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"A Poor Relation?" Reflections on a Panel Discussion Comparing Property Rigths to Other Rights Enumerated in the Bill of Rights

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"A POOR RELATION?"* REFLECTIONS ON A PANEL DISCUSSION COMPARING PROPERTY RIGHTS TO OTHER RIGHTS ENUMERATED IN THE BILL OF RIGHTS

Rashmi Dyal-Chand**

INTRODUCTION

The purpose of this Essay is to summarize and reflect upon the second panel discussion at the Third Annual Brigham-Kanner Property Rights Conference at William & Mary School of Law, October 6–7, 2006. The panel was entitled "Comparing the Treatment of Property Rights to the Protections Given to Other Rights Under the Bill of Rights." As described by Professor Eric Kades, the organizer of the conference, the panel's topic was inspired by a statement by Justice Rehnquist in the case of *Dolan v. City of Tigard*: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ."[1] By virtue of their location in the Bill of Rights are the property rights embodied in the Fifth Amendment as important as the other rights in the Bill of Rights?[2] Are they somehow even more important? Are there any textual or other reasons to treat these rights differently from other rights in the Bill of Rights? These were among the questions addressed by the panel participants and the thoughtful discussion that followed their presentations.

This Essay will proceed as follows. Part I will summarize the major points raised by each of the panelists. It is important to note at the outset that this summary is not an attempt to capture everything that each of the panelists said. Indeed, many important details and subtleties will be omitted here. Nor does it necessarily reflect the points each speaker emphasized. Rather, I seek in this Part to draw out common themes among the panelists. Part I will also summarize the discussion that followed the presentations. Part II will explicate and reflect upon some of the major themes that were raised.

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* As I describe below, this phrase is taken from the majority opinion in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

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[1] *Dolan*, 512 U.S. at 392.

[2] The Fifth Amendment provides, in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

I. SUMMARY

A. The Panelists

1. James W. Ely, Jr., Milton R. Underwood Chair in Free Enterprise, Professor of Law, Professor of History, Vanderbilt University Law School

Professor Ely, who was the recipient of this year's Brigham-Kanner Property Rights Prize for his numerous critically acclaimed books and articles on property rights, emphasized that property rights receive secondary treatment compared to other rights in the Bill of Rights. On the basis of his extensive historical research, Professor Ely concluded that the Framers of the Constitution of the United States and the thirteen original states did not draw distinctions in priority between economic and personal rights.[3] In *The Guardian of Every Other Right*, Professor Ely elaborates on this point: "[T]he Framers saw property ownership as a buffer protecting individuals from governmental coercion. Arbitrary redistributions of property destroyed liberty, and thus the Framers hoped to restrain attacks on property rights."[4] According to Professor Ely, the Framers were concerned that, without property rights, it would be impossible to attain these important personal rights.[5]

Professor Ely also commented that the views of the Framers of the U.S. Constitution, as well as those of the original thirteen states, are not mainstream views today.[6] Instead, judicial, legislative, and public opinion today appears to prioritize personal rights over economic rights.[7] Professor Ely documents this shift extensively in *The Guardian of Every Other Right*. He describes, for example, the push after World War II "to secure equal rights for racial minorities and the campaigns for environmental and consumer protection" which "further restricted the use of property and economic liberty."[8] He concludes that "[a]s the network of economic regulations grew more intrusive, there was an erosion of individual property rights."[9] In that respect, he argues, contemporary mainstream views of property rights are not true to history.

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[3] *See, e.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992) [hereinafter ELY, THE GUARDIAN]; James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 87 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993) [hereinafter Ely, *The Enigmatic Place of Property Rights*].

[4] ELY, THE GUARDIAN, *supra* note 3, at 43.

[5] *Id.*

[6] Based on his historical analysis, I understood Professor Ely's reference to "mainstream" views to include both legal and public views. *See id.* at 153–54.

[7] *Id.*

[8] *Id.* at 135.

[9] *Id.*

2. Gideon Kanner, Counsel, Manatt, Phelps & Phillips and Professor Emeritus, Loyola Law School, Los Angeles

Professor Kanner, an experienced appellate attorney and eminent domain expert who has represented property owners in a number of cases before the United States and California Supreme Courts, argued that property rights receive "disparate" treatment from other rights in the Bill of Rights. He supported this argument with a number of examples of lesser judicial treatment of property rights. One example cited by Professor Kanner is the case of *National Advertising Co. v. City of Raleigh*.[10] In that case, a billboard company brought an action claiming that an ordinance requiring the removal after a specified number of years of certain "off-premises outdoor advertising signs" effectuated a taking as well as a violation of billboard owners' First Amendment rights.[11] According to Mr. Kanner, the court dismissed both claims, but it rejected the takings claim on the grounds that it was barred by the statute of limitations, while deciding the First Amendment claim on the merits because the court doubted that the statute of limitations can ever run on First Amendment claims.[12] This was one of several examples cited by Professor Kanner of a disparity in treatment that is, in his words, "gross, unjust, and unjustifiable."

3. Stephanie M. Stern, Assistant Professor, Loyola University Chicago School of Law

Professor Stern, whose scholarship focuses on the application of psychology to property, land use, and environmental issues, focused on the question of how property might serve to support social interactions among private citizens, a question which she suggested has been under-analyzed because contemporary discourse has focused so heavily on the connection between private property and autonomy. She began by describing the concept of "social territory," which she defined as spaces that facilitate social interactions. Such spaces, which could be a city block or a neighborhood, offer companionship and security, create social norms, and reinforce social order. According to Professor Stern, research in social psychology has shown the interactions that take place in such spaces are important to human development and flourishing.

Professor Stern proposed that the concept of social territory has implications for the law of eminent domain. While this concept does not provide us with a comprehensive theory or per se rule, it does introduce a new way of thinking about the public use requirement in takings law. In some contexts, such as in the famous case

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[10] 947 F.2d 1158 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).

[11] *Id.* at 1160.

[12] *See id.* at 1166, 1168.

of *Poletown Neighborhood Council v. City of Detroit*,[13] the social territory perspective would have courts focus on the unique costs of condemning an intact neighborhood with an irreplaceable character. In other circumstances, specifically where a local redevelopment plan would enhance social spaces, the social territory perspective might support a taking. Professor Stern cited the development of Lincoln Center in New York and redevelopment efforts in Roxbury, Massachusetts, as examples. In the latter context, the redevelopment plans included new homes, a community greenhouse, a gym, and a community center.[14] As Professor Stern pointed out, a social territory perspective focuses on the potential social gains rather than on the question of who—public or private—is doing the development. Finally, Professor Stern commented on what it might mean to operationalize the admittedly fuzzy notion of social territory. She suggested that the political process is particularly well-suited to balancing people's needs in this context and that the current legislative initiatives in a number of states are therefore important.[15] She also argued that it is important to ensure that affected parties are given notice of proposed takings and opportunities to appeal.

4. John W. Little III, Partner, Brigham Moore LLP

Mr. Little, an experienced trial lawyer who has litigated property rights cases in numerous state and federal courts in Florida, focused on the question of how jurors view the right of private ownership compared to other rights. Mr. Little stated that, in his experience, most Americans continue to believe that private ownership is integral to their freedom. He highlighted the recent case of *Kelo v. City of New London*[16] as an event that refocused national attention on the importance of property rights. Mr. Little commented that, since the *Kelo* decision, large numbers of people had been excused from juries for cause on the grounds that they could not be fair to the government in judging takings cases.

5. Eric A. Kades, Professor of Law and Director, Property Rights Project, William & Mary Marshall-Wythe School of Law

Professor Kades, a prolific author on the subjects of property law, property rights, law and economics, and corporations, focused on the relationship between the First

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[13] 304 N.W.2d 455 (Mich. 1981) (upholding the city's condemnation of a large tract of land for the purpose of conveying it to a private corporation for construction of a large plant), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).

[14] Boston's Dudley Street Neighborhood Initiative (Urban Strategies Council, Oakland, Cal.), May 2004, *available at* http://www.urbanstrategies.org/slfp/documents/DSNIDNIDesc507.doc.

[15] For examples of such initiatives, see *infra* notes 24–25 and accompanying text.

[16] 545 U.S. 469 (2005) (holding that the use of eminent domain pursuant to a development plan, the purpose of which was to create jobs, increase tax revenues, and revitalize a distressed city, satisfied the "public use" requirement of the Takings Clause).

Amendment and the Takings Clause. He began by pointing out a fundamental textual and operational distinction between the Takings Clause and other rights in the Bill of Rights: the text of the Bill of Rights makes only one right, the right to own property, alienable, indeed, even by force. Professor Kades noted that, by contrast, if a person contracts with the government to sell her right to speak for one million dollars, such a contract is not enforceable. Moreover, it is quite possible that the person will not be required by law to return the one million dollars to the government.

Professor Kades also discussed the correlation between property rights and rights of free speech globally. He shared data from the Heritage Foundation showing that, in most countries, there is a significant correlation between property rights and rights of free speech.[17] These rights appear to be mutually reinforcing. Partly on this ground, he argued, it is an oversimplification to claim that one right is more important than the others. After sharing this observation, Professor Kades focused on countries that do not follow this pattern. Singapore, Egypt, and Algeria, for example, have very strong property rights, but very limited rights of free speech.[18] At the other extreme, Latvia, Poland, and Italy have weaker property rights but stronger rights of free speech.[19] As between these countries, Professor Kades raised the fascinating question: where would you rather live?

B. The Discussion

A lively discussion followed the panelists' presentations. This summary only covers a few salient points among the many interesting questions and comments raised. Several members of the audience, and some of the panelists, sought elaboration on the implications of Professor Stern's suggestion that takings law pay closer attention to the potential social gains from, and social impact of, a proposed condemnation. Several people, including one audience member and Professors Ely and Kanner, raised the concern that such an analysis might exacerbate the negative effects of condemnation on low-income and under-represented groups if the social gains primarily went to members of society who are economically and socially more advantaged.

In response to a question from the audience about the tension between broad property rights and environmental protection, the panelists discussed the balancing necessitated by takings law. Mr. Little argued that the judiciary should apply a "strict scrutiny" standard in determining whether a decision to condemn satisfies the "public use" requirement of the Takings Clause because such a standard would better maintain the balance between individual property rights and public needs. Professor Kades described the balance as appropriately maintained by the admonition in takings law that no individual should be disproportionately burdened

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[17] *See* Appendix *infra* p. 863.

[18] *See* Appendix *infra* p. 863.

[19] *See* Appendix *infra* p. 863.

by a regulation.[20] Thus, the Supreme Court has concluded that a regulation effectuates a per se taking if an owner loses all economic use of her property.[21] But if her property retains some economic value, the economic impact of the regulation will be among the factors a court will balance in determining whether a taking has occurred.[22] Additionally, Professor Ely discussed the long-standing tension between takings law and nuisance law and, in that context, suggested that owners ought to be compensated more readily than they currently are when environmental regulations affect the use of their property.

A third interesting conversation focused on the question of whether legislatures controlled by Republicans are more protective of property rights than those controlled by Democrats. Several panelists, as well as an audience member who has extensively studied the matter, commented on the broad bipartisan support for property rights in the wake of *Kelo* in a notable number of jurisdictions.

II. REFLECTIONS

Several themes recurred in the panelists' presentations as well as in the discussion that followed. The purpose of this Part is to present the three major recurring themes and to reflect on what they might teach us about the treatment of property rights as compared to other rights in the Bill of Rights. The first theme centers on public opinion: to what extent, if at all, should public opinion inform takings law, particularly given its countermajoritarian foundation in the Constitution? The second theme focuses on the changing definition of property: to what extent, if at all, should takings law reflect evolving understandings of the nature of

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[20] *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" (citation omitted)); Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

[21] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

[22] *Penn Central*, 438 U.S. at 124 ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." (citation omitted)).

property? The third theme relates to the proper role of property rights relative to other rights: is it appropriate for property rights to serve as a "poor relation" to the other rights in the Bill of Rights? Moreover, is it appropriate, or even possible, for property rights also to be the "guardian" of these other rights? As will become clear, each of these themes implicates some of the same important questions about takings law. The issues are complex and interrelated.

A. What Does It Matter What the Public Thinks?

Public opinion was the focus of much attention, both in the panelists' presentations and in the discussion that followed. For example, Mr. Little described prospective jurors' perceptions about the importance of property rights. Professor Stern suggested that the best means by which to incorporate the social territory perspective into takings law might be to defer to legislative judgments seeking to balance people's needs for, and feelings about, their communities. And Professor Kades referred to public opinion when he asked where we would rather live if forced to choose between countries with either strong property rights or strong rights of free speech, but not both.

These references to public opinion raise the important question of whether public opinion should inform takings law and, if so, how. Let me suggest that the answer to this question is not at all obvious, particularly because the ultimate arbiter of constitutional meaning is the Supreme Court, a countermajoritarian institution. Take Mr. Little's jury-empanelling example. Certainly it is important that, in the wake of *Kelo*, many people feel they could not decide a takings case in the government's favor. But should this fact result in a change in takings law? Or, instead, is broad public education warranted in order to demonstrate the value of eminent domain to those members of the public who feel that decisions like *Kelo* produce no public benefits? Similarly, to what extent should the law reflect the choice most Americans would make in answering Professor Kades's question?

Professor Stern suggested that public opinion is important in incorporating the social territory perspective in at least two respects. The first is by ensuring broad procedural rights to those whose property may be taken, including adequate notice requirements and rights to appeal. This is a convincing point. Procedural rights are important not only because they allow potential condemnees to share their subjective feelings about the social importance of their properties, but also because they are crucial to the balance of rights between the public and the individuals whose property may be taken in order to benefit the public. It is important to note, however, that takings law and practice regularly do provide for relatively broad procedural rights.[23]

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[23] In *Hawaii Housing Authority v. Midkiff*, for example, the Hawaii Legislature held "extensive hearings" in order to determine the extent to which land ownership was concentrated in the hands of a few. 467 U.S. 229, 232 (1984). In addition, under the statute's

An additional possibility raised by Professor Stern is that the political process should play a more central role in shaping the structure, and not merely the application, of takings law. In making this suggestion, Professor Stern referenced the many legislative initiatives that followed the *Kelo* decision. These initiatives cover a relatively broad range of options. Substantively, they range from defining the "public use" requirement more narrowly to exclude economic development purposes such as increasing the tax base or employment, as was done by North Dakota, Georgia, and Indiana, among others,[24] to Utah's restriction on the use of eminent domain to acquire single-family, owner-occupied properties.[25] These varying approaches raise the question whether there are certain elements or aspects of takings law that would be better informed by public opinion than others. Professor Stern makes a compelling argument that the "public use" inquiry would benefit from public opinions about social interactions in particular spaces. Are there aspects of the "public use" inquiry that ought not to be subject to public opinion? Consider the example of condemnation for the purpose of economic development. Where a municipality is engaged in a process of comprehensive, long-term planning, it seems critical not just to incorporate public hearings relating to the social and cultural importance of affected neighborhoods, but also to seek expert advice on urban planning, sprawl, income-generating opportunities, public health, and other matters. It is certainly conceivable that public opinion could conflict with expert opinion in many such cases. It is also quite conceivable that expert opinion could produce a better long-term planning process than public desires alone.

Another question raised by Professor Stern's comments is whether public opinion ought to guide other aspects of the takings claim. For example, should the determination of just compensation incorporate more subjective feelings about "social territory" held either by affected individuals or more broadly by their communities?[26] Should public opinion be more relevant to the application of the

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condemnation scheme, the Hawaii Housing Authority was required "to hold a public hearing to determine whether acquisition by the State of all or part of [a given] tract will 'effectuate the public purposes' of the Act." *Id.* at 233. More generally, in *Schroeder v. City of New York*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires that notice of the commencement of a condemnation proceeding be given to an owner of an affected property. 371 U.S. 208, 211 (1962).

[24] National Conference of State Legislatures, Eminent Domain 2007 State Legislation: Enacted Laws, http://www.ncsl.org/programs/natres/emindomainleg07.htm (last visited Oct. 22, 2007) [hereinafter 2007 State Legislation]; National Conference of State Legislatures, Eminent Domain: 2006 State Legislation, http://www.ncsl.org/programs/natres/emindomainleg06.htm (last visited Oct. 22, 2007).

[25] 2007 State Legislation, *supra* note 24. This statute appears to have created an exception for urban renewal projects so long as certain procedural requirements and timelines for development are followed. *Id.*

[26] Current valuation techniques are generally more "objective." *See* Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871 (2007) (discussing current theories of compensation and proposing a new "self-assessment" method

Penn Central balancing test?[27] To the determination of whether a "per se" taking has occurred?[28]

It seems to me that an alternative way in which the political process could serve the purposes of incorporating the social territory perspective and broader public opinion about property rights would be for the public to elect officials whom they could trust to use condemned property in such a way as to provide widespread public benefits. Voters should ask candidates specific questions about their positions on the use of eminent domain, in general and in particular contexts. Such a use of the political process could and should also address the concerns raised by Professor Kanner and others that low-income and minority neighborhoods are disproportionately and unjustly targeted by eminent domain proceedings. Public hearings in the context of producing a redevelopment plan can and sometimes do take a broad range of public opinion into consideration, thereby protecting property rights in nuanced and important ways. In contrast to many of the post-*Kelo* statutes, however, such uses of the political process leave the job of defining a "public use" to the political process.

Compelling arguments exist for considering each of these options for incorporating public opinion into law-making in protection of property rights. Here, a comparison to other rights in the Bill of Rights seems useful. Perhaps one way to sort through these options would be to consider whether we would apply them to these other rights. Would we, for example, allow a public referendum to define the extent of freedom of speech or religion? What would we define as the proper role for the legislature and the courts with respect to our First Amendment rights? Should the similar (constitutional) origin and demarcation of these rights lead to similar jurisprudential treatment? When considered from this perspective, are current legislative reforms "impoverishing" the Takings Clause even further? Or can these reforms be justified by the text of the Takings Clause?

B. What Property Exactly Shall Not Be Taken?

Much of the commentary by the panelists and the audience emphasized the importance of history to contemporary takings law. The discussion benefited greatly both from Professor Ely's participation on the panel as well as from his scholarship.

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that takes subjective value into consideration); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678–79 (2005) ("For all the disagreement and uncertainty in the rest of takings jurisprudence, compensation is considered straightforward; it is measured by the fair market value of the property taken.... Fair market value excludes . . . consequential damages and compensation for any of the real but subjective harms suffered by the property owner.").

[27] *See supra* note 22 and accompanying text.

[28] *See supra* note 21 and accompanying text.

I do not seek here to enter the important debate about methods of constitutional interpretation to which Professor Ely's work makes substantial contributions.[29]

I do wish to comment on a much narrower matter that is marginally related to this debate: the very meaning of property has evolved significantly since the nation's origin. Specifically, the ownership of slaves was central to the Framers' conceptualization of property rights.[30] As Professor Ely describes, "[S]outherners demanded the adoption of [constitutional] clauses to buttress the institution of slavery."[31] Land—and in particular the ability to farm it—was also of far greater relevance than it is today.[32] In contrast, property for many citizens today consists mainly of such things as stocks and bonds, intellectual property, and money. As I have described elsewhere, consumer credit today serves many of the purposes traditionally served by residential real estate.[33] I have even hypothesized that human worth has been propertized to some extent by modern lenders.[34] Whether one believes in remaining true to the Framers' views of property rights as coequal with personal rights, the very nature of property has changed significantly. Should the evolution in views about the meaning of property be considered?[35]

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[29] For an example of opposing viewpoints in this debate about methods of constitutional interpretation, compare Justice Scalia's majority opinion and Justice Brennan's dissent in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). While he generally appears to favor strong protections for property rights, Professor Ely, in the Epilogue of *The Guardian of Every Other Right*, manifests what I would describe as a certain ambivalence about the extent to which the Supreme Court should uphold the Framers' views of property rights. In his words:

> From an institutional perspective, the Supreme Court cannot afford to be perceived as being overly solicitous of business enterprise and property owners, to the disadvantage of the general public. . . . Some regulation of existing property rights also is necessary to preserve economic opportunity for others. . . . In the last analysis, the viability of property rights, like all individual rights, rests on broad popular acceptance.

ELY, THE GUARDIAN, *supra* note 3, at 154–56. According to Professor Ely, this same ambivalence underlies recent Supreme Court jurisprudence. *See* Ely, *The Enigmatic Place of Property Rights*, *supra* note 3.

[30] ELY, THE GUARDIAN, *supra* note 3, at 46.

[31] *Id.*

[32] *Id.* at 10–13, 16, 18.

[33] *See* Rashmi Dyal-Chand, *From Status to Contract: Evolving Paradigms for Regulating Consumer Credit*, 73 TENN. L. REV 303 (2006).

[34] *See* Rashmi Dyal-Chand, *Human Worth as Collateral*, 38 RUTGERS L. J. 793 (2007).

[35] I am not seeking to address the doctrinal question whether property other than real property can be taken. It can be. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003–04 (1984) (holding that "to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment"). Rather, I seek to explore the extent to which the evolving nature of property affects popular perceptions about its importance.

This question returns us to the question of how relevant public opinion ought to be. It certainly seems desirable for takings law to move beyond a vision of property that had slavery at its core. Moreover, it seems likely that people think differently about property when the thing owned is a home, money,[36] a novel they have written, or their sense of self worth. Surely the salience of these "new"[37] forms of property affects people's beliefs about the inviolability of their rights to property. In circumstances where property rights over something other than land are at issue, in what respects, if at all, might such rights conflict with the police power?

Although the panel focused almost exclusively on the Takings Clause as a source of property rights, it is difficult to avoid connecting these questions about the meaning of property and the proper role of public opinion in guiding Takings Clause jurisprudence to another historical source of property rights: substantive due process. As Professor Ely has explicated in *The Guardian of Every Other Right*, the Takings Clause is not the only constitutional source for property rights.[38] In *Lochner v. New York*, the Supreme Court invalidated a New York statute that limited bakery workers to ten-hour workdays or sixty-hour work weeks on the grounds that such regulation violated the workers' liberty of contract under the Fourteenth Amendment.[39] *Lochner*'s legacy must continue to shape our understanding of the virtues and risks of protecting individual rights. The Court's reasoning in *Lochner* is too closely analogous to the "laissez-faire"[40] rhetoric employed by some property rights advocates today to be ignored; *Lochner*'s lessons must be remembered as the Court continues to seek a balanced approach, especially to the "public use" requirement in takings law.

C. Property Rights as Guardian or as Poor Relation?

A third important theme raised by the panelists' comments harkens back to Justice Rehnquist's statement that the Takings Clause should not be "relegated to the status of a poor relation."[41] The panelists and audience raised numerous examples of "disparate" treatment of property rights, to borrow Professor Kanner's terminology.[42] Professor Ely commented that the mainstream view of property rights today does not reflect the Framers' view of property rights as coequal with other

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[36] I refer here to Margaret Jane Radin's description of money as (highly impersonal) property. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982).

[37] These are new at least in their economic centrality if not in their status as property.

[38] ELY, THE GUARDIAN, *supra* note 3, at 43–47.

[39] Lochner v. New York, 198 U.S. 45 (1905).

[40] I am borrowing Professor Ely's terminology here. *See* ELY, THE GUARDIAN, *supra* note 3, at 87–90.

[41] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

[42] *See supra* Part I.A.2.

rights. Professor Kanner provided examples from case law, such as *National Advertising Co. v. City of Raleigh*.[43]

But as Professor Kades pointed out in his presentation, a certain amount of disparate treatment is dictated by the text of the Takings Clause, which explicitly makes property rights alienable by force.[44] In other words, the status of property rights as "poor relation" is arguably dictated to some extent by the Constitution itself. Yet another view of the Takings Clause, quite different from Professor Kades's, is that it protects property *more* than any other right in the Bill of Rights by requiring compensation when property rights are regulated to the point of being "taken."[45] Returning to the comparison between the Fifth and First Amendments, the government can in fact regulate speech quite extensively, and it can do so without compensating those whose speech it regulates. Perhaps the just compensation requirement of the Takings Clause simply reflects the belief that property rights, at least those that were historically important such as rights to land or slaves, are more readily monetizable than speech rights. But perhaps this requirement also reflects the notion that property rights are *more* important than the other rights in the Bill of Rights.

Considered together, these views lead to two foundational questions. First, assuming that the Takings Clause is currently the "poor relation" of the Bill of Rights, is that necessarily wrong or, instead, does its distinctive textual role *require* that it serve the other rights as a poor relation? Several panelists clearly argued that property rights should not be treated as a "poor relation," and that is a question that I hope to explore briefly too.

Before I do, however, I wish to focus attention on a second narrower question that implicates this theme: can property rights be the guardian of every other right *and* still be a poor relation? Stated another way, can property rights be both more important and less protected than the other rights? Let me acknowledge the possibility that such a proposition might not be true to the Framers' intentions, as described by Professor Ely,[46] but nonetheless consider whether the proposition is useful in our current world. Could it be that an effective means of ensuring personal rights as well as widespread property rights in our modern world is by balancing our individual economic rights with appropriate governmental services and protection?

A hypothetical example might be useful here. Suppose, in a particular jurisdiction, the vast majority of land is owned by just a few families. As a consequence, most of the citizens in the jurisdiction merely rent the land on which their homes are located, rather than owning it outright. Indeed, there is so little land available for purchase that a market for residential real estate really does not exist. Suppose now that a state agency develops a plan to allow sale of much of the land to the citizens currently renting it. The agency determines that the means by which to accomplish

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[43] 947 F.2d 1158 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).

[44] U.S. CONST. amend. V; *see supra* Part I.A.5.

[45] I am grateful to Professor Peter Enrich for sharing this insight.

[46] *See* ELY, THE GUARDIAN, *supra* note 3.

this goal is to take the land by eminent domain from the few owners and sell it to the renters.

This hypothetical example is closely based on the foundational case of *Hawaii Housing Authority v. Midkiff*.[47] In that case, the Supreme Court implicitly recognized an important, if somewhat ironic, truth about property rights in this society. In taking property from a few private owners in order to create opportunities for many of Hawaii's citizens to attain property rights, the Court recognized that property rights are so critical to the attainment of other rights that the government must ensure widespread opportunity to acquire them.[48] Precisely because property rights protect liberty, life, and the other core personal rights, it would be catastrophic to allow property to be concentrated in the hands of a few.[49] In Hawaii, prior to the Hawaii Housing Authority's condemnations for the purpose of redistribution, the law protected property rights so extensively that it stifled a market in real estate.[50] In such a circumstance, the Court concluded, regulation of property rights was necessary precisely because property rights are so important.[51]

Returning to the question whether property rights *ought* to be the "poor relation," perhaps the distinctive textual role defined for property rights in the Takings Clause is a recognition that property rights must be impoverished to some extent in order to serve as the foundation both for broad distribution of property rights and for the protection of other rights. Perhaps the just compensation requirement recognizes that property rights are more important and therefore more subject to limitation. Given the complex and diverse meanings of property in contemporary society, perhaps property rights require consistent regulation in order to produce the benefits that the Framers envisioned and that the public today still appears to seek.[52] In other words, perhaps it is not at all wrong for property rights to serve as the "poor relation" precisely so that they may fulfill their role as the "guardian of every other right."

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[47] 467 U.S. 229 (1984).

[48] *See id.* at 242–43.

[49] Indeed, property rights are among the most fundamental reforms advocated by economic development specialists around the globe. Elsewhere, I discuss the viability of property formalization efforts as a component of the property rights agenda. *See* Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. (forthcoming 2008), *available at* http://www.ssrn.com/abstract=968689.

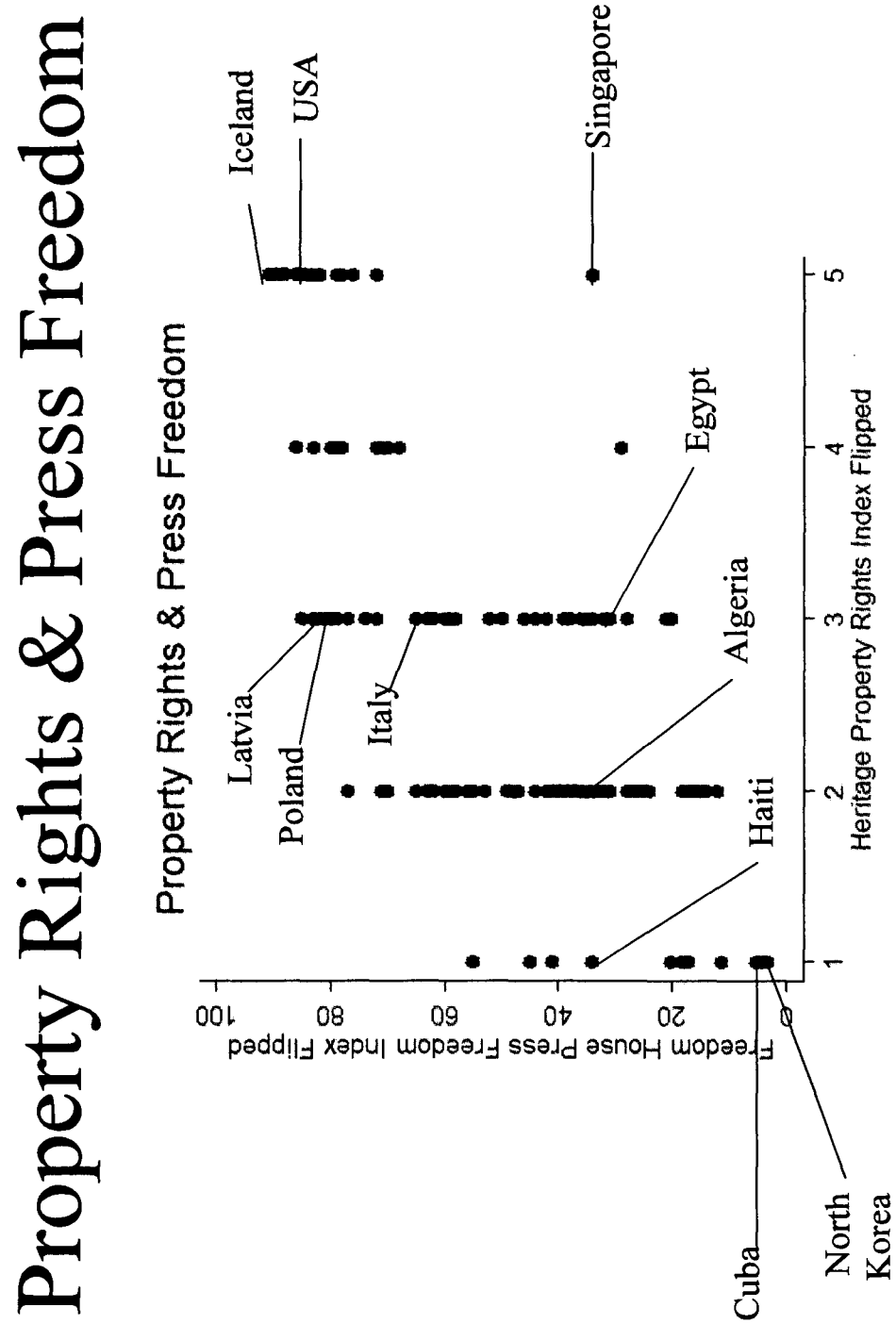
[50] *Midkiff*, 467 U.S. at 232.

[51] *Id.* at 241–43. Of course, the use of the eminent domain power also served the purpose of alleviating the tax liabilities that the owners would have faced if they had sold their properties directly to the renters, a benefit that presumably served an important political purpose. *Id.* at 233.

[52] These questions, of course, implicate the questions I raised earlier about the nature of property rights. I hope to explore these complex and interrelated questions at greater length in the future.

CONCLUSION

The panel discussion raised difficult and important questions about the relationship between property rights and the other core rights protected by the Bill of Rights. One sign of its success was the early revelation that what is really important in this area is not the question of whether property rights are more or less important than the other rights in the Bill of Rights. Rather, it is that property rights serve a unique foundational role. As a consequence, current public attitudes about property rights and the evolving meaning of property appear to be quite relevant to takings law. Perhaps the most important insight from the discussion was the ironic possibility that, in order to fulfill their unique role, property rights must also be constrained.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