with such reasoning is that it constricts, or at least purports to constrict, the Constitution’s possibilities for property down to an eroded nub of a single judicial balancing test. It forces property to depend most directly of all on random factors like the zeal and skill of the advocates and judges involved. One of the most striking results of this austerity has been erratic drift over time, wherein the Court sometimes extends the Constitution’s protections to property forms other than land,¹⁰⁵ sometimes denies them,¹⁰⁶ and often leaves the pro-

clauses.” *Id.* at 795. Nor did Professor Black raise it in his seminal *Structure and Relationship in Constitutional Law*. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). But the Court certainly takes this approach in *Penn Central*, noting at the outset that “[e]xercises of the taxing power are one obvious example” of the Constitution’s implicit assumption that “government may execute laws or programs that adversely affect recognized economic values.” *Penn Cent.*, 438 U.S. at 124.

¹⁰³ *Id.* at 127. As often as it has been debunked by commentators, the Court is still convinced of *Pennsylvania Coal*’s novelty and distinction on this point among takings precedents. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (“[U]ntil the Court’s watershed decision in *Pennsylvania Coal* . . . it was generally thought that the Takings Clause reached *only* a direct appropriation of property, or the functional equivalent of a practical ouster of [the owner’s] possession.” (internal citations and quotation marks omitted)).

¹⁰⁴ See generally Sax, *supra* note 34. Professor Brauneis maintains that *Pennsylvania Coal* has dominated the American legal imagination of constitutional property since it was written because it fit so neatly with the procedural and remedial conventions of our legal system overall. For example, Holmes’s account of burdensome legislation as a taking has often been invoked to support a tort remedy as the preferred form of redress. See Brauneis, *supra* note 14, at 687. But cf. *id.* at 688 (arguing that *Pennsylvania Coal*’s use as support for damages remedies depends on “two anachronisms”).

¹⁰⁵ See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–06 (1984) (using *Penn Central* to analyze confiscation of trade secrets); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980) (using *Penn Central* to analyze the interest earned on private funds temporarily held by a government agency).

¹⁰⁶ Patent law routinely refuses any constitutional protection for use rights at all, i.e., any application of a burden threshold test to rearrangements of patent owners’ rights (other than a “right to exclude”). See, e.g., ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY* 48 (3d ed. 2002) (“Unlike other forms of property . . . a patent includes *only* the right to exclude *and nothing else*. Patent rights are wholly *negative* rights—rights to stop others from use—not positive rights to use the invention.”).

tections to be asserted loudly but vainly by litigants, officials, and dissenting judges alike.¹⁰⁷

Secondly, this reasoning's power is at least as much a product of extrinsic factors as of its own rational force. *Pennsylvania Coal* was authored by a famously pragmatic judge who was widely known to be uncomfortable with the very notion of substantive due process—the idea that “liberty” or “property” enjoys constitutional protections not explicitly named in the Constitution's text.¹⁰⁸ Even the pragmatic Holmes, the story goes, believed that property rights as so many reasonable expectations should have *some* wider refuge under the Constitution than mere procedure—at a time when application of the Bill of Rights to the states had barely begun.¹⁰⁹

The methodological trouble with this intuitionistic, intratextualist approach, however, is that neither Holmes, Brennan, nor any other judicial hero has ever been able to synthesize the scores of precedents we have accumulated to express the burden threshold qualitatively, quantitatively, or with any other solidity worthy of the name “law.” The institutional structure of our property in land precludes exactly that developmental progress. As long as property is just a commodity, any burden on a present owner can always be mitigated with some form of relief (which owners themselves can be obliged to seek).¹¹⁰ Thus, a “magnitude of the burden” threshold keyed to the “values

¹⁰⁷ In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the majority defended its holding that regulations rendering land economically worthless were virtually per se takings (against a dissent that pointed out how absurd this would be if applied to personal property) by limiting its holding to property in land. See *id.* at 1027–28. The Court has usually denied relief for the taking or deprivation of personal property even when government actions have rendered it economically worthless. See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979) (eagle feathers made unsellable due to federal statute); *Everard's Breweries v. Day*, 265 U.S. 545 (1924) (alcoholic beverages banned by the Eighteenth Amendment); *Jacob Ruppert v. Caffey*, 251 U.S. 264 (1920) (sale of alcohol banned during World War I). Many have questioned why this (feudal) distinction between real and personal property ought to matter today. See, e.g., Peñalver, *supra* note 50.

¹⁰⁸ See William Michael Treanor, *Jam For Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 829–30 (1998). Holmes's modern successors have taken their cues from that skepticism of “substantive” due process. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 271–72 (1994) (“[T]he Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.”); *Graham v. Connor*, 490 U.S. 386, 394–95 (1989) (holding that the Fourth Amendment's more “specific” norms prohibiting unreasonable uses of force ought to govern excessive force claims, not those of “substantive due process”).

¹⁰⁹ See Brauneis, *supra* note 14, at 670 n.263.

¹¹⁰ Variances, special exceptions, and other such tools in traditional land use law are the paradigmatic version of this paradox. See, e.g., *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350 (1986) (“The local agencies charged with administering regulations gov-

incident to property” is arguably one that can *never* be settled except through timely, authoritative application of the law prior to and apart from the testing of confiscation.¹¹¹ To ensure accuracy, these two steps should come in short order because governing law is constantly changing. The mere fact that an allocation of ownership rights is disturbed—e.g., that some owner’s preferred use is prohibited—can hardly prefigure an injury tantamount to common law ejectment, i.e., a *complete* reallocation of rights.¹¹² Thus, if all property amounts to is an ephemeral allocation of rights and the Constitution safeguards it from confiscation, then reallocations necessarily become actionable at some point that is always to be determined. But someone must judge the degree of unfairness that has *just* resulted and the reasons the judge gives for that judgment need not be particularly wide or deep.¹¹³ An action is either too burdensome or it is not; it is never an insufficiently justified burden. Consequently, precedents do not aggregate into rules, due in good part to the *jurisdictional density* of the underlying right(s).¹¹⁴

Ultimately, then, the model of property in *Penn Central* and *Pennsylvania Coal* is a model of provisional allocation of rights where reallocations can be both presumptively valid and presumptively suspect. This model of property may or may not endure as we move

erning property development are singularly flexible institutions; what they take with the one hand they may give back with the other.”).

¹¹¹ Even laws explicitly foreclosing any possibility of burden-mitigation are complicated by the possibility of subsequent, amendatory laws. *Cf. Lucas*, 505 U.S. 1003, 1041 (1992) (Blackmun, J., dissenting) (“The Court admits that the 1990 amendments to the Beachfront Management Act allowing special permits preclude Lucas from asserting that his property has been permanently taken.”).

¹¹² In the rare challenges to acts of eminent domain, the Court has long made the federal question of the public use behind the condemnation into a similarly deferential affair. *See Clark v. Nash*, 198 U.S. 361, 367–69 (1905) (deferring to state court’s assessment of public use because of the importance of local facts and circumstances); *see also Kelo v. City of New London*, 545 U.S. 469, 492–93 (2005) (Kennedy, J., concurring) (same).

¹¹³ Reasons are “narrow” rather than “wide” when they pertain to the action at hand and few (if any) others. Reasons are “shallow” rather than “deep” when they avoid foundational issues and reach for minimally coherent grounds of agreement. *See* CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 10–14 (1999); *see also* CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 121–47 (1996); *cf. ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY* 304–32 (1988) (arguing that practical moral reasoning tends inherently toward casuistry).

¹¹⁴ *See supra* notes 62–63 and accompanying text. Land use treatises as a rule avoid offering any threshold for exactly this reason. *See, e.g., JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 604 (2d ed. 2007) (cases provide “little guidance” on which burdens are too burdensome).

deeper into the ecological age.¹¹⁵ This much is sure though: these dueling presumptions are compounding property's practical challenges as our legal system struggles to identify *reasonable* owner expectations and government's frustration thereof. Before coming to that struggle, though, Section C shows what this legal-procedural structure of property has meant to our Constitution's asymmetrical property guarantees and how the two have converged in federal jurisdiction doctrine.

C. *Loose Ends and Dead Ends: The Wages of Constitutional Property*

The burden-fairness approach never engages the obvious questions about property or even suggests how they ought to be engaged. In *Penn Central*, New York City had offered the railroad "transferable development-rights" ("TDRs") in exchange for the air rights the landmark preservation ordinance curbed.¹¹⁶ The New York courts entered a finding that these TDRs were "valuable," if not necessarily enough to balance out the owner's whole loss.¹¹⁷ Yet the precise relevance of such TDRs—whether they defeat the "taking" or simply count toward the "just compensation" required—is *still* unsettled as a matter of federal constitutional law, three decades after *Penn Central*.¹¹⁸ By 2002, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,¹¹⁹ the Supreme Court had held that most forms of burden mitigation must be sought and denied before an owner's injury is truly realized.¹²⁰ Even challenges to a complete ban

¹¹⁵ Compare FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 27, at xiv–xv, xxxi (arguing property as an inherently provisional allocation of possessory and use rights is the only model viable today), with Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993) (arguing property as relatively stable bundle of rights that stabilizes ownership of nonfungible resources like land is a critical support mechanism for democratic constitutionalism). See *infra* notes 207–22 and accompanying text.

¹¹⁶ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1977).

¹¹⁷ *Id.*

¹¹⁸ In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), in addressing a takings claim in which the government argued that the availability of TDRs which had not yet been liquidated by the plaintiff precluded her takings claim as not yet "ripe," the Court held that the TDRs did not render a takings claim unfit for adjudication, at least not by any of the arguments made in *Suitum*. *Id.* at 739–44. Only a separate concurrence by Justices Scalia, O'Connor, and Thomas, however, went so far as to deny the TDRs had *any* relevance to the finding of a taking. See *id.* at 745. If the rest of the Court held this position as well, it is unclear what prompted the separate concurrence.

¹¹⁹ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

¹²⁰ See, e.g., *id.* at 341–42 (denying relief in a challenge brought by several landowners against a "temporary moratorium" on building approvals based on the possibility that approvals would one day be forthcoming); *Pennell v. City of San Jose*, 485 U.S. 1, 9–10 (1988) (refusing to adjudicate rent control ordinance as a taking because record included no actual instance in

on the “improvement” of land lasting for years should be denied judicial relief under this logic as nothing more than premature attacks on governmental purposes that lack necessary clarity and finality.¹²¹ If losses are to be measured against “whole” parcels, the Court reasons, durational loose ends should defeat jurisdiction just as effectively as so many other loose ends.¹²² Yet this approach to constitutional property eventually provoked so many challenges that it erected a virtual stockade of jurisdictional rulings—*Agins*,¹²³ *San Diego Gas & Electric Co.*,¹²⁴ *Williamson County*,¹²⁵ and *MacDonald, Sommer & Frates*¹²⁶ among others. And the harder it became to perfect a federal takings claim without first litigating underlying state law issues in state fora of

which rent ceiling was reduced); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190 (1985) (“As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property.”); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (“There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance . . . or a waiver [Therefore] the taking issue . . . is not ripe for judicial resolution.”); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding that takings claim was not ripe for review because the plaintiffs had not “submitted a plan for development of their property as the [challenged] ordinances permit”). Interestingly, this had been clear in condemnation cases predating *Pennsylvania Coal*. See, e.g., *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251, 256–57 (1917).

¹²¹ The *Tahoe-Sierra* majority reasoned that the plaintiffs’ “facial challenge” to the temporary (thirty-two month) moratorium lacked sufficient merit because no plaintiff’s property had crossed the burden threshold, at least not according to any evidence in the record. *Tahoe-Sierra*, 535 U.S. at 320–21, 331–32, 341–42.

¹²² *Id.* at 331–32. Durational loose ends were at issue in *Tahoe-Sierra*. But other kinds of loose ends have served to strip jurisdiction, too. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court had to remand the case to state court for actual durational calculations after holding that a “temporary taking” was actionable, at least in theory. *Id.* at 321–22. In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), the Court affirmed a demurrer in state court being appealed because the owner/plaintiff had only “submitted one subdivision proposal” and had yet to receive a “final, definitive position” from the local authority on the land in question, leaving unresolved whether property had been taken. *Id.* at 348, 351–53. And in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), the Court dismissed for lack of jurisdiction by finding that the state courts had only refused one form of relief (money damages through an inverse condemnation action), but had left open the possibility of other forms of relief. *Id.* at 633. Of course, not just any loose end will suffice. The Court has ignored remaining mitigation options where an owner’s inverse condemnation action in state court serves as the mode of appeal and the record reflects the futility of that owner’s further mitigation efforts. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 619–26 (2001) (inferring finality from the authority’s reasons for rejecting the permit application to fill wetlands).

¹²³ *Agins*, 447 U.S. at 258.

¹²⁴ *San Diego Gas & Elec. Co.*, 450 U.S. at 625–26.

¹²⁵ *Williamson County*, 473 at 175.

¹²⁶ *MacDonald*, 477 U.S. at 343–44.

various kinds, the less likely plaintiffs were to bring any of their claims to federal court.¹²⁷

Did these rulings narrow the scope of the constitutional guarantee by narrowing the paths to federal court? That question still dominates our attention, much to our collective detriment in my view.¹²⁸ Because rather than ever tracking the practical consequences of its jurisdictional allocations or the ways in which they drive doctrine and remedies,¹²⁹ the Court typically just grounds its denials of a federal forum in its most familiar “ideology”¹³⁰: the presumed parity of state and federal courts for the litigation of federal rights.¹³¹ And, of course, if relative burdens on present owners cannot be gauged without first applying all the governing law to the property allegedly taken or deprived, it follows necessarily that there is no measurable “injury” without a complete application of that law by an appropriate authority.¹³² Yet, once claims are litigated in state court, they may not come

¹²⁷ See generally Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995). Professor Sterk observes that this has put the vast majority of constitutional property claims before state high courts, exactly where he argues they should be. See Sterk, *Demise*, *supra* note 58, at 287–92. One cannot be certain of that proposition, however, without first having a much better understanding of how state courts actually handle federal rights—an understanding that is not available in the present state of our knowledge. See CHEMERINSKY, *supra* note 68, at 177–224.

¹²⁸ Cf. CHEMERINSKY, *supra* note 68, at 205 (“[W]hen there is empirical uncertainty, analysis turns to presumptions. Presumptions offer a basis for action in a world of incomplete information and of empirical questions for which there are not empirical answers. Both sides of the parity debate have attempted to defend their positions by creating and invoking presumptions.”).

¹²⁹ See generally Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

¹³⁰ Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1164–88 (1988).

¹³¹ Burt Neuborne’s seminal article, *The Myth of Parity*, has inspired attacks on this ideology since before *Penn Central*. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

¹³² The legal doctrine itself, in other words, is making the constitutional protections self-disabling because, as compared to other kinds of legal authority, judicial power is so obviously episodic, costly to invoke, and narrow in temporal scope. And with the possible—if inexplicable—exception of federal removal jurisdiction, the Court has diligently defended against end runs around all its jurisdictional blocking. See *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 160, 174 (1997) (holding that a federal district court had jurisdiction to review a state commission’s administrative decisions, which allegedly constituted a taking). In *City of Chicago*, the Court sustained federal jurisdiction over a removal action that had begun in state court as a petition for record review of a city’s denial of demolition permits. The City had denied ICS’s demolition permits under its landmark-preservation ordinance and ICS’s state court action was challenging the lawfulness of that denial. See *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 985 (7th Cir. 1996), *rev’d*, 522 U.S. 156 (1997). The only federal claims in the

to federal court as such—the claims are confined to the certiorari jurisdiction of the Supreme Court.¹³³

The sharper paradox, however, is that these jurisdictional struggles have all coincided with an improbable revival of substantive due process.¹³⁴ Today, in a growing variety of contexts, the federal courts are reinvigorating due process, often at the behest of owners,¹³⁵ and often with Justice Kennedy in the lead.¹³⁶ For example, according to Justice Kennedy (and at least four other colleagues on occasion), ret-

litigation were constitutional property claims. When the City removed the case to federal court, ICS resisted with arguments on abstention, discretionary refusals of supplemental jurisdiction under 28 U.S.C. § 1367, and ripeness. The Supreme Court never addressed the ripeness argument, preferring instead to focus on and reject the abstention arguments. It was only on remand that the Seventh Circuit, going straight to the merits of the appeal, affirmed the district court's summary judgment for the City, rejecting every ICS claim as either meritless or premature. *See International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998).

¹³³ *See, e.g., San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 347 (2005) (holding that the full faith and credit statute prevented federal courts from hearing federal constitutional takings claims already litigated in state courts).

¹³⁴ *See, e.g., Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (Powell, J., joined by Brennan, Marshall, Blackmun, JJ., announcing judgment) (invalidating zoning ordinance as unduly intrusive regulation of family and a denial of due process); *id.* at 513, 513–21 (Stevens, J., concurring in the judgment) (finding the local law to be a “taking of property without due process and without just compensation”).

¹³⁵ *See* Michael J. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 Nw. U. L. Rev. 417 (1976); Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917 (1999). I say “improbable” because the Court still routinely expresses skepticism (of various kinds) toward substantive due process claims. *See, e.g., Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (rejecting substantive due process challenge to zoning ordinance limiting number of non-family occupants in a dwelling).

¹³⁶ For example, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), when confronted with a retroactive liability-shifting statute, the Coal Industry Retiree Health Benefit Act, four members of the Court (Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas) voted to invalidate the Act as applied to Eastern Enterprises because it was a “taking” without compensation. *Id.* at 504, 538. Only Justice Kennedy found the liability shifting provision unconstitutional as a denial of due process, leading him to concur in the judgment only. *See id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part). Kennedy's role in substantive due process's privacy cases is well known. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1219–32 (1996). His separate opinion in *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring), prominently invoked his concurrence in *Eastern Enterprises* alongside *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), two Equal Protection Clause cases invalidating the challenged laws under rational basis review, to argue that the “public use” element of the Takings Clause ought to focus on perversions of the political process. *Kelo*, 545 U.S. at 491–93. Justice Kennedy also appended a concurrence to the otherwise unanimous opinion in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), pointing out that the Court's “decision d[id] not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.” *Id.* at 548 (Kennedy, J., concurring).

roactive liability-shifting statutes¹³⁷ and punitive damage awards that are “grossly excessive” or “arbitrary,”¹³⁸ are a deprivation of *property* without due process of law. This nascent trend in due process, combined with the clear jurisdictional advantages its recent precedents offer owner-plaintiffs,¹³⁹ will only deepen the puzzles of property because these jurisdictional rules are making it easier to enter federal court with a proto-trump while making it harder to enter with a full trump.¹⁴⁰

Now, to be sure, the sharper its paradoxes have become, the more the Court has disowned them. Occasionally, the Court has camouflaged its mess in notoriously murky distinctions between “facial” and “as-applied” challenges.¹⁴¹ Most often, though, the Court quietly relies on the institutional structure of property in land in the United States as a shield deflecting the hardest questions. For, with the burden-fairness test identified so clearly with property in land, and the American land use system so able to deal with each landowner individually, it is only the truly *abnormal* upsets of ownership which reach the federal courts at all.¹⁴² Our paramount interpreters of law, in short, deal with property rights under such jurisdictional constraints

¹³⁷ *E. Enters.*, 524 U.S. at 539, 550 (Kennedy, J., concurring in the judgment and dissenting in part).

¹³⁸ See also, e.g., *Philip Morris, USA v. Williams*, 549 U.S. 346, 349 (2007); *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–17 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 574 n.22 (1996); see *infra* notes 189–90 and accompanying text.

¹³⁹ In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court construed 42 U.S.C. § 1983 to provide immediate federal jurisdiction to any plaintiff alleging a state official violated his or her federal rights. *Id.* at 183. Although *Pape* has since been overruled in substantial part, see *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 663 (1978), it still holds true for most due process claims. See, e.g., *Zinerman v. Burch*, 494 U.S. 113, 124–26 (1990).

¹⁴⁰ As *Lingle* suggested, see *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005), owners can make out a claim for relief under the Due Process Clauses by alleging that some law which applies to their property—along with others—does not significantly advance any important governmental objective. See, e.g., *Crown Point Develop. Corp. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007). None of that depends on tailored mitigation that might or might not be available to the particular owner. The probable *success* of such claims is still a matter of great doubt, but they clearly materialize much more readily than takings claims rooted in the burden threshold test. See, e.g., *id.*

¹⁴¹ See, e.g., *Tahoe-Sierra Preserv. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736–38 & n.10 (1997); *Yee v. City of Escondido*, 503 U.S. 519, 533–34 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 474 (1987); *Hodel v. Va. Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 295 (1981). The Court has even gone so far as to reform complaints styled as due process claims into “facial” takings claims. See, e.g., *Hodel*, 452 U.S. at 293–98. Why and/or how investment-backed expectations or their frustration can be gauged in the course of a “facial” challenge to a statute or regulation that has yet to be applied has never seemed to trouble the Court.

¹⁴² See Peñalver, *supra* note 50, at 234–46.

that they hardly ever engage the underlying premises, purposes, or reasoning behind the engineering of those rights by other legal agents. Part III argues that this approach has become unsustainable and that a more institutionally *interactive* model of property could open paths to real improvements in our constitutional rights doctrines.

III. Jurisdictional Complexity: Property Rights as Whole Things

We have adapted our perspectives on property and constitutional property to the legal system we have. That system identifies legal protection with judicial enforcement of a constitutional text—with the jurisdictional, doctrinal, and remedial rules constituting legal rights, as recognized in court.¹⁴³ But the more we have examined it as a whole, the more our lexicon of rights as a matter of precedent and jurisdiction to adjudicate has seemed contrived, artificial, and unsatisfying.¹⁴⁴ The inter-jurisdictional nature of so many rights, coupled with the complexity of our constitutional norms shaping the power to adjudicate, have left us with a wealth of hyper-technical distinctions that randomly intersect broadly applicable themes.¹⁴⁵ Especially as multi-member panels showcase the raw power of their “median voters,” compared to what practical reason or coherence over time might require, constitutional rights adjudications are increasingly adrift.¹⁴⁶

¹⁴³ On rights being the functional equivalent of the applicable jurisdictional, doctrinal, and remedial rules, see Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

¹⁴⁴ See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998); Dorf, *supra* note 136; Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 446 (1998); Levinson, *supra* note 129; Fallon, *supra* note 143; Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 119 HARV. L. REV. 1016 (2004). The modern version of this critique likely began a generation ago, though. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265; Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

¹⁴⁵ See Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399 (2005); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005).

¹⁴⁶ Cf. Heller & Krier, *supra* note 35, at 1024 (“[T]he mess is hardly surprising: changing times, values, politics, and personalities result in new and different views among the members of the Court, yet our constitutional tradition requires that the Justices always moor their opinions to particular words. The tie has held, but only because the words have been stretched beyond recognition.”).

Part III's argument, in a nutshell, is that the adjudication of constitutional property has become totally uncoupled from the practical choices of the institutions allocating and reallocating rights over our resources. This blind spot in the Court's constitutional property reasoning is most evident in its so-called exactions and substantive due process precedents and in the way it has related its doctrines to each other. Section A questions the jurisdictional novelty of "exactions" under the Court's precedents and Section B explains due process doctrine's tendency toward means/ends reason balancing in the protection of property rights.

A. *The Exactions Mess: The Inevitability of Reason Balancing?*

Recall that the Court in *Lingle v. Chevron* minimized the degree to which substantive due process and takings scrutiny had mixed after *Penn Central*.¹⁴⁷ In truth, these two had virtually merged, producing a unique compound of judicial federalism and constitutional right. That compound is thickest in the so-called "exactions" cases. According to the Court, exactions occur when government conditions a required permission on the forfeiture of some valuable property right.¹⁴⁸ An exaction, in other words, cannot arise without a specific owner being

Professor Sandy Levinson reacted to the descriptive project of Parts II and III roughly as follows: The Court *has* been adrift on regulatory takings and has adopted a series of convenient but ultimately unsatisfactory distinctions among like cases whenever the need has arisen in a "swing" Justice's mind. But this is no different, he argues, from other areas like, for example, the Establishment Clause, where seemingly insignificant distinctions become decisive in a narrow 5-4 majority declaring some displays of the Ten Commandments illegal and others not. *Compare* *Van Orden v. Perry*, 545 U.S. 677 (2005) (5-4 majority holding that public display of the Ten Commandments did not violate First Amendment's Establishment Clause), *with* *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (5-4 majority holding that public display of the Ten Commandments violated First Amendment's Establishment Clause). Justice Breyer's discriminating eye for religious displays that do/not violate non-establishment norms is like Justice Kennedy's view of constitutional property, I agree. But only constitutional property, as dominated by property in land as it has been, *entails* the sort of jurisdictional paradoxes our system of divided sovereignty has generated in its so-called inter-systemic adjudications. *Cf.* Schapiro, *Interjurisdictional Rights*, *supra* note 145, at 1409 ("In *Erie Railroad Co. v. Tompkins* . . . [a]ll nonfederal law became state law, subject to authoritative construction by the highest state court.").

¹⁴⁷ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540–48 (2005). Most of the *Lingle* opinion on this point was dicta, however, as no "exaction" was even arguably at issue in *Lingle*. Moreover, when the Court stated that its nexus and proportionality test applied to exactions and was "not designed to address, and is not readily applicable to, the much different questions arising" when an owner is denied use rights altogether, see *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999), it did not explain the differences it thought so obvious.

¹⁴⁸ *Dolan v. City of Tigard*, 512 U.S. 374, 385–86 (1994).

party to the governmental action—an “adjudicative” action—which is, then, necessarily the product of law application. Importantly, however, the Court’s two exactions cases, *Nollan v. California Coastal Commission*¹⁴⁹ and *Dolan v. City of Tigard*,¹⁵⁰ treat only *certain* exactions. If and when government seeks a definite *interest in land* from such an agent, the bargain must bear an “essential nexus” and “rough proportionality” to the public purpose(s) underlying the original permission requirements and the agent’s proposed actions that are contrary thereto.¹⁵¹ What remains entirely unclear is why this scrutiny applies only to the taking of possessory interests in land; why means/ends scrutiny is appropriate only in this takings context and not others; and why state or local laws that pre-set the deals officials are authorized to make are not similarly actionable as “exactions.” Part III.A suggests that the communicative conventions of our Supreme Court are now accounting for most of constitutional property’s disarray and uses exactions to make that particular point. Part III.B suggests that these conventions are unfortunately too far removed from practical reason more genuinely conceived and that a real improvement would be to start viewing legal reasons more like other reasons.

Nollan and *Dolan* both involved the coerced transfer of a kind of *easement*; both involved deals to limit the owners’ rights to exclude others from their land.¹⁵² Yet both cases also signaled that arbitrariness—governmental demands lacking good or sufficient reasons—can constitute a taking of property requiring just compensation, i.e., precisely what the *Lingle* Court subsequently said could *not* be a taking by itself.¹⁵³ Neither case involved a burden so great that “fairness and justice”¹⁵⁴ required its compensation nor a government action so unjustified that fundamental fairness required its reversal.¹⁵⁵ They were hybrids of those two wrongs. Indeed, *Nollan* and *Dolan* all but spelled out that an exaction is a special kind of constitutional wrong.¹⁵⁶

¹⁴⁹ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

¹⁵⁰ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

¹⁵¹ *Dolan*, 512 U.S. at 386-91; *see Nollan*, 483 U.S. at 8.

¹⁵² *See Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379-80, 385-86.

¹⁵³ *See Nollan*, 483 U.S. 837-42 (stating in its discussion that “unless the permit condition serves the same governmental purpose as the [constitutionally permissible] development ban,” the condition amounted to “an out-and-out plan of extortion” (citations omitted)); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544-45 (2005).

¹⁵⁴ *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹⁵⁵ *See United States v. Salerno*, 481 U.S. 739, 746 (1987) (equating substantive due process guarantees with a prohibition on governmental conduct that “shocks the conscience”) (quotation omitted).

¹⁵⁶ In dicta, the Court indicated as much again in *Lingle*. *See Lingle*, 544 U.S. at 546-47.

Diligently righting this wrong would bear suspicious similarities to a bygone era of substantive due process,¹⁵⁷ but let us put that aside. Note instead the ambiguity of these principles in our jurisdictionally complex system. If this really is a takings claim made viable against a state through the Fourteenth Amendment, it first needs an authoritative and definitive *application* of state law to the property in question.¹⁵⁸ Without that, the court hearing the claim cannot know the burden being pled. And if it is only the adjudicative character of exactions that passes them through *Penn Central*'s jurisdictional stockade into federal court,¹⁵⁹ our practical uncertainties compound immedi-

¹⁵⁷ Cf. *Dolan*, 512 U.S. at 410 (Stevens, J., dissenting) ("In its application of what is essentially the doctrine of substantive due process, the Court confuses the past with the present."). The *Lingle* Court dismissed the means/ends scrutiny of *Agins* and *Penn Central* as not having mattered in *Nollan* or *Dolan*, arguing that "[b]oth *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 546. "In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a per se physical taking." *Id.*

This assertion was apparently meant to distinguish the heightened means/ends scrutiny in *Nollan* and *Dolan* from that of *Lochner v. New York*, 198 U.S. 45 (1905), but the distinction is shaky at best. First, it relies heavily on the Court's ill-explained favoritism toward land (and, in particular, the common law right to exclude) as compared to other property interests. See ALEXANDER, *supra* note 32, at 80–81; Peñalver, *supra* note 50, at 246–53. Second, it is unclear why it matters that a constitutional property case "involved" the Fifth as opposed to the Fourteenth Amendment unless the Fifth Amendment's application to the states is somehow *different from* the applicability of the Bill of Rights generally. Cf. Rubin, *supra* note 61, at 833–34 ("Discomfort in the application of substantive due process . . . cannot justify limitations that threaten to render the doctrine incoherent, that fail to come to terms with its internal logic and structure, or that, ultimately, are in deep tension with the structural rules governing claims of federal rights under the Fourteenth Amendment."). Finally, even if cases requiring nexus and proportionality remain a relatively rare judicial intervention into the bargaining between local governments and owners, it still seems to have made that bargaining less flexible and therefore harder. See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 4–5, 27–41 (2000).

¹⁵⁸ See *supra* notes 109–33 and accompanying text.

¹⁵⁹ *Nollan* and *Dolan* are notably ambiguous on the exact relevance of the kind of legal action at issue in the pleading of an unconstitutional exaction. Compare *Dolan*, 512 U.S. at 391 & n.8 (referring to the action under challenge as an adjudicative action and arguing that immediate scrutiny was therefore appropriate), with *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841–42 (1987) (observing that the state could simply condemn an easement over the Nollans' property "by using its power of eminent domain" if it chose to do so and that conditioning required development approval on the granting of an easement was a taking requiring compensation). The cases speak for themselves at least to the following extent: no argument resisting federal jurisdiction on ripeness or other similar grounds was even mentioned by the Court. See also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions . . ."). Still, many have claimed that a statute or ordinance prescribing the terms of a bargain which owners seeking permissions must be willing to accept should be actionable under

ately. Why should an owner negotiate with such an adversary in good faith? A rational owner should just try to hasten (and worsen) their bargain in preparation for (federal court) litigation. So does anything *necessarily* differentiate an exaction from the other burdens that regulations constantly shift around among owners?¹⁶⁰ Do owner expectations matter in exactions as they do under *Penn Central*? Is it only that interests in land with common-law roots were at issue in *Nollan* and *Dolan*? Clever pleading will almost certainly circumvent any effort of that kind to confine the precedents.¹⁶¹ In my view, these dead ends have no satisfactory escape because the only real difference between exactions and other regulatory burdens are the jurisdictional, doctrinal, and remedial rules the Court has more or less accidentally affixed to exactions.

Nollan and *Dolan* displaced a variety of state-specific equilibria¹⁶² by setting a single federal standard and a sharpened threat of U.S. Supreme Court review *as to possessory interests in land*.¹⁶³ Giving a good explanation for why possessory interest exactions became their

Nollan and *Dolan*. See, e.g., *Home Builders Ass'n v. City of Beavercreek*, 729 N.E.2d 349, 355–56 (Ohio 2000).

¹⁶⁰ Several courts have struggled openly with the question since *Dolan*. See, e.g., *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 63–45 (Tex. 2004); see also *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 692–98 (Colo. 2001) (upholding a legislatively imposed “plant investment fee” on developers’ subdivision of land as immune from the *Nollan/Dolan* test because the fee was not imposed in an adjudicative process). In a 5–4 vacatur for reconsideration in light of *Dolan*, the U.S. Supreme Court remanded an exaction case involving only fees—not the right to exclude—back to the California Court of Appeal. See *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994) *vacating and remanding* 19 Cal. Rptr. 2d 468 (Ct. App. 1993). On remand, the appeals court upheld its original conclusion, and the California Supreme Court, applying the nexus and proportionality test, determined that the condominium conversion fee ordinance and its application to *Ehrlich* were both constitutional. See *Ehrlich v. City of Culver City*, 911 P.2d 429, 432–33 (Cal. 1996). However, the court reversed and remanded so that the city could show that the fee amount was appropriate. *Id.* at 433.

¹⁶¹ When push comes to shove, a great deal of our statutory age can be analogized to the common law. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 101–09 (1982).

¹⁶² I am, I hasten to add, skeptical that any such equilibrium could be expressed with much precision. Cf. Ordeshook, *supra* note 7, at 178 (“Without a consensus about the regularities that warrant theoretical treatment, theorizing too easily becomes an exercise in curve fitting—of structuring variables in mathematical form to fit some empirical fact, real or imagined.”). However, as a shorthand expression for the variety of competing forces at work on dedications and exactions under state law, the notion of equilibrium is a good starting point.

¹⁶³ *Nollan* and *Dolan* are certainly consistent on this point with the Court’s intuition that land is somehow special. Cf. Peñalver, *supra* note 50, at 286 (“Because of the general favoritism towards land in the regulatory takings area, fewer oxen have been gored by judicial invalidations of regulations during the Court’s expansion of regulatory takings law over the past two decades. . . . [But] the unprincipled nature of that favoritism towards land provides an argument for reconsidering that expansion altogether.”).

own occasion for federal constitutional review would be much easier had it not been for the Court's erratic pronouncements on applying means/ends scrutiny to land use controls in general.¹⁶⁴ Yet, given the powerful influences federal court precedents exert in state court and the extent to which constitutional property rights operate reciprocally upon one another,¹⁶⁵ the more important question is the extent to which *Nollan* and *Dolan* preempted or chilled state courts from tackling the many hard questions of fairness and efficiency that ownership of interconnected resources entails. Section B suggests that this intersection of jurisdiction, doctrine, and divided sovereignty shows constitutional property for the nest of contradictions it has become and links the Court's haphazard approach to constitutional property to its aging philosophy of rights and judicial power.

B. Our Many-Sided Due Process Guarantees: Property Rights as Reasons?

Recall that *Penn Central* and *Pennsylvania Coal* elevated individual expectations and interests above even compelling governmental ends for the sake of identifying constitutionally protected "property."

¹⁶⁴ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016–17 (1992) ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land. [But w]e have never set forth the justification for this rule.") (quotations and citations omitted); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488–93 (1987) (reviewing prior Supreme Court precedents that emphasized the important role that the individual nature of state action played in the takings analysis of each case). The pre-*Penn Central* due process scrutiny of local zoning and other land use controls was actually a relatively relaxed testing of the public purposes behind zoning and the rational connections linking the use limitations enacted to those purposes. See, e.g., *Miller v. Schoene*, 276 U.S. 272, 277–79 (1928); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325, 327–28 (1927); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 387–89 (1926); *Hadachek v. Sebastian*, 239 U.S. 394, 407–12 (1915). In the one case where the Court invalidated a zoning ordinance as a denial of due process, it did so not because of the ordinance's harsh impact on the owner-plaintiff but rather because the city offered no reason for dissecting the owner's parcel with its zoning districts (contrary to a convention of placing district lines along streets and other property boundaries). See *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928).

¹⁶⁵ For example, several state high courts have recently interpreted the "public use" restriction on eminent domain in their state constitutions to provide greater protections for owners than did the *Kelo* Court. See, e.g., *Sw. Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 768 N.E.2d 1, 9–11 (Ill. 2002); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 784 (Mich. 2004); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1140–42 (Ohio 2006). Yet, many still adhere to the federal interpretation; in any event, state judiciaries still routinely employ *Penn Central*'s burden threshold reasoning (some with a very deferential version of the "whole parcel" norm) in regulatory takings. See Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2003); see also Hannah Jacobs, Note, *Searching for Balance in the Aftermath of 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1527–45 (2007).

The dominant concern was supposedly fairness to owners, not social utility.¹⁶⁶ If constitutional property is one legal thing, though, why should fairness be subordinate to utility or utility be subordinate to fairness based entirely on a plaintiff's choice of claim or forum? Especially as the Court has continued to ignore seemingly salient differences between the Fifth and Fourteenth Amendments, due process has grown increasingly mysterious.¹⁶⁷ Today, although the justices usually agree—at least in the abstract—“that due process has a substantive component . . . [prohibiting] certain actions . . . no matter what procedures attend them,”¹⁶⁸ the scope of this constitutional norm is becoming utterly obscure in the Court's jurisprudence.¹⁶⁹

Recall that the Fourteenth Amendment's substantive due process doctrines were originally developed by a Court that believed the Bill of Rights applied only to the federal government¹⁷⁰ and that, as incorporation doctrine expanded, the felt need for substantive due process waned.¹⁷¹ Recall further that a variety of judicial doctrines testing the fit between government means and ends, principally as a way of balancing reasons for collective action against individual rights, eventually settled into definable tracks throughout the latter half of the

¹⁶⁶ See *supra* notes 103–04 and accompanying text.

¹⁶⁷ Compare ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 793 (3d ed. 2006) (“[O]nce a right is deemed fundamental, under due process or equal protection, strict scrutiny is generally used. . . . If a right is safeguarded under due process, the constitutional issue is whether the government's interference is justified by a sufficient purpose.”), with *id.* at 565 (“The Supreme Court . . . has defined property based on the expectations created by the relevant law. The problem, however, with this definition is that it allows the government to undermine the existence of property simply by instructing people not to expect [its] continued receipt . . .”).

¹⁶⁸ *County of Sacramento v. Lewis*, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring).

¹⁶⁹ See *infra* notes 188–90 and accompanying text.

¹⁷⁰ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding it contrary to the Fourteenth Amendment's Due Process Clause for a state to prohibit inter-racial marriage); *Rochin v. California*, 342 U.S. 165, 166, 174 (1952) (stating that it was contrary to the Fourteenth Amendment's Due Process Clause to convict a defendant with evidence obtained by pumping his stomach); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding it contrary to the Fourteenth Amendment's Due Process Clause for a state to mandate attendance in public schools); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (stating it was contrary to Fourteenth Amendment's Due Process Clause for a state to prohibit the teaching in school of any language except English); *Truax v. Corrigan*, 257 U.S. 312, 329–30 (1921) (finding it contrary to the Fourteenth Amendment's Due Process Clause for a state to restrict the availability of injunctions in labor disputes). Indeed, even precedents limiting the scope of due process protections have exerted formative influences on subsequent articulations of “unenumerated” rights. Compare *Buck v. Bell*, 274 U.S. 200 (1927) (finding no protection against forced sterilization for eugenic purposes), with *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding it was contrary to Equal Protection Clause to force person's sterilization because procreation is a “fundamental right”).

¹⁷¹ See *Lewis*, 523 U.S. at 842; Rubin, *supra* note 61, at 833–41.

twentieth century.¹⁷² This was not by accident. For better or worse, open-textured constitutional guarantees that are implemented with judicial doctrines weighing and comparing reasons for action need, first and foremost, *limiting principles*. Individual judges' capacities for reason balancing are uneven at best.¹⁷³ Thus, as with other doctrines structuring judicial reason balancing, the Supreme Court's jurisdictional and remedial contouring became just as influential as the implicit weighting of reasons it did in particular cases.¹⁷⁴ The result was an unmistakable tiering of judicial scrutiny that aimed the most exact-

¹⁷² The Court's tiers of scrutiny developed over time and in response to an array of normative and institutional influences. See G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 2–7 (2005); see also Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401 (1997). The Court's most searching scrutiny, for example, actually originated in pieces, first as a way of allowing infringements of constitutional rights only if necessary to avert catastrophic harms, second as a means of exposing illicit governmental motives, and finally as a general mechanism for balancing risks to the public against individual autonomy. Cf. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007) (“[T]he Supreme Court adopted the strict scrutiny formula as its generic test for the protection of fundamental rights without reaching agreement about the precise nature of the inquiry that courts should use in applying it.”).

¹⁷³ See generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986). Raz, even after a sober assessment of the median judge's capacities for practical reason, still maintained (with Nagel) that

there can be good judgment without total justification. The fact that one cannot say why a certain decision is the correct one, given a particular balance of conflicting reasons, does not mean that the claim to correctness is meaningless What makes this possible is *judgment* . . . which reveals itself over time in individual decisions rather than in the enunciation of general principles . . . in many cases it can be relied upon to take up the slack that remains beyond explicit rational argument.

Id. at 287 (quotations omitted). In the remainder of the present argument, I presume this to be true in all probable futures for constitutional property and the jurisdiction to adjudicate its content and scope.

¹⁷⁴ For example, Section 10 of the Administrative Procedure Act directed reviewing courts to “set aside” agency action found to be “arbitrary” or “capricious.” 5 U.S.C. § 706(2)(A) (2006). The scope and meaning of the “*Chevron* doctrine” that encapsulated this obligation, see *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844, 866 (1984), has preoccupied a generation of administrative lawyers. Empirically, however, *Chevron* seems to have exerted much less influence as a matter of reason balancing by individual judges applying it than it has as a matter of role definition among courts, agencies, and political actors. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1085–93 (2008); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) (comparing the application of *State Farm* “hard look” review with the application of *Chevron* “reasonableness” review and finding that the risks of reversal for agencies were substantially the same under *Chevron* and *State Farm*’s “hard look” review, changing significantly only as a function of judicial panel political party affiliations).

ing standards at governmental action impinging upon a relatively short list of “fundamental” rights.

What must give pause about such an approach, though—and what returns us to our system’s structural dilemmas described in Part II.A—is *why* our Constitution should be zoned into favored and disfavored rights at all. As Lawrence Sager observed:

After threats to speech, religion, and the narrow band of activities that fall under the rubric of privacy, after the disfavor of persons because of their race or gender . . . and after lapses from fairness in criminal process, the attention of the constitutional judiciary rapidly falls off. By default, everything else falls in the miasma of economic rights.¹⁷⁵

The many critics of judicial relief as anti-democratic in all its forms likely played the leading role in this zoning.¹⁷⁶ If federal judges and the judicial power are so imperfect, though, what assures us they can distinguish fundamental from non-fundamental rights? Land may well be a special economic commodity (it is obviously a judicial favorite),¹⁷⁷ but if it is somehow *constitutionally* special, we are no closer today to learning why than we were in 1922.¹⁷⁸ A conviction that land is ineffably special could just as easily underscore the importance of local control over land use¹⁷⁹ as it could that of an individual’s trump. In fact, for something so obviously dependent upon the care and support of our thousands of municipal, county, and state governments, property rights in land have remained inexplicably dominated by a

¹⁷⁵ Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. REV. 410, 410–11 (1993).

¹⁷⁶ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 337–43 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980).

¹⁷⁷ See generally Peñalver, *supra* note 50.

¹⁷⁸ See *supra* note 101 and accompanying text. I am purposefully bracketing the argument that land is *not* a commodity. But see FREYFOGLE, *THE LAND WE SHARE*, *supra* note 27. Seemingly influenced by the “normative pull of property,” Professor Alexander has argued that reason-balancing like that in substantive due process doctrine and *Dolan*—albeit more deferential than that in *Dolan*—would be an improvement in the Court’s takings jurisprudence, all things considered. See ALEXANDER, *CONSTITUTIONAL PROPERTY*, *supra* note 32, at 219–43. Although I share Professor Alexander’s sense that European-style “proportionality” analysis (as he describes it) is a closer approximation of practical reason than the Court’s approach to constitutional property has been, I disagree with him that our judiciary could escape its own path dependence long enough to actually institutionalize proportionality analysis in full.

¹⁷⁹ See, e.g., *City of Eastlake v. Forest City Enterps.* 426 U.S. 668, 679 (1976) (upholding ballot initiative on zoning changes against challenge of arbitrary unfairness by linking it to popular sovereignty).

judiciary hobbled by its own lack of institutional imagination and, in particular, by its notion of rights as trumps.

So what *is* a right to be protected in one's property against the very governance that provides it? Any realistic account of rights accepts that they serve separate functions in separate domains (moral, legal, customary, etc.).¹⁸⁰ A right against confiscation is a *legal* right if and only if it is an enforceable constraint on government's agents. Yet, the Takings Clause hardly constrains government to "take" property only for good or sufficient reasons. According to the Court, all it requires is that, when property is taken, "just compensation" be paid.¹⁸¹ How, then, do the rights of the Takings Clause fit with or overlap those of due process? In *Graham v. Connor*,¹⁸² *United States v. Lanier*,¹⁸³ *County of Sacramento v. Lewis*,¹⁸⁴ and elsewhere,¹⁸⁵ the Court has suggested that when a plaintiff's claim could arise under some "explicit textual source of constitutional protection,"¹⁸⁶ like the Takings Clause, substantive due process claims are essentially *pre-empted*.¹⁸⁷ If a claim could be a takings claim, in short, it should be and should not be a substantive due process claim. This seems difficult to square with the Constitution as written unless the Court means to create some kind of structural protection of state autonomy that blocks owners' choices of claim or forum.

Procedural due process is presumably beyond the reach of this preemption in that *it alone* protects rights to be heard as such.¹⁸⁸ Yet,

¹⁸⁰ See, e.g., Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223, 248 (2005) (arguing that rights can best be understood using a "several functions theory," which holds that "rights play a number of different roles in our lives").

¹⁸¹ See *E. Enterps. v. Apfel*, 524 U.S. 498, 554 (1998) (Breyer, J., dissenting) ("[A]t the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good.").

¹⁸² *Graham v. Connor*, 490 U.S. 386, 395 (1989).

¹⁸³ *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997).

¹⁸⁴ *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

¹⁸⁵ See, e.g., *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (Rehnquist, C.J., for plurality).

¹⁸⁶ *Graham*, 490 U.S. at 395.

¹⁸⁷ See *id.* Professor Rubin argued that "the Court appears to believe that the rule applies to prevent the invocation of substantive due process if a claim—even an unsuccessful one—is somehow 'covered by' or 'aris[es] under' another more 'specific constitutional provision.'" Rubin, *supra* note 61, at 853 (quoting *Lanier* and *Graham*). Several Justices seem to view *Graham* as a means of avoiding redundancies in doctrine (and no more) whereas other Justices view it as a means of limiting the scope of a potentially limitless constitutional warrant for judicial second-guessing of other governmental actors. See *id.* at 851–52.

¹⁸⁸ Cf. *Zinerman v. Burch*, 494 U.S. 113, 125–26 (1990) (distinguishing between substantive and procedural due process as two different "constitutional violations" actionable separately under 42 U.S.C. § 1983). Moreover, the continued sublimation of substantive due process into

here again, distinguishing substantive from procedural due process seems easy only so long as the stakes are low. Procedural due process, like its substantive counterpart, is meant to prevent “arbitrary” deprivations of property.¹⁸⁹ “For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.”¹⁹⁰ What exact *kind* of arbitrariness is unique to procedural, as opposed to substantive, due process? The Court has long conceded that substance and process shade undetectably into one another. Could substantive and procedural due process combined make regulatory takings cases obsolete? The jurisdictional uncertainties abound. Due process may require some kind of hearing in the course of condemnation proceedings,¹⁹¹ but does it, for example, forbid a local zoning board comprised of (interested) owners from hearing their neighbor’s petition for a variance?¹⁹²

Finally, *Graham* preemption represents a special source of uncertainty for particular votes on the Court, especially that of Justice Kennedy.¹⁹³ Thus, this intersection raises at least one more obvious

procedural due process, *see, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), could open procedural due process claims up to *Graham* preemption, at least in theory.

¹⁸⁹ For example, confiscatory state actions that are subject to subsequent judicial review have been treated as questions of procedural—not substantive—due process. *See, e.g.*, *Hudson*, 468 U.S. at 533 (deprivation of property interest did not violate Due Process Clause until state failed to provide adequate post-deprivation remedy).

¹⁹⁰ *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

¹⁹¹ It is one thing to hold that the Due Process Clause applies to condemnation proceedings. *See, e.g.*, *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956) (“It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation.”). It is something else altogether to specify in detail what kind of hearing must be held, when it must be held, and to what end. *Cf. Brody v. Vill. of Port Chester*, 434 F.3d 121, 133–36 (2d Cir. 2005) (holding, after some consternation, that an owner has no right to a full hearing prior to an initial condemnation decision because the village’s decision involved “legislative” questions, the prejudgment of which “would impose an impossible burden on the condemnor and would represent an unwarranted judicial arrogation of the legislature’s power to condemn”).

¹⁹² *Cf. 1000 Friends of Or. v. Wasco County Court*, 742 P.2d 39, 45–46 (Or. 1987) (stating that only formalized, adjudicatory decisions in which a decisionmaker’s interest was real and immediate threaten due process guarantee of a neutral decisionmaker). None of this is to suggest some systemic bias in local zoning practice. *See* Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW 447 (2004) (finding little evidence to support allegations of rampant abuse or unfairness). But it is to question the place of due process in non-judicial proceedings in which the whole point is to rearrange ownership rights.

¹⁹³ *See supra* note 136 and accompanying text. Justice Kennedy rooted his concurrence in the judgment but not the (plurality) opinion in *Eastern Enterprises*—where he would have invalidated a retroactive liability-shifting statute as a denial of due process but not as a taking—by

question. For most “property” other than property in land, for any right in the bundle of sticks (representing property in land) that comes up short of *Penn Central*’s burden threshold, and for exactions of interests other than the common law right to exclude, might substantive due process welcome an owner-plaintiff into federal court to challenge government’s means/ends reasoning where takings doctrine would foreclose that opportunity?¹⁹⁴ If so, property in land has become a trap for the unwary: its status as a fundamental right seems oddly to entitle it to *less not more* federal court protection. Not surprisingly, the lower courts that have confronted these curiosities have found them troubling, to say the least.¹⁹⁵ Part IV argues that the takeaway from this mess must be the imperative of working together on a richer, more institutionally interactive vocabulary of property and property rights. Such a vocabulary would cast rights adjudications as mere fragments of an unavoidably social endeavor: the development of a legal norm’s meaning gradually, over time.

observing that the plurality’s takings analysis ignored the “one constant limitation . . . in all of the cases where the regulatory taking analysis has been employed, [that] a specific property right or interest has been at stake” and by observing that the plurality’s reasoning “would expand an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause.” *E. Enterps. v. Apfel*, 524 U.S. 498, 541–42 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). Regulatory takings doctrine, in other words, was the one area with even less coherence or connection to constitutionally defined rights than substantive due process. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring) (arguing that substantive due process analysis was appropriate because the case involved “no definitional problem . . . in determining whether there is an interest sufficient to invoke due process”).

¹⁹⁴ The meaning of the *Graham* rule, naturally, is open to different interpretations. It can be viewed as a way of keeping due process from becoming so many redundant protections of individuals otherwise protected by the Bill of Rights, or it can be viewed it as an incipient threat to substantive due process’s underlying legitimacy. *See Rubin, supra* note 19, at 851–52. For example, prior to *Lingle*, the Ninth Circuit had held that *Graham* and similar cases “preempted” most substantive due process challenges to land use regulations. *See Armendariz v. Penman*, 75 F.3d 1311, 1318, 1325 (9th Cir. 1996). Following *Lingle*, the Ninth Circuit reversed that precedent. *See Action Apt. Ass’n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1024 (9th Cir. 2007). But the form and substance of such actions remain mysterious. *See, e.g., Action Apt. Ass’n v. City of Santa Monica*, 82 Cal. Rptr. 3d 722, 732–33 (Ct. App. 2008) (rejecting a developer’s argument that *Lingle* allowed the nexus and rough proportionality tests to be applied to facial challenges).

¹⁹⁵ *See* Robert Ashbrook, *Land Development, The Graham Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1265–76 (2002) (tracking the circuit splits involving *Graham*’s notion of preemption and regulatory takings claims); *Rubin, supra* note 61, at 876–81.

IV. An “Inescapable Network of Mutuality”¹⁹⁶:
Property Rights in the Age of Ecology

A legal right, as distinct from moral or customary rights, is protected and enforced by legal norms and institutions. The existence conditions for moral rights do not necessarily involve legal norms or agents, of course, but the degree to which these two kinds of rights interact has fueled endless conjecture on their overlaps.¹⁹⁷ Our courts, as reviewed in Parts II and III, remain deeply divided over how to identify and specify constitutional property rights—much like we as a people differ over what ought to be considered property. Yet, as with many legal rights, we seem to have settled into an “awkward consensus”¹⁹⁸ on the importance of property. Some view rights like property as (consequentialist) constraints on imperfect political communities, shielding them from their own vices,¹⁹⁹ others view them as normative absolutes that must control no matter how dire their consequences,²⁰⁰ and still others view rights as uniquely poignant mechanisms of cultural expression.²⁰¹ In most such theories, though, courts play the leading role in legal rights, buffering the person from the society at

¹⁹⁶ Martin Luther King, Jr., *Letter from Birmingham Jail*, (Apr. 14, 1963), reprinted in 26 U.C. Davis L. Rev. 835, 836 (1993) (“We are caught in an inescapable network of mutuality Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial ‘outside agitator’ idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.”). King’s insight can be faulted only in that it seemed to pertain solely to those relations within our borders.

¹⁹⁷ See, e.g., JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 1–33 (1990); see also T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998) (discussing, more generally, the foundational judgments, values, and reciprocal nature of morality).

¹⁹⁸ A decade ago, Dorf and Sable identified what they called an “awkward consensus” on rights and situated it in the middle of their “democratic experimentalism.” See Dorf & Sable, *supra* note 144, at 446. “Current discussion of rights as both immunities from state and private interference, and entitlements to public goods due the citizens of a democracy—even when calculation of the public good suggests otherwise—has arrived at an uneasy, half-spoken agreement that rights matter.” *Id.* at 446. Compare JOSEPH RAZ, *Legal Rights*, in *ETHICS IN THE PUBLIC DOMAIN* 238 (1994) (distinguishing between legal rights positively enacted and protected as such and “legally respected rights” which may arise inadvertently in a legal system’s patterns or gaps), with Dworkin, *supra* note 36 (arguing that valid legal rights have priority over all other normative considerations except other valid legal rights).

¹⁹⁹ See, e.g., Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFFS. 3, 3–7 (1981).

²⁰⁰ Cf. JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER WRITINGS* 1, 20 (Stefan Collini ed., 1989) (1859) (“If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be in silencing mankind.”).

²⁰¹ See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 11–16 (1993); cf. WALDRON, *supra* note 4, at 353 (tracing to Georg Wilhelm Friedrich Hegel the view that “individuals need private property in order to sustain and develop the abilities and self-conceptions definitive of their status as persons”).

large.²⁰² Part IV offers an alternative lesson from the last thirty years of constitutional property adjudication. This proposal begins with the aging notion of rights as judicially crafted trumps against social planning and coordination and suggests a reorientation of rights like constitutional property. Such rights would be oriented toward both the forms of social cooperation which actually empower people to flourish, as well as the *institutional frictions* that give their entitlements substance. As we adjust our conception of ownership in this age of ecology—principally, because we must adjust our views of what things are meaningfully distinct in nature—we inevitably confront an institutional heritage to be updated as well. Section A links the flaws we have been considering in that heritage to an unnecessarily complicated picture of legal rights. Section B suggests what simplifications are readily available, and Section C suggests the deeper improvements that may be on the distant horizon.

A. *Property as Stub (Not Trump): When Change and Evolution Are the Only Constants*

Allocations of property rights are under constant revision in society—much like our intuitions on what things count as property. *Penn Central* and its related precedents normalized this *provisionalist* model of property.²⁰³ What the jurisprudence of *Penn Central* has never done, though—and what it probably cannot do as currently engineered—is explicate the sense and reference of a constitutional property right. *Penn Central* assumes that property rights are always in flux. All the norms that supply or protect to owners their privileges, powers, and immunities under the law are, at least in theory, constituents of their ever-changing property rights.²⁰⁴ But what is a claim of right if it is so susceptible to upset or even total cancellation? The only answer lies in lowering the barriers between legal and other claims of right. An “epistemic right” rests on, if anything, an adequacy of reasons—a condition that is in many but not all circum-

²⁰² See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82–90 (1977); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 29–31 (1985); RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 37–44 (2001).

²⁰³ See *supra* notes 102–15 and accompanying text.

²⁰⁴ Cf. Wenar, *supra* note 180, at 36 (“Philosophers of law sometimes complain that the ordinary language of rights is loose, or confused. Yet there is nothing wrong with ordinary language. The word ‘right’ in ordinary language is merely systematically ambiguous, like many other words, such as ‘free.’”). Wenar offers a non-technical account of rights as so many “incidents,” i.e., privileges, claims, powers, and immunities under the law. *Id.* at 224–37.

stances transient.²⁰⁵ What legal reasons exist, in contrast, depends on the legal norms that exist; and the legal norms that exist must be *some* function of jurisdictional authority.²⁰⁶

A long tradition in law characterizes property as the legal control over tangible, non-fungible resources by their owner.²⁰⁷ As a human artifact, property must have a purpose and, on this theory, property's purpose would seem to be the optimal use of resources—avoiding both their under- and over-use.²⁰⁸ But we cannot say what optimal resource use is without first establishing what resources there are, how they are depleted, and what opportunities they represent. Without answers to these questions, conflict is frequent, sharp, and often irresolvable, at least in the moment. Furthermore, the control of property has taken myriad normative forms that inhibit or enable *change* to varying degrees. The traditional view is that normative forms inhibiting the reallocation of rights are inherently more property-like than forms that enable their reallocation.²⁰⁹ The provisionalist, by contrast,

²⁰⁵ See, e.g., Leif Wenar, *Epistemic Rights and Legal Rights*, 63 ANALYSIS 142, 144 (2003) (“Having an epistemic right to believe that $2 + 2 = 4$ entails its being reasonable for one to believe that $2 + 2 = 4$.”). Particle physics eventually deprived everyone of their epistemic rights to think atoms indivisible, but adding 2 and 2 will equal 4 for as long as Peano arithmetic holds true.

²⁰⁶ To avoid borrowing trouble into this discussion, I bracket the precise nature of this relationship. But see JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979).

²⁰⁷ See, e.g., PENNER, *supra* note 28, at 25–27; Hohfeld, *supra* note 28; Honoré, *supra* note 28, at 108; see also THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 15–22 (2007). Land may well be the paradigmatic form of such a resource. See, e.g., Ellickson, *supra* note 115, at 1318–19 (stating that the “fundamental issues of land ownership[] [are] the rules that establish the foundation of virtually all human activity”). But common law estates in land are best regarded as involving many distinct resources, effective control of which is under constant revision. See, e.g., John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979 (2008) (arguing that the common law maxim that surface owners hold subsurface rights that extend “to the center of the earth” is “poetic hyperbole” and not binding law in the modern era).

²⁰⁸ “Optimal” signifies nothing more here than a superlative; it is entirely neutral among competing theories of the productive or wasteful use of resources.

²⁰⁹ See Merrill, *supra* note 32, at 887–94. Those rights grounded in so-called “legislative grace” are, on this view, the least property-like of all. Cf. Grey, *supra* note 25, at 81 (“The legal realists who developed the bundle-of-rights notion were on the whole supporters of the regulatory and welfare state, and in the writings that develop the bundle-of-rights conception, a purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned.”). In practice, however, even common law rights have become inherently re-allocable. Compare J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239, 241–42 (1990) (“As land regulation has increased, courts generally have found ways to sustain the regulations against complaints that owners’ property had been taken. . . . [T]hey have pushed back the economic limits imposed by the [T]akings [C]lause to the point where the owner usually can prevail only if can make *no* economic use of the land.”), with *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027

views change as the only constant in a world of competing public priorities, looming environmental risks, and an evolving scientific consciousness perceiving both the public's priorities and these looming risks.²¹⁰

Normative analysis of this condition generally shifts the focus to the supposed legitimacy (or illegitimacy) of particular public political processes. Public choice theory's adherents offer their proof of agenda-manipulation, rent-seeking, and the like,²¹¹ while so-called "deliberative" democrats argue that such systemic breakdowns in collective action are avoidable.²¹² Unfortunately, neither the field of public choice nor that of deliberative democratic design has yet delivered anything close to what it promises: empirically grounded insights that better enable rule by the people.²¹³ Indeed, the more these two

(1992) ("It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; [a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." (internal quotations and citation omitted)). And it is not necessarily change wrought only by legislatures or agencies; courts may also rearrange rights abruptly. See Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1453–54 (1990).

²¹⁰ See, e.g., DANIEL H. COLE, *POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION* (2002) (comparing different mechanisms of resource control as a reflection of democratic and other normative values).

²¹¹ Much of Professor Joseph Sax's work pointed in this direction. See generally Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 *ECOLOGY L.Q.* 327 (1998); see also ACKERMAN, *supra* note 38; CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 245–316 (1997); CHARLES F. WILKINSON & H. MICHAEL ANDERSON, *LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS* 15–45 (1987); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1627, 1637–43 (2006).

²¹² See generally JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994) (offering a normative theory of the Constitution as a mechanism designed to achieve a certain level of deliberation in public decisionmaking); Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191, 237–50 (2001) (linking the structure of taxation to the capacity of our politics for genuine deliberation); see also MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996) (laying a normative foundation for property in a deliberative democratic system). There are important connections between this contemporary view and the Madisonian Federalist view of property that motivated so many Founders. See NEDELSKY, *supra* note 31, at 203–76.

²¹³ General critiques of both positive and normative public choice theses include MACKIE, *supra* note 7, at 29–30, 111–12 and GREEN & SHAPIRO, *supra* note 7, at x ("Rational choice theorizing is too much driven by controversies of its practitioners' own making and too little by the political phenomena that social scientists have traditionally sought to understand."). Contemporary (post-Arrovian) challenges to the possibility of *deliberation* in politics are summarized ably in Jack Knight & James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 *POL. THEORY* 277 (1994). Ironically enough, deliberative democrats have defended that their predictive failures are but a reflection of the human sciences' failings

have foundered empirically, the further they have retreated into untestable hypotheses, metaphysical speculation, or worse.²¹⁴ Thus, collapsing property into one or the other account of political authority does not make much practical sense just yet—which is not to say that an increasingly professionalized Supreme Court bar²¹⁵ will not advocate doing so in order to capture a vote or two in the right case. Without what seems at present like *much* better information, we are incapable of making any permanent judgments about how public processes for the allocation and reallocation of property rights *ought* to work within our constitutional tradition.²¹⁶

Even if change and reallocation are the norm, however, a suitably broad interpretation of the concept of a *resource* leaves property-as-resource-allocation a workable starting point.²¹⁷ The dynamism of popular sovereignty alone makes the enduring questions of how best to apportion resources, scarcity, and their trade into opportunities to experiment. Thus, if public choice and deliberative democracy each lack conclusive normative or positive accounts of political authority, improvisation necessarily fills the void. Indeed, the American way of splitting differences, with its diverse practitioners spanning decades,²¹⁸

more generally. See Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY* 67, 84–86 (James Bohman & William Rehg eds., 1997).

²¹⁴ See generally GREEN & SHAPIRO, *supra* note 7. Indeed, restated carefully, social choice theory and deliberative democratic theory are arguably “mutually supportive” in that the very utility of deliberation in politics is its capacity to avoid Arrowian cycling and other problems of aggregating individual opinions. See John S. Dryzek & Christian List, *Social Choice Theory and Deliberative Democracy: A Reconciliation*, 33 *BRIT. J. POL. SCI.* 1, 27–28 (2003).

²¹⁵ See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 *GEO. L.J.* 1487 (2008) (demonstrating how Supreme Court practice has become concentrated in the hands of a small number of expert practice groups and how those groups steer the Court’s agenda).

²¹⁶ Dean Rubin’s “micro-analysis” of institutions is a much richer picture of this nexus than I have provided. See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *HARV. L. REV.* 1393, 1424–33 (1996). And it has arguably been gaining ground among a variety of theorists. See generally NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001) (applying detailed comparative institutional analysis to land use management); ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* (2007) (comparing voting rules in courts, legislatures, and for public offices as means of enhancing democratic accountability over time); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 *HARV. L. REV.* 1035 (2006) (proposing a model to predict when rational legislators should prefer to delegate discretion to an administrative agency as opposed to courts).

²¹⁷ I hasten to add that resources, of course, are also allocated by means other than property rules. Cf. Calabresi & Melamed, *supra* note 25, at 1090–93 (describing three kinds of entitlements: property rules, liability rules, and rules of inalienability). No property right, however, is wholly unrelated to resource allocation.

²¹⁸ Justice Brandeis’s dictum on the link between federalism and experimentation is per-

represents a tradition of *experimentalism*.²¹⁹ The experimentalist interprets legal rights as the fulcrum balancing, on the one hand, atomized agents and their individuated hopes and expectations against, on the other hand, the vast possibilities in collective governance and common agency.²²⁰ There can be no permanent fixing of this balance—only various provisional versions. Legal norms are, on this account, merely the verbal or institutional sleeves housing deeply contingent, historically situated snap-shots. Viewed as a temporally extended progression (or as whole picture albums), systemic considerations are never far from the surface in legal practice given the possibility that today's outcomes can educate tomorrow's agents.²²¹ Indeed, with our evolving scientific consciousness and a fast-changing environment, rights experimentalism *must* leave virtually every postulate open to continuous revision, and well-chosen, well-executed experiments provoke just that.²²² Rights serve as placeholders—social expressions of

haps the best known starting point. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). But experimentalism’s many disparate adherents are the most powerful evidence of the vagueness of its core values. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 158–62 (1992); PROGRAM ON ENERGY, ENV’T, & ECON., THE ASPEN INST., *THE ALTERNATIVE PATH: A CLEANER, CHEAPER WAY TO PROTECT AND ENHANCE THE ENVIRONMENT* 1, 37–43 (1996) (listing participants from environmental groups, energy companies, and government organizations); BRIAN J. COOK, *BUREAUCRATIC POLITICS AND REGULATORY REFORM* 19–34 (1988).

²¹⁹ The uptake of experimental science and its offspring, the policy scientist, was arguably the signature consequence of American Progressivism. See SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* (2003); James Farr et al., *The Policy Scientist of Democracy: The Discipline of Harold D. Lasswell*, 100 AM. POL. SCI. REV. 579 (2006).

²²⁰ See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008).

²²¹ Cf. Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 760 (1989) (“By any understanding, law involves the kinds of possible relationships among persons who live together in a society. It organizes people who live in proximity to one another. There is then a significant prospect of disputes. A society provides guidance to its members about the avoidance, processing, and settlement of disputes.” (internal citation omitted)).

²²² Sabel and Zeitlin describe a “directly deliberative polyarchy” to implement such ideals. It would be deliberative by using “argument to disentrench settled practices and open for reconsideration the definitions of group, institutional, and even national interest associated with them.” Sabel & Zeitlin, *supra* note 220, at 276. It would be *directly* deliberative by using “the concrete experience of actors’ differing reactions to current problems to generate novel possibilities for consideration rather than buffering decision-makers in Madisonian fashion” *Id.* And it would be polyarchic if it functioned as “a system in which the local units learn from,

confidence in the right holders' judgments within the confines of their rights—not necessarily as evidence of fair procedures or good outcomes per se.

Much of this, to be sure, is virtually unrecognizable in the present Court's rights jurisprudence, especially its constitutional property opinions. Intent on deriving supposed logical necessities from the Constitution's text or structure²²³ or, barring that, logical necessities from its own analogies extending and distinguishing precedents,²²⁴ the Court has at turns epitomized what can go wrong with practical reasoning.²²⁵ The bold structural (re-)engineering of *Penn Central*, with its announcement of a broadly applicable test unhinged from every source of authority but the Court itself, is later embarrassed by the opportunistic minimalism of *Nollan*, *Dolan*, and a dozen others that must be reconciled in heaps of dicta like the opinion in *Lingle*. The Court almost never speaks with both the modesty and precision its unique position demands, even though the one *necessary* outcome of its constitutional rights precedents is the preemption of other legal actors' (present) reasoning to one degree or another. Compared to virtually any other legal agent, the Supreme Court speaks with unmatched scope and force.²²⁶ Indeed, in its hands, the authority to preempt others' reasoning is at its zenith, jurisdictionally.²²⁷ To whatever

discipline, and set goals for each other." *Id.*; see also Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313, 313–14 (1997) (arguing that directly deliberative polyarchy increases political accountability by exposing policy choices to public scrutiny).

²²³ See *supra* notes 102–04 and accompanying text.

²²⁴ See *supra* notes 116–26 and accompanying text.

²²⁵ There is, of course, reason to believe that the Court's failings on constitutional property are symptomatic of wider pathologies. See, e.g., Burton, *supra* note 221. But I focus here on property as an exemplar.

²²⁶ The Court is obviously aware of its influence. See, e.g., SUNSTEIN, *ONE CASE*, *supra* note 113, at xi ("The current Supreme Court embraces minimalism. Indeed, judicial minimalism has been the most striking feature of American law in the 1990s."). And it is not only the Supreme Court that mismanages its preemptive powers. See, e.g., William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007) (arguing that federal regulators and legislators have too often preempted state and local regulation without adequate analysis of that regulation's institutionally innovative aspects). But the Court's individual members may care less about systemic inefficiency than specific opportunities to expand or narrow precedents to their own favor. See LARRY ALEXANDER & EMILY SHERWIN, *DEMISTIFYING LEGAL REASONING* 86 (2008) ("From the standpoint of a judge who thinks the precedent rule is misconceived, however, any narrowing of the rule is an improvement . . .").

²²⁷ This is not to say that such power is inherently corrupt. Cf. SUNSTEIN, *ONE CASE*, *supra* note 113, at 248 ("Skeptics have no reason to favor a limited judicial role . . . [T]here is all the difference in the world between skepticism and a recognition of cognitive or motivational limitations on the part of certain people engaged in distinctive social roles."). Clearly we have some

extent an agent follows a precedent as he or she would follow a rule, that agent has foreclosed his or her own reasoning to just that extent.²²⁸ And more legal agents are bound to follow the Supreme Court's opinions, right or wrong, than those of virtually any other single authority.²²⁹ This puts the Court in a uniquely vulnerable position in terms of errors and error costs because the only justification for exerting authority, ultimately, must be epistemic and courts' usual epistemic position is relatively weak.²³⁰ Yet the Court couches its opinions in archaisms,²³¹ metaphor and simile,²³² sarcasm,²³³ casuistry,²³⁴

normative absolutes as a nation. *Who* and *what* may be owned, for example, are limited substantially by such absolutes.

²²⁸ See ALEXANDER & SHERWIN, *supra* note 226, at 83–87. Following Hart, Raz and other contemporary positivists, I here assume that rules operate as *exclusionary reasons*—second order reasons that are protected from the kind of balancing that normative decisionmaking normally entails because they constitute a recognizably conclusive reason for action wherever they apply. See FREDERICK SCHAUER, *PLAYING BY THE RULES* xv (1991) (arguing that rules are “crude probabilistic generalizations that may . . . produce in particular instances decisions that are suboptimal or even plainly erroneous”). See generally JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (2d ed. 1990).

²²⁹ There is good reason to doubt that *stare decisis* has anything like preemptive force among the Supreme Court Justices themselves. See HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* 287–315 (1999). For lower court judges, however, the binding force of higher courts' opinions is normally more evident and expectable.

²³⁰ Theorists and partisans from many different backgrounds have lately converged on this point. See, e.g., ALEXANDER & SHERWIN, *supra* note 226, at 104–06; RAZ, *supra* note 228, at 58–84; Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 151 (2006) (arguing that individual ethics and “cultural commitments” indelibly shape perceptions of risks, facts, and arguments); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 572–74 (1998) (arguing that as a result of “hindsight bias,” judges cannot objectively evaluate a situation that has already occurred); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 906–11 (2006) (arguing that common-law decisionmaking can often exacerbate mistakes by tinkering with rules in order to achieve equity in a particular case before a court); cf. Richard J. Zeckhauser & W. Kip Viscusi, *Risk Within Reason*, in JUDGMENT AND DECISION MAKING 465, 476 (Terry Connolly et al. eds., 2000) (arguing that government agencies have no systematic strategies for assessing and responding to risk).

²³¹ See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (“The State may not put so potent a Hobbesian stick into the Lockean bundle.”).

²³² See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (deferring to the village's decision to segregate single family homes from apartment houses due in part to the release of “comprehensive reports” on zoning calling the apartment house “a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the [single-family home] district”).

²³³ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (“Since . . . a [harm-prevention] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff.”).

²³⁴ See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (denying takings challenge to law requiring lawyers to deposit clients funds in IOLTA accounts on grounds the precise

and other forms of argumentative communication that are uninformative, excessively manipulable, and too often blatantly self-contradictory.

Some subtle and some not-so-subtle methodological improvements in the Court's approach to communicating, therefore, present the possibility of real improvements in our model of ownership and its constitutional protections given the inevitability of disagreement over property. The demonstrative claim to that end is that the legal norms making up our constitutional property rights are best understood, at least for the time being, as *exclusionary reasons*. They essentially block present reasoning by those who act on them with respect to tangible, non-fungible resources. If there is a normative claim in what remains, it is this: constitutional property norms demonstrate why we should start viewing rights as *stubs*, like the placeholders on Wikipedia,²³⁵ instead of viewing them as any sort of trump over social coordination or planning. Social coordination and planning are either the source, or, at the very least, are integral to the enjoyment of property rights as real things. In this regard, property illustrates how an epistemically modest faith in graduated specification, even for matters as foundational as claims of right, can actually enhance our collective capacities to grasp and more precisely balance reasons for action in an uncertain world.

B. Diachronic Judging: More Truth, Less Argument

Property as reasonable expectations is both intuitive and problematic. The notion has a long, distinguished pedigree in the English-speaking world dating back to the time of Jeremy Bentham.²³⁶ What

petitioners' had lost nothing to which they were entitled and, therefore, were unlike the petitioners in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), where the Court granted relief to petitioners burdened by exact same rules).

²³⁵ A "stub" on Wikipedia is a short placeholder meant to invite further development from fellow editors. Wikipedia itself says the following: "A stub is an article containing only a few sentences of text which is too short to provide encyclopedic coverage of a subject, but not so short as to provide no useful information." Wikipedia, Entry for Stub, <http://en.wikipedia.org/wiki/Wikipedia:Stub> (last visited Aug. 26, 2009). The fluidity and multipolarity of Wikipedia's development forced "stubs" into existence and the passion and diversity of its authors made them as useful as they have become. Stubs are both synchronic and diachronic by nature, i.e., they are created at a point in time but are oriented to an inter-temporal existence and, thus, to being over time. Cf. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 131–44 (2001) (arguing that "the person" is a temporally-extended being, rather than a composition "of many different selves . . . at a[ny] particular moment").

²³⁶ Bentham's attack on the natural rights theory of property linked property to legislation and other positive law. JEREMY BENTHAM, THE THEORY OF LEGISLATION 113 (C.K. Ogden ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802) ("Property and law are born to-

do such expectations truly consist in, though, when legislative and administrative rebalancing of resource control is as frequent and thorough as we have seen in our age of ecology? Permission to fill the atmosphere with more carbon dioxide may eventually be a constrained entitlement, commodifying what was once a global commons.²³⁷ Will those entitlements be property and, if so, in which jurisdictions?²³⁸ What is left to motivate a theory of “reasonable expectations” of entitlement in a world in which total interconnectedness is constantly being better revealed, communicated, and understood? What is left to distinguish property when resource use is so contingent upon so many different jurisdictions’ authority and say-so?

Bentham and his intellectual heirs insisted that property as expectations ultimately consists in the procedural or legal obstacles to legislative action.²³⁹ There is undeniable power in this insight, but our experience has revealed the traps that arise when legal authority is as pulverized as our system has rendered it.²⁴⁰ Besides the obvious trap of collapsing property into whatever the courts protect,²⁴¹ and the now-famous difficulties that arise from acquisitions completed *after* the legal changes in question,²⁴² the fact remains that authority over even paradigmatic forms of property like land has become a jurisdictional mosaic. Popular sovereignty, after all, kept evolving after the

gether, and die together. Before laws were made there was no property; take away laws, and property ceases.”). But Bentham realized that property as a possessive, individualistic right was critically important to society and that the principled interpretation of legislation was first and foremost the “basis of expectation,” that is, the *reason* for individuals to plan on a thing’s possession, use, transfer, etc. *Id.* at 110–12.

²³⁷ See Jillian Button, Note, *Carbon: Commodity or Currency? The Case for an International Carbon Market Based on the Currency Model*, 32 HARV. ENVTL. L. REV. 571, 571 (2008).

²³⁸ See *id.* at 574 n.13.

²³⁹ See H.L.A. HART, *ESSAYS ON BENTHAM* 120–21 (1982).

²⁴⁰ See *supra* notes 39–49 and accompanying text.

²⁴¹ As Justice Kennedy observed in his *Lucas* concurrence, “if the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring in the judgment).

²⁴² In *Palazzolo v. Rhode Island*, the use prohibitions at issue had been enacted prior to the owner-plaintiff’s taking ownership of the property, arguably precluding any claim that the owner reasonably expected to use his land in the manner prohibited. Nevertheless, the Court held that post-regulation acquisition did not preclude the owner from raising a takings claim. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–30 (2001) (Kennedy, J., for majority except in Part II.B of opinion). Still, there was considerable disagreement over the precise effect post-regulation acquisition should have on an owner’s claim. See *id.* at 632–36 (O’Connor, J., concurring); *id.* at 636–37 (Scalia, J., concurring); *id.* at 637–45 (Stevens, J., concurring in part and dissenting in part).

Founding, generating new, untested institutional forms. An updated model of ownership, therefore, must presuppose institutional evolution and our tendencies toward improvisation.

Our concept of a right has long presupposed a multi-agency state. Its real defect has been its triangular rigidity: courts, legislatures, and executives exhaust the forms of authority. What it must envision is a multi-scalar state wherein a spectrum of jurisdictions and the array of agents they create are known to make law and have shifting and inter-related motivations over time. What appears to be a good outcome or fair process at first can change unforeseeably, especially in the presence of strategic action. So what would constitutional property be if jurisdiction to adjudicate were more self-consciously *inter-temporal* and institutionally corrigible? How could it allow for a right's existence and content to be determined over time, application by application? How could it commit to a *time-elapsed* interpretation of law?

Even when rights are stably distributed, of course, their practical value often fluctuates wildly because of governmental action (or inaction) throughout the economy.²⁴³ The real value of any commodity, by definition, is a function of macro-political and economic trends that courts are normally powerless to shape (at least intentionally). Moreover, many of the resources we value most could not exist but for political decisions to pool otherwise worthless legal privileges.²⁴⁴ And that highlights the populational nature of things that we normally regard as "property": whatever in our extant institutions generates stasis, stability, or settlement over time *at a populational level* can give rise to reasonable expectations, properly conceived.²⁴⁵ Nothing less could possibly justify subjective expectations in an uncertain world.

²⁴³ See, e.g., FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 27, at 26–28.

²⁴⁴ See Heller, *Tragedy*, *supra* note 10, at 660–79.

²⁴⁵ Cf. Merrill, *supra* note 32, at 998 (concluding that an interest's monetary value and irrevocability from the vantage point of executive and judicial actors serve as better indicia of property than other criteria the Supreme Court has identified). Much of this will have nothing to do with property law, per se. Thus, the relative degree of deference agencies receive from reviewing courts and the parties who may participate in their decisionmaking or challenge them in court—which often play leading roles in agencies' choices arranging or rearranging individual entitlements—should be critically important to any experimentalist interpretation of property rights under the authority of administrative agencies. Compare Richard B. Stewart, *The Reform of American Administrative Law*, 88 HARV. L. REV. 1669, 1676–88 (1975) (describing the theories of administrative law's directional shift to interest group representation in the 1960s and 1970s), with Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 446–57 (2008) (describing increasing penetration of cost-benefit analysis within agencies as a result of political forces).

In reality, furthermore, rights claimants' reasons for action need not bear much connection to justice. Rights claimants are, in an important sense, *probabilistic* agents.²⁴⁶ They rarely behave as though legal rights are immutably valuable or permanent. They assert them opportunistically and strategically, and often settle short of a full adjudication based on the probabilities of prevailing, not on heartfelt conviction or righteousness. And common law courts have advantages along exactly this axis linking rights claimants and society's institutional frictions. They are uniquely Janus-faced in our tradition, for only courts are required to look back before looking forward in our governmental system. Experimentalist courts, on the comparatively rare occasion they are asked to author a judgment, would do so cognizant of their special authority, duty, and positioning at precisely the points legal norms go into effect. They would presume repeat institutional interactions and stake out hypotheses regarding broader-scale patterns; they would root their holdings in a transparent set of assumptions about those institutions' patterns in the hope of provoking the subsequent testing of the courts' reasoning, independent of their own temporally-bound capacities to analyze rights claims.²⁴⁷ This kind of judging would invite continuous revision of whatever "law" emerges based on empirical insights that can only be gathered gradually.²⁴⁸

Is this so different from what we have now? In my view, it would eventually end the pigeon-holing so tragically common among our

²⁴⁶ Cf. Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, 19 J. ECON. PERSP. 75, 80–83 (2005) (characterizing patents as "lottery tickets" the worth of which rises or falls based on various contingencies outside the patent-holder's control).

²⁴⁷ The recent emergence of *experimental philosophy* could teach experimentalist judges a fair bit about the proven limits of intuitionistic, *a priori* analysis. See Joshua Knobe & Shaun Nichols, *An Experimental Philosophy Manifesto*, in EXPERIMENTAL PHILOSOPHY 3, 5 (Joshua Knobe & Shaun Nichols eds., 2008):

As far as we know, no experimental philosopher has ever offered an analysis of one concept in terms of another. Instead, the aim is usually to provide an account of the factors that influence applications of a concept, and in particular, the *internal psychological processes* that underlie such applications. Progress here is measured not in terms of the precision with which one can characterize the actual patterns of people's intuitions but in terms of the degree to which one can achieve explanatory depth.

Id.

²⁴⁸ This kind of judging would be, to whatever extent it looked forward, oriented to institution-building. Cf. KOMESAR, *supra* note 216, at 154–55 ("Simple, romantic notions of institutions must be abandoned. Civic republicans and communitarians, like libertarians and other advocates of private property, will have to face the realities of institutional choice. . . . Real reform requires confronting real institutional choices and that means . . . institutions envisioned and compared in the . . . context of numbers and complexity.").

courts today that elevates unstable analogies and supposed logical necessities of text²⁴⁹ over practical problem-solving. Consider the following obvious failings brought out in our short tour of constitutional property above. Why are land and the right to exclude so special in constitutional property law?²⁵⁰ Why should courts engage in reason-balancing in some takings cases—for example, “exactions”—but not others?²⁵¹ Why does the Court refuse to differentiate between jurisdictional scales regarding the confiscation of property?²⁵² What is the source of the expectations protected by *Penn Central*?²⁵³ What are the systemic consequences of allocating one set of claims or another to state courts as opposed to federal courts?²⁵⁴ What role does “substantive due process” play given the scope of *Penn Central*, *Nollan/Dolan*, and other “regulatory takings” precedents?²⁵⁵ The Supreme Court not only fails to answer such questions arising out of its jurisprudence, it compounds them with its “constitutional-zoning,”²⁵⁶ opportunistic minimalism,²⁵⁷ and outright self-contradiction.²⁵⁸

Let us imagine a better approach to exactions, the densest patch of the Court’s many-threaded constitutional property doctrines. State courts had dealt with conditional permissions, dedication requirements, and bargaining in land use contexts for decades before *Nollan* and *Dolan*.²⁵⁹ Most of them had done so with means/ends rationality review—reason balancing—and a requirement that the municipality

²⁴⁹ For a good overview of this predicament, see generally ALEXANDER & SHERWIN, *supra* note 226, at 27–127.

²⁵⁰ See *supra* notes 151–61 and accompanying text.

²⁵¹ See *supra* notes 147–60 and accompanying text.

²⁵² See *supra* notes 56–69 and accompanying text.

²⁵³ See *supra* notes 98–99 and accompanying text.

²⁵⁴ See *supra* notes 129–33 and accompanying text.

²⁵⁵ See *supra* notes 166–94 and accompanying text.

²⁵⁶ See *supra* note 175 and accompanying text.

²⁵⁷ See *supra* notes 82–87 and accompanying text.

²⁵⁸ See *supra* note 103 and accompanying text.

²⁵⁹ See, e.g., *Ayres v. City Council*, 207 P.2d 1, 3 (Cal. 1949); *Aunt Hack Ridge Estates, Inc. v. Planning Comm’n*, 273 A.2d 880, 882 (Conn. 1970); *Pioneer Trust & Sav. Bank v. Vill. of Mount Prospect*, 176 N.E.2d 799, 800 (Ill. 1961); *Collis v. City of Bloomington*, 246 N.W.2d 19, 21 (Minn. 1976); *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 13 (N.H. 1981); *Fred F. French Inv. Co. v. City of New York*, 350 N.E.2d 381, 382–83 (N.Y. 1976); *Brous v. Smith*, 106 N.E.2d 503, 504 (N.Y. 1952); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 443 (Wis. 1965). For helpful discussions of exaction cases in state courts, see generally Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729 (2007); R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5 (1987).

actually be delegated the authority it claimed.²⁶⁰ Few of them had ever confined their scrutiny to real property rights.²⁶¹ Few of them had shown any interest in reviving *Lochner's* brand of substantive due process.²⁶² But, then neither had they used means/ends scrutiny for unguided revisions of legislative deliberations.²⁶³ If anything, state courts had become less and less suspicious of municipalities using their authority to acquire revenue and non-revenue assets through their granting of land use permissions because they had seen that bar-

²⁶⁰ See, e.g., *Ayres*, 207 P.2d at 5–6; *Pioneer Trust and Sav. Bank*, 176 N.E.2d at 800–02; *Fred F. French Inv. Co.*, 350 N.E.2d at 386.

²⁶¹ Even after *Dolan*, courts have continued to test exactions not involving interests in land with the standards announced in *Nollan* and *Dolan*. See, e.g., *N. Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384, 389 (Ill. 1995) (scrutinizing transportation impact fees imposed upon subdivider to ensure fee was tailored to offset impacts “specifically and uniquely attributable” to subdivision). It seems an odd contortion of our federalism for the jurisdiction from which the noted *Pioneer Trust* doctrine arose to ignore its own law and to focus entirely on *Nollan's* and *Dolan's* nexus and proportionality test. See *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 386–88 (Ill. App. Ct. 1995).

²⁶² The most common doctrinal test—that the dedication, condition, or exaction bear some recognizably “reasonable relationship” to the social costs entailed by an owner’s proposed actions—was explained by the California Supreme Court as follows:

We see no persuasive reason in the face of . . . urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for . . . facilities to such an extent that additional land for such facilities will be required.

Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606, 611 (Cal. 1971), *appeal dismissed*, 404 U.S. 878 (1971); see Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 55 (1987).

²⁶³ In *Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976), for example, the Minnesota Supreme Court heard a facial challenge to a Minnesota statute authorizing municipalities to require land dedications from subdividing landowners for the purpose of park and other land conservation. *Id.* at 20. The landowner also challenged the city’s ordinance utilizing this authority by giving the subdivider a choice between dedicating land or paying an in-lieu-of fee. *Id.* He owned 14 acres in the city and had applied for permission to subdivide it into 33 lots. *Id.* at 20. After surveying the jurisprudence from around the country, the court expressed its principal concern: “[a] municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation.” *Id.* at 26. The court went on to hold, however, that neither the statute nor the ordinance were actionable as such because *Collis's* approval had yet to be denied—a fact that, in combination with the ordinance’s terms that “as a general rule, it is reasonable to require” a substantial dedication or in-lieu-of fee, proved decisive. *Id.* at 27 (emphasis added) (internal quotations omitted). The holding, however, was “without prejudice” to subsequent attacks “in judicial review proceedings” should the statute be applied. *Id.* at 28.

gaining's results over time.²⁶⁴ This is not to say that that bargaining's results were particularly fair or efficient. Indeed, this use of authority had uncertain causal connections to the hyper-expansion of suburbia throughout the same period.²⁶⁵ It is to say that state courts had settled on reason balancing of an unmistakably ad hoc, but nonetheless *jurisdictionally constrained*, sort.²⁶⁶

²⁶⁴ See Ira Michael Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1155 (1964) (arguing that subdivision exactions, whether justified under the taxing or the police power, had become a critical source of "desperately needed municipal revenues" by the 1960s). Without citation, Professor Fischel once maintained that "[p]rior to about 1970, exactions were pocket change to local governments and developers alike." FISCHEL, *REGULATORY TAKINGS*, *supra* note 38, at 341. Although there is support for the conclusion that exactions continued growing robustly throughout the 1970s, '80s and '90s, this is not the equivalent of maintaining that prior to the 1970s they were insignificant. I have found no persuasive evidence to support such a conclusion and, indeed, am inclined to believe just the opposite given the prevalence of exactions claims in the reported opinions of that era. See, e.g., Henry J. Schmandt, *Municipal Control of Urban Expansion*, 29 FORDHAM L. REV. 637, 645 (1961) ("It is today conceded that a municipality has the power to . . . require [the developer] to build at his own cost on-site public improvements such as roads, sewers, and water mains. Whether he can be compelled to provide or pay for improvements that are not directly related to the subdivision is now the subject of much litigation."); see Smith, *supra* note 259, at 7.

²⁶⁵ Compare Heyman & Gilhool, *supra* note 264, at 1119–20 (noting that infrastructure costs needed to keep up with new residents can be acute in high-growth areas and that existing residents would bear the tax burdens of that growth disproportionately with recourse to fees and dedications), with John W. Reps & Jerry L. Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405, 415–16 (1963) (noting that exactions were best negotiated and administered by local governments in connection with subdivision platting and other land use authorities because states have overwhelmingly delegated that authority to municipalities). Exactions were common long before the Supreme Court took note of them. See Donald W. Brodie, Note, *Platting, Planning & Protection—A Summary of Subdivision Statutes*, 36 N.Y.U. L. REV. 1205, 1205 (1961) (observing that state-controlled land development through subdivision legislation is widely accepted as a proper exercise of state power); see also Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 429 (1977) (noting that in-kind exactions are common suburban practice; Julian Conrad Juergensmeyer & Robert Mason Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415, 418 (1981) (noting that required dedications for intradevelopmental capital improvements is a well-accepted part of subdivision regulation); Marygold Shire Melli, *Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 389, 399–405 (1953) (reviewing subdivision control statutes around the nation).

²⁶⁶ For many years, the variety of urban planning priorities pushed municipal officials in different directions, generating a variety of justifications for exactions of different kinds. This led to a series of judicial decisions ranging over a number of bargain types and a number of constitutional justifications for both the imposition and the judicial scrutiny. See John D. Johnston, Jr., *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L. REV. 871, 921–22 (1967). This, however, was no different from the evolution of justifications for land use planning more generally. See, e.g., Allison Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 653 (1958) (noting various justifications for land use planning such as health, safety, well-being, efficiency, and economy).

Starting from the obvious reasons for requiring subdividers to dedicate adequate space for public streets, sidewalks, sewers, and other utilities,²⁶⁷ municipalities began to tie all sorts of infrastructural investments to their shifting of regulatory permissions.²⁶⁸ Developer-owners came to *expect* it.²⁶⁹ Local governments were singularly responsible for the land use planning in their jurisdictions. States had ceded them the authority to serve local publics and mediate land use conflicts that arose.²⁷⁰ So, aware of the competitive threats²⁷¹ and the economy of information²⁷² they were facing, many local governments

²⁶⁷ Johnston, *supra* note 266, at 874.

²⁶⁸ The practice of tailoring local assessments to private owners' individual benefits from public infrastructure was common—and one of the most frequent catalysts of Due Process Clause litigation in the federal courts—well before the rise of land use exactions more generally. See, e.g., *Londoner v. City of Denver*, 210 U.S. 373, 380 (1908); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 326 (1901); *Wight v. Davidson*, 181 U.S. 371, 378–79 (1901); *Norwood v. Baker*, 172 U.S. 269, 270–71 (1898). Although these so-called “special assessments” had traditionally included only streets and related infrastructure, by the end of the post-war boom, community planners had begun to link a variety of social costs to the subdivision and development of land, and some had even advocated for a renewal of special assessments. See Reps & Smith, *supra* note 265, at 409 (“On the special-assessment analogy, it is clear that a requirement is valid only to the point that its benefits may reasonably be expected to inure to future homeowners in the subdivision.”).

²⁶⁹ See Heyman & Gilhool, *supra* note 264, at 1143 (“Modern cost-accounting techniques permit precise calculation of costs for various facilities allocable to new subdivisions . . . according to a formula applicable to all, thus achieving equality of treatment among all new subdivision residents.”); cf. Thomas D. Zilavy, Comment, *Subdivision Regulation: Requiring Dedication of Park Land or Payment of Fees as a Condition Precedent to Plat Approval*, 1961 WIS. L. REV. 310, 321 n.57 (1961) (“[T]he business of subdividing is one affected with a public interest, and is subject to reasonable regulation to protect this interest.”). This is not to say that developers expected or acquiesced in *every* condition or exaction or that true takings never masqueraded as such. See, e.g., *Fred F. French Inv. Co. v. City of New York*, 350 N.E.2d 381, 383 (N.Y. 1976) (holding that a “zoning amendment” rendering private property subject to public use while simultaneously vesting transferable development rights in the owner in exchange was invalid because it was a denial of due process of law). But as to the *notion* of an exaction in exchange for permission to subdivide or intensify the use of land, owners adapted as quickly as they had to the zoning ordinance itself.

²⁷⁰ The power over land use controls was local long before states began delegating it in the nineteenth century. See HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870* (1983); Jamison E. Colburn, *Localism's Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 *ECOLOGICAL L.Q.* 945, 967–91 (2006).

²⁷¹ See, e.g., WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 207–59 (2001) (describing inter-local competition and its effects on local politics); David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 *J.L. & POL.* 261, 265 (2005) (“[L]ocal governments have a peculiarly limited jurisdiction, yet they must govern in a world in which influential forces do not respect jurisdictional lines.”).

²⁷² The notional claim that municipalities are participants in an overall economy of information probably traces to Tiebout, if not his predecessors. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956). I have elsewhere linked the

behaved strategically to achieve the best results they could within their territories at their particular moment in time.²⁷³ Many of the subsequent legal challenges to these government actions were simply variations on the claim that the municipality was not authorized to maneuver and bargain as it had, i.e., that it had assumed powers belonging to the state.²⁷⁴

What state courts thus grew proficient at detecting case by case were the aberrations—the instances in which the municipality’s action was simply incongruent or inconsistent with its avowed purposes.²⁷⁵ It is hardly congenial to property rights, after all, to force municipalities trying to fund the infrastructure that fits new development into existing communities to rely exclusively on ad valorem property taxes on present owners.²⁷⁶ One of the chief “values incident to [real] property,”²⁷⁷ certainly, is the ratio of taxes to services.²⁷⁸ Indeed, the dedi-

development of land use law in America to its hyper-fragmentation of authority, the corresponding vulnerability of local jurisdictions to the behaviors of their neighbors, and the information costs of rational action when local strategic behaviors are left unchecked and uncoordinated at the regional level. See Jamison E. Colburn, *Solidarity and Subsidiarity in a Changing Climate: Green Building as Legal and Moral Obligations*, 5 U. ST. THOMAS L.J. 232, 240, 247–51 (2008) (tracing the evolution of land use authority in the United States by subsidiarist means as a matter of information economy); Jamison E. Colburn, *Localism’s Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 ECOLOGY L.Q. 945, 954, 965–69, 990–91 (2006).

²⁷³ The totality of state law governing municipalities will be what local officials guide their behaviors by, and that totality is often invisible to courts hearing particularized cases. See Barron & Frug, *supra* note 271, at 263–64, 272.

²⁷⁴ See, e.g., *Ayres v. City Council of Los Angeles*, 207 P.2d 1, 3 (Cal. 1949); *W. Park Ave., Inc. v. Twp. of Ocean*, 224 A.2d 1, 4 (N.J. 1966); *Jenad, Inc. v. Vill. of Scarsdale*, 218 N.E.2d 673, 674 (N.Y. 1966), *abrogated in part by Dolan v. City of Tigard*, 512 U.S. 374, 389 (1994); *Frank Ansuini, Inc. v. City of Cranston*, 264 A.2d 910, 911, 913 (R.I. 1970).

²⁷⁵ See Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 485–86, 492 & n.95 (1991); Fenster, *supra* note 259, at 762–63.

²⁷⁶ It is neither congenial to property rights nor especially modest about judicial competence. Cf. Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 1002–03 (1989) (“Any effort by a court to trace individual benefits and burdens from a broad-based income or property tax through the myriad expenditures made from a general revenue fund would be fraught with difficulty. When the exaction is more narrowly focused, however, such as in the case of an exaction on land development, it may seem that measuring and distributing burdens and benefits is relatively straightforward. Yet the distribution of even the simplest category of burdens—the direct fiscal burdens associated with providing governmental services to new development and its occupants—involves difficult questions of judgment about fairness.”). Difficult judgments about fairness may be inevitable under *Nollan/Dolan*. But, if so, they have been given precious little attention in the reported cases applying the nexus and proportionality tests.

²⁷⁷ See *supra* notes 101, 111 and accompanying text.

²⁷⁸ See generally FISCHEL, *supra* note 271; Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the*

cations and impact fees had become so integral to urban finance that many state courts viewed themselves as role-constrained.²⁷⁹ State law thus gradually evolved into a spectrum of relatively deferential reason-balancing tests ensuring that valid public purposes were the actual motivation for the exactions challenged and local protectionism was being kept in check.²⁸⁰ Judicial weighing and comparing of the reasons for any exaction led naturally to a comparison with reasons for protecting burdened owners, one deal at a time.

An experimentalist Supreme Court encountering this practice, convinced that property was being taken, would anchor its reasoning directly to the scale and capacities of the jurisdictional authority and precise property right(s) under review. By 1994, the Court had already held that conditional permits could be a special kind of constitutional wrong where “the condition substituted for the [underlying] prohibition utterly fails to further the end advanced as the justification for the prohibition.”²⁸¹ In *Dolan v. City of Tigard*,²⁸² the owner wished to further develop a 1.67 acre streamside lot by expanding and paving a gravel parking lot and doubling the size of her store.²⁸³ After processing the application, the city proposed to condition its permission on the store owner’s dedication of a right of way that would add connectivity to a nascent walking and biking trail along the stream. The city linked this dedication to the expansion of impervious surface coverage in the watershed and to the automobile-dependence of the proposal, two design choices the city had long sought to deter through its land use planning program.²⁸⁴ Preoccupied with the doctrinal chaos in its precedents, however, the 5-4 majority of the Court spent more effort choosing the words to repackage *Nollan*’s nexus test²⁸⁵ than it did appraising the city’s own jurisdiction specific reasoning. Had it

Tiebout Hypothesis, 77 J. POL. ECON. 957 (1969); Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975).

²⁷⁹ See Been, *supra* note 275, 505–06; see Juergensmeyer & Blake, *supra* note 265, at 425.

²⁸⁰ See Been, *supra* note 275, at 506.

²⁸¹ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836–37 (1987).

²⁸² *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

²⁸³ See *id.* at 379.

²⁸⁴ See *id.* at 377–83.

²⁸⁵ See *id.* at 391 (“We think the ‘reasonable relationship’ test . . . is closer to the federal constitutional norm . . . [b]ut we do not adopt it as such, partly because [it] seems confusingly similar to the term ‘rational basis’ which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.”). As the dissent made clear, the test in *Nollan* had actually—along with much of the Court’s “regulatory takings” doctrine—begun to look suspiciously similar to the Court’s substantive due process jurisprudence (the implications of which the dissent found discomfiting). See *id.* at 405–11 (Stevens, J., dissenting).

done the latter, it might have paused to consider what institutional safeguards had supposedly let this owner down. The city's findings were, on their face, quite measured and had been reviewed by a specialized state tribunal—Oregon's Land Use Board of Appeals—for consistency with state law governing municipal assertions of this authority.²⁸⁶ The owner had not even exhausted her opportunities for a variance²⁸⁷ and the Oregon Court of Appeals and Oregon Supreme Court both held that the city's conditions self-evidently advanced valid purposes.²⁸⁸

Dismissing the city's and state's reasoning as "obvious,"²⁸⁹ the Court then proceeded to hold that a quantitative equivalence was required between the public's conditions and the owner's proposed uses.²⁹⁰ Of course, the city could not possibly have derived any such ratio. Its greenway and the expanded parking lot at the owner's store bore uncertain relationships to the curbing of automobile use—as the city admitted from the beginning.²⁹¹ Far from being "axiomatic,"²⁹² though, limiting the growth of impervious surface coverage bears its own uncertain relationships to watershed health. Not all impervious surfaces are created alike; the precise location and onsite engineering

²⁸⁶ See *id.* at 382.

²⁸⁷ See *id.* at 383 n.4.

²⁸⁸ See *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994). The Oregon Supreme Court took note of the city's *actual* findings.

The increased impervious surface would be expected to increase the amount of storm water runoff from the site to [the stream]. The . . . drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the . . . floodplain . . . the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site.

Id. at 439–40 (internal quotations omitted).

²⁸⁹ *Dolan*, 512 U.S. at 387.

²⁹⁰ See *id.* at 388 ("The second part of our analysis requires us to determine whether the degree of the exactions demanded . . . bears the required relationship to the projected impact of petitioner's proposed development.") (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) ("[A] restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose.")) (internal quotations omitted)).

²⁹¹ *Id.* at 395–96.

²⁹² *Id.* at 392–93 ("It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property. . . . [But] [t]he city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.").

can make tremendous differences.²⁹³ Indeed, what the city was attempting with its greenway deal was arguably the very kind of practical experimentation that local land use planning is uniquely positioned to carry out. The institutional frictions slowing the city's movement toward the deal it offered Dolan were deliberate and practical.²⁹⁴ Moreover, whatever else landowners can reasonably expect today, it is not free permission to double the intensity of a commercial use.²⁹⁵ By ignoring in its opinion the epistemic and institutional settings in which this proposed deal arose, the Court suppressed the most salient aspects of the case if its wider constitutional significance was truly the matter.²⁹⁶

More importantly, though, are federal courts even *capable* of balancing the proportionate social cost an owner's proposed use represents against the burden a jurisdiction's conditions put upon any particular owner (assuming *Dolan* does not establish an "objective" burden test, which is another unanswered question)? If the Court meant, through its refinement of the nexus test, to be guiding lower courts as they confront conflicts of this sort, it did a wretched job of leaving them a task they could actually carry out.²⁹⁷ The two things seem as incommensurable as any others the Court normally leaves to the political process. The Court would have better acquitted itself if it suggested why the Oregon system of allocating land use authority was in some way inferior to those of other states. Without that more concrete point of comparison, the Court's sharp defense of Ms. Dolan seems premature at best and ill-conceived at worse.

Of course, future-oriented judging need not take the form of *Penn Central's* or *Dolan's* judicial legislation. Courts are constantly

²⁹³ See, e.g., Elizabeth Brabec et al., *Impervious Surfaces and Water Quality: A Review of Current Literature and Its Implications for Watershed Planning*, 16 J. PLANNING LIT. 499, 503–04 (2002). The influence of impervious surfaces, moreover, is often dwarfed by other aspects of urbanization in a watershed. See, e.g., Derek B. Booth et al., *Forest Cover, Impervious-Surface Area, and the Mitigation of Stormwater Impacts*, 38 J. AM. WATER RES. ASS'N 835, 842 (2002).

²⁹⁴ Cf. Sabel & Zeitlin, *supra* note 220, at 305 (arguing that "[a]ccountable behaviour . . . [is] no longer . . . a matter of compliance with a rule set down by the principal, as if the principal knew what needed to be done, but rather provision of a good explanation for choosing, in the light of fresh knowledge, one way of advancing a common, albeit somewhat indeterminate project").

²⁹⁵ See JUERGENSMEYER & ROBERTS, *supra* note 114, at 283–90.

²⁹⁶ If it was not the matter, the Court took the case imprudently and ended up disrupting many different approaches to these problems of fairness and efficiency that were being tried across the states. See *supra* notes 267–80 and accompanying text.

²⁹⁷ Common law nuisance is perhaps the most analogous judicial enterprise. But see WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 571 (4th ed. 1971) (calling nuisance doctrine an "impenetrable jungle").

looking back and reconstructing past precedents to synthesize them into usable law. This is what makes opinions that fix their judgments to specific institutional settings, parties, and procedural paths methodologically superior. Good judging is assiduously particularistic and attentive to broader patterns all at once. But it would be easier to recognize and trace the comparative influences of legislatures, agencies, municipalities, courts, and other legal agents in allocating and reallocating rights over time if judging became more, rather than less, institutionally aware and explicit. No handful of judges can possibly match the political imagination of thousands, hundreds of thousands, or millions when it comes to solving real problems that most of America's jurisdictions share in common. And the preemptive powers of the federal courts make that a tragedy worth avoiding wherever we can.

C. Deliberation as Authority in Law: Embedding Judgments in Their Epistemic Context

If good legal reasoning is a reflection of (valid) legal norms and popular sovereignty has given us an incomparably complex system of authority to change the law within scores of quasi-distinct jurisdictional spheres, then the questions raised here come down to the nature of legal authority itself. When virtually all legal norms can be changed at will (i.e., the will of a sufficient majority), motivationally effective deliberation is all that invests property with any sort of individual security over time. Too little regard for that security may undermine a law's legitimacy in our constitutional tradition. But this critique can be turned on judicial action as surely as it has been on political action. Rights may ultimately depend on the integrity of the authorities which establish them. But, if so, the Court's jurisprudence of *constitutional meaning* has been the most destabilizing force of all for the last three decades. It has failed to signal what it means by property in the constitutional sense. Moreover, as Ian Shapiro contends, democracy for us is at least a "subordinate foundational good, designed to shape the power dimensions of collective activities without subverting their legitimate purposes."²⁹⁸ In other words, stable majorities in our system will eventually deprive owners of any security given sufficient time and motivation. Thus, as "we" identify and regroup our resources in the coming decades, what our legal system *can* do is aim to construct legal norms that, rather than compounding our

²⁹⁸ IAN SHAPIRO, DEMOCRATIC JUSTICE 18 (1999).

coordination problems, better enable us to solve them as coherently as possible given the fact that “we” are a temporally extended, internally plural self. A major step toward that end, I have argued, would be to focus more attention on the epistemic limits we all face as actors and less attention on the reification of legal doctrines which are inherently imperfect, cryptic, and temporary.

Whatever the flaws in the Supreme Court’s methods, though, one can see significant directional change in its constitutional property doctrines. Just as property became a multi-textured constitutional concept, a comprehensive “whole parcel” rule attracted a consistent majority on the Court.²⁹⁹ Parcels, the Court decided, have temporal, spatial, and functional dimensions and regulatory burdens must be measured across all of them. Individual and shared rights, the Court concluded, necessarily coexist and must jointly characterize ownership at any given moment. The only thing a court can measure is the rapidity of, and justification(s) for, change. An even better bearing can be taken from the Court’s 1987 case, *Keystone Bituminous Coal Ass’n v. DeBenedictis*.³⁰⁰ That case effectively abrogated *Pennsylvania Coal* in result if not necessarily in reasoning (or rhetoric).³⁰¹ In *Keystone*, a statute “strikingly similar”³⁰² to the act struck down in *Pennsylvania Coal* was challenged for taking subsurface estate owners’ coal by prohibiting them from mining it in ways that could cause subsidence at the surface.³⁰³ The Court upheld the law as a (by then) conventional exercise of state authority reallocating inherently provisional rights which deprived the owner of neither enough rights nor enough value to be a taking.³⁰⁴

²⁹⁹ See Richard J. Lazarus, Lucas *Unspun*, 16 SE. ENVTL. L.J. 13, 22–29 (2007) (describing the eventual votes from Justices O’Connor and Kennedy for the whole parcel approach, shifting the Rehnquist Court accordingly).

³⁰⁰ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

³⁰¹ The Court in *Keystone* was insistent, as it has been throughout the post-*Penn Central* era, that measures “enacted solely for the benefit of private parties” are not justifiable exercises of sovereignty. *Id.* at 486; cf. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose.”).

³⁰² *Keystone*, 480 U.S. at 506 (Rehnquist, C.J., dissenting). Of course, the majority took pains to distinguish “the obvious similarities between the cases.” *Id.* at 481–502.

³⁰³ *Id.* at 476–78.

³⁰⁴ Cf. *id.* at 485 (“[T]he . . . Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners. The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas.”).

The exactions cases, by contrast, offered little justification for their creation of a hybrid constitutional wrong, no explanation for their abandonment of takings doctrine's normal jurisdictional rules, and no explanation for regarding land as somehow constitutionally different from other forms of property.³⁰⁵ Their obscurantism has hardly helped others contribute to or build on the placeholder *Nollan* and *Dolan* set down. The *Penn Central* burden threshold test will likely never produce a fixed rule of law.³⁰⁶ But it does have the virtue of queuing others to be more consistently deliberative about their control of resources.³⁰⁷ And it has the virtue of realism about individual expectations in an age of perpetually-improving perceptions of nature and society. In just that much, perhaps, it is more experimentalist than the exactions cases.³⁰⁸

V. Conclusions

Given all the imperfections of the judicial process and all the (human) frailties of the judicial mind, one quite practical response to the claims above is: so what, then? The cognitive and deliberative failures that are apparent looking back over the twentieth century's constitutional property jurisprudence point to the following conclusion: the combination of reason-giving in the form of judgments together with the highly situated stories of the cases being decided has been an embarrassment to practical reason if coherence over time is any measure. And yet this combination remains non-negotiable. But if the assertion of rights in the courts of the United States depends most substantially and directly on the existence of jurisdiction to adjudicate, the precise doctrinal mechanisms that are refined over time, and the remedial traditions that determine the availability of relief,³⁰⁹

³⁰⁵ See *supra* notes 152–65 and accompanying text.

³⁰⁶ See *supra* notes 110–15 and accompanying text.

³⁰⁷ Professor Schapiro's metaphor of polyphony, which may well capture what the Court should strive for as well, is rooted in the simultaneous independence and interactivity of sounds (as opposed to other, more exclusionary stimuli)—and “accepts a substantial role for dissonance as well as harmony.” Schapiro, *supra* note 73, at 249. “[A] polyphonic conception [of our federalism] recognizes an important role for competition among states and between states and the federal government.” *Id.*

³⁰⁸ Moreover, the third *Penn Central* factor, which allows the court to assess a challenged action's “character,” see *supra* notes 93–97 and accompanying text, represents an opportunity of great potential. The essential character of a law or executive action is intimately bound up with the political process that generates it. Simply put, healthy politics generates healthy balances of individual and collective ends. Finding durable, easily communicated criteria for identifying either is work that ought to go hand-in-hand with judging constitutional property rights claims.

³⁰⁹ See *supra* notes 147–95 and accompanying text.

then this structural combination of opinion writing and salience-biased³¹⁰ procedures frames at least one imperative going forward. We must minimize the epistemic bottlenecks and choke points that common law adjudication entails³¹¹ in order to maximize the probability that dispersed information can be aggregated and sorted over time while not ignoring individual interests in the law's protections *today*.³¹²

So-called "many minds" arguments have been all the rage in legal theory lately, pointing to Condorcet's Jury Theorem as a way around cognitive and deliberative failures like those highlighted above.³¹³ There is reason to doubt that adjudication and opinion writing, carried out as they are in serial fashion by actors with correlated biases, make good use of "many minds," at least as compared to other lawmaking institutions.³¹⁴ A comparative understanding of adjudication wherein the epistemic advantages of random biases, temporally and structurally varied procedural paths, and controls on known defects like reputational and information cascades are all given,³¹⁵ provides us with a hopeful future for constitutional property.³¹⁶

Now the critique developed in Part IV faulted only the manner in which our federal courts are engaging past precedents as relevant to

³¹⁰ Those who have studied and categorized cognitive failures characterize the trends mapped out in Parts II and III as the manifestation of salience bias, i.e., judging and attempting to counteract low probability/high impact risks and harms based on highly profiled events like those at issue in most litigation. *See, e.g.*, PAUL SLOVIC, *THE PERCEPTION OF RISK* 37–38 (2000).

³¹¹ *See* ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 25–55 (2009).

³¹² *Cf.* Dorf & Sabel, *supra* note 220, at 404 (acknowledging that "incrementalism, by decentralizing authority and subdividing large decisions into small ones, directly surrenders the weak to the power of the strong").

³¹³ *See, e.g.*, CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* (2009); CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006). The Jury Theorem holds (roughly) that when "there is a binary choice as to which a right answer exists, a majority vote among a group of sincere voters who are better than random will approach perfect accuracy as the size of the group increases, as individual accuracy increases, and as the correlation of the biases within the group decreases." VERMEULE, *supra* note 311, at 19–20.

³¹⁴ *See generally id.*

³¹⁵ *See, e.g.*, DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* (2008).

³¹⁶ Precedents read as establishing "exclusionary reasons" for subsequent legal actors, indeed, combine the worst aspects of adjudication from an epistemic standpoint:

[A] system of precedent is a system of sequential decisionmaking in which voters know the decisions of earlier voters. Even where there would be epistemic value in the aggregation of simultaneous legal judgments from many judges or other minds, one cannot straightforwardly infer that there would be equivalent epistemic value in precedent, seen as a system for aggregating the judgments of many minds over time.

VERMEULE, *supra* note 311, at 49.

present reasoning about property conflicts. For, inevitably, synthesizing precedents brings present actors to the contradictions in legal reasoning which only surface over time. Parts II and III highlighted some of those contradictions in our constitutional property doctrines, but they did not suggest how we should respond. Here, I conclude that that response must be to create the conditions in which inter-jurisdictional deliberation capable of dissolving such contradictions can be provoked and sustained over time. Acting on opinions as *exclusionary reasons* when those opinions merely elaborate dubious interpretive inferences or unsustainable doctrinal pigeonholes (e.g., exactions versus regulatory takings) or both, is to exacerbate our cognitive and deliberative shortcomings. By contrast, structuring legal communication to emphasize information, context, and other verifiable connections of that communication's point to the rest of what we take to be true allocates authority within and by that communication to optimize its aggregative value.³¹⁷ It empowers subsequent decisionmakers to make the best use of the communication(s).

For courts, this entails equal parts imagination and modesty regarding the identification and articulation of rules of law governing other institutions' more specific allocations of resources. It entails respect for both individual human flourishing *and* the immense possibilities inherent in collective governance. "Property," it should go without saying, thus encapsulates some *particular* jurisdiction's judgment about rights over resources; it ought never to be equated with uniquely rational, just, or authoritative distributions or outcomes. Precedents interpreting constitutional property, though, seem particularly prone to this inferential trap. Instead of foregrounding the malleability of doctrinal categories, the fallibility of judicial reason balancing, or the contextuality of "investment-backed expectations," the twentieth century's constitutional property precedents exalted the Supreme Court's allocative judgments above the judgments of all others.

³¹⁷ Besides its inherently diachronic orientation, the other key facet of a stub—the Wikipedia entry meant to serve as a placeholder—is its ease of speedy deletion. See Wikipedia, Entry for Stub, <http://en.wikipedia.org/wiki/Wikipedia:Stub> (last visited Aug. 26, 2009) ("When you write a stub, bear in mind that it should contain enough information for other editors to expand upon it. The key is to provide adequate *context*—articles with little or no context usually end up being speedily deleted."). Judicial opinions obviously differ from Wikipedia stubs in the timescales and ramifications of such deletions, but claims of right are not nearly as different from "epistemic rights" as some assume. Both depend on an adequacy of reasons—a sufficient justification (whether for action or for belief)—and, thus, both are as oriented to the future as they are to the past.

What interpretations would foster inter-jurisdictional, inter-temporal deliberation? Presumably, those that recognize and validate jurisdictional diversity would do so. Of course, the Court has never (to my knowledge) held that we should differentiate “due process of law” as between federal, state, or local rearrangements of property rights—withstanding the undeniable textual, historical, and structural differences separating the Fifth and Fourteenth Amendments.³¹⁸ If constitutional property truly is one legal thing, however, this is precisely the kind of structural judgment the Court must leave open to revision. Yet, as many times as it has heard pleas for some form of federal relief from a state or local action rearranging the rights and responsibilities of ownership, the Supreme Court has refused to acknowledge the fact that the Fourteenth Amendment *included* a Due Process Clause and *excluded* a Takings Clause.³¹⁹ And this refusal raises foundational questions still today. If property is a reflection of jurisdictionally appropriate authority and, specifically, of some host jurisdiction’s *provisional* expression of confidence in its owners, and if jurisdictional authority has been pulverized into a multitude of little pieces (some topical, some geographical in space), why must our federal courts suppose away all of the institutional improvisation that exists with jurisdictional, doctrinal, and remedial rules that render it all invisible? These rules could all be used to reward jurisdictional, inter-jurisdictional, and inter-temporal deliberation about property as a means and as an end.

Of course, due process, “public use,” and takings scrutiny have usually had at least this much in common: they ask whether a good and sufficient reason has been given by an authority that is reordering peoples’ property rights, and they each presume, at least generally, that this question is a proper question for the judiciary to answer.³²⁰ It is the *precise* connection between reason and action that differs from right to right and “[w]hether one conceives of rights as prepolitical

³¹⁸ This is not to imply agreement with those who have advocated such differentiation over the years. Many such proposals are deeply problematic. It is rather to raise the possibility that the scale and scope of the jurisdiction being bound to protect a right ought to influence the *content* of that right. See, e.g., NOZICK, *supra* note 69, at 320–334.

³¹⁹ See *supra* notes 169–72 and accompanying text.

³²⁰ See, e.g., *Covington and Lexington Tpk. Co. v. Sandford*, 164 U.S. 578, 592–92 (1896); *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896). *Fallbrook Irrigation* and *Missouri Pacific* were both physical appropriation cases, although *Fallbrook Irrigation* also rejects a claim that the state statute improperly denied the appellants’ request for a hearing, see *Fallbrook Irrigation*, 164 U.S. at 167–68. *Sandford* involved a state rate limit statute the railroad challenged as a “deprivation of property.” See *Sandford*, 164 U.S. at 593–98.

entitlements or as positive enactments designed to advance some conception of the good, they ought to have protection against incidental as well as targeted burdens.”³²¹ *Penn Central’s* (and *Pennsylvania Coal’s*) animating concern for less-than-total confiscations is, in this light, justifiable. Yet there can be no theory of property without a good theory of the multi-agency state, a theory of splintered and imperfect institutional embodiments of popular sovereignty. In the end, then, any theory of property as “expectations” in an actual jurisdiction must be a *political* theory, a theory about legislative action in a multi-scalar, multi-polar world in which owners and jurisdictions populate a common, inescapable network. Unfortunately, constructing such a theory entails complicated normative and positive (causal) analyses of political action. It entails explaining why and how majorities coalesce, hang together over time, and fall apart. And it entails tracing property’s substantial role in those dynamics.

The singularity of our constitutional property, however, induces a kind of bias in our federal judiciary. The macro-political forces actually driving the allocations and reallocations of—and popular expectations attaching to—our many different forms of ‘property’ are virtually invisible to our courts.³²² When home values are as anchored to sinking capital markets (or local school performance) as farm acre values are to annual subsidy packages and development pressures, though, “investment-backed expectations” almost certainly collapse as independent indicators of what people *own* separate and apart from society. Finding the indicators of practical deliberation and sincere reason-giving would be a more productive—if also more daunting—form of judicial work. Judging that was keyed to those indicators would inevitably focus on a jurisdiction’s specific means and ends as opposed to doctrinal abstractions. Officials who mean to bring about durable improvements in either property or sovereignty, thus, should seek ways to facilitate the wider, quicker uptake of new learning about both society and the environment across the range of possible actors. A model of ownership resilient enough to work in so dynamic an environment will be one predicated directly on the best of practical reason. And that would be aided immensely by a Supreme Court more attentive to the jurisdictional and temporal complexity of our notions of ownership.

³²¹ Dorf, *supra* note 136, at 1202.

³²² See *supra* notes 7–11 and accompanying text.