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TAKING PROPERTY RIGHTS SERIOUSLY? THE SUPREME COURT AND THE “POOR RELATION” OF CONSTITUTIONAL LAW

Ilya Somin*

INTRODUCTION

Over the last twenty-five years, the Supreme Court has expanded protection for constitutional property rights. After decades of neglect,¹ the Court has begun to take constitutional property rights seriously.² At the same time, however, protection for property rights still falls far short of that enjoyed by most other individual rights enumerated in the Constitution. In case after case, the Court has expressed support for property rights, but stopped short of providing them with more than minimal protection. Property rights have gained ground in recent decades. But they still have a long way to go. In *Dolan v. City of Tigard*, Chief Justice William Rehnquist’s opinion for the Court emphasized that there is “no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation.”³ But despite the Court’s own rhetoric to the contrary, property rights are still the “poor relation” of the Constitution.

Part I of this article analyzes the Court’s recent property rights jurisprudence. It particularly focuses on the Court’s decisions interpreting the Takings Clause of the Fifth Amendment. I examine key decisions on Public Use, regulatory takings, remedies for takings clause violations, and access to federal courts for citizens who claim that their property rights have been violated. In most of these fields, recent court decisions have

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¹ See, e.g., Herman Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?* 37 AM. U. L. REV. 9, 10 (1987) (noting that in the years prior to the 1980s, “the Court ha[d] rendered almost impotent even those constitutional clauses most concerned with protecting property”). For a good recent discussion of the historical reasons for the decline of property rights protection from the 1930s to the 1980s, see JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 125-57 (3d ed. 2008).

² This statement and the title of the article is an adaptation of RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

³ *Dolan v. City of Tigard*, 512 374, 392 (1994).

modestly expanded protection for property owners. However, the Court's decisions in each of these areas also fall far short of giving property rights the same degree of protection as that extended to most other individual rights enumerated in the Constitution. Efforts to extend judicial protection for property rights have been almost uniformly opposed by the Court's liberals, while Court conservatives have often been divided among themselves.

Part II considers some of the standard rationales for denying judicial protection for property rights equal to that enjoyed by other constitutional rights. It addresses claims that property rights deserve little or no protection because they are already protected by the political process, because the courts lack expertise on "economic" issues, because judicial protection would benefit the rich at the expense of the poor, because the Courts should not enforce supposedly arbitrary common law property baselines, and because judicial protection for property rights might harm the environment. I suggest that each of these concerns is overstated, and that many apply with equal or greater force to the enforcement of other constitutional rights. Moreover, expanded judicial protection for property rights might actually benefit the poor more than the wealthy and may in some important cases promote environmental protection rather than diminish it.

Finally, Part III briefly considers the future of constitutional property rights. In the short term, much will depend on the composition of the Supreme Court. In the long run, judicial protection for property rights can only be effective if it is embraced by jurists from a broad portion of the political spectrum. Property rights probably will not get much more judicial solicitude than they enjoy today if support for them remains confined to judicial conservatives and libertarians. It is highly unlikely that the judicial liberals currently on the Supreme Court will alter their longstanding opposition to property rights. Outside the Court, however, some liberal jurists and activists have shown an increasing willingness to reconsider traditional post-New Deal hostility to property rights. The strong left of center reaction against the Court's decision in *Kelo v. City of New London*⁴ may point the way forward to cross-ideological cooperation on these issues.⁵ Liberal jurists at the state level

⁴ 545 U.S. 469 (2005).

⁵ For a discussion of the broad reaction against *Kelo*, see Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, MINN. L. REV. (forthcoming 2009), at pp. 7-12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298 (hereinafter, Somin, *Limits of Backlash*).

have also been less hostile to property rights than their federal counterparts. Liberals, conservatives, and libertarians are unlikely to ever fully agree on constitutional property rights. But they may be able to agree on the need for significantly greater judicial protection than exists today.

This article does not attempt to provide a comprehensive theory of constitutional property rights or provide a detailed discussion of the precise level of judicial protection they should enjoy. It also does not attempt to address the extent to which original meaning should guide judicial interpretation of property rights as opposed to other considerations. Rather, I undertake the more limited task of documenting the second class status property rights receive in current Supreme Court case law. I also argue that the conventional rationales for this relative judicial neglect are flawed. We need not have a comprehensive theory dictating the correct level of judicial protection for property rights in order to conclude that the Supreme Court's current approach of overwhelming deference to the government is inadequate.

I. ASSESSING THE SUPREME COURT'S RECENT PROPERTY RIGHTS JURISPRUDENCE.

Over the last twenty-five years, the Court has begun to take constitutional property rights more seriously. At the same time, however, they still usually receive only minimal judicial protection. This has been the consistent pattern in the Court's decisions on public use, regulatory takings, remedies for property rights violations, and federal court access for litigants claiming that their property rights have been violated. Underlying this pattern is a strong ideological division on the Court. With rare exceptions, the Court's liberal justices have consistently opposed efforts to strengthen judicial protection for property rights. The conservative justices have been far from uniform in their support of property claims, and are sometimes divided among themselves. Overall, however, they have been willing to provide property rights with greater protection than their liberal counterparts.

A. Public Use.⁶

⁶ This section draws on my earlier article on *Kelo* and public use. See Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 224-44 (2007).

1. Pre-Kelo Deference to the Government.

The Takings Clause of the Fifth Amendment has historically been interpreted to require that property can only be condemned for a “public use.”⁷ However, until very recently, most experts had assumed that the Public Use Clause was, for practical purposes, virtually dead. In two major decisions, *Berman v. Parker* (1954)⁸ and *Hawaii Housing Authority v. Midkiff* (1984),⁹ the Court gave government officials virtually unlimited authority to determine what counts as a “public use.” In *Berman*, the Court upheld a Washington, DC condemnation justified on the grounds of alleviating urban “blight.”¹⁰ Although there was little doubt that the area in question was indeed blighted,¹¹ a unanimous Court went beyond the narrow conclusion that government could condemn property for the purposes of alleviating blight, and emphasized the supposed need for extreme deference to legislative determinations of public use. The Court claimed that “[t]he role of the judiciary in determining whether [eminent domain] is being exercised for a public purpose is an extremely narrow one.”¹² If the “legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”¹³

Midkiff, decided thirty years later, was perhaps even more deferential to the government. The case arose from an unusual factual background. For complicated historical reasons, some 47% of the land in Hawaii was owned by “only 72 private landowners,” while another 49% was held by the federal or state governments.¹⁴ The state claimed that the 72 landowners had established an “oligopoly” in the market for land and decided to establish a program to condemn the property. Although there is serious doubt as to whether there really was a landowner oligopoly setting prices above the market level,¹⁵ the Supreme Court accepted the state’s claim at face value.

⁷ See, e.g., *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (noting that the “Court’s cases have repeatedly stated that ‘one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.’” (quoting *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937))).

⁸ 348 U.S. 26 (1954).

⁹ 467 U.S. 229 (1984).

¹⁰ 348 U.S. 26 (1954).

¹¹ See *Id.* at 30 (noting that “64.3% of the dwellings [in the area] were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory”).

¹² *Id.* at 32.

¹³ *Id.*

¹⁴ *Id.* at 232.

¹⁵ See Sumner Lacroix & Louis Rose, *Public Use, Just Compensation, and Land Reform in Hawaii*, 17 RES. L. & ECON. 7 (1995) (presenting evidence that there was no real exercise of monopoly power in the Hawaii land market). Even if there

The Court could have upheld the Hawaii condemnations on the relatively narrow ground that “[r]egulating oligopoly and the evils associated with it is a classic exercise of a State’s police powers.”¹⁶ But it chose – as in *Berman* – to go beyond the facts of the case and endorse a much broader doctrine of deference to government power. In a unanimous opinion written by Justice Sandra Day O’Connor, the Court held that the scope of public use is “coterminous with the scope of a sovereign’s police powers” and that takings must be upheld under the Public Use Clause so long as “the exercise of eminent domain power is rationally related to a conceivable public purpose.”¹⁷ Archival evidence shows that the justices were well aware that this language gave government officials virtually unlimited condemnation authority, yet chose to include it in the opinion anyway.¹⁸

Berman and *Midkiff* seemed to sound the death knell for public use limitations on takings. As recently as 2002, a treatise authored by two leading property scholars could conclude that “nearly all courts have settled on a broader understanding [of public use] that requires only that the taking yield some public benefit or advantage.”¹⁹ However, this apparent judicial consensus was severely shaken by *Kelo v. City of New London*.

2. *Kelo v. City of New London*.

The *Kelo* case arose from the condemnation of ten residences and five other properties as part of a 2000 “development plan” in New London, Connecticut that sought to transfer the property to private developers for the stated purpose of promoting economic growth in the area.²⁰ Unlike in *Berman*, none of the

was an oligopoly problem, Hawaii’s use of eminent domain did little to increase the availability of land on the housing market. See Eric Young & Kerry Kamita, *Extending Land Reform to Leasehold Condominiums in Hawaii*, 14 U. HAW. L. REV. 681 (1992) (arguing that the land reform program upheld in *Midkiff* did little to make more land available to tenant farmers); WILLIAM A. FISCHER, REGULATORY TAKINGS 72 (1995) (same).

¹⁶ *Midkiff*, 467 U.S. at 242.

¹⁷ *Id.* at 240-41.

¹⁸ See D. Benjamin Barros, *Nothing 'Errant' About It: The Berman and Midkiff Conference Notes and how the Supreme Court got to Kelo with its Eyes Wide Open*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, & EMINENT DOMAIN (Robin Paul Malloy ed. forthcoming). available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902926 (visited Mar. 4, 2008).

¹⁹ THOMAS MERRILL & DAVID A. DANA, PROPERTY: TAKINGS 196 (2002).

²⁰ *Kelo v. City of New London*, 545 U.S. 469, 473-77 (2005).

properties in question were alleged to be “blighted or otherwise in poor condition.” So the promotion of “economic development” was the only possible rationale for the takings.²¹

Justice John Paul Stevens’ majority opinion held that “economic development” was an acceptable public use under the Takings Clause²² and emphasized the need to maintain the Court’s “policy of deference to legislative judgment in this field.”²³ The majority rejected the property owners’ argument that the transfer of their property to private developers rather than to a public body required any heightened degree of judicial scrutiny.²⁴ It also refused to require the City to provide any evidence that the takings were likely to actually achieve the claimed economic benefits that provided their justification in the first place.²⁵ On all these points, the *Kelo* majority chose not to “second-guess the City’s considered judgments about the efficacy of the development plan.”²⁶ The Court emphasized that “economic development” takings should get near-absolute deference from courts so long as they are part of an “integrated development plan.”²⁷ Since nearly all actual development takings are part of a plan²⁸ and the *Kelo* majority refuses to allow courts to scrutinize the quality of the plans to ensure that they have a real chance of achieving their supposed objectives, *Kelo* provides a virtual blank check for government officials to condemn virtually any property they wish.

It is always possible to argue that the taking of any property for transfer to a private business might increase “development” – especially if neither the government nor the new owners of the condemned property are required to actually produce the development in question.²⁹ Moreover, the majority’s and Justice Kennedy’s confidence that they can ferret out “favoritism” towards private interests while maintaining a highly deferential approach to public use is probably misplaced. Even in *Kelo* itself, years of litigation in trial court, the Connecticut state supreme court, and the U.S. Supreme Court were not enough to fully expose what turned

²¹ *Id.* at 476.

²² *Id.* at 484-85.

²³ *Id.* at 480

²⁴ *Id.* at 484-85.

²⁵ *Id.* at 487-88.

²⁶ *Id.* at 488.

²⁷ *Id.* at 487-88.

²⁸ I discuss this point in Somin, *Grasping Hand*, at 235-36.

²⁹ For a more detailed discussion of this point, see *Id.* at 191-94.

out to be the Pfizer Corporation's crucial role in instigating the New London condemnations.³⁰ The Court also failed to give due consideration to the fact that there was little or no prospect of the takings ever yielding economic benefits even close to commensurate to the costs incurred from the expenditure of \$80 million in public funds and uprooting of existing homeowners and businesses.³¹ Almost a decade after the initial decision to condemn the property and nearly three years after the Supreme Court decision, no new facilities have been built on the condemned property, and it is far from clear when or if new construction will ever occur.³²

Nonetheless, *Kelo* represents a slight increase in protection for property rights relative to the Court's earlier precedents. First and most important, *Kelo* was a close 5-4 decision – in striking contrast to the unanimity of *Berman* and *Midkiff*. Justice O'Connor, the author of *Midkiff*, wrote a strong dissent that repudiated some of her own earlier handiwork.³³ Even among the majority justices, Justice Kennedy drafted a concurring opinion indicating his potential willingness to impose tighter public use constraints in cases where there is clearer evidence of "favoritism" towards particular private interests.³⁴ This dissension on the Court indicates that public use is once again a live, controversial issue among the justices. However, it is also important to recognize that the disagreement on the court broke down along classic ideological lines. The four liberal justices (Stevens, Ginsburg, Breyer, and Souter) all voted with the majority, while four of the five conservatives (O'Connor, Chief Justice Rehnquist, Scalia, and Thomas) voted to protect property owners and the fifth (Kennedy) filed a concurrence that was somewhat less deferential to the government than the majority opinion. This pattern of left-right division on property rights issues recurs in many of the other cases considered in this article. So too does the pattern of the four liberals being almost uniformly opposed to strengthening protection for property owners while the five conservatives were sometimes divided.

³⁰ See *Id.* at 235-37 (discussing the evidence). For a detailed account of Pfizer's role, see Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, THE DAY, Oct. 16, 2005.

³¹ *Id.* at 226-27.

³² See Elaine Stoll, *Fort Trumbull Developer Asks for More Time, Misses Deadline*, THE DAY, Nov. 11, 2007 (noting that nothing has so far been built on the condemned property and that the developer in charge of construction has repeatedly missed deadlines, and may not be able to meet future ones); Elaine Stoll, *NLDC and Developer Agree to Terms on Fort Trumbull*, THE DAY, Dec. 11, 2007 (describing new agreement between New London Development Corporation and developer that will give the latter a final chance to meet its obligations).

³³ See *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting) (rejecting "errant language in *Berman* and *Midkiff*" that could be used to justify an overly broad interpretation of public use).

³⁴ *Id.* at 492-93 (Kennedy, J. concurring). For my analysis of Justice Kennedy's concurrence, see Somin, *Grasping Hand*, at 229-31, 235-36.

Less significant, but still noteworthy, is the fact that the majority opinion is slightly more restrictive than *Midkiff*. Reference to *Midkiff*'s statement that a public use is any action "rationally related to a conceivable public purpose" is notable by its absence.³⁵ Similarly, the opinion holds out the possibility that courts need not grant massive deference to "a one-to-one transfer of property, executed outside the confines of an integrated development plan."³⁶ These two modest retreats from *Midkiff* have little real-world impact; virtually any taking can be justified by the creation of an "integrated development plan" and few occur outside one. Nonetheless, the Court's contortions on this point do indicate a degree of discomfort with the idea of giving government virtually unlimited condemnation authority.

Kelo therefore represents a noteworthy effort to take property rights more seriously. But it also leaves them with very little if any meaningful protection under the Public Use Clause. Very heavy deference to government decisionmakers enables them to condemn virtually any property they might choose to target. As James Ely notes in his article on *Kelo*, "among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference" to the government.³⁷

Unlike any of the other cases considered in this article, *Kelo* resulted in a massive political backlash, one that produced more legislation than any other Supreme Court case in American history.³⁸ The implications of that backlash for constitutional property rights are briefly considered in Part III.

B. Regulatory Takings.

Just as controversial as the public use question is the issue of which government restrictions on property rights constitute a taking require compensation under the Fifth Amendment. At one extreme is the view that almost any regulatory restrictions on property are takings unless they restrict common law harms such as nuisances.³⁹ At the other extreme are claims that only physical occupation or invasion of property by

³⁵ *Midkiff*, 467 U.S. at 241.

³⁶ *Kelo*, 545 U.S. at 487.

³⁷ James T. Ely, Jr., "Poor Relation" *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 62.

³⁸ See Somin, *Limits of Backlash*, supra note ____.

³⁹ See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

the state counts as a taking. Finding the right answer to this question is a difficult task. Over the last twenty-five years, the Court has repeatedly struggled with the issue and provided property owners with modestly greater protection than they enjoyed before. Overall, however, the vast majority of regulatory restrictions on property use are still not considered takings, even if they impose very severe losses on owners and greatly restrict their autonomy. The Court has made clear that physical invasions require compensation even if they are very minor in nature. But even in this area, the Court has not been completely consistent. It has also modestly increased property owners' protection against regulatory restrictions that don't count as physical invasions. However, the Court's restrictions on the latter are easy to for government officials to circumvent.

1. Physical Invasion and Occupation.

In the 1982 case of *Loretto v. Teleprompter*, the Supreme Court made clear that when the government's "physical intrusion [on property] reaches the extreme form of a permanent physical occupation, a taking has occurred."⁴⁰ Even a "minor" permanent physical invasion counts as a *per se* taking;⁴¹ indeed, the regulation held to be a taking *Loretto* itself involved a very modest requirement that a building owner allow the placement of a small television cable on the roof of her building.⁴² It is difficult to deny that a government-mandated physical occupation of property is automatically a taking. Significantly, however, three of the Court's liberal justices (Brennan, Blackmun, and White) dissented in the case, arguing that even a permanent physical occupation might not always be a compensable taking under the Fifth Amendment.⁴³ Unlike in most of the other cases considered here, however, the liberal justices disagreed amongst themselves in *Loretto*, and the majority opinion was written by the Justice Thurgood Marshall, one of the Court's staunchest liberals. In the 1982 Burger Court, property rights were not yet a crucial bone of left-right contention on the Court, as they became under Chief Justice Rehnquist.

⁴⁰ *Loretto v. Teleprompter CATV Corp.* 458 U.S. 419, 426 (1982).

⁴¹ *Id.* at 421.

⁴² *Id.* at 421-22.

⁴³ *Id.* at 442-51 (Blackmun, J., dissenting).

In two later cases, *Nollan v. California Coastal Commission* (1987)⁴⁴ and *Dolan v. City of Tigard* (1994),⁴⁵ the Supreme Court further tightened restrictions on government actions that required physical occupation of a property owner's land. In *Nollan*, an ideologically divided 5-4 majority held that a requirement that beachfront property owners allow the public to pass through their property in order to obtain a building permit was a taking. The Court held that there was no "essential nexus" between the building permit and the purpose of the requirement of allowing public access to the property.⁴⁶ Unless "the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out and out plan of extortion."⁴⁷ This logic is difficult to dispute. Had *Nollan* been decided the other way, land use regulators could get around the Court's holding that physical invasions of property count as takings simply by imposing regulations requiring that landowners allow a physical invasion as a condition of exercising any of the numerous other prerogatives of property owners. For example, a physical invasion could be imposed as a condition that must be met before the owners could put the property to commercial use or residential use or either. The Court emphasized, however, that *Nollan* was an extreme case because it "does not meet even the most untailored standards" of fit between the purpose of the physical invasion of property and that of the regulation it was tied to.⁴⁸ The Court did not require anything approaching a very tight fit between the two.

Despite the latter important caveat, the four most liberal justices on the Court at the time (Blackmun, Brennan, Marshall, and Stevens) all dissented. *Nollan* perhaps marks the beginning of the Court's sharp ideological division over property rights.

Dolan, another ideologically divided 5-4 decision, extended the logic of *Nollan*. The case held that a city requirement that a landowner dedicate part of his flood plain property to flood drainage purposes and part as a pedestrian pathway was a taking.⁴⁹ The majority agreed that the state had met the *Nollan* requirement of an

⁴⁴ 483 U.S. 825 (1987).

⁴⁵ 512 U.S. 374 (1994).

⁴⁶ *Nollan*, 483 U.S. at 837-38.

⁴⁷ *Id.* at 837 (quotation omitted).

⁴⁸ *Id.* at 838.

⁴⁹ *Dolan*, 512 U.S. at 390-96.

“essential nexus” between the purpose of its physical invasion of property and the permit scheme it was attached to.⁵⁰ Limiting development in a flood plain has an “obvious” connection to flood prevention.⁵¹ However, the Court still held that Tigard’s requirement constituted a taking because there was no “rough proportionality” between the degree of imposition imposed on the landowner and the government’s objectives.⁵² It emphasized that “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication [of property to government-mandated purposes] is related both in nature and extent to the impact of the proposed development” that the state intended to forbid unless the landowner acceded to its demands.⁵³ The City of Tigard failed this standard because it had not provided any proof that creation of a pedestrian/bicycle easement over the landowner’s property would actually further the objective of “flood control” more than a simple requirement of leaving some of the property undeveloped without allowing the public access to it.⁵⁴

It is important to recognize that *Dolan* did not impose any really severe burden of proof on the government. It merely held that “the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway.”⁵⁵ Local governments seeking to impose similar regulations in the future could easily “make some effort” to quantify their claimed benefits, especially if courts do not investigate their “findings” with any great degree of scrutiny. *Dolan*’s holding was probably the minimum necessary to avoid wholesale circumvention of the *Nollan* “essential nexus” standard. If local governments could avoid liability for physical invasions of property simply by making “conclusory statements”⁵⁶ that such impositions advanced a government purpose sanctioned under *Nollan*, virtually any regulation could be defended on such grounds.

For example, the California Coastal Commission could have easily justified the regulation at issue in *Nollan* itself by arguing that allowing public access through Nollan’s property was necessary to advance the

⁵⁰ *Id.* at 388.

⁵¹ *Id.*

⁵² *Id.* at 391.

⁵³ *Id.*

⁵⁴ *Id.* at 394-96.

⁵⁵ *Id.* at 395-96.

⁵⁶ *Id.* at 395.

purpose of protecting the beachfront environment because it would increase public appreciation for its scenic attractions.⁵⁷ As the majority pointed out, similar requirements of at least a minimal connection between legitimate government interests and the regulatory burden imposed on individuals are standard in cases where other constitutional individual rights are at stake.⁵⁸ Denying comparable protection for property rights would reduce them to “the status of a poor relation” among constitutional rights.⁵⁹

The limited nature of *Dolan*’s holding makes it all the more striking that the Court’s four liberal justices all dissented.⁶⁰ Justice Stevens’ dissent, which won the support of two other justices, emphasized that land use “exactions” such as Tigard’s “warrant... a strong presumption of constitutional validity” because they are “a species of business regulation.”⁶¹ The meaning of “business regulation” in this context is not entirely clear; but presumably it refers to the traditional post-New Deal notion that property rights are “economic” in nature and therefore not entitled to the same level of judicial protection as “noneconomic” personal rights. For example, no similar “presumption of constitutional validity” is extended to government regulations restricting “business” transactions relating to free speech, contraception, or abortion.

Despite the limited nature of the *Nollan* and *Dolan* decisions, it is undeniable that the Court has strengthened protection for property owners against government-mandated physical invasions of their land. However, it has not been entirely consistent in this area. In its important but oft-neglected 1992 decision in *Yee v. Escondido*,⁶² the Court opened up a significant loophole in its physical occupation jurisprudence.⁶³ In effect, *Yee* held that a government mandated physical occupation of property was not a taking if it arose from a conjunction of two seemingly separate regulations rather than a single integrated one.

Yee arose from the combination of California’s 1978 Mobilehome Residency Act and a later rent control ordinance. The 1978 law severely limited the bases on which the owners of mobile home parks could

⁵⁷ This is actually not much different from one of the government’s actual arguments in *Nollan*, the claim that the development of Nollan’s property would create a “psychological barrier” to beach access because passersby would no longer have as clear a view of the beach. *Nollan*, 483 U.S. at 838.

⁵⁸ *Dolan*, 512 U.S. at 392.

⁵⁹ *Id.*

⁶⁰ *Id.* at 397-405 (Stevens, J., dissenting, joined by JJ. Ginsburg and Breyer); *Id.* at 412-16 (Souter, J., dissenting).

⁶¹ *Id.* at 402 (Stevens, J., dissenting).

⁶² 503 U.S. 519 (1992).

⁶³ Much of the following analysis of *Yee* is adapted from Ilya Somin, *Yee v. Escondido*, ENCYCLOPEDIA OF THE SUPREME COURT (Macmillan, forthcoming).

terminate their tenants' leases. Even after the expiration of a lease or the sale of the mobile home to a new owner, tenants could only be ousted if they failed to pay rent, if they violated park rules, or if the park owner decided to use the land for a wholly different purpose.⁶⁴ The deleterious impact of the MRA on park owners was at first partly offset by their ability to increase tenants' rents. Later, however, some California cities, including the City of Escondido in 1988,⁶⁵ adopted rent control ordinances that strictly regulated the rents charged by mobile home parks. As a result of the combination of the MRA and the rent control ordinances, many park owners were saddled with tenants paying government-mandated low levels of rent whom under the MRA they could not expel. John Yee and several other park owners filed a lawsuit claiming that the combination of the two laws amounted to an uncompensated "physical occupation" taking of their land. They argued that the MRA and the rent control ordinances effectively forced them to keep unwanted tenants on their property.⁶⁶

A unanimous Court ruled that the combination of the MRA and the rent control ordinances did not constitute a taking. It primarily relied on the fact that the interaction between the park owners and mobile home owners was a "voluntary" one not compelled by the government.⁶⁷ This reasoning elides the reality that the two laws effectively changed the agreement between tenant and owner to one very different from what they had initially agreed on, yet still made it extremely difficult for the owner to terminate the relationship.⁶⁸ Some mobile home owners continued to rent park space for years after the park owner would have preferred them gone, paying rents much lower than that initially agreed on in their contracts. The "voluntariness" of such transactions is questionable at best.

In *Yee*, the Court failed to consider the possibility that a conjunction of two seemingly separate laws could lead to the imposition of an involuntary physical invasion of property even if neither did so taken in isolation. Given the numerous overlapping laws and regulations of the modern regulatory state, this decision

⁶⁴ *Yee*, 503 U.S. at 523-25.

⁶⁵ *Id.* at 524-25.

⁶⁶ *Id.* at 525-27.

⁶⁷ See *Id.* at 527-28 (emphasizing that "Petitioners voluntarily rented their land to mobile home owners" and claiming that "neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so").

⁶⁸ The owner could only do so by withdrawing his or her property from the rental market altogether. *Id.* at 524-25, 528.

leaves a great deal of potential scope for uncompensated government-mandated occupations of private property.⁶⁹

2. Takings Clause Review of Nonphysical Restrictions on the Use of Property.

The status of government regulations that restrict property owners' rights without creating a physical occupation of their property has long bedeviled constitutional law. In the 1922 case of *Pennsylvania Coal Co. v. Mahon*, the Supreme Court famously held that a regulation can be a taking if it "goes too far" in restricting property owners.⁷⁰ However, figuring out what counts as "too far" and what doesn't has turned out to be a difficult task.

The 1978 *Penn Central* decision sets out three factors that must be weighed in determining whether a regulatory action that doesn't involve a physical invasion of property is a taking: "The economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and the "character of the government action."⁷¹ None of the three factors is individually dispositive. *Penn Central* balancing test cases are often difficult to evaluate because of the vagueness of the three criteria and the lack of precise guidance on how to weigh them against each other. Nonetheless, courts generally apply the *Penn Central* test in ways that favor the government.⁷² In 2002, the Supreme Court majority itself indicated that the *Penn Central* test had become the "polestar" of its regulatory takings jurisprudence in large part because it shielded from invalidation "numerous practices that have long been considered permissible exercises of the police power."⁷³ A 2003 study of 133 cases decided on the *Penn Central* test

⁶⁹ For a related critique of *Yee*, see Richard A. Epstein, *Yee v. City of Escondido: The Supreme Court Strikes Out Again*, 26 LOYOLA OF LOS ANGELES L. REV. 3 (1992). Cf. Kari Anne Gallagher, *Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the Nollan Analysis?* 67 NOTRE DAME L. REV. 821 (1992) (providing further discussion of the case).

⁷⁰ 260 U.S. 393, 415 (1922).

⁷¹ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

⁷² See, e.g., Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENV. L. REV. 339, 340, 344 (2006) (arguing that the majority of the Court's justices apply the *Penn Central* test in a way that is generally deferential to the government and noting that the "conventional wisdom" among "land-use lawyers" interprets the Court's application of the test that way); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 333 (2007) (noting that property owners rarely prevail in the Supreme Court under the *Penn Central* test).

⁷³ *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (quotation omitted).

found that property owners prevailed in less than 10% of cases.⁷⁴ And this analysis likely ignores numerous cases where owners did not even try to challenge a regulatory action because the probability of success was too low to justify the litigation costs.

Despite this generally pro-government orientation, the Rehnquist Court issued several decisions that expanded protection for property owners against regulatory takings. Perhaps the best known is *Lucas v. South Carolina Coastal Council*, which held that a regulation is a “per se” taking if it deprives the owner of “all economically beneficial or productive use” of his property.⁷⁵ In such cases, the three factor *Penn Central* test does not even apply; the regulation is automatically considered a taking unless it alleviates some sort of traditional common law harm, such as a nuisance.⁷⁶ However, the *Lucas* majority very carefully limited the per se rule to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.”⁷⁷ Thus, the per se rule does not apply in the far more common cases where regulations leave the owner at least a small portion of the property’s original economic value. Moreover, it is often quite difficult to prove that a regulation has wiped *all* of a property’s economic value even if it has in fact come close to that point. The government can always argue that some slight value remains. As Justice Stevens pointed out in a perceptive dissent, “[i]n response to the rule, courts may define ‘property’ broadly and only rarely find regulations to effect total takings.”⁷⁸

Lucas has been extensively criticized both by those who believe it goes too far in protecting property owners against regulatory takings and those who argue it hasn’t gone far enough.⁷⁹ For our purposes, it is useful to note three aspects of the case. First, as discussed above, the per se rule it establishes is very narrow in

⁷⁴ F. Patrick Hubbard, et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENV. L. & POL’Y F. 121, 141-42 (2003). The owners won in 13.4% of cases that reached the merits stage. *Id.* The authors claim that the 13% success rate is not especially low when one considers that all but one of the cases where property owners lost were ones where low litigation costs or high potential rewards justified pursuing a case with a low probability of success. *Id.* However, the fact that nearly all of the *Penn Central* cases litigated in the authors’ sample involved cases where plaintiffs had incentives to go forward with even a low probability of success merely underscores the fact that the test is tilted against owners. Otherwise, we should observe a much larger number of cases where plaintiffs went forward despite the fact that they needed a substantial chance of winning in order to make the costs of litigation worthwhile.

⁷⁵ 505 U.S. 1003, 1015 (1992).

⁷⁶ *Id.* at 1015-17.

⁷⁷ *Id.* at 1017.

⁷⁸ *Id.* at 1064 (Stevens, J., dissenting).

⁷⁹ For extensive citations to both types of criticisms, see David Callies, *Regulatory Takings and the Supreme Court*, 28 STETSON L. REV. 523, 523 n. 1 (1999).

scope, applying only to the rare case where a regulation destroys all of a property's economic value. Second, like virtually all the other recent cases expanding protection for property rights, *Lucas* was opposed by most the Court's liberal justices, three of whom dissented from the close 6-3 decision.⁸⁰

Third, it is difficult to justify the rule set forth by the majority. As Justice Stevens pointed out in his dissent, that rule seems "wholly arbitrary" because under it, "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value."⁸¹ Justice Scalia, in the majority opinion, responds to this point by suggesting that owners who lose 95% of the value of their property might still recover under the *Penn Central* test.⁸² However, as noted above,⁸³ courts usually apply the *Penn Central* rule in a way highly deferential to the government. The difficult question, therefore, is whether the scope of the per se rule should be expanded or whether the *Lucas* rule should be abolished completely. Meaningful protection for property rights against regulatory takings likely requires some version of the former course.

In the wake of *Lucas*, scholars and jurists wondered whether the Court was likely to further expand judicial review of regulatory takings. For a time, it seemed as if it might do so. In the 2001 case of *Palazzolo v. Rhode Island*, the Court held that a regulation could be considered a taking even if it came into force prior to the time when affected owner acquired title to his property.⁸⁴ The majority, in an opinion written by key swing voter Justice Kennedy, emphasized that postenactment acquisition would only entitle the owner to claim a taking if the regulation in question were sufficiently "unreasonable" to justify such a step.⁸⁵ The justification for the majority's holding is readily understandable in light of the fact that forbidding challenges by postenactment acquirers would enable the state to circumvent virtually any limitation on regulatory takings simply by enacting a regulation giving notice that the property in question is subject to any regulatory restrictions that Agency X might choose to impose. By this means, the "State would be allowed, in effect, to

⁸⁰ Justice Byron White was the only nonconservative justice to join with the majority, and his liberal credentials were probably the shakiest of all the four liberal justices.

⁸¹ *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting).

⁸² *Id.* at 1019 n.8.

⁸³ See supra note _____.

⁸⁴ 533 U.S. 606, 626, 630 (2001).

⁸⁵ *Id.* at 627.

put an expiration date on the Takings Clause.”⁸⁶ Moreover, a regulatory taking claim often cannot be asserted by the owner at the time of its enactment because of ripeness requirements.⁸⁷

Despite the relatively narrow nature of the ruling, *Palazzolo* was opposed by all four liberal justices (Breyer, Ginsburg, Souter, and Stevens). Like *Lucas*, *Nollan*, and *Dolan*, it underscored the depth of the Court’s ideological division over property rights and made clear the determination of the liberal bloc to oppose even relatively modest expansions of judicial protection for owners under the Takings Clause.

Nonetheless, the combination of *Palazzolo* and *Lucas* led some observers to believe that regulatory takings claimants were making great progress on the Court. That impression was largely undercut by the Court’s next major regulatory takings decision, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.⁸⁸ This case, litigated on behalf of the government by future Chief Justice John Roberts, severely restricted the possible effects of *Lucas* and other decisions limiting regulatory takings.

The *Tahoe-Sierra* litigation arose because the Lake Tahoe Regional Planning Agency had imposed two moratoria on all development in the area of Lake Tahoe, for a combined total of 32 months.⁸⁹ In an opinion joined by the four liberal justices and Justices O’Connor and Kennedy, the Court held that “temporary” deprivations of owners’ rights do not constitute per se takings, even if they eliminate all of the property’s economic value during the time period during which the moratorium lasts.⁹⁰ All such cases must instead be analyzed under the three factor *Penn Central* test,⁹¹ which in practice would enable the government to prevail in the overwhelming majority of cases.

In his dissent for the Court’s three most conservative justices, Chief Justice Rehnquist pointed out two major flaws in the majority approach. The most important is the fact that it opens the door to virtually unlimited efforts to circumvent the *Lucas* rule by declaring that a regulatory restriction on property rights is “temporary”:

⁸⁶ *Id.*

⁸⁷ *Id.* at 628.

⁸⁸ 535 U.S. 302 (2002).

⁸⁹ *Id.* at 306.

⁹⁰ *Id.* at 332-42.

⁹¹ *Id.* at 339-42.

Under the Court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development “temporary,” or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the “temporary” prohibition into a long-term ban on all development. The Court now holds that such a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified. Apparently, the Court would not view even a 10-year moratorium as a taking under *Lucas* because the moratorium is not “permanent.”⁹²

After *Tahoe-Sierra*, a legally sophisticated government agency can almost always avoid the danger of having its regulations declared per se takings simply by announcing that they are “temporary” and then renewing them after the initial term expires.

Rehnquist also noted that the Lake Tahoe development moratorium had actually lasted six years, rather than the 32 months asserted by the Court.⁹³ In reality, the property owners had been prevented from developing their property from 1981 to 1987, rather than just from 1981 to 1984. The majority had discounted the 1984-87 period because development during that time had been prevented by a district court injunction, not by the direct action of the Regional Planning Agency.⁹⁴ However, as Rehnquist notes, the injunction was issued in order to enforce the Agency’s own earlier 1980 regulations limiting development in the area (which were distinct from the ones that expired in 1984).⁹⁵ This aspect of the *Tahoe-Sierra* decision opens up a potential second loophole in the *Lucas* rule: regulatory agencies can evade it by dividing up a ban on property use into several different regulations and having some of them enforced by judicial action.

In sum, *Tahoe-Sierra* largely obviated the additional protection for property rights established by *Lucas*.⁹⁶ It likely also reduced the impact of *Palazzolo*. The ability to challenge preexisting regulations is of limited value to property owners if virtually all such challenges will be evaluated under the deferential *Penn Central* test.

⁹² *Id.* at 346 (Rehnquist, C.J., dissenting).

⁹³ *Id.* at 345-46.

⁹⁴ *Id.* at 345.

⁹⁵ *Id.* at 346.

⁹⁶ For related criticisms of *Tahoe-Sierra*, see, e.g., Richard A. Epstein, *The Ebbs and Flows of Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO SUPREME COURT REV. 5; See also Eric R. Claeys, *Takings and Private Property in the Rehnquist Court*, 99 NW. U. L. REV. 187, 214-15 (2004) (concluding that Lake Tahoe essentially “limited *Lucas* to its facts”).

Like previous regulatory takings cases, *Tahoe-Sierra* demonstrated the unwillingness of the liberal justices to countenance expanded protection for property owners. Unlike in *Lucas* and *Palazzolo*, however, two of the more moderate conservatives joined the liberals and thereby dealt property owners a major defeat.

In the 2005 case of *Lingle v. Chevron*, the Supreme Court – this time unanimous - closed off another potential route towards greater protection for property owners, holding that a government regulation could not be challenged as a taking because it fails to “substantially advance” a legitimate government interest.⁹⁷ Such challenges can only be brought under the highly deferential “rational basis” test of the Fifth Amendment’s Due Process Clause,⁹⁸ which in practice means that they will almost always be rejected. *Lingle* was probably correct in distinguishing between the question of whether a government action is a taking (the proper inquiry under the Takings Clause) and that of whether it serves a legitimate purpose. It is also unusual in being a prominent property rights case decided unanimously.

Overall, the last twenty-five years of Supreme Court regulatory takings decisions have seen a modest expansion of protection for property owners. However, the almost unwavering opposition of the Court’s liberal bloc, combined with internal divisions among conservatives, have severely constricted that expansion and rendered its impact minor at best.⁹⁹ Protection for property owners against regulatory takings remains extremely weak compared to protections for indirect violations of other constitutional rights.

C. Remedies for Property Rights Violations.

In contrast to the extensive public debate occasioned by *Kelo* and the great attention paid to the Court’s regulatory takings decisions by academics and land use lawyers, neither the public nor academia has given much consideration to the Court’s jurisprudence on remedies for property rights violations. Here too, however, the Court has given property rights far less protection than that extended to other individual rights.

⁹⁷ 544 U.S. 528, 537-44 (2005).

⁹⁸ *Id.* at 542-43.

⁹⁹ For a similar conclusion, see Claeys, *supra* note _____.

The recent case of *Wilkie v. Robbins* best exemplifies that trend.¹⁰⁰ Wyoming rancher Harvey Frank Robbins alleged that the federal Bureau of Land Management launched an extensive campaign of harassment against him because he refused to grant the BLM an easement across his property without compensation. According to Robbins, government agents repeatedly trespassed on his property and harassed his customers. In one instance, they even allegedly tried to videotape female customers in the act of relieving themselves.¹⁰¹ Because the case was at the summary judgment stage, the Court had to assess these allegations in the light most favorable to Robbins.¹⁰²

Under the Fifth Amendment, government coercion to force Robbins to give up the easement without payment is a clear violation of the Takings Clause; it is an obvious case of a government-mandated “permanent physical occupation” of property that is a per se taking under *Loretto*.¹⁰³ Despite the presence of a clear violation of constitutional rights, the Court, in a 7-2 decision, denied Robbins the right to seek a damages remedy for the government’s apparent illegal actions.¹⁰⁴

This was not in and of itself especially troubling. There are other ways to prevent violations of constitutional rights. For example, the Court majority noted that Robbins could file tort or trespass suits against the BLM agents in order to get compensation for some of their wrongful actions.¹⁰⁵ The problem is that the majority itself admitted that those other remedies were inadequate in this case. As the Court acknowledged:

Robbins’s argument for a [damages] remedy that looks at the course of dealing as a whole, not simply as so many individual incidents, has the force of the metaphor Robbins invokes, ‘death by a thousand cuts.’ It is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one’s lodge broken into, but something else to be subjected to this in combination over a period of six years. . . . The whole here is greater than the sum of its parts.¹⁰⁶

¹⁰⁰ 127 S. Ct. 2588 (2007). The discussion of *Wilkie* presented here is in large part based on my earlier short article on the case. See Ilya Somin, *Put Out to Pasture: The Supreme Court Again Fails To Give Property Rights the Respect they Deserve*, LEGAL TIMES, July 30, 2007.

¹⁰¹ *Id.* at 2594-97; for additional evidence of the BLM’s harassment of Robbins, see *Id.* at 2609-11 (Ginsburg, J., dissenting).

¹⁰² *Id.* at 2594 n.2.

¹⁰³ See the discussion of *Loretto*, *infra* § II.B.1.

¹⁰⁴ *Wilkie*, 127 S.Ct. at 2598-2605.

¹⁰⁵ *Id.* at 2598.

¹⁰⁶ *Id.* at 2600.

Thus, the majority denied Robbins a damages remedy despite its own admission that an award of damages was the only way to fully compensate him for the violation of his constitutional rights by federal officials. The justification for the Court's reasoning was ultimately rooted in the second-class status it assigned to constitutional property rights. According to Justice Souter's majority opinion, "action[s] for damages to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations."¹⁰⁷

This claim greatly overstates the actual likelihood of damages actions for redress of property rights violations. Current Supreme Court precedent certainly does not hold that property rights are violated any time they are restricted in any way by "tax claim settlements" or OSHA regulations. Thus, any damages claims for alleged violations of constitutional property rights in such cases could easily be dismissed by courts; cost-conscious litigants, indeed, would be reluctant to file them in the first place.

More importantly, however, the same argument could be used to deny damages remedies for violations of any other constitutional right. For example, a wide range of "legitimate government actions" affect speech and religion in some way. That does not prevent courts from allowing the use of damages remedies in First Amendment cases structurally similar to *Wilkie*. In both situations, the government sought to coerce a citizen into giving up his constitutional rights.¹⁰⁸ The Court has also allowed damage remedies for violations of the Fourth and Eighth Amendments, and for violations of the Fifth Amendment's equal protection component.¹⁰⁹ Obviously, there are numerous "legitimate government actions" that can give rise to claims of discrimination under the Fifth and Fourteenth Amendments or unlawful searches or seizures under the Fourth Amendment. In effect, the Court has ruled that property rights are an exception to the longstanding general rule

¹⁰⁷ *Id.* at 2604.

¹⁰⁸ *Id.* at 2613-14 (Ginsburg, J., dissenting).

¹⁰⁹ See, e.g., *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388 (1971) (damages remedy granted for Fourth Amendment violation); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment violation); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (Fifth Amendment equal protection violation).

that every violation of a constitutional right deserves an adequate remedy, if necessary enforced by the judiciary.¹¹⁰

In addition to relying on the above slippery slope argument, the majority opinion also claims that a key difference between *Wilkie* and other instances of government retaliation for exercising a constitutional right is the motive for the government's action. "[U]nlike punishing someone for speaking out against the Government," Justice Souter explained, "trying to induce someone to grant an easement for public use is a perfectly legitimate purpose."¹¹¹

The problem with this reasoning is that constitutional rights restrict not only the ends that government may pursue, but also the means that it can use to achieve them. In *Wilkie*, the government's desire to acquire an easement onto Robbins' property was not in and of itself unconstitutional. But the effort to achieve this purpose by forcing the owner to give up the easement without compensation was an unconstitutional means to an otherwise legitimate end. To take up Souter's First Amendment analogy: It is perfectly legitimate for government officials to try to stimulate public support for their policies. It is not legitimate, however, for them to suppress opposing speech as a means to this end. If public officials punish antigovernment speakers for their speech, the Court surely would not deny the victims a damages remedy simply because the government's ultimate purpose was "legitimate."

By endorsing this argument, seven Supreme Court justices essentially concluded that a government effort to coerce a citizen into giving up his constitutional property rights serves a "legitimate purpose," even though they would never agree that it is similarly "legitimate" for officials to try to force the surrender of other constitutional rights. It is hard to imagine a stronger indication of the continuing second-class status of property rights in the Court's jurisprudence.

To be sure, two justices – Scalia and Thomas – voted with the majority in part because they oppose court-imposed damages remedies against the government in general, not simply in the context of property

¹¹⁰ For the classic statement, see *Marbury v. Madison*, 1 Cranch 137, 163 (1803) (noting that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded") (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1769))

¹¹¹ *Wilkie*, 127 S. Ct. at 2601.

rights.¹¹² Yet even they also “join [the Court’s] opinion,” thereby endorsing its claims that property rights violations are entitled to weaker remedies than infringements of other constitutional rights.¹¹³

Wilkie therefore fits with the Court’s broader pattern of offering weak protection for property rights relative to that accorded other rights violations. However, it is unusual in so far as all the conservative justices voted against property rights in this case, while two of the most liberal (Ginsburg and Breyer) defended them. This result may be accounted for by the conservative justices’ traditional hostility to judicially mandated damages remedies, expressed most clearly by Thomas and Scalia. The liberals, by contrast, are historically more supportive of damages remedies.

Even so, it is significant that two of the liberals still refused to allow damages remedies in this case, and three of the conservatives refused to join Scalia and Thomas in basing their judgment – even in part – on a general rejection of damages remedies. At the very least, therefore, there was a cross-ideological coalition of five justices willing to relegate property rights to second class status in the field of remedies.¹¹⁴

D. Access to Federal Court For Property Rights Claimants.

The Supreme Court has long made it difficult for property rights claimants to gain access to federal courts. In the leading 1985 case of *Williamson County Regional Planning Commission v. Hamilton Bank*,¹¹⁵ the Court ruled that an inverse condemnation claim under the Takings Clause must meet a two prong test. Claimants must first obtain a “final decision” on their land use applications from the appropriate state regulatory agency.¹¹⁶ Then, they must seek and be denied compensation for the taking of their property from a

¹¹² *Id.* at 2608-09 (Thomas, J., concurring). I have criticized the Thomas-Scalia position in Somin, supra note _____.

¹¹³ *Id.* at 2608.

¹¹⁴ For related criticisms of *Wilkie*, see Laurence H. Tribe, *Death By a Thousand Cuts: Constitutional Wrongs Without Remedies after Wilkie v. Robbins*, 2007 CATO SUPREME CT. REV. 23. Tribe, who represented Robbins in the Supreme Court, argues that *Wilkie* undermines the use of damage remedies for constitutional rights generally, not merely for property rights. *Id.* at 24-25. In my view, Tribe’s analysis doesn’t give sufficient weight to the ways (discussed above) in which the majority’s reasoning singles out property rights for especially unfavorable treatment. However, it is possible that Tribe will prove prophetic and that the reasoning of *Wilkie* will be applied to other rights in future cases. I briefly discussed that possibility in Somin, *Put Out to Pasture*, supra note _____.

¹¹⁵ 473 U.S. 172 (1985).

¹¹⁶ *Id.* at 190-94.

state court.¹¹⁷ As various commentators have pointed out, this test “virtually closes the door” on most litigants seeking to assert an inverse condemnation claim in federal court.¹¹⁸ It does so by enabling state officials to delay making a “final” decision until the property owners run out of time and funds.¹¹⁹ Even if the property owners persist beyond that point, they will also have to spend additional time and effort seeking a state court remedy, before being allowed to file in federal court. It is significant that, even at the height of its efforts to increase protection for property rights in the 1990s, the Court did not see fit to reconsider *Williamson County* and allow victims of constitutional property rights violations greater access to federal court. No other litigants claiming violations of individual constitutional rights are denied access to federal judicial remedies to such an extent.

In its 2005 decision in *San Remo Hotel v. City and County of San Francisco*,¹²⁰ the Court further restricted federal court access for inverse condemnation claims under the Takings Clause. In that case, an inverse condemnation claim had obtained a “final decision” from a state regulatory body, duly filed in California state court and had their claim rejected by a state supreme court decision.¹²¹ At that point, however, a federal court of appeals held that the property owner was barred from reasserting its claim in federal court by the Full Faith and Credit Clause.¹²² This, of course, created a Catch-22 situation for property owners. If they file in federal court in the first instance, their claims are barred by the *Williamson County* requirement that they must first seek compensation in state court. If they don’t and end up losing in state court, they will be barred from a federal forum by the Full Faith and Credit Clause.

The Supreme Court nonetheless affirmed the Court of Appeals decision, despite recognizing “the concern that it is unfair to give preclusive effect to state court proceedings that are not chosen, but are instead

¹¹⁷ *Id.* at 195.

¹¹⁸ Ely, supra note _____. See also Stephen E. Abraham, *Williamson County Fifteen Years Later: Is a Takings Claim (Ever) Ripe?* 36 REAL PROP. PROB. & TR. J. 101 (2001); Max Kidalov & Richard Seamon, *The Missing Piece of the Debate Over Federal Property Rights Litigation*, 27 HASTINGS CONST. L.Q. 1, 5 (1999) (noting that the doctrine makes it “almost impossible for federal courts to remedy violations of the Just Compensation Clause”).

¹¹⁹ Ely, supra note _____ at 66.

¹²⁰ 545 U.S. 323 (2005).

¹²¹ *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 106-11 (Cal. 2002).

¹²² *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), *aff’d* 545 U.S. 323 (2005).

required in order to ripen federal takings claims.”¹²³ It also noted that “state courts . . . have more experience than federal courts do in resolving complex, factual, technical, and legal questions relating to zoning and land-use regulations,”¹²⁴ and used this fact as a secondary justification for its decision.

San Remo further reinforces the second-class status of property rights relative to other constitutional rights.¹²⁵ The Catch-22 scenario it creates for inverse condemnation claimants seeking federal court access has no parallel elsewhere in constitutional individual rights litigation. Moreover, the Court’s argument that state courts have superior competence in resolving “complex” property rights issues is one that could just as easily be applied to almost any constitutional challenges to state regulatory regimes. Yet the Court only sees fit to resort to it in the property rights field.

In a concurring opinion joined by three other conservative justices, Chief Justice Rehnquist argued that the Court should reconsider the *Williamson County* requirement that inverse condemnation claimants must seek compensation in state court before being allowed to file a federal court claim.¹²⁶ Rehnquist had joined the Court’s opinion in *Williamson County* and his reconsideration of his earlier views signaled a growing willingness to increase protection for property owners on the part of the Court’s conservatives. The split between the signers of the Rehnquist concurrence and the other five justices (including all four liberals) is yet another example of the ideological split over property rights on the Court and the unwillingness of the liberal bloc to countenance any expanded protection for property owners.

E. Summarizing Recent Trends.

Over the last twenty-five years, the Supreme Court has begun to take property rights more seriously than before. However, actual protection for property owners remains extremely limited in nature. In large part, this is a consequence of the deep ideological split on the Court. While many of the conservative justices have been willing to strengthen protection for property rights, the four most liberal ones have been almost uniformly

¹²³ *San Remo*, 545 U.S. at 347.

¹²⁴ *Id.*

¹²⁵ This point is also made by Ely, *supra* note _____ at 67-68.

¹²⁶ *San Remo*, 545 U.S. at 347-50 (Rehnquist, C.J., concurring).

opposed. As a result, expanded protection for property rights could only prevail in the Court if all five conservatives were united in their support for it. In numerous key cases, such as *Kelo*, *Tahoe-Sierra*, and *San Remo*, one or two of the conservatives defected to the liberal side and blocked a potentially significant increase in protection for property rights.

That is not to say that any of the conservatives have been completely consistent in their support for property rights. To the contrary, several key property rights cases have gone in favor of the government by lopsided or unanimous votes where all or most of the conservatives voted with the liberal bloc. *Yee v. Escondido* and *Wilkie v. Robbins* are two of the most important examples; *Lingle* is another. Scholars such as Eric Claeys argue that these cases can be explained by the conservative justices' adherence to "minimalism" and "judicial restraint," which leads to a reluctance to invalidate governmental decisions in cases with potentially sweeping implications where the constitutional text and original meaning seem unclear.¹²⁷

Such attitudes surely do influence the conservative justices. But it is difficult to explain the overall pattern of their votes in property rights cases in this way. After all, most of the conservatives did vote for property owners in cases such as *Kelo* and *Tahoe-Sierra*, whose implications were potentially sweeping as well. As noted above, the four conservative dissenters in *Kelo* were willing to categorically forbid "economic development" takings, a result that would have significantly inhibited the use of eminent domain by local governments.¹²⁸

It is also possible that the conservatives were unwilling to support property rights in cases where doing so would require application of a balancing test as opposed to a "bright line" rule.¹²⁹ However, the conservatives could have used a bright line rule approach to rule in favor of the property owners in *Yee*, where this could have been accomplished by simply recognizing that *Yee's* property had been subjected to an involuntary physical occupation.¹³⁰ The same can be said for *Wilkie*, where the Court could have applied the rule that judicially imposed damage remedies are permissible in cases where other remedies are insufficient to

¹²⁷ See, e.g., Claeys, *Takings and Private Property in the Rehnquist Court*, supra note _____ at 220-22.

¹²⁸ See § I.A, infra.

¹²⁹ Claeys, supra note _____ at 220-22; Claeys, *Takings: An Appreciative Retrospective*, 15 WM. & MARY BILL OF RTS. J. 439, 442-43 (2006).

¹³⁰ See § I.B.1.

fully compensate the victim of property rights violations.¹³¹ Ultimately, therefore, it is difficult to discern a clear distinction between those cases where many of the Court’s conservatives have been willing to support significantly expanded judicial protection for property rights and those where they have joined with the liberals in rejecting it.

II. DO PROPERTY RIGHTS DESERVE THEIR SECOND CLASS STATUS?

In this Part, I briefly consider several of the standard rationales for according property rights lesser judicial protection than that extended to most other individual constitutional rights. I do not attempt to provide anything approaching a comprehensive theory of the extent to which the Court should protect property rights.¹³² I also don’t address claims that property rights should be denied judicial protection because judicial review is an undesirable institution more generally.¹³³ In addition, I do assume that at least some nonoriginalist considerations are relevant to modern-day judicial enforcement of property rights, especially with respect to considering justifications for their second-class status that are themselves nonoriginalist in nature. Thus, my analysis takes account of instrumental and utilitarian considerations. I also consider arguments based on the strengths and weaknesses of the political process as an alternative to judicial intervention.¹³⁴ This may be permissible even from a strongly originalist standpoint. Committed originalists can disagree among themselves as to whether the political process or courts are the best institutions for enforcing the original meaning of a given constitutional provision.

Within these constraints, I assess and find wanting standard arguments for giving property rights less protection than other individual rights. The second-class status to which property rights have been relegated by the Supreme Court cannot be justified. Whether the discrepancy should be remedied by “leveling up” the

¹³¹ See § I.C, *infra*.

¹³² For a recent argument urging a very high level of protection for property rights, see RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY* (2008).

¹³³ For examples of such claims, see, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing for the abolition of judicial review); ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* 196 (1996) (arguing that judicial review of all laws should be subject to congressional override); Lino Graglia, *Revitalizing Democracy*, 24 *HARV. J.L. & PUB. POL’Y* 165 (2000) (arguing that judicial review should be severely curtailed in order to give more scope for “democracy”).

¹³⁴ For the classic argument in favor of taking these issues into account in constitutional theory, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

protection accorded property rights or “leveling down” that accorded other individual rights is a question for another time – though I am much more sympathetic to the leveling up approach.

A. The Political Process as a Superior Protector for Property Rights.

One of the most often deployed arguments for minimizing judicial protection for property rights is the claim that the political process protects them already. Therefore, judicial protection is generally unnecessary.¹³⁵ There is no question that property owners wield considerable political power, particularly at the local government level.¹³⁶ Indeed, the average property owner probably has greater political influence than the average nonowner, if only because the former is likely to be far richer than the latter. Thus, it is not implausible to suppose that the political power of property owners will often prevent their rights from being violated without any need for judicial intervention.

However, the claim that the political power of property owners as a group obviates the need for judicial review is flawed because it assumes that the victims of property rights violations are likely to be the most politically influential owners, or at least ones with average amounts of political influence. In reality, government officials who undermine property rights are likely to target the poor or otherwise politically weak. Thus, the fact that property owners as a group have extensive political influence is unlikely to provide much protection to those owners whose rights are most likely to be violated.

Historically, government efforts to curtail property rights have targeted the poor and other politically weak groups far more than others. The Supreme Court’s validation of the constitutionality of “blight” condemnations in *Berman v. Parker* allowed the expulsion of some 5000 low-income African-Americans so

¹³⁵ For recent defenses of this position, see, e.g., Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007) (arguing that local governments have adequate incentives to provide optimal levels of protection for property rights); and Daniel Cole, *Political Institutions, Judicial Review, And Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141 (2007) (making institutional arguments for the superiority of the political process as a protector of property rights). See also WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS (2001) (providing extensive evidence of the ability of homeowners to influence local governments to adopt policies that protect their interests and maximize property value); FISCHER, REGULATORY TAKINGS (1995) (arguing that judicial protection for victims of regulatory takings is generally unnecessary). Serkin’s article argues that judicial protection for property rights against local governments is unnecessary because property owners are protected by interjurisdictional mobility and competition. I addressed this variant of the political process argument in Somin, *Grasping Hand*, supra note _____ at 221-23.

¹³⁶ See FISCHER, HOMEVOTER HYPOTHESIS.

that the land they lived on could be transferred to middle and upper class white interests.¹³⁷ *Berman* and similar state constitutional cases helped set the stage for “urban renewal” takings that displaced some 3 to 4 million people since World War II – most of them poor and a disproportionate number racial minorities.¹³⁸ Most ended up in far worse conditions after their relocation than before.¹³⁹ The Supreme Court’s lax enforcement of public use limitations on takings has clearly not been offset by the political process – in large part because most of those targeted for condemnation lack the political influence to fend for themselves effectively.¹⁴⁰ “Economic development” takings such as that upheld in *Kelo* also tend to target the politically weak.¹⁴¹ To a lesser extent, the same is true of the Court’s unwillingness to enforce limitations on regulatory takings. Here too, the victims are disproportionately likely to be the poor and others who lack political power.¹⁴²

The Supreme Court’s unwillingness to challenge zoning restrictions also tends to victimize the poor, since “exclusionary zoning” is often used to prevent the poor and ethnic minorities from moving into more affluent areas.¹⁴³ Moreover, the political process is even more unable to prevent such abuses than in the case of takings because the primary victims of exclusionary zoning have not yet moved into the jurisdiction in question and therefore have no ability to influence its political decisions, even as voters.

Even if the political process does usually protect the rights of property owners, it does not necessarily follow that courts should forego intervening in those cases where it fails to do so. Many other constitutional rights protect interests that also have great influence in the political process. For example, the First Amendment’s Free Speech Clause protects major media organizations such as CNN and the *New York Times*

¹³⁷ *Berman v. Parker*, 348 U.S. 26, 30 (1954); HOWARD GILLETTE, JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C., 163-64 (1995).

¹³⁸ For relevant citations, see Somin, *Grasping Hand*, at 268-70; see also Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 37-48 (2003) (giving historical background and noting strong political support for blight condemnations despite their negative impact on the poor and racial minorities).

¹³⁹ See generally MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (2004) (describing extensive social and psychological costs of forced relocation); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN INC: HOW AMERICA REBUILDS CITIES 20-35 (1989) (same).

¹⁴⁰ For a more detailed discussion see, Somin, *Grasping Hand*, at 190-203.

¹⁴¹ *Id.*

¹⁴² For further analysis of this point, see Ilya Somin, *Why Robbing Peter Won’t Help Poor Paul: Low Income Neighborhoods and Uncompensated Regulatory Takings*, 117 YALE L.J. POCKET PART 71 (2007).

¹⁴³ See discussion at the end of this Part.

despite the fact that these firms have tremendous political influence. Nonetheless, the Court has protected the *Times* in several major First Amendment cases¹⁴⁴ and has not applied a more deferential standard of review merely because the *Times* and other major media outlets can usually protect themselves in the political process. To the extent that the political process protects property rights effectively, that may reduce the number of occasions where judicial review is needed. But it would not justify increased deference to the government in those cases where rights violations still occur.

B. Deference to Expertise.

Deference to the alleged expertise of political decisionmakers is also often cited as a justification for weak judicial scrutiny of constitutional property rights claims. For example, the majority opinion in *Kelo* placed heavy emphasis on the need to avoid judicial “second-guessing” of expert city planners’ condemnation decisions.¹⁴⁵ It is indeed likely to be true that elected officials and agency bureaucrats have greater expertise on property issues than do judges. However, this fact doesn’t justify giving property rights lesser protection than that accorded other constitutional rights.

The expertise argument would justify cutting back judicial protection for virtually all constitutional rights, not just property rights. For example, government officials surely know more than judges do about the extent to which the need to protect national security, combat racism, or prevent public disorder justifies restrictions on freedom of speech. Similarly, they are also likely to have greater knowledge than do judges about the degree to which government support for religion is needed to promote education and moral behavior. Police, prosecutors, and legislators surely have greater expertise than judges on the question of which searches and seizures are “reasonable” in light of the need to combat violent crime, and whether *Miranda* warnings lead to increased criminality by reducing deterrence. Finally, legislators are likely better informed than judges about the degree to which the use of racial classifications is necessary to achieve important public policy objectives.

¹⁴⁴ See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *New York Times v. United States*, 403 U.S. 713 (1971) (the Pentagon Papers case).

¹⁴⁵ *Kelo v. City of New London*, 545 U.S. 459, 488 (2005).

In all of these areas, there are complex disputes among experts, who often vehemently disagree with each other.

There is no reason to believe that the judges' relative lack of expertise is less severe in these areas of public policy than in the case of property rights. If lack of judicial expertise justifies deference to the political process in the case of the Takings Clause, it also does so in the case of the Free Speech Clause, the Establishment Clause, the Fourth Amendment, the Establishment Clause, and the Equal Protection Clause, among others.

As in the case of other constitutional rights, the political process' superior ability to draw on expertise is counterbalanced by its perverse incentives to violate rights for the benefit of politically powerful interest groups. In many situations, the political branches' superior expertise will be used to benefit the politically powerful at the expense of the weak rather than to advance the public good in a disinterested way. This is the classic justification for judicial review in other areas of constitutional law, and it applies just as readily in the case of property rights.

Even when the political branches act out of purely public-spirited motives, it is not necessarily the case that judicial intervention will reduce society's ability to apply expertise to the problem. While political actors might indeed have more information than judges, they might have less than market actors do, and less incentive to use it effectively. If judges act to protect property rights against the political process, the ultimate decision on the disposition of the property will be made not by the judges themselves, but by the private owners. These owners may well have greater knowledge about the tradeoffs between possible uses of their property than is possessed by political leaders. As F.A. Hayek famously argued, market prices generally embody more and better information about alternative uses of resources than government planning processes do.¹⁴⁶ Elsewhere, I have argued that markets are better able than government to generate the information needed to decide whether existing uses of property should be left in place or "assembled" into new development projects; this suggests

¹⁴⁶ F.A. Hayek, *The Use of Knowledge in Society*, 4 AM. ECON. REV. 519 (1945).

that allowing the government to engage in *Kelo*-style economic development takings actually reduces society's ability to utilize expertise in land use planning.¹⁴⁷

I do not contend that private property owners will always have superior information and expertise to that possessed by the government. However, such is often likely to be the case. In any event, it is important to understand that the relevant expertise comparison is that between market actors and government officials, not that between the latter and judges.

C. Redistribution to the Poor.

The desire to promote redistribution of wealth to the poor is a longstanding reason for opposition to judicial protection of property rights.¹⁴⁸ It is undeniable that the wealthy own more property than the poor and that judicial protection for property rights is therefore a potential obstacle in the way of redistribution. Even if we set aside purely rights-based deontological objections to redistribution, it doesn't necessarily follow that leaving property rights to the mercy of the political process would benefit the poor at the expense of the wealthy. To the contrary, it may well be that doing so will exacerbate inequality of wealth more than alleviate it.

As discussed above,¹⁴⁹ many infringements on property rights target the poor for the benefit of wealthy or middle class interest groups. That is certainly the case with the blight takings licensed by *Berman v. Parker* and "economic development" takings permitted by *Kelo*.¹⁵⁰ Municipal zoning, upheld by the Supreme Court in 1926,¹⁵¹ is routinely used to price the poor out of real estate markets in order to reserve more land for upper-

¹⁴⁷ Somin, *Grasping Hand*, supra note _____ at 204-208; see also Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1 (2006) (making a similar argument more systematically).

¹⁴⁸ See, e.g., BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE* 71-107 (1998) (noting the centrality of this issue to the Progressive critique of constitutional property rights).

¹⁴⁹ See § II.A, infra.

¹⁵⁰ *Id.*

¹⁵¹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

income housing and recreation.¹⁵² These results are not accidental. Rather, transferring power to the political process is likely to benefit those groups with the most political power and disadvantage those who lack it.

For a variety of reasons, the poor have far less influence on government policy than the relatively affluent. They are less likely to vote,¹⁵³ less likely to engage in other forms of political activity, and of course less likely to make financial contributions to political campaigns.¹⁵⁴ In addition, the poor also have lower levels of political knowledge than more affluent citizens.¹⁵⁵ Low political knowledge makes it more difficult for poor voters to effectively assess government policy and cast informed votes.¹⁵⁶ Moreover, due in part to their lower average levels of education, the poor are less likely than the more affluent to be able to make effective use of the information they do possess, and more likely to be misled by faulty reasoning or deception.¹⁵⁷ The poor therefore rarely exercise substantial influence over the political process, especially in cases where their perceived interests conflict with those of the wealthy or the middle class.¹⁵⁸

Therefore, it is not surprising that judicial deference to the political process on property rights issues benefits the relatively wealthy at the expense of the poor more often than the reverse. Even if increasing redistribution to the poor is desirable, foregoing judicial protection for property rights is unlikely to achieve this goal.

¹⁵² See, e.g., Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability*, NAT'L BUREAU OF ECON. RESEARCH, WORKING PAPER No. W8835, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=303557 (showing that zoning systematically makes housing more expensive for low-income people).

¹⁵³ See, e.g., RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* (1992); RAYMOND I. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* (1980).

¹⁵⁴ For the data on political activity and donations, see SIDNEY VERBA, KAY LEHMAN SCHLOZMAN, & HENRY E. BRADY, *VOICE AND EQUALITY* (1995).

¹⁵⁵ See MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1314 (2004).

¹⁵⁶ See, e.g., Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, Cato Institute Policy Analysis (Sept. 22, 2004) (explaining the dangers of political ignorance), available at <http://www.cato.org/pubs/pas/pa525.pdf>.

¹⁵⁷ See BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER* (2007) (showing how education, which is highly correlated with income, is a strong predictor of voter ability to reason effectively about economic issues).

¹⁵⁸ Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778 (2005) (concluding that the poor have almost no influence on public policy when their preferences differ from those of the more affluent); Larry M. Bartels, *Economic Inequality and Political Representation* (Aug. 2005) (unpublished manuscript) (showing that the preferences of the poor have virtually no impact on policy), available at <http://www.princeton.edu/~bartels/economic.pdf>.

D. “Positive Rights,” “Negative Rights,” and the Rejection of Common Law Baselines.

Some legal theorists have long argued for eliminating judicial protection for “negative” property rights on the grounds that all property is really the creation of the government and that there is no meaningful distinction between positive and negative rights because both must be defined and protected by the state. Thus, there is no meaningful difference between a government that protects “negative” common law property rights against state intervention and one that instead redistributes them away from the original owners in order to grant “positive” rights to others. Depending on the situation, the latter might actually increase freedom more than the former. Common law baselines for property rights, it is argued, should be denied any constitutional protection by courts.

Along similar lines, many claim that constriction of “negative” freedom to use property can sometimes expand “positive” freedom to use it for others, especially the poor and disadvantaged who cannot easily acquire property through the market. These arguments were first advanced by the Progressive and New Deal-era critics of traditional property rights, such as John Dewey.¹⁵⁹ Cass Sunstein is the leading modern advocate of this view, contending that it is central to a proper understanding of post-New Deal constitutionalism.¹⁶⁰

A complete critique of these arguments is outside the scope of this article.¹⁶¹ For our purposes, it is essential to recognize that the Progressive critique of negative rights cannot be limited to property rights, but extends with equal force to other constitutional liberties.¹⁶² Thus, it does not justify treating property rights less favorably than others.

If property rights are viewed as creations of the state requiring government-funded enforcement and potentially redistributable in order to provide “positive” liberties to others, the same can be said for other

¹⁵⁹ John Dewey, *Liberty and Social Control*, in THE LATER WORKS OF JOHN DEWEY, 1925-1953, VOLUME 11: 1935-1937, ESSAYS, *LIBERALISM AND SOCIAL ACTION* 360, 362 (Jo Ann Boydston ed., 1987); see also FRIED, supra note ____ (discussing other Progressive-era liberals who made similar arguments).

¹⁶⁰ See, e.g., CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 501-04 (1987); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873 (1988).

¹⁶¹ For a more general recent criticism of the Progressive/New Deal approach to constitutional rights, see Richard A. Epstein, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

¹⁶² For a similar argument, see Adrian Vermeule, *A New Deal for Civil Liberties: An Essay in Honor of Cass Sunstein*, Tulsa L. Rev. (forthcoming), available at [HTTP://ssrn.com/abstract=1150260](http://ssrn.com/abstract=1150260).

constitutional liberties. It can be said for rights to freedom speech, which are only assigned to individuals in so far as the government so defines them and in so far as it protects them against intrusion by both the state and other private individuals. Potentially, the redistribution of speech rights from some private individuals to others (e.g. – forcing newspapers or TV stations to set aside time and space for views they would not normally air) could lead to a net increase in opportunities to speak across the board. Sunstein has actually made this point in his own writings on free speech,¹⁶³ though he still seems to assume that “negative” speech rights should get somewhat greater judicial protection than property rights.¹⁶⁴

The same analysis can be applied to most other constitutional rights. For example, a pregnant woman’s right to choose an abortion¹⁶⁵ can be said to depend on a prior governmental assignment to her of the right to control her own body. Instead, the post-New Deal regulatory state could assign that right to the fetus, to the fetus’ father, or to some government agency tasked with deciding whether continuing a given pregnancy would maximize overall social welfare.

Another problem with the Progressive rejection of traditional property rights is its implicit assumption that government redistribution of traditional property rights is likely to work in favor of the poor and others disadvantaged in market processes. On this assumption hinges the hope that judicial withdrawal from protection of property rights might increase freedom to own property overall. As discussed above, real-world political processes are more likely to transfer property to the relatively affluent at the expense of the poor than vice versa.¹⁶⁶

E. The Environmental Challenge.

¹⁶³ See SUNSTEIN, *PARTIAL CONSTITUTION*, at 197-231, Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

¹⁶⁴ Sunstein, *Partial Constitution* at 228-29. Sunstein contends that governmental restrictions on speech are different from restrictions on “economic” property rights because the former can be used to close off opportunities for “change” in the political process. This attempt to distinguish political speech rights from property rights ignores the fact that government curtailment of the latter can be used to close off social and economic change in the private sector. Unless we implicitly privilege government-imposed change over change that occurs through the market and civil society, we cannot justify heightened judicial protection for speech rights on the basis that it is necessary to ensure the possibility of change.

¹⁶⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁶⁶ See § II.C, *infra*.

In recent years, critics of judicial protection of property rights have increasingly cited the need to protect the environment as an important new justification for their position. Many scholars and environmentalists claim that requiring compensation for regulatory takings would undermine government conservation efforts.¹⁶⁷ Environmentalists also tended to support the *Kelo* decision, fearing that efforts to revitalize public use limits on takings might lead to the invalidation of efforts to use eminent domain to promote environmental goals.¹⁶⁸ In this section, I cannot possibly consider the full range of arguments involved in the debate over the relationship between property rights and environmental law.¹⁶⁹ So I will confine myself to a few brief points.

First, there are at least some property rights protections that actually prevent harm to the environment. For example, a judicial ban on *Kelo*-like “economic development” takings might help prevent the condemnation of conservation land for transfer to commercial enterprises and also prevent various indirect environmental harms associated with development projects.¹⁷⁰ At the same time, such a ban would not threaten any of the relatively rare situations where eminent domain is used to prevent damage to the environment.¹⁷¹

Second, even expanded judicial review of regulatory takings might sometimes reinforce environmental protection by eliminating perverse incentives for property owners to destroy endangered species found on their

¹⁶⁷ See, e.g., John Echeverria, *The Taking Issue*, in LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT 143, 148 (John Echeverria & Raymond Booth Eby eds. 1995) (“there can be little doubt that an expanded reading of the takings clause would in fact increase the cost of existing environmental programs and reduce the level of environmental protection Americans currently enjoy.”); *id.* at 146 (arguing that the “beneficiaries of regulation,” including those who suffer from environmental harm and “future generations” would suffer from a compensation requirement); Glenn P. Sugameli, *Takings Bills Threaten Private Property, People and the Environment*, 8 FORDHAM ENVTL. L.J. 521, 522 (1997); Joseph L. Sax, *Using Property Rights to Attack Environmental Protection*, 14 PACE ENVTL. L. REV. 1 (1996); Ira Michael Heyman, *Property Rights and the Endangered Species Act: A Renascent Assault on Land Use Regulation*, 25 PAC. L.J. 157 (1994). See also David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655, 656 (1995) (noting “the assumption underlying the affiliation of propreservation groups with the strict anti-compensation position”).

¹⁶⁸ See Ilya Somin & Jonathan H. Adler, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 626-27 (2006) (giving examples).

¹⁶⁹ For a broader and more systematic critique of claims that protection for property rights leads to environmental harms, see Jonathan H. Adler, *Back to the Future of Conservation: Property Rights and Environmental Protection*, 1 NYU J. L. & LIBERTY 987 (2005).

¹⁷⁰ Somin & Adler, *supra* note _____ at 641-65.

¹⁷¹ For a detailed doctrinal analysis of the impact of a ban on economic development takings on the use of eminent domain to protect the environment, see *Id.* at 628-41.

property, encouraging private conservation efforts, and forcing government to allocate its environmental protection efforts in a more cost-effective manner.¹⁷²

Finally, even if the critics are correct and there is indeed an irreconcilable conflict between property rights and environmental protection, it would not necessarily follow that constitutional property rights should be relegated to second-class status across the board. Instead, courts could give greater deference to the government in cases involving environmental regulations, while maintaining stronger protection for property owners in other cases. In the same way, courts provide lower protection for free speech rights in cases with strong national security implications than in cases addressing speech restrictions for which there is no compelling national security rationale.¹⁷³

III. THE FUTURE OF JUDICIAL PROTECTION FOR PROPERTY RIGHTS.

The last twenty-five years of Supreme Court decisions have seen a resurgence of judicial interest in property rights. However, the end result has been only a very modest increase in protection for those rights. In case after case, the Court's liberal bloc has uniformly refused to countenance even modest increases in property rights protection. The conservatives, for their part, have often been divided amongst themselves. As a result, property rights advocates have not been able to win truly decisive victories in the Court, even though they have prevailed in a number of noteworthy cases, such as *Nollan*, *Dolan*, *Lucas*, and *Palazzolo* and come painfully close to victory in *Kelo*.

In the short to medium term, we are unlikely to see major breakthroughs for property rights on the Court, unless some of the liberal justices retire and are replaced by others more supportive of property rights. In 2005, Chief Justice John Roberts' replacement of Chief Justice Rehnquist at most replaced one property rights supporter with another. It is even possible that Roberts is significantly less supportive of property rights than

¹⁷² These points are developed at length in Jonathan Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Regulatory Takings*, 49 B.C. L. REV. 301 (2008).

¹⁷³ See, e.g. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 992 (W.D. Wisc. 1979) (allowing imposition of prior restraint in case with "grave national security concerns", even though prior restraints are strongly disfavored in other First Amendment cases).

his predecessor, given his role in the *Tahoe-Sierra* case¹⁷⁴ and his statement during his confirmation hearings that the rights at stake in *Kelo* might be safely left to the protection of the political process.¹⁷⁵ The replacement of Justice Sandra Day O'Connor, often a fairly strong supporter of property rights, by Justice Alito also probably won't have broad-ranging effects.

More importantly, it is unlikely that property rights will ever get strong protection from the Court unless there is at least some degree of bipartisan, cross-ideological agreement that such protection is merited. Throughout American history, constitutional rights have rarely if ever achieved strong judicial recognition if their importance was recognized by only one side of the political spectrum. Even judicial protection for abortion rights, a possible exception to the rule, arose because several conservative Republican justices endorsed such protection,¹⁷⁶ and later survived thanks to the support of relatively conservative justices such as Sandra Day O'Connor and Anthony Kennedy.¹⁷⁷ In sum, the Court probably will not elevate property rights to the same status as that enjoyed by other individual rights unless property rights protection ceases to be a parochial concern of the Court's conservatives and gains at least some measure of liberal support.

It is highly unlikely that the Court's current four liberal justices will change their positions on property rights. However, it is not impossible that future liberal jurists will take a different view. The broad outrage generated by *Kelo* and recent developments in state courts suggest that some judicial liberals may be rethinking property rights.

The *Kelo* decision generated widespread outrage from across the political spectrum, with some 80 to 95 percent of the public opposing the decision, including some 77% of self-described liberals.¹⁷⁸ In the aftermath of the decision, forty-three states and the federal government passed reform legislation purporting to

¹⁷⁴ see *infra* § II.B.2.

¹⁷⁵ Roberts commented that the legislative reaction to *Kelo* shows that "this body [Congress] and legislative bodies in the states are protectors of the people's rights as well" and "can protect them in situations where the court has determined, as it did 5-4 in *Kelo*, that they are not going to draw that line." Washington Post, *Transcript: Day Three of the Roberts Confirmation Hearings*, Sept. 14, 2005 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/ar2005091401445.html>) (visited Oct. 25, 2005)

¹⁷⁶ See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 473-599 (1994) (discussing the origins of *Roe v. Wade* and the crucial role of these conservative justices).

¹⁷⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (crucial case where *Roe v. Wade* was reaffirmed thanks to the support of Kennedy and O'Connor, who were essential swing voters).

¹⁷⁸ Somin, *Limits of Backlash*, at 8.

ban or limit economic development takings – the most extensive legislation reaction against any Supreme Court decision in American history.¹⁷⁹ Perhaps more importantly for our purposes, the decision was denounced by a large number of liberal political activists and elites, including Bill Clinton, Democratic National Committee Chair Howard Dean, Ralph Nader, and liberal African-American Congresswoman Maxine Waters.¹⁸⁰ The NAACP had joined with several other liberal organizations in filing an amicus brief urging the Court to forbid economic development takings because they tend to target poor minorities.¹⁸¹ I myself authored an amicus brief on behalf of the prominent left-liberal urban development scholar Jane Jacobs, whose longstanding opposition to urban renewal takings was based on similar concerns.¹⁸²

Ultimately, the majority of the legislation passed in the wake of *Kelo* is likely to be ineffective, in part because legislators found it easy to pass off cosmetic legislation as real “reform” due to widespread voter ignorance.¹⁸³ At the same time, however, a number of states have passed strong reform laws.¹⁸⁴ The widespread opposition to *Kelo* by liberal activists and legal advocates (notably the NAACP) suggests a growing recognition among them that judicial protection for property rights can benefit the poor and minorities as much or more so than wealthy whites.

Developments in state courts also show that legal liberals are not as monolithic in their opposition to property rights protection as the Supreme Court’s record suggests. A total of eleven state supreme courts have now forbidden economic development takings under their state constitutions.¹⁸⁵ These include recent

¹⁷⁹ *Id.* at 19-41.

¹⁸⁰ *Id.* at 2, 6-7. Ralph Nader had been a longstanding opponent of economic development takings, dating back to his involvement in the 1981 *Poletown* case. See JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 127-30, 133-34 (1989) (noting Nader’s role in leading opposition to the Poletown takings). For Nader’s own statement of his views, see Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207 (2004)

¹⁸¹ See *Kelo v. City of New London*, Amicus Br. of NAACP, AARP, & Southern Christian Leadership Conference, 2004 WL 2811057.

¹⁸² See *Kelo v. City of New London*, Amicus Br. of Jane Jacobs, 2004 WL 2803191. In my communications with Jacobs, came to realize that her reasons for opposition to the *Kelo* takings were strikingly similar to my own, despite coming from very different ideological starting points. For Jacobs’ classic statement on the subject, see JANE JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 5 (1961) (strongly criticizing use of eminent domain for urban renewal).

¹⁸³ See generally, Somin, *Limits of Backlash*.

¹⁸⁴ *Id.*

¹⁸⁵ See *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 457 (Fla. 1975) (holding that a “‘public [economic] benefit’ is not synonymous with ‘public purpose’ as a predicate which can justify eminent domain”); *In re Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); *Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) (“No ‘public use’ is involved where the

unanimous decisions by state supreme courts in the generally liberal states of Michigan and Illinois, and the moderate state of Ohio.¹⁸⁶ The supreme court of the largely liberal state of Washington has maintained and reaffirmed its ban on economic development takings since 1959.¹⁸⁷ At least in the public use area, liberal state supreme court justices have sometimes rejected the lead of their federal cousins.

The Michigan, Illinois, and Washington decisions predate *Kelo* and so cannot be attributed to the short-term effects of the *Kelo* backlash. They instead represent a broader, preexisting willingness by some liberal state judges to provide broader protection for property rights than the Supreme Court requires. Several state Supreme Courts have also given property owners greater protection against regulatory takings than is available under the federal Supreme Court's deferential *Penn Central* test.¹⁸⁸

The liberal backlash against *Kelo* and some liberal state supreme court justices' willingness to provide greater protection for property rights than their Supreme Court colleagues, suggest that the left-right split over property rights on the Supreme Court is not inevitable. Obviously, liberals are unlikely ever to view property rights in the same way as conservatives and libertarians do. But it is possible that a coalition of jurists from all

land of A is condemned merely to enable B to build a factory"); *Karesh v. City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development); *City of Little Rock v. Raines*, 411 S.W.2d 486, 495 (Ark. 1967) (private economic development project not a public use); *Hogue v. Port of Seattle*, 341 P.2d 171, 181-191 (Wash. 1959) (denying condemnation of residential property so that agency could "devote it to what it considers a higher and better economic use," *Id.* at 187); *Opinion of the Justices*, 131 A.2d 904, 905-06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214-15 (Mont. 1995) (holding that a condemnation that transfers property to a "private business" is unconstitutional unless the transfer to the business is "insignificant" and "incidental" to a public project); *City of Norwood v. Horney*, 853 N.E. 2d 1115, 1136-38 (Oh. 2006) (following *County of Wayne v. Hathcock* in holding that "economic development" alone does not justify condemnation); *Bd. of County Com'rs of Muskogee County v. Lowery*, 136 P.3d 639, 646-52 (Okla. 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma state constitution); *Ga. Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a "substantial . . . projected economic benefit" cannot justify a "condemnation"); *Southwestern Ill. Dev. Auth. v. National City Env.*, 768 N.E.2d 1, 9-11 (Ill. 2002) (holding that a "contribu[tion] to economic growth in the region" is not a public use justifying condemnation); *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004) (forbidding economic development takings under Michigan state constitution).

¹⁸⁶ See Michigan, Illinois, and Ohio decisions cited in note _____.

¹⁸⁷ *In re Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981); *Hogue v. Port of Seattle*, 341 P.2d 171, 181-191 (Wash. 1959).

¹⁸⁸ For recent state supreme court cases of this type, see, e.g., *Mann v. Ga. Dept. of Corrections*, 653 S.E.2d 740, 760-61 (Ga. 2007) (holding that statute forbidding sex offenders to reside within 1000 feet of facilities where "minors congregate is a taking of his property"); *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110, 1126-27 (Nev. 2006) (holding that Nevada Constitution gives greater protection against regulatory takings than the federal constitution as interpreted by the Supreme Court); *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1008-09 (Ohio 2002) (giving mineral rights greater protection against regulatory takings than is available under *Penn Central* and *Lucas*).

three groups can support the idea of giving property rights greater judicial protection than is available under current Supreme Court doctrine.

Where might such a cross-ideological coalition focus its efforts? Prediction is necessarily a difficult task. Much will depend on the particular cases and policies that bring the coalition into being. Nonetheless, we can identify two areas where it could potentially emerge. Both involve issues where liberal jurists might be willing to strengthen protection for property rights because doing so would prevent harm to the poor and minorities at the hands of politically more powerful groups.

The first such area involves “blight” and economic development takings, which historically have been used to expel poor and minority property owners for the benefit of middle and upper class interests.¹⁸⁹ Liberal activists such as Ralph Nader and The NAACP have already recognized that minorities and the poor have a strong interest in strengthening public use restrictions on eminent domain, as indicated by their support for the property owners in *Kelo* and related state cases.¹⁹⁰ In the future, this realization might spread to liberal judges on the federal courts, as it already has on some state courts.

Like eminent domain, zoning has also long been used to the detriment of minorities and the poor.¹⁹¹ *Village of Euclid v. Amber Realty*,¹⁹² the 1926 case in which the Supreme Court held that zoning restrictions do not constitute a taking, involved what we would today call “exclusionary zoning” established to keep poor

¹⁸⁹ See discussion in §§II.A, C, *infra*. See also Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L REV 841, 856-57 (2006) (“Not only do cities fail to use their eminent domain power to build more affordable housing units, but they often use their power to raze them”).

¹⁹⁰ See note 179 and accompanying text.

¹⁹¹ See generally William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 Urb. Stud. 317 (2004).

¹⁹² 272 U.S. 365 (1926). The district court decision in *Euclid* noted that:

The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. *In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.*

Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (D. Oh. 1924), *rev'd* 272 U.S. 365 (1926) (emphasis added).

people from moving into a more affluent community.¹⁹³ Several liberal state Supreme Courts have moved to restrict or forbid exclusionary zoning under their state constitutions.¹⁹⁴

Federal courts, including the Supreme Court, have shown little interest in exclusionary zoning issues in recent years. There have been no notable Supreme Court decisions on the subject since the 1970s.¹⁹⁵ In the short term, it is unlikely that the Supreme Court will revisit this field. However, the issue is one that could be a possible area for liberal-conservative coalition-building in the future; first at the state court level, and eventually reopening the issue in federal courts under the Takings Clause.¹⁹⁶

CONCLUSION.

Over the last 25 years, the Supreme Court has begun to take property rights more seriously. Nonetheless, property rights continue to be the second-class “poor relations” of constitutional law. Whether that pattern will continue remains to be seen.

¹⁹³ See Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 593, 615 (2001) (noting that the zoning scheme upheld in *Euclid* amounted to “overt licensing of segregation by class”).

¹⁹⁴ The best-known case is *S. Burlington County NAACP v. Tshp. of Mt. Laurel*, 336 A.2d 713 (N.J. 1975). For other examples, see *Surrick v. Zoning Hearing Board of Upper Providence Township*, 382 A.2d 105 (Pa. 1977); *Reimer v. Bd of Supervisors of Upper Mount Bethel Township*, 615 A.2d 938 (Pa. Commw. Ct. 1992); *BAC, Inc. v. Bd of Supervisors of Millcreek Township*, 633 A.2d 144 (Pa. 1993); *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975)

¹⁹⁵ See *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.* 429 U.S. 252 (1977) (upholding such an ordinance against an Equal Protection Clause challenge claiming that it discriminated against blacks).

¹⁹⁶ *Arlington Heights* and other 1970s cases in this field considered the question only under the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding exclusionary zoning ordinance against Equal Protection Clause and the Fourteenth Amendment challenges).