DOES PROPERTY HAVE CONSTITUTIONAL RIGHTS?

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The observation that the Supreme Court has evinced a distinctively pro-business orientation in the past several decades has become common among scholars[1] and in the popular press as well.[2] A careful empirical analysis by Lee Epstein, William Landes and Richard Posner concludes that this description is largely accurate.[3] Much of the evidence for this conclusion comes from statutory cases,[4] but, not surprisingly, the Court's constitutional decisions that can be described as pro-business have attracted the most attention.

Result-based characterizations of this sort, however, run counter to recent scholarship about Supreme Court decisionmaking, and specifically to scholarship about the Supreme Court's anti-regulatory decisions from the first third of the twentieth century.[5] The standard account of the Court that handed down these decisions, generally called the Lochner

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[1] Erwin Chemerinsky, The Case Against the Supreme Court 159-91 (2014); Erwin Chemerinsky, The Roberts Court at Age Three, 54 Wayne L. Rev. 947 (2008); David L. Franklin, What Kind of Business Friendly Court—Explaining the Chamber of Commerce Success at the Roberts Court, 49 Santa Clara L. Rev. 1019 (200); Richard J. Lazarus, Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar, 96 Geo. L.J. 1487 (2008).

[2] David Lazarus, Supreme Court's Arbitration Ruling is Another Blow to Consumer Rights, Los Angeles Times, Dec., 18, 2015; Adam Liptak, Corporations Find a Friend in the Supreme Court, New York Times, May 4, 2013; Michael Orey, The Supreme Court: Open for Business, Bus. Week, July 9, 2007, at 30; Jeffrey Rosen, Supreme Court, Inc., New York Times Magazine, March 16, 2006, at 38; David G. Savage, High Court is Good for Business, L.A. Times, June 21, 2007, at A1; James Surowiecki, Courting Business, The New Yorker, March 7, 2013; James Vicini, Top Court Sides with Business in Key Cases, Reuters, July 2, 2008, http:// www.reuters.com/article/reutersEdge/idUSN0236698320080702

[3] Lee Epstein, William M. Landes and Richard A. Posner, How Business Fares in the Supreme Court, 97 Minn. L. Rev. 1431 (2013).

[4] See Franklin, supra note [ ]; Lazarus, supra note [ ].

[5] David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform 127 (2011): Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (1993); David Mayer, Liberty of Contract: Rediscovering a Lost Constitutional Right (2011); Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*, 76 N.Y.U. L. Rev. 1383 (2001); Noga Morag-Levine, Catching the Wind: Regulating Air Pollution in the Common Law State 63-85 (2003); Robert C. Post, Defending the Lifeworld: Substantive Due Process in the Taft Court Era, 78 B.U. L. Rev. 1489 (1998)

Court,[6] is simply that it was politically conservative, favoring the rich over the poor, the established over the excluded.[7] But as the Lochner revisionists point out, an explanation of this sort subscribes to what may be regarded as vulgar legal realism,[8] and to the judicial attitude studies that treat legal doctrine as irrelevant.[9] Such accounts suffer, the revisionists argue, from both epistemological and psychological defects. From the epistemological perspective, they foreclose inquiry into any principled basis for the Court's decisions; whatever the Justices write, no matter how coherent and convincing, is dismissed as insincere, mere window dressing for an effort to protect the privileges of their social class. From a psychological perspective, the political explanation for the Court's decisions assumes that the Justices were thoroughgoing cynics, that they were willing to ignore their professional standards and personal pride in the service of naked preferences. This is an implausible account of human behavior, [10] and an odd one for legal scholars to adopt since most scholars, with the same professional training as the judges, would never agree that their scholarship is designed to serve class interests.[11]

The Lochner revisionists offer a useful lesson for observers of the current Court. Despite a pattern of decisions that seems to be consistently pro-business, it is incumbent on scholars to analyze the language and reasoning of these decisions in detail. The Court's own explanations should not be viewed uncritically, of course, but they should be taken seriously. Whether one wants to describe, deplore or defend these decisions, one should begin

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[6] The name comes from the emblematic case of Lochner v. New York, 198 U.S.5 (1905) (striking down a state law prescribing maximum hours for bakers). For a history of the case, see Paul Kens, Lochner v. New York: Economic Regulation on Trial (1998).

[7] See, e.g., Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origin and Development 515-23 (1948); Kens, supra note [ ], at 4-5; Arthur Selwyn Miller, The Supreme Court and American Capitalism 50-59 (1968); Lawrence Tribe, American Constitutional Law 574-78 (2nd ed. 1988).

[8] The classic example is Jerome Frank, Law and the Modern Mind (1930). It is "vulgar" because it declares that judicial decisions are based entirely on personal predilections, and that doctrine plays no role at all. This view can be found in the popular press –and on the streets – but it was extreme even for the legal realists. See Brian Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging 93-98 (2010). There is no question, however, that the realists, perhaps because of their experience with and interpretation of the Lochner Court, were generally doubtful about the sincerity of judicial decision making. See, e.g., Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927); Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935); Karl Llewellyn, Realistic Jurisprudence: The Next Step, 30 Colum. L. Rev. 431 (1930).

[9] See, e.g., Jeffrey Segal and Harold Spaeth, The Supreme Court and the Attitudinal Model (1993); Glendon Schubert, Judicial Policy Making: The Political Role of Courts (rev. ed., 1974); Harold Spaeth, Supreme Court Policy Making: Explanation and Prediction (1979); Barbara Yarnold, Politics and the Courts: Toward a General Theory of Public Law (1990).

[10] Perhaps the deepest argument against it is the phenomenological insight that people seek meaning in their lives, and often subordinate material consideration to that effort. See Anthony Giddens, Modernity and Self-Identity: Self and Society in the Late Modern Age (1991); Alfred Schutz, The Phenomenology of the Social Word 43-96 (George Walsh and Frederick Lehnert, trans., 1967); Charles Taylor, Sources of the Self: The Making of Modern Identity 211-302 (1989).

[11] For a particularly good discussion of these considerations, see Gillman, supra note [ ], at 11-18.

from the assumption that they rest upon a rationale, and then attempt to discern what that rationale might be.

But the effort to rehabilitate Lochner can be taken too far. A number of the revisionists, having decided to premise their inquiry on the idea that the Lochner Court was acting on the basis of principle, conclude that the Court's substantive due process doctrine regarding economic legislation was not only principled but validity based on legal precedent and consistently applied across the range of cases that the Court decided. As will be discussed below, this is untrue: economic due process was not supported by prior law and does not account for the full range of the Lochner Court's anti-regulatory decisions.[12] Instead, it will be argued, the principle that animated the Court was the defense of private property, and specifically its defense against the Progressive legislation that was becoming dominant at the time. The Justices who constituted the majority of the Supreme Court in the Lochner Era believed that the Constitution established a right to retain one's legally acquired property,[13] and on this basis placed limits on the extent to which existing property law could be altered by majoritarian legislation.

As these Justices recognized, however, the right they were so anxious to defend was not specifically granted in the constitutional text.[14] The doctrine they fashioned in response – in all sincerity, as the revisionists correctly note – held that the Fifth and Fourteenth Amendments' due process guarantee establishes a right to retain one's property that state and federal governments can only infringe upon demonstrating a compelling need. This is the doctrine that the Supreme Court definitively rejected in the judicial revolution of 1937-38.[15] The Court concluded at that time that the Constitution does not create any general right to acquire or retain property; instead, these rights are created, and their contours delineated, by state or federal law. Although the full implications of this conclusion did not become apparent for several decades,[16] the basic principle is clear enough, and has not been seriously questioned since.

Once the animating principle of the Lochner Court is correctly identified, it provides an insight into the principle that underlies the current Court's pro-business decisions. The Justices who have handed down the recent decisions are not prepared to revive the claim that there is a constitutional right regarding property that limits legislative action. But they have concluded

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[12] See pp. [ ] infra.

[13] This refers to a right to retain property one has acquired by other legal means, not a right to possess property in the first place. The latter is foreign to our legal tradition, but it is perhaps suggested by Hegel. F.W.G. Hegel, Philosophy of Right 40-57 (T.M. Knox, trans., 1967) (§§ 41-71). See Jeremy Waldron, The Right to Private Property (1991)

[14] See pp.[ ] infra.

[15] United States v. Carolene Prods., 304 U.S. 144 (1938); West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[16] See pp. [ ] infra.

that private property has constitutional rights. In other words, property is created by government action, but once it is created, these Justices believe, it possesses certain inherent features that the government cannot alter or impair.

This paper attempts to demonstrate the way in which the principle that private property has rights underlies a number of the current Court's most controversial decisions that can be characterized as pro-business. In particular, it discerns a single doctrinal concept that animates two sets of decisions that are generally treating separately--first the so-called regulatory takings cases, including *Loretto v. Teleprompter Manhattan CATV Corp.*,[17] and *Lucas v. South Carolina Coastal Council*,[18] and second the cases granting constitutional rights to corporations, most notably *Citizens United v. FEC*,[19] and *Burwell v. Hobby Lobby Stores, Inc.*[20] It then proceeds to argue that this principle, however sincerely maintained, is just as incoherent as the principle that spawned the original Lochner Court's decisions. The Justices have been unwilling to accept a basic feature of the Anglo-American legal system: private property, however important, is entirely subject to legislative action and depends solely on the political process for its protection.

Part I addresses the history, theory and doctrine of property rights and property protection prior to the decisions of the current Supreme Court. The first section shows that property was regarded as subject to state control throughout English history; despite the urgings of some political and legal theorists, it was never recognized as a right, nor does it appear as such in the U.S. Constitution. The second section explicates the meaning of due process and the mode of protection it provides. The third section then recounts the way that the Supreme Court used the Due Process Clause to create a right to property during the Lochner Era, the subsequent rejection of that right, and the reconceptualization of procedural due process in light of that rejection. Parts II and III then discuss the current Court's decisions that rest on the idea that property, once created, has intrinsic rights that constrain government action. Part II discusses the Court's takings decisions and Part III discusses its corporate rights decisions. Part IV then assesses the doctrinal, conceptual and normative difficulties with this doctrinal idea. In other words, having identified the principle on which a number of the apparently pro-business decisions of the Court actually rests, it offers a critique of these cases on the basis of that principle.

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[17] 458 U.S. 419 (1982). See pp. [ ] infra.
[18] 505 U.S. 1003 (1992). See pp. [ ] infra.
[19] 558 U.S. 310 (2010). See pp. [ ] infra.
[20] 573 U.S. _____, 134 S. Ct. 2751 (2014). See pp. [ ] infra. A fifth case discussed at length, Horne v. Department of Agriculture, 576 U.S. ____, 135 S. Ct. 2319 (2015), see pp. [ ] infra, seems to have attracted less controversy, at least so far.

I. Property Rights and their Protection in the Anglo-American Legal System

A. Rights to Private Property in England and the U.S. Constitution

Discussions of property typically begin with a definition of the term, after duly noting how difficult it is to define. While this may seem like a logical first step, the definition depends on a prior decision about what the definition is attempting to achieve. One common legal definition, for example, is that property consists of rights "in or to things."[21] Clearly, however, this fairly innocuous-sounding formulation incorporates a rejection, or perhaps a condemnation, of the concept of property that allowed people to exercise property rights over other people, a concept which prevailed from the very beginnings of Western civilization until the eighteenth century.

A more promising way to understand the nature of private property rights in our legal system, therefore, is to trace their development over time, making use of the concept's continuity in preference to a definition. At the time when William of Normandy conquered England, private property was conceived as a type of control, or *dominium.* Medieval canonists sharply distinguished *dominium* from possession (*possessio*) or mere use of the entity in question.[22] With respect to land, by far the most important type of property during this era, an absolute right or *dominium* was described as allodial, and meant that the land was not subject to taxation or the sovereign's right of eminent domain.[23]

Whatever the scope of such allodial rights were in England during Anglo-Saxon times, they came to an abrupt end with William. Other European monarchs were still deriving their

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[21] E.g., C.B. Macpherson, The Meaning of Property, in C.B. Macpherson, ed., Property: Mainstream and Critical Positions 1,2 (1978). See Henry E. Smith, Property as the Law of Things, 125 Harv. L. Rev. 1691, 1691 (2012); Carol M. Rose, Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory, 2 Yale J. L. & Human. 37, 40 (1990); Jeremy Waldron, Property Law, in Dennis Patterson, ed., A Companion to Philosophy of Law and Legal Theory 3, 4 (1996). The writers are of course aware that their formulations are rejecting slavery. See also note [ ] infra (citing sources that propose a more expansive concept of property).

[22] See Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 453-54 (1983); Richard Tuck, Natural Rights Theories: Their Origin and Development 17-20 (1979). As time went on, use was recognized as a type of *dominium*, that is, a *dominium utile*. E.g., Thomas Aquinas, Summa Theologica 1470 (Fathers of the English Dominican Province, trans.,1948) (II-II Q. 66, art. 1) (only God has *dominium* over external things as regards their nature, but "as regards their use, and in this way, man has a natural dominium over external things"). See Tuck, supra, at 18-19. By thus recruiting the concept of *dominium* for the previously opposed concept of usufruct, Medieval scholars were essentially acknowledging that the original notion that property was a form of *dominium* no longer had a place in civil law.

[23] J.C. Holt, Colonial England 71-80 (1997); Susan Reynolds, Fiefs and Vassals: The Medieval Evidence Reinterpreted 48-74 (rev. ed., 1996). Holt argues that the Norman rulers never recognized allodial rights for their subjects, even prior to the Conquest, and that the most their rulers granted was the right to inherit.

concepts of rulership from Ancient Rome.[24] But William, perhaps as a result of his defective pedigree (he was illegitimate) or perhaps through his political genius, reconceived kingship in purely feudal terms that were more appropriate to the actual conditions of the time.[25] He declared himself the allodial owner of all the land in England.[26] The followers to whom he gave land after the Conquest, plus those Anglo-Saxon nobles who he allowed to remain in possession of their land, were treated as having received a provisional grant. These grants, or fiefs were held by the possessor in exchange for loyalty to William, the payment of certain feudal dues, and the provision of certain military services.[27] By making use of the feudal system in this manner, William was able to create the most powerful central government that existed at the time.[28]

The result of William's strategy was that no one in England had absolute or complete control over land; all land was held in fief, that is, subject to feudal obligations and restrictions.[29] In 1135, when William's son Henry I died without a male heir,[30] his nephew, Stephen of Blois, and his daughter, Maude, who was married to the Holy Roman Emperor, went to war over the Crown. The war, which went on for twenty years -- a period known as the Anarchy -- ended with the accession of Henry II.[31]

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[24] This is consistent with the more general observation of contemporary historians that the continuities between the Roman imperial period and the Early Middle Ages were much greater than previously recognized. In fact, there has been a tendency to treat these previously separate eras as the single historical period of "late antiquity." See Peter Brown, The Making of Late Antiquity (1978); Peter Brown, The World of Late Antiquity (1989); Peter Heather, The Fall of the Roman Empire: A New History of Rome and the Barbarians (2006); Walter Goffart, Barbarians and Romans, AD 418-584: Techniques of Accommodation (1980)

[25] Charlemagne, another political genius, made a similar effort, structuring his land grants as temporary usages and requiring all his subjects to swear an oath of loyalty to him. But the basic structure of his regime continued to be based on the imperial model. See Roger Collins, Early Medieval Europe, 300-1000, at 291-308 (2nd ed., 1999); F.L. Ganshof, Feudalism 34-35, 51-61 (Philip Grierson trans., 1996).

[26] Berman, supra note [ ] at 440; Norman F. Cantor, The Civilization of the Middle Ages 281-84 (rev. ed. 1993); R.H.C. Davis, A History of Medieval Europe from Constantine to St. Louis 284-87 (2nd ed. 1988); David Douglas, William the Conqueror: The Norman Impact on England 265-316 (1967).

[27] See Marc Bloch, Feudal Society 148-62 (L.A. Manyon, trans., 1961); Ganshof, supra note [ ], at 3-19; Reynolds, supra note [ ]; Julia M.H. Smith, Europe After Rome: A New Cultural History 500-1000, at 160-98 (2005).

[28] The one possible rival was the regime of his fellow Normans in Italy. See Berman, supra note [ ], at 434-38; Gordon S. Brown, The Norman Conquest of Southern Italy and Sicily (2003); Charles Homer Haskins, The Normans in European History 192-245 (1915).

[29] Although William was particularly effective in exercising control, the idea of property on which his control was based was the standard one in Medieval thought. Aquinas, for example, states that all things are common property according to natural law. But, he continues, it is lawful for people to possess property in the sense that they have the power to "procure and dispense" things, and practical to grant property rights in order to maintain an orderly and prosperous society. Aquinas, supra note [ ], at 1471 (II-II Q 66, art. 2). In other words, property is a pragmatic, human arrangement for dealing with things that, by their nature, belong to the collectivity.

[30] When William died, the crown went to Henry's older brother, and when he died in 1100, it went to Henry. Henry had one son, but he died when the White Ship that was carrying him to England sank in the English Channel. Winston Churchill, A History of the English Speaking Peoples, vol. 1: The Birth of Britain 188 (1956)

[31] Id. at 190-98; W.L. Warren, Henry II at 12-53 (1973). Henry II's accession was the result of a compromise between Stephen and Maude. It allowed Stephen to hold the crown until his death, but then be succeeded by Maude's son Henry.

One of England's greatest kings, Henry II enacted several statutes, called assizes, that created a new set of royal judges who were authorized to establish a uniform, or common law for all of England.[32] His immediate motivation was to resolve the disputes between conflicting land grants that Stephen and Maude had issued in their efforts to obtain support. In addition, he was anxious to replace the confusing multitude of baronial jurisdictions with a single set of laws and to obtain for the Crown the fees that courts received when adjudicating legal disputes.

As successor to both Stephen and Maude, Henry was not particularly concerned about whose grants were recognized, so long as the disputes were resolved and civil peace maintained. Consequently, he left the development of the legal rules for resolving these disputes to his new royal judges. Thus, the common law of England --the royal law that applied throughout the realm -- was fashioned by judges, rather than directly by royal enactment.[33] These judges were acting as the king's delegates, however, and were authorized only to elaborate his authority, not to displace it. As time went on, the role of landowners in the military and the government declined in favor of mercenary or conscript soldiers and legally-trained bureaucrats.[34] These changes, together with the increasing importance of commerce, led the common law judges to gradually eliminate feudal obligations and expand private people's control over the land they possessed.[35] But the central government remained the sole allodial owner of land, which continued to be subject to its taxing power and eminent domain authority. In a legal sense, therefore, landed property continued to be treated as a grant, or fief,[36] and the fief, now called the fee simple, remains the highest form of property rights that a private person can possess in English common law.

The seventeenth century confrontation between English institutions and the Stuart monarchy generated both theoretical and political controversy about property rights. At the beginning

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[32] Churchill, supra note [ ], at 215-25; Richard Mortimer, Angevin England 1154-1258, at 51-63 (1994); Frederick Pollock and Frederic Maitland, The History of English Law, vol. 1, at 145-56 (1952) [1898]; Warren, supra note [ ], at 317-61.

[33] Berman, supra note [ ], at 445-57; Doris M. Stenton, English Justice, 1066-1215 (1964); Pollock and Maitland, supra note [ ]; Theodore Plucknett, A Concise History of the Common Law (rev. ed. 2008). Given that the law was being developed by subordinate officials, another factor in its development was the work of treatise writers. Berman, supra note [ ], at 457-59; Pollock and Maitland, supra note [ ], at 162-67, 206-11.

[34] See generally A.L Brown, The Governance of Late Medieval England 1272-1461 (1989); Denys Hay, Europe in the Fourteenth and Fifteenth Centuries 92-103, 113-16, 133-41 (2nd ed. 1989); Thomas Ertman, The Birth of Leviathan: Building States and Regimes in Medieval and Early Modern Europe 156-223 (1997); Mortimer, supra note [ ], at 37-76; W.L. Warren, The Governance of Norman and Angevin England 1086-1272 (1989)

[35] Pollock and Maitland, supra note [ ], vol. 2, at 1-124 (describing the common law development of private rights to land)

[36] Public offices were assimilated to this structure, that is, they were treated as the property of the officeholder, which he could sell if he chose, although only with the king's approval. Ertman, supra note [ ], at 171-74. This development would have been unwieldy, if not impossible, unless it was understood that property was ultimately subject to royal control.

of the century, Hugo Grotius articulated an influential version of social contract theory.[37] It was translated into English terms by John Selden, [38] and then given a truly revolutionary reconceptualization by Thomas Hobbes.[39] This theory, described by Macpherson as "possessive individualism," held that individuals beginning in the state of nature joined together to form a society, and thereby receive the benefits of social order, through a contractual agreement.[40] In order to make this contractual conceit make sense, its proponents needed to find something that individuals in the state of nature could exchange for the benefits that they received. What they had, of course, was their liberty; in order to trade it, they then had to be described as having a property right to that liberty or, more simply, to themselves. The idea could be vaguely associated with the legal doctrine, no longer operative in Europe, that one could sell oneself into slavery,[41] but it was a purely theoretical construct within social contract theory.

John Locke, in part to justify the Glorious Revolution of 1689, then developed an alternative version of social contract theory that incorporated a robust idea of property rights.[42] He envisioned a state of nature where life was much more pleasant, humane and long than the one premised by Hobbes. [43] In this semi-civilized realm, people could acquire natural rights to property by mixing their labor with physical resources.[44] They then entered into a social contract, still trading their liberty for peace and order, but they were now somewhat less desperate that Hobbes' nastily afflicted brutes, and they had something that they were insistent on retaining, namely, the property they had acquired through their labors. Locke concluded that protection of

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[37] Hugo Grotius, The Rights of War and Peace: Including the Law of Nature and of Nations (A.C. Campbell, trans., 1979). See Stephen Buckle, Natural Law and the Theory of Property: Grotius to Hume (1991)

[38] John Selden, History of Tithes (2010). In this and other works, Selden argued that royal authority in England was not the product of a generalized social contract but rather the result of particular understandings and practices of English society. See Harold Berman, The Origins of Historical Jurisprudence: Coke, Selden, Hale, 103 Yale L.J. 1651 (1994); Martha A. Ziskind, John Selden: Criticism and Affirmation of the Common Law Tradition, 19 Am. J. Legal Hist. 22 (1975). Regarding Grotius' influence on Selden, see Tuck, supra note [ ], at 82-92.

[39] Thomas Hobbes, Leviathan (C.B. Macpherson ed., 1968),

[40] C.B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke (1962).

[41] Many European peasants voluntarily submitted to slavery in the Early Middle Ages, see Patrick Geary, Before France and Germany: The Creation and Transformation of the Merovingian World 35-38 (1988). This was not necessarily a bad deal at the time, as it traded citizenship in the collapsing Roman Empire for the more real protection of a local landowner. But the practice, and slavery itself, was defunct in Western Europe by the High Middle Ages. See Bloch, supra note [ ], at 255-74; Hugh Thomas, The Slave Trade: The Story of the Atlantic Slave Trade, 1440-1870, at 34-36 (1997). The Atlantic slave trade was based on the different, and even weaker principle, that prisoners of war could be enslaved. See Thomas, supra at 40-47.

[42] John Locke, The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government, in John Locke, Two Treatises of Government and A Letter Concerning Toleration 100 (Ian Shapiro, ed., 2003)

[43] Id. at 101-06

[44] Id. at 111-21. For an incisive analysis of Locke's theory of property, see Jeremy Waldron, The Right to Private Property 137-252 (1988)

private property was intrinsic to the social contract, and thus beyond the justifiable power of the government to infringe upon.[45]

Another intellectual trend in the seventeenth century was the glorification of the common law. Four centuries of cumulating doctrine had provided common law courts with a functional independence from the central government. James I, the first true foreigner to occupy the English throne since Henry II, found this distinctive feature of the English legal system distasteful and sought to combat it in a variety of ways.[46] In response, the common law judges, most notably Edward Coke, promulgated the myth -- once again in all sincerity -- that the common law dated back to England's Anglo-Saxon past.[47] It was thus more venerable than the English Crown, which could trace its lineage only as far back as William the Conqueror, and therefore, by the standards of the day, it was more authoritative. In other words, Lord Coke was claiming that the central government could not legally displace the common law courts nor could it abrogate the common law. With common law, of course, came the property rights it had established, still the centerpiece of its developed doctrine, although far from its exclusive focus.

Both Locke's social contract theory and Coke's conception of the common law would reverberate throughout the eighteenth century, but neither became incorporated into the English legal system. It was a third product of the conflict between English institutions and the Stuart monarchy that was to transform and ultimately define that system. This was the increasing authority of Parliament. Having beheaded one of the Stuarts and ruled in his place, Parliament then deposed another after the monarchy had been restored and began the political process that would render it supreme in England in a bit more than a century.[48] In doing so, it did not subscribe to the political theory of John Locke or to the legal theory of Edward Coke. Instead, it retained all the powers of the central government that had been previously held by the

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[45] Locke, supra note [ ], at 133-57.

[46] Winston Churchill, A History of the English-Speaking Peoples, vol. 2: The New World 147-63 (1956); Barry Coward, The Stuart Age: England 1603-1714, at 87-163 (4th ed., 2011); Mark Kishlansky, A Monarchy Transformed: Britain, 1603-1714, at 65-112 (1997); Graham E. Steel and David L. Smith, Crown and Parliaments 1558-1689 (2001). The conflict continued under James I's successor, Charles I and led to the English Revolution.

[47] J.G.A. Pocock, The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century 30-69 (2nd ed. 1987); Berman, supra note [ ], at 1673-89. In fact, Coke, unlike Selden, claimed that common law dated back even further, to pre-Roman times. Id. at 1680. In any case, it was old. As Berman writes: "Coke's most important contribution to the philosophy of English law . . . was his identification of "the fundamental law" of England, its unwritten constitution, with the common law itself." Id. at 1681.

[48] See Coward, supra note [ ], at 354-506; Jeffrey Goldsworthy, The Sovereignty of Parliament: History and Philosophy (2001); Kishlansky, supra note [ ], at 263-336; John Marshall, Whig Thought and the Revolution, in Tim Harris and Stuart Taylor, eds., The Final Crisis of the Stuart Monarchy 57 (2013). For eighteenth century developments, see Jeremy Black, Walpole in Power (2001); Winston Churchill, A History of the English-Speaking Peoples, vol. III: The Age of Revolution 103-24 (1956); B.W. Hill, The Growth of Parliamentary Parties 1689-1742 (1977); B.W. Hill, British Parliamentary Parties, 1742-1832 (1985)

monarch. This meant that it still asserted ultimate control over the rules of private property, even if the elaboration of those rules continued to be carried out by common law judges.

The Framers of the U.S. Constitution were heirs to the English legal system and its basic concepts. They implicitly assumed that the rules regarding private property would be subject to the authority of government. Because the national government they were creating had only delimited or enumerated powers, and those powers did not extend to most legal relations among citizens, the Framers did not need to assert any general authority to determine property rules. But they did not hesitate to grant the national legislature plenary authority over property rights in those areas where they deemed national authority appropriate. These included, at the least, interstate commerce, commerce with the Indian tribes, bankruptcy, copyrights and patents.[49]

In leaving most legal relations among citizens under the control of the states, the Framers were of course aware that these relations would be governed by English common law. At the time of the Constitutional Convention, the states had been exercising control over legal relations for over a decade and none had displaced the common law that the colonial courts had applied.[50] But the Framers were also aware that the states had full authority to enact legislation changing common law, and that this could include the rules regarding private property.[51] The Constitution that they drafted made no effort to place any restriction on state authority to do so.

This is a notable absence because the document contains a provision, Article I, Section 10, that places an extensive series of other restrictions on the scope of state legislation. It prohibits states from entering into treaties, coining money, issuing bills of credit or paper money, passing ex post facto laws and bills of attainder, granting titles of nobility, imposing import or export duties, and waging war or maintaining troops in time of peace. The clause verges into commercial matters as well in prohibiting states from passing any "Law impairing the Obligation of Contracts," a matter that will be discussed below.[52] If the Framers had believed that there should be limits on the government's authority to control and alter the common law rules regarding private property, this was certainly the place to say it, but they declined to do so.

In fact, the original Constitution uses the word property only once. Article IV, Section 3, Clause 2 states: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging

[49] U.S. Const., Art. I, sec. 8, cls. 3, 4, 8
[50] Lawrence Friedman, A History of American Law 79-81 (3rd ed., 2005)
[51] Id. at 167-81.
[52] See pp. [ ], infra.

to the United States." This can be regarded as a restatement of King William's declaration that allodial ownership belongs solely to the central government because it describes that government's plenary authority over the territories as a type of property right. In any event, it is notable that the original Constitution's only reference to property is an assertion of governmental power, not a protection of private rights.

B. The Right to Due Process

Reference to private property appeared in the Constitution when the Bill of Rights was added; the Fifth Amendment states that no person shall "be deprived of life, liberty or property without due process of law." This provision was based on English precedent; due process, unlike a right to property, had been recognized as a constraint on governmental action for six hundred years, since Magna Carta.[53] Like the Bill of Rights in general, it was originally applicable only to the federal government, but it became the first Bill of Rights provision to be applied to the states through what became known as the incorporation doctrine. [54]

As its language clearly indicates, the Due Process Clause does not create any rights to private property or any restrictions on the government's ability to alter the rules by which property is created, transferred, or destroyed. What it says is that the government may not impose any disadvantage on an individual, including the deprivation of property that the individual possesses in accordance with some other legal rule, unless it follows due process, that is, proper procedures.[55] It predates the institution of jury trials in England by several months,[56] but that procedure, as it

[53] For the history of the document itself, see J.C Holt, Magna Carta (1992). For the historical background, see Stephen Church, King John: And the Road to Magna Carta (2015); Dan Joes, Magna Carta: The Birth of Liberty (2015), For its influence on American law, see A.E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968).

[54] See Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897). The Court did not explain the doctrinal basis for its decision at the time, but only in a subsequent opinion, Twining v. New Jersey, 211 U.S. 78 (1908). With respect to the other Bill of Rights provisions discussed in this article, see Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating the Free Speech Clause). On incorporation generally, see Akhil Reed Amar, The Bill of Rights 181-230 (2000) (arguing that the Fourteenth Amendment incorporates the entire Bill of Rights, but that only some Bill or Rights provisions establish individual rights while others protect the states); Michael Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986) (arguing the Fourteenth Amendment was intended to incorporate the entire Bill of Rights)

[55] See Edward L. Rubin, The Illusion of Property as a Right and Its Reality as an Imperfect Alternative, 2013 Wisc. L. Rev. 573.

[56] Magna Carta was promulgated in June, 1215. At the time, the ordinary mode of proof was the ordeal. It was displaced as a result of the canons promulgated by the Fourth Council of the Lateran, which convened in November of that year. See Robert Bartlett, Trial by Fire and Water: The Medieval Judicial Ordeal (1986). The reference to "the lawful judgment of his peers" in Chapter 39 probably refers to the procedure specified in Chapter 61, that is, the Court of Twenty-Five. See Holt, supra note [ ], at 78=80, 327-31. The "law of the land" means the common law.

developed over time, became recognized as the model of due process.[57]

The basic and generally familiar concept that underlies this provision is that the government, either by positive legislation or by delegation to other officials such as common law judges, enacts general rules. Many of these rules subject groups of people to a restriction or a disadvantage: individuals who knowingly buy cocaine will go to prison, butchers must pay a special tax. The due process right then requires the government to use specified procedures to demonstrate that a particular individual falls within the legally established group before it can impose the legally enacted disadvantage on that individual. The individual cannot challenge the general rule criminalizing cocaine on the basis of the due process clause, but he can argue that he himself did not know that the nature of the substance that he purchased. The butcher cannot challenge the state's authority to impose the tax, but she can assert that she does not belong in the group subject to the tax, as defined by the taxing statute, because she sells only veggie burgers. Thus, the Due Process Clause is similar in effect to the Bill of Attainder clause in Article I, Section 10 of the original Constitution, in that it forbids the government from enacting legislation that singles out an individual for disadvantageous treatment.

This understanding of the due process clause was articulated in two Supreme Court decisions, *Londoner v. Denver* [58] and *Bi-Metallic Investment Co. v. State Bd. of Equalization.* [59] They date, ironically, from the height of the Lochner Era. In the *Londoner*, the City of Denver assessed a tax on property owners who benefitted directly from an improvement to the street on which their property was located. The City declared, in effect, that each particular assessment was conclusive and declined to grant the property owners a hearing on whether the amount of the tax on each one had been assessed in accordance with the law. The Supreme Court reversed, holding that denying them such a hearing violated the Due Process Clause. A few years later, the State of Colorado enacted a law increasing the valuation of all taxable property in Denver by forty percent.[60] In response to a claim that property owners had been denied a hearing that would enable them to contest the tax, the Court held that no hearing was required because the tax applied generally to all the property in Denver. Writing for the majority, Justice Holmes declared: "General statutes within the power of the state are passed that affect the person or property of

[57] See, e.g., John Langbein, The Origins of Adversary Criminal Trial (2003); Pollock and Maitland, supra note [ ], at 598-674.
[58] 210 U.S. 373 (1908)
[59] 239 U.S. 441 (1915).
[60] There is, of course, the lurking worry that the issue would not have been so crisply decided had not these contrasting enactments involved the same city and the same area of law.

individuals, sometimes to the point of ruin, without giving them a chance to be heard."[61]

The distinction is strongly supported by the basic theory of representative democracy. Because they must be elected to gain or retain their positions, policy makers in a representative democracy must be attentive to the views of their constituents. This enables groups of people to influence their representatives, but also means that they must accept the possibility that other groups will be more influential, and that the inevitable conflicts will be resolved in ways that they dislike. Individuals acting on their own, however, generally have no ability to exercise such influence. They cannot protect themselves if the legislature, for whatever reason, decides to single them out for disadvantageous treatment. Consequently, the Due Process Clause provides that when the government takes action that disadvantages the individual in some way, it must prove that the person belongs to a general category on which the disadvantage has been imposed through the political process.[62]

The Contracts Clause, one of the Constitution's Article I, section 10 restrictions on state governmental action, was almost certainly understood in similar terms at the time the original Constitution was drafted. It was designed to prohibit state legislatures from passing laws denying specified creditors the right to collect on a debt, a tempting type of enactment during the post-Revolutionary period in cases where the debtor was an influential citizen and the creditor a foreign speculator.[63] As such, it was also similar to the Bill of Attainder Clause, which appears immediately before it in Section 10, in forbidding states from singling out individuals for disadvantageous treatment.[64]

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[61] 239 U.S. at 445. The plaintiff's claim was that it had not been given a chance to contest the validity of the forty percent increase. It would have been entitled to a hearing if it raised a claim that involved the application of the increase to its individual circumstances – for example, that its property was located outside the boundaries of Denver.

[62] For a challenge to this approach, see Richard A. Epstein, Supreme Neglect: How to Revive Constitutional Protection for Private Property (2008). Professor Epstein argues that there should be no difference between taking one person's property and taking many people's. That view, however, depends on an a priori preference for property rights over democratic decision making, a view with neither doctrinal nor normative support. He also argues that giving the government the power to reduce property values by general enactment may lead to bad public policy. That may be true in some cases, but it is a matter that we necessarily leave to democratically elected legislatures. A further argument is that general statutes may in fact be masquerades for individualized takings. Id. at 101 That is in fact a problem, and that is the sort of problem that is appropriately referred to courts, which should strike down general legislation on due process grounds in those instances.

[63] See Ron Chernow, Alexander Hamilton 297-99 (2004); Bray Hammond, Banks and Politic: From the Revolution to the Civil War 95-103 (1957). As Hammond notes, another way to achieve the same result was for these influential citizens to induce the state legislature to issue paper money that they could use to pay their debts. Being general legislation, this practice would not have fallen under the prohibition of the Contracts Clause, and thus had to be prohibited by a separate provision in Section 10 denying states the power "coin money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in payment of Debts."

[64] See II Max Farrand, The Records of the Federal Convention of 1787, at 439-40 (1966). According to Madison's notes for August 28, Rufus King, after the Convention had voted 8-1-1 in favor of language that would become Section 10, proposed to add "a prohibition on the States to interfere in private contracts." Gouverneur Morris objected: "That would be going too far. There are thousands of laws related to bringing actions – limitations of actions &

Since the adoption of the Fifth Amendment shortly thereafter, it has been regarded as an attribute of the due process guarantee, and thus governed by the same distinction that informs *Londoner* and *Bi-Metallic*.[65] Even the Lochner Court understood it in this way, rejecting a challenge to a state law that prohibited banks from foreclosing on mortgages once the law was enacted.[66]

Another way to understand the status of property rights under the Due Process Clause is to compare the protection afforded to these rights with the Clause's protection of liberty. The Supreme Court clearly recognizes that rights best characterized as liberty can be created by state law, and that such rights receive due process protection under the same rationale as state-created property rights.[67] But, in contrast to property, the Court has also recognized that liberty, unlike property, includes intrinsic rights possessed by all human beings, and more specifically all citizens. These include such essential freedoms as the right to move freely about, the right to choose one's place or residence, the right to choose one's intimate partners, and the right to give birth to and raise children.[68] In other words, liberty, unlike property, is not created by state law; it is a basic condition guaranteed by the Constitution.

This means that liberty must be defined by constitutional law. As in the case of property, the government may deprive citizens of their liberty under certain circumstances. It may do so

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which affect contracts . . ." After further colloquy, James Wilson responded: "The answer to these objections is that *retrospective* inference only are to be prohibited." (emphasis in original). Madison asked whether that was "already done by the prohibition of ex post facto laws." He then notes: "Mr. [John] Rutlidge then moved instead of Mr. King's motion to insert – "nor bills of attainder nor retrospective laws." His motion carried, 7-3. The Contracts Clause did not appear in the subsequent Committee on Style draft that Madison copied, id. at 597, but -- according to his notes again -- it was added on September 14, id. at 619.

[65] The result is that the Court has almost invariably rejected challenges to legislation based on the Contracts Clause. See Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470 (1987); Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983); Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398 (1934).

[66] Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398 (1934). This continues to be regarded as the leading case. It is typically stated as holding that the Contracts Clause applies only to existing contracts and not to future ones, a principle that is sufficient to decide the issue in the case. This is essentially equivalent to the singling out formulation, since the legislation could hardly single out an individual contract for disadvantageous treatment if that contract was not yet in existence.

[67] Paul v. Davis, 424 U.S. 693, 710 (1974) (liberty as well as property interests attain "constitutional status by virtue of the fact that they have been initially recognized and protected by state law"). The clearest examples of state-created liberty interests are prisoner's rights cases because they involve rights granted to individuals against the background of a justified deprivation of basic liberty. E.g., Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (state created parole system with definitive criteria creates a liberty interest); (Wolff v. McDonnell, 418 U.S. 539 (1974) (state-created good time credit program creates a liberty interest). However, the Court cut back severely on this doctrine in Sandin v. Conner, 515 U.S. 472 (1995) in favor of an approach to prisoners' rights that focuses on intrinsic, or constitutionally defined liberty.

[68] E.g., Obergeffel v. Hodges, 576 U.S. _____, 135 S. Ct. 2584 (2015) (right to choose one's spouse); Saenz v. Roe, 526 U.S. 489 (1999) (right to travel); Santosky v. Kramer, 455 U.S. 745 (1982) (right to raise one's children); Zablocki v. Redhail, 434 U.S.374 (1978) (right to marry); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); United States v. Guest, 383 U.S. 745 (1966) (right to travel); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to have children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to determine the education of one's children); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867)(right to travel).

as long as it provides them with due process, that is, as long as it uses specified procedures to show that they belong in a legally-defined category that has been determined, through the political process, to merit the imposition of a disadvantage. It may restrict their freedom to move about if they have committed murder, it may restrict their choice of residence if they have committed child abuse, and it may prohibit them from choosing a sibling or a child as an intimate partner. But the intrinsic quality of liberty means that there are also limits, arising from the Constitution itself, on the sorts of legally-defined categories that the government may create. This is the doctrine generally known as substantive due process. It holds that the Due Process Clause, in addition to providing procedural protection for individuals, imposes substantive limits on general legislation through its concept of liberty.

Substantive due process presents difficulties because the constitutional text does not specify the elements contained in the term liberty. In reaction to the Lochner era decisions, the Supreme Court has tried to combat this uncertainty by using other portions of the text, most notably the other Bill of Rights amendments, to give it content.[69] Ultimately, however, the Court has been compelled to recognize that the absence of at least certain elements of liberty from the text does not indicate an intent to exclude them, but simply their lack of salience at the time the text was drafted or amended.[70] Most recently, in *Obergefell v. Hodges*, the Court held that the state may not enact a law that restricts a person's choice of spouse on the basis of gender.[71] Writing for the majority, Justice Kennedy began the opinion by declaring: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that

[69] Most notably, with respect to the constitutional right of privacy. In Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Douglas, writing for the Court in a decision that struck down a state law prohibiting the distribution of contraceptives, began by declining to employ the substantive due process doctrine:

Overtones of some arguments . . . suggest that *Lochner v. New York* . . . should be our guide. But we decline that invitation, as we did in *West Coast Hotel Co. v. Parrish*. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.

Id. at 481-82. Instead, Justice Douglas said: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy." Id. at 484. He then went on to identify the First, Third, Fourth, Fifth and Ninth Amendments as the guarantees that formed this penumbra by their emanations. A similar rationale was employed in a number of other decisions that grounded reproductive rights on the idea of constitutional privacy, e.g., Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[70] For cases from the post 1937-38 era basing the decision on a substantive due process liberty right, see, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (right to choose one's intimate partner); Cruzon v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) (right to refuse medical treatment); Washington v. Harper,494 U.S. 210 (1990) (right of prisoners to refuse psychotropic drugs); Santosky v. Kramer, 455 U.S. 745 (1982) (right to raise one's children); Zablocki v. Redhail, 434 U.S.374 (1978) (right to marry).

[71] 576 U.S. ____, 135 S. Ct. 2584 (2015)

allow persons, within a lawful realm, to define and express their identity."[72]

A further indication of the difference between the Constitution's concept of property as a creation of state law and liberty as an intrinsic human right is provided by the final clause of the Fifth Amendment. It states: "nor shall property be taken for public use without just compensation."[73] This is, in effect, an alternative to due process. Instead of demonstrating that the individual whose property is taken is subject to such disadvantageous treatment because she belongs within a general, legally-established category, the government, acting in its executive capacity, simply take the individual's property for a public purpose. Such action, of course, creates precisely the danger of oppressive action that the Due Process Clause is designed to prevent. In this case, however, oppression is avoided by providing the individual with monetary compensation for the loss of property. In effect, the market takes the place of the legislature. It sets the value of the individual's property independently of the particularized action. The individual may not appeal to the courts to contest the government's right to take his property, so long as it meets the public purpose requirement, but may contest the government's assessment about what the property is worth. In such a case, the court will decide the case, ensuring that the individual has been treated fairly, by consulting the market, a system that is beyond the control of the government official who decided on the taking.[74]

The availability of this alternative to due process rests on the principle that no one in modern society possesses allodial rights to property. All property is subject to government control and thus to the government's power of eminent domain as well as its power to enact general rules. Because liberty is not subject to government control in the same way, there is no equivalent to the just compensation clause for liberty interests. The government may not incarcerate an individual it dislikes and compensate her for her loss of freedom, or compel an individual to carry out a particular task on the government's behalf and pay him the value of his labor, or prevent an individual from marrying the person of her choice and give her a nice house in compensation.[75] Here

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[72] Id. at 2593.

[73] As noted above, this was the first provision of the Bill of Rights to be applied to the states. See Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

[74] See Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984); United States v. 564.54 Acres of Land, 441 U.S. 506 (1979)

[75] This last example was in fact the law in England during the feudal era. Because a fief was regarded as a provisional grant of land by the king, given in exchange for loyalty and certain specific obligations, it was personal to the grantee. If the grantee died, his widow came into possession (*possessio*, not *dominium*, of course). But to allow her to marry whom she wished would be to place a person in control of the land who had not necessarily sworn allegiance to the king or undertaken the required obligations. Consequently, the widow could only remarry with the king's permission. The abolition of this restriction, which became practical as general obligations of loyalty to the monarch took hold and mercenary armies replaced feudal levies, was provided for in Chapter 8 of Magna Carta. See Holt, supra note [ ], at 199-202.

again, our legal system distinguishes property from liberty and treats property rights as the product of government policy, not as intrinsic to the person's status as human being or citizen.

C. The Evolution of Constitutional Doctrine Regarding Property Rights

Although the conception of property as the product of state law is securely established in the Anglo-American system, and although it is embodied in the text of the U.S. Constitution, it has not been an easy principle to accept. It seems particularly threatening in the context of a democratic government. At least since Aristotle, the fear has been that the unpropertied masses will vote to transfer massive amounts of valuable property to themselves or undermine the institution in its entirety.[76]

This fear was reawakened in the United States during the Progressive Era.[77] Progressivism, a broad-based social movement,[78] responded to the momentous transformations engendered by the growth of industrialism in the United States in the late nineteenth century -- the so-called Gilded Age.[79] These transformations included the advent of enormous industrial corporations, their development of factory-made consumer products, the mass marketing of these products to an enthusiastic but unwary public, the expansion of the urban working class needed to produce these consumer products, the harsh and impecunious conditions to which the workers were subjected, and the vast disparities of wealth between these workers and the new elite that owned and managed the industrial corporations.[80]

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[76] Aristotle, Politics, in The Works of Aristotle, vol. 2 at 445, 506-07, 523-24 (Benjamin Jowett, trans., 1952), 1304b20*-1305b22*, 1319b33*-1320b15*

[77] See generally John Whiteclay Chambers II, The Tyranny of Change: America in the Progressive Era, 1890-1920 (1992); Eric Goldman, Rendezvous with Destiny: A History of Modern American Reform (1952); Richard Hofstadter, The Age of Reform: From Bryan to FDR (1955); Michael McGerr, A Fierce Discontent: The Rise and Fall of the Progressive Movement in America (2003): Irvin Painter, Standing at Armageddon: The United States, 1877-1919 (1989); Robert H. Wiebe, The Search for Order, 1877-1920 (1967).

[78] On the idea of social movements generally, see, e.g., Donatella Della Porta and Mario Diani, Social Movements: An Introduction (1999); William A. Gamson, The Strategy of Social Protest (2nd ed. 1990); Alberto Melucci, Nomads of the Present: Social Movements and Individual Needs in Contemporary Society (John Keane and Paul Mier trans., 1989); Anthony Oberschall, Social Conflict and Social Movements (1973); Sidney Tarrow, Power in Movement: Social Movements, Collective Action and Politics (1994); Alain Touraine, The Voice and the Eye: An Analysis of Social Movements (Alan Duff, trans., 1981).

[79] See, e.g., Sean David Cashman, America in the Gilded Age: From the Death of Lincoln to the Rise of Theodore Roosevelt (3rd ed., 1993); Leach, supra note [ ]; Charles R. Morris, The Tycoons: How Andrew Carnegie, John D. Rockefeller, Jay Gould, and J.P. Morgan Invented the American Supereconomy (2005); Glen Porter, Industrialism and the Rise of Big Business, in Charles W. Calhoun, ed., The Gilded Age: Perspectives on the Origins of Modern America 11 (2007); W. Bernard Carlson, Technology and America as a Consumer Society, 1870-1900, in id. at 29.

[80] There were related developments in agriculture. While production remained in the hands of individuals -- the proverbial family farm -- it shifted from subsistence farming to the production of cash crops. The marketing and distribution functions that necessarily accompanied this shift were controlled by large national corporations that paralleled the industrial firms. The Grange was a social movement that reacted directly to this situation, while Populism was a more general response to both agricultural and urban conditions. See

Progressives chose to combat these problems in a variety of ways, but a leading strategy, and perhaps the dominant one, was to enact state and federal legislation that embodied consciously developed social policies. Laws to protect workers from injury, enable or require them to earn sufficient wages, protect consumers from fraudulent or defective products, and alter living conditions in the burgeoning cities, proliferated rapidly as Progressives gained political control. This legislation necessarily displaced the existing common law rules regarding property with a different and more restrictive legal regime.

A number of Supreme Court Justices at this time, prey to the age-old worry that a democratic polity could demolish the institution of private property, perceived this legislation as legally suspect. They recognized that much of it was justified by changing circumstances and they understood that there was no explicit clause protecting property in the Constitution. But they believed that Anglo-American law embodied a basic right to private property and that Progressive legislation, if not properly crafted and carefully contained, could violate this right. With the *Lochner* decision, or perhaps a bit before, they located this right in the Due Process Clause's protection of liberty, which they recognized as a term that, unlike property, must be defined by constitutional doctrine. Anglo-American common law, they declared, establishes liberty of contract, the basic right of people to negotiate commercial agreements without government interference. This then became the doctrine of substantive due process in the economic realm and the instrument that the Court deployed to protect private property rights.[81]

As noted at the outset, contemporary scholarship has challenged the standard account of the Lochner Court as motivated by purely political considerations.[82] While some of this scholarship is essentially analytic,[83] a number of scholars have sought to justify the Court's economic due process decisions. David Bernstein argues that liberty of contract was a widely accepted principle of nineteenth century legal thought derived from natural rights beliefs, and thus element of the prevailing social contract theory of government legitimacy.[84] David Mayer claims that it emerged from the Founders' understanding of liberty, the principle for which they had fought

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Chambers, supra note [ ], at 75-77; Lawrence Goodwyn, The Populist Movement: A Short History of the Agrarian Revolt in America (1978); McGerr, supra note [ ], at 21-32; Robert C. McMath, Jr., American Populism: A Social History, 1877-1898 (1992); Elizabeth Sanders, Roots of Reform: Farmers, Workers, and the American State 1877-1917 (1999); Worth Robert Miller, Farmers and Third Party Politics, in Calhoun, supra note [ ], at 283.

[81] Liberty of contract was explicitly identified as a property right. See Adair v. United States, 208 U.S. 161 (1908); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[82] See note [ ] supra (citing sources)

[83] E.g., Friedman, supra note [ ]; Morag-Levine, supra note [ ]; Post, supra note [ ].

[84] Bernstein, supra note [ ]

and on which they based the nation they created.[85] Howard Gillman regards economic due process as being grounded in Americans' aversion to class legislation and thus in the demand that government act neutrally and for the common good.[86]

The difficulty with these accounts is that they overlook the Lochner Court's Commerce Clause cases.[87] At the same time it was striking down state legislation on substantive due process grounds, the Court was striking down national legislation on federalism grounds.[88] An expansive reading of the Due Process Clause and a narrow reading of the Commerce Clause are unrelated doctrinal interpretations. The Court's aggressive and unprecedented use of both these interpretations at the same time suggests that its motivating principles could not be cabined as neatly within due process doctrine as these revisionists assert.

The Lochner Court was in fact motivated by principle, but the principle involved was the protection of private property from the excesses of majoritarian legislation. In the Justices' view, Lord Coke was correct in tracing common law to the primordial past and identifying it as the essence of the Anglo-American legal system. They genuinely believed that the rights secured by common law, including the rights to private property that it established, were an element of the liberty that the Due Process Clause protected. State legislation that displaced the common law was therefore suspect and federal legislation that displaced state common law was equally suspect.[89]

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[85] Mayer, supra note [ ]., Unusually, even among the revisionists, Mayer argues that the substantive due process decisions were not only principled but correct.

[86] Gillman, supra note [ ].

[87] For a more extensive discussion of this point, see Edward L. Rubin, Lochner and Property, in Nicholas Parrillo, ed., Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry Mashaw (forthcoming, 2016).

[88] E.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down legislation that prohibited interstate shipment of goods produced by child labor); Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330 (1935) (striking down legislation that established a pension system for railroad employees); United States v. Butler, 297 U.S. 1 (1936) (striking down legislation that attempted to raise the price of agricultural products by inducing farmers to decrease production); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down legislation that that set maximum hours for coal miners). The Court also undermined the Sherman Act, the nation's first antitrust statute, by holding that manufacturing, since it occurred in a single place, was not interstate commerce. United States v. E.C. Knight, 156 U.S. 1 (1895).

[89] The Court never quite articulated this rationale in explicit terms, perhaps because the Justices were aware that it would be difficult to justify, however firmly they believed it. But it was built into their analysis of state law regulation. One of the clearest expressions of this belief comes from Truax v. Corrigan, 257 U.S. 312 (1921) (striking down a state law that restricted the use of injunctions in labor cases). Chief Justice Taft, writing for the Court, said:

Plaintiffs' business is a property right . . . and free access for employees, owner and customers to his place of business is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. . .. Intention to inflict the loss and the actual loss caused are clear. The real question here is, were the means used illegal? The above recital of what the defendants did, can leave no doubt of that. The libelous attacks upon the plaintiffs, their business, their employees, and their customers, and the abusive epithets applied to them were palpable wrongs. They were uttered in aid of the plan to induce plaintiffs' customers and would-be customers to refrain from patronizing the plaintiffs. The patrolling of defendants immediately in front of the restaurant on the main street and within five feet of plaintiffs' premises continuously during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the entrance to the restaurant and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees,

That did not mean that all such legislation should be struck down on constitutional grounds. As the revisionists correctly note, the Lochner Court sustained a great deal of Progressive legislation. What it did mean was that either state or federal legislation that displaces common law property rights must be based on convincing social policy considerations.[90] In some cases, legislation was sustained because the business in question was deemed to be "affected with a public interest."[91] This reconciled regulation with the right to private property because the property owner was regarded as having voluntarily submitted to regulation when it entered that line of business.[92] In other cases, necessarily an overlapping category, the Court was holding that the justification for legislation that interferes with common law property rights must rise to the level of a countervailing right. Thus, a maximum hours law for bakers was struck down as unjustified in the *Lochner* case itself, but a maximum hours law for women was upheld because women, being more vulnerable to workplace conditions, need protection,[93] and a maximum hours law in manufacturing was upheld because manufacturing, unlike baking, is a dangerous activity.[94] A state could not ban the use of rags as mattress stuffing on public health grounds because the rags could be made safe by sterilization,[95]

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plaintiffs and customers, and the threats of injurious consequences to future customers, all linked together in a campaign, were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business.

Id. at 327. Tort law, and specifically the law of libel and of nuisance, is common law, and it is apparently the violation of common law that makes the action in question "illegal" and "unlawful." The anti-injunction statute was enacted to displace this common law prohibition on something that we now fully accept as a legitimate tactic in labor disputes ("with the possible exception of "threats of injurious consequences to future customers"), and that is what the Court disallows.

[90] See Morag-Levine, supra note [ ], at 63-85, 187-88.

[91] Munn v. Illinois, 94 U.S. 113, 126 (1877) (upholding state maximum rate legislation for grain storage facilities). *Munn* predates the period when the Supreme Court was striking down state legislation on economic due process grounds since it upholds the legislation in question. But it did so using a rationale that clearly created the conceptual framework for the Lochner Era decisions, namely, that the business in question was affected with a public interest. It was followed by a series of other cases that upheld state regulatory law, but did so on the Lochner Era's public interest rationale. See Mugler v. Kansas, 123 U.S. 623 (1887) (sale of alcoholic beverages); Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890); Railroad Commission Cases, 116 U.S. 307 (1886). The Lochner Era itself can be taken to begin with Allgeyer v. Louisiana, 165 U.S. 578 (1897) (striking down a state law that forbid marine insurance by out-of-state insurance companies unless they were licensed by the state). *Allgeyer* states the right to property and liberty of contract doctrine quite clearly. The use of the subsequent *Lochner* decision as the emblem for this doctrine is simply conventional.

[92] 94 U.S. at 126: "when one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good." For decisions during the Lochner Era that sustained legislation on the basis of this rationale, see, e.g., VanDyke v. Geary, 244 U.S. 39 (1917) (residential water supply systems); Terminal Taxicab Co. v. Kutz, 241 U.S. 252 (1916); German Alliance Ins. Co v. Lewis, 233 U.S. 389 (1914); Noble State Bank v. Haskell, 219 U.S. 104 (1911). The "affected with a public interest" phraseology comes from a seventeenth century treatise by Sir Matthew Hale. See Walton H. Hamilton, Affectation with Public Interest, 39 Yale L.J. 1089 (1930)

[93] Muller v. Oregon, 208 U.S. 412 (1908)

[94] Bunting v. Oregon 243 U.S. 426 (1917)

[95] Weaver v. Palmer Bros., 270 U.S. 402 (1926)

but it could order the destruction of diseased trees.[96] The federal government could not set prices and control production in the coal industry,[97] but it could regulate food and drug companies to protect consumers from harmful products.[98]

The use of the Due Process Clause to strike down economic legislation was rejected by the Court in *West Coast Hotel v. Parrish*[99] and *United States v. Carolene Products.*[100] Like the decisions they overruled, these decisions are often explained in purely political terms. They were Owen Roberts' "switch in time that saved nine," or the Court's more general surrender in the face of the widespread demand for government programs to combat the Great Depression.[101] Here too, however, there is a convincing revisionist account; Barry Cushman argues that the 1937-38 decisions were principled ones based on a gradually evolving understanding that the Lochner Court's distinctions between justifiable and unjustifiable economic regulation were incoherent.[102]

Another principle that supports the Court's reversal of the Lochner Era cases is its conclusion that there is no general common law. In the same session that it decided *Carolene Products*, the Court decided *Erie Railroad v. Tompkins*,[103] which declared that in a diversity case, as opposed to a federal question case, there is no federal law to apply. Instead, the federal judge must determine what the law of the relevant state provides.[104] The decision thus recognizes that common law is merely state law established by legislative delegation to the judiciary rather than by legislative enactment.[105] In other words, it reiterated, or perhaps reinstituted, the principle of legislative supremacy established in seventeenth and eighteenth century England. By thus demoting

[96] Miller v. Schoene, 276 U.S. 272 (1928)
[97] Carter v. Carter Coal Co., 298 U.S. 238 (1936)
[98] Hipolite Egg Co. v. United States, 220 U.S. 45 (1911); McDermott v. Wisconsin, 228 U.S. 115 (1913)
[99] 300 U.S. 379 (1937) (upholding state minimum wage law for women employees)
[100] 304 U.S. 144 (1938) (upholding prohibition on sale of milk mixed with vegetable oil). For an illuminating account of this case, see Geoffrey Miller, The True Story of Carolene Products, 1987 Sup. Ct. Rev. 397.
[101] See Conrad Black, Franklin Delano Roosevelt: Champion of Freedom 377-78, 412-15 (2003); James MacGregor Burns, Roosevelt: The Lion and the Fox 231-32, 291-315 (1956); Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 11-32 (1998)
[102] Cushman, supra note [ ]. In so doing, Cushman undertakes a sustained effort to rehabilitate the reputation of Justice Roberts. See id. at 45-105.
[103] 304 U.S. 64 (1938).
[104] Rejecting the existence of general common law does not mean that there is no federal common law, of course. Federal common law will exist in any circumstance where the federal courts have been authorized by Congress, explicitly or implicitly, to develop rules in an area subject to federal control. Such areas include labor law, the law regarding the commercial paper of the United States, and administrative law. One of the most famous non-constitutional cases of the past half century, Chevron Corp. v. NRDC, can be regarded as federal common law. See Gillian E. Metzger, Ordinary Administrative Law as Common Law, 110 Colum. L. Rev. 479 (2010)
[105] See New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (state common law of defamation is state action subject to First Amendment restrictions); Shelly v. Kramer, 334 U.S. 1 (1948) (state common law of contracts is state action subject to Fourteenth Amendment)

common law, *Erie* refuted the underlying principle on which the economic due process cases were based, namely, the principle that common law is superior to state law and that common law rights are included in the constitutionally defined liberty that the Due Process Clause protects.

The 1937-38 rejection of substantive due process for economic interests was definitive. But the belief that common law property rights have constitutional status retained its normative appeal despite the recognition of its invalidity. Without any clear justification, the Court maintained the belief that only rights created by common law were entitled to constitutional protection under the procedural aspect of the Due Process Clause. Rights created by statute, it held, could not serve as a basis for constitutional protection. This was the doctrine that became known as the rights-privileges distinction.[106] It was grounded in the Lochner Era substantive due process doctrine that the Court had rejected. While the Court no longer claimed that common law property rights were included in constitutional liberty, there was certainly no doubt that such rights, once established, could not be taken from an individual unless the individual was shown to fit within some legally defined category that merited such treatment. In other words, common law property rights, once established, were entitled to procedural protection under the Due Process Clause. The Court then committed the logical error of concluding that the inverse of this rule was also true, namely, if a right was not created by common law, then it was not protected by the Due Process Clause. The source of this error was the continued belief that common law had some sort of constitutional significance; even if it no longer was a source of substantive due process protection, it was still a precondition for procedural due process protection.

After two decades of cases that challenged this distinction, and a leading law review article by Charles Reich,[107] the Supreme Court finally recognized that the rights-privileges distinction was invalid.[108] Any substantial right, no matter what its source, merits due process protection. The purpose of the Due Process Clause is

[106] See, e.g., Fleming v. Nestor, 363 U.S. 603(1960) (denying due process protection for termination of government benefits); Barsky v. Board of Regents, 347 U.S. 442 (1954) (denying due process protection for termination of government license); Levine v. Farley, 107 F.2d 186 (D.C. Cir., 1939), cert. denied, 308 U.S. 622 (1940) (denying due process protection for termination of government employment). The classic statement is by then-Judge Oliver Wendell Holmes in a state case, McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892): "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

[107] Charles A. Reich, The New Property, 73 Yale L.J. 733 (1964). See also Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245 (1965).

[108] Goldberg v. Kelly, 397 U.S. 254 (1970). In the majority opinion, Justice Brennan wrote: "[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "'a *privilege,' and not a 'right.'*" Id. at 262 (quoting Shapiro v. Thompson, 394 U.S. 618 (1969), emphasis in original).

to protect typically powerless individuals from oppression, and taking away a person's welfare benefits or driver's license is just as oppressive as taking away her bank account or automobile. Thus, having grappled with Progressive, New Deal, and Great Society legislation for seven decades, the Supreme Court finally recognized the basic status of property in the Anglo-American legal system. As Justice Stewart, writing for the majority in *Roth v. Board of Regents*, declared: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ."[109]

There was still one final flicker of conceptual confusion on this issue. In *Arnett v. Kennedy*, decided 1974,[110] a federal employee, having been dismissed in accordance with the procedures specified in the Lloyd-Lafayette Act,[111] challenged the constitutionality of those procedures. Justice Rehnquist, in a plurality opinion, quoted the *Roth* language about the creation of property by state law. He went on to say that since the law had created the plaintiff's property interest in his job, it also could determine the procedures by which that interest could be taken away. He wrote: "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."[112] But this position did not command a majority of the Court and it has not been followed since. Property rights are created by state law, not by the Constitution, but the procedural protection of those rights, once created, is indeed a constitutional matter. The explanation, to summarize once more, is that property rights are established generally, and are thus to be determined by the political process, but the removal of those rights occurs on an individual basis, and individuals need constitutional protection against unfair treatment.

II. The Takings Cases

By the mid-1970's, it appeared that the conceptual confusion regarding property rights that had afflicted the Supreme Court since the beginning of the century had been resolved. The Justices understood that property rights are entirely subject to state law in our legal system and thus to be determined by the political process, not the Constitution. They further understood

[109] 408 U.S. 564, 577 (1972).
[110] 416 U.S. 134 (1974).
[111] 5 U.S.C. § 7201. The Act provided that the employee could file objections to the dismissal notice orally and in writing and examine the information on which the dismissal was based. The employee claimed that he had a due process right to a trial type hearing before an impartial decision maker.
[112] Id. at 154.

that common law is simply one form of state law, so that even if property rights are determined by judges through the common law, they remain subject to the political process and do not acquire constitutional status. Finally, they understood that, with respect to property rights, the Due Process Clause imposes only procedural requirements on the treatment of individual, and that the constitutional protection that attaches to those requirements does not extend to the general rules by which property is created and structured.

But the Justices willingness to accept these conclusions was diminished, perhaps by the torrent of regulatory law, rivalling that of the Progressive and New Deal Eras, that emerged during the 1960's and early 1970's in areas such as civil rights, environmental protection and consumer protection.[113] This dramatic development seems to have revived the age-old and only recently-rejected concern that it would be dangerous to leave the rules regarding private property in the hands of a democratic populace. Over the course of the following four decades, therefore, the Court fashioned a fallback position that attempted to preserve some of the effects of the Lochner doctrine without subscribing to its demolished premises. Knowing that it would now be impossible to assert that there is a right to private property, a majority of the Justices articulated the alternative view that property has rights. That is, the state concededly has plenary power over the creation and design of property rights, and the particular rights that were created by common law judges, whether or not they remain in force, have no constitutional significance. But once the state has chosen create property rights, and particularly once it has chosen to create rights that are or resemble common law rights, the state loses some of its control over these rights. Property, according to the contemporary Court, has rights, and these rights may be asserted against further state action to alter or reduce them. This is the Supreme Court's new Lochnerism.

A natural place to begin this inquiry into the principles underlying the current Court's decisions is with the cases that specifically discuss the concept of property, that is, the cases that involve the scope of the Fifth Amendment's Takings Clause. The Clause creates two boundaries that have generated controversy:

[113] This includes the Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241; the Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437,codified at 52 U.S.C. 10301 et seq.; the Clean Air Act of 1966, Pub. L. 89–675, 80 Stat. 954; the Federal Water Pollution Control Act of 1972 (Clean Water Act), Pub. L. 92–500, 86 Stat. 816; the Endangered Species Act of 1973, Pub. L. 93–205, 87 Stat. 884, codified at 16 U.S.C. 1531 et seq.; the Truth in Lending Act of 1968, Pub. L. 90–321, 82 Stat. 146, codified at 15 U.S.C. 1601 et seq.; and the Magnuson-Moss Warranty –Federal Trade Commission Improvement Act of 1975, Pub. L. 93–637, Jan. 4, 1975, 88 Stat. 2183, codified at 15 U.S.C. 2301 et seq. See generally Charles and Barbara Whalen, The Longest Debate: A Legislative History of the Civil Rights Act (1987); Randall Woods, Prisoners of Hope: Lyndon B. Johnson, the Great Society and the Limits of Liberalism (2016); Julian E. Zelizer, The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society (2015)

first, whether the state is justified in taking a particular action provided that it compensates a person disadvantaged by that action, and second whether the state, when taking a particular action, needs to provide compensation to those who have been disadvantaged. While the first question has generated one of the most controversial decisions of the past decades, *Kelo v. City of New London*,[114] it is not directly relevant to this discussion. When the state compensates, it is conceding that the disadvantages imposed on the individual constitute a loss of property, the only question being whether the state has the right to take the property in question.[115] The issue that directly implicates the Court's conception of property is the second. In a regulatory state, which is the one we have, this question is likely to arise with frequency. The Takings Clause decisions of the recent Court that have proven most controversial, and can be most readily characterized as pro-business, are the so-called regulatory takings decisions, where the Court has required compensation for the property owner's loss of value as a result of generally applicable regulatory laws.

A. Loretto v. Teleprompter Manhattan CATV Corp.

One of the earliest decisions that can be regarded as revealing the contemporary Court's pro-business orientation is *Loretto v. Teleprompter Manhattan CATV Corp.*[116] New York State enacted a statute that required owners of rental property to allow a private company to install cable television equipment (cables and junction boxes) on their property for a nominal fee. Loretto, the purchaser of a property in which this equipment had already been installed, argued that the statute constituted a taking that required compensation by the state. In an opinion by Justice Marshall, the Supreme Court concluded "that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[117] The Court offered reassurance that its decision "in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a

[114] 545 U.S. 469 (2005). In response to this decision, President George W. Bush issued Executive Order 13406, Protecting the Property Rights of the American People (June 23, 2006) which limited the federal government's use of its eminent domain authority. Within a few years, thirty-seven states had updated their eminent domain laws, in most cases abjuring the authority granted by the decision. See Edward J. Lopez, R. Todd Jewell and Noel D. Campbell, Pass a Law, Any Law, Fast! State Legislative Responses to the *Kelo* Backlash, 5 Rev. Law & Econ. 101 (2009)

[115] Of course, Takings Clause controversies can also arise about the amount of compensation that the state must provide. E.g., United States v. Powelson, 319 U.S. 266 (1943). Again, such controversies generally concede that property is at stake.

[116] 458 U.S. 419 (1982)

[117] Id. at 426. The invasion, as described by the Court, consisted of "a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." Id. at 438

building."[118] But it failed to explain exactly why this was true, other than to say that the challenged statute authorized "permanent occupation of the landlord's property by a third person."[119]

The reason why this case reached a conclusion that conflicts with prior doctrine is that it is based on a distinction that is different from the one those prior cases used. For the most part, prior decisions reflect the *Londoner-BiMetallic* distinction between generally applicable governmental action, which is not a taking, and action that selects, or singles out, a particular piece of property. [120] In *Loretto*, however, the Court employed a distinction between permanent physical occupation and other, presumably temporary or non-physical, impacts on the property in question. As the majority conceded, and as the dissent pointed out, this distinction fails to explain why the government can require an owner of rental property to install "utility connections, mailboxes, smoke detectors, fire extinguishers, and the like."[121]

In fact, the difference between cable equipment and utility connections or mail boxes cannot be explained in terms of the impact on the owner; in each case, a general regulation compels all owners of a particular form of property to dedicate a small portion of their property for a designated public purpose.[122] The factor that appears to explain the difference is the impact of the

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[118] Id. at 440.

[119] Id.

[120] *Compare* Palozollo v. Rhode Island, 533 U.S. 606 (2001) (environmental law limiting development of property within a defined area to residential use is not a taking); Bowen v. Gilliband, 483 U.S. 587 (1987) (change in welfare law shifting child support payments to the government is not a taking); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (law and regulation limiting coal mines from extracting coal in a manner that could cause surface subsidence is not a taking); Agins v. Tiburon, 447 U.S. 255 (1980) (zoning ordinance forbidding multiple family homes within a given area is not a taking); PruneYard Shopping Center v. Robbins, 447 U.S. 74 (1980) (government action, in this case by a court, that opens shopping centers to speech activities is not a taking); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (ordinance down-zoning an area from industrial to residential use, thereby reducing the market value of the property in the affected area, is not a taking) *with* Nollan v. California Coastal Comm., 483 U.S. 825 (1987) (requiring a particular property owner to grant an easement for crossing the property as a condition for granting a permit to construct a residence is a taking); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (requiring that a particular waterway created by a private party be available for public use is a taking); United States v. Causby, 328 U.S. 256 (1946) (destroying the value of a particular chicken farm by routing airplanes landing routes over it is a taking); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872) (flooding a particular piece of land when building a dam is a taking). A decision that affects a particular piece of property, however, can nonetheless be taken without providing compensation if there is a sufficient public justification. See Dolan v. City of Tigard, 512 U.S. 374 (1994) (requiring a particular property owner to set aside land for a public greenway as a condition for granting a building permit is not a taking); Penn Central Transp. Co. v. City of New, 438 U.S. 104 (1978) (designation of a building as a landmark, thereby preventing the owners from building another structure on top of it, is not a taking); United States v. Caltex, Inc., 344 U.S. 149 (1952) (destruction of industrial facility to prevent it from falling into enemy hands during wartime is not a taking). For an exception to this general pattern of decisions, see note [ ] infra.

[121] 458 U.S. at 440; id. at 452-53 (Blackmun, J., dissenting)

[122] The amount of space that the equipment occupied was minimal, consisting of "a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof . . . [and] two large silver boxes along the roof cables." Id. at 422. None of it interfered with any of the building's functions.

general regulation on the property itself. First, the cable equipment at issue in *Loretto* was installed by a private company, rather than by the property owner pursuant to regulatory instructions. Second, the equipment, at least initially, did not benefit the residents of Loretto's building but served as part of the transmission system for other buildings in the vicinity.[123] As a result, the New York statute's requirements seemed like an "occupation" of the property in a way that the requirement to provide mail boxes or smoke detectors to the residents would not. Compounding this insult to the property was the fact that the equipment was installed by a private company, and that the statutorily authorized fee, set by a state agency, was an insulting "one-time $1 payment."[124]

According to the Supreme Court's modern, or post-Lochner Era jurisprudence, none of these considerations should have mattered. All owners of rental property in New York State were required by a democratically-enacted state law to comply with certain regulatory requirements that affected only their economic interests and had no impact on their personal liberty.[125] There is, to be sure, a visceral sense, derived perhaps from traditional patterns of pre-administrative common law, that the government may not intrude upon a person's property without providing compensation. But the law in question, like a law requiring a landlord to provide mailboxes or smoke detectors, was truly regulatory in nature. It did not take title to some portion of

[123] Id. at 422. The cable was connected to the units in Loretto's building two years after she purchased the property.

[124] Id. at 423.

[125] The one major exception to the pattern of recent Takings Clause cases that limits the compensation requirement to individualized action is Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). Upon learning that the firm it had purchased had debts greater than the purchase price, Eckerd's filed a complaint of interpleader in state court that named the purchased firm and its creditors and tendered the purchase price to the court. The clerk of the court deposited the money in an interest bearing account. When the interpleader fund was transmitted to the receiver, the court retained, pursuant to statute, not only the prescribed court fee, but also the interest on the fund. The Supreme Court held that the interest was private property and that the state court's retention of the interest constituted an uncompensated taking. In an opinion by Justice Blackmun, the Court acknowledged that property is created by state law, citing *Roth*, id. at 161. But state law defined the interest as belonging to Webb's creditors the Court held. Retaining the interest is "analogous to the appropriation of the use of private property in *United States v. Causby*, 328 U.S. 256 (1946)". Id. at 164.

Causby, however, involved an individualized action; (destroying the value of a particular chicken farm by routing airplanes landing routes over it). In *Webb's Fabulous Pharmacies*, the state court acted pursuant to statute. The action involved, however, has a sort or random, particularized feel to it; Webb's creditors were denied the interest because Eckerd's purchase price happened to fall into the control of the court, rather than being dealt with through some other mechanism. In addition, the statute's operation may raise procedural due process concerns; it appears as a kind of penalty for making use of the judicial system. The possibility that these additional concerns led the Supreme Court to require compensation for action taken pursuant to a general statute is further suggested by its subsequent rulings in Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) and Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003). These cases concerned state legislation providing that interest on client funds that lawyers hold in trust can be taken by the state to support legal services when the amounts involved are too small to be conveniently returned to the client (so-called IOLTA programs). In *Phillips*, the Court felt compelled to follow *Webb's Fabulous Pharmacies* and hold that the interest was property, but in *Brown* it declined to grant compensation because the clients had lost nothing of value.

the property in question, nor interfere with the owner's use of it in any significant way. It simply required that commercial property in New York comply with certain conditions necessary for modern telecommunications. Conversely, the owner was not defending itself against a government action that interfered with the value of the property or its ability to use that property. Rather, it was trying to use its control of the property to block the provision of a valuable service to the public, and extract money from the government on the basis of that control.

Most significantly, the statute in question was a public policy decision that balanced the economic interests of tenants against the economic interests of landlords. This is a conflict that arises in a variety of situations, including habitability, rent withholding, termination, eviction, security deposits and rent control. As with other economic matters, resolution of these conflicts is a matter for the political process to determine. In New York State, tenants seem to wield significant amounts of political influence, and able to obtain legislation favorable to their interests. In other states, the balance may be more likely to favor landlords and other property owners. Since the end of the Lochner Era, the prevailing doctrine is that constitutional courts do not intervene in conflicts of this sort. A decision striking down the New York law as overly burdensome on landlords would then open the question of whether different laws in Nebraska or Arizona should be struck down as overly burdensome on tenants. This is the kind of determination that modern courts abjure.

The Justices who decided the Loretto case knew this principle of course, and presumably accepted it. The only basis on which they could have decided not to follow it was the existence of a countervailing constitutional right. That right, apparently, is that general legislation cannot authorize an "invasion" of private property without providing compensation to the property owner. But the concept of invasion necessarily refers to the property itself, not to the rights of any person owning or otherwise connected with the property. From the owner's perspective, the challenged statute was a general regulation, established by the legislature, that imposed a regulatory requirement on its business, essentially the same, in its impact and burden, as the requirement to provide mailboxes, or install smoke alarms, or supply adequate heat in winter. In other words, the doctrinal basis of the Court's decision is that property, once created by state law, has intrinsic rights, in this case a right not to be invaded.

B. Lucas v. South Carolina Coastal Council

Lucas v. South Carolina Coastal Council[126] rests on the same doctrinal foundation as *Loretto*, despite the distinct difference in the type of regulation it involved. Pursuant to the federal Coastal Zone Management Act of 1972, as amended in 1980, which directed states to restrict development in coastal areas, [127] South Carolina passed the Beachfront Management Act.[128] This authorized a state agency to establish a boundary beyond which no occupable improvements would be allowed. Lucas, a developer, had purchased two parcels with the intent of building single family residences. Once the agency established the required boundary, however, Lucas' parcels fell on the seaward side of the boundary, which meant that residential development was forbidden. Lucas brought suit claiming that the state's action constituted a taking that required compensation, and the Supreme Court agreed. In an arguably pro-business decision written by Justice Scalia, the Court declared: "when the owner of real property has been called upon to sacrifice *all* the economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. [129]

While the explicit basis for the Court's ruling in *Lucas* is that it protects individuals who own property from regulations that are tantamount to takings, the Court's rule for making this determination does not relate to the rights of individuals. It makes sense only if there can be said to be rights that are intrinsic to property. The Court might have held that a generally applicable regulation decreasing an individual's wealth by a certain amount of money constituted a taking. Alternatively, it could have held that a taking occurred when the regulation decreased the individual's wealth by a certain proportion. Neither of these rules is constitutionally justified or pragmatically viable, but at least it would correspond to the purpose that the Court declared. The *Lucas* rule does not; it protects the property itself from being rendered valueless by the challenged regulation. Its criterion for determining that a regulation amounts to a taking relates to the regulation's impact on the property, not on the property's owner.[130]

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[126] 505 U.S. 1003 (1992). Gillman identifies the demand that legislation be impartial as the true principle that underlies the Lochner cases. Supra note [ ].

[127] Coastal Zone Management Act, codified as amended, §16 U.S.C. 1456b(a)(2).

[128] S.C. Code Ann. § 48-39-250 et seq.

[129] Id. at 1019 (emphasis in original, footnote omitted).

[130] In reaching this conclusion, the Court relied heavily on Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), which held that when a statutory restriction on coal mining to avoid surface subsidence had the result of destroying the entire value of the mine in order to save one residence from destruction, the coal company was entitled to compensation. The majority opinion, written by Justice Holmes, famously declared: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id at. 414. Despite its authorship, *Pennsylvania Coal* is a Lochner Era decision, based on the idea that there is a constitutional right to private property. The opinion does not invalidate the statute, but rather concludes that in the factual situation of the case the preservation of a single residence cannot justify the extensive economic loss suffered by the mine owner. In addition, it gestures at

The familiar counter-example to regulatory takings claims, down-zoning, is particularly applicable here. If a property is originally zoned for commercial use, its market value, based on a realistic possibility that the property owner could have built a shopping center on it, might be $50,000,000. Down-zoned to residential use only, the property's market value might decrease to $500,000. The owner, according to law before and after the *Lucas* decision, could not have received compensation for his $49,500,000 loss.[131] But, according to *Lucas*, if the state then prohibited residential use and the market value dropped to zero, the state would need to compensate the owner for the loss of the remaining $500,000 in market value. This would true, moreover, whether the land in question was the owner's only asset, or whether the owner was a wealthy individual with five other properties or a land development corporation with hundreds. In other words, the constitutional status of the owner's loss is not being determined according to any criterion related to the owner, but rather one related to the piece of property itself. It seems to be the property itself that possesses a right not to have its value reduced to zero.

A second conceptual difficulty with *Lucas* involves the variable or protean character of property. For the purposes of the due process right to liberty, the boundaries of a person are fixed; every person has exactly one body, and a deprivation of liberty means an action that involves that body, and nothing else. Property, however, can be increased, decreased, combined or divided to a virtually unlimited extent. As a result, lower courts, in response to the litigation that has resulted from the *Lucas* decision, have been required to wrestle with what they have termed the denominator, or relevant parcel issue: the extent to which a piece
[132]

Here again, the only way to make sense of the Court's holding is to conclude that the piece of property that Lucas in fact owned had intrinsic rights, of the sort an individual would possess. Because Lucas' property was located entirely on the

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liberty of contract, pointing out that the coal company had conveyed the land to the plaintiffs "but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal." Id. at 411. As Justice Brandeis pointed out in dissent, id. at 419, "a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied." He further noted that "[i]f public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power." Id. at 420. This is the way a post-Lochner court would approach the case; *Pennsylvania Coal* survives as good law mainly because the opinion was authored by Holmes.

[131] See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding that zoning restrictions are a valid exercise of the police power and do not constitute a taking). The case was decided during the Lochner Era and has not been seriously challenged since.

[132] In fact, a perfectly plausible scenario is that its value would not have been reduced at all. Lucas's loss of his right to develop the seaward part of the property might have been counterbalanced by the increase in the value of the landward part, which would then be guaranteed a clear view of the sea.

seaward side of the legislatively defined boundary, it was rendered valueless. In effect, it lost its commercial life. Had it extended across the boundary, it would only have suffered a reduction in value; it would have been injured, but the injury would not have been economically fatal. Thus, the Court concludes, its owner would not have been entitled to compensation.

This is not an easy principle to sustain. A piece of property, unlike a person or even a dog, is not a self-defining entity. A person who asserts a right--- to free speech or freedom of religion, for example -- is clearly identifiable as a single being, asserting his or her rights. This concept runs deeper than the doctrine frequently invoked in standing cases, which is that one person may not assert the rights of another.[133] Even if that doctrine is relaxed, as it might be with respect to parents and their children, it is nonetheless premised on the idea that the other person whose rights are being asserted is in fact another person. But property, being extendible, can be divided or combined to a virtually unlimited extent. It seems odd to hold that acquires constitutional protection merely because it is divided in a certain way.

The New Lochnerism of the Lucas decision is further emphasized by the exceptions it allows. As the majority readily conceded, that the government regulation can reduce the economic value of property to zero without triggering the compensation requirement if the regulation is justified by sufficient public interest or necessity. This principle was well-recognized throughout the Lochner era. In *Miller v. Schoene*, for example, the state was allowed to order the destruction of the property owner's red cedar trees without compensation because the trees were infected with a parasite that would otherwise spread to nearby apple trees.[134] The Lucas Court, in dealing with this settled principle, rejected the traditional (and Lochner Era) formulation that the state would not be required to compensate if the conditions that it sought to remedy were "akin to public nuisances."[135] This doctrine of harmful or noxious use was, in the Court's view, "simply the progenitor of our more contemporary statements that 'land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.' "[136]

Having rejected this formulation, Justice Scalia was then required to articulate its replacement. He declared: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation

[133] E.g. Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000); Allen v. Wright, 468 U.S. 737, 751 (1984); Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972).
[134] 276 U.S. 272 (1928)
[135] 505 U.S. at 1022.
[136] Id. at 1024 (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), which in turn quoted Agins v. Tiburon, 447 U.S 255 (1980), brackets in original)

only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[137] If there was positive law -- that is, a statute or regulation--, that proscribed the use, the matter would be free from doubt, of course; purchasers of land on the seaward side of the South Carolina boundary could hardly argue that they are entitled to compensation for their inability to carry out legally forbidden construction of a residence. In the absence of such law -- that is, in any case where a legal issue would arise -- the contours of the owner's property interest would be determined by common law. Justice Scalia attempted to avoid this characterization, but succumbed to it at the end of the opinion when he stated the principles for deciding Lucas' claim upon remand: "[T]o win its case. . .as it would be required to do if it sought to restrain Lucas in a common law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses" that the property owner intends.

This formulation does precisely what the Lochner Court did in its due process cases, and what the subsequent Court rejected in *Erie*: it constitutionalizes common law. It cushions, or perhaps obscures this result by viewing common law through the lens of people's reasonable expectations. This enables the Court to avoid the Lochner Era assertion that the particular doctrines of common law are embedded in the Constitution through natural law or Anglo-American culture, but it suffers from closely-related conceptual difficulties. First, as Justice Kennedy pointed out in his concurrence, is its "inherent tendency toward circularity," since people's expectations will be shaped by judicial doctrine. [138] Second, the Supreme Court has no reliable mechanism for assessing what people's actual expectations may be, so any assertion about these expectations becomes a restatement of the Justices' own views in pseudo-social science form.

The third and most important difficulty is that the Court's formulation relies, in the final analysis, on the premise that we continue to have a predominantly common law legal system on which positive law episodically intrudes. This is simply not true; we have an administrative or regulatory state that retains common law rules when they continue to comport with public policy and systematically abolishes or alters them when they do not. It is thus conceptually questionable to define any constitutional doctrine in terms of the substantive provisions of the common law, as opposed to state or federal law in its entirety. To put the matter in the Court's expectations terminology, everyone who owns property in a modern state understands, from the outset, that

[137] 505 U.S. at 1027.
[138] Id. at 1034.

the property might be subject to various regulatory restrictions. The point is a general and conceptual one, but it can be concretized by the fact of the Lucas case. When the plaintiff bought his two parcels of beachfront property in 1986, the federal Coastal Zone Management Act had been in place for fourteen years, and the amendments that triggered the South Carolina law had been in place for six. Moreover, no one in our society could be unaware that the preservation or development of coastal land was a matter of intense political controversy which might lead to regulatory restrictions on development. That is the reason why there is a large office building in Washington, D.C. occupied by the National Association of Home Builders, and why there is another building occupied by the Natural Resources Defense Council. It is the contest between the NASB and the NRDC that determines, in our democratic and administrative system, whether general legislation permits or prohibits property owners from developing beachfront land.

C. Horne v. Department of Agriculture

The New Lochnerist principle that property has rights served as the basis for the Supreme Court's recent Takings Clause decision in *Horne v. Department of Agriculture*.[139] Under the Agricultural Marketing Act of 1937, the Department of Agriculture is charged with promulgating regulations to maintain stable prices for specified agricultural products.[140] The Act applies to "handlers," that is, processors and sellers, of agricultural commodities, rather than to producers or growers. With respect to raisins, a 1949 regulation adopted pursuant to the Act requires handlers of the product to set aside, or "reserve" a specified portion of raisins they are processing, calculated as a percentage of each producer's total crop. These reserved raisins may not be sold by the handlers on the open market; instead, their disposition is determined by a committee (the Raisin Committee) established by the Department of Agriculture and thus, in its own right, an agency of the federal government. The Committee is authorized to dispose of the raisins in ways that do not compete with the domestic market; typically, it sells them overseas or gives them away to school lunch programs. If there are proceeds, they are distributed, after deduction of the Raisin Committee's administrative costs, to the producers on a pro rata basis.

Marvin and Laura Horne were raisin producers who were unhappy with this regulatory scheme. Since the statute and regulations do not apply directly to producers, the Hornes became handlers as well, processing the raisins they produced and those

[139] 576 U.S. _____, 135 S. Ct. 2419 (2015)
[140] Ch. 296, 50 Stat. 246, codified as amended at 7 U.S.C. § 602(4)

from other farms.[141] Then they refused to set aside any reserve raisins, as required by the regulation. In response to an enforcement action by the Department of Agriculture, they raised several legal claims, the significant one being that the reserve requirement is an uncompensated taking, and thus unconstitutional. In an opinion by Chief Justice Roberts, the Court agreed, holding that the "reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the government."[142]

The starting point for the opinion is a clear declaration, in response to a contrary holding by the court below, that personal property, such as the raisins in this case, is entitled to the same level of constitutional protection as real property.[143] The Court explained this decision in terms of legal history, including a citation of Chapter 28 of Magna Carta.[144] In terms of the theory of takings described above, this conclusion seems undeniably correct. Individuals without any realistic access to the political process can just as readily be oppressed by government seizure of their personal property as their real property.[145] Thus, like real property, personal property can only be taken from people if the state follows due process of law or provides compensation. But, as with real property, the state possesses the power to make general rules defining the contours of personal property. Although William the Conqueror limited his explicit declaration of allodial ownership to real property because of its connection to the political power structure of the era, a similar power over personal property is a fixture of our legal system. For example, the state prohibits the ownership of certain types of physical objects, such as explosives and narcotics, it defines the length and scope of private rights to intellectual property such as patents and copyrights, and it creates new property rights, such as licenses and welfare benefits.

While the starting point of the decision is clear, the subsequent reasoning is not. No one questions the

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[141] Horne v. Department of Agriculture, 133 S. Ct. 2053, 2058-59 (2013) (reversing, on statutory grounds, a ruling by the Court of Appeals that the plaintiffs were required to raise their Takings Clause claim in the Court of Federal Claims). This earlier opinion has background information about the facts of the case that does not appear in the Supreme Court's subsequent ruling on the merits.

[142] 135 S. Ct. at 2428.

[143] Id. at 2426 ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property.") The court below had held that "the Takings Clause affords less protection to personal than to real property," 750 F.3d 1128, 1139 (9th Cir. 2014), quoted by the Court at 135 S. Ct. 2425. In fact, the Supreme Court's conclusion would seem to have been established by prior cases. See, e.g., Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) (compensable taking when government appropriates interest on private funds); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (compensable taking when government appropriates interest on private funds); United States v. Causby, 328 U.S. 256 (1946) (compensable taking when airplane landing pattern damages chickens).

[144] 135 S. Ct. at 2426. There are three chapters of Magna Carta that protect personal property: Ch. 28, which is cited by the Court, Ch. 30 and Ch. 31. See note [ ] infra (discussing Ch. 28)

[145] In fact, as time has gone on, personal property has represented an increasingly large proportion of people's wealth.

constitutionality of general legislation that stabilizes produce prices by restricting the quantity of crops that farms may produce. Even the Lochner Court upheld the Agricultural Adjustment Act's use of the taxing and spending power for this purpose.[146] To be sure, it struck down the Act on federalism grounds in *United States v. Butler*,[147] but that holding was reversed in *Wickard v. Filburn*,[148] which decided that the Act's restrictions on production could be constitutionally applied to a farmer who grew wheat for his own consumption. This means that there is no private property type right, as the Lochner Court might have held using liberty of contract doctrine, to grow more raisins than the regulations allow.[149]

From the farmers' perspective, a regulation that forbids them from selling their excess raisins is equivalent to a regulation that prevents them from growing those raisins in the first place. Undoubtedly, they expended some additional effort and incurred some additional expense in producing the excess raisins. But as Justice Breyer pointed out in his separate opinion, it is not clear that the farmers lost money as a result; the whole purpose of the Agricultural Adjustment Act, after all, is to prevent the price of agricultural products from declining due to over-production.[150] Nor could the producers argue that they were entitled to compensation for their effort and expense. Compensating people for disobeying the restriction would be tantamount to declaring it invalid.

Thus, if the farmers have no right to produce more raisins than the regulation allows, then the right that the Court

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[146] 297 U.S. 1 (1936). The opinion, by Justice Roberts, framed the issue in the case in terms of the debate between James Madison and Alexander Hamilton regarding the scope of federal power, and explicitly endorsed Hamilton's position. Id. at 58-66.

[147] Id. at 66-78. Both Conrad Black and James MacGregor Burns, in their biographies of Franklin Roosevelt, treat Justice Roberts' decision in this case as a particular irritant to the President. See Black, supra note [ ], at 377-78; Burns, supra note [ ], at 231-32. Black suggests that Roberts should have recused himself because of his relationship with Butler's lawyer. If this case is the one that made Justice Roberts notorious as an opponent of New Deal legislation, however, it is worth noting that his decision that the Act was unconstitutional was not based on liberty of contract, the issue involved in his notorious "switch in time." In fact, as Cushman observes, note [ ] supra at 78-93, Justice Roberts had already written a ringing rejection of liberty of contract doctrine in Nebbia v. New York, 291 U.S. 502 (1934). See pp. [ ] infra.

[148] 317 U.S. 111 (1942). The federalism holding in *Butler* had been overruled several years earlier by Jones & Laughlin Steel Corp. v. United States, 301 U.S. 1 (1937). The Agricultural Adjustment Act, having been invalidated by the Court in *Butler*, was reenacted with altered language shortly thereafter and was thus the law at the time of *Wickard*.

[149] The same provision in Magna Carta that the Court cites to support its holding that personal property is equally entitled to protection as real property also supports the distinction between general and individualized action. That provision, Ch. 28, says: "No constable or any other of our bailiff shall take any man's corn or other chattels unless he pays cash for them at once. . ." Holt, supra note [ ], at 459. This clearly refers to action taken against a particular individual, not general legislation, because constables and bailiffs were administrative officials, extensions of the king's household actually, who could not enact legislation. Ch. 30, which deals with horses and carts, refers to sheriffs and bailiffs. But Ch. 31, dealing with timber, begins: "Neither we nor our bailiffs . . ." This probably refers to individualized action as well, but the absence of any reference to the king (the source of legislation at the time) in Ch. 28 makes clear that only individualized action is covered by its compensation provision.

[150] 135 S. Ct. at 2435-36.

established must belong to the raisins. What makes the regulation in the case different from a regulation limiting production is that, as the Court said, the government is taking "actual raisins." People may not have a constitutional or natural right to grow raisins, but, according to the Court, the raisins, once they have come into existence, have a right not be taken. They are property, and property, it would appear, has intrinsic rights than limit general governmental action. Just as the government has no right to authorize a private company to snake cable equipment through an innocent apartment building, and no right to rip all the economic value from a blameless seaside lot, it has no right to seize actual raisins and use them for its own purposes. Reading the Court's opinion, one can almost envision the reserve raisins weeping and trembling as they are torn away from their more fortunate companions who are happily headed to market, to be dumped on foreign shores or casually distributed to unappreciative school children.

III. The Corporation Cases

A second set of constitutional decisions based on the Supreme Court's neo-Lochnerist principle that property has rights involves corporations. In two leading decisions, *Citizens United v. Federal Election Commission* and *Burwell v. Hobby Lobby Stores, Inc.*, the Court held that corporations can assert First Amendment rights, respectively the right to speak and the right to practice religion, in opposition to otherwise applicable legislation. There has already been an enormous amount of writing about these cases, much of it focused on the nature of the corporation and whether it can reasonably be regarded as possessing rights.[151] The relevant point for present purposes is a simpler one. A corporation is quite obviously not a human being, and no one has asserted that it is. Rather, it is property of one sort or another, as will be described below. Concluding that a corporation possesses the right to speak or to practice religion, therefore, is to assert that property has rights.

In *Citizens United* and *Hobby Lobby*, in contrast to the decisions described above, the rights that property possesses are not property rights, and thus do not emerge from any notion about the need to protect property as such. Rather, they are rights

[151] See, e.g., Reuven S. Avi-Yonah, Citizens United and the Corporate Form, 2010 Wis. L. Rev. 999 (2010); Margaret M. Blair and Elizabeth Pollman, The Derivative Nature of Corporate Constitutional Rights, 56 Wm. & Mary L. Rev. 1673 (2015); Corey A. Ciocchetti, Religious Freedom and Closely Held Corporations: The Hobby Lobby Case and Its Ethical Implications, 93 Or. L. Rev. 259 (2014); Patrick N. McNulty and Adam D. Zenor, Corporate Free Exercise of Religion and the Interpretation of Congressional Intent: Where Will It End?, 39 S. Ill. L.J. 475 (2015); Joseph F. Morrisey, A Contractual Critique of Citizens United, 15 U. Pa. J. Const. L. 765 (2013); Elizabeth R. Sheyn, The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United, 65 U. Miami L. Rev. 1 (2010); Michael R. Siebecker, A New Discourse Theory of the Firm After Citizens United, 79 Geo. Wash. L. Rev. 161 (2010).

granted to citizens for activities that have no necessary relationship to property, or economic activity in general. The Supreme Court holds, however, that once property is created it can possess these rights as well. For this proposition to be coherent, of course, the property must be in a form that is legally capable of action in the world.[152] It would simply not make sense to say that some beachfront land has the right to speak, or that raisins can practice religion; no one would know what these statements mean. Corporations, however, are a form of property that, as positive law has defined them, are capable of action, and it is this form of property that has been recognized by the Court as possessing these additional rights.

A. *Citizens United v. Federal Election Commission*

For purposes of this discussion, the facts of *Citizens United v. Federal Election Commission* can be simply stated.[153] The Bipartisan Campaign Reform Act of 2002 (BCRA) [154] prohibits corporations from using general treasury funds for "electioneering," which is defined as a publicly distributed communication that expressly advocates the election or defeat of a candidate for federal office within 30 days of a political primary or 60 days of certain federal elections. Citizens United, a non-profit corporation, wanted to distribute a previously produced film through video-on-demand in a manner that arguably fell within this prohibition, and therefore sought declaratory and injunctive relief on the grounds that the prohibition is unconstitutional. Rejecting a variety of narrower grounds on which the case might have been decided,[155] the Supreme Court, in an opinion by Justice Kennedy struck down the prohibition as a violation of the First Amendment.

Issues regarding the constitutionality of various election law provisions had been extensively litigated prior to the *Citizens United* case. The majority and the dissenters disagreed about the proper interpretation of the previous decisions, but everyone acknowledged that the Court, in order to reach its result, needed to overrule at least two recent cases, *Austin v. Michigan Chamber of Commerce* [156] and *McConnell v. Federal Election Commission.*[157] Consequently, the majority could not assert that

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[152] See pp. [ ] infra.
[153] 558 U.S. 310 (2010)
[154] Bipartisan Campaign Reform Act of 2002, Pub. L.107-155, 116 Stat. 81, codified at 2 U.S.C. § 441b.
[155] The Justices disagreed strongly on whether the case could be decided on non-constitutional grounds. See 558 U.S. at 322-29 (Opinion of the Court), 396-414 (Stevens, J., dissenting). For present purposes, the relevant point is that the majority felt impelled, rightly or wrongly, to reach the constitutional issue.
[156] 494 U.S. 652 (1990) (upholding a provision of a Michigan campaign finance law similar to the challenged provision of the BCRA on ground that it did not violate the First Amendment).
[157] 540 U.S. 93 (2003) (upholding most provisions of the BCRA on First Amendment grounds and overruled only with respect to the provision at issue in the case)

its decision was unambiguously compelled by precedent.[158] It was obligated to justify its decision in terms of the principles that animate the Free Speech Clause.

It did so, and in ringing terms, but the language of its opinion reveals a certain amount of discomfort with the ultimate result. Justice Kennedy describes the First Amendment as protecting "speech." The "prohibition on corporate independent expenditures," he writes, "is thus a ban on speech."[159] He continues: "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[160] As he moves deeper into the discussion, moreover, Justice Kennedy increasingly detaches the idea of speech from its speaker and begins to personify it as an independent force. "For these reasons," he writes, "political speech must prevail against laws that would suppress it."[161]

Having suggested that speech exists independently of a speaker, Justice Kennedy then proceeds to the central argument of the opinion: "Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."[162] He goes on to say: "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."[163] In other words, he treats the prohibition on corporate expenditures as a form of discrimination.[164] The upshot is that he establishes speech as a disembodied good, protected by the Constitution, and then argues that prohibiting any entity from availing itself of that good is wrong for two reasons: first, it decreases the amount of the good, and second it mistreats the prohibited entity.

As an abstract matter, much of this sounds non-controversial, and it reverberates with Mill's classic argument for

[158] See 558 U.S. at 348 ("The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them.")
[159] 558 U.S. 339.
[160] Id.
[161] Id. at 340.
[162] Id. The qualification about regulating content is necessary because a finding that the anti-electioneering provision of the BCRA is unconstitutional on the ground that it is a content-based restriction on speech might suggest that all federal law regulating campaign expenditures are unconstitutional. Most of the classic First Amendment cases that Justice Kennedy offers as examples, however, involve content-based restrictions, id. at 336-37, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991) (striking down "Son of Sam" law that required an accused or convicted criminal to make income from a work describing his crime available to victims of the crime); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (restricting the application of state defamation law when a public figure is involved); Brandenburg v. Ohio, 385 U.S. 444 (1969) (striking down a law that criminalized seditious libel)
[163] 558 U.S. at 341
[164] Justice Kennedy amplifies this argument by pointing out that the BCRA exempts media corporations from its prohibition, thus discriminating further against other corporations. Id. at 352-54, 361.

freedom of speech.[165] The questionable aspect of it is that the First Amendment does not protect speech; it protects "freedom of speech." This suggests that what is being protected is not speech, as an abstract entity, but someone's ability to speak.[166] What the Constitution protects, in other words, is rights, in this case the right of someone capable of action to speak. The issue in the case, therefore, is whether a corporation possesses such a right. To grant that right to individuals but to deny it to corporations would, as the Court says, favor some speakers over others. Putting the matter in this form does not answer it, however, but merely restates it. There are many contexts in law when one group of actors is favored over another; the real question would be whether such differential treatment is justifiable.

What is the legal source of the corporation's the right to speak that the Court enforces in *Citizens United*? By describing speech as an abstract good, and then asking why a particular entity should be denied access to that good, the Court effected a sort of figure-ground reversal in the way rights questions are usually analyzed. Ordinarily, the moving party must demonstrate that the law grants it the right it seeks to enforce; in the language of the Federal Rules of Civil Procedure, it must "state a claim on which relief can be granted."[167] In our system, rights are generated by positive law, including the Constitution, or by judicial decision, that is, common law, with the judges acting as delegates of some authority established by positive law, and thus ultimately subject to that authority.

Corporations are generally created by state positive law, but are of course subject to federal law, which is almost always positive, through the Supremacy Clause. The first answer, although not necessarily the final one, to the issue raised in *Citizens United* is that corporations have no right to engage in electioneering because a federal statute denies them that right. Whatever state positive law provides about a corporation's right to speak, the federal law would seem to preempt it. The Court's decision finds a superior right in the Constitution, which unquestionably prevails over federal statutes. To do so, however, it is not sufficient to proclaim that "[s]peech is an essential mechanism of democracy" or that "political speech must prevail against laws that would suppress it." It is necessary to find that

[165] John Stuart Mill, On Liberty, in The Essential Works of John Stuart Mill 249, 268-304 (Max Lerner, ed., 1961)

[166] At one point, Justice Kennedy departs from this discursive conceit and says: "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self- government and a necessary means to protect it." Id. at 339. That is an unarguable point in our system, but it indicates the reason why Justice Kennedy adopts a difference mode of discourse in the rest of the passage, namely, it is open to an obvious refutation. Corporations may be defined as persons, but they are certainly not citizens; as such, they do not enjoy self-government (whatever that would mean) but instead are governed by entities others than themselves. And it would seem odd to describe a corporation as inquiring or hearing, even if one is prepared to say that it is speaking.

[167] FRCP 12(b)(6)

corporations have freedom of speech, that is, a constitutional right under the First Amendment.

But corporations are generally regarded as a form of property. That is to say, they are owned by other persons and, in our legal system, something that is owned is typically described as property.[168] As Margaret Blair and Elizabeth Pollman describe,[169] American courts originally tended to treat corporations as personal associations, in part due to their small size and limited scope, but by the twentieth century they came to regard them as independent entities.[170] The would apply to any corporation and, they argue, is the only realistic way to describe a category of firms that includes those that have "hundreds of thousands of shareholders, many of them other corporations, and [where] the mix of shareholders changes by the minute."[171] An alternative approach favored by some economists treats the corporation as a nexus of contracts.[172] The Court does not refer to this approach, however, and could not have been thinking of it in *Citizens United* because it essentially dissolves the corporation into a set of reciprocal agreement and leaves no independent entity on which rights could conceivably be conferred.[173]

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[168] The standard view is that a corporation is owned by its shareholders. See John Armour, Henry Hansmann and Reinier Kraakman, What is Corporate Law?, in Reinier Kraakman, et al, The Anatomy of Corporate Law: A Comparative and Functional Approach 1, 14-15 (2nd ed. 2009); Melvin Eisenberg, The Conception that a Firm is a Nexus of Contracts and the Dual Nature of the Firm,24 J. Corp. L. 819 (1999); Henry Hansmann, Ownership of the Firm, in Roberto Romano, ed., Foundations of Corporate Law 15 (2012). One current economic theory goes further and characterizes a corporation as a set of property rights. Sanford J. Grossman and Oliver D. Hart, The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration, 94 J. Pol. Econ. 691, 693 (1986); Oliver Hart, An Economist's Perspective on the Theory of the Firm, 89 Colum. L. Rev. 1757, 1765-66 (1989). Both approaches identify the corporation as a form of property.

[169] Blair and Pollman, supra note [ ].

[170] Economists and sociologists both point out that large firms are in fact large organizations with highly organized internal authority structures, and that the dynamics of such structures has a major impact on the way the firm behaves. That means, as a descriptive matter, that the firm cannot be regarded as simply reflecting the desires of its owners. See W. Richard Scott, Institutions and Organizations: Ideas, Interests and Identities (4th ed., 2013); Oliver Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 106-54 (1975); Margaret M. Blair and Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 287 (1999); Neil Fligstein, The Structural Transformation of American Industry: An Institutional Account of the Causes of Diversification in the Largest Firms, 1919-1979, in Walter W. Powell and Paul J. DiMaggio, eds., The New Institutionalism in Organizational Analysis 311 (1991); John W. Meyer and Brian Rowan, Institutionalized Organizations: Formal Structure as Myth and Ceremony, in Powell and DiMaggio, supra at 41; Oliver Williamson, Transaction Cost Economics and Organization Theory, in Oliver Williamson, Organization Theory: From Chester Barnard to the Present and Beyond 207 (1995). Because this approach suggests that the firm's actions will be heavily influenced by human interactions among its employees and others, it has important implications for strategies of legal regulation. But there is no question that the employees and others, as individuals, possess all the rights that are granted to any member of society, whether they work for a private firm or not. The complexity of firm behavior that organization theory reveals counts against the ascription of rights to the firm itself because it increases the difficulty of conceiving of the firm as an individual, or as a direct reflection of its owners.

[171] Blair and Pollman, supra note at 1734. This extends the basic insight that Berle and Means reached about the separation of ownership and control in modern corporations. Adolph A. Berle and Gardiner C. Means, The Modern Corporation and Private Property (1932).

[172] Frank H. Easterbrook and Daniel R. Fischel, The Economic Structure of Corporate Law (Michael C. Jensen and William H. Meckling, The Theory of the Firm: Managerial Behavior, Agency Cots, and Ownership Structure, 3 J. Fin. Econ. 305 (1976).

[173] According to the seminal article on nexus of contract theory:

To assert that corporations possess the right to speak is to assert that property has rights. Property however, as discussed above, is now recognized as a creation of the state; whether any particular form of property is created, and what characteristics it will possess once it has been created, is within the discretion of the state, which means that it is determined by the political process. This general principle is evident in the particular case of a corporation, which only exists if specifically authorized by legal enactment. The powers and obligations of the corporation are determined by the enactment. Among those powers, of course, are the right to own property, to make legally binding contracts, and to bring legal actions to protect its property and enforce its contracts.

To reach its conclusion, however, the Court is necessarily asserting that property has additional rights. Acknowledging that property rights are created by the state, as it must after *Carolene Products*, and certainly after *Roth v. Board of Regents*, the Court nonetheless holds that these property rights, once created, have certain intrinsic features that cannot be changed at the level of authority by which they were created. As in the Takings Clause cases described above, a neo-Lochnerian principle that property has rights lies at the basis of the Court's decision. And as in those cases, the Court never even attempts to justify or explain its conclusion. Instead, it side-steps the issue by declaring that speech, as an abstract concept, has great importance in our society and that, as a general principle, all legal entities should be able to make use of it.

Rejecting the new Lochnerist idea that property has rights would not have definitively resolved the case, nor would it have left corporations entirely unprotected by the First Amendment. As the Court correctly noted, political speech is particularly valuable in a democratic society and, as it also noted, such speech, if it is to fulfill that role, must be permitted in a variety of media. One principle that captures this concern is suggested by *Lovell v.*

Viewing the firm as the nexus of a set of contracting relationships among individuals also serves to make it clear that the personalization of the firm implied by asking questions such as "what should be the objective function of the firm", or "does the firm have a social responsibility" is seriously misleading. *The firm is not an individual.* It is a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals (some of whom may "represent" other organizations) are brought into equilibrium within a framework of contractual relations. In this sense the "behavior" of the firm is like the behavior of a market; i.e., the outcome of a complex equilibrium process. We seldom fall into the trap of characterizing the wheat or stock market as an individual, but we often make this error by thinking about organizations as if they were persons with motivations and intentions.
Jensen and Meckling, supra note [ ], at 311 (emphasis in original, footnote omitted). Note that if nexus of contract theory is accepted, the Court's approach would be even more neo-Lochnerian that than it is according to standard corporation theory. That is because the firm, rather than property, would be a set of contracts, and thus any rights that were granted to the firm would need to be based on a pure liberty of contract theory – that the state is limited from interfering with voluntary contractual relations, even when they involve something other than property, such as services (i.e. agency). See also Morissey, supra note [ ] (noting that the contracts in the nexus of contracts model are often flawed in ways that would provide an affirmative justification for the BCRA restrictions on corporate speech.)

City of Griffin,[174] which involved a law prohibiting the distribution of leaflets on public streets. There is no question that a state has a general interest in keeping its streets clean, and thus the authority to enact anti-littering laws. But the Court held that leaflets, even if they created litter, are a valuable modality of speech by individuals who are granted that right -- that freedom -- by the First Amendment. Consequently, the state cannot ban this particular scattering of paper, even if it can most others, and must devise an alternative way of keeping its streets clean that is less restrictive of a constitutional right.

A corporation, viewed from this perspective, is legally equivalent to a leaflet. Like the leaflet, it is a piece of property, and thus has no inherent rights; no one would describe a leaflet as having the right to speak. But, also like the leaflet, a corporation is an important modality of speech, and that modality should not be foreclosed to those who in fact possess the right to speak, namely citizens of our society. Rather, the modality of acting through a corporation, like the modality of leafleting, should generally be available to anyone who is in a position to make use of it. This is one way to understand most of the precedents cited by the majority that protect a corporation on free speech grounds.[175] A significant exception is *First Bank of Boston v. Bellotti*,[176] which specifically targeted corporate speech and was the subject of an intense disagreement between the majority and the dissent.[177]

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[174] 303 U.S. 444 (1938)

[175] See 558 U.S. at 342, citing, inter alia, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (holding that the trial court did not abuse its discretion in granting preliminary relief to bar operators who sought to overturn a local ordinance that forbid the presentation of topless dancing); Southeastern Promotions, Ltd. v. Conrad (prohibiting a municipality from banning the production of the musical "Hair" in its facility on grounds that the prohibition constituted a prior restraint); Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684 (1959) (striking down a statute that authorized state agency to deny exhibition licenses to films that expressed approval of immoral behavior such as adultery); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (restricting the application of defamation law when a public figure is involved). None of these cases involve a specific prohibition against corporate activity. They deal with prohibitions against arguably protected actions that could be carried out by either an individual or a corporation. For the Court to deny protection because the plaintiff is a corporation would be to fashion a limitation on its own decision, without any positive law provision that it was being asked uphold. That limitation, moreover, would have been arbitrary, because no one claimed there was any relevant difference between a corporate and a non-corporate entity presenting a film, a play or topless dancing., or making defamatory statements about a public figure.

Several of the other cases cited by the majority involve First Amendment protection of media companies: Turner Broadcasting Sys. v. FCC, 512 U.S. 622 (1994); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Time, Inc. v. Hill, 385 U.S. 374 (1967). These cases necessarily involve business organizations, but turn on the fact that the entity asserting First Amendment protection is a publisher or broadcaster, not on their corporate identity.

[176] 435 U.S. 765 (1978) (striking down a Massachusetts law that prohibited corporate donations to support or oppose referenda unless the corporation's interests were directly involved).

[177] The majority thought this decision was directly on point in rejecting "the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property." 558 U.S. at 346-47(quoting 435 U.S. at 784-85). The dissent saw the case as direct support for its position because the opinion stated that "our consideration of a corporation's right to speak on issues of general public interest

The question can then be framed in different, and arguably more coherent terms than asserting the intrinsic rights of property. What the Supreme Court was being called upon to decide was whether there is a countervailing public concern that is weightier, in the corporate speech context, than clean streets are in the leafleting context. Clearly, there is: the integrity of the vote. Voting is truly central to a democratic system of government. Although freedom of speech certainly serves many different purposes, the *Citizens United* Court treated it primarily as instrumental to the electoral process. Restrictions on speech therefore, can conceivably be justified because they protect a right that is of equal significance as freedom of speech. As Edwin Baker points out, we have no trouble reaching this result when the competing right is due process; [178] detailed and demanding restrictions regarding when people can speak in court, and what they can say, are readily accepted because they are necessary for the orderly conduct of trials that is essential to due process. The restrictions on election-related speech using the modality of corporations that were at issue in *Citizens United* case could conceivably be justified on a similar basis. After all, the Supreme Court has sustained anti-leafleting laws in the immediate vicinity of polling places because the justification in this case is fair elections, not clean streets.[179] The dissent raised some of these arguments, and the Court responded, but the entire discussion was framed in terms of corporate speech, rather than competing rights.

B. Burwell v. Hobby Lobby Stores, Inc.

In *Burwell v. Hobby Lobby Stores, Inc*.,[180] a large closely held corporation and two smaller closely held corporations sought exemptions from a Department of Health and Human Services (HHS) regulation that they include coverage for certain forms of contraception in their employee health care plans. The rationale was that the way that these particular contraceptives work is

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implies no comparable right in the quite different context of participation in a political campaign for election to public office." 588 U.S. at 442-43 (citing 435 U.S. at 788, n. 26). Justice Stevens explained the reason why *Bellotti* did not apply to the *Citizens United* case by asserting that there is an important distinction between referenda and elections. "A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation." 558 U.S. at 443. Another possibly relevant distinction, despite the majority's assertion to the contrary, id. at 347, is that the Massachusetts law in fact involved content discrimination of a sort that the BCRA does not. In the final analysis, however, what *Bellotti* may demonstrate, along with *Austin*, *McConnell* and various other decisions is that this entire area of law is in a state of doctrinal confusion.

[178] Edwin Baker, Campaign Expenditures and Free Speech, 33 Harv. C.R.-C.L. L. Rev. 1 (1998)

[179] Burson v. Freeman, 504 U.S. 191 (1992), The Court found this to be a difficult case, however. Writing for a plurality, Justice Blackmun stated: "As a facially content-based restriction on political speech in a public forum, [the state statute] must be subjected to exacting scrutiny: The State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id. at 198 (internal quotation marks omitted).

[180] 573 U.S. ____, 134 U.S. 2751 (2014).

equivalent to an abortion, and that providing support for abortions violates the religious beliefs of the corporations' owners. The majority and the dissent disagreed about whether *Hobby Lobby* is a constitutional case. According to the majority, the plaintiffs' claim could be sustained under the Religious Freedom Restoration Act of 1993 (RFRA), as amended. [181] Thus, if *Hobby Lobby* is to be characterized as pro-business, it would belong, according to the majority's analysis, to the category of recent Court decisions that favored business as a matter of statutory interpretation, not to the category of neo-Lochnerist decisions finding that property possesses intrinsic rights. Justice Ginsburg, in a dissent jointed by three other Justices, argued that the RFRA was intended only to modify one element of the Supreme Court's Free Exercise doctrine, and that this doctrine continued to control the case.[182] Even if that approach is wrong, and the majority is correct, however, the body of doctrine that constitutional courts have developed regarding the Free Exercise Clause is so extensive and familiar, while the amendments to the RFRA so recent, that it seems impossible to interpret the words of the statute without reference to constitutional doctrine. In addition, the RFRA, as amended, applies only to a limited categories of state governmental action,[183] leaving other religious exercise claims by corporations to be interpreted under the First Amendment.

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[181] Pub. L. No. 103-141, 107 Stat. 1488 (1993), codified as amended at 42 .S.C. § 2000bb through 42 U.S.C. § 2000bb-4. The RFRA, passed in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), declared that government "shall not burden a person's exercise of religion even if the burden results from a statute of general applicability" unless the government can demonstrate that the burden is the least restrictive means of furthering "a compelling state interest." In its original form, deciding the case on this basis would not have avoided constitutional issues because the RFRA defined the exercise of religion as "the exercise of religion under the First Amendment," thus rendering constitutional doctrine the basis for determining the meaning of the Act's essential term. But according to the *Hobby Lobby* majority, a subsequent amendment to the RFRA effected "a complete separation from First Amendment case law," 134 S. Ct. 2762 by deleting the reference to the First Amendment and defining the exercise of religion as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

[182] Specifically, Justice Ginsburg argued that the purpose of the RFRA was simply to restore the compelling state interest test that the Court had modified in *Employment Division v. Smith*, 494 U.S. 872 (1990). 134 S. Ct. at 2791. Thus, the Act preserves all the Supreme Court's decisions prior to *Smith*, and alters only *Smith*'s departure from that prior body of doctrine. The subsequent amendment to the RFRA, according to Justice Ginsburg, was designed to expand the range of practices that would fall within the statute's protection, again without altering the basic doctrine regarding free exercise of religion. Id. at 2792-93.

[183] As originally enacted, the RFRA applied to state governments as well as the federal government. However, in City of Boerne v. Flores, 521 U.S. 507 (1997), the Court struck down the application of the RFRA to the states as exceeding Congress' power to enforce First Amendment rights under Section 5 of the Fourteenth Amendment. The statue was then amended (this being the amendment at issue in *Hobby Lobby*), by the Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 804, codified at § 2000cc et seq. The Act uses the Commerce and Spending Clause powers to require localities that receive federal funding to avoid imposing "a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution," which was the issue in *City of Boerne*. Thus, its arguably broader definition of religious exercise would not apply to actions by corporations that do not involve land use. A separate provision of the Act instructs states to avoid imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution." Presumably, despite the Court's recent decisions, corporations could not fall within this protected category.

Under either approach to the case, the majority's decision rests on the conclusion that some positive law – either the Constitution or the RFRA -- that protects people's right to exercise their religion and does not explicitly include corporations within its terms nonetheless should be read to include them. In contrast to *Citizens United*, the decision in *Hobby Lobby* does not abstract religion itself as an independent good meriting protection and then argue that all entities should have equal access to that good. Rather, it acknowledges that what is being protected is the right to exercise of religion, that is, to act in a particular way. The Court is then required to demonstrate that the RFRA or the Constitution is best interpreted to grant corporations that right. This raises an issue about corporate identity that goes beyond the question, shared by both cases, of whether a corporation should be granted rights. Speech, in addition to words spoken by a human being, clearly includes the distribution of a film of the sort at issue in *Citizens United*. There is no question that a corporation is capable of speech in this manner; most films shown in theater or on video are produced by corporations. But it is not as clear that a corporation is capable of "the exercise of religion." The issue is even more sharply drawn, perhaps, because the case involves for-profit corporations, . non-profit religious corporations and certain other religious organizations being exempt from the HHS regulation.[184]

In response to these issues, Justice Alito, writing for the Court, begins with the observation that a corporation is defined by law as a person.[185] This is widely recognized as a legal fiction, as if the government lawyer, in a different type of First Amendment case, brought a space heater into court to combat the charge that the law had a chilling effect, or an oxygen tank in response to a demand for breathing space.[186] Justice Alito readily concedes

[184] , C.F.R. §§ 147.131(a)-(c).

[185] 134 S. Ct. at 2768. In doing so, the Court relied on the Dictionary Act, 1 U.S.C. § 1, which defines the term persons to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

[186] See Meir Dan-Cohen, Rights, Persons and Organizations: A Legal Theory for a Bureaucratic Society (1986); John Dewey, The Historical Background of Corporate Legal Personality, 35 Yale L.J. 655 (1926). For a somewhat contrary view, see Sanford A. Schane, The Corporation is a Person: The Language of a Legal Fiction, 61 Tul. L. Rev. 563 (1987). Schane argues that ascribing human personality to a corporation is a valuable way to understand its behavior. As evidence, he notes that actions people take with their minds can be ascribed to a corporation (General Motors decided), while actions they take with their bodies usually cannot (General Motors ate lunch). This seems correct as a matter of linguistic theory. See George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal About the Human Mind (1987) (arguing that thought is inherently metaphorical); Andrew Ortony, ed., Metaphor and Thought (2nd ed. 1993) (discussing various ways that metaphors are used in ordinary speech, politics and science). But it only emphasizes the task for legal decision makers in determining whether a metaphor such as corporate personhood is relevant or useful in specific contexts. It would seem to be a conceptual error to treat a metaphor as a definitive conclusion. Economic and sociological analysis of the firm as an organization, see note [ ] supra (citing sources) only emphasizes the error by revealing first, that the firm's actions are the result of separate and identifiable actions by human beings, and second, that the way these actions combine to produce the firm's decisions are too complex to allow the firm to be realistically modeled as a single individual.

this point, but he is less clear about its implications. There can be little doubt that the members of the Green family, owners of Hobby Lobby and one of two smaller corporations in the case,[187] have a First Amendment right, in exercising their religion, to be protected from any government regulation that would force them to participate in abortions. But in order for this right to produce the result in the case, it must cross two legally established divides. First, the Greens' right must be attributable to the corporations for which they are principals. Second, the corporations' financial support to its employees, in this case in the form of a company-funded health plan, must be seen as participating in some way in the employees' particular use of that support, in this case to fund their purchase of abortifacient drugs.

The way the Court attempts to cross those divides reveals its reliance on the neo-Lochnerist principle that property has rights. With respect to the first divide, three basic features of a corporation should be noted. First, as discussed above, corporations are property and thus owe their existence to positive law.[188] Second, a corporation, as defined by positive law, is capable of taking action and granted various legal powers, including the right to own property in its own name, to enter into binding contracts, and to be appear as a litigant in court to represent its interests.[189] Third, positive law separates the liabilities of the corporation from the personal liabilities of its principals.[190]

Given that a corporation is created by law, and that it is a form of property that is capable of action, it is possible to grant a corporation the right to exercise religion, in some comprehensible sense of that term. As the Court points out, non-profit corporations are regularly granted that right by state law.[191] But the mere fact that an entity is capable of being granted a right does not mean that it must be granted that right, or that is has been granted that right. That question remains open and can only be answered by examining the positive law, whether statutory or constitutional, that establishes or applies to corporations.

As the dissent points out, the exercise of religion is an activity that, at least initially, we associate with human beings, not

[187] The second small corporation was owned by a different family, but its presence in the case does not raise any issue that are not presented by the two Green family corporations.
[188] See pp. [ ] supra.
[189] Dan-Cohen, supra note [ ], discusses the way that the corporation's ability to act can be understood in terms of organization theory. He argues that this approach would obviate the need to describe a corporation as a person, and thus dispel much of the confusion that this terminology has created.
[190] Armour, Hansmann and Kraakman, supra note [ ], at 1-18; Angela Schneeman, The Law of Corporations and Other Business Organizations 209-12, 215-16 (6th ed. 2012); Frank H. Easterbrook and Daniel R. Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89 (1985). The authors note two other elements of a for-profit firm, namely transferability of shares and delegation of management with a board structure.
[191] 134 S. Ct. at 2768-69.

organizations.[192] Justice Alito concedes this as well; a corporation, he says, is an instrumentality, "a form of organization used by human beings to achieve desired ends."[193] This leads to a further question: what sort of instrumentality is a for-profit corporation? There can be little doubt that the state laws establishing the mechanism of non-profit corporations are specifically designed to facilitate religious activity. It seems almost equally clear that the Free Exercise Clause protects institutions that are designed to carry out or promote religious practices, such as churches. But the primary purpose of a for-profit corporation, according to the positive law that creates it, is not to facilitate religion but to make money and, more specifically, a profit.[194]

An instrumentality designed to make money for its principals, however, is not one that represents or reflects their personal views; rather, it is a means by which they carry out of particular activity that is universally recognized as one aspect of human life and not its totality. This consideration immediately implicates the third essential feature of a corporation, which is the separation of the liabilities of the corporation from the personal liabilities of its principals. In other words, the corporation, as a legal person, is a distinct entity from its principals. Those who do business with the corporation as it carries out its basic economic role can, consistent with our legal system, hold the corporation accountable for the binding contracts that it has used its legal personhood to enter into, as well as torts it has committed. But they are precluded, by the most basic definition of a corporation, from holding the principals responsible.

This, then, is the divide that the majority must cross in order to establish that a for-profit corporation has been granted the right to exercise religion. One way that Justice Alito tries to do so is by declaring that the purpose of the legal fiction that defines corporations as persons is "to provide protection for human beings."[195] That is true, but the protection that a corporation necessarily provides is protection from liability. As just discussed, this type of protection creates the divide between the

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[192] Id. at 2794 (Ginsburg, J., dissenting) ("the exercise of religion is characteristic of natural persons, not artificial legal entities").

[193] Id. at 2768

[194] See Armour, Hansmann and Kraakman, supra note [ ], Easterbrook and Fischel, supra note [ ]. This follows from the ownership structure of the corporation, since it is the profits that the owners are entitled to receive and, given the classic separation of ownership from control in large or even mid-size corporations, see Berle and Means, supra note [ ], that will be most owners sole benefit from their investment. There is controversy about whether a for-profit corporation should regard profit maximizing (which might include efforts to increase goodwill to increase sales or ward off profit-reducing regulation) as its only goal, or whether the corporation also has obligations to other stakeholders and to the general public. See John Mackey and Raj Sisodia, Conscious Capitalism: Liberating the Heroic Spirit of Business (2014); Lynn Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the General Public (2012); Blair and Stout, supra note [ ]. But serving the needs of other stakeholders only increases the divide between the owners and the corporation, and thus makes the Court's task in *Hobby Lobby* still more difficult.

[195] 134 S. Ct. at 2768

principals and the corporation, rather than providing a means of crossing it. It is also true that non-profit corporations are often designed, by law, to protect people's exercise of religious or other rights, but that is not true for the corporations at issue in the case.

An alternate strategy might be to emphasize the fact that the corporations in the case are closely held, rather than publicly traded. But the Court declines to make this distinction.[196] Instead, it reassures people who might be concerned about the decision's potential for allowing large, publicly traded corporations to resist government regulation with an explicitly empirical, and thus non-legal argument. Justice Alito simply says that "it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. . . [N]umerous practical restraints would likely prevent that from occurring."[197] As a guess, that may be correct, but it means that the Court is not relying on the fact that the corporations in the case are closely held to establish the connection between the principals' rights and the rights that the Court regards as having been granted to the corporation. Apparently, any corporation, including a large, publicly traded one, might be have religious beliefs that would be recognized under the RFRA. The Court relies on the religious beliefs of the Greens in this case to give content to the religious claims that the corporation can use its First Amendment rights to assert.[198] The Greens' beliefs thus function as a test of the sincerity of the religious beliefs in question. But the Court fails to explain how those beliefs were transferred from the owners of the corporation to the corporation itself.[199]

In short, the opinion never crosses the divide between the owners and the corporation. The Court never explains why the positive law creating corporations should be interpreted as granting them the same rights that the owners possess. Rather, it employs a figure-ground reversal similar to the one it uses in *Citizens United*. It assumes that property, in this case property that is capable of independent action, possesses rights. If the

[196] One difficulty with using this distinction is that it does not correspond to our intuitive sense of situations where the corporate is intimately connected to or associated with its owners. A closely held corporation can be quite large; the Court tells us that Hobby Lobby Stores has over 500 locations and 13,000 employees. 134 S. Ct. at 2765. In fact, closely held corporations include some of the largest and best known firms in the U.S. According to Forbes, the ten largest, according to Forbes, are Cargill, Koch Industries, Chrysler, GMAC, Pricewaterhouse Coopers, Mars, Bechtel, HCA and Ernst & Young. Cargill had $ 110.63 billion in revenue in 2015, and 152,600 employees; Ernst & Young had $ 24.52 billion and 135,730 employees. Hobby Lobby ranked only 276 (where it was listed as having $ 1,7 billion in revenue and 18,000 employees). www.forbes.com/lists/2008/21/privates08_Americas-Largest-Private-Companies_Rank.html.

[197] 134 S. Ct. at 2774

[198] This seems to be a reversion to the associational model of nineteenth century corporate law, see Blair and Pollman, supra note [ ].

[199] The other company involved in the case that was owned by the Greens operates 35 Christian bookstores and has 400 employees. 134 S. Ct. at 1765. Even that seems too large for the argument that a corporate firm can be viewed as an extension of its owner. It might make sense to ignore the businesses' corporate form, and cross the divide between an owner and a corporation on the basis of facts specific to a case, if the owner and her family were the corporation's only employees.

government wants to contravene those rights, the majority demands that it provide an affirmative reason, such as the insincerity or incoherence of the claim.

The second divide, which is between the corporation and its employees, illustrates this same approach, and perhaps in even more extreme form. As the dissent points out, the government is not requiring the corporations in the case to provide abortions for its employees.[200] Rather, it requires them to fund a health plan; the HHS regulation then requires that the health plan include contraceptive drugs that the principals of the corporation regard as abortifacients. Thus, it is the government that has decided that the drugs are included in the required health plan, and the individual employee who decides whether to use them.[201] It is difficult to see why the action that violates the principals' religious beliefs should be attributed to the corporation at all. Even if the corporation has a right, granted by statute or the Constitution, to avoid any obligation to conduct or assist in abortions, why should this right apply to actions separated from the corporation by two independent decisions? The Greens are of course entitled to their own sincere beliefs, but Christian Scripture does have some intelligent things to say about religion, and it is instructive that St. Paul, in a roughly analogous context, declares the test to be open and visible participation in the forbidden practice. [202] The HHS

[200] Id. at 2799.

[201]The majority relies heavily on Braunfeld v. Brown, 366 U.S. 599 (1961) as a precedent for recognizing the free exercise rights of a commercial enterprise. 134 S. Ct. at 2768-70. In that case, Orthodox Jews objected to Sunday closing laws because the effect of these laws, given their religious beliefs, was to compel them to close their businesses for one more day than competing non-Jewish merchants. The Court recognized that the plaintiff could assert a free exercise claim, although ultimately rejecting the claim on the merits. Justice Ginsburg, in dissent, notes that the businesses involved were sole proprietorships, "where the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations." Id. at 2797. Perhaps an equally compelling reason to recognize the owners' free exercise right in *Braunfeld* is that, given the nature of their claim, they could only avoid the disadvantage to which they objected by taking direct personal action in violation of their religion, that is, they would need to personally open and operate their stores. Thus, *Braunfeld* would provide direct support if the HHS regulations required owners of corporations to personally supply abortifacient drugs to any employee who requested them.

[201] Id. at 2799.

[202] The issue for St. Paul, presented to him by members of the church that he had founded at Corinth, was whether a Christian could eat meat that had been offered to an idol. Greek religion involved the sacrifice of animals to the gods and the Greeks, being pragmatists, decided that what the gods really wanted was the fat. This meant that pagan temples wound up with a lot of extra meat, which they either served in the temple or sold in the market. St. Paul begins with the observation that an idol is nothing; consequently, there is nothing wrong with the meat. 1 Corinthians 8:4. If you buy it in the market, he says, just don't ask where it is from and you can eat it in good conscience. Id., 10:25. But be sure other Christians don't see you eating the meat in the pagan temple, for then they will become confused and it will undermine their own faith. Id., 8:10. If you are invited to a private dinner and another Christian tells you that the meat was sacrificed to an idol (and, presumably, is troubled by this), avoid eating it so that you do not upset him, even though you are otherwise free to do so. Id., 10:28-33.

It is worth noting that this is a much more serious issue, in terms of Scripture, than abortion. Idolatry is condemned throughout the Old and New Testaments; the prohibition against it appears in the Decalogue and Moses punished his followers who succumbed to it with death. Exodus 32:27. In contrast, abortion is never mentioned in either the Old or New Testament.

regulations at issue in Hobby Lobby do not meet this test; it seems unlikely that anyone would conclude that a corporation's compliance with generally applicable regulations regarding their employees' welfare is a reflection of corporate policy.

Beyond the attenuated causal connection between the corporation's decisions and the employee's actions, there is an affirmative reason to maintain the distinction. Rights theory validates some deeply felt human inclinations, such as the desire for independence, dignity or self-expression. One set of inclinations is the desire that other people conform to one's own views, or share one's own religion. Its appeal is undeniable and it is clearly one of the motivating forces in shaping Western history. Our theory of rights requires that the value of this inclination, however deeply felt, must be set at zero. As Justice Ginsburg notes in her dissent, our legal doctrine is that people's exercise of their rights are not diminished in any way by the fact that other people object to the way those rights are exercised.[203] Many reasons can be given for this conclusion, but the most basic is that the contrary belief would undermine the individual rights we seek to protect.

Thus, the Court not only grants rights to property, in this case a corporation, but interprets those rights in an unusually expansive way. It is hard to resist the impression that the Court is crossing the second divide, the one between the corporation and its employees, by attributing a sort of heightened sensitivity to the corporation. The decision conjures up the image of the corporation shuddering and gasping as its employee take the money she has received from the corporation and buys abortifacient drugs from her local pharmacy. We can accept the Court's conclusion that the Greens have this reaction, but attributing their feelings, as well as their beliefs, to the corporation only means that the Court is crossing the second divide by being even more oblivious about the first one.

IV. Assessing the Supreme Court's New Lochnerism

Thus, a number of the constitutional decisions of the recent Supreme Court that have been characterized as pro-business in fact seem to be based upon a principle. That principle is that property has intrinsic rights. The Court recognizes that there is no right to private property, contrary to the previously held doctrine in the so-called Lochner Era. But the current Court seems to believe in a related principle that can be described as neo-Lochnerism: that once property it created it possesses a range of constitutional rights, including a Due Process right to resist uncompensated reductions in its value, a First Amendment right to speak, and a First Amendment right to exercise religion. The

[203] 134 at 2804-05.

normative question that remains is whether the neo-Lochnerist principle represents a proper or desirable interpretation of the Constitution.

One way to approach this question is in terms of the Supreme Court's most comprehensive and eloquent rejection of Lochnerism. This is not one of the 1937-38 decisions that put the doctrine decisively to rest, but an earlier opinion written by Justice Owen Roberts, *Nebbia v. New York.*[204] After an extensive review of the case law to that point, Justice Roberts concluded that "there is no closed category of businesses affected with a public interest."[205] The cases indicated that this distinction, which the Court had previously relied upon to determine whether regulation was constitutionally permissible, was confused and difficult to apply. But that is true of many legal distinctions; Justice Roberts' more basic point was that the distinction was doctrinally and theoretically unsound. Doctrinally, it depended on granting common law some vaguely-defined and poorly justified constitutional status, rather than recognizing that common law is state law and that all property is created by state law. As a matter of political theory, he declared that "the power to promote the general welfare is inherent in government."[206] "[S]ubject only to constitutional constraint, the private right must yield to the public need."[207]

To say that the existence and contours of property law are not protected by the U.S. Constitution does not mean, of course, that property is not important in our society. Property rights are obviously essential to our economic system. Moreover, in profound and varied ways, as many scholars have pointed out, they shape the way we think about ourselves and relate to each other.[208] For these reasons, they have long been treated by many leading thinkers as an element of natural law. But the role of the Supreme Court, of course, is to decide cases on the basis of the

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[204] 291 U.S. 502 (1934). The Court reverted to the Lochner doctrine after *Nebbia*, see Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) (striking down a state minimum wage law for women and reaffirming Adkins v. Children's Hosp., 261 U.S. 525 (1923)). For a comprehensive discussion of the decision, see Cushman, supra note [ ], at 78-93.

[205] 291 U.S. at 536.

[206] Id. at 524

[207] Id. at 525

[208] See Bruce Ackerman, Social Justice in the Liberal State (1981) (relationship between property ownership, public conceptions about law, and the sense of freedom); Aristotle, supra note [ ], at 458-59, 1262b37*-1263b30* (practical value of private property); Meir Dan-Cohen, Harmful Thoughts: Essays on Law, Self, and Morality 264-301 (2002) (private property and people's sense and image of themselves); Laura Underkuffler, The Idea of Property (2009) (claims to property rights are based on core values); Jeremy A. Blumenthal, To Be Human: A Psychological Perspective on Property Law, 83 Tul. L. Rev. 609 (2009) (property determines what it means to be human); Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982) (control of property is part of an individual's sense of self); Carol M. Rose, Introduction: Property and Language, or, the Ghost of the Fifth Panel, 18 Yale J. L. & Human. 1 (2006) (property is a social as well as an economic institution); Rose, supra note [ ] (in addition to creating entitlements to things, property defines relationships between people); Joseph William Singer, Property as the Law of Democracy, 63 Duke L.J. 1287 (2014) (property shapes the social relations that are crucial in establishing a democratic polity).

Constitution, as informed by our legal traditions, not to impose concepts that have been propounded by political theorists but never incorporated into the Anglo-American legal system. From its earliest origins, through the entire history of its development, and as reflected in the U.S. Constitution, our legal system has never recognized a right to private property that is independent of political authority.

Strong theoretical considerations support this doctrinal conclusion. First, property generally involves various forms of control over scarce resources. One person's right to speak or practice religion does not preclude another's, but property generally involves, and is sometimes defined by, the power to exclude.[209] Second, property rights, unlike the individual rights protected by the Constitution, often extend beyond the individual. Each person asserts the right to speak, to believe, to avoid self-incrimination, as a single entity. But property enables individuals to exercise control over objects and relationships that are distant from themselves, without any intrinsic limitations on the extent of that control. Third, property can generate enormous inequalities among people. Even in the monarchical era, these inequalities conflicted with the developing ethos that all members of society were subjects of the king[210]; the advent of democratic governance renders the inequality that property rights create still more discordant with the underlying conception of the polity. Finally, property allows concentrations of economic power that can distort the political process in a variety of ways, from subtle lobbying to outright corruption. None of this means that property should be abolished of course, but it does suggest that it should be subject to political control. It suggests that William the Conqueror was wise, at the very beginning of the Anglo-American legal tradition, to subordinate property rights to government authority, and that the Framers of the Constitution were wise in continuing that tradition.

These doctrinal and theoretical considerations apply with equal force to the Court's neo-Lochnerist principle. In each of the cases discussed above, the Court simply fails to explain why it is granting rights to property. Its typical approach in these cases is to assume that property, once created, has rights that can conceivably be applied to that type of property. Physical objects like apartment houses, beachfront lots and raisins have the right not to be intruded upon or reduced in value, while corporations, which are capable of action, have the right to speak and exercise religion. The Court then demands evidence that the Constitution

[209] See Armen A. Alchian, Property Rights, in John Eatwell, Murray Milgate and Peter Newman, eds. The Invisible Hand 232, 232 (1989).

[210] From our present perspective, the status of being subject to a king does not seem particularly admirable or worth preserving. It must be recalled, however, that in the Middle Ages, many people were unfree, which generally meant that they were subjects of a feudal lord. Becoming royal subjects released them from the multifarious, intensive tyrannies of the feudal system. That is why it was said that in cities, which were chartered by the king and outside the feudal system, the city air makes a man free.

denies such rights and, finding none, declares that such rights exist.

There is no doctrinal support for the Court's assumption. Property plays an extremely important role in our society, and lawmakers, legislative or judicial, will often find that granting rights to property of various sorts is a useful way to advance public policy. Granting land the right to be used for residential purposes helps people find housing, granting corporations the right to make contracts advances the economy, granting factories the right to sell their emission reductions helps control pollution. But these choices lie within the discretion of policy makers as a matter of doctrine, and for the theoretical reasons stated above. The fact some rights have been granted to certain types of property does not mean that this type of property must be given other rights, or that other types of property must be given the same rights. If inland property retains its use as residential, that does not mean that beachfront property must be granted that same use; if media companies are allowed to electioneer, that does not mean that all corporations must be allowed to do so; if non-profit corporations are allowed to avoid certain government regulations that does not mean that the same exemption need be applied to corporations organized for profit.

Moreover, the fact that human beings possess intrinsic rights, such as the right to speak or exercise religion, does not mean that corporations must be granted those rights as well. To be sure, corporations, as they are structured by positive law, are forms of property that are capable of acting in the world. It is on this basis that they are described as legal persons. Thus, they can be granted legal rights, but the Court's assumption that they must be granted these rights is surely one of the oddest elements of its neo-Lochnerist doctrine. The Court's attempts to justify this assumption are only briefly and casually stated. First, it says, in *Hobby Lobby*, that there is no point treating corporations as being separate from people because "[c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them cannot to anything at all."[211] Second, it says, in *Citizens United*, that there is no basis for making the distinction.[212]

The statement that corporations cannot do anything separate and apart from their owners, managers and employees is false. A corporation, for example, can pull a carriage. That is because carriages can be pulled by horses, and, according to existing law, an entity that is granted the power to buy property can own a horse.[213] Corporations could do many other things as well if existing law allowed them to own human beings. It does not, but this is only a temporary impediment. Foreseeable

[211] 134 S. Ct. at 2768.
[212] 558 U.S. at 341
[213] It is true that most horses need to be controlled by a driver, but the horse does the actually pulling and a well-trained horse could pull the carriage on its own.

advances in automation will lead to machines that can design a factory, drive a car, compose electronic music and play that music in a nightclub. At that point, since the law allows machinery to be owned, corporations will be able to do all these things. In other words, corporations actually do exist independently of their owners, managers and employees, and they will soon be able to take action independently of those people. What makes them different does not depend on what they can or cannot do, but rather on the fact that they are property -- creations of state law rather than independently existing beings with intrinsic rights.

There is, moreover, a major distinction between human beings and corporations that merits their differential treatment. In our current legal system, every corporation is a slave. It is owned by other legal persons, used for its owners' purposes, and legally subject to their commands.[214] If it is a for-profit corporation, the benefits of its work belong to its owners and are generally appropriated by them.[215] In contrast to all but the harshest systems of slavery, the owners not only control all the corporation's actions, but they can end its existence at any time or dismember it while it is still alive.

The reason we consider slavery anathema is that we regard natural persons as rights holders, that is, our view is that their status as human beings carries with it certain intrinsic rights. These include their right not be enslaved no matter what their race, regardless of whether they have been captured in war, and even despite the fact that they were willing to sell themselves into slavery. The reason we are willing to allow corporations to be used as the property of other persons, that is, to be treated as an instrumentality for other people's benefit, is that we do not regard them as having intrinsic rights. The relationship operates in both directions because property is something that, in our legal system, has no intrinsic rights. In other words, an entity that has no intrinsic rights can be owned as property, and an entity that can be owned as property has no intrinsic legal rights.

The theoretical considerations stated above support these doctrinal principles regarding property in general and in its corporate form. Property involves resources, tangible and intangible, and public policy is centrally concerned with the way those resources are managed. The zone of autonomy that we recognize for individual liberty of various kinds does not apply to

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[214] This comports with Aristotle's definition of a slave. Aristotle, supra note [ ], at 447, 1253b15*-1254a19*. See Kenneth M. Stampp, The Peculiar Institution 21-24 (1956); Thomas, supra note [ ], at 29. But see Kevin Bales Disposable People: New Slavery in the Global Economy 12-29 (1999). Bales defines slavery as compelled or bonded labor. In modern slavery, he says, "no one tries to assert legal ownership of the bonded laborer. The slave is held under threat of violence . . ." Id. at 17. Bales' characterization of this horrific human rights abuse as slavery may be a good way to approach the problem, but he needs to characterize it as a new form of slavery precisely because the element of ownership is missing.

[215] As noted above, a corporation can act autonomously, that is, without human action, if it can own a machine that is capable of such action. The word robot, coined by Karel Capek in his play R.U.R. (Claudia Novack-Jones, trans., 2004) [1921] is the Czech word for slave.

property. Some property, such as a person's clothing, souvenirs, and personal work products can be placed within this zone, but property rights, as we conceive them, necessarily extend far beyond the ambit of the individual. They involve the control of social resources and, consequently, the ability to exercise direct control over other individuals. To impair the ability of the citizenry, acting through its elected representatives, to define and control such rights is to undermine our basic system of government.

It might be possible to develop some doctrinal distinctions that protected certain forms of personal property on an individual rights basis,[216] but the need to do so has not arisen in our society. That is due to a second theoretical reason why there is no right to private property and why property should not be granted intrinsic rights. Property holders are simply not a group within society that needs protection. They are numerous, they are dispersed through all regions of society and all demographic groups within society, and, by definition, they can command resources that enable them to make their voices heard in the political arena. They are, moreover, a diffuse group, with varying interests that will regularly be invoked on both sides of a political controversy. In fact, because the definition and control of property in so central to the public policy process in general, it will often be unclear whether a particular policy on an issue such as regulation, trade, subsidies, taxation or welfare benefits or harms property owners. Once again, we assign that determination to the basic process by which we govern ourselves.

Conclusion

Despite the claims of some political and jurisprudential theorists, a right to private property was never part of the Anglo-American legal system. Property has always been recognized as a creation of the state and always been subject to the state's political decision making process. Reflecting this reality, the U.S. Constitution grants no such right, although it does provide individuals with procedural protection against the arbitrary deprivation of any property that the state has chosen to create and that they then possess. But the disconcerting novelty of Progressive Era legislation, itself a response to the disconcerting novelty of Gilded Age industrialism, induced the Supreme Court to fashion a right to private property grounded on the idea that common law possesses constitutional significance. This effort, which relied on both the Due Process Clause and the Commerce Clause, turned out to be doctrinally, conceptually and normatively untenable and was definitively rejected by the Court. For the past three quarters of a century, the Court has returned to the

[216] See Dan-Cohen, supra note [Harmful Thoughts], at 265-301.

traditional and standard view that property is created and controlled by public policy.

In the past several decades, however, the Court, perhaps reacting to the disconcerting expansion of regulatory legislation during the 1960's and early 1970's, has attempted, once again, to provide constitutional protection for property from the perceived excesses of public regulation. Precluded from reviving the economic due process notion that there is a right to private property, the Court has now fashioned the doctrine that property has rights. That is, property is acknowledged to be a creation of state law, but once it is created, the Court holds, it intrinsically possesses certain rights that it can enforce against governmental action. In the Takings Clause cases, these include the right not be physically occupied, the right to maintain some minimum value, and the right not to be regulated in a manner that involves removal of its physical components. In cases involving corporations, the rights granted have included the First Amendment right to speak and to exercise religion.

Thus, the principle that property has rights serves as the foundation for a number of the Court's recent decisions. But the Court has never articulated or argued for that principle. In fact, it is as doctrinally, conceptually and normative untenable as the Lochner principle that there exists a right of private property. Doctrinally, the distinctions in the cases are simply unworkable. Conceptually, there is no rationale for why rights should attach to creations of positive law, as opposed to human beings who have an independent existence and, in fact, create the laws. Finally, from a normative perspective, property involves the control of society's physical resources. That has been regarded in our legal system, since the time of William the Conqueror, as within the control of the political decision making process.