

CONSTITUTIONAL PROTECTION FOR PROPERTY RIGHTS AND THE REASONS WHY: DISTRUST REVISITED

FRANK I. MICHELMAN*

INTRODUCTION

A country's constitution, its body of "constitutional" or "higher" law, may contain a "bill" or "charter" of "rights"—a compilation of special guarantees respecting named aspects of personal and associational freedom, authority, and social standing. Lists typically include guarantees respecting faith and conscience, communication and expression, political franchise, security and privacy, equality, due process, and so on. By special guarantees respecting such matters, we mean assurances beyond the general ban a constitution may also contain against interference into personal and social life by legislation that is utterly and incontestably void of any credible, public justification. We do not, however, necessarily mean absolute and unconditional assurances. We may rather mean assurances against non-trivial infringements by the state (or by others with the state's allowance) for which (or for the state's allowance of which by others) the state does not provide a sufficiently convincing justification, in terms of some overriding moral or other social purpose that is served by the infringement or by the law that authorizes or allows it.

Our topic of interest here is the inclusion of property rights among those aspects of personal and associational freedom, authority (and so on) that are covered by special constitutional guarantees. But what, then, are "property" rights—as distinguished, say, from freedom, dignity, privacy, equality, and due process rights? In answer: I use the term "property right" roughly to mean a legally supported power and privilege of control over assets external to the embodied self.¹ Accordingly, when I speak of constitutional protection for property rights, I mean supreme-law protection for (i) defensive claims against (ii) disturbances of proprietary positions and prerogatives that (iii) have been lawfully established under (iv) an extant legal regime that supports private ownership.

* Robert Walmsley University Professor, Harvard University.

1. Externality to a self more expansively construed would be another question. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

We deal here, then, with negative (or “possessive”) as opposed to positive (or “distributive”) rights respecting property.² Our concern is with constitutional guarantees respecting retention and control of assets (and their values) currently recognized as yours, as opposed to guarantees respecting what you will not be suffered at any time, or for long, to go without.³ By “constitutional protection for property rights,” I mean a trumping right of every person to be protected—perhaps not absolutely and unconditionally, but not negligibly, either—against state-engineered losses in lawfully acquired asset-holdings or asset-values.

The question of *constitutional protection for property rights* is obviously not identical to the question of support in a country’s legal system for property rights and private ownership. Constitutional law aside, a society or its leadership may be quite firmly and reliably committed to private property and market-based institutions, and therefore to providing and upholding the sorts of civil and regulatory laws and transactional facilities required to support such institutions: laws prohibiting theft and trespass, for example, in forms gross and subtle; laws bestowing proprietary dignity on non-corporeal claims, or on holdings divided by time or by use; facilities such as deeds registries, land courts, and probate tribunals; and so on.

Consider, now, the case of New Zealand, which offers no higher law protection at all for any personal rights; or of Canada, whose Charter of Rights and Freedoms makes no mention of property rights. Or, for that matter, of the United States, where nominal constitutional protection for property rights⁴ becomes, in the view of many, a paper tiger under prevailing judicial constructions.⁵ Constitutional law aside, no one doubts that the legal systems of these countries all

2. See Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987).

3. Of course, a constitution may also contain guarantees of the latter sort—see, e.g., SOUTH AFRICA CONST. §§ 25(5), 25(7), 26–28—but they are not the concern of this essay.

4. See U.S. CONST. amend. V, XIV (providing guarantees against deprivations of property without due process of law and against takings of property except for public use and with just compensation).

5. See, e.g., Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 46–47 (1992) [hereinafter Epstein, *Distrust*] (referring to a “present state of affairs . . . where there is essentially no constitutional protection of property” as “a mistake of constitutional dimensions”). Epstein wrote that prior to the decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), but that decision supplies no reason for a change of mind. See Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988).

notably support private property and market-based institutions and will continue to do so into an indefinite future.

Our question here is not about “reasons why” for a first-order legislative policy (as we might call it) of cushioning owners against a wide range of redistributive effects of state legislative and other actions. So doing looks like a normal form of respect for private property (the institution), and a legislative policy of respect for private property can draw support from a well-known mix of reasons of political morality and prudence. Our question, though, is about “reasons why” for a *second-order* policy of embedding *in supreme law* a trumping right of every individual to due respect, from first-order (“ordinary”) lawmakers and officials, for the first-order policy of respect and regard for private property. In response to *that* question, one’s initial thought might be that the plainer and more compelling are the reasons for the first-order policy, the less obvious—in a democracy, anyway—will be reasons for the second-order policy of constitutional-legal backup.

Parallel questions can be raised, of course, about any bill-of-rights protection you might care to mention—be it for life or liberty or dignity or expression or privacy or whatever—and parallel rejoinders anticipated.⁶ The precise contents of the doubts and rejoinders will vary from protection to protection and from country to country. My undertaking here will be to provide a highly general typology of rejoinders focused on property-rights protection. By calling the typology “general,” I mean that each rejoinder-type it mentions could potentially be relevant for any country, although (as will become obvious) the actual force of any one or any combination of the rejoinders will vary sharply from country to country, depending on historical, economic, and legal-cultural situation.

All the rejoinders I will suggest to the constitutional protection question for property rights can be brought together under one highly abstract, unifying reason. It seems that any answer will have to draw from the highly general idea that a specific entrenchment in constitutional law, of everyone’s individual right against state-engineered asset-value impairments, is a functional prerequisite (or is at any rate a highly useful device) for securing the moral aims and social benefits that private property and market-based institutions

6. The possible parallelism of rejoinders will become evident in Part III, below.

are meant to capture. Relevant circumstances vary radically from country to country, but—as we shall see—it may always be urged that such is the case, more or less credibly in varying historical conditions.

As a closing introductory word, I note that a typology of “reasons why” for constitutional protection of property rights may bear relevance not only (and maybe not chiefly) for the work of those engaged in the fashioning of constitutional texts, but also (and maybe sometimes mainly) for the work of judges and whoever else is called upon from time to time to construe and apply what appear to be pertinent constitutional texts. I proceed next to a tiny case study designed to illustrate that point and thereby to lay some groundwork for the typology to follow—and designed, as well, to give some attention to the judicial work of Justice Sandra Day O’Connor, the honoree at our conference in Beijing.

I. THE *LINGLE* DECISION

The decision by Justice O’Connor that I want to highlight is the judgment she wrote for a unanimous Supreme Court in 2005, in the case of *Lingle v. Chevron*.⁷ That was a case in which a trial-level court of the United States had decided, first, that a certain scheme of price regulation imposed by the state was economically unsound, and, second, that because of this economic error the state would be required to pay cash compensation to those suffering private economic losses as a result of the price regulations.⁸ The U.S. Supreme Court disagreed. It held that the question of a state’s obligation to compensate private parties for losses resulting to them from a scheme of state regulation of the economy is not to be commingled in that way with the question of the scheme’s economic wisdom. Rather, these are to be approached by courts as entirely separate questions, each subject to a different type of judicial oversight (and the latter to very little of it). To my mind, this opinion for the Court by Justice O’Connor stands as her single most telling contribution to the field of constitutional protection for property rights.

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

8. See *Chevron U.S.A. v. Caetano*, 198 F. Supp. 2d 1182 (2002); *Chevron U.S.A. Inc. v. Caetano*, 57 F. Supp. 2d 1003 (1998). The details are summarized in *Lingle*, 544 U.S. at 532–36.

Whenever the state introduces a new scheme of economic regulation, imposing special legal controls over trade in some economic market, it is likely that some people's private property holdings will suffer a resulting loss in economic value. Let us call this kind of loss to a property owner a "regulatory loss." Our Constitution prohibits the state from taking away anyone's private property for public use, without paying the owner for the property taken.⁹ So the question arises: Does a regulatory loss count as a "taking" of property by the state for which our Constitution requires the state to pay? Our courts have said, in effect, that usually it does not, but in some special cases it does.¹⁰ But then, of course, the question is: Which sorts of cases are those special ones? By the light of what guiding values or principles do we pick those special cases out? That is where the *Lingle* decision comes in.

Over the years, our Supreme Court has explained our Constitution's requirement of compensation to owners for property taken by the state as concerned, at its core, with ensuring that costs occasioned by the state's activities will be spread fairly across the whole society of citizens—thus as driven not by a value of economic efficiency but by a value of civic fairness.¹¹ In line with that idea, the decisive factor for picking out those regulatory losses for which the Constitution demands compensation would always have to be something about the loss itself, whether measured absolutely or relatively to the situations of others¹²: How heavy (acute, debilitating, degrading) is the burdensome effect sustained by the complaining owner? How disproportionate is it to what others bear, or

9. See U.S. CONST. amend. V. This same guarantee has been held applicable to state governments in the United States by force of U.S. CONST. amend XIV, see *Chicago B. & Q. R. Co. v. Chicago*, 126 U.S. 226 (1897).

10. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

11. The routine citation is *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (affirming the purpose of the taking clause 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"). See *Lingle*, 544 U.S. at 537. Compare text accompanying note 11 with Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149, 169–70 (1987) (endorsing the civic rationale for the taking clause, but without suggesting that it is the sole and exclusive, or even the dominant rationale).

12. See *Lingle*, 544 U.S. at 539 (remarking that the Court's tests for treating a regulatory loss as constitutionally demanding of compensation have converged on a focus on "the severity of the burden that government imposes upon private property rights").

may normally expect to bear over a complete lifetime in a market-regulatory political-economic environment?

The message seemed clear, but some confusion nevertheless arose in our courts, owing to some incautiously worded dicta from our Supreme Court, mainly in the year 1980 in a case called *Agins v. Tiburon*,¹³ but also in a few other, earlier cases.¹⁴ Following the *Agins* decision, some of our judges had clothed themselves with a responsibility to treat as a taking of property, for which the state must pay, any loss to an asset-holder resulting from a scheme of regulation found by that judge to reflect a mistake (or perhaps it would be a “clear” mistake) of economic policy in the ordinary sense that the scheme (as the judge concludes from the evidence presented in court) will not work out to any net public economic advantage. According to this view, a judge so finding must treat any resulting regulatory losses to property owners as “takings” of their property for which they have a constitutional right to a monetary compensation from the state, and so must require the state to choose between paying full compensation to all adversely affected property owners or else withdrawing the new regulations from going into effect against those owners.¹⁵

Justice O’Connor’s judgment for the Supreme Court in the *Lingle* case has put a stop to that idea. The *Lingle* ruling sends clear directions to our courts, as follows: The Constitution assigns questions of economic policy for decision by the government and the legislature, not by the judiciary. Therefore, when courts of law are weighing a Constitution-based claim from property owners to compensation for regulatory losses suffered by them, those courts must set aside completely any question about the economic wisdom of the regulation.¹⁶ The courts must focus strictly on the question of whether the losses

13. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The Court wrote that “the application of a [regulatory law] to particular property effects a taking if the [law] does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.” *Id.* at 260 (citations omitted).

14. *See Lingle*, 544 U.S. at 541–42 (recalling these earlier cases and dicta).

15. *See, e.g.*, the lower-court decisions in the *Lingle* case, cited in note 8, *supra*.

16. The *Lingle* decision allows for the possibility of regulatory legislation that is shown to be so plainly and totally devoid of a credible, public justification that it fails the test of “due process of law” and is on that ground to be held unconstitutional. In such a case, however, the sole remedy obtainable from a court would be nullification of the offending legislation. No claim for compensation would arise. *See Lingle*, 544 U.S., at 542–43.

or burdens to the complaining property owners are so large, acute, and disproportionate that those owners cannot in all fairness and justice be denied compensation for those losses.¹⁷

The *Lingle* ruling has obvious importance on a practical level. It steers judges away from using the Constitution's protections for the rights of persons and associations as a basis for overruling the government's judgments regarding economic policy.¹⁸ Additionally, it gets in the way of litigants who might aim to use "takings" litigation as a broad-gauged political strategy of opposition to state regulatory activism.¹⁹ But the *Lingle* ruling also contains some deeper messages from the Supreme Court about the general shape of our constitutional law, and I want to mention two of those.

The first message is, again, about the Constitution's reason for laying down its safeguard against uncompensated takings of property by the state. The reason, as the *Lingle* ruling teaches, does not lie in the pursuit of a technical economic conception of welfare maximization. It rather lies in a concern for fairness, equity, and mutual regard among citizens in their democratic political relations, that is, in their relations as lawmakers to each other. Clarification of this point—that our Constitution protects against privately held asset-value losses (insofar as it does) for the sake of equitable relations among citizens, not for the sake of social welfare maximization (an echo, one might say, of the famous dissenting declaration by Justice Holmes in the *Lochner* case that the Constitution "is not intended to embody [an] economic theory"²⁰) is an important recent marker in the discourse of American constitutional law.

A second, larger message from the *Lingle* decision requires a bit more in the way of explanation. The American Constitution's bill of rights is obviously concerned with protecting certain interests of citizens against dangers of impairment by acts of the state. Now, we can distinguish the general interest every person always has (whether or not making use of privately owned assets) in the freedom to choose

17. See *id.* at 542 (calling the two inquiries "logically distinct" from one another).

18. The *Lingle* Court made plain its rejection of (and indeed its revulsion toward) any such general policy-oversight role for the United States judiciary. See *id.* at 544–45.

19. Compare *Lingle, supra* at 537 (quoting from a prior decision the point that the taking clause is "designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of an otherwise proper interference amounting to a taking").

20. *Lochner v. New York*, 198 U.S. 45, 74, 75 (Holmes, J., dissenting).

and pursue his or her activities and projects without heavy-handed interference from the state, from the interest, special to an owner of property, in the security of the value of that ownership to her. Over the past history of American constitutional law, the idea has sometimes arisen that our Constitution treats the latter sort of interest—of an owner in the security of her ownership and its value—as exceptionally sacrosanct, especially strongly protected, beyond the level of consideration accorded to the more generalized interest each person has in freedom to choose and pursue her own projects and activities in life.²¹ The *Lingle* decision is significant because it cuts strongly against this idea of super-special protection for property and property values. The decision puts the Constitution's protection for a person's asset values back on the same level with protection for a person's general freedoms when this exercise is not directly connected to property ownership.

The point is implicit, not explicit, in Justice O'Connor's *Lingle* opinion, and it may not be immediately self-evident. Therefore, I offer illustration.

Suppose there is some kind of plant crop from which you can manufacture a substance that produces a mild state of pleasurable intoxication when eaten or smoked, and which also can serve as a useful medication against certain human disease conditions. Call this crop cannabis. Suppose this stuff—cannabis—is being widely grown by farmers and sold on the market for a profit, and also is being widely and profitably processed into consumable products by manufacturers. Now suppose the state steps in and totally prohibits any and all production or use of cannabis for any purpose, including medicinal purposes. As a result, some owners of land that had been used for growing crops of cannabis, and some owners of factories where the material was processed for consumption, suffer substantial losses in the economic values of their holdings of land and industrial hardware and software. Some other citizens, who have no external assets or investments at stake but only their bodies and

21. Jennifer Nedelsky has written extensively on the property right's special representation, in American legal culture, of the normative separateness of persons and boundaries around them, most recently in her *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 91–96 (2011); see JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 1–9 (1990).

minds (that is, they had been using cannabis medicinally and recreationally) will have to seek out replacement products. Assume that any discoverable replacements turn out to be more expensive and less effective or benign than the products of cannabis.

Now suppose both groups want to claim that the new law is unconstitutional. The reason both groups give is that the state has not shown—and has not, in all truth, got—any genuine public justification for making the law. The demonstrable fact (so both groups maintain) is that neither unrestricted cultivation of cannabis nor unrestricted production and distribution of marketable manufactures from cannabis causes any more in the way of social harm than do cultivation, processing, and marketing of any of countless other agricultural products (including but by no means limited to grapes and grains grown as raw material for the production of alcoholic beverages). Both groups stand ready with proof in the form of impressive data studies and analyses, which they will present if allowed into court with their claims. Indeed, each group plans to tender in court the exact same studies and expert witnesses.

Now here is one, further fact about American constitutional law. The chances of succeeding with such an evidentiary showing of the regulation's uselessness, when the only constitutionally protected interest you can assert is the simple freedom to obtain products you desire on the market (whether for recreational, medicinal, or any other kind of use) are virtually zero. Any merely, barely, remotely plausible claim by the state to have a genuinely public, regulatory purpose will prevail.²² By contrast, under the doctrine stemming from the *Agins* case (which the Supreme Court finally did away with in *Lingle*), the very same evidence of the uselessness of the regulation would stand a good chance of succeeding when presented by a property owner demanding compensation for a resulting regulatory loss to asset values.²³

22. The point appears to hold quite generally, regardless of whether the use for which the regulated or forbidden product is sought is one, such as the practice of one's religion, that enjoys special constitutional recognition. See *Employment Div. v. Smith*, 484 U.S. 872 (1990). There is an apparently quite narrow exception when the use for which the product is required is constitutionally protected expression *and* the regulation in question specially targets products required and acquired in the course of a publication activity. See *Minnesota Star & Tribune Co. v. Comm'r of Revenue*, 460 U.S. 575 (1983).

23. That is how some American courts had been reading the remark from *Agins* (447 U.S. 255) that the Constitution requires compensation for regulatory losses whenever the causative regulation has not been shown to “substantially advance” a legitimate state interest. See *Lingle*, 544 U.S. at 542 (“The ‘substantially advances’ formula suggests a means-ends test: It

Thus, constitutional protection against losses to asset values would be preferred to constitutional protection against losses to general recreational and (so to speak) medicinal freedom.

Can you see any reason why a constitutional bill of rights should be written or read to produce such an outcome? Any reason why the state should be held to a stricter standard of justification for its regulatory laws when defending them against the claims of asset owners who have suffered a loss in the market values of their assets, than when defending them against the claims of sick people denied access to a cheap and effective medicine, or healthy people denied access to an irreplaceable recreational asset? Justice O'Connor's judgment in the *Lingle* case carries a strong suggestion that our Constitution is not to be understood to have any such effect. And that is indeed a significant development in the long history of American constitutional law.

II. A TYPOLOGY OF REASONS TO PROTECT DEFENSIVE PROPERTY RIGHTS CONSTITUTIONALLY

Before starting on a typology of reasons to protect property rights constitutionally, let us recall more or less exactly what the constitutional protection is for which we want to lay out the possible reasons. Here are the points to bear in mind:

- By “defensive property rights” we mean rights against state-authorized impairments of the reach, security, and value of rights, powers, and privileges attached to legal private ownership of identifiable assets, lawfully obtained.
- By “constitutional protection” for such rights we mean protection commanded by a country's entrenched, “higher” or “supra-legislative” (“constitutional”) laws, but furthermore we mean protection that is *special* in the same sense in which we would say that religious-freedom rights or free-expression rights are specially protected by constitutional law: meaning that the protection exceeds in force and rigor whatever protection the constitution prescribes generally and residually (as a matter, say, of “legality” or “rationality” or “due process”) against any and all regulatory lawmaking that is found to lack even a shred of a plausible pretense to genuine public motivation or justification.

asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose.”).

- We do not, however, necessarily mean that the protection must be the absolute or “hard” protection of a highly formal and largely exceptionless rule against infringement (so that all covered impairments are ipso facto unconstitutional), as opposed to the “softer” form of protection suggested by a “balancing” or “proportionality” regime (so that a showing of a covered impairment puts the state to a burden of showing a sufficiently convincing justification).

I place into three main categories the possible “reasons why” for constitutional protection of property rights as thus defined. I call these categories by the names of **fundamental personal right**, **collective good**, and **necessity**. I have fashioned this threefold categorization specifically with regard to the “reasons why” question for property right protection. It turns out, though—as we shall soon start seeing—to bear a noticeable companionship to the “reasons why” that American jurists have typically produced for our second-order policy of constitutional protection for free-expression rights (as opposed, that is, to the “reasons why” for a strong first-order legislative (and common-law) policy of respecting freedom of expression).

Fundamental personal right. For a number of reasons (which we do not have to sort out meticulously here), one might want to insist that if a Constitution is going to name *any* specified aspects of personal or associational freedom or authority for special protection, that list ought to include whatever such aspects count as the fundamental rights (or interests, as some might prefer to say) of persons. Thus, one reason that we regularly give for the U.S. Constitution’s protection of expressive liberty is that the freedom to speak one’s mind and thoughts to others counts for a great deal in putting together a worthy, fruitful, or respect-worthy human life.²⁴ Something similar might be proposed for the interest of a person in the retention, as against organized social invasion or impairment, of proprietary prerogatives, benefits, and values that compose one’s lawfully acquired asset portfolio at any given time. (It is not my purpose here to say whether such a proposition is philosophically or anthropologically supportable. For now, just suppose that it is.)

Collective good. In standard American constitutional legal discourse, free-expression rights are highly valued and protected not

24. See, e.g., THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–8 (1970).

only by reason of their widely perceived centrality to individual personal dignity and flourishing, but also because they enable and structure the collective good of the free flow and exchange of information and ideas.²⁵ Needless to say, private property rights may be similarly valued and protected, on a widely shared understanding that private property is constitutive of the collective good of a market-based economic system, whose superiority to alternatives, in terms of both productivity and freedom, is expected to work to everyone's advantage.

Necessity. By a reason of "necessity" for some level of constitutional protection against asset-portfolio impairments, I mean a perceived risk, found unacceptable by a country's constitutional policymakers, that some group of actors will respond to a failure to adopt that level of protection in ways damaging to the country's interests. The actors might be investors or lenders without whose capital inputs the country's economy will founder, or they might be other governments or international organizations whose friendship or cooperation will be imperiled by such a failure. ("Necessity" may look like a subset of "collective good," but we will notice below a difference between them perhaps worth having in mind.)

I believe these three reason-types—"fundamental right," "collective good," "necessity"—are sufficiently spacious to take in every rejoinder we might expect to hear to the question of reasons for constitutional protection for defensive property rights (as opposed, that is, to reasons for a first-order policy of legislative respect and regard for private-property and market institutions and their supportive legal software). And yet, despite the spaciousness and generality (or you might call it the vagueness) of each of these three reason-types, a typology dividing the "reasons why" space into those three sectors can provide some guidance—as I now undertake to show—to those charged with the making and implementation of constitutional law.

III. NON-CONFIDENCE IN ORDINARY POLITICS: VARIATIONS ON THE THEME OF "DISTRUST"

How much (if any) and what forms of special constitutional protection, for which selected rights and interests, will make the overall best of whatever we regard as the relevant values—including, I

25. Two standard citations are *New York Times v. Sullivan*, 376 U.S. 254, 269–72 (1964), and ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

mean, whatever values we may (or may not) attach to popular self-government, to social justice, to political legitimacy or identity—along with, of course, the more technically amenable values of productive efficiency? (To be clear: I do not mean to exclude the possibility that our conception of “overall best” will require the assignment to some values of a preemptive or “lexical” priority over others.²⁶) The question seems complex to the point of non-tractability—perhaps for any given society at any given time, let alone for societies and times in general. Even so, we can go some distance toward a generalizable mapping of conceivable responses to it. *Against* constitutional protection for one or another right or interest, it seems the objection must always reduce either to a denial that political regard for that alleged right or interest can ever carry any positive value at all (say, a zealot’s take on religious freedom), or else to a concern about legal formality: a worry that overall good service to our full array of values (including, remember, whatever values we attach to political identity, legitimacy, and democracy) demands a kind and degree of political responsiveness to ever-changing social, economic, and cultural conditions, not excluding resort to regulatory or redistributive state activities that the presence in the picture of the protective constitutional rules will sometimes inevitably block or distort. *In favor of* constitutional protection, it seems the reasons will usually if not always boil down to deficits of confidence and trust in ordinary politics, for which constitutional protection is perceived to provide a cure that is worth whatever losses to whatever values are expected to result.

My rumination here thus follows in the track of Professor Richard Epstein’s designation twenty years ago of distrust of government as the “universal solvent” and “fundamental postulate” of constitutional design.²⁷ Just as with the case of the constitutional defense of speech, Epstein wrote, “[T]he constitutional defense of property . . . rest[s] on the sense that government . . . officials are . . . persons . . . subject to a . . . presumption of distrust,” owing to the inevitable ravages on judgment of self-interest and imperfection of knowledge.²⁸ The universal constitutional solvency of distrust or non-confidence may come

26. See JOHN RAWLS, A THEORY OF JUSTICE 43 (1971) (defining a “lexical order” as “an order which requires us to satisfy [fully] the first principle in the ordering before we can move on to the second . . . and so on”).

27. Epstein, *Distrust*, *supra* note 5, at 45–48.

28. *Id.* at 47.

to seem a truth inescapable, once you pause to think about it. Present purposes do not require any final verification of this thought, but it is worth a moment's reflection.

Here before us is a proposition (say) of the unique serviceability to sovereign moral and other social ends of legislative due regard for private property (or for free speech or free exercise of religion). You either do or you do not hold that proposition to be self-evident, true beyond fair and reasonable dispute. Only if you do hold it thus can you possibly be excused for writing it into a law that inevitably must interfere with—is designed to interfere with—forms of collective decision you regard as ordinarily respect-worthy and maybe even as ordinarily morally required. But if you do hold it thus, then you ought not to invite the hampering, by rigid constitutional law, of the state's pursuit of those supposedly sovereign moral and social ends by such regulatory and redistributive means as it from time to time judges best—*unless* you think the likelihood is substantial that political decision-making in the ordinarily accepted modalities will deviate from a competent pursuit of values that (by hypothesis) reign in your country as public values whose sovereignty as such cannot reasonably be contested. Note that the force of this proposition does not depend on any particular account of the causes of expected deviation. They might be corruption, haste, excitement, distraction, general incompetence, random unavoidable oversight or mistake. The question in respect of each suspected cause will be whether you see the problem as usefully correctable by the device of constitutional protection for this or that named category of rights or interests.²⁹

The point seems general and supple enough to cover conceptions of the aims and functions of constitutions that are not facially straight-line instrumentalist or calculative. Constitutions are often said to serve expressive and identitarian aims: identifying ourselves to ourselves and to others as a people who hold value *V* in the highest regard. But why do it *that* way, with the attendant risks to the daily pursuit of the very values we cherish, if we have perfect confidence in our doing it simply by setting to the world and to ourselves a vivid example of a people who do, in fact—and not under the lash of a judicial guardianship—steadfastly maintain in their politics the highest regard for *V*?

29. For an extended survey of possible reasons not to be too sure about this, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

Well, we might believe that the general interest is best served by getting some matters settled once and for all for the long term, so that people can plan and proceed with their lives accordingly.³⁰ Or constitutional protections may be conceived to serve the function of “gag rules,” of taking off the table for political consideration issues that we fear will be dangerously socially and politically divisive.³¹ But the sovereignty of the values of social-normative stability and of avoidance of excessive political division, as well as the proposition (say) of the unique serviceability to those ends of an assurance of the state’s non-involvement with religion, either are or not among propositions you think any reasonable fellow citizen must share; and then the general dilemma follows as sketched above.

But if distrust or non-confidence is thus the universal solvent, then what boots it to sort out the general reasons for constitutional protection for property into that other series I have suggested: fundamental right, collective good, necessity? The answer is that the dialectics of non-confidence play out differently, with different players, for the three reason-types, and those variations have implications for the forms and degrees of constitutional protection that we may judge most apt for the case of defensive property rights.

Start with collective good. As widely perceived by American constitutional policymakers, a socially beneficial free market of ideas depends on the willingness of people who have things to say to say them, and thus also on people’s sense of safety against state-organized retribution, overt or subtle, for saying the things they do (thus our constitutional-legal doctrines of “overbreadth”³² and “chilling effect”³³). And so of course it is with property rights and their perceived essential service to market structuring and to general prosperity and freedom: Without adequate assurance of the safety of lawful acquisitions against state-organized or authorized invasions, effort and investment will flag and fail. At the point of constitutional policy-making, the question (posed in terms of collective good) will be how much of—or, better, how crucial—a contribution toward a requisite level of assurance is to be expected from one or

30. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992).

31. See Stephen Holmes, *Gag Rules or the Politics of Omission*, in *CONSTITUTIONS AND DEMOCRACY* 19–21 (Jon Elster & Rune Slagstad eds., 1988).

32. See, e.g., *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 213–14, 216 (1975).

33. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

another sort of constitutional protection for property. The answer will depend as much on local political-cultural variables—which the constitutional choices might themselves affect, in one direction or the other, in the shorter and longer runs—as on anything like a culture-independent real truth about the actual difference that constitutional law and judicial review will make to on-the-ground governmental performance. (Thus, constitutional protection might be judged necessary in the early years of a post-colonial state-formation, but not later on, after a property-supportive political culture and track record have become firmly established.)

Move now to “necessity.” The difference between a “necessity” reason and a “collective good” reason for constitutional protection is the difference between the force of an internal judgment of reason by constitutional policymakers and the force of a judgment imposed on them (they think unreasonably or exploitatively) by external powers. We right here might judge that productive economic energy should in all reason be sufficiently forthcoming here, given our historical and political-cultural situation, without strong constitutional protection for portfolio values; but they out there might nevertheless construct a credible threat of boycott if we do not meet their demands for protection that would be excessive from some ideal, values-optimizing standpoint. (Might the market for constitutional protection of property thus be open, so to speak, for rent-seeking? Compare the market for state-subsidized industrial relocations between cities, regions, and countries.) Of course, that would not make the necessity any less of a necessity. So while the analysis for “collective good” might be complex and subtle beyond any hope of determinacy, the analysis for “necessity” might in practice be quite simple: We are between a rock and a place that is even harder, so give them what they demand.

The analysis for “fundamental rights” involves its own sort of complication. We have to distinguish between the view that a due regard for *other* rights or interests deemed fundamental—liberty, dignity, privacy, due process, equality of political respect and regard—entails some robust measure of legally backed security against ownership disturbances, and the view that state authorship or tolerance of disturbances of asset-holdings or asset-values counts as a fundamental right-violation just in and of itself, regardless of any further

ramification to freedom, dignity, privacy, equality, or due process. The former view, I have argued elsewhere, is no less comfortably ensconced than the latter in liberal political thought.³⁴

On the latter view, the move to constitutional protection for property reflects a failure of confidence in the ability of ordinary politics to resist temptation to violate directly a recognized fundamental right. On the former view, the situation is more complex. Inclusion of “property” in the list of specially protected aspects of individual freedom, authority, and so on—when, say, “liberty,” “dignity,” “privacy,” “equality,” and “due process” have all already been included by reason of the universal solvent of distrust—then seems to reflect a failure of confidence not just in ordinary politics but in the extraordinary forums and processes of constitutional-legal enforcement, typically supreme or constitutional courts. “Property,” then (in the sense of defensive rights against impairments or diminutions of current holdings or their values) will have been added to the specially protected list not because it is deemed in itself to be a “dominant interest worth protecting,”³⁵ but because we mistrust the readiness of even those extraordinarily trusted forums and processes to remember and give due weight to the dependencies of the truly dominant interests—freedom, dignity, and so forth—on private property in the background. (But then upon whom do we rely to “enforce” the corrective reminder against *them*?)

IV. “HARD” AND “SOFT” CONSTITUTIONAL PROTECTION

By way of suggesting what sort of payoff I would look for from our foregoing breezy (or you might call it arm-waving) consideration of the differing plays of the dialectics of distrust over our three broad reason-types for constitutional protection of property, I now introduce a distinction between “hard” and “soft” constitutional protection. A fairly dramatic hypothetical example—inspired by the recent legislative and constitutional property law of South Africa³⁶—will make clear the distinction I have in mind.

34. See Frank I. Michelman, *Liberal Constitutionalism, Property Rights, and the Assault on Poverty*, 22 STELLENBOSCH L. REV. 706 (2011).

35. Compare Richard A. Epstein, *The Property Rights Decisions of Justice Sandra Day O'Connor: When Pragmatic Balancing Is Not Enough*, 1 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 177, 186 (2012).

36. See generally ANDRÉ VAN DER WALT, *CONSTITUTIONAL PROPERTY LAW* (3d ed. 2011).

The case involves a law on eviction control.³⁷ The law bars an owner from evicting anyone from quarters occupied by that person as his home, unless and until a court has determined that replacement housing is available to that person, within his means and also within practicable reach of that person's established place of work, if he has one, or of locations where work will be available for him if he is capable of working. This statutory barrier to eviction is plainly written to apply to any and all cases of attempted evictions of people from their current homes, regardless of any conceded entitlement of the applicant to immediate possession under basic and simple property and contract law—say, the applicant is the owner and the lease term has expired, or perhaps the occupation has been nakedly illegal from the start.

Now suppose an owner of residential property, blocked by this law from recovering possession following expiration of an express contractual lease term, argues in response approximately as follows:

My owner's title to this land is an asset, an item of property. The law in question, as applied to this case, has created in the current occupant a new asset, consisting of his legally protected, indefinitely continuing privilege to occupy the space in question. The law's bestowal of that asset on him perpetrates a redistribution from me to him—thus, a withdrawal from my asset portfolio, a contraction of its boundaries. The constitutional property clause flatly prohibits withdrawals of assets from owners by the state without just and equitable compensation, and no compensation has been provided.

Where that line of argument would normally be expected to succeed, no further questions asked, constitutional protection is of the kind I mean by "hard."³⁸ Owners stand assured of high prospects of success from a strongly rule-formalist style of adjudication (no "consequences" or "balancing" questions here), where "conceptual

37. Such laws and their constitutionality in South Africa are discussed in *id.* at 296–99.

38. Compare Epstein, *supra* note 35, at 202–03:

The common law view . . . was that . . . the landlord was entitled to immediate eviction [of a holdover tenant], or could hold the tenant [either] to the fair market value of the leased premises [or] the stipulated rent in the lease. . . . It follows . . . that [a statute barring eviction and holding the rent to something less] [is] confiscatory unless the state pick[s] up the difference between statutory rent and market value.

severance” (as we have learned to call it under tutelage from Professor Radin³⁹) is rampant.

By contrast, the constitutional protection would be “soft” where—as in South Africa—the court would be expected to agree that a constitutionally cognizable limitation (or “deprivation”) of property rights has occurred, but then immediately proceed to weigh the adequacy of the state’s justifications for the eviction-control law in terms of its overall service to the achievement of universal freedom, dignity, and equality, considering what might be the relatively modest infringement (as the state would argue) on the owner’s freedom, dignity, and so on.⁴⁰ Owners might win some cases, but they would lose a lot of them, too. Protection would also be “soft” where the predictable judicial response is denial that any “taking” of property has occurred, considering that, after all, the owner has not been totally stripped of either the asset’s economic value (she still gets the same rent as before) or of her right to exclude the world once the current occupant takes leave. (I leave nameless, for the moment, the country where such would be the anticipated result.)

Let us now consider how the choice between hard and soft protection, or among forms and degrees of relative hardness and softness of protection, plays out against our tripartite division of reasons for constitutional protection for property. Under “collective good,” the level of hardness will be set—and no doubt adjusted from time to time by the appliers—pragmatically, in response to the considerations roughly described in the first paragraph of Part III, above. Under “necessity,” protection will be as hard as the makers and appliers of the country’s constitutional law think is required to meet the demands of the necessitating forces—but also presumably no higher than that, except as independently supported by their own internal considerations of collective good or fundamental rights.

Under “fundamental right,” the case is more interesting. Hard formalistic protection seems relatively more congenial to the view that security of asset holdings is a free-standing fundamental right on its own, while soft-protection-only seems more congenial to the

39. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1668, 1676 (1988).

40. See, e.g., Theunis Roux, *The “Arbitrary Deprivation” Vortex: Constitutional Property Law After FNB*, in CONSTITUTIONAL CONVERSATIONS 265 (Stu Woolman & Michael Bishop eds., 2008). See generally VAN DER WALT, *supra*, note 36.

view that property security is only—at most—secondary and supportive of other rights such as liberty, dignity, equality, and so on. On a secondary understanding of the place of “property” in the list of constitutionally protected rights, a court would experience a stronger push toward looking and seeing how the challenged law fits into an overall program for securing to everyone what John Rawls calls a “full and adequate scheme of equal basic liberties”⁴¹—pointing, then, towards a test of proportional justification. Of course, that comparison is not ironclad. On the one hand, in today’s world of constitutional-legal discourses, we cannot claim to find any bald contradiction between an affirmation of the fundamental status of an interest or right, and a subjection of constitutional protection for that right to a universal principle of proportionally justified limitation;⁴² distrust (of both ordinary lawmakers and constitutional reviewers) does not *necessarily* stretch so far. But, on the other hand, it might. Distrust *might* stretch far enough to dictate, to a given set of makers and appliers of constitutional law, that defensive property rights need strong and formalistic protection here and now, even allowing for antiformalist objections and even believing that defensive property rights lack a self-standing fundamental status of their own—just because they are, after all, secondarily and crucially supportive of rights and interests that are indeed fundamental, in ways that we don’t trust either ordinary politics or judicial-balancing politics to recognize or properly weigh.

Once again, we seemingly are left without much in the way of solid ground to stand on. But this much, at least, we can confidently say—recalling, now, my exemplary case of the eviction-control law: If you happened upon a regime of nominal constitutional protection for property rights, and found that it would not treat that law as highly constitutionally suspect and calling for some beyond-cursory measure of justification, you would have to doubt that the authors of that regime looked upon defensive property interests as first-line fundamental. And that finally returns us to Justice O’Connor and the *Lingle* case.

Because, of course, the regime I have in mind is that of the United States of America. Extrapolating as any competent lawyer would

41. See JOHN RAWLS, POLITICAL LIBERALISM 291 (1993).

42. See generally DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004); ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2002).

from our Supreme Court's decisions in the cases of *Yee v. City of Escondido*,⁴³ *Fresh Pond Shopping Center v. Callahan*,⁴⁴ and *Pennell v. City of San José*,⁴⁵ there seems no chance at all that a landowner here could prevail in our exemplary case. Can we catch a glimpse of why not from Justice O'Connor's opinion in *Lingle*?

Maybe not at first glance. O'Connor's opinion establishes two points about the American rationale for constitutional protection for defensive property rights: focus on a concern for civic fairness and of its rejection of a concern for economic theory. So far, that is non-committal on the question of American recognition of a free-standing, fundamental defensive right, against state-engineered asset impairments or redistributions. But, as I have tried to suggest, an answer to that question—and here Professor Epstein and I come again together—seems detectible not far beneath the surface of the opinion.⁴⁶

43. *Yee v. City of Escondido*, 503 U.S. 519 (1992).

44. *Fresh Pond Shopping Center v. Callahan*, 464 U.S. 875 (1983) (appeal dismissed for want of a substantial federal question).

45. *Pennell v. City of San José*, 485 U.S. 1 (1988).

46. Between Professor Epstein and me there are normative disagreements but none, I think, about the correct description of the current state of American constitutional-legal doctrine.