

"Property" in the Constitution: The View From the Third Amendment

Tom W. Bell

Repository Citation

Tom W. Bell, *"Property" in the Constitution: The View From the Third Amendment*, 20 Wm. & Mary Bill Rts. J. 1243 (2012), <http://scholarship.law.wm.edu/wmborj/vol20/iss4/7>

“PROPERTY” IN THE CONSTITUTION: THE VIEW FROM THE THIRD AMENDMENT

Tom W. Bell*

ABSTRACT

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

INTRODUCTION: THE SEARCH FOR CONSTITUTIONAL PROPERTY	1244
I. “PROPERTY” IN THE CONSTITUTIONAL TEXT	1247
<i>A. The Property Clause of Article IV, Section 3, Clause 2</i>	1248
<i>B. The Due Process Clause of the Fifth Amendment</i>	1248
<i>C. The Takings Clause of the Fifth Amendment</i>	1249
<i>D. The Due Process Clause of the Fourteenth Amendment</i>	1249
II. PROPERTY, GENERALLY	1250
III. CONSTITUTIONAL PROPERTY IN CASELAW AND COMMENTARY	1252
<i>A. The Property Clause of Article IV, Section 3, Clause 2</i>	1252
<i>B. The Due Process Clause of the Fifth Amendment</i>	1255

* Professor, Chapman University School of Law. Thanks go to Glen Whitman, Eugene Volokh, Randy Barnett, Nicholas Quinn Rosenkranz, Gary Lawson, Tom G. Palmer, Aeon Skoble, Ilya Somin, Mike Rappaport, and Alexander Volokh.

C. <i>The Takings Clause of the Fifth Amendment</i>	1256
1. Stretching “Private Property” to Include Public Property	1256
2. Protecting Personal Property Less than Real Property	1257
D. <i>The Due Process Clause of the Fourteenth Amendment</i>	1261
IV. THE PROBLEM OF CONSTITUTIONAL INCONSISTENCY	1265
V. THE VIEW FROM THE THIRD AMENDMENT	1269
CONCLUSION: CONSTITUTIONAL PROPERTY BY COMMON CONSENT	1275

INTRODUCTION: THE SEARCH FOR CONSTITUTIONAL PROPERTY

In 1942, as Japanese forces swept toward the mainland, the United States government forcibly evacuated natives from the Aleutian Islands off the southwest coast of Alaska.¹ In some cases, United States military officials pursuing a “scorched-earth” policy razed entire villages.² In other cases, the natives suffered vandalism of their empty homes, destruction of their irreplaceable craftwork, and theft of their religious icons.³ Most significantly for present purposes, a few of the Aleuts had United States soldiers quartered in their homes.⁴ Though it hardly ranked among the worst wrongs inflicted on the residents of the Aleutian Islands in the early 1940s, that hitherto unremarked instance of quartering offers a telling example of how constitutional interpretation affects real people. Why were the Aleuts not protected against the trespasses of their own government? The Constitution plainly required better control over the occupying forces and compensation for the property rights they violated,⁵ yet it took decades for the federal government to admit to having maltreated the Aleutians, apologize, and pay damages.⁶ These injustices might never have occurred if federal officials had adhered to the bold, clear language of the Third and Fifth Amendments. Alas, though, courts and commentators have cast great uncertainty on the meaning of the term “property” as used in the Constitution. This Article documents that troubling state of affairs and turns to the Third Amendment for help.

What does “property” mean in the United States Constitution? The word appears four times in the text, at crucial junctures.⁷ Its definition steers the great machinery

¹ G. Edward White, *The Lost Internment*, 14 GREEN BAG 2d 283, 294 (2011).

² *See id.* at 297.

³ *Id.* at 297–99 (citing REPORT OF THE COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED, 355–56, 359 (1982) [hereinafter PERSONAL JUSTICE DENIED]).

⁴ PERSONAL JUSTICE DENIED, *supra* note 3, at 330 (citation omitted).

⁵ *See* U.S. CONST. amend. V.

⁶ For details of the wartime treatment of Aleutian natives, see generally, PERSONAL JUSTICE DENIED, *supra* note 3, and White, *supra* note 1. The former text constitutes the official report of the federal government and provides the basis for the compensation later paid under the Aleutian and Pribilof Islands Restitution Act, 50 U.S.C. app. § 1989c (2006).

⁷ *See infra* Part I (discussing the Property Clause of Article IV, section 3, clause 2, the Due Process Clause of the Fifth Amendment, the Takings Clause of the Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment).

of federal and state government. Yet it remains uncertain whether “property,” in the Constitution, includes both real and personal property.⁸ If the latter, moreover, does it include tangibles (such as cars or guns) as well as intangibles (such as future estates or negotiable instruments)? The question of what “property” means in the Constitution seems simple enough. The answer is not.

More precisely, the *answers* are not simple. Perhaps, after all, “property” means something different each time it appears in the Constitution. A good deal of caselaw and commentary suggests as much.⁹ Judging from the precedents, “property” means one thing in Article IV, section 3, clause 2 (the Property Clause), another in the Fifth Amendment (where “property” appears twice), and yet another in the Fourteenth Amendment’s Due Process Clause.¹⁰ Though originalism bears little blame for these innovative readings, it bears noting that to interpret the Constitution in light of its public meaning at ratification would not guarantee uniformity either, given that “property” arguably meant one thing in the late 1780s, when the Constitution and the Bill of Rights were ratified, and another in 1868, when the Fourteenth Amendment was ratified.¹¹

It should give us pause that both major schools of constitutional interpretation, living constitutionalism and originalism, deny that “property” has a uniform meaning in the founding document of the federal government.¹² In other areas of legal interpretation, courts routinely favor the practice of giving one term the same meaning throughout the same text.¹³ That sound principle would appear more important in constitutional law than in mere statutory or private matters. If ordinary Americans cannot trust the Constitution to speak boldly and true—if its words instead twist and shade from clause to clause according to the hermeneutical wizardry of robed judges and cloistered academics—the rule of law cannot fare well.¹⁴

⁸ See *infra* Part III (discussing caselaw and commentary that defines the word “property” in the aforementioned four parts of the Constitution).

⁹ See *infra* Part III.

¹⁰ See *infra* Part III.A.–C.

¹¹ See *infra* Part IV (discussing the problem of constitutional inconsistency).

¹² See *infra* Part IV.

¹³ See, e.g., *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (relating as a principle of statutory construction that, ordinarily speaking, “identical words used in different parts of the same act are intended to have the same meaning” (citation omitted)); see also *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

¹⁴ See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 796 (1999) (decrying as “inherently exclusionary” theories of constitutional interpretation that require “intimate familiarity with vast amounts of caselaw and the subtle arts of doctrinal analysis, or mastery of history writ large and writ small, or fluency in abstruse political philosophy”). But see Adrian Vermeule & Ernest A. Young, *Commentary: Hercules, Herbert, and Amar: The Trouble With Intratextualism*, 113 HARV. L. REV. 730, 731 (2000) (“Amar’s assumption of constitutional coherence is also descriptively implausible in light of the heterogeneity of the Constitution, a document whose component provisions were enacted at different times, in

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

The Third Amendment reads in full: “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”¹⁵ Logic and history strongly suggest that, in the event of quartering, compensation would be due for any taking of any property, whether real or personal.¹⁶ Quartering in violation of the Third Amendment would merit damages, not to mention equitable relief.¹⁷ Quartering permitted under the Third Amendment, moreover—quartering done in war “in a manner to be prescribed by law”—would also have to provide for just compensation. The Takings Clause makes no exception for war, after all,¹⁸ and the Ninth Amendment guarantees that the enumeration of the right to just compensation “shall not be construed to deny or disparage” other rights retained by the people.¹⁹ As a matter of pure logic, the Third Amendment creates no loophole for the Law of Takings, and the right to just compensation covers both real and personal property. It beggars belief, after all, that those who suffer quartering would receive recompense for the loss of rents, but not for food, furnishings, or other chattels lost to the depredations of quartered soldiers. History gives us a bitter lesson on that count.

The surprising and tragic treatment of Aleutian natives during World War II demonstrates the dangers of giving the term “property,” as used in the Takings Clause, an unduly narrow definition. Far worse than quartering, those residents and citizens of the United States suffered vandalism of their empty homes, destruction of their personal effects, and defilement of their religious icons.²⁰ Only years later did the federal government, after extensive hearings, recant, apologize, and offer recompense.²¹ Though only belatedly and impliedly, the natives finally won the right to receive just compensation, which evidently aimed to remedy not only quartering and other trespasses to real property, but also the destruction and theft of the natives’ personal

different circumstances, and for different reasons, and whose interpreters generally read different types of provisions in different ways.”).

¹⁵ U.S. CONST. amend. III.

¹⁶ See Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 137, 148 (1993).

¹⁷ See *id.* at 146 & n.228.

¹⁸ U.S. CONST. amend. V.

¹⁹ U.S. CONST. amend. IX.

²⁰ White, *supra* note 1, at 298–99.

²¹ See 50 U.S.C. app. § 1989c (2006); see also Roy L. Brooks, *German Americans, Italian Americans, and the Constitutionality of Reparations*, in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 207 (Roy L. Brooks ed., 1999); *Bill Summary & Status, 100th Congress (1987–1988), H.R. 442*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/D?d100:442:/list/bss/d100HE.lst>: (last visited May 1, 2012).

property.²² By compensating the Aleuts for the full range of losses caused by the quartering of soldiers, modern lawmakers rose toward the standard set by colonial Americans who, when legislatively regulating quartering, routinely provided for compensation not just for lost rents, but also for personal property taken or destroyed by troops.²³ Viewed from the standpoint of the Third Amendment, therefore, the Takings Clause does not and should not discriminate between real and personal property. Plain language, logic, history, and simple justice demand that the term “property” as used in the Fifth Amendment be given its ordinary and generous meaning.²⁴

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

I. “PROPERTY” IN THE CONSTITUTIONAL TEXT

The word “property” appears four times in the Constitution and its amendments.²⁵ It appears once in the body of the text, in the so-called “Property Clause,”²⁶ and three times in the amendments: the Due Process Clause of the Fifth Amendment,²⁷ the Takings Clause of the Fifth Amendment,²⁸ and the Due Process Clause of the Fourteenth Amendment.²⁹ This Part briefly recounts each of these references to property, providing a useful reference for the Article’s subsequent analysis. Although this Part discusses context, it leaves a discussion of related caselaw and commentary for Part II.

²² See app. § 1989c-4(d) (2006).

²³ See Bell, *supra* note 16, at 137 (describing legislation passed during the Revolutionary War by Delaware, Maryland, and New Jersey).

²⁴ See *infra* Part III.C (discussing varying interpretations of the Takings Clause).

²⁵ U.S. CONST. art. IV, § 3, cl. 2; *id.* amend. V (appearing twice, in the contexts of procedural due process and takings); *id.* amend. XIV.

²⁶ *Id.* art. IV, § 3, cl. 2.

²⁷ *Id.* amend. V.

²⁸ *Id.*

²⁹ *Id.* amend. XIV.

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

Although “property” appears elsewhere in the Constitution, Article IV, section 3, clause 2 alone has won the moniker of the “Property Clause.”³⁰ It reads, in relevant part: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”³¹ This provision became effective with the rest of the original Constitution when New Hampshire, the ninth and last requisite state, ratified the Constitution on June 21, 1788.³² As discussed below in more detail, caselaw and commentary on the Property Clause has focused on the scope of federal power over real estate owned by the United States government.³³ Nothing in the plain text limits the Clause to real property, however, and the term “other” arguably suggests a broader meaning.³⁴ Furthermore, practical considerations suggest that Congress would need the power to “make all needful Rules and Regulations respecting”³⁵ not only federally owned land, but also federally owned property, such as desks, tanks, or notes payable. The debate on that point, discussed in more detail below, primarily turns on the question of whether the Property Clause amounts to an all-purpose spending clause.³⁶

B. The Due Process Clause of the Fifth Amendment

In the first of two references to due process in the Constitution, the Fifth Amendment guarantees, “No person shall . . . be deprived of life, liberty, or property, without due process of law.”³⁷ The Fifth Amendment became effective on December 15, 1791, almost three and a half years after the original Constitution, after winning approval by three-fourths of the then-extant state legislatures.³⁸ The Clause evidently aims to ensure that no one will suffer loss of property absent

³⁰ See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 470 (1982) (identifying Article IV, section 3, clause 2 as the “Property Clause”); *Kleppe v. New Mexico*, 426 U.S. 529, 535 (1976) (same).

³¹ U.S. CONST. art. IV, § 3, cl. 2. Perhaps significantly, or more likely not, of the four appearances of the word in the constitutional text this is the only one in which it is capitalized in the original. *Id.*

³² See Sol Bloom, *Constitution of the United States: Questions & Answers*, NAT’L ARCHIVES, http://www.archives.gov/exhibits/charters/constitution_q_and_a.html (last visited May 1, 2012).

³³ See *infra* Part III.A.

³⁴ See *infra* Part III.A.

³⁵ U.S. CONST. art. IV, § 3, cl. 2.

³⁶ See *infra* Part III.A.

³⁷ U.S. CONST. amend. V.

³⁸ See *The Bill of Rights—The First Ten Amendments to the Constitution*, NAT’L ARCHIVES, http://www.archives.gov/exhibits/charters/charters_of_freedom_7.html (last visited May 1, 2012). The requirement that three-fourths of the states approve proposed amendments comes from Article V of the Constitution. U.S. CONST. art. V.

certain procedural protections. As discussed more fully below, however, a long line of precedents has also read the Due Process Clause to protect substantive rights.³⁹

C. *The Takings Clause of the Fifth Amendment*

After forbidding affronts to a variety of rights, the Fifth Amendment concludes with the Takings Clause, which provides, “Nor shall private property be taken for public use, without just compensation.”⁴⁰ The Takings Clause became effective on December 15, 1791, along with the rest of the Fifth Amendment.⁴¹ Only this appearance of the term “property” in the Constitution is modified by the word “private.” Though perhaps just a rhetorical flourish, that adjective arguably excludes *public* property from the protection of the Takings Clause, meaning that the federal government could condemn a state highway or park without paying just compensation. Courts have effectively ignored that potential limitation, however, instead holding that the federal government must compensate even for the taking of public property.⁴² That interpretive question does not interest courts and commentators, however, so much as questions about which sorts of property rights—or, what amounts to much the same thing, which sorts of *takings*—require compensation. As we will see below (and see criticized thereafter) recent authority and years of ordinary practice give real property more protection than personal property under the Takings Clause.⁴³

D. *The Due Process Clause of the Fourteenth Amendment*

The second of the Constitution’s two references to due process provides, “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”⁴⁴ Apart from focusing on states rather than the federal government, this Fourteenth Amendment Due Process Clause reads almost exactly like the Fifth Amendment’s,⁴⁵ and therefore presumably has the same goal of ensuring that no one will suffer loss of property absent certain procedural protections. As with its counterpart in the Fifth Amendment, however, and as discussed more fully below, courts have also read the Due Process Clause of the Fourteenth Amendment to protect substantive rights.⁴⁶

³⁹ See *infra* Part III.B, D.

⁴⁰ U.S. CONST. amend. V.

⁴¹ See NAT’L ARCHIVES, *supra* note 38 and accompanying text.

⁴² See *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984); *United States v. Carmack*, 329 U.S. 230, 241–42 (1946).

⁴³ See *infra* Part III.C.

⁴⁴ U.S. CONST. amend. XIV, § 1, cl. 3.

⁴⁵ *Cf. id.* amend. V.

⁴⁶ See *infra* Part III.D.

Despite the similarities between the two Due Process Clauses, they were not ratified at the same time.⁴⁷ Whereas the Fifth Amendment became effective along with the rest of the original the Bill of Rights in 1791,⁴⁸ the Fourteenth Amendment won ratification in 1868, during the Reconstruction Era.⁴⁹ Query whether that might lead an originalist to claim that “property” means one thing in the Fifth Amendment and another in the Fourteenth. Presumably, the answer would depend on whether the word’s definition changed during that almost eighty-year span. With regard to the meaning of “intellectual property,” as discussed below, it arguably did.⁵⁰

II. PROPERTY, GENERALLY

What does “property” mean? Definitions vary, of course, but Black’s Law Dictionary offers a fairly standard version: “That which is peculiar or proper to any person; that which belongs exclusively to one.”⁵¹ It includes “everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate.”⁵² John Lewis, in his classic treatise on eminent domain, put it this way: “Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition.”⁵³ Unless “property” comes with a limiting adjective, then, it covers anything of value subject to an owner’s exclusive rights of use and transfer.

Written definitions will only get us so far in understanding the scope of “property,” though. We can better understand it by examining reasoning from cases. Like most legal concepts (indeed, like most concepts generally), the meaning of “property” ranges from a solid core of paradigmatic examples to a misty border of mere analogs and near-misses.⁵⁴ Tangibles, such as real estate and personal moveables, come to mind first and most naturally when we think of property. Indeed, laypeople may not

⁴⁷ See Bloom, *supra* note 32; *Constitution of the United States: Amendments 11–27*, NAT’L ARCHIVES, http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html (last visited May 1, 2012).

⁴⁸ NAT’L ARCHIVES, *supra* note 38.

⁴⁹ *Primary Documents in American History: 14th Amendment to the U.S. Constitution*, THOMAS, <http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html> (last visited May 1, 2012).

⁵⁰ See *infra* text accompanying notes 57–59.

⁵¹ BLACK’S LAW DICTIONARY 1216 (6th ed. 1990) (defining “property”).

⁵² *Id.*

⁵³ 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 52 (3d ed. 1909) (footnote omitted).

⁵⁴ For a discussion of different methods of analysis, see generally ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY* (1988) (defining and defending reasoning from cases as opposed to analytical approaches to moral and legal reasoning).

think of much else.⁵⁵ Those trained in the law, after only a little reflection, also include nearby suburbs within property’s territory, areas populated by intangible rights, such as future interests and choses in action, mysterious to laypeople but long familiar to common law courts.⁵⁶

Still farther afield, at the far and fuzzy border of “property,” lie purely statutory creations such as copyrights, patents, and welfare benefits. Because they lack the imprimatur of custom, and fail to embody many of property’s defining features, these positive rights arguably qualify as mere privileges.⁵⁷ Consider copyrights, for instance, which rely on a federal statute for their very existence, expire after a limited time, and cover goods that, because they do not suffer rivalry in consumption, do not even qualify as “private” to economists.⁵⁸ Patents, which arise from the same constitutional clause,⁵⁹ submit to a similar critique. As for welfare, although the Supreme Court mused in *Goldberg v. Kelly*⁶⁰ that “[i]t may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity,’” it did not equate the two.⁶¹ Instead, the Court merely held that welfare recipients facing termination of benefits had certain due process rights under the Fourteenth Amendment.⁶²

We can also understand property the way that a biologist might understand a phylum or species—as something that fits within a taxonomy of greater and lesser kinds. Viewed in that light, property includes two broad categories: real property and personal property.⁶³ Each of these two includes various subtypes, both tangible and intangible. The law of real property governs not only solid things such as land, buildings, and crops, but also future interests, mortgages, and other abstract rights that touch and concern the land.⁶⁴ Personal property includes not only moveable chattels like cars and computers, but also intangibles like annuities, accounts

⁵⁵ See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 97–100 (1977) (discussing lay conceptions of property).

⁵⁶ See JOHN LEWIS, 2 *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* 743–45 (3d ed. 1909).

⁵⁷ See Tom W. Bell, *Copyright as Intellectual Property Privilege*, 58 *SYRACUSE L. REV.* 523, 531–32 (2008) (arguing that patents and copyrights more closely resemble statutory privileges than common law property).

⁵⁸ *Id.* at 523–24.

⁵⁹ U.S. CONST. art. I, § 8, cl. 8.

⁶⁰ 397 U.S. 254 (1970).

⁶¹ *Id.* at 262 n.8.

⁶² *Id.* at 264; see also *Atkins v. Parker*, 472 U.S. 115, 128 (1985) (stating in dicta that hearings determining eligibility for food stamps must meet the same standard); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 578 (1972) (conjecturing that an employee of a public university could have a “property” interest in his employment sufficient to give him due process rights).

⁶³ BLACK’S LAW DICTIONARY 1217 (6th ed. 1990) (citing CAL. CIV. CODE § 657) (describing classifications of property).

⁶⁴ *Id.* at 236–37, 1218 (defining “real property” and “real chattels”).

receivable, and contract rights.⁶⁵ As in biology, there remain disputed cases. For instance, does copyright more closely resemble a form of intangible personal property or a mere privilege, such as a welfare entitlement, that lives or dies by statutory enactment?⁶⁶ Still, though, a taxonomic approach to property shows both a solid core of indisputable family members and a wide-ranging set of distant kin.

III. CONSTITUTIONAL PROPERTY IN CASELAW AND COMMENTARY

Judging from caselaw and commentary on the matter, the meaning of “property” in the Constitution varies both from its ordinary meaning and from place to place in the text. In the Property Clause, the word undoubtedly applies to realty, and probably applies to most chattels, but arguably does not apply to money.⁶⁷ In the Due Process Clauses of the Fifth and Fourteenth Amendments, which courts largely read in parallel,⁶⁸ “property” reaches broadly enough to encompass welfare benefits.⁶⁹ In contrast, courts have read the Takings Clause to protect real property more completely than personal property, suggesting yet another clause-specific definition of the word.⁷⁰ This Part reviews how legal authorities have interpreted the Property Clause, the Due Process Clause of the Fifth Amendment, the Takings Clause, and the Due Process Clause of the Fourteenth Amendment, each in its turn, to reveal the peculiar and fractured nature of constitutional property.

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

Although the term “property” appears in other areas of the Constitution, Article IV, section 3, clause 2 alone has earned the label of the “Property Clause.”⁷¹ It reads, in relevant part: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁷² What does “Property” mean here? Given that “Territory” describes federal lands falling *outside* the boundaries of any state, “other Property belonging

⁶⁵ *Id.* at 236–37 (defining “chattel,” “chattel mortgage,” and “chattel paper”).

⁶⁶ For one view on that question, see Bell, *supra* note 16, at 524 (arguing that copyright more closely resembles a statutory privilege than common law property).

⁶⁷ See *infra* Part III.A.

⁶⁸ See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Hurtado v. California*, 110 U.S. 516, 535 (1884).

⁶⁹ See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that a discounting of welfare benefits requires due process).

⁷⁰ Compare *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031–32 (1992), with *Andrus v. Allard*, 444 U.S. 51, 64–67 (1979) (finding that denying compensation under the Takings Clause was unjust, because a regulation’s effect on the landowner’s property value was relevant).

⁷¹ See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 534 (1976); see also *infra* Part I.A.

⁷² U.S. CONST. art. IV, § 3, cl. 2.

to the United States” must include federal lands *within* a state, such as military bases or the vast western tracts controlled by the Bureau of Land Management. On that point, courts and commentators agree.⁷³

Does “other Property” go beyond real estate to include personal property such as chattels or negotiable instruments? Nothing in the plain text limits the term to real property.⁷⁴ Moreover, the addition of “other” suggests that anything fairly described as “property”—real or personal, tangible or otherwise—falls within the scope of the Property Clause.⁷⁵ Practical considerations suggest that Congress would need the power to “make all needful Rules and Regulations respecting” not only federally owned land but also federally owned paperclips, chairs, or debt claims.⁷⁶ Perhaps because it obviously holds true, however, courts do not appear to have tested that claim.

Indeed, the Property Clause has seen relatively little judicial interpretation.⁷⁷ The most recent Supreme Court case to deal with it, *Kleppe v. New Mexico*,⁷⁸ dates from more than thirty years ago.⁷⁹ *Kleppe* raised the question of federal authority over wild horses and burros inhabiting federal land,⁸⁰ facts that would appear ripe for a determination of whether “other Property” in Article IV, section 3, clause 2 included chattels. The Court allowed that “it is far from clear that . . . Congress cannot assert a property interest in the regulated horses and burros superior to that of the State.”⁸¹ Ultimately, though, it dodged the question of the scope of “other Property” and instead decided the case on the grounds that “the ‘complete power’ that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.”⁸²

Anyone who, as part of his or her legal education *cum* hazing, has struggled with the role that *ferae naturae* play in that old chestnut of a case, *Pierson v. Post*,⁸³ can perhaps sympathize with the Court’s unwillingness to resolve the property status of wild animals on public lands.⁸⁴ The Court in *Kleppe* sat out that chase, simply decreeing instead that the federal government’s power over its *real* property gives

⁷³ See *infra* text accompanying notes 90–91.

⁷⁴ See U.S. CONST. art. IV, § 3, cl. 2.

⁷⁵ See David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 250 (1997).

⁷⁶ See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 28 (2004).

⁷⁷ John D. Leshy, *A Property Clause for the Twenty-First Century*, 75 U. COLO. L. REV. 1101, 1102 (2004) (“As constitutional provisions go, it has had a relatively tame history in the courts.”).

⁷⁸ 426 U.S. 529 (1976).

⁷⁹ *Id.*

⁸⁰ *Id.* at 533.

⁸¹ *Id.* at 537.

⁸² *Id.* at 540–41.

⁸³ 3 Cai. 175 (N.Y. Sup. Ct. 1805).

⁸⁴ *Id.* at 179 (holding that property rights in a wild fox were acquired only by possession).

it similar power over any *ferae naturae* found there.⁸⁵ *Kleppe* thus does not reliably tell us whether the term “other Property” in the Property Clause encompasses more than real property.

Other court opinions do not appear to have asked the question expressly, much less answered it. Litigation over the proper scope of the Property Clause has focused on real property rather than personal property,⁸⁶ giving judges little reason to expound on the full scope of “other Property.” Granted, the Supreme Court claimed, in *Ivanhoe Irrigation District v. McCracken*,⁸⁷ that “beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges.”⁸⁸ The case did not implicate federal real property, however, and the Court did not cite the Property Clause—or, indeed, any provision of the Constitution—as supporting authority. Instead, the Court relied on its own precedents, one of which raised Property Clause issues only to resolve them via the same real property-based gambit employed in *Kleppe*.⁸⁹ In sum, it appears that judicial opinions have held that the Property Clause encompasses personal property *sub silentio*, at most.

Few commentators have considered the question of whether the Property Clause covers anything beyond real property, either; discussions of the Clause typically slip immediately from the constitutional text to discussions of “federal land.”⁹⁰ The most extensive originalist analysis of the Clause—an entire article devoted to the question—does not even consider the question of whether the Clause ever spoke of anything beyond real property, concluding simply that ““other Property” was land within the boundaries of a state, owned by the federal government, but not qualifying as an enclave.”⁹¹

The commentary includes one exception to that lacuna: a minor academic skirmish over whether “Property” in Article IV, section 3, clause 2 includes money. The debate began when Professor David Engdahl argued that an all-purpose spending power could be found, in part, in the Property Clause’s authorization of Congress “to dispose of . . . Property belonging to the United States.”⁹² In opposition, Professors

⁸⁵ *Kleppe*, 426 U.S. at 540–41.

⁸⁶ See *infra* Part III.C.2 (discussing the courts’ view of both types of property).

⁸⁷ 357 U.S. 275 (1958).

⁸⁸ *Id.* at 295.

⁸⁹ See *Fed. Power Comm’n v. Idaho Power Co.*, 344 U.S. 17, 22 (1952) (emphasizing that Congress has power to regulate “commerce . . . upon any part of the public lands and reservations of the United States” (citation omitted)).

⁹⁰ Leshy’s article, for example, *supra* note 77, does not even use the words “chattel,” “personal,” or “moveable.”

⁹¹ Robert G. Natelson, *Federal Land Retention and the Constitution’s Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 359 (2005).

⁹² U.S. CONST. art. IV, § 3, cl. 2; see Engdahl, *supra* note 75, at 243–57; David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 50–52 (1994).

Gary Lawson and Guy Seidman argued that the Property Clause’s placement in Article IV, amidst a “grab bag of miscellaneous provisions” rather than amidst the express enumerations of Congressional power in Article I, demonstrates that it’s use does not establish a general power to spend federal funds.⁹³ They added that the Clause’s reference to the ability to make “all needful Rules and Regulations respecting” the property shows that it refers primarily to real property—hence the express reference to territorial lands.⁹⁴ Lawson and Seidman conceded that tangibles such as filing cabinets and desks, so useful for administering government power, might also qualify as the sort of property the disposal of which should adhere to “needful Rules and Regulations,” but they concluded that “money is a much poorer fit.”⁹⁵

To sum up their debate, Engdahl contended that the term “Property”—as used in the Property Clause—means all manner of property, whereas Lawson and Seidman contended that it covers only real and tangible chattels, with the exception of money.⁹⁶ We need not pick a winning side in their contest, however. For present purposes, it suffices to offer the dispute as yet another example of how commentators have given “property” in the Constitution specialized definitions that vary from clause to clause.

B. The Due Process Clause of the Fifth Amendment

But for a focus on the federal government, rather than on state governments, the due process provisions of the Fifth Amendment do not materially differ from those of the Fourteenth Amendment.⁹⁷ Courts⁹⁸ and commentators⁹⁹ have thus tended to

⁹³ LAWSON & SEIDMAN, *supra* note 76, at 28.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ For an interestingly parallel view of the scope of the Takings Clause’s coverage, see Mark R. Jundt & Vernon R. Pederson, *A Vexatious Problem Among Many: In Light of the Conflict Between the Fifth and Sixteenth Amendments, Is Taxation an Uncompensated Taking?* 84 N.D. L. REV. 365, 371–72 (2008), discussed more fully *infra* note 113.

⁹⁷ Compare U.S. CONST. amend. V, with *id.* amend. XIV.

⁹⁸ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010) (noting that the Bill of Rights generally applies the same standards to the federal government that the Fourteenth Amendment applies to the states); *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954) (imposing on the federal government under the Fifth Amendment the same standards of due process that apply to states under the Fourteenth Amendment); *Hurtado v. California*, 110 U.S. 516, 535 (1884) (explaining that the Fourteenth Amendment Due Process Clause restrains states in the same way that the Fifth Amendment Due Process Clause restrains the federal government).

⁹⁹ See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886 n.1 (2000) (calling the Fifth Amendment’s Due Process Clause “substantively identical” to its counterpart in the Fourteenth Amendment). *But see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (arguing on originalist grounds that the Due Process Clauses in the Fifth and Fourteenth Amendment have different meanings).

treat the two as identical when puzzling over the interpretation of their common terms, among them the word “property.” In the interest of efficiency, therefore, this Article discusses the subject once, under the heading of the Fourteenth Amendment’s Due Process Clause, below.¹⁰⁰

C. The Takings Clause of the Fifth Amendment

Courts and other authorities have interpreted “private Property” in the Takings Clause to sometimes speak more broadly, and at other times and more narrowly, than the ordinary meaning of the phrase. On one hand, they claim that government-owned property falls within the scope of the Takings Clause;¹⁰¹ on the other hand, public officials need not pay just compensation when they outlaw, confiscate, or destroy personal property.¹⁰² This section describes each of these paradoxes in turn, amply demonstrating that the law has given “property” in the Takings Clause an extraordinary meaning.

1. Stretching “Private Property” to Include Public Property

In *United States v. 50 Acres of Land*,¹⁰³ the Supreme Court held that the Takings Clause’s protection of “private Property” covered property owned by state and local governments.¹⁰⁴ The Court admitted that “the language of the Amendment only refers to compensation for ‘private property,’ and one might argue that the Framers intended to provide greater protection for the interests of private parties than for public condemnees.”¹⁰⁵ The Court nonetheless went on to hold that “private” included “public”:

When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to “private property” in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.¹⁰⁶

We might well doubt the Court’s logic in equating intergovernmental transfers with takings of private property, as well as the truth of the claim that a taxpayer feels

¹⁰⁰ See *infra* Part III.D.

¹⁰¹ See, e.g., *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

¹⁰² See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979).

¹⁰³ 469 U.S. 24.

¹⁰⁴ *Id.* at 31.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

the loss of local public property as keenly as the loss of a home. We might likewise doubt the *50 Acres* Court’s invocation of *United States v. Carmack*,¹⁰⁷ a case the Court had decided nearly forty years earlier.¹⁰⁸ In fact, the Court in *Carmack* merely took note of the fact that the federal government had conceded its obligation to pay for having taken locally owned public property.¹⁰⁹ Because the parties did not contest the claim, *Carmack* could hardly have decided it. The Court in *50 Acres* thus had only itself to credit or blame for giving “private” an extraordinarily broad meaning.¹¹⁰

In retrospect, following the controversial holding of *Kelo v. City of New London*,¹¹¹ we can see a sort of perverse logic at work in how the Supreme Court reads the Takings Clause. Whereas the Court in *50 Acres* held that the protections afforded to “private Property” extend to public property, the Court in *Kelo* held that “for public use” extends to takings for private use done “pursuant to a ‘carefully considered’ development plan.”¹¹² To the Supreme Court, in other words, “private” includes “public” and “public” includes “private.”

2. Protecting Personal Property Less than Real Property

Ample authority teaches what the plain language of the Taking Clause suggests: personal property enjoys the same protection under the Takings Clause that real property does.¹¹³ The Supreme Court has defined the scope of “private Property” in the Takings Clause very broadly, saying it includes “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”¹¹⁴ Courts have often recognized that the taking of personal property for public

¹⁰⁷ 329 U.S. 230 (1946).

¹⁰⁸ See *50 Acres of Land*, 469 U.S. at 31, n.15 (citing *United States v. Carmack* in support of the passage quoted in the text above).

¹⁰⁹ *Carmack*, 329 U.S. at 242 (“[T]he Federal Government recognizes its obligation to pay just compensation for [the public property] and it is conceded in this case that the Federal Government must pay just compensation for the land condemned.”).

¹¹⁰ Compare *id.* at 241–42 (noting the federal government’s obligation to compensate state and local governments for condemned land), with *50 Acres of Land*, 469 at 31 & n.15 (1984) (interpreting *Carmack* as holding that just compensation principles for private land extend equally to public land).

¹¹¹ 545 U.S. 469 (2005).

¹¹² *Id.* at 478 (citing *Kelo v. City of New London*, 843 A.2d 500, 536 (2004)).

¹¹³ See, e.g., Jundt & Pederson, *supra* note 96, at 370–71. But see *id.* at 371–72 (arguing that money may fall outside the scope of the Takings Clause because it is a fungible asset). The article goes on to argue that the question of fungibility is but one factor courts should consider in assessing a potential taking, *id.* at 373–75, and that a tax that took thirty percent of the value of an asset might qualify as a taking under the analysis of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). That conclusion seems doubtful, though; *Lucas* involved a taking of almost all of the value of the property in question—far, far more than a mere thirty percent. See *id.* at 1006–07.

¹¹⁴ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

use requires just compensation under the Takings Clause.¹¹⁵ Relatedly, the Supreme Court has also given “taken” a broad meaning, clarifying that it includes not just cases where the government takes possession of private property, but also cases where, by destruction, it deprives another of possession.¹¹⁶ Despite all of this, however, the Supreme Court has given less protection to personal property under the Takings Clause than it has to real property.

Does a taking occur when a government regulation forbids the sale of property, thereby depriving it of all market value? Judging from Supreme Court precedents, the answer evidently depends on the sort of property involved. The Court in *Andrus v. Allard*¹¹⁷ grappled with that question in the context of personal property, and held that no taking of personal property occurred when the Eagle Protection and Migratory Bird Treaty Acts forbade the sale—in whole or in part—of legally captured gold or bald eagles.¹¹⁸ “The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them,” the Court explained.¹¹⁹ It conceded that “a significant restriction has been imposed on one means of disposing of the artifacts,”¹²⁰ and that “the regulations here prevent the most profitable use of appellees’ property.”¹²¹ The property owners complaining of the regulations could still give away their chattels, the Court reasoned, and might even earn some economic benefit from charging customers to view the now-unmarketable goods.¹²²

Would the Supreme Court treat real property the same way? We do not have to wonder; *Lucas v. South Carolina Coastal Council*¹²³ answered the question with a full-throated “No.”¹²⁴ Apart from the fact that it involved real—rather than personal—property, *Lucas* bears a startling resemblance to *Andrus*. Like that earlier case, *Lucas* concerned a regulation that effectively stripped the subject property of all marketable value.¹²⁵ Only the right to enjoy the property undeveloped or to sell it in like condition remained.¹²⁶ In that regard, the regulation at issue in *Lucas* burdened

¹¹⁵ See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (relating to interest from IOLTA accounts); *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194 (9th Cir. 1998) (relating to interest from inmate funds placed in trust); *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) (holding that “taking” of presidential papers requires just compensation).

¹¹⁶ See *General Motors Corp.*, 323 U.S. at 378.

¹¹⁷ 444 U.S. 51 (1979).

¹¹⁸ *Id.* at 67–68.

¹¹⁹ *Id.* at 65.

¹²⁰ *Id.*

¹²¹ *Id.* at 66.

¹²² *Id.*

¹²³ 505 U.S. 1003 (1992).

¹²⁴ *Id.* at 1031–32.

¹²⁵ *Id.* at 1007.

¹²⁶ See *id.* at 1044 (Blackmun, J., dissenting) (observing that the aggrieved property owner could still “picnic, swim, camp in a tent, or live on the property in a movable trailer,” as well as “alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house”).

the property owner less than the regulations at issue in *Andrus*, which forbade sales entirely. Unlike *Andrus*, however, the *Lucas* Court required just compensation for so radical a reduction of property rights.¹²⁷ In so holding, it emphasized that a taking occurs whenever a regulation “denies an owner economically viable use of his land.”¹²⁸

It did not escape the *Lucas* Court that its holding stood somewhat in tension with that of *Andrus*—that it had, in effect, created a two-tier Takings Clause.¹²⁹ In anticipation of such an objection, the Court observed that “by reason of the State’s traditionally high degree of control over commercial dealings,” the owner of personal property “ought to be aware of the possibility that new regulation might even render his property economically worthless,” and cited *Andrus* in support of that claim.¹³⁰ In effect, the Court held that because the government had, in practice, so often disregarded property rights in chattels, they no longer enjoyed the full protection of the Takings Clause.¹³¹ Many commentators,¹³² and at least one court,¹³³ have found the *Lucas* Court’s distinction unconvincing.

Given that Justice Scalia, a self-proclaimed originalist,¹³⁴ wrote the opinion,¹³⁵ it proves somewhat surprising that *Lucas* did not address the question of whether the Founders thought it appropriate to destroy the market value of personal property without providing just compensation. Scholars have addressed the question, however.

¹²⁷ *Id.* at 1031–32.

¹²⁸ *Id.* at 1016 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

¹²⁹ *Id.* at 1015 (differentiating a “physical invasion” and a “regulation [that] denies all economically beneficial or productive use of land”).

¹³⁰ *Id.* at 1027–28.

¹³¹ *See id.* at 1027–28 & n.15.

¹³² *See, e.g.*, STEVEN J. EAGLE, REGULATORY TAKINGS 88 (2d ed. 2001) (arguing that “[t]he implication that ‘personal property’ should have less protection than real property under regulatory [sic] takings doctrine flies in the face of long precedent that both tangible and intangible personalty are as susceptible to condemnation as realty”); Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 *ECOLOGY L.Q.* 227 (2004) (exhaustively criticizing the *Lucas* Court’s attempt to distinguish between the treatment of personal and real property); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 *STAN. L. REV.* 1433, 1441 n.48 (1993) (calling the *Lucas* Court’s “distinction . . . between land and personal property . . . one of the opinion’s least artful efforts”).

¹³³ *See Maritrans Inc. v. United States*, 342 F.3d 1344, 1352–54 (Fed. Cir. 2003) (expressing a belief that a taking of personal property can “be the subject of a takings claim” under the Fifth Amendment if a government regulation deprives an owner of all economically viable use). The court declined to find that such a taking had occurred in the case before it, however. *Id.* at 1355, 1359.

¹³⁴ *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

¹³⁵ *See Lucas*, 505 U.S. at 1006.

Professor Eduardo M. Peñalver concluded that “it seems unlikely that the uncompensated taking of personal property was somehow less offensive to the Framers than the uncompensated taking of land.”¹³⁶ Most relevantly for present purposes, Henry St. George Tucker, writing nearly contemporaneously with the ratification of the Clause, surmised that it was “probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by Impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever.”¹³⁷ The Founders meant for the Takings Clause to remedy not so much the taking of real property as the taking of personal property by quartered troops.

The *Lucas* Court relied on *Andrus* for the claim that personal property merits less protection under the Takings Clause than real property does. It bears noting, however, that *Andrus* did not go as far as prior courts had in derogating the right to receive just compensation for takings of chattels.¹³⁸ Consider the 1924 case of *Everard’s Breweries v. Day*,¹³⁹ which questioned the constitutionality of regulations forbidding not just the sale of previously legal liquor, but also the transport or possession thereof.¹⁴⁰ Does so complete a destruction of a property’s value constitute a compensable taking? The *Everard* Court summarily dismissed the notion: “It cannot be said that [Congressional] action in this respect violated any personal rights of the appellants protected by the Constitution. That it did not take their property in violation of the Fifth Amendment, is clear.”¹⁴¹ The Court offered nothing more by way of analysis, but earlier cases upholding prohibitions on the use or enjoyment of liquor under the guise of the police power had already, evidently, settled the question.¹⁴²

Notwithstanding claims that the Takings Clause protects all forms of property, therefore, and notwithstanding the text’s blanket reference to “private Property,” the Supreme Court has failed to extend to personal property the same rights that it recognizes in real property. Perhaps we could reframe that unequal treatment as not so much a question of the meaning of “property” as of “taking,” explaining that

¹³⁶ Peñalver, *supra* note 132, at 249.

¹³⁷ 1 HENRY ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 305–06 (The Lawbook Exchange, Inc. 2008) (1803); *see also* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1122–23 (1993) (arguing that “the appropriation of private, and, presumably, personal, property to supply the army during the Revolutionary War” numbered among the “paradigm[atic] case[s]” of government misbehavior that the Founders meant for the Takings Clause to remedy).

¹³⁸ *Andrus v. Allard*, 444 U.S. 51, 66–68 (1979) (holding, instead, that there was simply no taking).

¹³⁹ 265 U.S. 545 (1924).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 563.

¹⁴² *See, e.g.*, *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264 (1920) (affirming the police power of a state under the Volstead Act); *Mugler v. Kansas*, 123 U.S. 623 (1887) (affirming a conviction under the prohibition statute as a valid exercise of police power).

while the Court fully recognizes the ontological status of personal property, it declines to regard the total destruction of the market value of personal property (as opposed to the total destruction of the market value of real property) as an actionable taking. Focusing on “taking” rather than the term “property” makes little difference as a practical matter, however, and, at all events, simply shifts the problem of discriminatory interpretation a few words away. After all, nothing in the term “taking” supports the distinction, developed by courts, between permitting the uncompensated destruction of economic value in the case of personal property and forbidding it in the case of real property.¹⁴³ For all intents and purposes, then, according to the Supreme Court, “private Property” in the Takings Clause embraces personal property less completely than it does real property.

D. The Due Process Clause of the Fourteenth Amendment

The Supreme Court has given “property” in the Fourteenth Amendment a very broad definition.¹⁴⁴ By its own account, “The Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”¹⁴⁵ How far beyond? The Supreme Court summed up its decisions in the area with the explanation that, “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”¹⁴⁶ Alas for clarity, however, that formulation defines “property” in a circular manner, in effect saying that the Fourteenth Amendment’s Due Process Clause protects entitlement claims that the Court recognizes as legitimate. It leaves unanswered the crucial question: What marks such claims as legitimate?

No one seems to doubt that common law rights to real and personal property enjoy Fourteenth Amendment protection. “It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined,”¹⁴⁷ the Supreme Court explained.

¹⁴³ In fact, the unequal treatment of personal property goes farther than that, as courts have declined to order just compensation even when governments exercise their police powers to prohibit all use and enjoyment of personal property, a restriction on property rights that goes far beyond those classified as a taking in *Lucas*. See, e.g., *supra* note 142.

¹⁴⁴ See *supra* Part III.B. The discussion in this Part of the Fourteenth Amendment’s Due Process Clause applies equally to the nearly identical language of the Fifth Amendment’s Due Process Clause, a parallelism supported by caselaw and commentary.

¹⁴⁵ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571–72 (1972) (holding that interest in re-employment under a year-to-year contract did not merit protection under the Fourteenth Amendment’s Due Process Clause).

¹⁴⁶ *Id.* at 577.

¹⁴⁷ *Id.*

The Court has taken “property” in the Fourteenth Amendment far beyond its traditional boundaries, however.

With reasonable reliance on an entitlement as the test, the Supreme Court has held that the Fourteenth Amendment’s Due Process Clause protects welfare benefits,¹⁴⁸ tenured employment,¹⁴⁹ and employment under an implied promise of continuation.¹⁵⁰ “The procedural component of the Due Process Clause does not protect everything that might be described as a ‘benefit,’” the Court cautioned in *Town of Castle Rock*.¹⁵¹ More specifically, “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”¹⁵² Nor does the Fourteenth Amendment’s protection for property apply “when the identity of the alleged entitlement is vague,”¹⁵³ or if it lacks “ascertainable monetary value.”¹⁵⁴ Despite those caveats, however, “property” in the Fourteenth Amendment still covers a great deal more than it does elsewhere in the law.

In defense of extending the Fourteenth Amendment to rights won under a contract of employment, courts long ago recognized that contract rights may win protection under the Takings Clause.¹⁵⁵ “[A] contract is property, and, like any other property, may be taken under condemnation proceedings for public use. Its condemnation is of course subject to the rule of just compensation,” the Supreme Court has observed.¹⁵⁶ Welfare benefits represent a different matter, however. The Supreme Court could not cite law developed under the Fifth Amendment when, in *Goldberg v. Kelly*,¹⁵⁷ it held that a state could not terminate welfare benefits without satisfying due process of law.¹⁵⁸

The *Goldberg* Court justified its broad reading of the Fourteenth Amendment in terms of principles rather than text. “Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights,”¹⁵⁹ the Court explained. The text of the

¹⁴⁸ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁴⁹ *Slochower v. Bd. of Educ.*, 350 U.S. 551 (1956).

¹⁵⁰ *Connell v. Higginbotham*, 403 U.S. 207 (1971).

¹⁵¹ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005).

¹⁵² *Id.*

¹⁵³ *Id.* at 763.

¹⁵⁴ *Id.* at 766 (quoting Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 964 (2000)).

¹⁵⁵ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 88–89 (1985) (analyzing caselaw in support of the proposition that the Takings Clause covers contract rights).

¹⁵⁶ *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 690 (1897) (citation omitted); see also *Omnia Commercial Co., Inc. v. United States*, 261 U.S. 502, 508 (1923) (“The contract in question was property within the meaning of the Fifth Amendment . . . and if taken for public use the Government would be liable.” (citations omitted)).

¹⁵⁷ 397 U.S. 254 (1970).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 262 (footnote omitted).

Fourteenth Amendment refers not to “important rights,” however, but to “property” rights.¹⁶⁰ Do welfare benefits really qualify as such? The Court avoided that prickly question, instead raising a different and rather easier one. “The constitutional challenge cannot be answered by an argument that public assistance benefits are ‘a “privilege” and not a “right,”’” said the Court.¹⁶¹ That hardly suffices to show welfare benefits equate to property, though, given that something can qualify as a right—the right to a jury trial, for instance¹⁶²—and yet still not qualify as property.¹⁶³

At the same time that it shied away from grappling with the plain text of the Fourteenth Amendment, the *Goldberg* Court did not go quite so far as equating welfare rights with “property.” That would have proven controversial. Beyond inducing dependence on its continuation, welfare has few property-like features. Would-be welfare recipients cannot simply demand or purchase the right to benefits; rather, they must apply for permission to receive them, and neither federal nor state law permits welfare benefits to be divided, transferred, or bequeathed like ordinary property.¹⁶⁴

Rather than simply calling welfare benefits “property,” therefore, the *Goldberg* Court limited itself to opining, “It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”¹⁶⁵ Justice Black, dissenting, accused the majority of juridical legerdemain: “It somewhat strains credulity to say that the government’s promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.”¹⁶⁶

¹⁶⁰ U.S. CONST. amend. XIV.

¹⁶¹ *Goldberg*, 397 U.S. at 262 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969)).

¹⁶² See Margaret Talkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 61 (2011) (stating that the right to jury trial is one of the “core rights” implicated in due process).

¹⁶³ *Goldberg*, 397 U.S. at 262.

¹⁶⁴ See Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 286 (1995) (“[T]he welfare state restricts the alienation of welfare benefits—in effect, by making them illiquid, discouraging their use for idiosyncratic purposes.”); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?* 106 YALE L.J. 1683, 1752 (1997) (describing the right to continued welfare payments as “not-freely-alienable”). Just as states generally disburse welfare benefits, so too do they regulate the alienability of those benefits. See, e.g., CAL. WELF. & INST. CODE § 11002 (West 2011) (“All aid given under a public assistance program shall be absolutely inalienable by any assignment, sale, or otherwise.”).

¹⁶⁵ *Goldberg*, 397 U.S. at 262 n.8. In support of that claim, the Court cited then-cutting-edge legal research: Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965). Nowhere, though, does Reich’s article equate welfare benefits with property rights.

¹⁶⁶ *Goldberg*, 397 U.S. at 275 (Black, J., dissenting).

At all events, despite the pioneering holding of *Goldberg*, the case may represent something of a dead letter today. Some decades after the decision, federal lawmakers stipulated that the provision of welfare benefits “shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.”¹⁶⁷ That provision evidently aimed at denying welfare recipients good claim to reasonably relying on the continuation of benefits, thereby arguably obviating due process claims based on the modification or denial of federally funded welfare benefits.¹⁶⁸ On that view, *Goldberg* remains good but ineffectual law, and the Fourteenth Amendment’s Due Process Clause still, in theory, includes government benefits under the heading of “property.”¹⁶⁹

Before closing out this discussion about the meaning of “property” in the Fourteenth Amendment, it bears noting that some authority claims that the Due Process Clause includes not simply one extraordinarily broad definition [of the word, but rather two different meanings, depending on whether procedural due process or substantive due process is at issue.¹⁷⁰ Our discussion of the Fourteenth Amendment has thus far focused on procedural due process—a context in which, as Professor Thomas Merrill has phrased it, courts protect property-as-entitlement.¹⁷¹ Merrill argues, however, that when due process functions in its substantive capacity, it protects a different conception of property—one that includes “everything relevant to calculating a person’s material wealth or net worth.”¹⁷² He confesses that it remains difficult “to flesh out this conception with a more specific definition,” as substantive due process itself resists a neat description.¹⁷³

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

¹⁶⁷ 42 U.S.C. § 601(b) (2006).

¹⁶⁸ See Sylvia A. Law, Review Essay, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 487 (1997) (reviewing five texts) (“While Congress has abolished the concept of ‘entitlement’ at the federal level, it is not yet clear what this will mean in terms of poor people’s ability to obtain due process when their benefits are terminated.” (footnote omitted)). But see Carolyn Goodwin, Comment, “Welfare Reform” and Procedural Due Process Protections: The Massachusetts Example, 48 BUFF. L. REV. 565, 572–74 (2000) (arguing that due process protections continue to apply at the state level).

¹⁶⁹ See, e.g., *Vandever v. Lloyd*, 644 F.3d 957, 969 (9th Cir. 2011) (rejecting a due process claim founded on cancellation of fishing rights).

¹⁷⁰ See *infra* notes 171–72.

¹⁷¹ Merrill, *supra* note 99, at 960–68.

¹⁷² *Id.* at 982.

¹⁷³ *Id.* at 983.

IV. THE PROBLEM OF CONSTITUTIONAL INCONSISTENCY

As the prior Part detailed, courts and commentators have given “property” in the Constitution peculiarly specialized definitions, and ones that vary from place to place within the document. On the very face of it, this seems problematic. The rule of law demands that we generally interpret words in statutes,¹⁷⁴ contracts,¹⁷⁵ and deeds¹⁷⁶ according to their plain meanings, so that they will remain accessible to the ordinary people allegedly bound by those words. That same rationale arguably applies with even greater force to that most public and powerful of legal documents the Constitution.¹⁷⁷ As Justice Souter colorfully put it, “[P]lain text is the Man of Steel” in fights over legal meaning.¹⁷⁸ “An argument rooted in the text of a constitutional provision may not be guaranteed of carrying the day, but insubstantiality is not its failing.”¹⁷⁹

Notably, Justice Souter voiced his paean to plain meaning in a dissent.¹⁸⁰ The Supreme Court does not always speak or act in a manner consistent with his well-founded views, concededly; appeals to plain language often appear in dissents or concurrences that chide other justices for adopting unduly esoteric readings of the text.¹⁸¹ “As its prior cases clearly show,” Justice White once observed with approval,

¹⁷⁴ See, e.g., *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004); *Union Bank v. Wolas*, 502 U.S. 151, 155–56 (1991); *Bell v. Casper*, 717 S.E.2d 783, 786 (Va. 2011) (“[w]hen the language of a statute is unambiguous, we are bound by the plain meaning of that language.” (citation omitted)).

¹⁷⁵ See, e.g., *Rains v. Becton, Dickinson & Co.*, 523 N.W.2d 506, 509 (Neb. 1994) (explaining that a contract’s “terms are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them”); *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146, 150 (Ohio 1978), *superseded by statute on other grounds* (explaining that, ordinarily, “common words appearing in a written instrument are to be given their plain and ordinary meaning.” (internal citation omitted)).

¹⁷⁶ See, e.g., *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Ct. App. 1996) (treating a deed for an easement as indistinguishable from a contract and explaining, “We begin with the plain language”).

¹⁷⁷ See Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17, 71–83 (2010) (arguing for interpreting the Constitution according to its plain, present, public meaning).

¹⁷⁸ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 n.13 (1996) (Souter, J., dissenting).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307, 344 (1967) (Brennan, J., dissenting) (appealing to the plain meaning of the Supremacy Clause); *Mazer v. Stein*, 347 U.S. 201, 219–21 (1954) (Douglas, J., concurring) (arguing that the case should be reargued in order to address concerns that the sculpture did not fall within the scope of “Writings” in Art. I, § 8, cl. 8); *Schick v. United States*, 195 U.S. 65, 79 (1904) (Harlan, J., dissenting) (complaining that the majority’s interpretation “is unauthorized by the Constitution if its words be interpreted according to their ordinary meaning”); *Munn v. Illinois*, 94 U.S. 113, 144 (1876) (Field, J., dissenting) (citing prior authority in support of the plain meaning of the Contracts Clause).

“this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the ‘plain meaning’ of the Constitution’s text.”¹⁸²

The Supreme Court pays homage to plain meaning often enough, however, to support the view that the same rules that apply to statutes generally also apply to that ur-statute, the Constitution.¹⁸³ In either case, as Karl N. Llewellyn put it in his famous catalog of canons of construction, “Words are to be taken in their ordinary meaning unless they are technical terms or words of art.”¹⁸⁴ It should, thus, at least raise eyebrows when—as with regard to the cribbed meaning of “property” in the Takings Clause¹⁸⁵ or the expansive meaning of “property” in the Fourteenth Amendment¹⁸⁶—constitutional property does not equate to ordinary property.

As a corollary, it should also trouble us that the definition of “property” varies from spot to spot in the Constitution.¹⁸⁷ If ordinary meaning serves as our lodestar, after all, we would expect it to stay North no matter where we travel in the document. Canons of construction demand likewise, as they teach that we should presume that repeated occurrences of a word within the same legal document have a uniform meaning throughout.¹⁸⁸ There is, as the Supreme Court said in *Atlantic Cleaners & Dyers v. United States*,¹⁸⁹ “a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”¹⁹⁰ Llewellyn put it this way: “The same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute.”¹⁹¹

¹⁸² *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 789 (1986) (White, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁸³ *See, e.g.*, *Solorio v. United States*, 483 U.S. 435, 441 (1987) (justifying its reading of Art. I, § 8, cl. 14 as the “plain meaning” of the text); *Dillon v. Gloss*, 256 U.S. 368, 374 (1921) (adopting the plain meaning of Article V); *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 318 (1843) (observing of the Contracts Clause, “[I]t would but ill become this court, under any circumstances, to depart from the plain meaning of the words used”); *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 469 (1826) (disposing of an issue pertaining to Art. III, § 2, cl. 1 on grounds that “this is not a case affecting a public minister, within the plain meaning of the constitution”).

¹⁸⁴ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Constructed*, 3 VAND. L. REV. 395, 404 (1950) (footnote omitted).

¹⁸⁵ *See supra* Part III.C.

¹⁸⁶ *See supra* Part III.D.

¹⁸⁷ *See Amar, supra* note 14, at 796 (suggesting that preserving the consistency of constitutional terms from spot to spot in the document promotes “democratic virtues”).

¹⁸⁸ *See, e.g.*, *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citing the “normal rule of statutory construction that ‘identical words used in different parts of the same act are intended to have the same meaning’” (quoting *Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986))).

¹⁸⁹ 286 U.S. 427 (1932)

¹⁹⁰ *Id.* at 433.

¹⁹¹ Llewellyn, *supra* note 184, at 404 (footnote omitted).

Although it appears problematic that courts and commentators have given constitutional property meanings inconsistent with ordinary usage and from place to place in the text, this does not end the inquiry. Perhaps, after all, we can excuse those facial wrongs as cases special enough to overcome the presumptions in favor of ordinary and uniform meaning.¹⁹² As Llewellyn famously pointed out, every canon of construction has its counterpart; “Hence there are two opposing canons on almost every point.”¹⁹³ Against the presumption of ordinary meaning, in particular, he set up this counter-canon: “Popular words may bear a technical meaning and technical words may have a popular signification and they should be so construed as to agree with evident intention or to make the statute operative.”¹⁹⁴ The presumption in favor of uniformity “will be disregarded where it is necessary to assign different meanings to make the statute consistent,”¹⁹⁵ Llewellyn explained. The Court in *Atlantic Cleaners* gave the excuse a slightly different twist, focusing on context, when it said that the presumption in favor of uniformity “readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.”¹⁹⁶

What Llewellyn did not point out so clearly, however, is that these dueling canons do not meet on a level playing field.¹⁹⁷ Instead, we ordinarily presume that a legal document speaks in ordinary and uniform terms, leaving the burden of proof on those who would urge technical and variable meanings.¹⁹⁸ Query, then, whether “property” must mean something other than its ordinary meaning—must not include cash in the Property Clause,¹⁹⁹ must not fully embrace chattels in the Takings Clause,²⁰⁰ or must reach as far as welfare benefits in the Fourteenth Amendment²⁰¹—in order

¹⁹² See Merrill, *supra* note 99, at 956 (“[A]lthough legal interpreters should resist attributing multiple meanings to the same word in a single document, there are contexts where this may be unavoidable, at least if our objective is to accommodate settled doctrine and to reach results that are normatively defensible.”).

¹⁹³ Llewellyn, *supra* note 184, at 401.

¹⁹⁴ *Id.* at 404.

¹⁹⁵ *Id.*

¹⁹⁶ *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

¹⁹⁷ He does, however, concede that the ultimate selling point for adopting a particular canon in a given instance is to win “a *simple* construction . . . *by tenable means*,” Llewellyn, *supra* note 184, at 401, a test that supports presumptions in favor of ordinary and uniform meaning.

¹⁹⁸ See, e.g., *Smith v. United States*, 508 U.S. 223, 242–45 (1993) (Scalia, J., dissenting); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 946 (D.C. Cir. 1991).

¹⁹⁹ See *supra* Part III.A (discussing caselaw and commentary pertaining to the meaning of “property” in the Property Clause).

²⁰⁰ See *supra* Part III.C.1–2 (discussing caselaw and commentary pertaining to the meaning of “property” in the Takings Clause).

²⁰¹ See *supra* Part III.D (discussing caselaw and commentary pertaining to the meaning of “property” in the Fourteenth Amendment).

“to agree with evident intention or to make the [Constitution] operative” (to paraphrase Llewellyn’s exception to the meaning rule).²⁰² Suffice it to say for now that neither this survey of the plain text and the context of the four appearances of the term “property” in the Constitution,²⁰³ nor the caselaw and commentary interpreting the word, give convincing reasons for overturning the presumptions in favor of ordinary and uniform meaning.²⁰⁴

If we find fault with the way that courts have given constitutional “property” extraordinary and inconsistent meanings, we can fairly blame the interpretative theory that judges should read the text loosely and favor their own precedents over plain meaning.²⁰⁵ Originalism does not seem to have had much effect on the caselaw pertaining to constitutional property, at any rate.²⁰⁶ That is not to say, however, that judges devoted to reading the Constitution according to its public meaning at the time of ratification would necessarily have settled on the present meaning of “property” or on the same meaning for every appearance of the word in the Constitution. After all, the meaning of “property” might have changed since ratification or in the years between the ratification of the Bill of Rights and the Fourteenth Amendment.²⁰⁷

Consider copyrights and patents, for instance. Because they exist solely because of federal legislation, first enacted in 1790,²⁰⁸ copyrights and patents were probably not on the Founders’ minds when they ratified the Bill of Rights. Indeed, those statutory privileges did not even win the appellation of “property” in American legal usage before the mid-1800s.²⁰⁹ From a purely originalist point of view, then, older uses of “property” in the Constitution—in the Property Clause, the Due Process Clause of the Fifth Amendment, and the Takings Clause—do not include copyrights and patents, whereas the Fourteenth Amendment’s more recent reference to “property,” dating from 1868, arguably does.²¹⁰ Furthermore, if originalism assigns different meanings to the various appearances of “property” in the Constitution, it must also thereby sometimes mandate a meaning not in accord with the plain meaning of the word.

²⁰² See Llewellyn, *supra* note 184, at 404.

²⁰³ See *supra* Part I.

²⁰⁴ See *supra* Part III.

²⁰⁵ See, e.g., Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319, 1322–25 (2008) (surveying various theories of living constitutionalism).

²⁰⁶ See *supra* text accompanying notes 1–21.

²⁰⁷ See *supra* text accompanying notes 138–40.

²⁰⁸ See Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790) (dealing with copyrights); Act of April 10, 1790, ch. 7, 1 Stat. 109 (1790) (dealing with patents).

²⁰⁹ Justin Hughes, *A Short History of “Intellectual Property” in Relation to Copyright* 28–31 (Cardozo Legal Studies Research, Working Paper No. 265, 2011), available at <http://ssrn.com/abstract=1432860>.

²¹⁰ For some evidence of the first proposition, see *Zoltek Corp. v. United States*, 442 F.3d 1345, 1352 (Fed. Cir. 2006) (declining to recognize patent rights as property protected by a Takings Clause claim against the United States government), and *Gal-Or v. United States*, 97 Fed. Cl. 476, 480 (2011) (citing *Zoltek* to dismiss plaintiff’s Fifth Amendment takings claims).

Both living constitutionalism and originalism, the two main contenders for the title of reigning theory of constitutional interpretation, thus admit the possibility (and sometimes embrace the actuality) that the meaning of “property” in the Constitution varies from ordinary usage and from clause to clause in the text. That should trouble anyone concerned about the rule of law, to say nothing of elegance and logic. Happily, there exists a third alternative: Give “property” its plain, present, public meaning everywhere it appears in the Constitution. On that view, the word would have its ordinary and broad meaning, comprising both real and personal property—but excluding mere statutory privileges—in each of its four constitutional appearances. For now, though, that approach to the Constitution remains largely unknown and undeveloped.²¹¹

V. THE VIEW FROM THE THIRD AMENDMENT

The jurisprudence of the Third Amendment has seen little activity in the twenty-odd years since this fine *Journal* last published my thoughts on the topic.²¹² This Part briefly surveys the new caselaw and commentary, before revealing what amounts to a blockbuster in this somewhat neglected field: a hitherto unnoted—though, in retrospect quite blatant—violation of the Third Amendment that occurred in the Aleutian Islands during World War II. The sad particulars surrounding that unconstitutional quartering do more than remind us of the Third Amendment’s continuing (if attenuated) relevance; however, they also illustrate why the Founders doubtless meant to include chattels within the scope of the Taking Clause, and why we should continue today to give “property,” as used in the Constitution, its plain and broad meaning.²¹³

In updating my research, I uncovered only one new case interpreting the Third Amendment since I last canvassed the field: *Custer County Action Association v. Garvey*,²¹⁴ wherein the petitioners complained of military aircraft flying through the airspace above their properties.²¹⁵ “Judicial interpretation of the Third Amendment is nearly nonexistent,” admitted the court.²¹⁶ It found guidance, however, in *Engblom v. Carey*,²¹⁷ a case that has given the amendment sustained attention.²¹⁸

The *Engblom* court held that “property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership

²¹¹ For an attempt at its development, see Bell, *supra* note 177, at 55–67 (arguing for interpretation of the Constitution according to its plain, present, public meaning in order to maximize the consent of the governed).

²¹² Bell, *supra* note 16, at 117–18.

²¹³ See Rubinfeld, *supra* note 137, at 1122–23.

²¹⁴ 256 F.3d 1024 (10th Cir. 2001).

²¹⁵ *Id.* at 1027.

²¹⁶ *Id.* at 1043.

²¹⁷ 677 F.2d 957 (2d Cir. 1982).

²¹⁸ See *id.* For my earlier article’s discussion of *Engblom*, see Bell, *supra* note 16, at 142–43.

but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others.”²¹⁹ Applying that principle to the claims before it, the court in *Custer County* held that the petitioners’ exclusive rights did not extend to navigable airspace over their land.²²⁰ Ironically or not, the court concluded: “We simply do not believe the Framers intended the Third Amendment to be used to prevent the military from regulated, lawful use of airspace above private property without the property owners’ consent.”²²¹ Unhappily for the refinement of Third Amendment jurisprudence, the Supreme Court denied certiorari.²²²

Outside the caselaw, the Third Amendment has, in recent years, occasionally popped up in bizarre (and therefore futile) complaints,²²³ and in humorous riffs about the Amendment’s seeming irrelevance.²²⁴ Scholars have given it more serious but speculative treatment, suggesting that the Third Amendment might apply to U.S. troops lodged on foreign soil,²²⁵ to military recruiting on college campuses,²²⁶ and to the Endangered Species Act.²²⁷ Commentators have argued that the Third Amendment’s concern for homes suggests special treatment for homes under the Takings Clause.²²⁸ Assessments of the Third Amendment have ranged from dismissing it as “an interesting study in constitutional obsolescence,”²²⁹ to this timely warning, well

²¹⁹ *Engblom*, 677 F.2d at 962.

²²⁰ 256 F.3d at 1042–44.

²²¹ *Id.* at 1043.

²²² *Custer Cnty. Action Ass’n v. Garvey*, 534 U.S. 1127 (2002).

²²³ *See, e.g., Am. Fork City v. Smith*, 258 P.3d 634, 636 (Utah Ct. App. 2011) (declining to address the plaintiff’s claim that having obtained his phone records violated his Third Amendment rights).

²²⁴ *See, e.g., Jonathan Chait, Mitch Daniels vs. The Thirders*, THE NEW REPUBLIC (May 18, 2011, 11:15 AM), <http://www.tnr.com/blog/jonathan-chait/88617/mitch-daniels-vs-the-thirders> (criticizing the plan of would-be presidential candidate Mitch Daniels to sleep in voters’ homes during his campaign). For continuing, but relatively sparse, coverage of Third Amendment news, see Jay Wexler, ODD CLAUSES WATCH, <http://oddclauses.wordpress.com/category/third-amendment/> (last visited May 1, 2012).

²²⁵ *See* Kaimipono D. Wenger, *Armenian Genocide and the Third Amendment*, CONCURRING OPINIONS (Sept. 13, 2011, 1:31 AM), <http://www.concurringopinions.com/archives/2011/09/armenian-genocide-and-the-third-amendment.html> (discussing the Third Amendment’s application to complaints that the Incirlik Air Base quarters U.S. troops on “property seized by Turkey during the Armenian genocide”).

²²⁶ *See* Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 NEW ENG. L. REV. 113 (2005) (arguing that the Third Amendment limits military recruiting on private campuses).

²²⁷ *See* Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The “Living Constitution,” the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769 (2000) (arguing that the Endangered Species Act effectuates an unconstitutional “quartering” of species on private land).

²²⁸ Thomas G. Sprankling, Note, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment’s Protection of Houses*, 112 COLUM. L. REV. 112 (2012).

²²⁹ Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 212 (1991). *But see* Robert A. Gross, *Public and Private in the Third Amendment*, 26 VAL. U.L.

founded in light of many apparent (but nonetheless unlitigated) instances of the quartering of National Guard troops following Hurricane Katrina: “If Americans ignore the Third Amendment, or dismiss it as trivial, they implicitly condone military incursion into their homes during domestic disasters when the rule of law has failed.”²³⁰ The Third Amendment has even touched the heights of constitutional theory; Professor Nicholas Quinn Rosenkranz explained in a recent article that the Third Amendment’s use of the passive voice makes it “grammatically and structurally, a model for the rest of the Bill of Rights.”²³¹

Though I do not go quite so far as Professor Rosenkranz in describing the proper scope of the Third Amendment’s influence, I will argue that it can teach us about the scope of “property” in the Takings Clause in particular and throughout the Constitution in general. The lesson begins with a surprising, and more than a little distressing, tale of hitherto unremarked quartering.²³² In 1942, as Japanese forces swept across the Aleutian Islands off of Alaska’s far southwestern coast, United States officials evacuated natives from the region and moved in military equipment and personnel.²³³ Among the many (and typically worse) abuses the natives suffered was at least one instance of quartering, which occurred when “a small Army force was sent to the Pribilofs on September 19[, 1942], billeted in the departed villagers’ dwellings, and ordered to construct an airstrip.”²³⁴

It bears emphasizing that the native Aleutians suffered wrongs worse than mere quartering. They were forcibly removed from their homes and interned in distant and unhealthy camps, an ordeal during which “[t]hey fell victim to an extraordinarily high death rate, losing many of the elders who sustained their culture.”²³⁵ Worried about Japanese invaders, and pursuing a “scorched-earth policy,” the United States military completely destroyed some evacuated villages.²³⁶ Other empty villages,

REV. 215 (1991) (responding to Horwitz with an argument for the continuing relevance of the Third Amendment).

²³⁰ See James P. Rogers, Note, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J.L. & PUB. POL’Y 747, 750 (2008). Rogers makes a convincing case that National Guard troops’ behavior following Hurricane Katrina resulted in many Third Amendment violations. *Id.* at 761–78.

²³¹ Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1030, 1033 (2011).

²³² I first learned about this remarkable historical episode in White’s *The Lost Internment*, *supra* note 1. That work does not mention any instances of quartering, however. That, I discovered only by studying the official report on the incident, prepared well after the fact and with an air of contrition. See PERSONAL JUSTICE DENIED, *supra* note 3. Most of that report—the majority of Part I—concerns the internment of Japanese Americans on the West Coast. *Id.* at 25–282, 295–301. The much shorter Part II focuses on the evacuation and internment of the natives of the Aleutian Islands. *Id.* at 315–59.

²³³ PERSONAL JUSTICE DENIED, *supra* note 3, at 318–31.

²³⁴ *Id.* at 330.

²³⁵ *Id.* at 318.

²³⁶ *Id.* at 328–29.

though left standing, “were pillaged and ransacked by American military personnel.”²³⁷ When, approximately one year later, the Aleuts were finally returned to their homes, “All household effects and equipment the Aleuts had left behind were missing.”²³⁸ The occupying forces took more than just the market value of the destroyed property. As reported in *Personal Justice Denied*, the official report of the Commission on Wartime Relocation and Internment of Civilians, “[t]hrough the insult of massive looting and vandalism of their homes and places of worship by American military forces, the Aleuts lost invaluable tangible ties to their past. Houses can eventually be rebuilt and refurnished, but stolen family mementos, heirlooms and religious icons . . . cannot be recovered.”²³⁹ Quartering was not the only, nor the worst, thing that the Aleuts suffered at the hands of their government.

On any fair accounting, though, the Aleuts did suffer unconstitutional quartering. Note first that the natives of the Aleutians enjoyed all the constitutional rights of other Americans. The Supreme Court has held that “the Constitution applies in full in incorporated Territories surely destined for statehood,”²⁴⁰ a classification that Alaska doubtless satisfied in 1942.²⁴¹ Beyond even that, the natives of the Aleutians would have enjoyed the “guaranties of certain fundamental personal rights declared in the Constitution” that the Supreme Court provided as early as 1922—including rights expressly protected by the Third Amendment.²⁴²

Did that 1942 quartering of troops in the homes of Aleutian natives violate the Third Amendment? Consider the provision in full: “No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”²⁴³ By 1942, the United States had entered into a “time of war” with Japan,²⁴⁴ making the second clause of the Third Amendment applicable. But lawmakers evidently passed no statute regulating the quartering of soldiers on the natives of the Aleutian Islands. The Amendment’s closing mandate—“in a manner to be prescribed by law”²⁴⁵—therefore went unmet, giving rise to a violation of the Third Amendment.

²³⁷ *Id.* at 318.

²³⁸ *Id.* at 356.

²³⁹ *Id.* at 359.

²⁴⁰ *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

²⁴¹ Alaska was incorporated as a territory in 1912. See Eric Gislason, *A Brief History of Alaska Statehood (1897–1959)*, ST. OF ALASKA, <http://www.gov.alaska.gov/ASCC/pdf/HistoryofAlaska.pdf> (last visited May 1, 2012).

²⁴² *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922). This case concerned constitutional rights of a defendant in ‘Porto’ Rico, but the Court compared the case to Alaska. Alaska was incorporated into the Union, and therefore people living in Alaska had constitutional guarantees. *Id.* at 309.

²⁴³ U.S. CONST. amend. III.

²⁴⁴ *PERSONAL JUSTICE DENIED*, *supra* note 3, at 47.

²⁴⁵ U.S. CONST. amend. III.

Far from following a manner prescribed by law, much of the evacuation and internment was executed in a slapdash and ad hoc manner, in the heat of war and far from officials on the mainland.²⁴⁶ *Personal Justice Denied* noted that “the government agencies (the Department of the Interior and the military) responsible for protecting the Aleut residents failed to coordinate their activities internally or with each other.”²⁴⁷ Nor did contemporary officials set things right once the immediate threat of Japanese attack had passed. “The evacuated Aleuts suffered material losses for which they were never fully recompensed, either in kind or in cash,” and officials interviewed after the fact “did not recall any expectation that the Aleuts’ personal possessions would be replaced or that some type of monetary compensation would be received.”²⁴⁸

The federal government thus unlawfully quartered soldiers in the Aleuts’ dwellings and, through the depredations of the occupying soldiers, took private property without providing just compensation.²⁴⁹ That much we can tell from the facts. But though the Commission reported facts that let us call the Aleuts’ evacuation and internment unconstitutional, the Commission on Wartime Relocation and Internment of Civilians did not name any legal wrongs,²⁵⁰ nor did the Aleutian and Pribilof Islands Restitution Act,²⁵¹ passed in response to the Commission’s report, explain why the federal government was offering compensation to wronged Aleutians.²⁵² To the contrary, the Act made recipients of its largess agree to a blanket waiver of “all claims against the United States arising out of the relocation” they had suffered.²⁵³ Each qualifying native willing to make that concession qualified for a payment of \$12,000.²⁵⁴

What does all this have to do with “property” in the Constitution? Note the sorts of wrongs that the relocated Aleuts suffered to their personal property: destruction by arson and malice, theft by ill-disciplined soldiers, and sacrilege of objects

²⁴⁶ PERSONAL JUSTICE DENIED, *supra* note 3, at 318–19 (explaining that “the evacuation of the Aleuts was not planned in a timely or thoughtful manner,” and was marked by “official indifference”).

²⁴⁷ *Id.* at 323; *see also id.* at 326–28 (describing confusion and neglect of duty among responsible government officials).

²⁴⁸ *Id.* at 356–57 (footnote omitted).

²⁴⁹ The Commission on Wartime Relocation and Internment of Civilians found a contemporary entry in the federal budget of \$31,441 for “refunds, award and indemnities” but could not find any additional information on the expenditures, and obviously regarded it as grossly insufficient to cover the natives’ losses. *Id.* at 357.

²⁵⁰ Neither was the Commission directed to reach legal conclusions; rather, it was tasked solely with collecting the facts and recommending a remedy. *Id.* at 1 (describing the Commission’s mandate).

²⁵¹ The Aleutian and Pribilof Islands Restitution Act, 50 U.S.C. app. §1989c (2006).

²⁵² *See id.*; *see also* Brooks, *supra* note 21.

²⁵³ App. § 1989c-5(e) (“The payment to an eligible Aleut under this section shall be in full satisfaction of all claims against the United States arising out of the relocation.”).

²⁵⁴ *Id.*

honoring family and religion.²⁵⁵ All qualify as foreseeable results of loosing armed and uprooted young men upon civilian populations. The founding generation knew those, the characteristic marks of quartering, all too well. They ratified the Third Amendment to prevent such offenses and the Fifth Amendment to remedy them.²⁵⁶

The prospect of quartering inspired fear and outrage in Colonial Americans not simply, or even primarily, because they feared the loss of implied leasehold rents. Quartered troops represented a more pointed threat to persons and personal property.²⁵⁷ Consider, for instance, Joseph Galloway's plea, warning his fellow Americans that rebellion would bring war, that war would bring quartering, and that quartering would find soldiers "travelling [sic] over your estates, entering your houses—your castles . . . seizing your property . . . ravishing your wives and daughters, and afterwards plunging the dagger into their tender bosoms."²⁵⁸

In a reversal of the scenario painted by the Court in *Lucas v. South Carolina Coastal Council*,²⁵⁹ it thus seems likely that concern for the protection of personal property, rather than of real property, originally inspired the Takings Clause. As Galloway's warning illustrates, the threat that quartering posed to real property—loss of leasehold values and damage to buildings—probably counted among the least of the concerns that the Third Amendment aimed to address.²⁶⁰ And while the historical record leaves much about the motivations behind the drafting of the Takings Clause obscure, Henry St. George Tucker described it as "intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment . . . without any compensation whatever."²⁶¹ The Founders thus probably meant the Takings Clause to remedy, foremost among other wrongs, the taking of personal property by quartered troops.

Originalists should find that argument persuasion enough to give real and chattel property equal treatment under the Takings Clause. Those who prefer a more flexible approach to constitutional interpretation, one designed to keep it in step with modern needs, should take due note of the offenses committed against the Aleuts during World War II. The federal government eventually admitted that it had acted wrongly and paid compensation.²⁶² The entire tragedy might have been avoided,

²⁵⁵ See PERSONAL JUSTICE DENIED, *supra* note 3, at 359.

²⁵⁶ See *supra* Part III.C (discussing the Takings Clause).

²⁵⁷ B. Carmon Hardy, *A Free People's Intolerable Grievance*, in THE BILL OF RIGHTS: A LIVELY HERITAGE 67, 67–68, 79–81 (Jon Kukla ed., 1987).

²⁵⁸ *Id.* at 79 (1987) (quoting Joseph Galloway and explaining the context of his comments) (alterations in original).

²⁵⁹ 505 U.S. 1003 (1992).

²⁶⁰ See Hardy, *supra* note 257, at 79–81 (discussing the rationale for the Amendment).

²⁶¹ TUCKER, *supra* note 137, at 305–06; see also Rubinfeld, *supra* note 137, at 1122–23 (identifying the taking of supplies by quartered troops as being among the "paradigm[atic] case[s]" that the Founders meant for the Takings Clause to remedy).

²⁶² See The Aleutian and Pribilof Island Restitution Act, 50 U.S.C. app. §1989c-2, 4 (establishing the Aleutian and Pribilof Island Restitution Fund and compensating Aleuts for their World War II deprivations).

however, if the Aleuts had been able to invoke the plain meaning of the Constitution, limiting quartering to that which was done in a lawful manner, and winning just compensation for all private property—personal and real—lost to occupying soldiers. Those who want to give the Constitution a living meaning should care about what it means to those who live under it.

CONCLUSION: CONSTITUTIONAL PROPERTY BY COMMON CONSENT

The evacuation and occupation of the Aleutian Islands during World War II shows only too well the results of ignoring the Constitution’s words. Though the federal government quartered soldiers, contrary to the plain meaning of the Third Amendment, it seems nobody has noticed until now. And though the Aleuts’ lost chattels fully qualified as “private property,” officials never admitted to violating the Takings Clause and took over forty years to pay any compensation.²⁶³ We can explain (if not excuse) the former oversight as a consequence of the Third Amendment’s obscurity. But how could anyone have overlooked so massive a violation of the Takings Clause? Perhaps confusion over the scope of constitutional property bears some of the blame.

As this Article has documented, courts and commentators have cast undue uncertainty on the meaning of “property” in the Constitution.²⁶⁴ They have tortured the word’s four textual appearances into four—or, on one accounting, *five*—distinct meanings.²⁶⁵ Such a disjointed interpretation cannot help but obscure the bold truth about our constitutional rights. We do not have to wonder whether that legal befuddlement might have tragic results; the wartime treatment of the Aleuts gives proof enough.

Adding irony to tragedy, the Aleuts went uncompensated for the very type of wrong that inspired the Takings Clause: occupying soldiers’ stealing and destroying personal property.²⁶⁶ The plain text of the Constitution required that the Aleuts receive just compensation for the loss of their chattels in like circumstances.²⁶⁷ Given the historical background of the Takings Clause, true originalists should likewise read it to protect chattels (Justice Scalia’s dicta in *Lucas* to the contrary notwithstanding).²⁶⁸ What about those who aim to keep the Constitution alive by

²⁶³ See White, *supra* note 1, at 297–99. Compensation was not provided until August 10, 1988, with the passing of the Aleutian and Pribilof Island Restitution Act. 50 U.S.C. app. §1989c (2006).

²⁶⁴ See *supra* Parts I–III.

²⁶⁵ The word “property” appears in Article IV, section 3, clause 2, the Due Process Clause of the Fifth Amendment, the Takings Clause of the Fifth Amendment, and in the Due Process Clause of the Fourteenth Amendment. For relevant discussion, see *supra* Part I.

²⁶⁶ See White, *supra* note 1, at 297–99.

²⁶⁷ U.S. CONST. amend. V.

²⁶⁸ See *supra* text accompanying notes 181–85. For Justice Scalia’s opinion, see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

reading it flexibly? They should learn from the Aleuts' maltreatment how the least advantaged among us benefit the most from steadfast respect for property rights. Given that poorer people are less likely to own much wealth in the form of real property, a just Constitution must protect chattel property to the utmost.

Even apart from the Constitution's plain language, its original meaning, and our concern for the poor, personal property deserves our highest regard. Unlike real property, personal property does not typically come freighted with claims, dating back to feudal law, that title ultimately vests in the King or other sovereign. There can be no more absolute form of fee simple absolute than that which we enjoy in personal property—a form of property that can arise quite literally out of thin air.²⁶⁹ How curious, then, that some authority treats personal property as less deserving of protection under the Takings Clause than real property.²⁷⁰

In the grand struggle to protect individual rights against government trespass, the Third Amendment plays a role akin to the provision in Van Halen's standard performance contract, requiring that a bowl of M&Ms be placed in the band's hospitality room with all the brown M&Ms removed.²⁷¹ Though sometimes touted as an example of rock star excess, the clause in fact served to test whether the band's contractual partner, provider of the concert venue, had read the terms of their agreement.²⁷² Finding brown M&Ms backstage warned Van Halen to look out for more serious breaches, such as those related to the contract's provisions on "lighting, staging, security, and ticketing."²⁷³ Quartering serves as a forbidden M&M in the Constitution's bowl of rights, and violations of the Third Amendment signal more serious problems. Consider that government officials violated the Third Amendment during the War of 1812, the Civil War, World War II, during a 1979 New York prison guards' strike,²⁷⁴ and Hurricane Katrina. Consider, and worry.²⁷⁵

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

²⁶⁹ Consider someone drawing oxygen from the atmosphere, bottling it, and selling it.

²⁷⁰ See *supra* Part III.C.2 (describing Takings Clause jurisprudence).

²⁷¹ See 1982 Van Halen Tour Rider 40 (1982) ("M&M's (WARNING: ABSOLUTELY NO BROWN ONES)"), available at <http://www.thesmokinggun.com/file/van-halens-legendary-mms-rider?page=8> (last visited May 1, 2012).

²⁷² See *Brown Out*, SNOPEs, <http://www.snopes.com/music/artists/vanhalen.asp> (last visited May 1, 2012) (providing background on the Van Halen clause).

²⁷³ *Van Halen's Legendary M&M's Rider*, *supra* note 271; see also *Brown Out*, *supra* note 272.

²⁷⁴ See Bell, *supra* note 16, at 136–39, 142–43.

²⁷⁵ Rogers, *supra* 230 at 761–68.