



## CSLS SPEAKER SERIES

Monday, October 10, 2016

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## “Does Property Have Constitutional Rights?”

This is an inquiry about whether the current Supreme Court’s apparently pro-business decisions in constitutional cases have a doctrinal foundation. It considers two groups of cases, regulatory takings and the constitutional rights of corporations. In the 1937-38 rejection of economic substantive due process, the Court acknowledged that there is no constitutional right to private property, that is, property rights are created and their contours are defined by state law. At the same time, it rejected the idea that common law, the source of the traditional rules regarding property (and of the contours of property rights that economic due process doctrine was protecting against state or federal legislation) exists as some sort of general source of legal rights, unmoored to state law. The implications of this change of doctrine for procedural due process were not recognized immediately, but by 1971 the Court had rejected the rights-privileges distinction and concluded that property, as the term is used in the two due process clauses, is entirely a creation of state law. This doctrinal conclusion raises the age-old fear (voiced by Aristotle, for example) that a democratically-elected lawmaker might confiscate the property of the wealthy. The regulatory takings and corporate rights decisions seem to respond to this fear by holding that while property is created by state law, it has intrinsic rights of some sort once it is created. These include the right not to be invaded (*Loretto v. Teleprompter Manhattan*) and the right not to have their commercial value reduced to zero (*Lucas v. S.C. Coastal Comm.*) In addition, the Court has held that corporations, which are, after all, property, have free speech rights (*Citizens United v. FEC*) and possibly free exercise rights (*Burwell v. Hobby Lobby*). While this notion of property’s intrinsic rights is recognizable as doctrine, it is neither conceptually coherent nor normatively justified. All the cases that rely on the doctrine should be overruled.

Professor Rubin’s paper is available on the CSLS website and in hard copy at the Center.

**PLACE** Selznick Seminar Room, 2240 Piedmont Ave.  
**TIME** 12:45 – 2:00pm. Coffee and water provided. Bag lunches welcome.  
**INFO** <https://www.law.berkeley.edu/centers/center-for-the-study-of-law-society/>  
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