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PROPERTY AS A CONSTITUTIONAL RIGHT

FRANK I. MICHELMAN**

A little over a week ago you might have read in the *New York Times* an essay by William Safire called "Poletown Wrecker's Ball."¹ "Poletown" is the unofficial name of a district in Detroit—as Safire describes it "a living, breathing neighborhood . . . , so named because many of its residents are of Polish extraction. Its small houses, candy stores, churches, add up to what urban planners would call a community."² This living, breathing, neighborhood is the projected site of a new General Motors plant promising 6,000 badly needed jobs for the economically distressed city. For the sake of those jobs, the city is using its eminent domain powers to acquire the site, from owners who evidently do not wish to sell voluntarily, for resale to GM. The taking will leave the ex-owners in possession of monetary "just compensation" but bereft of homes and neighborhood.

What prompted Mr. Safire's essay was a decision of the Michigan Supreme Court sustaining as constitutional the city's use of eminent domain power in the Poletown case,³ in the face of a dissent protesting that the power should be available only to acquire property for direct "public use, such as a road," and not for any less direct "public purpose, such as a job-creating private enterprise."⁴ Safire thinks the decision allowing

* The John Randolph Tucker lecture was delivered by Professor Michelman at the Washington and Lee School of Law on May 9, 1981.

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¹ Safire, *Poletown Wrecker's Ball*, *New York Times*, April 30, 1981, at A31, col. 7 [hereinafter cited as Safire].

² *Id.*

³ *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).

⁴ Safire, *supra* note 1, at A31, col. 7; see 410 Mich. at 662-69, 304 N.W.2d at 472-75 (Ryan, J., dissenting).

Detroit to take property for the purpose of turning it over to GM is an "extension of the law of eminent domain,"⁵ which it surely is not.⁶ He also calls the decision a product of "anticapitalistic thinking"⁷—a description which, given the circumstances of the case, obviously depends a lot on how you define capitalism.

What strikes closer to home, for me, is Safire's view of the case as "an abuse of . . . power that endangers everyone's right to own." At stake, he writes, "is the sanctity of private property, . . . a primary right of individual Americans."⁸

Let me tell you that I have grown to anticipate Mr. Safire's op-ed essays with a kind of morbid fascination—so often do they seem to me to make a point worth taking seriously, accompanied by reasoning and rhetoric that I find distinctly cranky. "Poletown Wrecker's Ball" is true to form. I think Safire is right to spot the Poletown case as one touching a very sensitive constitutional nerve. I think he is wrong to frame the issue as that of "the sanctity of private property," or of "everyone's right to own," as if "property" or "ownership" comprised a talismanic limit—self-defining, general, and absolute—on the means by which popular government may pursue public goals. There are mysteries about the idea of constitutionally protected property rights of which Safire's essay displays no inkling. Some of those mysteries I want to explore with you this morning. The exploration will lead us—or so I intend—to a better way than Safire's of understanding the poignancy of Poletown.

It is common ground that the Constitution protects the rights of property. Private property may not be officially taken over by agents of government for public use without payment of compensation to the owner.⁹ The government may not deprive an individual of property without affording a fair procedural opportunity to contest the deprivation.¹⁰ So much, at least, is thought to be express in the constitutional text.¹¹ It is further widely agreed that the Constitution should be read to forbid governmental deprivations of property that are arbitrary in the sense either that they serve no legitimate governmental objective or that they are viciously motivated.¹²

What can we say by way of defining the "property" rights thus safeguarded by the Constitution, of describing their scope and content in

⁵ Safire, *supra* note 1, at A31, col. 7.

⁶ See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954); *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963).

⁷ Safire, *supra* note 1, at A31, col. 7.

⁸ *Id.*

⁹ See U.S. CONST. amend. V.

¹⁰ See U.S. CONST. amends. V, XIV.

¹¹ See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 14-21, 97-98 (1980) [hereinafter cited as ELY].

¹² See, e.g., *Flemming v. Nestor*, 363 U.S. 603, 611, 617 (1960); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 406-07 (1977).

general? What kinds of interests or relations, respecting what kinds of valued objects, fall within the category of protected interests or relations that the Constitution knows as "property"? The constitutional text itself does not begin to answer the question. Judges adjudicating claims under the property clauses of the Constitution can answer it—as answer they must—only by attributing to the Constitution some political theory, some principle or principles of political morality, that it does not itself enunciate.

In speaking of constitutional rights to, or of, property, one might have in mind claims of two distinct types that I shall call, respectively, direct and derivative rights. One would assert a *direct* constitutional right of property by claiming—as, for example, Mr. Safire evidently would—that the Constitution requires, for some significant set of valued objects or opportunities, that the standing general laws of the country, which under our federal Constitution means primarily the laws of the states, must provide for some kind of private entitlement. These general laws must, that is, establish and maintain at least some of those legal relations—rights and duties, powers and liabilities—thought characteristic of a private property system. A *derivative* constitutional right of property, by contrast, makes no such demand on the content of the standing general laws. It allows that those laws may, as of any given moment, provide or not provide for private entitlements respecting any given class of objects. The derivative right attaches only to such instances of entitlement as do happen to arise, under such standing laws as do happen to provide for them, protecting these contingent but actual entitlement relations against certain kinds of governmental impairment.

To illustrate: To claim that a state is required by the Constitution to give public employees legal tenure in their jobs—to make them dismissable only for substantial cause¹³—would be to assert a kind of direct constitutional property right. By contrast, one would assert a kind of derivative constitutional property right by the contention that just insofar as state law does in fact provide for tenure under certain conditions, an employee whose case meets those conditions is constitutionally entitled to a due process hearing prior to dismissal for cause.

Now let me introduce one more piece of terminology. Judges, I have said, face the problem of defining the scope and content of constitutionally protected property. Let us call "formalistic" a method that allows a judge to decide whether a particular case involves a deprivation or taking of property by referring to some reasonably simple, objectively evident, external criterion, so as to avoid direct judicial engagement with substantive issues of political morality. For example: It is given that a person adversely affected by official action is constitutionally entitled to

¹³ Cf. *Board of Regents v. Roth*, 408 U.S. 564, 588 (1972) (Marshall, J., dissenting) (employee entitled to government job unless government can establish some reason for denying employment).

a fair procedural opportunity to contest that action if it deprives her of property. For this purpose, at least, one might say that "property" means any entitlement—but only those entitlements—for which legal recognition plausibly can be found in existing law apart from the constitutional due process guaranty itself.¹⁴ Similarly, one might say that governmental activity that injuriously affects, but does not formally appropriate, a person's holdings amounts to a compensable "taking" of property only if it contravenes specific "investment-backed expectations" that were "reasonable" under the law as it stood when the investment occurred.¹⁵

A quite different approach to the taking-of-property problem, but an equally formalistic one under my definition, would be to hew rigorously to the possibility suggested by Professor Ackerman, that property should be held to be taken when ordinary lay usage and understanding would so perceive and describe what has occurred.¹⁶ Still a third formalistic method for defining constitutionally protected property would be to inquire whether the interest for which protection is claimed would have been a legally protected one under a body of traditional common-law doctrines regarding property and contract, regardless of any intervening legislative alteration of those doctrines.¹⁷ By all these methods of reference over—whether to extra-constitutional contemporary law, to contemporary lay understanding, or to the traditional common law—the court purports to decide whether the injured interest in the case before it qualifies as property by determining whether *someone else* had *already* concluded—for whatever reasons, and prompted by whatever values—that it should so count, or should enjoy some relevant kind and degree of legal protection. The court can thus try to avoid making direct judgments of its own regarding the nature or quality of the interest or injury, or the political values at stake in deciding whether such an interest ought to be legally protected.

There are, as I expect you will have seen, some significant connections between the choice of a formalistic method for deciding what counts as constitutionally protected property and the question whether all claims to constitutional protection for property must be strictly of the derivative type, or whether direct claims also are to some degree admissible. For example, in recent years the Supreme Court seems to have committed itself to the method of defining constitutionally protected

¹⁴ *E.g.*, *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972); *Board of Regents v. Roth*, 408 U.S. at 576-78.

¹⁵ *Compare* *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) *with* *Agins v. Tiburon*, 447 U.S. 255, 262 (1980) *and* *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-25, 136 (1978).

¹⁶ *See* B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 100-03 (1977). *See also* Ackerman, *Four Questions for Legal Theory*, in *NOMOS XXII: PROPERTY* 351 (J. Pennock & J. Chapman eds. 1980) [hereinafter cited as Ackerman].

¹⁷ *E.g.*, *Coppage v. Kansas*, 236 U.S. 1, 14 (1915).

property by reference over to contemporaneous law aside from the constitutional property guaranties themselves, which I shall henceforward sometimes refer to simply as "standing law". That method is obviously tied to a view of constitutional property rights as strictly derivative in nature. For Justice Stewart and the Court for which he spoke in *Board of Regents v. Roth*,¹⁸ it was a matter "of course" that "property interests . . . 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 . . ."¹⁹

By contrast, for the bad old Supreme Court of the era of the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine,"²⁰ it was unthinkable that constitutional rights of property could be left dependent upon extra-constitutional law, which the legislature might change at will and which need not provide for private property in any given class of valued objects or indeed in any valued objects whatever. The bad old Supreme Court was thus given to upholding direct claims to the effect that a disputed interest or relation was *constitutionally* entitled to protection as property regardless of its recognition as such by the contemporaneously applicable extra-constitutional law. Against that practice, two quite different objections have been lodged. Some have complained that the Court indulged in a "natural law" mode of adjudication by which it irresponsibly and arbitrarily imposed on the country values having no warrant in law—the height of anti-formalism. Others have seen the Court as having formalistically adopted, as the unalterable definition of a constitutionally mandated system of property rights, the categories and doctrines of late-nineteenth-century common law. On the latter, and I believe the truer view, the objection to the method of the *Lochner* era is not laxity or usurpation, but rigidity and abdication. The Court's fault was not that of frustrating popular sovereignty by erratic or unprincipled dictation of its own values, but rather that of frustrating popular sovereignty by a too rigid adherence to a too particular and too static body of principle, wrongly conceived by the Court as not encompassing the principle of popular sovereignty itself.

But whichever way one reads the *Lochner* lesson, it surely helps explain the modern Court's professed aversion to the idea of direct constitutional property rights and, relatedly, its professed espousal of the method of reference over to external standing law to determine what is and is not constitutionally protected property. A direct constitutional right of property can be defined as one which is judicially determined to exist despite the contrary tenor of contemporary standing law. A judicial determination of that type seems apt to negate popular sover-

¹⁸ 408 U.S. 564 (1972).

¹⁹ *Id.* at 577.

²⁰ *Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525, 535 (1949).

eighty one way or the other: either by directly substituting the court's own value preferences for those of representative popular assemblies, or by freezing the regime of legal entitlements into the mold of whatever body of fixed external doctrine the Court has adopted as its constitutional property benchmark.

Now, it is an apparent beauty of the modern Supreme Court's constitutional property doctrine that it seems to avoid both these pitfalls, and yet keep some meaning and force for the guaranties against deprivations without due process and takings without just compensation. Property remains a significant constitutional right although what counts as property at any given time is apparently left entirely up to nonconstitutional law-makers. How can this be?

Let us consider that the institution of property is responsive to the values of security and regularity in daily social encounters—themselves conditions, it may well be said, upon which liberty in turn depends. In Justice Stewart's words in the *Roth* case, "it is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."²¹ If so, then because daily reliance is obviously affected by contemporaneous legal rules, the content of those rules has a plain bearing on what should count as an illicit impairment of property. Indeed, an impairment might seem essentially to consist of a violation of, or departure from, the rules as they stood when the reliance arose.

That is how it might seem if a view of property institutions as designed to serve the social values of security and regularity were the only possible view. Property, however, can be, and has been, regarded as a matter of individual moral entitlement or desert for reasons quite apart from, or additional to, those values.²² An individual may be thought entitled to social recognition as the owner of a thing simply by virtue of having discovered it, or as due recompense for the labor spent in producing it. Socially protected possession of goods may be thought to be a condition of an individual's personal development or social and political competence. A reliance-centered theory of property occupies no naturally preferred or objectively right status in moral theory. Neither does it shine forth from the words of the Constitution.

I do suppose, simply as a matter of the general intellectual history of liberal political ideas, that a view of property as connected through security and regularity with liberty can fairly be attributed to the Framers of 1787 and 1868. It is, however, an entirely different question whether history licenses the conclusion that the protection of expectation and reliance, security and regularity, was the *only* value the Framers associated with the right of property. The latter inference seems implausible on its face, as regards a society in which property

²¹ Board of Regents v. Roth, 408 U.S. at 577.

²² See generally L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS (1977).

holdings had been associated with station in life and at least to some degree with political competence,²³ and property qualifications for voting and office-holding were common.

There thus seems to be little historical or philosophical basis for a conclusion that constitutional property rights are exclusively reliance-based or expectation-based, that they are purely derivative and in no way direct, and that what counts as constitutionally protected property can at any moment be fully told by deciding what entitlements can from time to time be inferred from official standing law. To be clear, I do not mean to contend that expectation and reliance are not highly relevant to property institutions, or that there is no such thing as a derivative constitutional property right, or that the validity of an entitlement claim under the standing law may not be a crucial variable in many constitutional adjudications under the property clauses. My contention is that derivative property rights are not the *only* ones the Constitution creates or protects, and that standing law can supply neither a perfectly complete nor a perfectly reliable definition of constitutionally protected property.

Even within the bounds of a reliance-centered property theory, it would be a mistake to think that reliance and expectation are exclusively governed by the official content of the formal standing law. Surely Professor Ackerman has a point in distinguishing between "lawyers' property" and "laymen's property"—in observing that the ordinary person's understanding of what is hers to keep, and of when something of hers has been "taken," does not and cannot always accord with sophisticated legal understanding.²⁴ And surely that popular understanding is itself deeply conditioned by the traditional categories and doctrines of the common law. Thus, even supposing that security and regularity were the sole objects of property institutions, there would be reason for testing constitutional claims of deprivation or taking of property against the criteria of lay understanding and traditional law, even when those are officially contradicted by contemporaneous law. There are, then, grounds both within and without the theory of property-as-expectation for at least entertaining the possibility of constitutional rights to protection against arbitrary or uncompensated deprivation of certain interests *not* treated as entitlements by the standing law.

I have advanced two theses, related but not identical. The first and more modest is that standing law does not and cannot supply a perfectly reliable definition of constitutionally protected property. The second and more drastic is that the Constitution does and must protect, as property, some claims that are not treated as entitlements by standing law. If it is not apparent now why these two theses are not identical, I hope it soon

²³ See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 217-19 (1969).

²⁴ See Ackerman, *supra* note 16, at 360-66.

will be. Let us begin with the first thesis: Standing law does not furnish a perfectly reliable definition of constitutionally protected property.

Suppose, in the days before the thirteenth amendment, I owned a man. I owned him, that is, pursuant to the standing laws of my state, which expressly allowed for one person's owning another. Among neighboring states, some did and some did not allow for ownership of human beings. Now suppose that, at some point in time after I bought my man, the United States Congress—acting, we can imagine for simplicity, under its power to regulate commerce among the several states—passed a statute saying that if anyone takes a man he owns into a “free” state, that man becomes a free man and the former owner owns him no longer. Suppose I did, thereafter, take my man with me onto free soil. Later, having brought him home again, I struck him in a manner that was tortious if he was then a *sui juris* person but legally privileged, under the standing law of my state, if he was considered to be my property. He then sued me for battery. I defended on the ground that he belonged to me, and one cannot tortiously batter one's own belonging. He responded that by virtue of the congressional statute he could no longer be treated as my property. I rejoined that to give the statute such an effect would be to deprive me of my property without due process of law, or to take it without just compensation, in violation of the fifth amendment.

Note that in order to succeed I would not have needed to establish a direct constitutional right of property, but only a derivative one, since, according to the standing law of my state, I was entitled to use that man as I pleased as of the moment when Congress intervened. But was a court, on that account, required to conclude that the congressional intervention infringed a property right of mine, in the sense that would bring into play the fifth amendment tests of deprivation without due process, or taking without just compensation? Does the Constitution's category of protected property automatically encompass *whatever* entitlements respecting external objects state law may at a given moment officially establish and sanction, regardless of their nature? In *Dred Scott v. Sandford*,²⁵ Chief Justice Taney for the Supreme Court at least suggested an affirmative answer to that question. It was an answer that many since have professed not to admire. But if we, then, answer the question negatively, where does that leave us with respect to my two theses?

A negative answer would seemingly establish the first and more modest thesis—that standing law does not furnish a perfectly reliable definition of constitutionally protected property. It would by no means establish the second and more drastic thesis—that constitutionally protected property *includes* some claims *not* treated as entitlements by the standing law. But it would be a step in that direction, for reasons soon to appear.

²⁵ 60 U.S. 393 (1857).

The next step is to see that the case of chattel slavery is not a unique exception to an otherwise sound proposition that any and all entitlements warranted by the standing law are property in the constitutional sense of attracting protection against supervening legislative or other government impairment.²⁶ Courts, at any rate, have never consistently thought so. For example, inchoate dower and curtesy claims—though exquisitely well-defined under long-standing, well-known, legal doctrine—have been judicially classed as “mere expectancies” that a legislature is free at any time to abolish retrospectively, without compensation.²⁷ The legal privilege of using one’s own land in any way that does not amount to a common-law nuisance or a violation of existing regulatory law, coupled with a legal right against interference with one’s lawful use, is perhaps our law’s classic instance of a universally conceded entitlement. Courts, however, have had no difficulty in upholding retrospective applications of supervening, sometimes severe, legislative restrictions on use, often on the theory that one’s constitutionally protected property simply does not encompass uses that are legislatively determined to contravene the public interest.²⁸

A more particular, and very striking, version of the same phenomenon is the federal constitutional doctrine of the navigation servitude. As a matter of state common law, owners of riparian lands are generally entitled to exploit the adjacent waters and their flow in various ways that enhance their landholdings as mills, farms, factories, fisheries, and boat launches. As a matter of federal constitutional law, Congress, under the commerce power, is authorized to provide, by means of both regulation and public works, for various public interests relating to the navigable waters of the country.

It might seem that the apparent potential for conflict between these two bodies of doctrine would be mediated by the fifth amendment’s guarantee against takings without just compensation. In cases not involving navigable waters, when regulatory or entrepreneurial activities of the federal government encroach severely on the value or use of private holdings sanctioned by the standing law, a right to compensation is held to arise under the fifth amendment.²⁹ Not so, however, when the impaired value or use is dependent upon the land’s proximity to, or en-

²⁶ No doubt the slavery example is a loaded one that does not logically entail any more general thesis. It is easy as an empirical matter to distinguish persons from the rest of the world as possible objects of ownership. It is just as easy to explain why persons should not be regarded as ownable—and why legally engendered expectations of owning them should be given short shrift—using reasons that are peculiarly applicable to persons as distinguished from everything else. Such an explanation might, for example, begin with the observation that the institution of property must seek its justification in the service it renders to the rights or interests of human beings—from which it follows that in the relation of owner-and-object the presumptively proper position for a human being is that of owner, not object.

²⁷ *E.g.*, Opinion of the Justices, 337 Mass. 786, 151 N.E.2d 475 (1958).

²⁸ *E.g.*, *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972).

²⁹ *E.g.*, *United States v. Causby*, 328 U.S. 256 (1946).

joyment of the water in or the flow of, a navigable stream. A reason often given is that the navigable waters of the country are a public endowment in which no vested private rights may be allowed to arise.³⁰ The cases reveal any number of surprising applications or extensions of the doctrine, which plainly cannot be explained in terms of the absence of expectation, actual or reasonable, on the owner's part that the law would protect his position.³¹ The servitude doctrine reflects a judgment not about the private expectations and reliances that the extra-constitutional standing law would likely engender, but rather about those that social values attributed by judges to the Constitution can tolerate. One is denied compensation not because it was unreasonable in a behavioral sense to develop feelings of security about one's advantageous situation vis-a-vis the river, but because it was unreasonable in a moral sense known to the court if not always to the citizen. Of course, I understand the argument that in time those two senses will tend to converge: If the courts persistently deny compensation for values dependent on proximity to navigable waters, riparian owners should start to make the appropriate expectational discounts. But that argument, fully understood, is going to help prove my second and more drastic thesis, the one that says there is and must be some kind of direct right of property under the Constitution.

Nothing could better illustrate the existence of a direct, constitutional property right than the Supreme Court's recent decision in *Kaiser Aetna v. United States*.³² The plaintiff owned land in Hawaii surrounding a lagoon separated from the sea by a thin sandbar.³³ The lagoon, as it originally stood, was not navigable in the sense that would bring it within reach of the navigation servitude doctrine. Under Hawaii law, Kaiser Aetna, as owner of the surrounding land, also owned the lagoon.³⁴ It conceived the project of building a planned community around the lagoon, and at the same time dredging a channel to the sea across the sandbar, so that the lagoon would become a private marina to be exclusively enjoyed by occupants of the planned community the plaintiff would build and market.³⁵ Notice of the plan was given to the U.S. Army Corps of Engineers, which made no objection.³⁶

Once the dredging had been completed, connecting the lagoon with the open sea, the United States took the position that the lagoon had now become a part of the country's navigable waters to which the

³⁰ See generally Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963).

³¹ Compare, e.g., *United States v. Willow River Power Co.*, 324 U.S. 499 (1945), with *United States v. Cress*, 243 U.S. 316 (1917).

³² 444 U.S. 164 (1979).

³³ *Id.* at 165.

³⁴ *Id.* at 165-66.

³⁵ *Id.* at 167.

³⁶ *Id.*

general public should have rights of access.³⁷ Allowing public access to the marina would of course greatly impair the market value of Kaiser Aetna's project which had contemplated a private marina for the exclusive use of the occupants of the project. Kaiser Aetna contended that to require it to forgo the normal property owner's right to exclude strangers from its property would so eviscerate its ownership interest as to constitute a taking of property for which compensation would be due under the fifth amendment.³⁸ The Supreme Court agreed.³⁹

The decision marks a sharp break with the expansive treatment of the navigation servitude concept in a long series of prior cases. Those cases had seemingly established that anyone who invests in the prospect of future private exploitation of the proximity of one's land to navigable waters does so at the risk of *uncompensated* impairment resulting from exercises of the navigation powers of the United States.⁴⁰ It was taken as a given in the Supreme Court's decision that Kaiser Aetna's lagoon had become a navigable water once the channel was dredged. Moreover, the government's act of requiring public access to this navigable water fell squarely within the ambit of its established navigation powers.

In sum, the standing law external to the fifth amendment itself did not purport to entitle Kaiser Aetna to compensation for damage wrought by exercises of the navigation power respecting the converted lagoon. The property right vindicated in the *Kaiser Aetna* decision must, then, have been a direct constitutional right, not a derivative one. The circumstances of the case—the initial acquiescence of the Corps in the dredging proposal, the fact that the utility of the lagoon for sea-going navigation had just been created by the imagination and investment of Kaiser Aetna, and the perception that making a nominal owner of property open his land against his will to strangers is a supreme insult to the notion of private ownership—all apparently conspired to make the Court decide that, regardless of whether the standing law warranted any secure expectation on Kaiser Aetna's part of legal respect for its exclusive right, Kaiser Aetna was *constitutionally* entitled to just such an expectation. The property right vindicated by the Court in the *Kaiser Aetna* case was thus, contrary to Justice Stewart's assurance in the *Roth* case,⁴¹ one that was "created by the Constitution."

The *Kaiser Aetna* case typifies a far more general—indeed, a breathtakingly more general—problem. Just as Congress is constitutionally authorized to engage in regulation and public works in support of the navigation interests of the country—the navigation power—so is the

³⁷ *Id.* at 168.

³⁸ *Id.* at 174-79.

³⁹ *Id.* at 179-80.

⁴⁰ *See, e.g.,* United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); Scranton v. Wheeler, 179 U.S. 141 (1900).

⁴¹ *See* text accompanying note 19 *supra*.

government of every state authorized by its constitution to engage in regulation and public works in pursuit of the health, safety, and general welfare of the public—the police power. Just as it can be said that no one can have a private vested right against regulation or improvement of the country's endowment of navigable waters, so it can just as plausibly be said—and often has been—that in general no one can obtain a private vested right against regulation or improvement for the sake of public health, safety, or welfare. Analogous to the doctrine of the navigation servitude, there could easily have arisen a doctrine of police-power servitude, according to which all modes of using and enjoying property are held subject to the risk of uncompensated impairment by exercise of the State's police powers.⁴² If, then, property rights under the federal Constitution were strictly derivative in nature, its purported guarantee against uncompensated takings of property by state governments would be a nearly empty promise.

Even so, the notion that all property is held subject to an implied police-power servitude seems at one time to have been entertained by the Supreme Court.⁴³ As late as 1922, it seems to have been entertained by Justice Brandeis dissenting in *Pennsylvania Coal Co. v. Mahon*.⁴⁴ But the *Pennsylvania Coal* case was both the Waterloo of the police-power servitude doctrine and the irrefutable demonstration of the impossibility of derivative constitutional property rights without direct ones lurking somewhere behind them. Writing for the Court, Justice Holmes characteristically captured the whole problem in an aphorism: "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone."⁴⁵ This was the same Holmes, mind you, who seventeen years earlier had insisted that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics"⁴⁶—a wisecrack which under the circumstances that provoked it might well have been taken as a denial that there are direct property rights under the Constitution; or so taken, rather, by anyone who failed to read to the end of Holmes's *Lochner* dissent, where the doom of unconstitutionality was reserved for state laws that "a rational and fair man necessarily would admit . . . would infringe fundamental principles as they have been understood by the tradition of our people and our law."⁴⁷ The Holmes of the *Pennsylvania Coal* decision must have thought that those fundamental principles demanded some limits on the police-power servitude. But whether its content be derived

⁴² See, e.g., *Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*, 402 N.E.2d 501 (Mass. 1980).

⁴³ See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 410-11 (1915); *Mugler v. Kansas*, 123 U.S. 623, 663-70 (1887).

⁴⁴ 260 U.S. 393, 416, 420-21 (1922) (Brandeis, J., dissenting).

⁴⁵ *Id.* at 413.

⁴⁶ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

⁴⁷ *Id.* at 76.

from historical fundamental principles or from some other source of political morality, it is certain that the property right vindicated by Holmes in the *Pennsylvania Coal* case, and never since disavowed by the Court, is one directly rooted in the Constitution and not derived from the standing law, which, as Holmes admitted, included the general exposure of holdings to uncompensated regulation.

In Professor Tribe's words, "[a]t stake must be not only what people *in fact expect* upon examining the body of positive law, but also what they are *entitled* to expect, positive law to the contrary notwithstanding."⁴⁸ And what could the source of the entitlement then be, if not the Constitution? And where then should we search for enlightenment as to the entitlement's scope and content, if not in the Constitution?

But what would it mean to search in the Constitution for such enlightenment, when it is plain to see that all the Constitution says is not to take property without compensation, or deprive anyone of property without due process of law, and nothing at all about what property consists of? I think we can see what it might mean, if we first step back and examine our problem from a more distanced perspective.

In *Democracy and Distrust*, John Ely offers a theory for reconciling "what are sometimes characterized as two conflicting American ideals—the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other. . . ."⁴⁹ Ely argues that judicial review, under textually nonspecific constitutional clauses, of the actions of representative assemblies can be justified as a device for resolving this apparent conflict, but only if the judges utilize a certain method for "supplying content"⁵⁰ to the nonspecific clauses. They must "focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."⁵¹

I think our problem has a similar structure and yields, at least partially, to a similar solution. We, too, are dealing with "two conflicting American ideals," both reflected in the Constitution: "the protection of popular government on the one hand" and the protection of property rights on the other. But "property," I think I have shown, is a thoroughly nonspecific term, one for which the judges have to "supply content." They can do so in a way that helps resolve the apparent conflict between popular government and property rights, if they understand property as itself an essential ingredient of "the opportunity to participate . . . in the political processes by which values are . . . identified and accommodated." All of that is, I am afraid, quite cryptic and requires some elaboration.

⁴⁸ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 469 (1978); see *id.* at 465.

⁴⁹ ELY, *supra* note 11, at 86-87.

⁵⁰ *Id.* at 87.

⁵¹ *Id.* at 77.

Certainly, as the alluring and impossible idea of the "police power servitude" illustrates, there is a puzzle about how to understand the idea of constitutionally guaranteed property rights within a regime of popular democracy. In a bit of hyperbole, Justice Brennan has suggested that "in any rational conception of a constitutional order" claims of vested property rights must give way before the principle of popular sovereignty.⁵² We cannot take him literally, else indeed "the contract and due process clauses are gone." But that only points again to the puzzle, not the solution. The puzzle, to put it in plainest terms, is just that it is both an implicit premise of the constitutional system that individual holdings are always subject to the risk of occasional redistributions of values through the popularly ordained operations of government, both active and regulatory, and an explicit premise of the system that people can have property, be owners, not only as among themselves but also vis-a-vis the people as a whole organized as the State. And therein surely seems to lie a contradiction.

I am entirely ready to admit that the contradiction is real, reflecting a deeper contradiction in our characteristically best attitudes towards popular rule and individual worth, infinitely valuing them both. It is a symptom of the classic dilemma of liberal democracy "in which political power is envisioned as restrained yet popularly responsive, heedful of the primary values of private and community choice, yet somehow also reflecting the will of the country."⁵³ It is a contradiction that will endure, I suppose, for as long as our civilization endures. But partial resolutions are possible. Indeed, it is possibility of partial resolutions that allows us to experience the contradiction as generative tension rather than as dead end.

Let us now pass in brief review some possibilities that are not resolutions at all, even partial ones. It is hardly any help to limit popular sovereignty—the police power—to exercises that, in fact or intention, are designed to further some public or social interest, because in any adequate conception of popular sovereignty, what counts as a social or public value will itself be open to political determination.⁵⁴ Nor does it help much to emphasize the procedural aspect of the notion of due process. Assurance of a hearing at which to contest the legality of governmental encroachments on one's property cannot protect property against legal redefinition to the point of extinction.

A more plausible candidate for the office of effective mediating device between property and police power is the rule of just compensa-

⁵² *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 260 (1978) (Brennan, J., dissenting).

⁵³ Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. CIV. RTS.—CIV. LIB. L. REV. 296, 298 (1980) [hereinafter cited as Michelman].

⁵⁴ See generally Michelman, *Politics and Values or What's Really Wrong With Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979).

tion for takings. Under that rule, the popular sovereign can do as he wills, as long as he follows "the constitutional way of paying for the change."⁵⁵ That way, both police power and property are rendered their due.

It's such a nice idea; too bad it doesn't work. Alas, there are a number of reasons why the device of compensating owners with money for governmental incursions on their property cannot avoid occasions when either property or police power must give way—and a choice, therefore, has to be made between two constitutional principles which, it follows, cannot both be absolutes. The most obvious, and least interesting, of these reasons is the sheer impracticability of providing monetary compensation for all property value impairments caused by governmental action in pursuit of valid goals. As Holmes put it in the *Pennsylvania Coal* decision, "government could hardly go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law."⁵⁶ As Holmes also saw, in many such cases it will be no answer—because it will not be true—to say that compensation is implicit in some "average reciprocity of advantage" secured by the challenged law itself to all the affected property owners.⁵⁷

The compensation solution, then, will often be unfeasible in practice even when available in principle. Of greater theoretical interest are cases in which the compensation solution is unavailable even in principle. Of these, the most obvious are cases in which economic redistribution is itself a purpose of the governmental intervention that prompts the demand for compensation. For example, consider the result if monetary compensation were required for all substantial losses to individual net worth occasioned by the imposition of an "excess profits" tax, or a graduated income tax, or some other ostensibly redistributive tax. It is easy to see why taxes have to be categorically distinguished by the courts from takings of property,⁵⁸ but hard to deny that the distinction hides—the way a fig-leaf hides—an immense subordination of property rights to general welfare.

For today I am chiefly interested in a somewhat different sort of case in which the compensation solution for a conflict between property and police power is unavailable even in principle. I mean the sort of case in which the injury suffered by the aggrieved owner is one for which

⁵⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416.

⁵⁶ *Id.* at 413.

⁵⁷ *Id.* at 415.

⁵⁸ *Cf. Block v. Hirsh*, 256 U.S. 135, 157 (1921) ("It may be assumed that the [challenged rent-control law] . . . will deprive [the complaining landlord] . . . of the power of profiting by the sudden influx of people to Washington caused by . . . the war, and thus of a right usually incident to fortunately situated property—of a part of the value of his property . . . But while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted").

money cannot compensate, because the injury is to some interest of the owner's apart from economic net worth. As a striking example of such a case, let us contemplate the case of Poletown.

It is obvious from their conduct that the Poletowners cannot be made whole by monetary just compensation. After all, an eminent domain taking of their homes and neighborhood, to be accompanied by compensation payments, is exactly what they are resisting. In these circumstances, we can easily see that property may represent more than money because it may represent things that money itself can't buy—place, position, relationship, roots, community, solidarity, status—yes, and security too, but security in a sense different and perhaps deeper than that of the Kaiser Aetna Corporation's "reasonable investment-backed expectations."⁵⁹ In the Poletown case either property and security must yield, or police power and general welfare must yield. Compensation cannot mediate the conflict. And so we are finally up against the question: What can we make the Constitution tell us about *the substance, the content*, of the property rights it purports to protect?

My suggestion is to seek a *rapprochement* of property and popular sovereignty in the idea that rights under a political constitution, including property rights, are first of all to be regarded as political rights. They are precisely such, I suggest, because and insofar as they are rights affecting the individual's participation in popular sovereignty itself. In this view it is a mistake to see property—as I gather William Safire sees it—as something categorically apart from—beyond the reach of—political action.⁶⁰ Rather one regards property as "an essential component of individual competence in social and political life," as a "material foundation" for "self-determination and self-expression," in sum, as "an indispensable ingredient in the constitution of the individual as a participant in the life of the society, including not least the society's processes for collectively regulating the conditions of an ineluctably social existence."⁶¹

If, to repeat, rights under a political constitution are political rights, then "what one primarily has a right to is the maintenance of the conditions of one's fair and effective participation in the constituted order, as an individual no less entitled than others to the respect and concern of the community, and also no more entitled than [others] to any particular outcomes save those that [bear on] the conditions of continued effective participation. Loss—even great loss—of the economic value of one's

⁵⁹ Cf. *id.* ("The preference given to the tenant in possession is . . . traditional in English law"). See also Letter from O. Holmes to W. James (April 1, 1907), reprinted in M. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 417 (1943) ("The true explanation of the law of prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life!").

⁶⁰ Compare Michelman, *supra* note 53, at 304.

⁶¹ *Id.* at 298-99, 304.

[holdings may] not as such violate those conditions. What does, perhaps, violate them is exposure to sudden changes in the major elements and crucial determinants of one's established position in the world, as one has come . . . to understand that position."⁶²

The implications of this view are too manifold and far-reaching to trace out here and now.⁶³ But I think you can see how it pertains to the Poletown case, and might vindicate my statement at the outset of this lecture that William Safire was right to spot that case as a constitutionally sensitive one. Just consider, if you will, how the obliteration of Poletown and the rupture of its society, with or without payments of money to the former inhabitants, may bear on their identity and efficacy as participants in the politics of Detroit, of Michigan, of the United States, in which are constantly being forged the conditions in which their, and our, future identity and efficacy will be determined. From these considerations I do not travel directly to the conclusion that the Michigan Supreme Court should have held invalid the city's exercise of eminent domain power in Poletown. I am just trying to explain my sense that what is happening in Poletown is constitutionally disquieting.

I do not think, though, that my explanation will serve for Mr. Safire. I can highlight the difference between us by asking you to consider another sort of case that is these days cropping up with increasing frequency. There are a number of cities in which rent control has been in force for long enough, during a period of rapidly inflating real estate values, to make apartment buildings worth a great deal more to their owners if sold at market price to individuals who will own their units as condominiums than if kept rented out to tenants at controlled rent levels. The process of condominium conversion, however, threatens displacement of long-time tenants who have been protected in their tenures by the rent-control laws but cannot afford to pay unregulated market values for their units as condominiums. In consequence, a number of laws and ordinances now exist that prohibit a condominium developer or purchaser from evicting a pre-conversion tenant—to whom, therefore, the developer or purchaser must continue indefinitely to rent at a controlled rental, though any contractual lease may long since have expired.

Predictably, the anti-eviction laws are being challenged in court as unconstitutional takings or deprivations of property—so far with, at best, mixed success so far as my information goes.⁶⁴ The developer's or, especially, the purchaser's claim is strong. The effect of the law is both to impose on the owner an unwanted occupant and to frustrate a perfectly

⁶² *Id.* at 306.

⁶³ See Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659.

⁶⁴ See, e.g., *Flynn v. City of Cambridge*, 418 N.E.2d 335 (Mass. 1981); *Grace v. Town of Brookline*, 399 N.E.2d 1038 (Mass. 1979).

natural and lawful goal of acquisition. How can the government thus act on the tenant's behalf without violating the owner's constitutional property rights? In the view of the constitutional notion of property I have taken, a possible answer appears: that the tenants in these cases also have interests at stake of the sort that the constitutional property clauses are meant to serve. They, after all, are the ones who stand to be uprooted and displaced from their homes and neighborhoods unless the law intervenes on their behalf.⁶⁵

It is clear on the face of Mr. Safire's essay that he would not countenance the possibility I have just suggested, that a tenant with an expired lease might have constitutionally cognizable property interests at stake to be legislatively counterposed against those of the building owners. For him, property and ownership are indistinguishable. "The property," he says, "belongs to the owners, not the renting residents."⁶⁶ And that allows me to end by putting our difference this way: Mr. Safire's concern is with the rights of ownership. My concern is with the right to property.

⁶⁵ See note 59 *supra*.

⁶⁶ Safire, *supra* note 1, at A31, col. 7.