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Property's Constitution

James Y. Stern*

Long-standing disagreements over the definition of property as a matter of legal theory present a special problem in constitutional law. The Due Process and Takings Clauses establish individual rights that can be asserted only if “property” is at stake. Yet the leading cases interpreting constitutional property doctrines have never managed to articulate a coherent general view of property, and in some instances have reached opposite conclusions about its meaning. Most notably, government benefits provided in the form of individual legal entitlements are considered “property” for purposes of due process but not takings doctrines, a conflict the cases acknowledge but do not attempt to explain.

This Article offers a way to bring order to the confused treatment of property in constitutional law. It shows how a single definition of property can be adopted for all of the major constitutional property doctrines without the calamitous results that many seem to fear. The Article begins by arguing that property is best understood as the right to have some measure of legal control over the way a particular item is used, control that comes at the expense of all other people. It then argues that legal rights are a kind of private property, and that while courts and commentators can

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validly invoke property in the context of legal entitlements to government benefits—so-called new property—they mistakenly believe the property at issue is the good a recipient has a right to receive, rather than the legal right to receive it. The Article shows that legal rights are the only category of things whose existence government can altogether extinguish. For this reason, ownership of legal rights is the only kind of property right government can terminate without conferring equivalent property rights on others. The Article further argues that while due process protection should apply whenever a person is denied an asserted property right (a deprivation), takings protection should only come into play when property rights are transferred from one party to another (a taking). Combining these observations, the Article concludes that termination of both “new property” rights and old-fashioned in personam legal rights should trigger due process but not takings protection. This analysis provides theoretical coherence that constitutional doctrine currently lacks. It also sheds light on the essential characteristics of property rights as a general matter, in order to help theoreticians understand more clearly the core structures of property law.

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INTRODUCTION

“Government is instituted no less for the protection of the property, than of the persons, of individuals.”¹ That at least was the position of James Madison, architect of the U.S. Constitution, in his arguments urging its adoption. Today, however, the very idea of property—to say nothing of its moral standing—is seriously questioned. Property has been declared “an essentially contested concept,” a disaster zone on the landscape of legal theory.² A much-cited essay by theorist Thomas Grey, for instance, argues that the “concept of property and the institution of property have disintegrated” and that property “is no longer a coherent or crucial category in our conceptual scheme.”³

Grey and others contend that disaggregating ownership into a “bundle” of countless shifting legal relationships between persons undercuts any basis for distinguishing property from other rights and denies property any conceptual coherence.⁴ The result, in the words of one scholar, is that “the concept of property itself is internally riven, situation-specific, metaphorically impacted, and often pragmatically derived and resolved.”⁵ Or more radically, says another, property is no more than “a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.”⁶ Not everyone agrees, but that only proves the point: what property is, if it is anything at all, is a major point of contention.

Fortunately, these difficulties are not necessarily debilitating in the private-law context where the law of property is enforced in the first instance. A court hearing a boundary dispute between neighbors, for instance, ordinarily need not worry whether the doctrine it applies is a rule of “property” law, so long as it is the right doctrine to apply. But labels do matter. In a variety of circumstances, classifying a legal question as a “property” issue can have significant implications.⁷ And the basic question “What is property?”—a recurring title in the literature of legal theory⁸—continues to puzzle scholars.

1. THE FEDERALIST NO. 54, at 339 (James Madison) (C. Rossiter ed., 1961).

2. See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 51–52 (1988); Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138, 147–48 (1999); Pey-Woan Lee, *Inducing Breach of Contract, Conversion and Contract as Property*, 29 OXFORD J. LEGAL STUD. 511, 517 (2009); Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1688 (1988); see also Walter Bryce Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOCIETY (New Series) 167 (1956).

3. Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 74 (J. Roland Pennock & John W. Chapman eds., 1980).

4. See *id.* at 72–73, 81–82.

5. Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 144 (2002); see also BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 10–20 (1977) (contrasting “ordinary” and “scientific” approaches to property).

6. Wallace Hamilton, *Property*, in 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 528 (1937).

7. Examples abound. The priority of a claim against a bankruptcy estate depends on whether it asserts a property right. The availability of injunctive and other specific relief may depend on whether a court thinks of the underlying claim as proprietary. The decision to view an owner’s grant of a right

One area in which ascertaining the meaning of property can be especially important is the realm of constitutional law. The word “property” appears in the Constitution in the Takings Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.⁹ These provisions

to travel across her land as conveying a property right, on the one hand, or a mere contractual license on the other, may affect such questions as whether the grantee may assert the right against subsequent owners of the land. A court’s choice among procedural rules—such as those concerning jurisdiction, venue, and conflict of laws—often turns on whether a problem is characterized as a property issue. The refashioning of landlord-tenant law in the latter half of the twentieth century was justified as a reconceptualization of the problem as one of contract, rather than property. A legal claim’s assignability, and the availability of relief against interference with a legal relationship by third parties, may be influenced by whether property is involved. Subordinating property rights to duties grounded in other bodies of law—claims founded on the doctrine of attractive nuisance, for instance—may be explained as a reclassification of the underlying legal problems as matters not of property but of some other area of law. And of course, countless statutes refer to “property.” See, e.g., *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 402 n.6 (2003) (reserving question whether receipt and provision of medical services is “property” for purposes of Hobbs Act, 18 U.S.C. § 1951(b)(2)); *Cleveland v. United States*, 531 U.S. 12, 26 (2000) (licenses to operate video poker machines are not “property” for purposes of 18 U.S.C. § 1341, federal mail fraud statute); *Haddle v. Garrison*, 525 U.S. 121, 125–27 (1998) (interference with at-will employment is injury to “property” for purposes of civil rights conspiracy statute, 42 U.S.C. § 1985(2)).

The meaning of property is no less important to legal theorists. Unjust enrichment scholars debate whether their field derives from principles of property law or some other basis. Intellectual property scholars discuss whether copyrights, trademarks, and patents are really property at all, to say nothing of trade secrets, “hot news,” and the like. And more generally, legal theorists seek to understand what property is, the better to appreciate its social and legal function, its normative bases, its proper future development, and extension of its concepts into other analogous areas of law.

8. E.g., David Bazelon, *What Is Property?*, in *ECONOMICS: MAINSTREAM READINGS AND RADICAL CRITIQUES*, (David Mermelstein ed., 1970); PIERRE-JOSEPH PROUDHON, *WHAT IS PROPERTY?* (Donald R. Kelley & Bonnie G. Smith trans., 1993); Boudewijn Bouckaert, *What Is Property?*, 13 *HARV. J.L. & PUB. POL’Y* 775 (1990); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 *ARIZ. L. REV.* 371 (2003); O. Lee Reed, *What Is “Property”?*, 41 *AM. BUS. L.J.* 459 (2004).

9. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

The word “property” also appears in Article IV, Section 3 (“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”); see also U.S. CONST. art. I, § 8 (granting Congress power “over all Places purchased by the Consent of the Legislature of the State” from which the district constituting the seat of government was created). On the relationship between these provisions and the Takings Clause, see William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L.J.* (forthcoming 2013).

A number of other constitutional provisions have relatively close relationships with property ideas. These include the Patent and Copyright Clause of Article I, Section 8, the Third Amendment’s provision that “[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner,” the Fourth Amendment’s recognition of the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” the Constitution’s various provisions dealing with the power to tax—especially the Sixteenth Amendment’s treatment of income taxation—the (now superseded) slavery clauses, and arguably the Ninth Amendment and the Constitution’s two “privileges” and “immunities” clauses. See U.S. CONST. art. IV, § 2; U.S. CONST. amend. XIV, § 1. A number of other constitutional provisions protect personal wealth or vested rights. See, e.g., U.S. CONST. amend. VIII (prohibiting imposition of “excessive fines”); U.S. CONST. art. I, §

give rise to the three major families of constitutional doctrine that explicitly concern property: “substantive due process,” “procedural due process,” and “takings.”¹⁰ These constitutional property doctrines adapt a body of rules designed primarily to govern relationships between citizens to a different purpose, using them to police the boundaries of lawful government power. And since those doctrines are available only when “property” is involved, courts seeking to apply them are forced onto the theoretical battlefield where the meaning of property is the object of conflict. The result has been a confused and schizophrenic collection of decisions and rules in which different bodies of constitutional law are set against each other—hardly the fulfillment of Madison’s vision.

The Supreme Court has faced the threshold definitional question most squarely in the procedural due process context. In a string of cases decided during the 1970s, the Court concluded that a variety of government benefits, from welfare aid to government employment, should be considered property for purposes of procedural due process.¹¹ But the Court immediately balked at the idea of extending takings protection to this so-called “new property.”¹² It is not hard to see why: if receiving welfare benefits is property, it would seem the government must provide “just compensation” if it decides to curtail distribution of those benefits. In essence, an entitlement program could not be repealed or even modified once adopted, at least for current beneficiaries. That result seems inconsistent both with the Constitution’s emphasis on negative rights—prohibitions on government action as opposed to requirements that the government provide affirmative benefits¹³—and with the managerial flexibility

10 (forbidding states from passing any law “impairing the Obligation of Contracts”). A catalog of the Constitution’s economic components might be as long as the Constitution itself.

10. Substantive due process doctrine protects property rights from what are considered unjust grounds of alteration. *See* *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996) (a punitive damages award “grossly excessive” in relation to a state’s interests in allowing such damages falls within a “zone of arbitrariness” inconsistent with due process). Procedural due process doctrine requires that certain procedures be followed before terminating or denying a property right. *See* *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976) (describing procedural due process requirements). Takings doctrine requires the government to have a public purpose to justify taking property from others and that it compensate those from whom the property is taken. *See* *Kelo v. City of New London*, 545 U.S. 469, 479 (2005) (describing public use requirement); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003) (setting forth two components of Takings Clause).

11. *See, e.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9–12 (1978) (gas and electric service); *Mathews*, 424 U.S. at 333–34 (disability benefits); *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975) (public school attendance); *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972) (government employment); *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (welfare benefits); *see also* Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

12. *See, e.g.*, *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (“[T]he analogy drawn in [*Goldberg*] between social welfare and ‘property,’ cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.”) (internal citation omitted); *see also infra* note 152.

13. *See* Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118–72 (1969) (distinguishing between negative and positive ideas of liberty).

needed to administer social welfare policies effectively.¹⁴ Perhaps most troublingly, it commits the Constitution to a potentially impossible position. After all, the money simply may not be there. If an entitlement program must be pared back because it is insolvent, it makes little sense to require the government to compensate beneficiaries for benefits it could not afford to dispense in the first place.¹⁵ It should come as no surprise that democratic governments make pledges to their peoples that prove impossible to keep. In reality, every statutory entitlement program promising benefits in the abstract—just like every unsecured debt and uncollected judgment—carries the implicit caveat “while supplies last.”

It is odd for “property” to mean different things for takings and due process purposes.¹⁶ In the context of challenges against the federal government, the Takings and Due Process Clauses occur in the same sentence of the Fifth Amendment, and in the context of challenges against state governments, the Takings Clause applies only because it is said to be incorporated as a component of the states’ due process obligations.¹⁷ Yet it seems unlikely either that takings protection will be extended to new property or that due process protection for new property will be eliminated any time soon. We are left, then, with conflicting commitments. Due process property should include government benefits, takings property should not, and both should define property the same way. Something has to give.

To date, there has been no satisfactory treatment of these important issues. The Supreme Court has attempted to settle the matter by fiat, simply declaring without explanation that due process protects more property than takings.¹⁸ In an influential article published a decade ago, property theorist Thomas Merrill took issue with the Court’s failure to address the definition of property in a coherent way.¹⁹ But while Merrill’s diagnosis of the Court’s doctrinal ailment

14. Administrators may need to rework eligibility rules to prevent fraud, for instance.

15. One might argue the government can escape the conundrum by raising taxes, but even setting aside objections to what would presumably be tax increases commanded by the judiciary, see *Missouri v. Jenkins*, 495 U.S. 33, 58–76 (1990) (Kennedy, J., concurring in the judgment), raising taxes will not necessarily fix the problem. It is possible the government’s obligations would exceed the revenues it could obtain from higher taxes.

16. The Takings Clause refers to “private property,” while the Due Process Clauses refer only to “property.” On the significance of this difference, see *infra* note 74.

17. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978) (citing *Chi. Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897)); cf. Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 844 (2006) (arguing that while *Penn Central* was based on an incorporation conception, *Chicago Burlington & Quincy* was based on a pure due process, rather than an incorporation, conception).

18. See *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (“[T]he analogy drawn in [*Goldberg v. Kelly*, 397 U.S. 254 (1970)] between social welfare and ‘property,’ cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.”) (internal citation omitted).

19. See Thomas Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

was accurate, the prescription he supplied was no cure. Merrill ultimately responded with not two but three definitions of property, one for each constitutional property doctrine.²⁰ Conceding it would be preferable to define property consistently for all constitutional purposes, Merrill nonetheless rejected such an approach out of concern that it could not “accommodate settled doctrine” or produce “normatively defensible” results.²¹

In this Article, I seek to demonstrate that such fears are misplaced. Drawing on core ideas of property theory, this Article develops a conception of property that can be reconciled with the thrust of modern constitutional doctrine and the intuitions that appear to underlie it. The goal here is partly to resolve the apparent inconsistency in the Supreme Court’s treatment of government benefits but also to provide a general definition of property that can guide resolution of other problems that implicate the Constitution’s property clauses.

The Article proceeds in three parts. Part I develops a general account of property by focusing on the basic function property law plays and the form property rights assume as a result of that function, irrespective of normative concerns that shape the particulars of how that function is carried out. It argues a property right should be understood as a right conferring some measure of legal authority to determine how a particular thing may be used—authority that comes at the expense of all others asserting authority over the thing. It is a legal right that centers on conduct pertaining to a particular, identifiable item, resource, or asset and that operates against the world generally.

Part II uses this understanding to make some additional observations about property as a formal institution of law. First, all individual rights—property rights or otherwise—are a kind of private property. The holder of the right has a property right in the right she holds—that is why her rights are hers. Second, the only way one person can lose a property right without someone else gaining it is if the underlying property ceases to exist. Property law treats the world as a zero-sum game as a formal matter: one person’s loss of rights in a particular thing is necessarily another’s gain if—but only if—the thing itself still exists after the first person loses her property right. Third, in personam legal rights—legal rights that are not property rights—are the only kind of privately owned things whose existence can be extinguished by legal process. Taken together, these three propositions suggest that, generally speaking, the only property rights that can be terminated without being transferred to someone else are those one holds by virtue of being the owner of an in personam right.

Part III shows how the conundrum that has led to a fractured understanding of constitutional property can be avoided by incorporating these

20. *Id.*

21. *Id.* at 956.

insights into constitutional doctrine. Although the Due Process and Takings Clauses both protect the same legal relationship when they protect rights of “property,” the actions they protect those rights against—deprivations and takings—differ. A deprivation should be understood to occur whenever an asserted property right is denied, but a taking should be understood to include only the transfer of a property right from one person to another. If a person loses a property right and the right does not then shift to the government or to another private party, the person has been deprived of property but has not suffered a taking. An interpretation of the Due Process and Takings Clauses along these lines would mean that the withdrawal of in personam legal rights always triggers due process protection, but only amounts to a taking if the right is transferred to someone else and not simply extinguished. When rights in personam are extinguished, ownership of them does not shift to someone else, for the simple reason that there is nothing left to own. Thus, although the government’s decision to abrogate positive in personam rights does deprive claimants of property, implicating due process protections, it does not constitute a taking. The claimants lose their rights, but no one else gains them.

Courts and commentators addressing constitutional property questions have confused themselves by thinking of new property entitlements as property rights, rather than as items of property to which property rights attach. It is not the abstract vision of whatever good the government has promised to provide—cash, medical services, housing, and so on—that constitutes property, but the valid legal claim to have those benefits provided. The beneficiary owns the legal right created by the state’s promise to provide those goods, not the goods themselves. Seen this way, the “new property” is not really new at all. It is simply a modern manifestation of the venerable notion that a person has property in his legal rights.

From a practical standpoint, the bottom line under this analysis is that takings protection is always available when rights in rem are at issue²²—assuming no other doctrine limiting what counts as a compensable taking comes into play—but in cases where rights in personam are at stake, takings protection is available only when the rights are reassigned or transferred, rather than extinguished outright. And because “new property” entitlements typically look more like rights in personam than rights in rem, they receive only the limited takings protection applicable to contractual and other in personam legal relations. Due process protection, however, extends to the invasion of any legal right, notwithstanding the form of the right or the nature of the infringement.

This analysis should prove helpful in a number of respects, not least in its ability to make sense of current doctrine and provide an account of property to help resolve constitutional property problems in the future. It also generates some potentially surprising results. Government action with respect to new

22. Excluding, of course, rights in rem where the res is a right in personam.

property may indeed support a takings challenge if it transfers an entitlement from one person to another, rather than terminating it altogether. At the same time, government actions that impair certain valuable common-law-style private rights might not support a takings claim, as where the government voids an unsecured contract claim. This is a reminder that property law is addressed first and foremost to the issue of control over particular things, rather than the distribution of material wealth. At least when it comes to defining the institution of property itself, the Constitution need not side with either the night watchman or the welfare state, only with the neutrality associated with playing by the rules.

I.

UNDERSTANDING PROPERTY

A. Starting Parameters

Given the controversies that attend constitutional interpretation, it is appropriate to begin with a few words about methodology. The approach followed here emphasizes property's formal characteristics when considered as an organizing concept of private law. I do not claim this approach produces results that best reflect the original intentions of the drafters or ratifiers of the Constitution's property clauses or the plain meaning of the relevant constitutional language, either today or at the time of adoption. Text and original meaning are nonetheless relevant. This Article seeks at the very least to avoid an interpretation that would contradict a generous construction of the Constitution's language. More generally, it aims to accommodate text and context to the maximum extent possible given other, admittedly significant interpretive commitments. Those additional commitments are precedent—at least to the extent it appears likely to remain in force—and theoretical consistency. The goal is to make sense of the law we have, broadly speaking, reconciling competing sources of legal authority where necessary, and making them cohere in some significant measure.

In pursuing an interpretation of this kind, moreover, this Article seeks to avoid taking sides in arguments over property law's moral foundations or the justice of any particular property regime. It strives to understand property in light of characteristics that transcend different modes of administration or normative visions, whether Lockean, utilitarian, Hegelian, Marxist, and so forth, that undergird property law. Of course, whatever account is ultimately produced can be assessed in normative terms. But the goal is to avoid relying on such judgments in determining what constitutes the legal practice we call property.

Before undertaking an analysis of property as a conventional legal institution, it is useful to note a few guideposts established under existing doctrine that will frame the inquiry. The Constitution uses the word "property"

in the provisions discussed here, but the word can be used in a number of different, though related, ways. Property can refer to a particular thing—Blackacre, for instance—whose legal status the law of property addresses. It can also refer to individual rights concerning such a thing, especially ownership rights, and to a thing's status as the object of those rights. And it can refer to the law of property as a whole. At various points, this Article deploys the term in each of those senses.

Constitutional usage is more precise, however. The Constitution's use of the word property has quite properly been read to refer to *property rights*,²³ a term whose meaning is explored in the next two Sections. The Constitution directs its attention to certain actions that contravene rights established within the law of property, not to the underlying assets those rights concern. In other words, the Constitution protects not physical possession of a thing, but legal rights pertaining to that thing. Those rights commonly include a right of physical possession, but not always. Thus, for example, there is no violation of property rights if government agents take possession of stolen government property from a thief who admits to having stolen it.²⁴ Conversely, if government declares that a tenant is the owner of the property he or she leases, the landlord may well have a constitutional claim, even though the landlord had no present right of possession.²⁵ Possessory rights are among those rights protected as property by the Constitution, but possessory rights are not necessary, and unlawful possession is not sufficient, to constitute property in the constitutional sense.

In terms of the source of property rights, it is black letter law that “the Constitution protects rather than creates property interests,” and that whether a person has a property right protected by the Constitution “is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’”²⁶ This statement requires further elaboration, however. The existence of a property right does not depend simply on whether some other body of law uses the term “property” or declares that a person has a

23. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945) (“It is conceivable that [the term ‘property’] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.”).

24. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1236 (1967) (arguing that “[w]hen theft occurs, society usually will do what it can to make the thief restore to the owner the thing stolen or its equivalent” and that the “whole point of society’s intervention negates any claim to compensation”).

25. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231–32 (1984) (upholding against “public use” challenge a state law transferring title in real property from lessors to lessees).

26. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

“property right.” As with a number of areas of federal law that attach consequences to “property” but do not purport to create property themselves,²⁷ the Constitution’s property clauses call for a means of classifying the legal relationships that other legal sources create. The Constitution’s reference to “property” implies a set of criteria for drawing lines between different kinds of rights, benefits, or statuses conferred by antecedent or external legal sources. If external sources of law create a legal relationship satisfying those criteria, a person has a property right. The criteria are defined by the Constitution, but the legal relationship to which they are applied is not.²⁸

A few other preliminary points: first, the sources of constitutional property are not restricted to only the most formal legal directives. When government appropriates private property, it cannot escape the Due Process or the Takings Clauses by characterizing its action as an unlawful (but unremediable) infringement of property rights, as opposed to a transfer of rights from the owner to itself.²⁹ Second, however, constitutional property is exclusively concerned with property as a legal matter—that is, with property rights arising under positive law—and not as a matter of moral or natural law or purely social custom. The Constitution has not been read to require the federal government or the government of any state to create property rights where none existed before. Nor has the Constitution been read to prevent the creation and allocation of legal property rights in a manner contrary to preexisting social practices. Third, constitutional property doctrine centers on *changes* in property rights—the Due Process and Takings Clauses both protect against certain alterations to existing allocations of property rights. The larger constitutional problem thus involves not one but two property questions: it must be determined both how property rights were allocated prior to the government’s challenged action and how they were allocated after it.³⁰ Due process and

27. See, e.g., *United States v. Craft*, 535 U.S. 274 (2002) (construing “property” for purposes of 26 U.S.C. § 6321, a federal tax lien statute); *Barnhill v. Johnson*, 503 U.S. 393 (1992) (construing “property” for purposes of 11 U.S.C. §§ 101 and 547, provisions of bankruptcy code).

28. See Merrill, *supra* note 19, at 927; Henry Paul Monaghan, *Of “Liberty” and “Property,”* 62 CORNELL L. REV. 405, 435 (1977).

29. This is not to suggest that remedial limitations like sovereign immunity cannot apply to claims arising out of the Constitution’s property clauses. Cf. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (stating that “it is the Constitution that dictates the remedy for interference with property rights amounting to a taking”). It is only to say that a *de facto* abrogation of a property right is equivalent to a *de jure* abrogation, and that legal rights can be established through comparatively informal means. See *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (stating that “an unwritten ‘common law’ in a particular university that certain employees shall have the equivalent of tenure” would satisfy the requirement of property for procedural due process purposes).

30. This can be somewhat confusing because property rights are partly defined in terms of time. The kind of alteration with which the Constitution is concerned is a difference at two different points in time in who has rights in a particular property *as of some fixed point or period in time*, not a difference at two points in time in who has rights in a property applicable at those two different respective moments. Whether *A* has a present property right in Blackacre at Time 1 and Time 2 is irrelevant. What matters is whether, at Time 1, *A* had been granted a property right in Blackacre during

takings doctrine are both in an important sense about retroactivity. Finally, this Article deals principally with the identification of “property” and only incidentally concerns the nature and extent of the constitutional protection property receives. The Article therefore will not address thorny issues concerning, for example, the degree of impairment to property rights necessary to constitute a “taking,”³¹ the meaning of the “public use” and “just compensation” requirements, or the procedures that are “due” when a person is deprived of property.

The basic question, then, is what the telltale characteristics of a property right are—what must the law do to confer upon a person a property right? Here, established doctrine provides a much less satisfying guide. In the context of due process claims, the Supreme Court has said property is established by a claimant’s demonstrating “a legitimate claim of entitlement” to receive a particular benefit from government, but not by showing a merely “abstract need or desire” to receive the benefit or a “unilateral expectation” of doing so.³² This means the benefit must not be a matter of administrative discretion but a claim of right.³³ And not only must provision of the benefit be legally obligatory, but the beneficiary must be offered some mechanism by which to request or perhaps to demand that it be provided.³⁴ In addition, the Court has suggested a benefit must have “some ascertainable monetary value”—an idea taken from Merrill’s constitutional property article—and has stated that the benefit derived from active enforcement of the law against others is not a form of constitutional property.³⁵ On at least one occasion, moreover, the Court has stressed the importance of “the right to exclude others” and of an “interest over which” a person has “exclusive dominion”³⁶—statements suggestive of traditional common law property ideas. This doctrinal framework was initially developed

Time 2 (a future interest, in other words), and whether, at Time 2, *A* no longer has that right and has lost that right in a manner inconsistent with any provisions for divestiture provided within the terms of the right.

31. The approach to understanding what it means for “private property” to be “taken” developed here is a floor, establishing minimum definitional requirements for a taking. Whether it is also a ceiling or whether instead a taking requires some additional qualitative assessment or proportionality review, is a question on which this Article takes no position. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 331 (2002); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–14 (1922). *Compare* Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57–62 (1985) (arguing any infringement takes property), *with* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674–78 (1988) (arguing against such “conceptual severance”).

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

33. *See* Castle Rock v. Gonzales, 545 U.S. 748, 761–64 (2005).

34. *See id.* at 765–66.

35. *See id.* at 767–68.

36. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999).

in procedural due process cases, but the Court has since applied it to substantive due process claims as well.³⁷

With respect to takings claims, the Supreme Court has articulated no test for identifying property. While the Court has emphasized the importance of a “right to exclude,” it has done so in the context of determining whether property was “taken,” not whether there was property at issue in the first place. Further, the Court has not limited the Takings Clause to situations in which a right to exclude others is impaired.³⁸ Although the right to exclude is considered “one of the most essential sticks in the bundle of rights that are commonly characterized as property,”³⁹ and “perhaps the most fundamental of all property interests,”⁴⁰ it evidently is not the only right that could be characterized as a property right.

Beyond this, there are simply holdings. On the one hand, the Court has said government benefits are not property for takings purposes, though it has not explained why or made any attempt to account for its contrary conclusion in the due process context.⁴¹ The Court has also rejected the claim that a right to acquire property, at least by eminent domain, is a property right.⁴² On the other hand, the Court has not hesitated to classify traditional ownership interests, especially ownership of land, as property. It has also recognized easements,⁴³ security interests,⁴⁴ and leaseholds⁴⁵ as sufficient to create property rights.⁴⁶ And in terms of the object of property relations, the Court has

37. See *Castle Rock*, 545 U.S. 748; see also *Coll. Sav.*, 527 U.S. 666 (not distinguishing between procedural and substantive due process); Merrill, *supra* note 19, at 997 (describing *College Savings* as a substantive due process case).

38. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537–38; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Some capacious understandings of the “right to exclude” might see regulatory takings cases—cases concerning laws restricting permissible uses of property—as infringing the owner’s right to exclude. But I am here using the phrase in its more conventional (and, I would maintain, helpful) sense of a right to forbid someone else’s use of a particular resource.

39. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

40. *Lingle*, 544 U.S. at 538.

41. See *Bowen v. Gilliard*, 483 U.S. 587, 605 (1987) (stating that government action that could lead to receipt of fewer welfare benefits is not a taking given the “unquestioned premise” that government may reduce welfare benefits generally); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980) (“There is no claim here that Congress has taken property in violation of the Fifth Amendment, since railroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time.”); see also *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (rejecting the claim that termination of Social Security benefits denied an “accrued property right” in violation of due process, notwithstanding dissent’s objections that the action took property without just compensation); *id.* at 621–22 (Black, J., dissenting).

42. *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 276–81 (1943).

43. *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 629 (1961).

44. E.g., *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596–602 (1935); see also *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982).

45. E.g., *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473–75 (1973); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

46. *Gen. Motors*, 323 U.S. at 377–78. The Takings Clause

treated items including tangible goods,⁴⁷ income produced by monetary funds,⁴⁸ and federal contracts as property.⁴⁹ But many important questions remain unresolved. The status of intellectual property rights—trademarks, copyrights, and patents—as takings property, for instance, is uncertain.⁵⁰ It is likewise unclear whether imposing general personal liability unconnected with any particular asset could constitute a taking of “property.”⁵¹ A court confronted with a takings challenge involving a novel property rights claim of property rights would find little in Supreme Court takings jurisprudence to guide the way.

This, then, is the unhappy state of constitutional law as it presently stands: The Court tells us “[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’”⁵² It also tells us “[t]he hallmark of a protected property interest is the right to exclude others.”⁵³ The Court says it has “never held that a physical item is not ‘property’ simply because it lacks a positive economic or market value.”⁵⁴ It later declares that even its prior decisions extending constitutional protection to government benefits “implicitly required” that a right “have some ascertainable monetary value” to be considered property.⁵⁵ In the due process context, the basic test of property established in the 1970s is occasionally joined by

deals with what lawyers term the individual’s ‘interest’ in the thing in question. That interest may comprise the group of rights for which the shorthand term is ‘a fee simple’ or it may be the interest known as an ‘estate or tenancy for years,’ as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

Id. at 378.

47. *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960); *United States v. Russell*, 80 U.S. 623, 628 (1871).

48. *See Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164–65 (1980); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

49. *See, e.g.*, *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (stating that, under *Lynch*, “valid contracts are property within meaning of the Taking Clause”).

50. Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 690 (2007). *Compare Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002), and *Hartford-Empire Co. v. United States*, 323 U.S. 386, 387–88 (1945), with *Zoltek Corp. v. United States*, 442 F.3d 1345, 1353 (Fed. Cir. 2006) (per curiam).

51. *See, e.g.*, *E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring) (agreeing with four dissenters that imposition of general liability does not constitute a taking of property); *see also* Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 215 (2008) (discussing precedential effect of *Apfel*).

52. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

53. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

54. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 169 (1998).

55. *Coll. Sav.*, 527 U.S. at 673, (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

additional requirements making what appear to be cameo appearances.⁵⁶ In the takings context, there are no established criteria for identifying property. And the same legal relationship changes from property to not-property depending on which provision of the Fifth Amendment—or which valence of the very same clause of the Fourteenth—is being invoked.

One might admit defeat at this point and simply attempt to define property as a matter of constitutional function, asking what the respective purposes of the Constitution's property doctrines are and working backward to derive different threshold criteria for each doctrine.⁵⁷ In large measure, that is the approach Merrill takes in *The Landscape of Constitutional Property*, which remains the most comprehensive attempt to bring order to the chaos of current doctrine. In that article, Merrill offers three different concepts of property: "ownership" for takings law,⁵⁸ "entitlement" for procedural due process,⁵⁹ and "wealth" for substantive due process.⁶⁰ The project has been influential, not only with scholars, but with the Court.⁶¹

Merrill's heroic attempt at synthesizing constitutional doctrine is not without some basis in theory—no surprise since Merrill is one of the leading property theorists in American law. Ownership, entitlement, and wealth are certainly related to property as a legal and social institution. But their connections to property are obscure, for Merrill frankly abandoned any real attempt to justify his three definitions as a matter of property theory. How could he do otherwise? Property theory might point to a number of possible conceptions of property, but it cannot itself tell us why one conception is appropriate for takings and another for due process. Merrill's basic rationale was not that these definitions made sense as an understanding of property, but that they are more or less consistent with existing doctrine and, more importantly, produce results that jell with the purposes or norms underlying the different constitutional property doctrines.⁶²

56. *Compare Coll. Sav.*, 527 U.S. at 673 (emphasizing "right to exclude"), with *Castle Rock v. Gonzales*, 545 U.S. 748, 765–68 (2005) (making no reference to such a right but suggesting the need for ascertainable monetary value, power to request or demand compliance with legal entitlement, and directness of the benefit secured by entitlement).

57. See Merrill, *supra* note 19, at 960–87.

58. Ownership for Merrill means that "nonconstitutional sources of law confer an irrevocable right on the claimant to exclude others from specific assets." *Id.* at 969.

59. Entitlement means "nonconstitutional sources of law confer on the claimant an entitlement having a monetary value that can be terminated only upon a finding that some specific condition has been satisfied." *Id.* at 961.

60. Wealth means "nonconstitutional sources of law confer an entitlement on a claimant having a monetary value." *Id.* at 987.

61. See *Castle Rock*, 545 U.S. at 766 (quoting Merrill); see also *id.* at 791 (Stevens, J., dissenting).

62. Although Merrill professed to take precedent as his starting point, the fact that he would define property differently for substantive and procedural due process purposes, notwithstanding the Court's use of the same definition for both, suggests constitutional functionalism is his primary desideratum. See Merrill, *supra* note 19, at 987–88.

There are good reasons to avoid this kind of constitutional purposivism if alternatives are available.⁶³ The ends the constitutional property doctrines ought to serve are contested. They can be described at varying levels of generality. And arguably they cannot be understood without defining property in the first place, since it is property that the doctrines exist to protect. That is not to say the doctrines' purposes are irrelevant, but it is important not to place too much weight on what are necessarily vague and high-level commitments. Moreover, an approach in which constitutional goals drive the analysis accords little weight to the idea of "property" as a legal concept, reducing it to something of a placeholder for whatever normative content an interpreter might wish to insert.⁶⁴ Why define property in light of due process, after all, rather than due process in light of property?⁶⁵

"Property," both at the Framing and now, is a vital concept in ordinary—that is, nonconstitutional—law. Before abandoning inquiry into "property" as a routine legal institution, it is worth considering whether something resembling its usual meaning can be profitably adapted for constitutional uses and taken seriously as a legal term. As I shall argue, an examination of ordinary property law that focuses on the analytic form of property rights can supply a coherent and workable approach to the problem of constitutional property.

B. *The Function of Property Law*

Property law's basic function is to allocate legal authority over resources. As a result of that function, property rights assume a distinctive form: they pertain to specific things and they are "good against the world." In other words, they are rights "in rem." To understand the relationship between the function and form of property rights, it is necessary to examine property law's elemental role within a legal system.

Law resolves human conflict by imposing rules that govern how human beings must act toward one another. It creates and shapes normative relationships between people. Many of these relationships are essentially personal. They establish a direct bridge of legal obligation between two people. A parent must provide for his or her child; a debtor must repay her creditor; an

63. Merrill's stated desire to "make sense of the landscape of constitutional property in the wake of the Court's recent pronouncements" is one that I share. *See id.* at 890. Where I disagree with him is over the best way to go about "mak[ing] sense" of the data supplied by decisional law. *See id.* at 955 (expressing concerns about definitions that produce "too much or too little property"); *see also id.* at 958–59, 987–88 (defending separate substantive due process definition of property despite contrary case law).

64. *See* Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923, 1932 (1997) (noting that in their accounts of the Takings Clause, both Frank Michelman and Joseph Sax "see through 'property' and construe the Takings Clause as being about something else—economic value or welfare").

65. *See* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539–41 (1985) ("'Property' cannot be defined by the procedures provided for its deprivation.").

employer must deal fairly with its employees; a railroad must not risk injury to foreseeable victims; and so on.

But the universe consists of more than human beings. It is filled with things. Some of these things are composed of physical matter—a chair, for instance, or a parcel of land. Others are ideal—a poem, a phone number, a law, or a chemical formula. Human beings interact constantly with things of every sort. Not surprisingly, much human conflict involves the use of things. Sometimes the role of things in human conflict is incidental: hitting someone with a baseball bat involves a material thing, but the essence of the conflict is not over the use of the baseball bat, at least not the use of any one baseball bat in particular. Often, however, there are conflicts involving things more directly, the sort of conflicts that arise whenever one person wants a thing used in a manner incompatible with the way another person wants it used. Incompatibility is meant broadly. Even if *A* does not have any particular use for Blackacre in mind but would simply like *B* not to use it, *A*'s and *B*'s wishes are incompatible so long as *B* would like to use Blackacre. They cannot both prevail. The law must take sides.

This problem is most evident in light of what is termed the “scarcity” of resources, but in a sense it goes beyond scarcity.⁶⁶ Scarcity refers to situations where there is not enough of a particular thing to satisfy everyone's wants. There is, for example, a finite amount of physical space on the planet, and human desires for space outstrip the Earth's capacity to provide it. But even if there were infinite space, human beings might disagree over what is to be done with any particular bit of it. Take for instance intellectual property, considered to be “nonrivalrous”—which is more or less to say not scarce.⁶⁷ “He who receives an idea from me,” Thomas Jefferson famously wrote, “receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.”⁶⁸ But while one person's use of an idea may not itself prevent someone else from using the idea in some affirmative way, it cannot be reconciled with the other person's desire to make use of the idea by having others not use it. Such a desire might arise from spite, contrariness, or opportunism, but it also might have more productive motivations: to keep a trade secret confidential in furtherance of long-range business plans, to keep a brand name from being used in ways that will diminish its cachet, to keep a song from being played in service of a political cause with which one disagrees, and so on. Scarcity of resources increases the

66. Cf. WALDRON, *supra* note 2, at 32 (“Scarcity . . . is a presupposition of all sensible talk about property . . . [S]o long as it obtains, individuals (either on their own or in groups) are going to disagree about who is to make which use of what.”).

67. Scarcity refers to a situation in which substitutes for a good are lacking, while rivalry refers to the inability of a good to support consumption by multiple people. A good that exhibits a high degree of nonrivalry can be thought of as nonscarce because it effectively supplies its own substitute.

68. Thomas Jefferson, Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in THE WRITINGS OF THOMAS JEFFERSON 326, 333–34 (Albert Ellery Bergh ed., 1907).

likelihood of conflict, but even in conditions of superabundance, conflict over what may be done with any given thing remains a distinct possibility.

The rules for resolving such disputes are the law of property. For each thing in existence, the law of property tells us who is in charge and to what extent as well as who has authority to decide how the thing will be used when disputes over use arise. The basic structure of property law is something like what parents do when they sew nametags into their children's clothes before sending them to summer camp. Property law affixes a sort of invisible tag to every object in the world, naming the person authorized to decide how to use the object. There need not be a single name on the tag—*B* might be empowered to make most decisions subject to an exception allowing *A* to decide some particular question or to take over at some particular point in time. The permutations can be exceedingly complex. But it is important to recognize the sort of conflicts that the law of property addresses—conflicts arising from competing claims to control some particular resource—and the way it addresses them. Property law tells us who gets to decide how a given resource may be used.⁶⁹

The approach to conflict resolution reflected in property law is fundamentally institutional, in that it focuses on the allocation of authority. Property law is primarily concerned not with what so-and-so may or may not do with Blackacre, but with who decides what so-and-so may do. It designates the person, group of persons, entity or entities with authority to adjudicate matters occurring at a particular focal point of human conflict. The basic model of property law is in many respects analogous to a jurisdictional approach. It assigns a kind of prescriptive jurisdiction over a particular set of activities, defining those activities in terms of their relationship to particular external things.⁷⁰ As one's home is one's castle, so one's property more generally may be said to be one's kingdom.

It is here that the concept of "ownership" comes into play. Ownership refers to a general authority to decide how a resource may be used, within the basic residuum of situations not otherwise spoken for by general laws.⁷¹ It is a basic building block of property law. It is ownership to which Blackstone was referring when he described property as "that sole and despotic dominion which one man exercises over the external things of the world, in total

69. 1 WILLIAM BLACKSTONE, COMMENTARIES *138.

70. That relationship is what we call "use." Use is something of a term of art, but is often defined fairly simply. Where the thing is physical space, a use is an activity occurring within the space; where the thing is a tangible item, it is an activity involving physical contact with the item.

71. For an influential account of ownership, see generally A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961); see also James Harris, *Property—Rights in Rem or Wealth?*, in THEMES IN COMPARATIVE LAW 51, 29–32 (Peter Birks & Arianna Pretto eds., 2002); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1702–14 (2012) (describing property law's "exclusion strategies," according to which "an owner can pursue her interest in a wide range of uses that usually need not be legally specified").

exclusion of any other individual in the universe.”⁷² The archetypical problems with which the Constitution’s property clauses are concerned are doubtless those in which a person’s rights as owner are infringed, and it is therefore useful to have a working conception of what ownership is and how it operates.

But while ownership will play an important role in this Article, it is not the key to the analysis. The Constitution protects “property,” which should be understood as embracing *property rights*,⁷³ a category of relations that includes but is not limited to ownership. For purposes of this Article, a property right is a right to control some aspect of a particular thing’s use. An easement, for instance, is not an ownership right—it does not confer a general power to control the burdened property—but it does carve out a slice of the general control otherwise vested in an owner. It gives the easement holder the right to determine some particular question regarding the use of the subject property. That right is a property right.

Moreover, for purposes of this discussion, property rights are not limited to rights associated with *private* property.⁷⁴ Access rights to shared or commonly held property are property rights, as are governmental rights to control individual resources.⁷⁵ Any allocation of authority to make decisions concerning the way a resource may lawfully be used confers a property right on the party who receives the authority.⁷⁶ Private property assigns legal control to particular persons on a nonreciprocal basis, concentrating it in a limited set of hands. Common or shared property assigns legal control to a larger group of people by means of more complex governance devices—voting and consensus rules, first-possession or first-actor rules, sharing requirements, charters and contracts, and so on. Collective or government property gives legal control to government. Each arrangement accomplishes the same basic task, even if the way it does so differs radically from its alternatives.⁷⁷

72. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

73. See *supra* note 23 and accompanying text.

74. Cf. Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 2004 (2008) (opining that a “feature of the current property debate that tends to be misleading is the nearly automatic identification of the term ‘property’ with ‘private property’ when arguing whether property as an institution has any distinctive, inherent features”). The Takings Clause refers not simply to property, but to “private property.” Most likely, this reflects the fact that the Due Process Clauses make “person” the object of the sentence, while the object of the Takings Clause is “property.” Still, it is possible this linguistic difference would preclude the use of the Takings Clause to challenge privatization of a truly public commons. Merrill suggests that absence of the word “private” in the Due Process Clauses supports the use of different property definitions. See Merrill, *supra* note 19, at 955–56. I find this unpersuasive. It certainly does not support different definitions for purposes of different due process doctrines, and it is hard to see why individual legal entitlements or other protections of material wealth are less “private” than fee ownership of Blackacre.

75. Indeed, the Takings Clause has been held to protect property belonging to state governments. See *United States v. 50 Acres of Land*, 469 U.S. 24, 32 (1984); *United States v. Carmack*, 329 U.S. 230, 242 (1946).

76. See WALDRON, *supra* note 2, at 38–39.

77. Property is too often described as a “bundle of rights,” but there are legal attributes the holder of a property right may acquire that are difficult to characterize as a component of authority

Property rights are thus the elements out of which the substance of property law is made. A property right is the right to have at least some say over at least some uses of a particular thing at some point or points in time. It is legal authority to govern certain human actions, actions that are defined in terms of their relationship to an item or thing—a relationship called a “use.” The authority may be broad or narrow, exclusive or shared, infinite, fixed, or contingent in duration. It may be accompanied by any number of auxiliary rights and remedial mechanisms for its protection and enhancement. But the formal unit at the heart of property is the simple right—however qualified, contingent, or brief—to decide how a given thing may be used.

C. *The Form of Property Rights*

So far, this Article has created a rough sketch of property as the right to control the uses of things, but more should be said about the distinctive form property rights take. To begin with, it is necessary to distinguish between two basic classes of rights: rights “in rem” and rights “in personam.” The terminology is ancient in its origins, but it remains current. And it is useful to this discussion because it calls attention to the forms of different kinds of rights. As used here, rights in rem are property rights, while rights in personam are rights that are not property rights.⁷⁸ All rights are therefore either in rem or

over a resource. Perhaps the least problematic of these is power to control the circumstances in which a property right ends and the related ability to transfer a property to someone else. Others include rights of quiet enjoyment, benefits “running with the land” unconnected with the use of any particular resource (including, for example, the right to have one’s garbage picked up); any obligations owed by others requiring affirmative conduct on their part; and any number of duties and liabilities, such as the duty to pay taxes or amenability to service of process in the jurisdiction where property is located. The mere fact that the package associated with a property right includes a beneficial legal consequence does not make the consequence a property right.

78. Others might draw the line between rights in rem and in personam differently. *See, e.g.*, J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 23–31 (1997) (“Rights *in personam* bind only specific individuals,” and are distinguished by “whether the duty is in any way specific to particular individuals in terms of its content.”); Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L. 1, 1 (2011) (stating that the “in rem rights” protected by tort law are not limited to rights of property). It is true that rights like the right not to be assaulted (and the corresponding duty not to assault) are impersonal in an important sense: all people are generally forbidden to assault others; all people are generally entitled not to be assaulted by others. Indeed, in this sense, such rights create a *more* impersonal relationship than those created by property law, for the relationship between property holder and property is contingent (and therefore personal or personality based) in a way that the relationship between person and self is not. One could well argue that the central preoccupation of property law is an attempt to depersonalize the position of the property holder by shifting the analytical focus away from the holder and to the property, so as to make the right more like the rights of bodily integrity and the like. But there is another way to understand the difference between a personal and an impersonal right that looks to whether the right is oriented around a personal interest, on the one hand, or an external object on the other. A right centered on a personal interest connects persons directly in a way that a right centered on an external object does not, which likely explains why such personal interest rights are much less likely to be alienable than rights in things. (Penner agrees that rights in rem require an external object, or *res*, but he includes as such an object “a state of affairs,” such as the state of not being assaulted, PENNER, *supra*, at 28, a characterization I consider unpersuasive—all rights concern a state of affairs. Norms, including rights, are “reasons for action,” *id.* at 6 (citing J.

in personam. A right in rem exhibits two distinguishing characteristics: it pertains to the use of a particular thing and it avails against the world generally. Properly understood, the idea of a right to control the way a thing is used implies both of these features, but it is worth describing them in greater detail to give a fuller picture of what control means.

1. *Discrete Thing*

A property right, a right in rem, is centrally concerned with some particular, singular, discrete thing—a res. It is crucial that the thing be identified with enough specificity to exclude any other candidate or substitute for the thing. It is the difference between “a building,” in the abstract, and “*this* building.” Property law can assign control only over the latter. A right to control “a building” may be quite valuable, at least if we can be assured that a particular building will actually be identified at some point. But until the identification takes place, the control the right purports to confer is itself meaningless.⁷⁹ A command to “keep out of a building”—not all buildings or a building of one’s choosing but some unidentified building—is nonsensical.⁸⁰

This specificity reflects an important aspect of what makes property unique. Other branches of law ask, “What does this person owe that person?” Property law is the reverse. It gives us a “who” for every “what.” As a mode of thinking about legal problems oriented around the assignment of decision-making power, property law begins with the objects over which that power is to be exercised. It is therefore concerned with legal control over actual, specific items. A right to be paid \$5, even if it is a right against every man, woman, and child on the face of the earth—a right “good against the world,” in other words—is not a property right because there is no actual thing that it gives the holder the right to control. When a right is framed only in terms of quantities, values, and substitutes of a thing, it secures a mere abstraction, an idealized conception of the thing, rather than the thing itself. Because property rights distribute control over resources, their central concern is with actual objects,

RAZ, PRACTICAL REASON AND NORMS (1990)), and actions affect states of affairs.). At any rate, I agree that rights of bodily integrity and rights of contract are different in kind, and I think neither Smith nor Penner would disagree that rights of property and rights of bodily integrity are distinct. Whether the in rem/in personam dichotomy should be used to capture the distinguishing features of contract or the distinguishing features of property is simply a matter of terminology, at the end of the day, and either use seems to me acceptable depending on one’s purposes, so long as it is clearly specified.

79. Cf. James H. Foster, *The Transferability of Development Rights*, 53 U. COLO. L. REV. 165, 170 n.32 (1981) (stating that “in practical terms, it is unclear how a system of property as general, unattached interests could retain the sense of property as particularized, individual control”).

80. This understanding is reflected in the legal terminology associated with converting in personam claims into in rem ones. The law speaks of attachments and liens (literally, ties) upon things owned by the person against whom the in personam claim is asserted. The abstract obligation that defines the relationship between creditor and debtor, plaintiff and defendant, must eventually be tethered to some actual, identifiable asset to implicate the primary concerns of property law.

rather than claims to goods or welfare in the abstract. Property law is appropriately understood as “the law of things,”⁸¹ not the law of undifferentiated, partitive “stuff.”

2. “Good Against the World”

The second distinguishing feature of a property right is that it is “good against the world.” It deals with legal relationships that operate upon, and very often concern the conduct of, all other legal actors.⁸² Because a property right designates which person has authority to decide how a particular thing may be used, it confers upon that person a right that binds others. That is the nature of the authority at stake. Rights in rem are meant to resolve the question of authority over property once and for all, and that requires that all other possible contenders for authority be considered. This does not imply exclusive authority in the sense of either undivided control or control that is broad in scope, only a recognition of the mutually exclusive nature of whatever authority any person might enjoy compared to anyone else. If *A* has a 1 percent share in Blackacre, no one else can have a 100 percent share.⁸³

A right concerning a distinct res is not a property right if it is a right only against a particular person or set of persons. If *A* promises to convey Blackacre to *B* next Tuesday, *B*’s right to have the contract enforced and the property conveyed is not itself a property right; the conveyance itself confers a property right on *B*. In and of itself, the right to have the property conveyed does not apply to the world at large.⁸⁴ If it did, it would mean the promise to convey not only conferred a contractual right to a conveyance, but actually achieved conveyance. So long as the right is understood as executory, however, *B* himself has no rights against trespassers nor, in all likelihood, against others to whom *A* might convey Blackacre, notwithstanding the promise to *B*. The primary legal effect of a contractual obligation is limited to the contracting parties.

81. See 2 BLACKSTONE, *supra* note 72, at Ch. 1; Geoffrey Samuel, *Roman Law and Modern Capitalism*, 4 LEGAL STUD. 185, 192 (1984) (describing how Roman law divided into three categories: the “Law of Persons,” “Law of Things or Property,” and “Law of Actions” (remedies)); see also Smith, *supra* note 71.

82. Cf. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 712, 718–20 (1917) (distinguishing between “multital” and “paucital” rights).

83. These ideas are developed further in James Y. Stern, Property, Exclusivity, and Jurisdiction 21–30 (unpublished manuscript).

84. Such a distinction traditionally was central to the operation of courts of equity, which routinely made personal commands of this sort. Equity was understood only to have jurisdiction in personam and could therefore operate in a way that would usually affect rights in rem—matters within the exclusive jurisdiction of law courts—but could not actually change allocations of property rights. See Wesley Newcomb Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537 (1913).

There is a useful distinction associated with Roman law between two kinds of rights concerning a *res*: rights in *rem* (against the thing) and rights in *personam ad rem* (to the thing).⁸⁵ In contrast to a right in *rem*, which is a true property right, a right *ad rem* is an essentially personal obligation that happens to reference a particular thing in the description of the duty it imposes. The different forms have different consequences. A personal right that merely happens to refer to a *res* “will be capable of surviving the loss or disappearance of that *res*,” while a right in *rem* will not.⁸⁶ A right in *personam ad rem* does not really refer to actual control over an actual *res* but to a personal relationship defined by an imagined conception of a *res*. That difference has important consequences, one of which is scope of the obligation the right imposes. Only the right in *rem* speaks to the legal status of all persons relative to one another and only the right in *rem* demands that a *res* be real. Consequently, only a right in *rem* will be secure against the possibility of opposing rights in relation to the *res* or the possibility that the *res* does not actually exist.

Now it is possible to give partial answers to the question of actual title, rather than personal obligation—to determine only that as between *A* and *B*, *B* should get to decide what happens to Blackacre. Indeed that is frequently all the law does, at least as a procedural matter.⁸⁷ But the implications of such a judgment are contingent and its usefulness is therefore limited. If it turns out *C* has title to Blackacre, *B* still gets nothing, notwithstanding a superior position in relation to *A*; *B*'s rights against *A* are purely hypothetical. Property law seeks to do better—property rights are meant to be complete statements of authority concerning a thing. That is why they necessarily implicate the status not of some select group of persons *vis-à-vis* one another but of all persons.⁸⁸

These ideas can be seen in operation in leaseholds. The law has at times expressed some confusion over how to classify a lease. Does it convey a property right or does it merely create a series of personal obligations governed by the law of contracts?⁸⁹ A leasehold seems like a property interest insofar as the tenant looks like a sort of miniowner for the term of the lease. She acquires

85. See Lionel Smith, *Transfers, in* BREACH OF TRUST 121 (Peter Birks & Arianna Pretto eds., 2002); see also The Carlos F. Roses, 177 U.S. 655, 666 (1900).

86. PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 49–50 (1989). As Birks explains, if “you come under an obligation to give me the cow Daisy,” but Daisy then disappears, “it is still not nonsense for me to maintain that you ought to give me Daisy. . . .” *Id.* at 49. If, however, someone has eaten my cake, “I cannot say in the present tense that there is any cake which I still own.” *Id.* at 50.

87. See Larissa Katz, *The Concept of Ownership and the Relativity of Title*, 2 JURISPRUDENCE 191, 193 (discussing view that the common law “recognises degrees of title far short of the ‘complete’ title that many think is the hallmark of true ownership”).

88. See Stern, *supra* note 83, at 22–23.

89. See, e.g., Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982); Robert H. Kelley, *Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated*, 41 WAYNE L. REV. 1563, 1569 (1995); Stephen Siegel, *Is the Modern Lease a Contract or a Conveyance?—A Historical Inquiry*, 52 J. URB. L. 649 (1975).

some significant rights to control the property's use, including the right to determine who may enter and occupy it and, within certain constraints, how the property may otherwise be used. But the tenant's rights seem contractual insofar as the owner is still, after all, the owner, and the scope of the tenant's rights seems to be defined by an agreement, usually in writing. Analyzing the problem in terms of the good-against-the-world aspect of property rights reveals the source of much of this confusion. The property-contract classification seems uncertain because the legal implications of the leasehold are uncertain. Does the tenant have a right in rem? If others interfere with rights of tenancy, can a tenant bring actions against them directly in the tenant's own name, or is the tenant required either to stand on the landlord's rights or to have the landlord bring enforcement proceedings?

The difference appears technical. Even if the tenant does not have standing to sue for trespass in her own right, she presumably can assert her rights under the lease to insist that the owner bring the trespass action.⁹⁰ As a result, people do not pay much attention to such details—whatever the intricacies of the relationship between landlord and tenant,⁹¹ their combined relations add up to a property right, however distributed, which by and large is all the rest of the world needs to know. But that particular detail is the essence of the property/contract divide, and when we have no sense of how it comes out, we have difficulty telling the difference between a kind of junior ownership for a term, on the one hand, and a license agreement, on the other.⁹²

90. Cf. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (finding standing to sue because plaintiffs had property interest in in personam claims assigned to them).

91. See, e.g., Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 831 (2001).

92. Even if both are said to have a right to sue as a general matter, there must be some means of resolving conflicts between landlord and tenant when they disagree over how that right is to be exercised; that mechanism will express the real structure of property rights at work. Admittedly, there are other features that might be considered in determining whether to classify the relationship as a matter of property law. Does the lease bind a landlord's or tenant's successors in interest? May the tenant transfer his or her rights, and if so, does the tenant remain liable if the transferee fails to abide by the lease? Is the tenant entitled to specific performance if, say, the landlord also leases the property to someone else? How much may the landlord and tenant customize the rights and duties that form their relationship? To a large extent, these are extensions of the in rem versus in personam theme: if a leasehold is binding on the world, for example, then a landlord probably should not have the power to convey an interest in the property that now belongs to the tenant. In rem classification does not demand this consequence: in principle, a nonowner could be permitted to divest an owner of title, as sometimes occurs in the case of good faith purchasers for value or holders in due course, who may acquire title from a person who does not actually have title himself. But it conforms to the spirit of the in rem conceptualization and is probably wise policy as a general matter. See Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 465–66 (2010) (under “classical liberal conception” of property, “[n]o transfer of rights, either in whole or in part, should do anything to either increase or diminish the rights of the original owner against the rest of the world. The arguments in favor of this view do not rest on any arid sense of formalism, but reflect deeply practical concerns”). The point I would stress, however, is that these kinds of conclusions are consequences of the classification as property or as contract, in rem or in personam, rather than causes of the classification.

The res-centered and good-against-the-world qualities of property rights are related. As we have seen, it is possible to craft a right that has one of these characteristics and not the other. But the reason property rights necessarily manifest both qualities is that property law's function is to assign control over a res among the universe of legal actors. Property is about authority. Authority requires that there be some actual domain where it applies. And within that domain, the authority necessarily comes at the expense of all others seeking the same authority. The twin characteristics of property derive from its basic function and corresponding structure.

D. *Whither Exclusion?*

This discussion has not referred to the “right to exclude,” often cited as the essence of a property right, or a private property right in any event, by both theorists⁹³ and courts, including the Supreme Court.⁹⁴ This is intentional, and because of the tremendous emphasis the right to exclude is frequently given, the reasons for its omission in this account require some discussion. For one thing, outside the context of land or other items of property that the nonowner could be said to be capable of entering (like a car, for instance), the right to exclude is a rather awkward description of the legal position of an owner in relation to nonowners. It is a bit unnatural to say Sally “excluded” Bob from her briefcase when Sally told Bob he could not borrow it from her. Theorists who give pride of place to exclusion really seem to be referring to the right to prohibit someone else—typically everyone else—from using a resource.

But recast as the right to prohibit, the exclusion principle seems quite incomplete as an account of property.⁹⁵ It does not speak to any right on the

93. See, e.g., Merrill, *supra* note 19, at 971; Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354 (1967).

94. See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) (stating that “[t]he hallmark of a protected property interest is the right to exclude others”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (describing right to exclude as “one of the most treasured strands in an owner’s bundle of property rights”); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (describing right to exclude as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

95. Others have departed from the “exclusion thesis” in favor of property conceptions that have some resemblance to the ideas advanced here. See Eric R. Claeys, *Exclusion and Exclusivity in Gridlock*, 53 ARIZ. L. REV. 9, 11, 18–20, 25–26 (2011) (book review) (defining property as “a right to determine exclusively the use of a thing”); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 290 (2008) (“Ownership’s defining characteristic is that it is the special authority to set the agenda for a resource.”); Mossoff, *supra* note 8, at 376 (defining property as an “integrated unity of the exclusive rights to acquisition, use and disposal”). Nevertheless, there are some important differences. The point is not that the right to exclude others is a derivative consequence of an individual normative interest in use or agenda setting. The idea of control emphasized here is formal, not purposive. Use and exclusion share a common ancestor in the concept of authority; neither derives from, nor is superior to, the other. One can have a right to use without a right to exclude and a right to exclude without a right to use. I would further stress that this idea differs from the agenda-setting notion developed by Katz both because it applies not only to ownership but also to any lesser property

part of the right holder to use the property herself.⁹⁶ The freedom to use an asset is obviously an important part of what most property rights confer—indeed, in some cases it may be just about the only thing a property right itself confers. If the right holder has an easement allowing her to cut across her neighbor’s property to reach her own, her entitlement is primarily framed only in terms of her own use of the property, not use by others.⁹⁷ No less important is the right to license a resource’s use by others (the right to “include”) and to impose conditions in doing so. A person with nothing more than the right to prevent others from using a particular resource may have practically nothing: if such a right were accompanied by a statute categorically forbidding others from using the resource, the right to exclude would be almost entirely hollow.⁹⁸ The right to forbid uses by others, to license uses by others, and to use the property oneself are each important aspects of property.⁹⁹ They all derive from a right of legal control over a resource, the essence of property, and it is not clear that any one of them should be privileged over any other, at least at a conceptual level.

What is significant about property rights, ownership especially, is not so much exclusion as exclusivity. A right to control is most complete and most meaningful when it is not shared with others; to the extent control is shared, it is, by definition, diminished. Being able to forbid others to use a particular thing is a significant aspect of a broader right of control over the way it is used, and there may be strategic reasons to give it pride of place in constitutional analysis. But it should be understood that the basic idea at the heart of property law does not make exclusion property’s *sine qua non*.

entitlements, *see Katz, supra*, at 309–10, and because it treats decisions respecting control that the holder of such an entitlement makes as conclusive, rather than calling for independent reevaluation of whether an alleged infringement of the entitlement holder’s property rights is truly inconsistent with the entitlement holder’s stated purpose or agenda for an asset, *see id.* at 299–303.

96. One could say that the right to exclude embraces the right to use because it allows the right holder to exclude anyone who would prevent her from using the property. While creative, this attempt to derive rights of use (privileges, in the Hohfeldian scheme) from claims against others is a rather awkward stretch of natural meaning. It is not self-evident, moreover, that a right to forbid uses by others would embrace the right to prevent government officials from enforcing general legal rules, rules that might well include prohibitions on use by anyone, owner included.

97. Such a right is constitutionally protected property. *See, e.g., Panhandle E. Pipeline Co. v. State Highway Comm’n*, 294 U.S. 613, 618 (1935) (finding that a utility company’s right of way is an easement protected by the Takings Clause). The easement holder might have the right to forbid others from interfering with her liberty, but that right reflects a secondary sort of protection of her primary entitlement of use. And it might well extend to conduct by others that does not involve their own use of the property but that nevertheless interferes with her ability to do so.

98. *Cf. Lior Jacob Strahilevitz, Information Asymmetries and the Right to Exclude*, 104 MICH. L. REV. 1835, 1843 (2006) (arguing the right to exclude includes not only a “hermit’s right” to keep others out altogether, but must also include, *inter alia*, a “bouncer’s right” to determine access).

99. The power to transfer property, another important aspect of property, might be characterized as a combination of the right to forbid one’s own use, as well as anyone else’s, other than on terms set by the transferee.

II.

SOME PROPERTIES OF PROPERTY

A. Rights as Property

Before discussing how the understanding of property developed here helps make sense of due process and takings doctrines, a few additional features and observations with important implications in the constitutional context should be noted. The first concerns legal rights. Legal rights are “things” in the basic sense of the word.¹⁰⁰ We can talk about them, differentiate them, and often buy and sell them. They are conceptually distinct from the legal identities of their individual holders, in the sense that we can at least imagine the possibility that a given right could be assigned to someone other than the person who holds it. Legal rights present the problem of allocation and are therefore proper subjects of property law.¹⁰¹ Like every other thing whose control the law allocates, a legal right is a piece of property, to which property rights can and do attach.

Indeed, all laws are things. A private legal right is really a special kind of law owned by an individual citizen, rather than by the government—“a species of normative property belonging to the right holder,” in the words of Hart.¹⁰² In other words, one might say that every law is an item of property; a law taking the form of an individual right is an item of private property. What makes a right a right is the identity of its owner. To say that *A* has a claim against *B* is not only to say that *B* is saddled with some particular obligation, but that *A* is the person to whom the obligation is owed, and not *C*, *D*, or anybody else. Thus a contractual right—for example, a right to have a \$100 debt repaid—is an item belonging to the person who holds it. Others might or might not be at liberty to interfere with the right holder’s enjoyment of the right by, say, persuading the debtor to give them the debtor’s last \$100. But at the very least, they may not legitimately be treated as the person to whom the debt is owed. On this view, a right is a legal relationship—an entitlement—over which the holder has *title*.

The “property” dimension of legal rights can get a bit complicated in the context of rights that are themselves property rights. The owner of private property may be said to own her ownership—a rather confusing proposition. It is hard to differentiate between the authority to decide how Blackacre may be

100. That is, an entity or item. *See, e.g.*, OXFORD ENGLISH DICTIONARY (3d ed. 2008) (giving as a definition “that which exists individually (in the most general sense, in fact or in idea); that which is or may be in any way an object of perception, knowledge, or thought; an entity, a being”).

101. *See* Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373, 384 (2009) (stating that “legal claims do reflect the doctrinally defined incidents of property—use, destructibility, disposition, exclusion, and, in some instances, alienability and heritability—in a number of ways”); *see also* Olivia A. Radin, *Rights as Property*, 104 COLUM. L. REV. 1315, 1316, 1318 (2004).

102. H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 185 (1982).

used and the authority to decide how that authority is itself to be used. It is easier to see the point, however, where property rights do not rise to the level of ownership. The holder of an easement pertaining to the property of another does not own the property, but she does own the easement. She has only a limited measure of control over the property subject to the easement, but she has full control over the easement itself—that is, the way in which she will exercise whatever rights the easement confers.

For purposes of this analysis, however, the more salient point is that property rights attach even to rights that are not property rights—personal rights that do not confer control over how the rest of the world may use a particular asset or thing. That does not mean that in personam rights are actually property rights after all. It means that the creation of an in personam right entails the creation of an additional right in rem, the res being the underlying in personam right.¹⁰³

B. *The Durability and Resilience of Property Rights*

Because of the role property rights play, they exhibit a number of distinct features, some of which have already been discussed. Two other related traits—referred to here as *durability* and *resilience*—are important to note. Property rights are “durable” in the sense that a valid property right is designed to avoid making demands that are logically impossible and that necessarily require that the right be ignored or curtailed. This admittedly somewhat cryptic statement can be better understood by comparing property rights with in personam rights like those created by contracts.¹⁰⁴

Contractual rights are often valid even though they are impossible to honor. A person might promise to do something he or she is not capable of doing and yet be considered obligated as a matter of contract to fulfill that promise—that, after all, is what happens in bankruptcy all the time. Contract law does not demand that a promise be capable of fulfillment, at least as a general rule. It is left to the law of property, remedies, bankruptcy, and the like to clean up the mess that contract law makes and bring contract’s ambitions

103. Hence the conclusion that a cause of action is property for due process purposes. *See* *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430–31 (1982); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also* Blumenthal, *supra* note 101, at 373, 416–21 (declaring “[a] lawsuit is property”). At the same time, however, a cause of action itself is not a *property right*, which may explain the decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (rejecting claim that false advertising by a state government made actionable by the Lanham Act, 15 U.S.C. § 1125(a), violated would-be plaintiffs’ property rights within the meaning of the Due Process Clause). *Cf.* Merrill, *supra* note 19, at 913 (suggesting *College Savings* contradicts *Logan* and *Mullane*).

104. *Cf.* Benito Arruñada, *Property Titling and Conveyancing*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 237, 237 (Kenneth Ayotte & Henry E. Smith eds., 2011) (explaining why “[f]or durable assets, a property right is . . . much more valuable than a contract right having the same content”).

down to earth.¹⁰⁵ The law of in personam obligations is imaginative. Because it is not oriented around real things, it can easily absorb and generate impossibilities. This is true even when in personam obligations purport to identify an actual res, as in the case of the proverbial contract to convey Blackacre—the obligation in personam ad rem. Such obligations are still essentially personal ones at their core. They may therefore be impossible to realize, as when, for example, a person makes mutually conflicting promises. One cannot convey ownership of the same property twice, but one can promise to do so as many times as one likes to as many people as one likes.¹⁰⁶

As the comparison to conveyance suggests, property law is more realistic. The need to domesticate impossible claims is the organizing idea of property. In principle, property rights do not conflict—any apparent or prima facie overlap between property rights is a matter that the law of property must resolve. Property law never imagines that completely exclusive, undivided title to property can be vested in two different people at the same time. Likewise, property law will not knowingly award property rights in a thing that does not exist.¹⁰⁷ It cannot, for example, conceive of awarding rights in the fabled city of Atlantis. It can award a contingent title so that *A* will own Atlantis if Atlantis turns out to be a real place and is discovered. It can award title in the idea of Atlantis, so that *A* is entitled to control depictions of Atlantis. But if Atlantis is simply a myth, it is nonsensical to suppose that *A* can be made its owner, with the power to evict others who enter it. As a matter of property law, the proposition simply does not compute. Again, however, this is not true for contract law. If *A* promises to take *B* to Atlantis, *A* may well be contractually obligated to do so. The law cannot force the promisor to do the impossible, but it can at least force him or her to pay damages in recognition of an actual duty to the person he or she promised.¹⁰⁸

Property rights exhibit the durability that contract rights lack because property law is designed to produce only results that are possible. In personam

105. See Barry E. Adler, *Bankruptcy as Property Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 206, 206 (Kenneth Ayotte & Henry E. Smith eds., 2011) (“There is exactly one function bankruptcy law must serve. It must govern mutually insupportable obligations. . . . [B]ankruptcy law is property law.”).

106. See *Kennedy v. Hazelton*, 128 U.S. 667, 671 (1888) (“A court of chancery cannot decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title.”); see also *Kiley v. Baker*, 27 A.2d 478, 480 (Pa. Super. Ct. 1942) (holding that equity will not order specific performance of contract to convey realty where seller had entered into prior contract with third person, even if conveyance to third person has not yet taken place).

107. Cf. BIRKS, *supra* note 86, at 49 (“A right *in rem* cannot survive the extinction of its *res*.”).

108. See *Taylor v. Caldwell*, [1863] 122 ENG. REP. 309, 312 (Q.B.) (“There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 266, illus. 9 (stating that a party may be held liable for breach of contract for failure to deliver an electronic device meeting contract specifications even though “it is not possible for any manufacturer, under the state of the art” to produce such a device).

rights, with their fundamentally abstract orientation, must be destructible. If the government promises to enforce all in personam obligations, its promise is a false one because, time and again, those obligations simply will be impossible to perform. But rights in rem are grounded in things and seek to reach all persons. Property law takes irreconcilable demands and imposes a solution that reconciles them as a matter of law. Not for nothing were property rights referred to as “real rights” in Roman and Medieval law—indeed, both the word “reality” and the word “realty” trace back to the Latin *res*.¹⁰⁹ Property law is the law of that which actually *is*. Property law takes the impossibility inherent in mutually exclusive claims on resources as its starting point. Its defining function is to resolve that impossibility. As a result, property rights are durable in a way that in personam obligations are not.

The other feature to observe about property rights is that they are “resilient.” It is not only the case that property rights, unlike other sorts of rights, in principle need not be destructible, but in a sense they cannot be destroyed. To be sure, no particular distribution of property rights is automatic, but so long as the property to which the rights attach exists, there is a sense in which it is inescapable that there be some distribution.

It is easiest to see this in situations where the law is committed to treating a particular thing as private property. If the owner of the thing is divested of her ownership, someone else will become the owner in her place.¹¹⁰ But the resilience of property rights goes further. All property is necessarily controlled by some person or group of persons or institution, no matter what form that control takes.¹¹¹ To say that a given item is unowned is to say in a sense that everyone owns it. Each person then has legal control over the question of his or her own use of the property. There may be a right to extinguish others’ claims by converting the property to private property, or there may not. There may be obligations not to consume more than a certain share of the property, or there may not. There may be obligations not to dispossess those currently in possession, or there may not. But authority to determine who may do what with

109. See OXFORD ENGLISH DICTIONARY (3d ed. 2008).

110. It is worth recalling the medieval position that someone must always be seised of land at any given moment. See CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY 30 (3d ed. 2002). Originating in the necessities of feudal obligation, the principle can nevertheless be seen as a reflection of the view that control rights must always be allocated one way or another.

111. By way of analogy, consider the law of corporate governance. Corporations law is in large measure centered on the idea of “control.” When a firm lacks a dominant shareholder, it is not that the firm is uncontrolled. Rather, control is said to be “in the market.” See *Paramount Comm’ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1990). Consider also the concept of political sovereignty, which, it has been suggested, displays similar properties of durability and resilience. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316–17 (1936) (“Rulers come and go; governments end, and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense.”); 1 BLACKSTONE, *supra* note 69, at *156 (stating that sovereignty “must, in all governments, reside somewhere.”). Hence the ancient exclamation, “The King is dead—long live the King!”

Blackacre must be apportioned. With respect to every conceivable act involving every particular thing, the law must determine who will decide whether the act should occur. The results of those decisions are the substance of property rights.

Legal control over resources is thus a zero-sum game.¹¹² For this reason, abrogating one person's rights in a given piece of property ordinarily does not destroy those property rights altogether. Abrogation instead transfers rights from that person to someone else. If property rights are taken away, but the property remains, the rights still lurk. Who the recipient is should not ordinarily be hard to ascertain. We simply have to ask: Who now decides how the property is to be used? There is a sense in which there is always an allocation of property rights in every extant thing because, as a formal matter, property rights are simply a description of whose claims to use a given resource in a certain way take legal priority at a given point in time. Just as property law by its nature does not permit allocation of more than 100 percent of the ownership among the universe of possible owners, it does not allow an allocation of less than that. Like in a carnival whack-a-mole contest, the denial of a property right here means a new property right pops up there. This is what is meant by property's resilience. So long as a thing exists, the law will have to decide, whether it admits so or not, who shall determine how the thing will be used.

C. *The Persistence of Property*

If property rights cannot be destroyed outright so long as the property to which they attach exists, then the only way to destroy property rights is to terminate the underlying property's existence. There can be no allocation of control in a thing that does not exist, after all—one cannot own a nonentity.¹¹³ But destroying property rights in this way is not so easily done. With one important exception, the law cannot altogether annihilate a piece of property.

For purposes of this analysis, there are two ways a thing might cease to exist. First, there is the termination of legal existence, a situation where the law refuses any longer to treat a particular thing as having any being. If the thing continues to exist in actual fact, however, this legal extinguishment is really a kind of conceptual reshuffling. Since the thing is still around, the law will still have to deal with the question of control. Thus if the law suddenly declares that, as far as it is concerned, there simply is no Blackacre anymore, Blackacre's owner has lost rights in Blackacre while former would-be trespassers have gained them. The property rights live on, even if they are not acknowledged as such.

112. I do not mean to suggest it is zero-sum as a matter of economic efficiency or utility, only as a matter of formal entitlements. Cf. Thomas W. Merrill, *Zero-Sum Madison Private Property and the Limits of American Constitutionalism*, 90 MICH L. REV. 1392 (1992) (critiquing the suggestion that property is a zero-sum in welfarist sense).

113. See BIRKS, *supra* note 86, at 49–50.

Alternatively, a thing might cease to exist as a matter of fact. Here we are faced with the termination of a phenomenon external to law, rather than the law's symbolic representation of such a phenomenon. This is generally not something law can bring about. While the law may cease to recognize a phenomenon's existence, it cannot, as a general matter, thereby eliminate that phenomenon from the world. Start with nonmaterial things, the objects of intellectual property law: it is hard to see how a symphony or a technical process—not a physical representation of the idea expressed but the idea itself—might be snuffed out. If one takes a Platonic view of such things, their existence is in a sense perpetual. If one imagines that poems and the like exist only so long as someone knows or thinks them, then they exist until they are forgotten, a result government would seem to need something like a mind-erasing machine to accomplish.

It is likewise hard to see how physical space, the starting point for real property, can be destroyed.¹¹⁴ The amount of physical space to which a given property right entitles a person might change, if, say, that space is defined in relation to boundary markers that move over time.¹¹⁵ Likewise a portion of space might become less valuable—it might not be worth much to own the spot where a penthouse apartment used to sit before razing of the building in which it was located. But, at least within the confines of Newtonian physics, the quantity of physical space around us is fixed. Only its apportionment changes.

The situation may seem more complicated when it comes to physical objects. As a matter of ordinary language, we are accustomed to speaking of things being destroyed.¹¹⁶ But this is not destruction of the kind sufficient to extinguish property. As Christopher Newman observes, “At any given moment in time, we identify a specific thing as a specific quantity of some material, composed of a specific set of subparticles of matter and having a specific form.”¹¹⁷ And the principle of the conservation of matter tells us that matter cannot be destroyed, only rearranged. If I own a painting that someone else sets on fire, the physical material constituting the painting will not cease to exist. It will simply be changed to ashes and smoke. Property law is still prepared to address the status of that material: because the material is mixed with the other particles and gas of the atmosphere, and because the atmosphere is the common property of all people, the physical matter has become a part of that commons. The change in form has led to a rearrangement of property rights. It is as

114. See ALBERT KOCOUREK, *JURAL RELATIONS* 336 (1928) (describing land as “purely a geometrical idea”).

115. See, e.g., *Stop the Beach Renourishment Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010).

116. Cf. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *YALE L.J.* 781, 792–94 (2005) (stating that “property destruction is harder to define than it appears at first glance” and offering illustrations of different conceptions of destruction).

117. Christopher M. Newman, *Transformation in Property and Copyright*, 55 *VILL. L. REV.* 251, 272 (2011).

though I owned a pond that was then emptied into a public reservoir. Though the pond is gone, the water is not, and while the water no longer belongs to me, property law still assigns it to someone.

This is no mere technicality or obscure ontological exercise. It reflects a view that pervades property law, albeit largely without conscious recognition. A dramatic alteration in a given item's form sometimes triggers a change in property rights, but often does not.¹¹⁸ A person still owns an egg after transforming it into an omelet, for instance. Form operates to identify and segregate a particular group of materials from others, and it can provide continuity when one bit of material is substituted for another.¹¹⁹ But changing the form of material, which is what physical destruction of an object accomplishes, does not avoid the property problem. It is simply a conceptual event that may or may not effect a change in rights to the materials captured within the form.

There is one kind of *res* that is genuinely capable of being destroyed, however: an *in personam* legal right. Legal rights are elements of positive law that, by definition, derive their existence from law. If a legal right is revoked as a matter of law, it ceases to exist. And when a legal right ceases to exist, property rights attaching to it cease to exist as well. No one can own it because there is no longer any "it" to own.

Not all legal rights are capable of destruction in this way. As already discussed, ordinary property rights—property rights attaching to things other than laws—are resilient. When the law negates one person's legal authority to control a particular thing's use, it necessarily vests a corresponding degree of control in someone else. For this reason, law cannot destroy property rights in extant things without transferring property rights to another person or body of persons. But law can extinguish other kinds of legal rights, and it can do so without transferring property rights. When an *in personam* obligation is nullified, no property rights are transferred. To be sure, the former duty bearer receives a benefit at the expense of the former right holder. But since the nullified right was not itself a property right, the benefit received is not a property right. And since the right has been nullified, the former duty bearer is not now the owner of the thing that the right holder used to own. That thing, the right, no longer exists.

Property rights attached to personal legal rights are thus a special kind of property. Unique among property rights, they are in certain circumstances capable of being destroyed without giving corresponding property rights to others. Objects are capable only of being reformed and reshaped, not

118. *See id.*

119. Thus a person may own a body of water, even if the molecules that make up the body are constantly changing.

extinguished, and as a result, their destruction always requires an allocation of property rights one way or another.

III.

PROPERTY AND THE CONSTITUTION

Having undertaken a general examination of property as a matter of legal theory, it is time to return to the specifically constitutional problems presented by takings and due process doctrines. The understanding of property this Article has developed can be adapted for constitutional use without great difficulty, though in some cases it will admittedly be much harder to apply the rule than to state it. The question a court should ask to determine whether a person is asserting a property right protected by the Constitution is whether the person was granted legal authority, under a given set of circumstances or at a particular point in time, to control some aspect of the way a particular, identifiable thing is used—authority that could be asserted against anyone else seeking to control that aspect of the thing's use. In everyday language, the question is whether there is something that legally belonged to the person. Was there something that was hers, in whole or in part?

On this definition, a legal right to receive money from a welfare agency, to attend a public school, or to be employed by a government agency is not a property right. There is no object or entity, tangible or otherwise, nor is the entitlement a relationship availing against the world at large. But such a legal right is an object of property to which a property right attaches. It is an identifiable thing that belongs to the holder of the right. To deny a person such a right is, therefore, also to deny a property right. Property is at issue whenever a person is alleging government impairment of a legal right belonging to her. Even though the underlying legal right is not itself a property right, its holder may still invoke the secondary property right that she also holds in the underlying right.

Supreme Court decisions do not seem to have conceptualized “new property” in this way. That is to be expected, since the Court's failure to treat property consistently in constitutional doctrine is the very problem this Article means to resolve. Still, this Article's goal is to harmonize the divergent aspects of prevailing law, not to bulldoze the constitutional landscape. The fear animating Merrill and others is that a single definition of property applicable to all constitutional doctrines will produce results that are neither “normatively defensible” nor consistent with prior decisions.¹²⁰ This concern must be taken seriously.¹²¹ If the Takings Clause must have a narrower compass than the Due Process Clauses, the argument goes, a single definition of property for all of them will therefore either overextend takings protection or underextend due

120. Merrill, *supra* note 19, at 956.

121. *Id.*

process. The flaw in this argument is the unstated minor premise that takings cannot be narrower than due process if property is defined the same way for each. As the next Section will show, the reconceptualization of constitutional property proposed here should not precipitate any dramatic change in the results that the prevailing approach has already produced.

A. *Deprivations and Takings*

While “property” is an element common to the Due Process and Takings Clauses, the kind of protection extended to holders of property rights by those provisions is not. For one thing, they impose different constraints on government—hearings, monetary compensation, and so on—when it interferes with property. More importantly for our purposes, the different protections the Clauses provide are triggered by different kinds of impairments of property rights. Due process comes into play if a person is “deprived” of property, while the just compensation and public use requirements come into play if a person’s property is “taken.” This linguistic difference suggests the possibility of an approach that distinguishes between different forms of interference with property.

The connotations of the verbs “to take” and “to deprive” are different in an important sense.¹²² Deprivation entails any act that prevents a person from enjoying something he or she otherwise would have enjoyed. It is a state of privation, and it may affect everyone equally without benefiting anyone. Taking, at least in its primary sense, has a narrower meaning. To take something entails more than interference with enjoyment. When something is taken it is transferred from one person to another such that one person gains what the other loses—hence the usual opposition of “give and take.”¹²³

122. In his article on constitutional property, Merrill acknowledged that “[t]o deprive someone of property has a broader range of meanings” than “[t]o take property,” but suggested that this difference supports attributing different meanings to the word “property”—something of a non sequitur. Merrill, *supra* note 19, at 983–84. If the ways language differs from provision to provision deserves attention, so too do the ways in which language stays the same.

123. Others have made similar observations about these terms. See John Decker Bristow, E. Enters. v. Apfel: *Is the Court One Step Closer to Unraveling the Takings and Due Process Clauses?*, 77 N.C. L. REV. 1525, 1547 (1999) (“The word ‘taken’ indicates a deprivation on the part of the property owner as well as a benefit or receipt by the government.”); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 710 (1993) (noting that “the Takings Clause appears, on its face, to be narrower in scope, triggered not merely by the owner’s deprivation, but by some kind of appropriation of the property by the government as well.”). As Roger Clegg puts it:

“Taken” is a narrower and more specific verb than “deprive,” which appears in the immediately preceding clause in the Fifth Amendment. . . . This is because “taken” connotes property leaving one person’s hands and becoming the property of another. Deprivation has no such connotation. Thus if a right in the property owner’s bundle is simply extinguished, it might plausibly be argued that, while a deprivation has been effected, a taking has not.

Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 535–36 (1995). Clegg, however, goes on to argue that there is “great deal of logic in insisting on payment of just

Applying this view to the constitutional text suggests that depriving a person of property, whether for substantive or procedural due process purposes, ought to mean the person is denied a claimed property right. Taking property, by contrast, ought to refer only to situations where a property right is transferred from one person to another.¹²⁴

This reading is supported by a number of other considerations. For one thing, there is the surrounding text. The Takings Clause speaks of taking property “for public use,” suggesting the Clause is implicated only when someone else—the public—receives rights in the property at issue.¹²⁵ There is no similar language in the Due Process Clauses.

A reading along these lines also finds some support in evidence of eighteenth-century usage. The 1789 edition of Thomas Sheridan’s popular

compensation when the government has taken private property and is itself using it, and in not requiring such payment when the government has simply outlawed the use of the property.” *Id.* at 543; see also Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1079–80 (1993). Clegg is right to focus on use by another as a prerequisite for a taking, but what he fails to appreciate is that, strictly speaking, outlawing the use of property shifts the right to decide how the property shall be used from its owner to the government. Deciding how *not* to use property is as much a use as deciding how it shall be used. (It appears that Clegg would recognize the concept of regulatory takings only when those regulations are something like the equivalent of an affirmative equitable servitude, but not when they resemble a negative one.) If the government seizes private property simply to set it aside as a nature preserve that no one would be permitted to enter, it would still seem like an appropriation of the sort the Takings Clause protects against. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). At any rate, his observation that both the text and the logic of the Takings Clause require some kind of transfer of ownership prerogatives is sound, even if his conception of those prerogatives is too cramped.

Bristow, meanwhile, argues that the Takings Clause should only apply where the government transfers private wealth to itself and not where it transfers property rights from one private party to another. See Bristow, *supra*, at 16, 47–48. This reading is perverse, given the hostility of the Founders to “special” legislation that transfers property between private parties. Moreover, it radically undermines the logic of the Court’s willingness to uphold such transfers, namely, that they have a sufficiently public purpose and therefore are not naked *A-to-B* transfers. See *Pa. Coal v. Mahon*, 260 U.S. 393, 415 (1922) (“The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.”).

124. Dean Treanor unintentionally acknowledges this when he writes:

If I tell my daughter Katherine that she cannot play with her ball in the apartment, she will not accuse me of having “taken” her ball (or of having “taken” anything else, for that matter). She has been deprived of something of value to her: there is nothing she likes better than playing ball in the apartment. But we don’t think of this prohibition as a taking of property.

William Michael Treanor, *Supreme Neglect of Text and History*, 107 MICH. L. REV. 1059 1067–68 (2009). Treanor’s point is not to distinguish takings from deprivations, but to argue that takings must involve physical possession. In that respect, it is worth noting that his characterization is not entirely accurate, since what Katherine loses is her right to use the ball, not just the ball. Simply as a matter of ordinary usage, it seems strained to imagine that takings must involve physical possession. One person can take property from another without ever physically possessing it by, for instance, embezzling money, copying an idea, or passing fraudulent documents in order to secure title to the other’s property. At any rate, Dean Treanor is certainly right that the Constitution’s actual choice of verbs is important when he observes that there is a reason we refer to the “Takings Clause” and not the “Property Clause.” See William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633, 634 (2008).

125. To be sure, there are senses of the verb “to take” that do not require a transfer, but as Clegg notes, the phrase “for public use” makes them especially unapt glosses on the meaning of the Takings Clause. See Clegg, *supra* note 123, at 536.

dictionary defines the verb “to take” as “to receive what is offered, to seize what is not given, to receive with good or ill-will; to lay hold on, to catch by surprize [sic] or artifice; to make prisoner” and it defines a “taking” as “seizure” and “distress.”¹²⁶ These are all acts or circumstances in which the emphasis is as much on one person’s gaining a thing as on another’s loss of it. In contrast, Sheridan defines the verb “to deprive” as meaning “to bereave of a thing; to put out of office.”¹²⁷ Here the emphasis is on loss, no matter how it comes about, rather than on appropriation by another. Sheridan’s definition is particularly helpful for our purposes because he provides the case of a clergyman who loses his position as an example of a deprivation. A position in the Church of England was (and is) a government job, and the right to a government job is today considered “new property.” Under Sheridan’s definitions, revocation of such a right would be a deprivation but not a taking, at least if the position were not immediately awarded to someone else.

This reading can also be justified in light of the perceived purposes of the Due Process and Takings Clauses and the received learning about their adopters’ outlook. The general concerns thought to animate the Due Process Clauses place primary emphasis on the injury to holders of property rights and focus much less on benefits received at the expense of property holders. Historically, for example, “due process of law” may have expressed separation-of-powers principles, forbidding extralegal interference with property by government officials.¹²⁸ In modern times, due process is said to forbid “arbitrary” government action.¹²⁹ In situations where property claims are tested

126. See THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1789).

127. *Id.*

128. See generally Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012); see also DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, 272 (1985) (“[C]onsiderable historical evidence supports the position that ‘due process of law’ was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law.”); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 511, 522 (1997). It should be noted, however, that due process was often seen as a restriction on “partial” legislation—legislation that sought to redistribute as an end in itself. See, e.g., *Loan Ass’n v. Topeka*, 87 U.S. 655, 663 (1874).

129. See, e.g., *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 559 (1956) (describing “protection of the individual against arbitrary action” as “the very essence of due process”). I leave aside those aspects of substantive due process incorporating what are considered fundamental freedoms that government cannot abridge, such as the rights articulated in the first eight amendments to the Constitution, although it might be possible to characterize these as “arbitrary” forms of government action too. Cf. James Y. Stern, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1554–56 (2008) (suggesting *Lochner*-era due process decisions may have been grounded in social compact theories that rendered certain government action restricting contractual freedom or redistributing property ultra vires and therefore “arbitrary”). Since these limitations are traditionally considered part of the “liberty” protected by the due process clauses, however, we may set them aside in the property context. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 707 (1931); see also *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (describing application of equal protection principles against

against general laws, due process requires safeguards like notice of any legal proceedings in which such determinations are to take place¹³⁰ and an opportunity for those affected to make their case.¹³¹ Due process has also been seen as forbidding certain forms of retroactive legislation and as disallowing discretionary jury awards of punitive damages that significantly outstrip a plaintiff's injury.¹³² Government may well find it profitable to act in a manner inconsistent with these principles, but the principles themselves do not require that government benefit at a property holder's expense. The view of due process that emerges focuses on the legality or perceived fairness of the government's treatment of the person as such. The concerns that may be said to animate due process protection are not limited to situations in which one party acquires property belonging to another.¹³³ They come into play whenever the government denies a person's claimed rights.

The Takings Clause, by contrast, suggests a greater concern for benefits received at the expense of another. The Takings Clause has been thought to have roots in the reaction to practices like the British Army's quartering soldiers and commandeering supplies during the Revolutionary War,¹³⁴ the later confiscation of loyalist property, and the taking of land for the construction of public roads.¹³⁵ These are all situations in which—consistent with “public use” language—ownership of property is transferred from one party to another. The Clause is founded on a simple quid pro quo notion of justice: government must pay for what it *gets*.

The Takings Clause has also been thought to embody a principle of impartiality among the citizenry. Consider the proposition advanced during the founding generation that a law that “takes property from A. and gives it to B.”

federal government via Fifth Amendment Due Process Clause (so-called reverse incorporation) as a gloss on due process “liberty”).

130. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Walker v. Hutchinson*, 352 U.S. 112, 115–17 (1956).

131. See *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976).

132. See *E. Enters. v. Apfel*, 269 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment); *BMW of N. Am. v. Gore*, 517 U.S. 559, 584–85 (1996); see also *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1925) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1142–46 (Ohio 2006) (finding eminent domain statute inconsistent with due process because it is excessively vague).

133. In terms of doctrinal operation, due process does not disclaim any consideration of the benefits received at the expense of a person alleging a property right. See, e.g., *Mathews*, 424 U.S. at 335. But those benefits seem more a reflection of limitations on due process protection, rather than of the kinds of situations that trigger due process concerns.

134. See 1 WILLIAM BLACKSTONE, COMMENTARIES, app. at 305–06 (St. George Tucker ed., 1803); see also Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1289–90 (2002).

135. See William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701–10 (1985).

violates “the great first principles of the social compact.”¹³⁶ The Takings Clause was conceived by James Madison, who had been appalled by disregard for the “sanctity of property” evident during the post-Revolutionary period expressed in, for example, legislative measures designed to aid debtors at the expense of creditors.¹³⁷ At the time the Takings Clause was ratified and throughout the nineteenth century, redistribution of property simply to benefit one private person at another’s expense was generally considered illegitimate.¹³⁸

There are echoes of these themes in modern takings decisions. The rationale underlying the “public purpose” requirement is said to be that “the

136. *Calder v. Bull*, 3 U.S. 386, 388 (1798); *see also* *Wilkinson v. Leland*, 27 U.S. 627, 658 (1829) (“We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.”). Timothy Sandefur associates this principle with Madisonian ideas grounded in Locke:

In republican theory, the power to take property for public use rests, not on the government’s right to exact support from subjects without their consent, but instead on the rights of all the people in the society. The majority may rightfully do only what the people can rightfully do unanimously. Since people have no right to steal from each other in the State of Nature, they cannot give government that right, or justify theft by compact.

Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use,”* 32 SW. U. L. REV. 569, 584 (2003); *see also* Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 893 (2004) (“[T]he social compact treats government as a partnership, and a partnership would defy its organizing principles if it forced one partner to sacrifice his property for the benefit of another.”).

137. Letter from James Madison to Thomas Jefferson (1788), in 11 THE PAPERS OF JAMES MADISON 712 (Robert Allen Rutland & Charles F. Hobson eds., 1979); *see also* Treanor, *supra* note 135, at 701–10. Treanor argues that although Madison was driven by antipathy toward legislation favoring unpropertied “factions” over the propertied and although he saw the Takings Clause as a way of instructing the people on the importance of property, he did not see the Takings Clause as a legal constraint upon redistributive measures. *Id.* at 711. It is enough for this Article’s purposes that such transfers are a concern the Takings Clause is meant to address, regardless of the mechanism by which it was meant to do so. We are not looking to reinvent the doctrinal wheel, and Madison’s personal intentions regarding the text are not controlling in any event. Treanor also contends that “[a]t times in his career . . . Madison appears to have moved beyond the position that redistributive consequences were a normal consequence of governmental actions, and to have favored government actions that had redistributive objects, if that redistribution accorded with republican ends.” William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 844 (1995). But even if Madison unqualifiedly endorsed redistribution when it could be justified in republican terms, he would have remained opposed to redistributions that could not be so justified. I argue only that the Takings Clause should be understood to be concerned with at least some transfers of property rights, not necessarily all such transfers.

138. *See* Shaun A. Goho, *Process-Oriented Review and the Original Understanding of the Public Use Requirement*, 38 SW. L. REV. 37, 76 (describing the Takings Clause as designed in part to prevent “taking the property of one person and giving it to another for no reason other than the government’s preference for the second person”). Some have challenged the Supreme Court’s interpretation of the “public use” provision of the Takings Clause. *See* Harrington, *supra* note 134, at 1248 (arguing that the reference to public use was meant to distinguish compensable takings from noncompensable taxes, fines, and forfeitures). Even if Harrington is correct, however, it seems clear enough that there was general hostility to forced transfers of property from one person to another simply to advance the private interests of the recipient. For much of the nineteenth century, the *A-to-B* limitation was largely enforced as a matter of due process. *See, e.g.,* *Loan Ass’n v. Topeka*, 87 U.S. 655, 663 (1874).

sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”¹³⁹ Furthermore, although American law has a significantly redistributive component today, the Takings Clause is still accounted for as a way of ensuring that some members of society are not singled out to bear the burdens properly allocated to society at large.¹⁴⁰ This benefits-and-burdens conception of the Takings Clause, like the *A-to-B* prohibition, makes the receipt of goods by some at the expense of others its organizing idea. As all these examples show, concerns about transfers pervade the way takings doctrine is understood.

Finally, it is worth noting that there is already one sense in which “deprive” seems to have a broader meaning than “take[.]” in the Constitution’s property clauses. There is no taking if a claimant was wrong about having any right to the property claimed—if, for example, a claimant litigates with his or her neighbor over the location of the boundary between their properties and loses.¹⁴¹ The claimant is nonetheless deprived of property because the claimant is denied an asserted property right. The claimant is entitled to whatever process is constitutionally due to prove the asserted claim.¹⁴² When a person is merely deprived of property by virtue of being judged not to be the property’s true owner, however, there is no takings problem because the deprivation does not transfer the property right to someone else—she never had it to begin with.

And there is at least one other way in which the category of actions constituting constitutional deprivations of property is broader than the category constituting takings. A deprivation-without-taking can also occur if a person holds a valid property right but the underlying property disappears, resulting in the loss of property rights without a corresponding gain to anyone else. In most cases, this second scenario would seem impossible. As this Article has shown, to terminate one person’s property rights in such property is to confer new ones

139. *Kelo v. City of New London*, 545 U.S. 469, 477, 480 (2005).

140. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (1992) (“The Just Compensation Clause was 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.”) (citation omitted).

141. Thus the otherwise fractured Court in *Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010), was in complete agreement that a judicial decision “consistent with . . . background principles of state property law” cannot be a taking. *Id.* at 2611–12.

142. *See id.* (accepting applicability of procedural due process); *see also Carey v. Piphus*, 435 U.S. 247, 266 (1978) (stating that “the right to procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions” and concluding student suspended from school without necessary hearing would be denied property without due process of law even if suspension was legally proper); *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972) (“It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing . . .”). One might view this as simply an epistemic problem, inasmuch as the validity of the claim cannot be determined until there has been as much process as would be appropriate if the claim were indeed valid. This understanding is undercut, however, by the availability of damages for the denial of due process even where the underlying claim is ultimately shown to be meritless. *See Piphus*, 435 U.S. at 266–67.

on someone else—another person or persons, government, or the public at large. If the property exists, then property rights exist, and, ordinarily, government cannot terminate the existence of the property itself. But again, the property right one has in one's legal rights is an exception to this rule. Positive legal rights, unlike all other things that can be owned, are created and sustained by law. Thus, while the government's decision that *A* no longer owns Blackacre necessarily requires that the rights *A* once enjoyed shift to someone else's hands, its decision that *A* is no longer entitled to receive welfare assistance does not transfer *A*'s legal right to someone else. No property right remains because there is no property, no res, left to speak of. The property—*A*'s legal claim upon the government—ceases to exist, and with it, *A*'s property right in the claim. *A* is deprived of *A*'s right to welfare, but *A*'s right is not taken.

Given this reading, there is no need to manipulate the meaning of “property” to avoid claims for compensation when entitlement schemes are reformed, government employment ended, and so on. The termination of a legal entitlement triggers due process, consistent with the legacy of the due process revolution of the 1970s. But it does not give rise to a takings claim since there has been no redistribution of property rights.

Note, however, that this conclusion is not limited to “new property” entitlements. It holds for any in personam obligation.¹⁴³ Thus, for example, while the government's determination that the owner of an unsecured bond must give it to someone else would constitute a taking, the government's decision that the bond is simply void would not. There might be a possible claim for restitution of any property provided as consideration, if it can be traced.¹⁴⁴ But as a general matter, extinguishment of an in personam right removes property from the picture. Note, too, that “new property” does receive takings protection in certain situations. Even if a legal right is purely in personam, it is still “taken” if it can be said to have been assigned to someone else, rather than being revoked altogether. On this view, there is as much a taking when the government transfers *A*'s taxi medallion to *B* as when it transfers *B*'s corporate bonds to *A*. If the right still exists, but it now belongs to someone else, the Takings Clause is implicated.

B. Some Objections and Some Replies

There is no magic formula that will unravel the many mysteries of property law's complex architecture. The approach proposed here does not

143. This raises an important point about the imposition of personal liability. So long as such liability is abstract and does not create rights to any asset in particular, there is no transfer of property rights that occurs and thus no taking. Because the person subject to the liability has lost the right not to have to pay the person to whom she has suddenly become indebted, a right to which she had a property claim, she has suffered a deprivation.

144. *Cf.* *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 623–24 (2000) (awarding restitution as a matter of contract law where federal government repudiates contract).

purport to assimilate property perfectly, even as a purely formal institution, let alone a social one, into the framework of constitutional law. That said, in a world of least-worsts, the forgoing marks an improvement over the status quo and provides a measure of theoretical and analytic consistency that has so far been absent. In this regard, it is important to address the principal objections to the constitutional property framework proposed here. I will discuss three such challenges.

1. *Analytic Error*

The first potential objection is that the argument is mistaken as an analytic matter. Termination of an in personam right, a critic might argue, is as much a transfer of rights between parties as is a reassignment of ordinary property rights. Declaring that an unsecured in personam debt is unenforceable, for example, relieves the debtor of a debt at the expense of the creditor.¹⁴⁵

This response rests upon a flawed analogy to property rights. Consider a typical breach of contract suit. If *A* sues *B* for \$100 in damages and loses, *A* does not then owe \$100 to *B*. The opposite of *B*'s having a duty to pay *A* \$100 is not *A* having a duty to pay \$100 to *B*; it is simply *B*'s *not* having a duty to pay \$100 to *A*.¹⁴⁶ *A* would have a duty not to try and appropriate \$100 from *B*, but that duty is the creation of property law, not contract. It is simply the backdrop against which the law of contract operates, and when the law of contract ceases to operate, the background is all that remains. *B* has rights in rem to his or her possessions, including bank accounts, and that right is as good against the rest of the world as it is against *A*. But from the standpoint of contract law, there is nothing more to be said. Contract law is essentially personal and transactional, and if there is no transaction, there is no contract right.

The structure of property law is quite different. Imagine a garden-variety ownership dispute—an argument over the location of the border between lands owned by two neighbors, or a homerun baseball caught by one spectator only after another one dropped it, or a jewel lost by its owner and found by a chimneysweep. In these sorts of situations, an affirmative and exclusive right of control will be assigned to one party with a corresponding duty of obeisance placed upon the other. The question is, who gets the right? There is no doubt that someone will. If the right, by its terms, ought to be held by one party but is instead given to the other, it has been transferred.

Not all property disputes involve ownership contests, of course, and another way of framing the analytic objection thus arises. A critic who accepts

145. Cf. GEORG W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 39 (T.M. Knox trans., 1967) (1821) (“[*Jus ad personam* in its essence is *jus ad rem*, *rem* being taken here in its general sense as anything external to my freedom, including even my body and my life.”).

146. See Hohfeld, *supra* note 82, at 710 (positing “no-rights” as the “jural opposite” of “claims”); see also STEPHEN R. MUNZER, A THEORY OF PROPERTY 19 (1990).

that no transfer occurs when in personam rights are extinguished might argue that, by the same token, no transfer occurs when ownership rights are invalidated—that is, when private property is made public. This again overlooks the difference between property and other kinds of rights. It is true that if Blackacre, the property of *O*, is suddenly declared common property or *res nullius*, *O* ceases to be the owner without anyone else becoming the owner in *O*'s stead. Ownership, in the sense of a right of undivided control over Blackacre, has indeed disappeared. But Blackacre has not. And legal control over Blackacre still exists, even though it is now dispersed thinly and widely. The rest of the world, in the aggregate, has benefitted at *O*'s expense—not in monetary value or utility, but in rights. The rights it has acquired, and the rights *O* has lost, are property rights, rights to determine what is to be done with Blackacre. A transfer of property rights has still taken place. This is the principle of resilience. While in personam obligations vanish in a puff of smoke when the government declares them unenforceable, property rights just change hands. There is no escaping the problem of allocation so long as there is a thing to be allocated.

2. *Overlooking Value*

A second general objection to the scheme proposed here is that it gives the Takings Clause too little reach by inadequately accounting for value, wealth, or material welfare.¹⁴⁷ What matters, it might be argued, is not whether a person has been denied a right with the formal characteristics of an *in rem* relationship, but that the person has been made materially worse off.¹⁴⁸ Thus the Takings Clause should protect new-property government benefits or private law in personam rights like those arising from contract law, or perhaps both. Individuals rely on such rights, and those reliance interests should not be disrupted. Moreover, to the extent the rights at issue resemble common law private rights, failure to extend them takings protection undermines incentives to maximize social wealth and strips individuals of what they have justly earned.

It is true that value is an important aspect of property law. A person's material welfare largely derives from the sum total of all that belongs to him, including whatever in personam rights he has. Although a property right does not guarantee value to its holder—ownership of worthless property is worthless—a property right is generally a precondition to appropriating value where it does exist.

147. Cf. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 604–05 (2005) (arguing for “value theory” of property in takings law).

148. See, e.g., *United States v. 508 Depot St.*, 964 F.2d 814, 818 (1992) (“Legal niceties such as *in rem* and *in personam* mean little to individuals faced with losing important and/or valuable assets.”).

The approach outlined here does not eliminate value from the takings inquiry. Market value can and does serve as a way to distinguish between alterations of property rights that rise to the level of compensable takings and those that do not.¹⁴⁹ It also provides the basic metric for determining just compensation.¹⁵⁰ More to the point, since property rights are the vessel in which much wealth is stored, protecting property rights in the manner described here does much to protect personal value. All property other than in personam rights is invariably protected by the Takings Clause,¹⁵¹ and in personam rights are still protected against reallocation.

But while this approach by no means excludes value, welfare, wealth, and the like from the equation, such considerations are not the appropriate touchstone for constitutional property doctrine. Property—the body of rules concerning ownership, use, and possession of things—is distinct from personal well-being, even if it is closely related. As a result, there are manifold difficulties with an approach centered on value.

Value standing alone is a wholly unsatisfactory foundation for takings law. As an initial matter, it is worth noting the text of the Takings Clause makes it clear that a taking of private property is permissible if just compensation is provided, implying that compensation does not negate or undo a taking. Compensation, in other words, is a substitute for the property that is taken, not property itself. The Takings Clause conceives of property as rights in actual things, not rights to their value. Current doctrine reflects this outlook. Government action that causes a drop in the market value of an asset without infringing formal property rights generally cannot support a takings claim.¹⁵² The Supreme Court has also been clear that terminating government benefits does not trigger takings protection, no matter how valuable those rights may be to their recipients.¹⁵³ And the “entitlements” approach to property that has guided the due process revolution since *Roth* would be incompatible with an understanding of property as value or welfare *simpliciter*.¹⁵⁴

149. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

150. See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

151. How much protection is another question. See *supra* note 31.

152. See, e.g., *Kirby Forest Indus. v. United States*, 467 U.S. 1, 15 (1984) (finding that an impairment of market value was not a taking); see also *Lucas*, 505 U.S. at 1027–28 n.14; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978); *United States v. Fuller*, 409 U.S. 488, 492 (1973); Amnon Lehavi, *The Taking/Taxing Taxonomy*, 88 TEX. L. REV. 1235, 1266–75 (2010) (describing the “persisting leitmotif in U.S. property law, by which formal property rights, and not value, are the subject of legal protection”).

153. See *Bowen v. Gilliard*, 483 U.S. 587, 605 (1987); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980); *Richardson v. Belcher*, 404 U.S. 78 (1971); *Flemming v. Nestor*, 363 U.S. 603 (1960); Merrill, *supra* note 19, at 958 (“[W]hen the courts have been confronted with claims that ‘new property’ interests such as Social Security or welfare benefits are entitled to substantive constitutional protection, those claims have been rejected out of hand.”).

154. Cf. *Bd. of Regents v. Roth*, 408 U.S. 564, 584–88 (1972) (Marshall, J., dissenting) (arguing against entitlements test).

But more than doctrine and practice stand in the way. Conceiving of property as economic value or well-being makes the constitutional question wholly dependent on a potentially complex empirical determination, requiring the kind of inquiry courts are poorly situated to conduct, and, what is more, a determination subject to constant fluctuation.¹⁵⁵ Indeed, making value the focus of constitutional property conflicts with notions of judicial competence and the separation of powers limitations in a fundamental way. If any government policy that has significant negative economic consequences for a person is a taking regardless of whether it abridges his or her legal rights, it appears the Takings Clause obliges government to maximize every person's material circumstances at every possible moment. Judicial policing of this obligation would amount to a kind of perpetual second-guessing of every government policy on grounds, essentially, of their wisdom. Such an understanding quickly descends into absurdity. Insofar as government policies generated inflation and thereby reduced the value of a person's cash, for example, a pure value conception of constitutional property would presumably require government to compensate for that lost value, thereby requiring more cash and producing more inflation. All of which is to say that value alone cannot structure the way constitutional property is conceived.

What about a less radical version of the value objection? A critic might accept a requirement of demonstrating the infringement of a preexisting entitlement or "vested right," but insist that any such impairment be treated as a taking, regardless of whether it entails the transfer of property rights from one party to another. This approach uses legal entitlements as a proxy for value. Some measure of formalism is restored, but individual material welfare remains the central idea.

While somewhat less dramatic in consequence, this view would still entitle any recipient of government benefits to just compensation in the event of a benefits termination, a result current doctrine rules out.¹⁵⁶ It also seems inconsistent with the standard rationales for the Takings Clause to the extent it prevents changes in property rights altogether. The just compensation requirement, for example, is said to force government to internalize costs its policies impose on individuals or distribute the costs more widely.¹⁵⁷ But in the case of new property, it does more than shift the costs of the government's policy; it effectively prevents any change whatsoever. Similarly, if it is argued

155. A similar principle operates in tax law: a taxpayer cannot claim a loss whenever the taxpayer's property loses value; the property must be sold or otherwise disposed of for the loss to be realized. *See Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554 (1991); Rev. Ruling 84-145, 1984-2 C.B. 47.

156. *See supra* note 153.

157. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (The Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.").

that the Takings Clause is meant to protect against reallocating social wealth, “new property” beneficiaries are on shaky ground; while termination of government benefits might be said to enrich the public at beneficiaries’ expense, the benefits themselves are by the same token forms of wealth redistribution.

An even narrower variant of the value objection might concede a lack of takings protection for entitlements to government benefits, but nonetheless insist that the Takings Clause still protect in personam private rights, contract rights most especially. Again, however, this position cannot be squared with current doctrine. It should also be noted that while the Constitution bars states from “impairing the obligation of contracts,” it places no such limitation on the federal government.¹⁵⁸ Instead, it explicitly gives Congress the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”¹⁵⁹ In other words, the federal government has at least some power to impair in personam contractual obligations while states are already forbidden to do so.¹⁶⁰ Takings protection for in personam contract claims arguably would negate a constitutionally conferred federal power and would be redundant as a limitation upon states.

As it happens, in fact, Supreme Court doctrine concerning bankruptcy acknowledges something like the distinction between takings and deprivations urged here. There is no question creditors are entitled to due process in bankruptcy proceedings, no matter what the form of their claim against the bankrupt, but takings protection is available only where a creditor has a claim secured by a specific asset.¹⁶¹ As we have seen, destroying a security interest—a right in rem applicable against the world, including subsequent purchasers—would transfer the security holder’s property rights to the debtor or the debtor’s creditors and is properly viewed as a taking. An unsecured in personam obligation, however, though property, is not a property right and can be impaired without implicating the Takings Clause.¹⁶²

158. See Michael McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 292 (1988) (stating that “the bankruptcy clause is evidence that the Framers believed national action impairing contractual rights might be necessary”).

159. U.S. CONST. art. I, § 8.

160. See *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (stating that “a chose in action is a constitutionally recognized property interest” and therefore entitled to due process protection); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (“[C]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.”).

161. See *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

162. For an overview of these issues, see Julia Patterson Forrester, *Bankruptcy Takings*, 51 FLA. L. REV. 851 (1999); James Steven Rogers, *The Impairment of Secured Creditors’ Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973 (1983). Bankruptcy claims—the rights against the bankrupt estate created by federal bankruptcy law—may themselves be seen as constitutional property. Cf. Joseph

This distinction is no empty formalism. Where distinct assets are concerned, the allocational function of property law is implicated, and secured claims can be honored without any need to discount them. Property law establishes something like a bankruptcy-style set of priority rules for control of each asset—as in, for instance, the complex rules governing the succession of future interests.¹⁶³ True bankruptcy, by contrast, testifies to the reality that in personam obligations are often impossible to fulfill on their own terms, with the result that unsecured creditors can only be repaid in “little tiny bankruptcy dollars.”¹⁶⁴ Their claims are personal, abstract, and contingent; when the debtor is insolvent, the government cannot accomplish what the debtor could not do—it cannot extract blood from a turnip. Because it simply is not possible to avoid compromising these kinds of in personam obligations, they cannot be treated as property rights that entitle a creditor to compensation from the government if a debtor becomes insolvent.

3. *Accepting the Due Process Revolution*

A final objection to this Article's approach to constitutional property is that it extends due process too far by treating “new property” as property. This argument could reflect a preference for contractual and other traditional in personam private rights, based on either utilitarian or moral understandings of private law.¹⁶⁵ It could also arise from a judgment that procedural due process protection for government benefits is bad policy out of concern that it will drain resources that might otherwise be made available to beneficiaries.¹⁶⁶

Yet again, however, precedent stands in the way.¹⁶⁷ And even accepting the proposition that a legal entitlement to receive “largess,”¹⁶⁸ a “privilege,”¹⁶⁹

Pace, Note, *Bankruptcy as Constitutional Property: Using Statutory Entitlement Theory to Abrogate State Sovereign Immunity*, 119 YALE L.J. 1568, 1608–15 (2010) (discussing bankruptcy claims as property for procedural due process purposes). Indeed, they might be seen not only as entitlements, i.e., property, but as property rights if the bankruptcy estate as a whole is viewed as a res. See Adler, *supra* note 105, at 206. That would provide an important and valuable protection to creditors in bankruptcy. But it would differ significantly in consequence from the conclusion that unsecured contractual claims against the bankrupt are property rights.

163. Cf. Honoré, *supra* note 71, at 126–28 (describing the “residuary” character of traditional ownership rights).

164. In re Child World, Inc., 147 B.R. 847, 850 (Bankr. S.D.N.Y. 1992).

165. See, e.g., Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 13 (1983). It may also be that “old property” is a better vehicle for the protection of civil liberty than “new.” See *id.* For sophisticated variations on these ideas, see Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919, 937–50 (2000).

166. See *Goldberg v. Kelly*, 397 U.S. 254, 278–79 (1970) (Black, J., dissenting).

167. See *supra* note 11 and accompanying text.

168. See Reich, *supra* note 11, at 733.

169. See *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972); William W. Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439 (1968).

or a “gratuity”¹⁷⁰ should be distinguished for constitutional purposes from other kinds of legal rights, the distinction is not always so easy to make.¹⁷¹ But more fundamentally, the position that traditional private rights may be treated as property while other entitlements may not presents difficulties from the standpoint of how due process is conceived. Whatever else due process may require, its most basic demand is simple legality—a person may not be stripped of property other than by the terms that positive law permits.¹⁷² “Vested rights” may be abrogated, but the rule of law demands that they not be abrogated except in accordance with a valid law authorizing abrogation. To the extent due process expresses this rule of law idea, there is a good argument that it applies to any individual entitlement, regardless of what it is that the beneficiary of the entitlement is entitled to.

Madison wrote that “as a man is said to have a right to his property, he may be equally said to have a property in his rights.”¹⁷³ In a sense, this statement points to an important analytic truth: what makes a legal right distinct from any other legal creation is that a right is owned by its holder, who alone decides how it is to be used. A person is legally connected to her rights in much the same way she is legally connected to the physical things she owns. Madison was not speaking of government benefits, of course, and he might well have disapproved of the modern welfare state. But he might also have accepted that valid legal rights are property, no matter their source or purpose. Although Madison considered slavery a moral evil, for instance, he nonetheless believed government manumission of slaves would take property rights from the slave-owners, so that the former owners would be entitled to just compensation under the Takings Clause.¹⁷⁴

170. See *Goldberg*, 397 U.S. at 262 n.8, 272 (Black, J., dissenting).

171. Cf. *Williams*, *supra* note 165, at 22 (arguing that government benefits should be treated as property for due process purposes in certain cases where government expenditures have crowded out private market provision of equivalent goods; when the benefits are seen as implicitly granted in exchange for tax revenues; and in licensing cases in which a license grants permission to do something otherwise legally prohibited).

172. See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 420–21 (2010) (discussing the view that “[a]t their most basic level, the Due Process Clauses may require nothing more than that judges and executive officers act in accordance with duly established law, as set forth in legislative enactments and in other provisions of the Constitution”); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (stating that the President’s power to execute the law “must be matched against words of the Fifth Amendment that ‘No person shall be . . . deprived of life, liberty or property, without due process of law’ One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.”).

173. James Madison, *Property*, in JAMES MADISON: WRITINGS 515 (Jack N. Rakove ed., 1999).

174. Letter from James Madison to Robert J. Evans (June 15, 1819), in 8 THE WRITINGS OF JAMES MADISON 445 (Gaillard Hunt ed., 1908) (“[W]hatever may be the intrinsic character of that description of property, it is one known to the constitution, and, as such could not be constitutionally taken away without just compensation.”).

At any rate, the basic equilibrium established in modern constitutional law is one of neutrality toward the welfare state.¹⁷⁵ Government benefits are neither constitutionally forbidden nor constitutionally compelled. Consistent with that equilibrium, and with a commitment to positive law as a way to avoid becoming mired in deep disagreements over distributional ethics, it may be appropriate to treat rights to government benefits as the right holder's property, just like corporate bonds, bank accounts, and other in personam legal claims.¹⁷⁶ If the provision of public monies through individual entitlements is legitimate, then those entitlements are legal rights like any others. They should be viewed as property within the meaning of the Constitution's property clauses and protected by the shield of due process from unlawful divestiture.

CONCLUSION

This Article has presented a simple picture of property law that largely avoids engaging the profound disagreements among legal theorists—and society generally—concerning the just distribution of wealth. Property law is primarily about conflict over the use of resources. Property rights entail authority to decide how a given thing may be used and take the form of individual entitlements that come at the expense of all others. Incorporating this understanding into the constitutional framework provides a single, theoretically coherent definition of property for purposes of due process and takings doctrines. Notwithstanding the fears of the Supreme Court and commentators, a unified definition of property applicable in different constitutional areas is compatible with the results current doctrine produces.

Property is a basic institution of law. It would be better to define it consistently across constitutional doctrines and to ground divergent constitutional results in sources of constitutional meaning that really do diverge, rather than to suppose property is one thing one moment and something else the next. Those who see too much takings property might do better to reconsider what constitutes a taking or just compensation,¹⁷⁷ those who see too much due process property should focus on the meaning of a deprivation and the requirements of “due process of law.”¹⁷⁸

175. See, e.g., *Nat'l R.R. Passenger Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 453–56 (1985) (stating that, as a matter of due process, “Congress remained free to ‘adju[s]t the burdens and benefits of economic life’ as long as it did so in a manner that was neither arbitrary nor irrational”) (citation omitted); *Bowen v. Gilliard*, 483 U.S. 587, 604 (1987) (“Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level.”).

176. See Madison, *supra* note 173, at 515 (“Government is instituted to protect property of every sort This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.”).

177. See Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964); Michelman, *supra* note 24.

178. See Frank H. Easterbrook, *Substance and Due Process*, 1982 *SUP. CT. REV.* 85 (1982).

The definition developed here is by no means complete,¹⁷⁹ and the definition of property is only one of the significant issues that constitutional property doctrine raises.¹⁸⁰ But the hope is that this account will encourage a clearer and more precise understanding in future attempts to delineate the scope of constitutional property. It also suggests what may be a better way to go about the task of interpreting the Takings and Due Process Clauses' requirements. A renewed emphasis on doctrinal consistency and symmetry would support an approach that, in general, gives the Due Process and Takings Clauses a similar ambit, at least where text and precedent do not militate otherwise. Thus, in deciding whether the government's action should trigger due process protection, one might ask whether the same action, if indeed wrongful, would support a takings claim. Likewise, in deciding whether government action constitutes a taking, one might ask whether that action should be subject to the strictures of due process. Consistency, in other words, may supply a route through the tangled maze of normative argumentation that surrounds the institution of property and reduce the occasions for unfettered moral theorizing.

179. See *supra* note 77; see also, e.g., Jeanne L. Schroeder, *Hegel's Slaves, Blackstone's Objects, and Hohfeld's Ghosts: A Comment on Thomas Russell's Imagery of Slave Auctions*, 18 CARDOZO L. REV. 525, 528 (1996) (discussing property conceptions of human slavery).

180. See *supra* note 31. Ascertaining the content of sources of law said to give rise to property can also be difficult. See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).