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THE LANDSCAPE OF CONSTITUTIONAL PROPERTY

*Thomas W. Merrill**

INTRODUCTION.....	886
I. FOUR FLARES IN THE DARKNESS.....	895
A. <i>Phillips v. Washington Legal Foundation</i>	895
B. <i>Eastern Enterprises v. Apfel</i>	900
C. <i>College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board</i>	908
D. <i>Drye v. United States</i>	914
II. <i>BOARD OF REGENTS V. ROTH</i> AND THE REIGN OF PURE POSITIVISM.....	916
A. <i>Roth and the Emergence of Pure Positivism</i>	917
B. <i>The Positivist Trap</i>	922
C. <i>Searching for a Solution</i>	926
D. <i>Too Much Property</i>	931
E. <i>The Takings Clause and the Positivist Trap</i>	934
III. BEYOND POSITIVISM: THE NEED FOR A FEDERAL PATTERNING DEFINITION.....	942
A. <i>Natural Property</i>	943
B. <i>Pure Positivism</i>	949
C. <i>The Patterning Definition</i>	952
IV. DELINEATING APPROPRIATE PATTERNING DEFINITIONS	954
A. <i>The Need for Three Definitions</i>	955

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<i>B. Procedural Due Process: Property-as-Entitlement</i>	960
1. <i>Entitlement</i>	961
2. <i>Monetary Value</i>	964
3. <i>Termination</i>	965
4. <i>An Assessment of the Definition</i>	967
<i>C. Takings: Property-as-Ownership</i>	969
1. <i>The Right to Exclude</i>	970
2. <i>Discrete Assets</i>	974
3. <i>Irrevocable Right</i>	978
4. <i>An Assessment of the Definition</i>	979
<i>D. Substantive Due Process: Property-as-Wealth</i>	982
1. <i>Dropping The Discrete-Assets Limitation</i>	983
2. <i>A Right to Exclude Without Discrete Assets?</i>	985
3. <i>A Different Direction</i>	987
<i>V. CONTRACTS AS CONSTITUTIONAL PROPERTY</i>	990
<i>CONCLUSION</i>	996

INTRODUCTION

THE Constitution contains two clauses that protect persons against governmental interference with their property. The Due Process Clause provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law."¹ The Takings Clause adds, "nor shall private property be taken for public use, without just compensation."² Both provisions appear to impose a threshold condition that a claimant have some "property" at stake before the protections associated with the Clause apply. Thus, under the Due Process Clause, it would seem that a claimant must have an interest in "property" (or in "life" or "liberty") before we move on to ask whether the state has "deprived" such a person of this interest without "due process of law." And the Takings Clause appears to require that a claimant have "private property" before we proceed to ask whether this interest has been

¹ U.S. Const. amend. V. A substantively identical provision appears in the Fourteenth Amendment. Id. amend. XIV, § 1.

² Id. amend. V. The Supreme Court has held that the Takings Clause applies to the States through the Fourteenth Amendment. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978) (citing *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897)).

"taken" by the government for a "public use" without the payment of "just compensation."

The Supreme Court has not always been attentive to the "property" threshold under these clauses. During a brief period in the early 1970s, it spoke as if procedural due process applies to any interest that is "important," whether or not such an interest can be properly categorized as "property" (or "life" or "liberty").³ In addition, cases from the 1960s and early 1970s seem to say that the substantive due process requirement of minimum rationality applies even if a claimant has no liberty or property interest.⁴

Starting in 1972 with its landmark decision in *Board of Regents v. Roth*,⁵ however, the Court has become increasingly insistent that persons seeking protection for economic interests under either the Due Process or Takings Clauses must establish they have "property" if they are to avoid dismissal of their lawsuit. This understanding is most securely established in *Roth*'s own area—procedural due process. The Court has rendered numerous decisions in the wake of *Roth* reaffirming the idea that property is a precondition of procedural due process protection.⁶ In the takings context, the understanding that a claimant must demonstrate the existence of a property interest is reflected in older federal eminent

³ The period lasted from *Goldberg v. Kelly*, 397 U.S. 254 (1970), to *Board of Regents v. Roth*, 408 U.S. 564 (1972); in other words, about two years. The case that seems to most clearly adopt the "important interest" threshold is *Bell v. Burson*, 402 U.S. 535, 539 (1971) (explaining that the automatic suspension of a driver's license when an uninsured motorist has an accident triggers due process because it "involves state action that adjudicates important interests of the licensees").

⁴ See *Richardson v. Belcher*, 404 U.S. 78, 81–84 (1971) (rejecting the claim that Social Security benefits are analogous to property for purposes of substantive due process protection, but considering whether a change in benefit levels violated the minimum rationality requirement of due process); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961) (finding that the exclusion of petitioner from a government facility implicated no liberty or property interest, but "assum[ing]" that she could not constitutionally be excluded for reasons "patently arbitrary or discriminatory"); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (holding that, although claimant had no property right in accrued Social Security benefits, the interest "is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause").

⁵ 408 U.S. 564 (1972).

⁶ See, e.g., *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'").

domain decisions,⁷ and thus antedates *Roth*. Nevertheless *Roth* clearly has had a major impact here as well. In several regulatory takings cases decided after *Roth*, the Court has pointedly asked whether a claimant has a cognizable interest in property before proceeding to consider whether this interest has been taken.⁸ And in making this threshold inquiry, the Court has generally followed the method prescribed by *Roth*.⁹

Substantive due process is the one area in which the Court until recently had remained silent about the need for a threshold identification of an affected property interest. No doubt this is because substantive due process protection of property has been modest throughout the post-World War II era.¹⁰ During the 1998 Term, however, in *College Savings Bank v. Florida Prepaid Postsecondary*

⁷ See, e.g., *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 629 (1961) (holding that flowage easement is property entitled to just compensation when taken); *United States v. Causby*, 328 U.S. 256, 266-68 (1946) (finding that airplane overflights interfered with respondent's property and hence could give rise to a compensable taking under the Fifth Amendment); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) (rejecting a takings claim on the ground that the utility had no property interest in the head of water in a river); *United States ex rel. Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 276-81 (1943) (finding that a utility's power of eminent domain under state law was not property and hence that its abrogation in a federal eminent domain proceeding did not give rise to a claim for additional compensation).

⁸ See, e.g., *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (1998) (finding that the interest in question was property and remanding for determination of whether it was taken without just compensation); *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55-56 (1986) (finding that the interest in question was not property and hence did not provide the basis for a takings claim); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04, 1013-14 (1984) (finding that the interest in question was property and concluding that it was taken during some periods but not during others); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164-65 (1980) (finding that the interest in question was property and that it was taken).

⁹ See *Phillips*, 524 U.S. at 164 (quoting *Roth*, 408 U.S. at 577); *Monsanto*, 467 U.S. at 1001 (quoting *Webb's*, 449 U.S. at 161, quoting *Roth*, 408 U.S. at 577); *Webb's*, 449 U.S. at 161 (quoting *Roth*, 408 U.S. at 577).

¹⁰ See generally Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555 (1997) (noting the contrast between substantive due process protection of liberty and property and urging recognition of fundamental property rights). The only exception has been the Court's imposition of mild restraints on court awards of punitive damages in civil cases. See *BMW of N. Am. v. Gore*, 517 U.S. 559, 584-85 (1996) (holding that a two million dollar punitive damage award for failure to disclose the repainting of a car was excessive in relation to legitimate state interests and hence in violation of substantive due process).

Education Expense Board,¹¹ the Court ruled that the interest of a business firm protected by a statutory cause of action for false advertising is not "property" within the meaning of the Due Process Clause, and hence Congress had no power to adopt legislation protecting this interest under Section 5 of the Fourteenth Amendment. The property trigger has thus now been unambiguously extended to substantive due process claims.

After *College Savings Bank*, one thing seems reasonably clear: Parties seeking to protect an economic interest under the Due Process or Takings Clauses, whether advancing a procedural or a substantive claim, must be prepared to demonstrate that their interest is "property." Yet how to do this remains unclear. In addition to *College Savings Bank*, the Court has rendered three other decisions in the last two years about the meaning of property under federal law. The first decision, *Phillips v. Washington Legal Foundation*,¹² applies the conventional method of looking to state law to identify constitutional property, but reaches a highly implausible result. The second, *Eastern Enterprises v. Apfel*,¹³ ignores the conventional method and enunciates a new limitation on the scope of property for takings but not due process purposes. The third, *College Savings Bank*, ignores the conventional method and adopts a federal definition of property that is consistent with the common law concept of property, but inconsistent with precedent under the Due Process Clause. The fourth and most recent decision, *Drye v. United States*,¹⁴ involves an interpretation of the Internal Revenue Code rather than the Constitution and also departs from the conventional method, but at least seems to have some continuity with the conventional method and with prior decisions in the tax area.

What is perhaps most remarkable about this burst of seemingly inconsistent pronouncements from the Court is that not one of the four decisions makes any reference to any of the others, or makes any effort to integrate its innovations (in the case of the two decisions that break new ground, *Eastern Enterprises* and *College Savings Bank*) into the preexisting fabric of the law. This state of

¹¹ 527 U.S. 666 (1999).

¹² 524 U.S. 156 (1998); see *infra* text accompanying notes 29–49.

¹³ 524 U.S. 498 (1998); see *infra* text accompanying notes 50–85.

¹⁴ 527 U.S. 666 (1999); see *infra* text accompanying notes 115–20.

affairs is, to put it mildly, likely to produce bewilderment among lower courts and practicing lawyers. The Court has rendered four decisions, each of which is like a flare that briefly illuminates a darkened landscape and then fades away. My objective in this Article is to construct a vision of what that landscape might look like if viewed in a fuller and more sustained light than provided by the Court.

The perspective I adopt is that of an internal participant in our legal system seeking to make sense of the landscape of constitutional property in the wake of the Court's recent pronouncements. The task is to try to fit the Court's outcomes and rationales into the existing legal universe, as defined by the relevant propositions about constitutional protection of property that are reasonably settled. The approach is thus normative, but the judgments are constrained by the path dependency of common-law constitutionalism.

One reason why an approach that tries to make sense of existing judicial doctrine is appropriate at this juncture is that the academic literature about the meaning of constitutional property is surprisingly thin. A spate of articles written in the late 1970s and early 1980s in the aftermath of *Roth* focused on the meaning of property for procedural due process purposes.¹⁵ But once the Supreme Court

¹⁵ See, e.g., Frank H. Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85 (1983); Robert Jerome Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. Cal. L. Rev. 355 (1978); Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clause Nonjusticiable*, 60 Tex. L. Rev. 875 (1982); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in XVIII NOMOS: *Due Process* 126 (J. Roland Pennock & John W. Chapman eds., 1977); Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405 (1977); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455 (1986); Edward L. Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044 (1984); Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 Cal. L. Rev. 146 (1983); Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982); Timothy P. Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 Geo. L.J. 861 (1982); Laurence H. Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269 (1975); Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 Sup. Ct. Rev. 261 (1976); William Van Alstyne, *Cracks In "The New Property": Adjudicative Due Process in The Administrative State*, 62 Cornell L. Rev. 445 (1977); Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. Legal

resolved the most burning controversy that emerged during these years,¹⁶ academic interest faded away, and the issue has lain dormant for more than a decade. With respect to the Takings Clause, there is an enormous literature about what it means to “take” property,¹⁷ and there is substantial writing about the “public use”¹⁸ and “just compensation”¹⁹ requirements. But the threshold requirement that a claimant have “private property” has received less attention.²⁰ Thus, rather than using the Court’s recent decisions

Stud. 3 (1983).

¹⁶ This was the “bitter with the sweet” controversy. See *infra* text accompanying notes 156–81. The Court settled the controversy in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539–41 (1985), and academic writing about the meaning of property for procedural due process purposes fell off noticeably thereafter.

¹⁷ Without in any way being comprehensive, see, for example, Bruce A. Ackerman, *Private Property and the Constitution* (1977); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (1995); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569 (1984); Hanoch Dagan, *Takings and Distributive Justice*, 85 Va. L. Rev. 741 (1999); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509 (1986); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 Mich. L. Rev. 1892 (1992); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. Rev. 605 (1996); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165 (1967); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393 (1991); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1299 (1989); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964) [hereinafter Sax, *Police Power*]; Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971) [hereinafter Sax, *Public Rights*].

¹⁸ See, e.g., Epstein, *supra* note 17, at 161–81; Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986); Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077 (1993).

¹⁹ See, e.g., Victor P. Goldberg et al., *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. Rev. 1083 (1987); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 Harv. L. Rev. 997 (1999); Benjamin E. Hermalin, *An Economic Analysis of Takings*, 11 J.L. Econ. & Org. 64 (1995); Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 Cath. U. L. Rev. 721 (1993).

²⁰ See Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1523 n.277 (1990) (“[T]he question of what property means in the takings context has not been rigorously analyzed by scholars and judges—despite the fact that it would seem central to any formulation of a coherent takings doctrine.”). Aspects of takings property are discussed in several sources. See, e.g., Ackerman, *supra* note 17, at 4 (contrasting “Ordinary Observer” and “Scientific Policymaker” understandings of property for takings purposes); Epstein, *supra* note 17, at 20–24 (urging adoption of

as a launching pad for engaging in political or economic theorizing, it may be more helpful at this juncture to take stock of where we stand in terms of the judicial doctrine seeking to define constitutional property, and to consider how it might be sorted out in a way that makes sense.

After describing the four recent decisions in Part I, the paper will turn in Part II to a consideration of the Court's most sustained effort to date to delineate a methodology for identifying constitutional property—the case law that grows out of the foundational decision in *Roth*. The Court stated there that property interests are not created by the Constitution, but rather are created (and their dimensions defined by) nonconstitutional sources such as state law.²¹ This approach to identifying property, which concentrates on the source of property and imposes little or no limit on its content, gave rise to what may be called the positivist trap. The most prominent version of the trap was then-Justice William Rehnquist's bitter-with-the-sweet thesis: that the procedures prescribed by nonconstitutional law qualify the scope of the property right, and hence compliance with these procedures automatically satisfies due process.²² More broadly, however, the trap arises whenever nonconstitutional law generates either too little property or too much property relative to some independent norm that is important to the Court. I will review various devices the Court developed during years following *Roth* in response to different versions of the trap.

Drawing upon the lessons that may be gained from the experience with *Roth*, Part III will seek to determine the optimal method for identifying constitutional property rights, with particular refer-

Blackstone's definition of property for purposes of interpreting the Takings Clause); McUsic, *supra* note 17, at 647–59 (arguing that the Court implicitly regards private property under the Takings Clause to mean interests in land); Paul, *supra* note 17, at 1416–24 (contrasting “physical” and “market” models for defining takings property); Thompson, *supra*, at 1522–27 (contrasting positivist and romantic theories of property). In addition, there are a few sources that consider the meaning of property as reflected in specific cases. See, e.g., Frank I. Michelman, Property, Federalism, and Jurisprudence: A Comment on *Lucas* and Judicial Conservatism, 35 *Win. & Mary L. Rev.* 301 (1993) (discussing the definition of property implicit in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)); D. Benjamin Barros, Note, Defining “Property” in the Just Compensation Clause, 63 *Fordham L. Rev.* 1853 (1995) (same).

²¹ See *Roth*, 408 U.S. at 577.

²² See *Arnett v. Keimedy*, 416 U.S. 134 (1974) (plurality opinion).

ence to the appropriate division of labor between constitutional and nonconstitutional law. I reject both a "natural property" and a "pure positivist" approach, and instead endorse what I call the "patterning definition" method. Under this strategy, courts would proceed in two steps. First, they would identify, as a matter of federal constitutional law, general criteria that distinguish constitutional property from other interests or expectancies that do not rise to the level of property. Second, they would canvas sources of nonconstitutional law (most prominently but not exclusively state law) to determine whether the claimant has a legally recognized interest that satisfies these criteria and hence constitutes constitutional property. An approach very much like this was recently endorsed in *Drye* for defining property for federal tax purposes.

In Part IV, I will turn to the more difficult question of determining what the patterning definition of constitutional property should be. Although awkward from a textualist perspective, I argue that the best approach is to adopt different definitions for procedural due process, the Takings Clause, and substantive due process. I call these three definitions *property-as-entitlement*, *property-as-ownership*, and *property-as-wealth* respectively.

The patterning definition for procedural due process, *property-as-entitlement*, is broad but not open-ended. Drawing upon existing decisional law, I suggest the definition should ask whether nonconstitutional sources of law confer an entitlement on a claimant having a monetary value that can be terminated only upon a finding that a specific condition has been satisfied. This definition would encompass both traditional common law property and government entitlements protected by "for cause" termination provisions.

The patterning definition for purposes of the Takings Clause, *property-as-ownership*, is significantly narrower. Building on the Court's recent decisions in *Eastern Enterprises* and *College Savings Bank*, I argue that the definition in this context should ask whether nonconstitutional sources of law confer an irrevocable right on a claimant to exclude others from interfering with specific assets. This definition would hew fairly closely to the private law concept of property. It would not be triggered by changes in taxes or liability rules because these sorts of government actions affect a claimant's wealth but do not undermine any ownership rights in

specific assets. It would also exclude entitlements to government benefits because these entitlements are not irrevocable in the strong sense that common law property rights are.

The patterning definition for purposes of substantive due process is more difficult to specify. As a constitutional doctrine, substantive due process is a mile wide and an inch deep. It includes, for example, the principle that all economic regulation must be minimally rational²³ and the principle that retroactive changes in tax and liability rules require special justification.²⁴ The breadth (and the weakness) of the doctrine suggests that the definition of property for these purposes should also be broad. Lacking any significant guidance in the Court's decisions, I tentatively suggest that property in this context should mean *property-as-wealth*, in other words, the definition would ask whether nonconstitutional sources of law confer an entitlement on a claimant having a monetary value. This is the broadest of the three patterning definitions.

Part V will briefly consider an issue that poses a special challenge to any attempt to set forth a comprehensive strategy for defining constitutional property: whether contract rights are property for purposes of the Due Process and Takings Clauses. The key stumbling block here is the Framers' decision to forbid the States from passing any law "impairing the Obligation of Contracts,"²⁵ but not to impose this prohibition on the federal government. If we are to respect this decision, then "contracts" cannot be coterminous with "property." Otherwise, every impairment of contract could just as easily be challenged as a regulatory taking, and, assuming the Takings Clause provides more protection than the Contract Clause (which seems to be the modern Court's view²⁶), federal impairment of contracts would be subject to the same degree of constitutional constraint as state impairments, contrary to the constitutional design.

²³ See, e.g., *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637-41 (1993).

²⁴ See, e.g., *United States v. Carlton*, 512 U.S. 26, 31 (1994) (stating that retroactive change in tax laws must meet a burden of justification not faced by prospective legislation); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976) (applying the same principle to a retroactive liability rule).

²⁵ U.S. Const. art. I, § 10, cl. 1.

²⁶ See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (giving short shrift to a Contract Clause claim relative to a takings claim).

I. FOUR FLARES IN THE DARKNESS

In the last two years the Supreme Court has issued four pronouncements about the meaning of property. Three of these edicts—the ones most immediately relevant here—concern the meaning of property for purposes of substantive constitutional protection under either the Due Process or the Takings Clauses. Each of the constitutional rulings was decided by a vote of 5–4, with the same coalition of Justices on each side. The majority in each case was composed of Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas; this coalition may be labeled the “pro-property” wing of the Court.²⁷ The dissenters in each case were Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer; this group we may call the “pro-regulation” faction.²⁸ Our three cases, however, suggest that such labels are potentially misleading. Two of the three decisions—the two that change the law in the most significant respects—restrict the domain of constitutional property relative to what it was before they were decided.

The fourth and most recent decision about the meaning of property—which is only indirectly relevant to our topic—arose under the tax lien provisions of the Internal Revenue Code. Nevertheless, Justice Ginsburg’s brief unanimous opinion for the Court provides in many respects the most useful model for integrating the Court’s various pronouncements about the meaning of constitutional property.

A. *Phillips v. Washington Legal Foundation*

The first of the four decisions to be argued and decided, *Phillips v. Washington Legal Foundation*,²⁹ arose out of a constitutional challenge to Interest on Lawyer Trust Accounts (“IOLTAs”). IOLTAs are an artifact of federal banking regulations. Under

²⁷ The same five Justices voted to find an unconstitutional taking in *Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994), and in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1005 (1992), where they were joined by Justice White, now retired.

²⁸ Justices Stevens, Souter, and Ginsburg, joined by the late Justice Blackmun, dissented in *Dolan*, 512 U.S. at 396, 411, and Justices Stevens and Souter dissented in *Lucas*, 505 U.S. at 1036, 1061, 1076.

²⁹ 524 U.S. 156 (1998).

those regulations, Negotiable Order of Withdrawal ("NOW") accounts (interest-earning demand accounts) are available only to individuals and charitable organizations.³⁰ Consequently, lawyers who hold small amounts of funds for clients have traditionally commingled these monies in ordinary non-interest-bearing checking accounts. In 1981, the Federal Reserve Board issued an opinion letter stating that lawyers could place client funds in a NOW account, provided all interest was paid over to a charitable organization.³¹ Prompted by this ruling, forty-eight States and the District of Columbia adopted rules requiring lawyers to place client funds in IOLTAs, with the interest going to charitable foundations that fund legal services for the poor.

The Court granted certiorari in *Phillips* to resolve a conflict over the narrow question "whether 'interest earned on client trust funds held by lawyers in IOLTA accounts [is] a property interest of the client or lawyer'" for purposes of the Takings Clause.³² Everyone agreed that the principal sum of money deposited in an IOLTA belongs to the client.³³ Moreover, under the Texas IOLTA program at issue in *Phillips*, it was conceded that if the client's funds were sufficiently large to generate net interest—interest in excess of the administrative costs of establishing a separate account—then the lawyer was required to establish a separate client account for the funds, in which case the net interest would be credited to the client.³⁴ IOLTAs could thus be used only in situations where, but for the IOLTA program, the client's money would be placed in an ordinary commingled checking account and would earn no interest.

Phillips presented something of a brainteaser of an issue: whether the fruits of X's property that may only be enjoyed by Y are nevertheless the property of X. But the Court's approach to resolving that question was highly conventional. The Court framed its analysis with the observation that "[b]ecause the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state

³⁰ See 12 U.S.C. § 1832(a) (1994).

³¹ See *Phillips*, 524 U.S. at 161.

³² *Id.* at 164 n.4 (quoting Petition for Cert. at i).

³³ See *id.* at 164.

³⁴ See *id.* at 169.

law.”³⁵ This invocation of nonconstitutional law as the source of constitutional property is, as we shall see, a well-established conceit in both the due process and the takings contexts.

The most notable aspect of *Phillips* was not the Court’s method, but the fact that the Court appeared to reach the wrong result under that method. In an opinion written by Chief Justice Rehnquist, the Court held that IOLTA interest “is the property of the client.”³⁶ Yet if we assume a method that identifies constitutional property by looking to “independent source[s] such as state law” means a court is to look to *all* relevant provisions of state law, the client did not have any property in IOLTA interest. This is because, under the Texas Supreme Court rules, client funds that would not earn net interest in a separate account must be placed in an IOLTA, and if placed in an IOLTA, those funds would not earn interest for the client. Hence, any client who consulted all “independent source[s] such as state law” should know in advance of depositing a small sum of money with a Texas lawyer that, under the law of Texas, those funds would earn no interest.

On its face, it is unclear why the majority deployed the conventional method in such an apparently flawed way. The Chief Justice’s opinion offers no explanation why some provisions of nonconstitutional law—in this case, common law precedents from Texas and elsewhere stating that “interest follows principal”³⁷—are relevant in determining whether IOLTA interest is the property of the client, whereas other provisions of nonconstitutional law—most notably the Texas Supreme Court’s IOLTA rules—somehow do not count in resolving the property question.

The only whiff of a theory lies in the adjectival phrases the Chief Justice employed in describing different provisions of law. The legal rules cited favorably by the Chief Justice had been “established under English common law since at least the mid-1700’s,” were “firmly embedded in the common law of the various States,” reflected “traditional property law principles,” and had a long “historical pedigree.”³⁸ In contrast, those provisions deemed irrelevant, such as the Federal Reserve Board’s opinion letter and the

³⁵ Id. at 164 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

³⁶ Id. at 160.

³⁷ Id. at 165–66 & n.5.

³⁸ Id. at 165–68.

rules promulgated in 1984 by the Texas Supreme Court, were not part of the “‘background principles’ of property law.”³⁹ This selection of descriptive phrases intimates that perhaps long-established common law rules are central to the identification of “true” property interests, whereas rules enacted by regulatory agencies are not. But the suggestion is just that—an intimation. The Rehnquist opinion sets forth no theory that would justify its result.

The most persuasive thing the Court said in support of its judgment was that physical things can be property, even if they have no economic value.⁴⁰ Similarly, “[w]hile the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property.”⁴¹ This suggests that the value the Court (and the respondents) attached to the property determination was a recognition of the client’s right to exclude others from the interest. The client might not be able to get his hands on the interest, but at least he could make sure that no legal aid lawyer got it either.

The problem with rationalizing the decision on this basis, however, is that the victory was purely pyrrhic. The Texas IOLTA rules in effect had already inversely condemned the client’s right to exclude others by requiring that all funds that could not otherwise earn net interest be deposited in IOLTA accounts. As Justice Souter persuasively argued in dissent,⁴² the Texas Supreme Court’s elimination of the client’s right to exclude others from the interest would not give rise to any actionable claim for a “taking” or for the payment of “just compensation.” Two of the established variables for determining whether a regulation exacts a taking are its economic impact and the degree to which it interferes with investment-backed expectations.⁴³ Since, absent the IOLTA program, a client would earn no interest on funds held by a lawyer, the program would seem not to have any adverse economic impact on

³⁹ Id. at 168 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)).

⁴⁰ See id. at 169–70.

⁴¹ Id. at 170.

⁴² See id. at 174–78 (Souter, J., dissenting).

⁴³ See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

ordinary clients and would not seem to interfere with any investment-backed expectations.

Similarly, the formula for determining just compensation looks to the value of the property before and after the challenged regulation is adopted.⁴⁴ Since client funds earned zero net interest before being placed in an IOLTA account, and earned zero interest after being placed in such an account, there was no change in valuation requiring the payment of compensation. Thus, the value of the judgment to the respondents, and evidently also to the Court majority, was simply the gratification of being able to proclaim that this type of device for funding litigation on behalf of the poor is "confiscatory."⁴⁵ This was constitutional law as symbolic politics.

Beyond symbolic politics, there is one respect in which *Phillips* highlights a more general dilemma in takings jurisprudence. This is what Margaret Radin has called the problem of "conceptual severance."⁴⁶ The problem derives from the fact that property can be conceptually subdivided into physical fractions of different sizes or into bundles of rights composed of different sticks or strands. The more a parcel of land or bundle of rights is disaggregated, the more draconian a government regulation will seem, because the regulation will have a greater impact on a fractional parcel or a single strand than it will have on a larger aggregation of interests. Thus, conceptual severance makes it more likely that a court will find a government regulation is a taking. The Court in fact has recognized the danger of conceptual severance and has warned that "a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable."⁴⁷

⁴⁴ See, e.g., *United States v. Miller*, 317 U.S. 369, 373 (1943) ("The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.").

⁴⁵ *Phillips*, 524 U.S. at 171 (referring to the State's "confiscation of respondents' interest income").

⁴⁶ Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1677 (1988). For a recent discussion, see Courtney C. Tedrowe, *Conceptual Severance and Takings in the Federal Circuit*, 85 Cornell L. Rev. 586 (2000).

⁴⁷ *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993).

The *Phillips* decision acquiesced in an egregious form of conceptual severance. By accepting the characterization of the interest on an IOLTA as a property right separate and distinct from the principal, the Court made it seem plausible to describe the IOLTA rules as effecting a complete "confiscation" of property. If, however, the relevant unit of analysis were the principal amount of funds deposited with a lawyer, then the IOLTA rules would at most represent a diminution in value of property relative to what it might be worth under other arrangements.⁴⁸ *Phillips* thus underscores what Justice Scaha confessed in *Lucas v. South Carolina Coastal Council*⁴⁹—that the Court has no idea how to prevent the definition of property from being manipulated through conceptual severance so as to influence the outcome of takings controversies.

B. Eastern Enterprises v. Apfel

The second of the three decisions, *Eastern Enterprises v. Apfel*,⁵⁰ followed closely on the heels of *Phillips*. At issue was the constitutionality of the Coal Industry Retiree Health Benefit Act ("Coal Act"),⁵¹ a federal statute enacted in 1992 requiring companies that had formerly been in the coal mining business to contribute to a fund providing health care benefits to retired coal miners and their families. With respect to the petitioner, Eastern Enterprises, the Coal Act meant that it had to pay for health care benefits for persons it had employed between 1946 and 1965, the year it turned over its coal mining operations to a wholly-owned subsidiary.⁵² These payments were compelled by law even though Eastern Enterprises, during the 1946 to 1965 period, had entered into no formal contractual commitments to pay such benefits beyond the term of individual collective bargaining agreements. The Coal Act therefore could be said to change the legal consequences of em-

⁴⁸ Indeed, the Chief Justice acknowledged that if the principal amount of client funds were regarded as the relevant property, the IOLTA rules would need to be considered a regulation of property, not a confiscation, and it would be unlikely that any takings challenge could be successfully mounted to such a regulation. See *Phillips*, 524 U.S. at 164.

⁴⁹ 505 U.S. 1003, 1016–17 n.7 (1992).

⁵⁰ 524 U.S. 498 (1998).

⁵¹ 26 U.S.C. §§ 9701–9722 (1994).

⁵² The subsidiary paid more than \$100 million in dividends to Eastern from 1965 until it was sold in 1987. See *Eastern Enterprises*, 524 U.S. at 516.

ployment contracts some thirty-plus years after the fact. Eastern's cumulative expected liability under the statute was estimated to be between \$50 and \$100 million.⁵³ Thus, *Eastern Enterprises*, unlike *Phillips*, was at least a fight over real money.

Also unlike *Phillips*, where the Court granted certiorari for the express purpose of deciding the constitutional property issue, the possibility that there was no property at stake in *Eastern Enterprises* did not make its appearance until well after the case had been briefed and argued. The claim was not raised in any of the briefs filed by the parties.⁵⁴ And notwithstanding the usual vigorous questioning at oral argument, the contention that there was no property within the meaning of the Takings Clause was neither urged by any of the lawyers nor floated by any Justice at the argument.⁵⁵

From the published opinions, it appears Justice O'Connor was assigned to write a majority opinion invalidating the Coal Act as it applied to Eastern. It appears she circulated a draft opinion assuming that the Takings Clause applied to the controversy and invalidating the Act as an uncompensated regulatory taking.⁵⁶ What happened next is unclear. But it may be that before O'Connor was able to gather five join memos, Justice Breyer circulated his dissenting opinion, advancing—among other arguments—the newly minted notion that the Coal Act did not take any property within the meaning of the Takings Clause.⁵⁷ In any event, when the dust settled, Justice Kennedy also concluded (whether before or after Justice Breyer circulated his dissent is unclear, although my own guess is that it was after⁵⁸) that he too was unpersuaded

⁵³ The exact amount was disputed: The higher number was the company's estimate and the lower number was the union's estimate. See *id.* at 529.

⁵⁴ See Brief for Petitioner; Brief for Respondents The UMW Combined Benefit Fund and Its Trustees; Brief of Respondents Peabody Holding Co., Eastern Associated Coal Corp. and Coal Properties Corp.; Brief for the Federal Respondent; Reply Brief for Petitioner, *Eastern Enterprises* (No. 97-42).

⁵⁵ See Transcript of Oral Argument, March 4, 1998, *Eastern Enterprises* (No. 97-42).

⁵⁶ Even in its published form, Justice O'Connor's opinion contains only glancing references to the constitutional property issue. These references appear in transitional passages, see, e.g., *Eastern Enterprises*, 524 U.S. at 521-23, 528-29, and are of the sort that could easily have been inserted in making revisions to the opinion in response to the circulations of other Justices.

⁵⁷ See *id.* at 554 (Breyer, J., dissenting).

⁵⁸ Justice Breyer's discussion of why the Takings Clause was not implicated started

that the Coal Act gave rise to any issue under the Takings Clause.⁵⁹ Justice Kennedy did not change his vote to invalidate the Coal Act, however. Instead, he authored an opinion concurring in the judgment and agreeing with Justice Breyer that no property was at issue within the meaning of the Takings Clause, but finding that the Coal Act violated substantive due process. At the end of the day, therefore, there were five votes to hold the Coal Act unconstitutional—four as a taking and one as a violation of substantive due process—but also five votes for the proposition that the Coal Act did not take any property within the meaning of the Takings Clause.

It is easy to understand why Justice O'Connor sought to invalidate the Coal Act under the Takings rather than the Due Process Clause. Two of the Justices in the pro-property coalition—Justices Scalia and Thomas—are adherents of the view that substantive due process is an "oxymoron,"⁶⁰ and they often decline to join decisions

by emphasizing that there had been no taking of a specific property interest from an individual followed by a transfer to the government, see *id.* at 554, although by the time he concluded it was not clear that the private transfer feature was critical. See *id.* at 556 ("If the [Takings] Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax?"). Justice Kennedy specifically rejected the implausible notion that the Takings Clause applies only when property is transferred from an individual to the government, see *id.* at 542–43 (Kennedy, J., concurring in the judgment and dissenting in part), suggesting that perhaps he had the benefit of Justice Breyer's draft while composing his own. For an academic theory that would limit the Takings Clause to instances where resources are transferred to the government, which conceivably may have been the original inspiration for Justice Breyer (or his clerk), see Rubinfeld, *supra* note 18, at 1079–80.

⁵⁹See *Eastern Enterprises*, 524 U.S. at 539–47 (Kennedy, J., concurring in the judgment and dissenting in part).

⁶⁰The argument is that "process" means procedure and hence the phrase "substantive due process" is like describing a color as "green pastel redness." John Hart Ely, *Democracy and Distrust* 18 (1980). The critique is highly popular among legal conservatives, almost entirely it would seem, because it undermines *Roe v. Wade*, 410 U.S. 113 (1973). Whether the critique is sound is debatable. Although "process" as a textual matter may equate to procedure, there is considerable evidence that "due process of law" was understood by the Framers to be a term of art incorporating the Magna Carta's "law of the land" guarantee. See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *Const. Commentary* 315, 320 (1999); see also sources cited *infra* note 161 (discussing the meaning of property for procedural due process purposes). The "law of the land" idea, in turn, is sufficiently vague that it could incorporate certain substantive restraints on legislative action.

that rest on the doctrine.⁶¹ Thus, Justice O'Connor probably steered away from substantive due process and toward the takings analysis in an attempt to secure five votes, rather than writing a plurality opinion for only three.⁶² Unfortunately, Justice O'Connor's effort to cast the Coal Act, which imposed a general liability, as a taking of property was sufficiently implausible that she lost the vote of Justice Kennedy—a Justice who had crossed the substantive due process rubicon in *Planned Parenthood v. Casey*⁶³ and evidently saw no jurisprudential objection to deploying due process to achieve substantive protections for property rights.

The Breyer/Kennedy argument as to why no takings property was implicated by the Coal Act was a novel one, in the sense that neither Justice was able to cite any legal authority in support of his thesis. Nevertheless the argument was presented as an inductive generalization drawn from the holdings of the Court's takings cases, and in this sense was not radical. Justice Breyer stressed that prior takings cases had all involved physical property, intellectual property, or a specific fund of money.⁶⁴ It was true, he conceded, that two recent decisions had entertained takings challenges to employee benefit schemes that imposed new liabilities on employers.⁶⁵ But those challenges had been rejected, so there was no holding of the Court that applied the Takings Clause to a statute imposing a "general liability."⁶⁶ Justice Kennedy provided an even more complete review of prior takings decisions, concluding that they all involved what he variously called "an identified property interest," a "specific property right" or a "specific property inter-

⁶¹ See, e.g., *BMW of N. Am. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting, joined by Thomas, J.); *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in judgment, joined by Thomas, J.); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring in judgment, joined by Thomas, J.).

⁶² See *Eastern Enterprises*, 524 U.S. at 537–38 (plurality opinion) (declining to reach the substantive due process claim in part because "this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation").

⁶³ 505 U.S. 833 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

⁶⁴ See *Eastern Enterprises*, 524 U.S. at 554–55 (Breyer, J., dissenting).

⁶⁵ See *id.* at 555 (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986) and *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)).

⁶⁶ *Id.*

est.”⁶⁷ Thus emerged the Breyer/Kennedy thesis: Property for Takings Clause purposes refers only to identified property rights, not to general liabilities that reduce net worth or general wealth.

Both Justice Breyer and Justice Kennedy bolstered their inductive generalization with policy arguments, which each Justice offered in his distinctive style. As befits the former Harvard law professor, Justice Breyer argued that the Takings Clause ought not to apply to a statute imposing a general liability because such an exercise “bristles with conceptual difficulties.”⁶⁸ In particular, he noted that the contrary conclusion would mean that the Takings Clause would apply to any statute assessing a tax, or any regulatory statute that creates burdens for some while benefiting others.⁶⁹

Justice Kennedy offered a more pragmatic assessment of why such an application of the Takings Clause would be “unwise,”⁷⁰ one centering on federalism concerns. After noting that the regulatory takings doctrine imposes a notoriously “difficult and uncertain” standard, he observed:

The difficulties in determining whether there is a taking or a regulation even where a property right or interest is identified ought to counsel against extending the regulatory takings doctrine to cases lacking this specificity. The existence of at least this outer boundary for application of the regulatory takings rule provides some necessary predictability for governmental entities.⁷¹

Eastern Enterprises is a decision of many ironies, not the least of which is that in the course of resolving a major controversy about the constitutionality of retroactive government action, five Justices saw fit to adopt a legal theory that had never been considered by the lower courts, briefed by the parties, mentioned at oral argument, or previously endorsed by the Court. A majority of five Justices thus roundly denounced the unfairness of retroactive law-making at the same time that another coalition of five Justices perpetrated it.⁷²

⁶⁷ Id. at 540–42 (Kennedy, J., concurring in the judgment and dissenting in part).

⁶⁸ Id. at 556 (Breyer, J., dissenting).

⁶⁹ See id.

⁷⁰ Id. at 540 (Kennedy, J., concurring in the judgment and dissenting in part).

⁷¹ Id. at 542.

⁷² Judicial decisions of course are by their nature retroactive, in the sense that if they

Irony aside, the new limitation on the meaning of property recognized by the separate opinions in *Eastern Enterprises* has potentially far-reaching implications for the Takings Clause, in two respects. First, if the Takings Clause applies only to interferences with specific property rights but not to reductions in net worth due to the imposition of general liabilities, the Clause cannot be used in any coherent fashion to consider issues involving the general distribution of wealth. The category of specific property rights was no doubt intended by Justices Breyer and Kennedy to be a broad one, covering not just real estate and personal property but also intellectual property rights, securities, and even bank accounts. But the wealth or net worth of individuals and firms is comprised of the sum of their specific assets *minus* their liabilities. This means that the Breyer/Kennedy move, assuming it sticks, eliminates any possibility of using the Takings Clause as an instrument for achieving distributive justice—or perhaps more relevantly, for policing supposedly misguided attempts by the political branches to achieve distributive justice. It will be at most an instrument for corrective justice—rectification of government actions that “single out” certain owners for economic harm,⁷³ considered in isolation from more general concerns about the distribution of shares of the social pie.⁷⁴

Issues of distributive justice have dominated academic discussions about the Takings Clause in recent decades.⁷⁵ Most prominently, Richard Epstein has set forth a grand vision in which the Takings Clause prohibits any attempt by the state to modify the distribution of wealth produced by voluntary exchanges of prop-

adopt new rules, those rules apply to the parties to the decision and others who have pending claims in the courts. See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96–97 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Given this inherent retroactivity, however, it would seem especially important that courts confine themselves to the consideration of points of law that the parties in the case have briefed and argued.

⁷³ Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 642–43 (1998).

⁷⁴ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000) (reviewing distributive and corrective justice theories of just compensation).

⁷⁵ See generally Leif Wenar, *The Concept of Property and the Takings Clause*, 97 Colum. L. Rev. 1923, 1932–34 (1997) (noting the tendency of leading takings scholars to substitute “economic value or welfare” for property and “to apply political philosophy to . . . the topic of government actions that have redistributive effects on resources and thus welfare”).

erty acquired through first possession.⁷⁶ In order to effectuate this vision, Epstein insists that “[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state.”⁷⁷ Epstein’s project would thus appear to be squarely foreclosed by the Breyer/Kennedy position in *Eastern Enterprises*. Other commentators, perhaps most notably Joseph Sax, have also assumed that the Takings Clause might be construed as a general impediment to the redistribution of shares of wealth, and have devoted themselves to articulating a new vision of property that would avoid this understanding.⁷⁸ If *Eastern Enterprises* is right, this lifetime of effort was unnecessary.

Second, the limitation of takings property to specific property rights could contain the seeds of a partial solution to the problem of conceptual severance, so prominently on display in *Phillips*. Conceptual severance comes about when property is conceived to be a “bundle of rights,” and the claimant contends that certain strands in the bundle are themselves free-standing “property rights.”⁷⁹ A regulation that has the effect of eliminating a single strand is then claimed to be a total taking of this freestanding property right. If takings property is limited to discrete assets, however, then some significant constraints may be imposed on conceptual severance. For example, if the only identifiable property right of the client in *Phillips* was the amount of money the client placed with the lawyer, then it would not be permissible to conceptually sever this asset into two rights—the right to the principal and the right to the interest—and argue that there has been a confiscation of the free-standing property right to the interest.⁸⁰

⁷⁶ See Epstein, *supra* note 17, at x.

⁷⁷ *Id.* at 95.

⁷⁸ See, e.g., Sax, *Police Power*, *supra* note 17, at 75–76; Sax, *Public Rights*, *supra* note 17, at 149–50; see also Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 *Ecology L.Q.* 327 (1998) (describing this feature of Sax’s writings on the Takings Clause).

⁷⁹ See Radin, *supra* note 46, at 1677–78; Wenar, *supra* note 75, at 1927–28.

⁸⁰ One of the many anomalies of *Eastern Enterprises* is that no Justice took the trouble to explain how the new specific property rule could be squared with *Phillips*. The only “specific property” that could be identified with confidence in *Phillips* was the principal amount of client funds deposited with the lawyer. Interest was earned on this property only because the client funds were commingled with other funds, and only because the interest was made payable to someone else. Was the client’s phantom share of the interest on this commingled fund an “identifiable” or “specific”

Whether *Eastern Enterprises* leads to such a limitation on conceptual severance depends on how courts interpret what Justices Kennedy and Breyer variously called an "identified property interest"⁸¹ or a "specific interest in physical or intellectual property."⁸² Some of the examples of specific property interests cited by Justice Kennedy are rife with the potential for conceptual severance. Thus, his enumeration included not just pre-packaged bundles of rights, such as "real property," "trade secrets," "easement[s]," and "liens," but also individual strands in such bundles, such as a "right of access to property," a "right to transfer property by devise or intestacy," a "right to affix on structures," the "right to sell personal property," and the "right to extract mineral deposits."⁸³ If a "specific property interest" includes every conceivable incident of property, including the right to inherit and the right to sell, then takings claimants can have a conceptual severance field day.

Other passages in Justice Kennedy's opinion and in Justice Breyer's opinion, however, suggest that a "specific property interest" is an assembled bundle of rights that conforms to a legally recognized form of property and is created, exchanged, or enforced by economic actors with enough frequency to be recognized as a discrete type of asset. From this perspective, land, intellectual property rights, and a fund of money (to use Justice Breyer's examples)⁸⁴ would be specific property rights, but the right to inherit or sell would not be. If specific property is given this latter interpretation—discrete assets or "things"⁸⁵—then the opportunities for conceptual severance will be considerably reduced.

asset of the client? This is doubtful. It would take some explaining to demonstrate why the new "outer boundary for application of the regulatory takings rule" established in *Eastern Enterprises*, 524 U.S. at 542 (Kennedy, J., concurring in the judgment and dissenting in part), did not put the issue in *Phillips*, decided just 10 days earlier, beyond the pale of the Takings Clause.

⁸¹ *Eastern Enterprises*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part).

⁸² *Id.* at 554 (Breyer, J., dissenting).

⁸³ *Id.* at 541–42 (Kennedy, J., concurring in the judgment and dissenting in part).

⁸⁴ See *id.* at 554–55 (Breyer, J., dissenting).

⁸⁵ Cf. Bernard Rudden, *Things as Thing and Things as Wealth*, 14 *Oxford J. Legal Stud.* 81, 81–83 (1994) (adopting similar terminology in discussing common-law property rights).

C. College Savings Bank v. Florida Prepaid Postsecondary
Education Expense Board

The most recent decision about the meaning of constitutional property is *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,⁸⁶ handed down on the last day of the 1998 Term. The issue arose indirectly, in the course of deciding whether Congress has the power to subject state governments to suit in federal court for violations of the Lanham Act. One question before the Court was whether Section 5 of the Fourteenth Amendment, authorizing Congress to adopt "appropriate legislation" to enforce the Due Process Clause,⁸⁷ supplied such power. Although there were a number of avenues the Court could have taken in rejecting the Section 5 argument,⁸⁸ Justice Scalia's opinion on behalf of the usual group of five Justices chose to reject this possible source of congressional authority on the ground that the petitioner's interests protected by the Lanham Act were not property within the meaning of the Due Process Clause.

The petitioner, College Savings Bank, marketed certificates of deposit designed to finance the costs of college education. The State of Florida, through its agency Florida Prepaid Postsecondary Education Expense Board, offered a similar product. College Savings filed suit in federal court alleging that Florida Prepaid had

⁸⁶ 527 U.S. 666 (1999).

⁸⁷ U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

⁸⁸ In a companion case addressing College Savings Bank's patent claim, the Court conceded that patents are property, but held that Congress had not established a sufficient predicate of state government disregard of patent rights to justify legislation under Section 5. See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 642-48 (1999) [hereinafter *Florida Prepaid*]. Presumably, the same rationale could have been used to reject the authority of Congress to extend the Lanham Act's prohibition on false advertising to the states. The fact that the Court abjured this relatively fact-bound basis for resolving the Section 5 claim in *College Savings Bank*, and instead reached out for the broad ruling that the interest protected by the Lanham Act is not "property," betrays an eagerness to declaim on the meaning of property—and to cut back on the scope of constitutional property—that is somewhat puzzling. It is generally assumed that the pro-property faction on the Court is indeed pro-property, and is willing to sacrifice some local autonomy in the interests of federal protection of property rights. See, e.g., Michelman, *supra* note 20, at 303-08 & n.25. But in *College Savings Bank*, the Court chose to vindicate state autonomy and went out of its way to do so by diminishing federal protection of property rights.

infringed its patent on the financing product⁸⁹ and had violated Section 43(a) of the Lanham Act by making false and misleading statements about the Florida tuition savings plan. Notwithstanding unequivocal language in the Trademark Remedy Clarification Act of 1992 subjecting States to suit in federal court for Lanham Act violations, the lower courts dismissed the false advertising claim as barred by sovereign immunity.⁹⁰ The Supreme Court affirmed, rejecting first the argument that Congress had power to overcome state sovereign immunity under its Section 5 power, and second that Florida had impliedly waived any claim of sovereign immunity when it entered the commercial marketplace in competition with College Savings Bank.⁹¹

With respect to the Section 5 issue, College Savings Bank seemed to have trouble articulating a consistent theory of why it had property at stake in a suit against a state agency for false advertising. Sometimes it seemed to stress that the cause of action created by the Lanham Act was itself a property right.⁹² At other times, it argued either that its business goodwill was the property, or that the customers and revenues it allegedly lost because of the false advertising were the property.⁹³ College Savings Bank was dealt a severe blow on the Section 5 issue when the Solicitor General, representing the United States as intervenor, declined to defend the Trademark Remedies Act under the Section 5 theory.

⁸⁹ The Court held that the patent claim did not survive the State's defense of sovereign immunity in the companion case. See *Florida Prepaid*, 527 U.S. at 647.

⁹⁰ See *College Savings Bank*, 527 U.S. at 671–72. The Lanham Act itself was passed pursuant to Congress's power under Article I of the Constitution, and the Court had held in *Seminole Tribe v. Florida*, 517 U.S. 44, 55–73 (1996), that Congress could not abrogate state sovereign immunity pursuant to its Article I powers. The question was therefore whether the Trademark Remedy Act of 1992, which extended the Lanham Act's cause of action to suits brought against States in federal court, could be sustained as an exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that the Fourteenth Amendment implicitly qualifies the implied sovereign immunity recognized by the Eleventh Amendment).

⁹¹ See *College Savings Bank*, 527 U.S. at 691. The latter issue commanded the bulk of the attention of the Justices, and resulted in the overruling, in the face of bitter and lengthy dissents, of *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), the leading case endorsing the implied waiver idea.

⁹² See Reply Brief for Petitioner at 8–9, *College Savings Bank* (No. 98-149).

⁹³ See Brief for Petitioner at 21–23, *College Savings Bank* (No. 98-149).

Instead, the Solicitor General relied exclusively on the claim of implied waiver.⁹⁴

The Court ruled that Congress had no authority under Section 5 to subject the states to Lanham Act suits alleging false advertising. With respect to the claim that the Lanham Act's cause of action against false advertising was property, Justice Scalia, writing for the majority, followed the script written by the Solicitor General,⁹⁵ adding some signature embellishments:

The hallmark of a protected property interest is the right to exclude others. That is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." That is why the right that we all possess to use the public lands is not the "property" right of anyone—hence the sardonic maxim, explaining what economists call the "tragedy of the commons," *res publica, res nullius*. The Lanham Act may well contain provisions that protect constitutionally cognizable property interests—notably, its provisions dealing with infringement of trademarks, which are the "property" of the owner because he can exclude others from using them. The Lanham Act's false-advertising provisions, however, bear no relationship to any right to exclude; and Florida Prepaid's alleged misrepresentations concerning its own products intruded upon no interest over which petitioner had exclusive dominion.⁹⁶

With respect to claims based on the alleged deprivation of goodwill or future revenues associated with College Savings Bank's business, Justice Scalia characterized the complaint as asserting "a more generalized right to be secure in one's business interests."⁹⁷ He then noted that such a claim suffered from the "same flaw" as the first, in other words, it reflected an interest that did not entail the right to exclude others.⁹⁸ Relying heavily on italics, he sought to explain:

The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestion-

⁹⁴ See Brief for the United States at 12, *College Savings Bank* (No. 98-149).

⁹⁵ The government's brief asserted that "[t]he hallmark of a property interest is the right to exclude others." *Id.* at 32.

⁹⁶ *College Savings Bank*, 527 U.S. at 673 (citations omitted).

⁹⁷ *Id.* at 672.

⁹⁸ *Id.* at 675.

tionably a "deprivation" under the Fourteenth Amendment. But business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense—and it is only *that*, and not any business asset, which is impinged upon by a competitor's false advertising.⁹⁹

Justice Scalia's distinction between the assets of a business (= property) and the activity of doing business ($\neq$ property) was rather obscure. Perhaps what he was saying is that College Savings Bank was alleging a loss of *future* customers and revenues, and it had no right to exclude competitors from capturing its prospective customers and revenues. Thus, although College Savings Bank may have had a sufficient interest in securing future customers and revenue to support a cause of action sounding in tort, this interest did not represent a property right.¹⁰⁰

Whatever the motivations underlying the Court's rejection of the Section 5 claim in *College Savings Bank*, the bottom line is that the Court has now endorsed, unequivocally and in a majority opinion, a federal definition of constitutional property.¹⁰¹ The "hallmark" of constitutional property is the right to exclude others. This is by no means an aberrant idea. As I have recounted more fully elsewhere,¹⁰² the right to exclude has been regarded as an es-

⁹⁹ Id.

¹⁰⁰ So restated, the Scalia analysis basically tracks the distinction between *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) and *Keeble v. Hickeringill*, 103 Eng. Rep. 1127 (Q.B. 1707). *Pierson* holds that there is no property right in wild animals that have not been reduced to capture; *Keeble* qualifies this by recognizing an action for unfair competition when someone deliberately frightens off a wild animal in order to prevent someone else from capturing it. In other words, the law of property requires possession, but the law of tort (specifically, the action for trespass on the case) will protect interests that fall short of possessory property rights. See Benjamin L. Fine, Comment, An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations, 50 U. Chi. L. Rev. 1116, 1126-39 (1983).

¹⁰¹ The dissenting Justices had relatively little to say about the constitutional property aspect of *College Savings Bank*, concentrating their efforts on the Court's overruling of *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). Justice Stevens could only sputter that the second property interest asserted by College Savings—loss of business revenues and profits—"is the same kind of 'property' that Congress described in § 7 of the Sherman Act and in § 4 of the Clayton Act. A State's deliberate destruction of a going business is surely a deprivation of property within the meaning of the Due Process Clause." *College Savings Bank*, 527 U.S. at 693 (Stevens, J., dissenting) (citations omitted).

¹⁰² See Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730

sential element of property by a wide range of influential thinkers. Yet no previous decision of the Court had offered such an unqualified endorsement of the centrality of the exclusion right. The right to exclude has always been described as “one of the most essential sticks in the *bundle of rights* that are commonly characterized as property.”¹⁰³ And indeed, no prior decision had appeared to assert in such an unqualified fashion that the definition of property is a matter of direct interpretation of the constitutional language.

The Court’s disposition of the constitutional property issue in *College Savings Bank* raises a number of perplexing questions. As in *Eastern Enterprises*, Justice Scalia made no effort to reconcile the articulation of a federal definition of constitutional property with the traditional understanding, stated as orthodoxy as recently as *Phillips*, that property rights are created and their dimensions defined by independent sources such as state law. We are left wondering whether the oversight was simply inadvertent, whether the Court has abandoned the older approach, or whether it envisions some reconciliation but has not troubled to tell us what it is.

A more serious concern about *College Savings Bank* is the incomplete research underlying both the general conclusion that the “hallmark” of property is the right to exclude, and the specific application of that conclusion to questions such as whether an unadjudicated cause of action is a property right. The sound bite line in *College Savings Bank*—“[t]he hallmark of a protected property interest is the right to exclude others”¹⁰⁴—bears an uncanny resemblance to a sentence in another case we shall encounter in the next part of the Article, *Logan v. Zimmerman Brush Co.*¹⁰⁵ The *Logan* line states: “The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which

(1998). This article, which argues that the right to exclude is the *sine qua non* of property, was published within a few days of *College Savings Bank* being handed down. Thus (for better or worse), I cannot claim any influence on the Court’s endorsement of a similar perspective with respect to constitutional property.

¹⁰³ *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (emphasis added); see also, e.g., *id.* at 179–80 (describing the right to exclude as “a fundamental element of the property right”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (describing the right to exclude as “one of the most treasured” rights of property).

¹⁰⁴ *College Savings Bank*, 527 U.S. at 673.

¹⁰⁵ 455 U.S. 422 (1982).

cannot be removed except 'for cause.'"¹⁰⁶ Thus, the United States Reports now contain two "hallmarks of property," which single out two very different defining attributes.¹⁰⁷

Logan is embarrassing for a more fundamental reason, however. *Logan* squarely holds that an unadjudicated cause of action (in that case, for employment discrimination) is constitutional property for due process purposes. *Logan* was cited in *College Savings Bank's* briefs (although, inexplicably, it was not identified as holding that a cause of action is property),¹⁰⁸ but was not cited by Justice Scalia. Nor did Justice Scalia make any effort to distinguish other cases, including the prominent due process precedent *Mullane v. Central Hanover Bank & Trust Co.*,¹⁰⁹ which arguably stand for the proposition that an unadjudicated cause of action is property under the Due Process Clause.¹¹⁰

The failure to attend to *Logan* and the procedural due process case law points to what will surely prove to be the most vexing problem created by *College Savings Bank*. The right to exclude others is commonly thought to be a differentiating feature of traditional common law property.¹¹¹ If we now understand the "hallmark of property" for substantive due process purposes to be the right to exclude others, what does this do to the legions of procedural due process cases that rest on the idea of the "new

¹⁰⁶ *Id.* at 430.

¹⁰⁷ A "hallmark" originally referred to the official stamp of the British Hall-marking Authority, indicating that articles such as plateware were made of genuine gold and silver of a certain degree of purity. See 6 *The Oxford English Dictionary* 1045 (2d ed. 1989).

¹⁰⁸ See Brief for Petitioner at 22; Reply Brief for Petitioner at 7, *College Savings Bank* (No. 98-149).

¹⁰⁹ 339 U.S. 306 (1950).

¹¹⁰ See also *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988) (treating a cause of action for breach of contract as property for procedural due process purposes); *Martinez v. California*, 444 U.S. 277, 281-82 (1980) (stating that a state tort claim is "[a]rguably . . . a species of 'property' protected by the Due Process Clause"). It should be noted that the cause of action in *Mullane* was designed to protect an existing property right—the beneficial interest in a trust fund—and it may be that the Court was relying on the underlying trust property to satisfy the property requirement. See Timothy P. Terrell, *Causes of Action as Property: Logan v. Zimmerman Brush Co.* and the "Government-as-Monopolist" Theory of the Due Process Clause, 31 *Emory L.J.* 491, 510 (1982); *infra* notes 344-47 and accompanying text (suggesting that for substantive due process purposes the property inquiry should focus on the underlying entitlement rather than the cause of action).

¹¹¹ See *infra* notes 303-13 and accompanying text.

property?"¹¹² Does the proclamation that the hallmark of property is the right to exclude announce the beginning of a movement to overrule *Goldberg v. Kelly*¹¹³ and its progeny on the ground that they rest on an incorrect federal definition of property? Or is it possible to understand the right to exclude in some abstract sense that incorporates the new as well as the old property? These issues may bedevil the lower courts in coming years, especially if state governments seek to avoid procedural due process obligations by urging the overruling of precedents called into doubt by *College Savings Bank*.

D. *Drye v. United States*

The most recent foray by the Court into the meaning of property, *Drye v. United States*,¹¹⁴ is straightforward and uncontroversial compared to the three preceding efforts. Rohn Drye owed the federal government \$325,000 in unpaid taxes, for which notices of federal tax liens had been filed. Drye's mother then died intestate, leaving an estate worth \$233,000 to which Drye was the sole heir. Drye disclaimed the inheritance, as he was entitled to do under Arkansas law, whereupon his daughter became the heir. She used the proceeds to establish a spendthrift trust, naming Drye as a life beneficiary. The IRS took a dim view of these transactions. It sought to seize the trust's assets on the ground that it had been funded by property belonging to Drye—that is to say, the money he stood to inherit had he not disclaimed. This action by the government raised the legal question whether an Arkansas heir who exercises the right to disclaim an inheritance has a "property" right in the disclaimed inheritance.¹¹⁵

Drye argued that the question was to be resolved as a matter of state law. Justice Ginsburg, writing for the Court, agreed that state law was relevant, but not dispositive. She reasoned that the exact rights persons have with respect to resources are determined by

¹¹² See *infra* notes 142–53 and accompanying text.

¹¹³ 397 U.S. 254 (1970).

¹¹⁴ 120 S. Ct. 474 (1999).

¹¹⁵ The federal tax lien statute provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321 (1994).

examining the relevant provisions of state law. But the characterization of these rights as constituting either "property" or "rights to property" within the meaning of the federal tax lien statute is an issue of federal law. As she put it: "We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."¹¹⁶

This allocation of responsibility between federal and state law required, of course, that the Court identify an appropriate federal definition of property. Ginsburg took note of lower court decisions holding that whether an asset has pecuniary value and whether it is transferable are key variables in ascertaining whether it is property for federal tax lien purposes.¹¹⁷ But she declined to hold that either factor is dispositive.¹¹⁸ Instead, she concluded that the critical question is "the breadth of control" the taxpayer exercises over a resource.¹¹⁹ Under Arkansas law,

the heir inevitably exercises dominion over the property. He determines who will receive the property—himself if he does not disclaim, a known other if he does. This power to channel the estate's assets warrants the conclusion that Drye held "property" or a "right to property" subject to the Government's liens.¹²⁰

In effect, the Court held that "property," at least for purposes of the federal tax lien statute, means "the power to channel" a valued asset.

Although superficially different, *Drye's* "power to channel" test is analytically not too dissimilar from *College Savings Bank's* "right to exclude" criterion. The former emphasizes the positive side of dominion and control over an asset—the power to determine who gets the beneficial use; the latter emphasizes the negative side—the power to determine who does not get the beneficial use. The power

¹¹⁶ *Drye*, 120 S. Ct. at 481.

¹¹⁷ See *id.* at 482–83.

¹¹⁸ See *id.*

¹¹⁹ *Id.* at 483 (quoting *Morgan v. Commissioner*, 309 U.S. 78, 83 (1940)).

¹²⁰ *Id.* at 483 (alteration in original) (citation omitted).

to channel and the right to exclude can thus be viewed as different manifestations of a more general "gatekeeper power"—"the right to determine who has access to particular resources and on what terms."¹²¹ Unfortunately, the *Drye* Court missed an opportunity to bring some closure to the Court's proliferating statements about the meaning of property by failing to reconcile or even cite *College Savings Bank*—or any of the other recent decisions about the meaning of constitutional property.

Still, *Drye* comes as a breath of fresh air after the three previous decisions. It articulates a clear conception of the relationship between federal and state law in determining the existence of property, it sets forth a reasonably clear federal criterion for the identification of property, and it applies this criterion to the facts in a way that seems persuasive. If only constitutional law were that simple.

II. *BOARD OF REGENTS V. ROTH* AND THE REIGN OF PURE POSITIVISM

The Court's recent explorations of the meaning of constitutional property have all been in the context of substantive protections—takings and substantive due process. There has been comparatively little action in recent years on the procedural due process front, perhaps because the Court has lost interest in further expanding the scope of procedural due process protections.¹²² Nevertheless, considerable judicial energy was expended on ascertaining the meaning of property as a threshold condition of affording procedural due process protection from the early 1970s to the mid-1980s. Moreover, the methodology for identifying property developed in this context eventually spilled over into the takings case law, where it generated analogous if more episodic issues. There are important

¹²¹ Merrill, *supra* note 102, at 740 n.37.

¹²² Professor Richard Pierce has suggested that the Court has had second thoughts about the wisdom of the procedural due process revolution of the 1970s and as a consequence has begun a process of rolling back the scope of procedural due process protections. See Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990's?*, 96 Colum. L. Rev. 1973 (1996). I agree with his general assessment of the direction of the law in this area, although I have ascribed the cause not just to dissatisfaction with the due process revolution but also to a more general pessimism about the administrative state. See Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 Chi.-Kent L. Rev. 1039, 1096–100 (1997).

general lessons to be learned about the conundrums of constitutional property through a reconsideration of the experience of that earlier era.¹²³

A. Roth and the Emergence of Pure Positivism

The decision that initiated the Court's inquiry into the meaning of property for procedural due process purposes was *Board of Regents v. Roth*.¹²⁴ The Court there announced, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."¹²⁵ Thus, a finding that either "liberty" or "property" is threatened is a condition precedent to any application of the Due Process Clause.¹²⁶ Although the Court cautioned against "rigid or formalistic limitations" on the definition of these threshold interests, it recognized the need for "certain boundaries."¹²⁷ To establish these boundaries, the Court continued, "the

¹²³ For a variety of reasons, including the dominance of the Contract Clause as a source of protection of economic rights in the nineteenth century and the grounding of substantive due process primarily in liberty of contract during the *Lochner* era, the Court gave little attention to the definition of property for constitutional purposes prior to the due process revolution of the 1970s. See Monaghan, *supra* note 15, at 435 ("The existence, *vel non*, of 'property' seldom raised any issue reaching the Supreme Court in the first half of the twentieth century."). See generally Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. Cal. L. Rev. 1 (1986) (describing nineteenth century Contract Clause litigation and the degree to which the property-privilege distinction and Takings Clause jurisprudence of the time affected that litigation).

¹²⁴ 408 U.S. 564 (1972).

¹²⁵ *Id.* at 569.

¹²⁶ Oddly, the Court did not mention "life." It is possible that the omission is related to the fact that *Roe v. Wade*, 410 U.S. 113 (1973), was pending before the Court at the same time it was deciding *Roth*. One of the issues in *Roe* was whether a fetus is a "life" within the meaning of the Due Process Clause, see *Roe*, 410 U.S. at 159-62, and the Court in *Roth* may have wanted to steer clear of any statement that would have generated speculation about how *Roe* would resolve this issue. Subsequent decisions have made clear, of course, that interests in "life" can also trigger the protections of due process. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (stating that due process bars official acts that result in loss of life in a way that "shocks the conscience").

¹²⁷ *Roth*, 408 U.S. at 572.

words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning."¹²⁸

The reason for this prominent attention to the concepts of liberty and property in 1972 is not hard to find. Just two years before *Roth*, the Court in *Goldberg v. Kelly*¹²⁹ had unsettled due process law by requiring states to follow highly elaborate hearing procedures before they could terminate welfare benefits. *Goldberg* and the torrent of due process litigation it unleashed represented a dramatic expansion of the domain of procedural due process.¹³⁰ Welfare and other public assistance programs had previously been regarded as "privileges" to which procedural protections could be fixed in the discretion of the legislature.¹³¹ Moreover, the Court's expansive interpretation of the Due Process Clause in *Goldberg* appeared to draw inspiration from articles written by a Yale Law School professor, Charles Reich.¹³² Reich's articles denounced the rights/privileges distinction and urged that "government largesse" be recharacterized as constitutionally protected "new property" in order to provide security to the growing numbers of persons dependent on the government for their livelihood.¹³³ By appearing to endorse these ideas, the Court was vulnerable to the charge that it was writing fashionable academic theories into constitutional law.

Roth's disquisition on constitutional liberty and property is therefore best understood as an effort to secure the legitimacy of the due process revolution started by *Goldberg*.¹³⁴ The Court's strategy was to make the revolution appear more law-like and hence less revolutionary than it actually was. This accounts for the

¹²⁸ *Id.*

¹²⁹ 397 U.S. 254 (1970).

¹³⁰ As Judge Henry Friendly noted in 1975, "[W]e have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution." Henry J. Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1273 (1975).

¹³¹ See 2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 11-13 (3d ed. 1994) (discussing pre-*Goldberg* law and the change wrought by *Goldberg*).

¹³² See *Goldberg*, 397 U.S. at 262 n.8 (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965) and citing Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964) [hereinafter Reich, *The New Property*]).

¹³³ Reich, *The New Property*, *supra* note 132, at 734-39.

¹³⁴ See Rubin, *supra* note 15, at 1067-68, 1104.

Court's announcement that the Due Process Clause applies only to a limited range of entitlements that have discernible "boundaries," and for its tacit disclaimer of earlier suggestions that protected entitlements be identified based on a judicial assessment of whether the challenged action imposes a "grievous loss"¹³⁵ or implicates "important interests."¹³⁶

Significantly, the Court outlined distinctively different methodologies for identifying constitutional liberty and property. Liberty was defined in terms of a list of freedoms recited in a substantive due process decision from the 1920s:

Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.¹³⁷

In later decisions, the Court described these freedoms as ones that "originate in the Constitution,"¹³⁸ or that are "guaranteed directly by the Due Process Clause."¹³⁹ In effect, the Court looked to history to identify those interests that are so "'deeply rooted' in our traditions"¹⁴⁰ that they can be presumed to be directly enshrined in the "liberty" protected by due process.¹⁴¹

¹³⁵ *Goldberg*, 397 U.S. at 263 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)); see also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (same).

¹³⁶ *Bell v. Burson*, 402 U.S. 535, 539 (1971).

¹³⁷ *Roth*, 408 U.S. at 572 (omission in original) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

¹³⁸ *Meachum v. Fano*, 427 U.S. 215, 226 (1976).

¹³⁹ *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989); see *Monaghan*, supra note 15, at 413 (observing that *Roth's* definition of liberty "assumes that the due process clause itself creates rights").

¹⁴⁰ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.).

¹⁴¹ In later years, some Justices quarreled with the idea that liberty interests are "created" by the Due Process Clause, suggesting instead that the *Roth/Meyer* list reflects those "unalienable rights" that belong to all persons by reason of their humanity. See *Sandin v. Conner*, 515 U.S. 472, 489 (1995) (Ginsburg, J., dissenting) (arguing that "'liberty'" springs from "'unalienable Rights' with which all persons are 'endowed by their Creator'" (quoting the Declaration of Independence para. 2 (U.S. 1776))); *Meachum*, 427 U.S. at 230 (Stevens, J., dissenting) ("I had thought it self-

With respect to constitutional property, the Court described a very different methodology. In what was to become a workhorse passage in subsequent decisions, the Court explained:

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—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.¹⁴²

This has been described as a “positivist” method for defining property,¹⁴³ meaning that nonconstitutional law establishes the terms and conditions under which individuals may acquire interests in “property” protected by the Due Process Clause.¹⁴⁴

By linking property to independent sources such as state law, *Roth* appeared to reject the development of a new constitutionalized definition of “property”—a course that would seem to entail federal judges making contestable judgments about the relative importance of different interests. Instead, courts would henceforth

evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights.”). It is not clear what practical consequences would turn on whether “core” liberty interests are thought of as being rights created directly by the Constitution or are conceived to be preconstitutional natural rights. In either event, the method of identifying protected liberty interests is to ask whether the interest is one of sufficient importance as to be beyond legislative revision, and to look to history, at least in large part, in order to identify such interests.

¹⁴² *Roth*, 408 U.S. at 577.

¹⁴³ See, e.g., Jerry L. Mashaw, Due Process in the Administrative State 104–06 (1985); Michelman, *supra* note 15, at 131–32.

¹⁴⁴ Use of the word “positivism” is potentially misleading in this context, since positivism is more typically used to distinguish the law of the sovereign—government-created law—from natural law or moral law. See, e.g., Joseph Raz, The Authority of Law: Essays on Law and Morality 37–77 (1979); H.L.A. Hart, Legal Positivism, in 4 Encyclopedia of Philosophy 418 (1967). See generally Jack Goldsmith & Steven Walt, *Erie* and the Irrelevance of Legal Positivism, 84 Va. L. Rev. 673, 677–80, 702–03 (1998) (reviewing different meanings of positivism). In discussing *Roth* and its method of identifying constitutional property, however, “positivism” has been employed as a term of art to distinguish nonconstitutional law, including federal and state statutory, administrative, and common law, from law derived directly from the Constitution. See, e.g., Michelman, *supra* note 15, at 131–32. Because of this potential confusion about the meaning of “positivism,” I will generally use the more clumsy phrase “nonconstitutional law” rather than “positive law” in referring to the methodology prescribed by *Roth*. Nevertheless, I will also from time to time refer to *Roth*’s “positivism,” understood to be shorthand for *Roth*’s injunction to define property in terms of nonconstitutional sources of law.

borrow or incorporate the list of protected interests already recognized under state law or federal nonconstitutional law—a process that presumably would be more objective and constrained.¹⁴⁵

As to the content of constitutional property—as opposed to its source in positive law—*Roth* was deliberately vague. The Court described the purpose of granting constitutional protection to property in extremely broad terms: “The Fourteenth Amendment’s procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives.”¹⁴⁶ Moreover, the Court reaffirmed its holding in *Goldberg* that welfare benefits are constitutionally protected property.¹⁴⁷ And with respect to the precise issue before the Court in *Roth* and the companion case of *Perry v. Sindermann*,¹⁴⁸ the Court concluded that tenured instructors at state universities and colleges have a protected property interest in their jobs.

The phrase the Court selected in characterizing those interests it deemed to be constitutional property—the interests of welfare recipients in continued benefits and of tenured teachers in continued employment—was “legitimate claim of entitlement.”¹⁴⁹ In contrast, the interests not deemed to be constitutional property—for example, the interests of untenured teachers—were characterized as “an abstract need or desire” for, or “a unilateral expectation” of, something of value.¹⁵⁰ Thus, it is plausible to read *Roth* as holding that constitutional property consists of all previously acquired “legal entitlements” to specific benefits that find recognition in nonconstitutional law.¹⁵¹

What is a “legal entitlement”? The Court left the phrase undefined in *Roth*, and its meaning, perhaps surprisingly, never became an issue in the many cases to follow. There is in the phrase an echo

¹⁴⁵ See Frank I. Michelman, Property as a Constitutional Right, 38 Wash. & Lee L. Rev. 1097, 1100–01 (1981); Thompson, *supra* note 20, at 1525.

¹⁴⁶ *Roth*, 408 U.S. at 576.

¹⁴⁷ See *id.* at 577.

¹⁴⁸ 408 U.S. 593 (1972).

¹⁴⁹ *Roth*, 408 U.S. at 577.

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., Monaghan, *supra* note 15, at 438 (arguing that *Roth* and related cases “absorbed as constitutional ‘property’ most of the twentieth century entitlements”).

of the rights-privileges distinction—entitlements are “rights” whereas abstract desires and unilateral expectations are “privileges”—although the Court strongly insisted that the “wooden distinction” between rights and privileges had been “finally rejected.”¹⁵² There is also a faint echo of the vested rights doctrine that played such a large role in nineteenth-century jurisprudence regarding constitutional property.¹⁵³ Entitlements are claims against the government that are “vested” as opposed to claims that are “mere expectancies.” Other than these hints at a substantive definition based on faint reverberations from the past, however, the overwhelming thrust of *Roth* was to suggest that constitutional property is defined exclusively by its source—objective understandings rooted in nonconstitutional law—as opposed to its content.

If we read *Roth* as defining “property” solely in terms of its source in “independent source[s] such as state law” and as imposing little or no restriction on the type of “entitlements” that can qualify as property, then it is appropriate to describe *Roth* as having endorsed a method of pure positivism in identifying constitutional property. Federal constitutional law, on this view, has nothing to say about the identification of constitutional property interests, other than directing us to turn to nonconstitutional law in seeking them out.

B. The Positivist Trap

Roth’s emphasis on the source of property in nonconstitutional law, combined with its failure to offer a substantive definition of constitutional property, gave rise to what Professor Jerry Mashaw was to call the “positivist trap.”¹⁵⁴ Mashaw and others have dis-

¹⁵² *Roth*, 408 U.S. at 571. Others have noted that *Roth* in effect resurrected a version of the right/privilege distinction at the same time it seemed to bury it. See Karen H. Flax, Liberty, Property, and the Burger Court: The Entitlement Doctrine in Transition, 60 Tul. L. Rev. 889, 902–03 (1986); Rubin, *supra* note 15, at 1067; Smolla, *supra* note 15, at 75–82; Comment, Entitlement, Enjoyment, and Due Process of Law, 1974 Duke L.J. 89, 98–99.

¹⁵³ See James L. Kainen, The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights, 79 Cornell L. Rev. 87, 103–11 (1993).

¹⁵⁴ Jerry L. Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U. L. Rev. 885, 888 (1981); see also Mashaw, *supra* note 143, at 145–51; Colin S. Diver, The Wrath of *Roth*, 94 Yale L.J. 1529 (1985) (reviewing Jerry L. Mashaw, *Due Process in the Administrative State* (1985)).

cussed the positivist trap largely in terms of the controversy over the bitter-with-the-sweet, which will be described momentarily. But with the benefit of hindsight, we can see that the trap was a far more general phenomenon. The trap arose because the Court's method effectively ceded the domain of constitutional property to governmental actors over which the Court, in its capacity as constitutional interpreter, had no control.¹⁵⁵ In other words, *Roth* appeared to require the Court to go along with any and all contractions or expansions on the domain of property dictated by nonconstitutional law. This cession of control produced a "trap" because it could lead to either too little or too much property relative to other value commitments that were important to the Justices.

The most notorious example of the positivist trap emerged soon after *Roth* was decided, in the form of a heated debate within the Court over whether a claimant's property should be defined in part by the procedures set forth in positive law for the protection of that interest.¹⁵⁶ Writing for a plurality of three Justices in *Arnett v. Kennedy*,¹⁵⁷ Justice Rehnquist reasoned that a federal civil service employee's interest in protection against wrongful termination should not be defined solely by the requirement that the termination be "for cause."¹⁵⁸ In addition, he argued, it was necessary to consider the rather bare-bone procedures that Congress in the same statute had designated for determining whether such cause exists. As he put it in a memorable line, "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."¹⁵⁹

The bitter-with-the-sweet idea seemed to flow inexorably from the logic of *Roth*. If property rights are created and their dimensions defined solely by nonconstitutional law, then presumably one should look to all relevant provisions of nonconstitutional law to determine the dimensions of the entitlement. Among the provi-

¹⁵⁵ See Rubin, *supra* note 15, at 1091-92.

¹⁵⁶ See generally *id.* at 1069-82 (recounting history of the debate).

¹⁵⁷ 416 U.S. 134 (1974).

¹⁵⁸ See *id.* at 151-54.

¹⁵⁹ *Id.* at 153-54.

sions that determine the strength of the entitlement, it would seem, are the procedural rules that have been prescribed to protect the entitlement.¹⁶⁰ Thus, for example, if a state employee can only be dismissed for cause, but the employee's supervisor is directed to make a determination of cause based on written submissions, then the property right would be the right not to be dismissed except for cause as determined through written submissions.

This notion that due process rights should expand and contract in accordance with nonconstitutional procedural provisions is hardly an outrageous one. If accepted, it would simply transform due process into the principle of legality—the principle that every person is entitled to have her case decided in accordance with the procedural law of the land. Most students of the relevant history think this was most likely what the Due Process Clause was originally understood to mean.¹⁶¹ So the effect of *Roth's* method, as elaborated by Justice Rehnquist's bitter-with-the-sweet logic, arguably would be to return the Clause to its original signification.¹⁶²

Yet there can be no gainsaying that this would be a dramatic departure from settled understandings. Ever since *Murray's Lessee v. Hoboken Land & Improvement Co.*,¹⁶³ the Court has taken the view that the Due Process Clause reflects not only the principle of legality, but also imposes limitations on the permissible range

¹⁶⁰ See generally Easterbrook, *supra* note 15 (emphasizing the close connection, in terms of legislative policy choices, between the decision to create an entitlement and the procedures prescribed for enforcing it).

¹⁶¹ See Easterbrook, *supra* note 15, at 95–100; John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va. L. Rev. 493 (1997); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 Am. J. Legal Hist. 265 (1975).

¹⁶² As further confirmation that this would not be an outrageous result, it is worth noting that the Rehnquist approach also reflects the allocation of authority over procedural rights reflected in the Administrative Procedure Act, as interpreted by *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). Noting that “this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments,” *id.* at 524, the Court held that federal courts have no authority to impose procedural requirements on federal agencies beyond those set forth in the APA or other enacted law. *Vermont Yankee's* allocation of the power to prescribe procedures under federal statutory law has been followed for twenty years, with no clearly deleterious consequences.

¹⁶³ 59 U.S. (18 How.) 272 (1856).

of procedures that can be prescribed by legislatures.¹⁶⁴ Justice Rehnquist's thesis thus would have required repudiating more than a century's worth of precedent, at least insofar as the interests encompassed by "property" are concerned.

Given the radical implications of the bitter-with-the-sweet thesis, it is not surprising that a majority of the Justices in *Arnett* regarded it with intense suspicion.¹⁶⁵ The bitter with the sweet had an "end game" quality about it: No one who received the procedures required by state law could ever complain of a violation of due process, because no one would have any "property" that extended beyond existing procedural rules. In effect, by looking to all sources of state law to define property, *Roth's* pure positivism produced too little property relative to what judicial norms indicated was appropriate.

Although it failed to gather a majority in *Arnett*, the bitter-with-the-sweet idea did not die quietly. Two years later, in *Bishop v. Wood*,¹⁶⁶ the thesis appeared to be gathering support on the Court.¹⁶⁷ Academic commentators grew alarmed. A veritable who's who of constitutional scholars¹⁶⁸ weighed in, pronouncing the

¹⁶⁴ See Easterbrook, *supra* note 15, at 100–09 (recounting history).

¹⁶⁵ The Justices who declined to join the Rehnquist opinion in *Arnett* had trouble explaining why the bitter-with-the-sweet was so troubling. See *Arnett*, 416 U.S. at 164–70 (opinion of Powell, J.); *id.* at 171–202 (opinion of White, J.). The separate opinions revealed the sticking point to be that the judiciary would not have the last word on the adequacy of procedures, but failed to explain why this was regarded as a problem. Commentators later attempted to fill the gap by arguing that judges have unique competence to determine optimal procedures in administrative settings. See, e.g., Laycock, *supra* note 15, at 887–89. But this claim was typically just asserted, rather than demonstrated. One could just as easily argue that judges are uniquely disqualified to establish administrative procedures because of bias in favor of trial-type hearings.

¹⁶⁶ 426 U.S. 341 (1976).

¹⁶⁷ The *Bishop* Court held that a state statute requiring that an at-will employee be given a statement of reasons before dismissal did not create a constitutional property right; thus the statement of reasons was the only process to which the employee was entitled. See *id.* at 344–47. The decision did not say that an employee who had tenure (that is, who could only be dismissed for cause) was entitled to no more than the procedures prescribed by statute. But the distinction was subtle, and, not surprisingly, the dissenting Justices saw the Court as shifting toward the Rehnquist position. See *id.* at 350–55 (Brennan, J., dissenting); *id.* at 355–61 (White, J., dissenting).

¹⁶⁸ See, e.g., Glennon, *supra* note 15; Laycock, *supra* note 15; Michelman, *supra* note 15; Monaghan, *supra* note 15; Tribe, *supra* note 15; Tushnet, *supra* note 15; Van Alstyne, *supra* note 15.

Rehnquist thesis "procedural nihilism."¹⁶⁹ Soon the tide turned decisively against giving any consideration to nonconstitutional procedural rules in defining constitutional property.

The question was how the Court was to solve the positivist trap that the bitter-with-the-sweet controversy revealed. A few academic commentators perceived that the root of the problem lay in *Roth's* emphasis on the source of property in nonconstitutional law combined with its nominalism about the definition of property.¹⁷⁰ But the dominant recommendation of the commentary in these critical years was that the Court should abandon *Roth's* positivist approach altogether and return to some other method of identifying the domain of procedural due process, such as Justice Frankfurter's "grievous loss" notion¹⁷¹ or *Bell v. Burson's* "important interest" test.¹⁷² This was not very helpful. *Roth* was a major statement by the Court about the method of interpreting the Due Process Clause, and it would be embarrassing to overrule it. As each successive case quoted *Roth* for the proposition that property is not created by the Constitution but by independent sources such as state law, the chances of wholesale repudiation grew dim. Thus, the Court was left to try to find a way out of the trap without much guidance or feedback from the academic community.

C. Searching for a Solution

One possible solution was soon forthcoming in a little-noted decision, *Memphis Light, Gas & Water Division v. Craft*.¹⁷³ There, Justice Powell offered an important qualification to *Roth's* reliance

¹⁶⁹ Rubin, *supra* note 15, at 1091.

¹⁷⁰ See, e.g., *id.* at 1085 (noting that *Roth* failed "to specify whether the term 'property' refers to a federal standard that serves to characterize state law, or to a state standard that derives its content from state law"); see also Monaghan, *supra* note 15, at 435; Terrell, *supra* note 15, at 896.

¹⁷¹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

¹⁷² *Bell v. Burson*, 402 U.S. 535, 539 (1971); see, e.g., Ely, *supra* note 60, at 19; Van Alstyne, *supra* note 15, at 490; see also Rubin, *supra* note 15, at 1047, 1101 (urging that the effort to define "liberty" and "property" be dropped in favor of an inquiry into whether the government is "adjudicating" a claim). But see generally Simon, *supra* note 15 (defending *Roth* as being consistent with both history and the institutional structure of government).

¹⁷³ 436 U.S. 1 (1978).

on state law as the source of property rights: "Although the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause.*"¹⁷⁴ In other words, Justice Powell suggested a significant modification to *Roth's* nominalism about the meaning of constitutional property. Nonconstitutional law would still create property interests. But in deciding whether any particular interest rose to the level of constitutional property, the interest would be assessed against a federal definition of constitutional property—a template, if you will, of what kinds of interests qualify as constitutional property. I will call this the "patterning definition" approach to constitutional property: Federal constitutional law prescribes the set of criteria an interest must have to qualify as property; whether the claimant has an interest that fits the pattern is then determined by examining independent sources such as state law.¹⁷⁵ The patterning definition approach is essentially the method for identifying property recently adopted by the Court for federal tax purposes in *Drye*.¹⁷⁶

Powell also used the occasion of *Memphis Light* to suggest, albeit somewhat tentatively, what the patterning definition of constitutional property should be for due process purposes. The question in the case was whether the respondents had a property interest in continued utility services, such that they would be entitled to a hearing before those services were cut off. Powell found it

¹⁷⁴ Id. at 9 (emphasis added) (quoting *Roth*, 408 U.S. at 577).

¹⁷⁵ This solution was intimated in passing by Professor Henry Monaghan in his influential 1977 article, "Of 'Liberty' And 'Property.'" Monaghan, *supra* note 15. Monaghan argued that although the interests of a claimant must be initially created by state law, "there is a federal content to the word 'property.'" Id. at 435. Thus, he argued, the characterization of the interests as being either property or something less than property should be a matter of federal constitutional law. See id. Monaghan's recognition of what I call the patterning definition solution was probably influenced by his familiarity with Contract Clause cases, see, e.g., *Indiana ex rel Anderson v. Brand*, 303 U.S. 95 (1938), in which federal courts had rejected unsupported state court findings that claimants had no contract rights under state law. See Monaghan, *supra* note 15, at 436 n.201.

¹⁷⁶ See 120 S. Ct. 474, 481 (1999) ("We look initially to state law to determine what rights the [claimant] has . . . then to federal law to determine whether the [claimant's] state-delineated rights qualify as 'property.'"). See *supra* notes 115–120 and accompanying text.

critical that under local law, termination of services was permissible only if the respondents were delinquent in their payments, and the respondents had disputed the utility's claim of nonpayment. After noting the importance of a "for cause" limitation on termination of employment in cases such as *Roth* and *Arnett*, Powell observed: "Because petitioner may terminate service only 'for cause,' respondents assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause."¹⁷⁷ In other words, however strange it might sound to Blackstone and common law lawyers, "property" for purposes of the Due Process Clause meant "entitlements that may be terminated only for cause."¹⁷⁸

Four years later, in *Logan v. Zimmerman Brush Co.*,¹⁷⁹ the suggestion that there is a federal definition of property and that it means entitlements terminable only for cause was reaffirmed and stated as settled doctrine:

The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact."¹⁸⁰

The qualification to *Roth* reflected in *Memphis Light* and *Logan* offered a way out of the positivist trap, at least in its bitter-with-the-sweet version. Under the suggested patterning definition, the only provisions of state law that would be relevant in determining whether a claimant has property would be those that establish an entitlement and impose a for-cause requirement on its termination. Other provisions of state law, such as those that prescribe procedures for determining whether cause exists, would be ignored under this approach, for the simple reason that they would be irrelevant to the federal patterning definition.

¹⁷⁷ *Memphis Light*, 436 U.S. at 11-12 (footnote omitted).

¹⁷⁸ Professor Monaghan's 1977 article also appeared to foreshadow this suggestion. See Monaghan, *supra* note 15, at 443 ("The Court's doctrine is still flexible enough to permit a holding that a present legal relationship, interruptible only for cause, plus a practical expectancy of its continuance, might constitute 'property.'").

¹⁷⁹ 455 U.S. 422 (1982).

¹⁸⁰ *Id.* at 430 (citations omitted).

Of course, even if one grants that *Memphis Light* and *Logan* devised an analytically coherent solution to the positivist trap, it does not follow that this solution was correct in any ultimate sense. From all that appears, the definition was derived through a process of trying to devise a rule that would reconcile the results already reached in previous cases, especially *Goldberg*, *Roth*, and *Bishop*, but in a way that would also permit the Court to reject the logic of Justice Rehnquist's opinion in *Arnett*. An escape from the positivist trap by use of a federal patterning definition of property is arbitrary, if the definition is arbitrary. Still, *Memphis Light* and *Logan* at least attempted a general doctrinal solution.

Although the *Memphis Light/Logan* definition of constitutional property was relied upon in at least one subsequent case,¹⁸¹ the qualification of *Roth* recognized in these decisions has never been given the prominence it deserves. There are several explanations for this neglect. Part of the problem is that neither decision directly involved a fight over Justice Rehnquist's bitter-with-the-sweet theory—the most notorious manifestation of the positivist trap. In addition, both decisions were written as modest applications of settled due process law rather than as an announcement of a major jurisprudential development. Thus, these decisions did not catch the eye of the legal community the way other decisions—such as *Goldberg* or *Roth* or *Mathews v. Eldridge*¹⁸²—that marked steps along the due process revolution did.

The most important reason why *Memphis Light* and *Logan* have remained in relative obscurity, however, is that the bitter-with-the-sweet thesis made one last run at the Court, and the Justice who drew the assignment to deliver the *coup de grace* was not Justice Powell or Justice Blackmun (the author of *Logan*), but Justice White. The occasion was *Cleveland Board of Education v. Loudermill*.¹⁸³ Although for practical purposes the issue was settled, the school board tried to argue that state law procedures for firing a tenured employee should qualify the nature of his property interest in continued employment. Justice White, the former football star,

¹⁸¹ See *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980) (relying on *Memphis Light* in finding no constitutional property).

¹⁸² 424 U.S. 319 (1976).

¹⁸³ 470 U.S. 532 (1985).

rejected the contention with all the finesse of a running back delivering a stiff-arm to pursuing tacklers.¹⁸⁴

[I]t is settled that the “bitter with the sweet” approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. “Property” cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process “is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.”¹⁸⁵

As this passage suggests, *Loudermill* rejected the bitter-with-the-sweet thesis for the simple reason that it produced results at odds with the norm that federal courts should have the last word in assessing the adequacy of legislated procedures. The more formally elegant solution of *Memphis Light* and *Logan*—that state procedures are ignored because they are not relevant to the constitutional definition of property—went unmentioned. Perhaps because of its emphatic language and its quality of offering a definitive pronouncement, *Loudermill* quickly became the leading case discussed by the treatises and reproduced in case books. The upshot was that the bitter with the sweet, the most prominent manifestation of the positivist trap, was dead. But as far as the casual consumer of due process opinions was concerned, the trap had been evaded but not disarmed.

¹⁸⁴ See Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* 103 (1998) (describing White’s skill in stiff-arming).

¹⁸⁵ *Loudermill*, 470 U.S. at 541 (alteration in original) (quoting *Arnett*, 416 U.S. at 167).

D. Too Much Property

Roth's positivist method for identifying constitutional property can give rise to conflicts with competing judicial norms only in special circumstances—where the competing norm is not itself clearly embodied in nonconstitutional law. If a norm is sufficiently crystallized to be reflected in nonconstitutional law, then there should be no conflict between *Roth's* method and the norm. Either the norm will itself be part of “independent source[s] such as state law,” or it will be reflected in federal law, in which case the federalized norm would preempt state law. *Arnett* and *Loudermill* revealed one way in which *Roth* could generate a conflict with norms not embodied in nonconstitutional law: where the rival norm is grounded in interpretation of the Constitution itself. The bitter-with-the-sweet thesis pitted “property” as defined by nonconstitutional law against a norm grounded in decisional law interpreting the Due Process Clause.

Another way in which the positivist method can produce a “trap” is when it generates outcomes that violate “soft norms,”—norms that are recognized as important by five or more Justices but are not sufficiently important to be codified in either nonconstitutional or constitutional law. This, of course, is simply a polite way of saying that the positivist trap can arise when the domain of property as defined by nonconstitutional law generates outcomes that five or more Justices do not like. The *Roth* method soon revealed problems of this sort as well. The primary difficulty for the increasingly conservative Court was not that positivism produced too little property, but rather too much.

As due process cases proliferated in the 1970s and early 1980s, examples of what many Justices regarded as insubstantial property interests began to appear. *Goss v. Lopez*,¹⁸⁶ holding that a ten-day suspension from public school was a deprivation of the property right to a public education, elicited four dissents. Prison and parole cases holding that state regulations could create positive liberty interests, analogous to positive property interests, produced even more extreme examples of claims the Justices regarded as trivial. For example, prisoners claimed the right to due process hearings

¹⁸⁶ 419 U.S. 565 (1975).

before tray lunches were replaced with sack lunches or before they were moved to cells without electrical outlets for television sets.¹⁸⁷ But perhaps the most vivid example of too much property was provided by *Parratt v. Taylor*,¹⁸⁸ where a prisoner asserted a due process violation based on the allegation that prison officials had lost a hobby kit valued at \$23.50 that he had ordered through the mail. This was unquestionably property under state law, and thus under the *Roth* framework it would seem to trigger the protections of due process. But a majority of Justices were unwilling to find that this kind of incident would give rise to a federally mandated due process hearing.

The soft norm that came into conflict with *Roth*'s method of identifying constitutional property in these cases was the fear of inundating federal courts with controversies that have traditionally been adjudicated, if at all, under state tort law.¹⁸⁹ This was highly ironic, of course. First the Court rebelled against the implications of *Roth* because it threatened to divest them of power over determining the procedures to be followed in state administrative hearings; then the Court rebelled against the implications of *Roth* because it threatened to swamp the federal courts with claims of entitlement to state administrative hearings.

To date, the Court's solution to the positivist trap in its too-much-property version has not been to redefine constitutional property.¹⁹⁰ Rather, it has been to utilize the downstream inquiries demanded by the language of the Due Process Clause to screen out such claims, in particular that a claimant show a "deprivation" of

¹⁸⁷ See *Sandin v. Conner*, 515 U.S. 472, 482-84 (1995) (citing *Burgin v. Nix*, 899 F.2d 733, 735 (8th Cir. 1990) (sack lunches) and *Lyon v. Farrier*, 727 F.2d 766, 768-69 (8th Cir. 1984) (electrical outlets)).

¹⁸⁸ 451 U.S. 527 (1981).

¹⁸⁹ See Monaghan, *supra* note 15, at 408 (noting the Court's determination "to prevent the escalation of every grievance against state and local government into a constitutional claim").

¹⁹⁰ Significantly, however, the Court has engaged in re-definition with respect to the "positive liberty" branch of procedural due process. See *Sandin*, 515 U.S. at 486 (limiting prisoners' positive liberty claims to those that impose an "atypical, significant deprivation" on the claimant). In effect, the Court has adopted a restrictive patterning definition with respect to prisoners' positive liberty claims. This may foreshadow a similar move with respect to property. See *infra* notes 293-97 and accompanying text (arguing that restricting property claims in a similar fashion is unwarranted).

property and that the deprivation violated "due process of law." The biggest inroad here was achieved in *Mathews v. Eldridge*,¹⁹¹ where the Court adopted a balancing test for determining what procedures satisfy "due process of law."¹⁹² That test turns in part on the Court's evaluation of the "weight" of the private interest at stake.¹⁹³ Under *Eldridge*, courts faced with property interests that they regard as trivial or insubstantial can respond by ordering only an informal pretermination hearing¹⁹⁴ or by ruling that a posttermination tort suit for damages satisfies the requirements of due process.¹⁹⁵ Another important downstream requirement is that there be a "deprivation." In *Daniels v. Williams*¹⁹⁶ the Court held that injuries inflicted by the mere negligence of state officials do not rise to the level of a deprivation. This ruling can also be used to screen out routine property claims that seem better suited to state tort suits.

In short, the Court has escaped from the positivist trap in procedural due process in a variety of ways. The principal problem of too little property—whether procedural rules would be included in the definition of the property right—was solved by fiat by declaring that procedural rules are irrelevant to the definition of property. The Court has solved problems of too much property by screening out insubstantial claims under the deprivation and due process requirements. Along the way, the Court also developed a more formally elegant solution to the trap in the form of a federal patterning definition for identifying constitutional property. This patterning definition solution, however, has been obscured by other, more ad hoc techniques the Court has deployed to solve the pervasive problems of too little or too much property.

¹⁹¹ 424 U.S. 319 (1976).

¹⁹² *Id.* at 333–49.

¹⁹³ *Id.* at 348.

¹⁹⁴ See, e.g., *Loudermill*, 470 U.S. at 545; *Goss*, 419 U.S. at 582–84.

¹⁹⁵ See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 536 (1984); *Parratt*, 451 U.S. at 543–44; cf. *Ingraham v. Wright*, 430 U.S. 651, 677–78 & n.46 (1977) (holding that a post-termination tort suit for using excessive force in paddling children in public school satisfies due process).

¹⁹⁶ 474 U.S. 327 (1986).

E. The Takings Clause and the Positivist Trap

The extensive jurisprudence seeking to define property for procedural due process purposes has no counterpart in the law arising under the Takings Clause. The most likely reason for this disparity is that there has been no sudden move on the part of the Court aggressively to expand the domain of the Takings Clause in a manner analogous to *Goldberg's* expansion of the domain of procedural due process. To be sure, there has been steady action on the takings front since the late 1970s, and the direction of the law, on the whole, has been toward a modest expansion of protection for private property from government interference. But the movement of the law has been incremental, rather than dramatic, resulting in no perceived need to justify the Court's efforts as falling within the proper scope of the Constitution's language. Moreover, most of the controversies to reach the Court during this time have involved disputes over land use regulation. The "property" in these cases is typically a fee simple in land, and there is no question that this interest is "private property" within the meaning of the Takings Clause. Nevertheless, in the few takings cases that arose in the years after *Roth* calling into question whether a claimant had "property," the Court turned to *Roth* and its positivist method to answer the question. Not surprisingly, one can find evidence of the positivist trap lurking just beneath the surface in these cases.¹⁹⁷

In the Takings Clause context, the trap has revealed itself primarily in the form of a tension between the property identified by the *Roth* method and the expectations of ordinary individuals about property. This should not be surprising. As Robert Ellickson and others have emphasized, the law in the books can diverge, often dramatically, from the understandings about resource uses that ordinary individuals apply in their daily lives.¹⁹⁸ When this happens,

¹⁹⁷ Cf. Thompson, *supra* note 20, at 1526 (noting that although "the Court has explicitly embraced a positivist definition of constitutional property . . . [W]hat the Court says it is doing is not necessarily what it is actually doing").

¹⁹⁸ See Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (1991). For other studies that reveal pronounced divergences between property on the books and property in action, see, for example, James M. Acheson, *The Lobster Gangs of Maine* (1988) and Hendrik Hartog, *Pigs and Positivism*, 1985 *Wis. L. Rev.* 899. For a general discussion of the relationship between takings doctrine and public opinion, see William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 *Colum. L. Rev.* 1774 (1988).

a court committed to defining property by looking to nonconstitutional sources of law may find that it cannot recognize a property right in situations where it might seem reasonable to do so, given established social understandings about the sorts of things that will be protected as property.¹⁹⁹ Alternatively, a court may find that it must recognize a constitutional property right where the claim seems trivial or insubstantial.²⁰⁰

¹⁹⁹ *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), provides an interesting illustration of the potential divergence between positive law and social expectations in the takings context. The question was whether former President Nixon was entitled to just compensation when Congress enacted a statute directing that his presidential papers be placed in the custody and under the control of the United States Archives. A key point of dispute in the litigation was whether presidential papers are the "private property" of the President who creates them, or belong to the United States. There was no statute (at the time Nixon was President) addressing the issue. The government relied on the common law of employment, which it characterized as providing that papers produced in the course of employment belong to the employer, not the employee. See *id.* at 1276. The D.C. Circuit rejected this approach, and instead relied on an unbroken practice, acquiesced in by Presidents and Congress alike, of treating presidential papers as private property. This history, the court concluded, constituted a "mutually reinforcing understanding[] . . . sufficiently well grounded to support a claim of entitlement." *Id.* at 1275. In effect, the court determined that the existence of takings property, at least in this unusual context, should be based on a very specific, prominent, and robust customary right, even though the customary right was arguably inconsistent with the more general common law rule.

²⁰⁰ Although this theme has been less prominent in the procedural due process cases, *Sindermann*, the companion case to *Roth*, illustrates how social expectations can generate reliance interests that diverge from the set of entitlements enforceable as a matter of law. *Sindermann* had taught in various junior colleges in the Texas state system for ten years before the Board of Regents terminated his employment. See *Sindermann*, 408 U.S. 593, 594–95. The schools at which he taught had no formal tenure system, and he had no formal contractual rights to continued employment. Nevertheless, *Sindermann* argued that his school's Faculty Guide and the consistent practices of Texas colleges regarding re-employment gave rise to a "*de facto* tenure program." *Id.* at 600. The Court remanded for further proceedings to determine whether these facts could be proven. See *id.* at 601–03. The Court's discussion of the relevance of the *de facto* tenure claim is ambiguous, and the decision is probably best read as saying that *Sindermann* would have a constitutional property right only if he could prove that Texas common law would recognize an enforceable contract based on these understandings. So read, the decision does not qualify in any fundamental sense the positivist theory of *Roth*. Still, one can readily imagine a situation in which state contract law would not provide a remedy, and yet teachers and administrators had come to act and believe as if a system of tenure is in place. Assuming *Roth*'s method requires a determination of no property in these circumstances, *Roth* would lead to a situation in which there is a divergence between the property recognized in law and the expectations of the persons most directly affected.

This divergence between positive law and social expectations is the only way to account for *Webb's Fabulous Pharmacies v. Beckwith*,²⁰¹ one of the quirkiest of the modern decisions to raise a question about the meaning of constitutional property. Three Florida statutes set forth a mechanism for selling the assets of insolvent corporations in a way that would convey clear title. The first provided that the proceeds of the sale be deposited with a Florida circuit court, an interpleader action be filed against all known creditors of the corporation, and the fund be divided by the court among the creditors asserting claims. The second provided that the clerk of the court was to receive a fee for the service of holding the fund in the court registry. The third, which was the source of the constitutional challenge, provided that the clerk should invest the fund in an interest-bearing account while the creditors' claims were pending, and provided further that the interest was to be "income of the office of the clerk of the circuit court investing such moneys."²⁰²

In *Webb's Pharmacies*, the receiver sued, contending that the statute authorizing the clerk to keep the accrued interest—over \$90,000 in that era of double-digit interest rates—was an unconstitutional taking of the creditors' property. The Florida Supreme Court disagreed, noting that the clerk would have no authority to deposit the funds in an interest-bearing account absent statutory authorization, and finding that the statutory scheme therefore made the interest on the fund "public money" until such time as the creditors were paid.

The Court in *Webb's Pharmacies* defined its task as determining whether interest on a statutorily authorized interpleader fund is "private property" for Takings Clause purposes. The starting point, as in the due process cases, was the quotation from *Roth* coupled with the observation that "a mere unilateral expectation or an abstract need is not a property interest entitled to protection."²⁰³ A confusing discussion ensued in which the Court shifted back and forth between noting that the creditors had a property right in the interpleader fund itself—a proposition no one disputed—and argu-

²⁰¹ 449 U.S. 155 (1980).

²⁰² *Id.* at 156 (emphasis omitted) (quoting Fla. Stat. ch. 28.33 (1977)).

²⁰³ *Id.* at 161.

ing that the State's policy of exacting both a fee for the clerk's services and all the accrued interest was unreasonable²⁰⁴—a proposition that would be relevant only if it were first established that the creditors had a property right in the interest on the fund.

The closest the Court came to grappling with the precise issue before it came in the following passage:

Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. . . . To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court.²⁰⁵

The Court's conclusion that the interest on the interpleader fund was the property of the creditors was difficult to square with *Roth*. In particular, if *Roth* means that *all* sources of Florida law must be consulted in defining the creditors' property rights, why was the Florida statute authorizing the creation of an interpleader fund to resolve creditors' claims a source of property rights for the creditors, while the Florida statute directing the clerk to keep the interest on the fund was not a source qualifying those property rights? In other words, in a case where the issue was framed by three state statutes, why was the Court free to define property by focusing on two of those statutes while ignoring—or rather, declaring unconstitutional—the third?²⁰⁶

The Court seemed intuitively to grasp that if all sources of Florida law could be consulted in defining the creditors' property rights, then the result would be too little property—that is, too little relative to the expectations of the creditors based on general

²⁰⁴ Various observations were advanced tending to support the conclusion that the statute permitting the clerk to keep the interest was unreasonable: The statute was contrary to the dominant rule followed in other states that interest follows principal; the award of all the interest to the clerk bore no reasonable relationship to the costs of maintaining and investing the fund; the statute served no valid police power justification given the separate fee charged for the clerk's services. See *id.* at 162–64.

²⁰⁵ *Id.* at 164.

²⁰⁶ See Thompson, *supra* note 10, at 1538 ("[G]iven the Court's positivist framework, the result [in *Webb's*] was impossible to explain.").

practices involving the payment of interest on invested funds. But the Court had no clue about how it might escape from *Roth's* positivist trap to recognize a larger property right than the one delineated by the Florida statutes. The Court accused the State of seeking to transform private property into public property by *ipse dixit*, but in fact it was the Court that shut off inquiry into the possible sources of state law bearing on the scope of property rights by *ipse dixit*.

The same theme appeared several years later in another decision that required the Court to consider a rather unusual property interest, *Ruckelshaus v. Monsanto Co.*²⁰⁷ The issue was whether a federal pesticide registration law had caused an unconstitutional taking of property in trade secret information belonging to a pesticide manufacturer. Although the government had stipulated that the manufacturer had "certain property rights" in its trade secret information that were protected by the Takings Clause,²⁰⁸ the Court deemed this stipulation unclear and embarked on a brief discussion of whether trade secrets are constitutional property.

The Court began its inquiry by quoting the passage from *Webb's Pharmacies*, which quotes *Roth* about property having its source in nonconstitutional law.²⁰⁹ Strict application of the *Roth* approach might seem to dictate the conclusion that the manufacturer had no protected property rights with respect to several of the years in question. This was because federal pesticide law during these years mandated public disclosure of trade secret information submitted with applications for registration and provided no compensation for the loss of the information.²¹⁰ Hence, when a manufacturer submitted its trade secrets to the government during these years it was knowingly participating in a regulatory process that would destroy the information's status as a trade secret.

The Court resisted this line of reasoning, however. After quoting *Roth*, the Court proceeded to consider relevant precedents of Missouri law (the principal place of business of the manufacturer), finding that these decisions protected trade secrets.²¹¹ It then went

²⁰⁷ 467 U.S. 986 (1984).

²⁰⁸ *Id.* at 1001.

²⁰⁹ See *id.*

²¹⁰ See *id.* at 994-96.

²¹¹ See *id.* at 1001.

on to discuss more general sources of law, including Supreme Court precedents and the legislative history of the federal pesticide law, in support of the proposition that “[t]rade secrets have many of the characteristics of more tangible forms of property.”²¹² This was followed by citations to Blackstone and Locke, and then to more Supreme Court decisions holding that other types of intangible interests are property for purposes of the Takings Clause.²¹³ The only source of law not considered was the provision of the federal pesticide law mandating disclosure without compensation. The net effect of this discussion was extremely confusing. Evidently, constitutional property is not to be identified by referring to the law that is itself alleged to constitute a taking of property. But why this limitation was appropriate, given the language of *Roth*, was left unexplained.²¹⁴

Why was the Court reluctant to use the disclosure statute to defeat the manufacturer’s claim that it had property? The best explanation would seem to be that a decision holding that the trade secrets were not property during the mandatory disclosure years was just too implausible—too jarring given general expectations about kinds of interests that are commonly regarded as being property in our society. The *Roth* approach, if applied by considering all relevant sources of nonconstitutional law, generated a result that the Court regarded as yielding too little property relative to what most observers would consider to be the intuitive result. So the *Roth* inquiry was obscured with smoke and mirrors.

Webb’s Pharmacies and *Monsanto* are examples of how the *Roth* approach to identifying constitutional property can lead to the positivist trap in takings cases. They suggest that when this hap-

²¹² Id. at 1002.

²¹³ See id. at 1002–03.

²¹⁴ The discussion of constitutional property in *Monsanto* is even odder because the Court held that, during the years when disclosure was mandated without compensation, there was no taking of trade-secret property. See id. at 1005–07. This was because the manufacturer was on notice during these years that trade secrets would be disclosed without compensation, and hence it could have had no “reasonable, investment-backed expectation” that the loss of trade-secret information would be compensated. Id. at 1006–07. The Court might as well have said that the manufacturer had to take the bitter (loss of trade-secret protection) with the sweet (the benefits of registration). The positivist trap so arbitrarily closed for purposes of defining property thus quickly reopened in defining what constitutes a taking.

pens, the Court can see no principled way out of the dilemma, but instead resorts to Houdini-like moves in order to escape. On some occasions, however, the Court has been willing to spring the positivist trap in order to defeat the reasonable expectations of the parties—all in the name of some higher social good, of course. This appears to be what happened in *Bowen v. Public Agencies Opposed to Social Security Entrapment* ("AOSSE").²¹⁵

AOSSE arose out of a series of amendments to the Social Security Act concerning the participation of state government employees in the federal old age, survivors, and disability programs. At first, state employees were excluded from Social Security. Later, Congress amended the Act in a way designed to entice them to join. The mechanism for participation was a formal "Agreement," authorized by Section 418 of the Social Security Act, entered into between the State and the federal government. To reassure state employees that they would not be prejudiced by joining the system, each Agreement expressly provided that state employees, upon giving two years' advance notice, could withdraw from participation in the federal program.

Beginning in the late 1970s, a number of associations of covered state employees concluded that Social Security was not the attractive proposition they originally thought it was and began exercising their withdrawal rights. Faced with a potentially severe loss of revenue from such withdrawals, Congress passed yet another amendment to the Act, this time repealing the termination provision. The amendment was expressly made applicable not only to future notices of termination, but also to any state agency that had previously given notice of termination pursuant to a Section 418 Agreement but had not yet left the system. A collection of state agencies with the apt name "Public Agencies Opposed to Social Security Entrapment" filed suit, contending that the repeal of the termination provision and resulting impairment of the termination clauses in the Section 418 Agreements was an unconstitutional taking of their property.

Here it might seem that the parties had a legitimate expectation that they had something akin to a property right. The use of a formal contract to memorialize the federal government's pledge of

²¹⁵ 477 U.S. 41 (1986).

termination rights, and the prominence given to that pledge in order to induce state government workers to consent to participation in the Social Security system, were designed to elicit reliance. Both Contract Clause cases²¹⁶ and, more recently, decisions rendered under the law of government contracting²¹⁷ have emphasized the importance of holding the government to its word when it deliberately employs formal contracts to induce a change of position by its citizens.

Nevertheless, the Court, speaking through Justice Powell, held unanimously that the state employees' contractual rights did not constitute "property" within the meaning of the Takings Clause.²¹⁸ It relied primarily on a boilerplate provision in the original Social Security Act of 1938, that reserved to Congress the right to "alter, amend, or repeal" any provision of the Act. Following earlier decisions construing such "reservation clauses" as defeating any claim of vested rights in charters or contracts with the government,²¹⁹ the Court reasoned that each Section 418 Agreement implicitly incorporated the reservation clause. Moreover, the clause in the statute put each state on notice that Congress was free unilaterally to repeal the termination right at any time.²²⁰

The argument based on the reservation clause was, of course, an endorsement of the positivist trap with a vengeance. An unquali-

²¹⁶ See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (holding that bi-state agency violated the Contract Clause when it repealed a clause in a public bond indenture reserving toll revenues for the repayment of bonds).

²¹⁷ See, e.g., *Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 2000 LEXIS 4306 (U.S. Jun. 26, 2000) (holding that oil companies were entitled to restitution of full amount paid for oil leasing contracts when Congress enacted a new law imposing additional conditions on engaging in exploratory drilling); *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (holding that when savings and loan associations were promised favorable accounting treatment if they acquired failing thrifts, a cause of action for breach of contract arose when Congress amended the law to prohibit such accounting treatment).

²¹⁸ See *AOSSE*, 477 U.S. at 55-56.

²¹⁹ See *id.* at 51-52. These decisions included, ironically, *Flemming v. Nestor*, 363 U.S. 603 (1960), the case that roused Professor Reich's ire and led him to write his articles urging the protection of the new property. See Reich, *The New Property*, *supra* note 132, at 768-71.

²²⁰ See *AOSSE*, 477 U.S. at 54 ("The State accepted the Agreement under an Act that contained the language of reservation. That language expressly notified the State that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself.").

fied promise in a contract with the federal government did not create a constitutional property right, the Court reasoned, because the statute authorizing the contract included in the fine print a provision reserving the right to Congress to amend the statute (not the contract) in the future. The Court was evidently anxious to avoid a ruling that would impair the financial integrity of the Social Security system. The full-blown positivist method of *Roth* worked just fine to achieve this outcome, and it was eagerly embraced.

In short, *Webb's Pharmacies* and *Monsanto* found that the claimants had constitutional property by looking to some provisions of nonconstitutional law while ignoring other provisions. *AOSSE* concluded that there was no constitutional property by drawing upon all conceivably relevant provisions of nonconstitutional law, and ignoring none. The apparent difference in approach can be explained by positing that in *Webb's Pharmacies* and *Monsanto* the Court thought that the positivist method generated too little property given the reasonable expectations of the parties, whereas in *AOSSE* the Court found the method generated just the right amount of property (that is, none), even though this probably conflicted with the expectations of the parties, because this result was necessary in order to achieve another value commitment embraced by the Justices—the desirability of saving Social Security.

III. BEYOND POSITIVISM: THE NEED FOR A FEDERAL PATTERNING DEFINITION

Part II's discussion of *Roth* and the Court's efforts to deal with the positivist traps *Roth* has generated reveals that there are, in principle, three strategies for defining constitutional property. First, one could adopt a "natural property" strategy, analogous to the method that *Roth* established for liberty interests, and seek to articulate a list of protected property interests as a matter of direct interpretation of the constitutional language. Second, one could follow a "pure positivism" strategy, which I have argued is the method most likely contemplated by *Roth* itself, and specify the source of property while remaining agnostic about its content. Third, one could embrace the "patterning definition" strategy of *Memphis Light* and *Logan* (and most recently of *Drye*), which would first establish federal constitutional criteria for identifying

protected property interests, and then look to nonconstitutional sources of law to determine whether any such interest exists.²²¹

I shall argue that the strategy for identifying constitutional property should be the patterning definition method. In order to reach that conclusion, we need to assess the merits of the three basic strategies: natural property, pure positivism, and the patterning definition.

A. Natural Property

One possible strategy would ask courts to identify constitutional property as a matter of direct interpretation of the constitutional language. Thus, just as the Constitution can be seen as a compact designed to protect certain "inalienable" rights of liberty that self-evidently belong to all persons,²²² so one could argue that the Constitution is a compact designed to protect certain rights of property that self-evidently belong to all persons.²²³

It is probably too late in the day to adopt such a natural-property strategy. The *Roth* axiom that property rights are created not by the Constitution but by state law and other independent sources has far too much gravitational force for the Court to repudiate it entirely. In fact, the understanding that property is a positive right largely (if not exclusively) defined by state law long antedates *Roth*.²²⁴ The understanding also has great staying power,

²²¹ For an analogous division of available strategies, see Paul, *supra* note 17, at 1412-13 (distinguishing substantive rights approach, deference to states, and adoption of "generalized ideas about property").

²²² This interpretation is suggested by the reliance of the opinions of Justices Stevens and Ginsburg on the Declaration of Independence in order to justify the existence of natural liberty interests. See *supra* note 141.

²²³ The Declaration of Independence lists as inalienable rights "Life, Liberty, and the pursuit of Happiness," not "life, liberty, and property." The Declaration of Independence para 2 (U.S. 1776). Professor Kmiec has suggested that Jefferson omitted "property" from the Declaration because property rights are transferable, that is, alienable, and it would therefore be odd to include it in a list of inalienable rights. See Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 Val. U. L. Rev. 367, 369-70 (1991). But it is not clear whether this explanation helps or undermines the natural-rights argument.

²²⁴ See, e.g., *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944); *United States v. Cress*, 243 U.S. 316 (1917). It is instructive that under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in which federal courts articulated rules of general common law, property rights were regarded as distinct and were generally defined with reference to

as evidenced by the fact that as recently as *Phillips* the Court used this approach to frame its inquiry into whether constitutional property exists.²²⁵ Thus, it would be extremely difficult for the Court at this point in time suddenly to "discover" a set of property rights that originates directly in the Constitution and hence is immune from legislative modification.

Even if the issue were not settled, it is far from clear that it would be coherent or desirable to speak of a set of core property rights protected directly by the Constitution itself. The basic problem is that property seems always to entail a large component of positive regulation.²²⁶ As even its proponents concede, "[n]atural law does not supply a detailed, unchangeable code of conduct or the content of specific property definitions or regulation."²²⁷ If that is the case, then we cannot turn to natural law to find a workable definition of property derived directly from the language of the Constitution.

The natural-property strategy could be implemented in several different ways, none of them satisfactory. First, one could pursue an originalist strategy and seek to define "property" for purposes of constitutional adjudication by looking to the forms of property recognized at the time of the Constitution's framing and ratification.²²⁸ Constitutional property would be defined as the set of

local law. For applications of this understanding, see *Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U.S. 91, 100-01 (1899) and *Smith Middlings Purifier Co. v. McGroarty*, 136 U.S. 237, 241 (1890). But see *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (declining to follow state common law rules construing an exclusive franchise granted by a railroad station to a taxi company).

²²⁵ See *supra* note 35 and accompanying text.

²²⁶ The inevitable reference to positive law in understanding property is revealed in Blackstone, who asserted that property is an absolute right that "every man is entitled to enjoy, whether out of society or in it." 1 William Blackstone, *Commentaries on the Laws of England* *123. Notwithstanding this apparent claim of a natural law foundation for property, Blackstone then proceeded to classify the laws relating to property not as the absolute rights of persons but qualified rights concerning things. See Daniel J. Boorstin, *The Mysterious Science of the Law* 170-80 (Univ. of Chicago Press, 1996); Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. Cin. L. Rev. 67 (1985); Carol M. Rose, *Canons of Property Talk*, or, *Blackstone's Anxiety*, 108 Yale L.J. 601 (1998).

²²⁷ Kmiec, *supra* note 223, at 370.

²²⁸ For a good summary of what little is known about the original understanding of the Takings Clause, see Andrew S. Gold, *Regulatory Takings and the Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 Am. U. L. Rev. 181 (1999).

interests that would have been recognized as property by an informed participant in American society of 1791 or 1868, and reasonable analogues or extrapolations therefrom.²²⁹

But this strategy would encounter severe difficulties. Property is a dynamic institution that evolves over time in response to changing technologies and changing levels of supply and demand.²³⁰ A definition of property frozen as of 1791 (or 1868) would prove over time to be increasingly discordant with modern needs.²³¹ Would the fee tail, which was a fairly common form of conveyance in the late eighteenth century but has since been abolished in England and in nearly all states,²³² be a natural-property interest? Would equitable servitudes, community property rights, condominiums, securitized debt, and so on, escape protection as natural property rights because these sorts of interests emerged only well after the ratification? And what about intellectual property rights? Such rights were clearly contemplated by the Constitution,²³³ but evidently were recognized to have their source in legislation to be adopted by future Congresses. Would this put them outside the sphere of natural property?

A less drastic alternative would be to identify as natural-property rights those forms of property that are "deeply rooted in this Nation's history and traditions."²³⁴ This would avoid the drawback of the originalist strategy that the forms of constitutional property would be permanently frozen as of the time of ratifica-

For the history of the Due Process Clauses, see *supra* note 161.

²²⁹ For explications of how an originalist would interpret the Constitution in the face of uncertainty about the meaning of the language, see Robert H. Bork, *The Tempting of America* 161–67 (1990) and Michael J. Perry, *The Constitution in the Courts: Law or Politics?* 39–53 (1994).

²³⁰ See, e.g., Yoram Barzel, *Economic Analysis of Property Rights* 85–105 (2d ed. 1997); Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 *J.L. & Econ.* 163 (1975); Harold Deinsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347 (1967).

²³¹ For an account of some of the changes in the nature of property holdings during the first one hundred years after ratification of the Constitution, see Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 *Buff. L. Rev.* 325, 333–57 (1980).

²³² See 2 Powell on Real Property §§ 193–98 (1998).

²³³ See U.S. Const. art. I, § 8, cl. 8 (empowering Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

²³⁴ *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (opinion of Powell, J.) (describing the test for identifying fundamental liberties).

tion. Constitutional property interests, like liberty interests,²³⁵ would be allowed to evolve, as courts reassess what types of interests are sufficiently "rooted" to earn the mantle of constitutional protection.²³⁶

But this evolutionary version of natural property would also present seemingly unsolvable dilemmas. Courts would have to develop criteria not only for identifying "property," but also for deciding which types of property are sufficiently "rooted" to warrant constitutional status. Consider in this regard the so-called "right of publicity," which protects the images and voices of celebrities from commercial exploitation without their consent.²³⁷ Is this a property right or simply a variation on the tort of invasion of privacy? If it is a property right, then does the fact that a particular state has recognized such a right for ten years make it a deeply rooted right? What about twenty years of recognition? Or thirty years? Does the fact that only about half the states recognize such a right²³⁸ detract from its status as fundamental property? These questions have no obvious answers.

The evolutionary version of natural property suffers from a subtler vice as well. Different types of property rights are generally created and modified by legislation, not through common-law decisionmaking.²³⁹ The reasons for this are complex, but it is likely that they relate to the need for certainty and predictability in property law, and especially the need to limit the number of permissible forms of property to provide more effective notice to third parties

²³⁵ Justice Scalia has advocated this type of evolutionary approach to defining fundamental liberty interests. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24-40 (1991) (Scalia, J., concurring in the judgment); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion).

²³⁶ For defenses of this type of evolutionary constitutionalism, see, e.g., Anthony T. Kronman, Alexander Bickel's Philosophy of Prudence, 94 Yale L.J. 1567 (1985); Thomas W. Merrill, *Bork v. Burke*, 19 Harv. J.L. & Pub. Pol'y 509 (1996); Ernest Young, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, 72 N.C. L. Rev. 619 (1994).

²³⁷ See generally 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* (1987 & 1999 Supp.) (defining and exploring the right of publicity).

²³⁸ See *id.* § 6.1[B], at 6-6.

²³⁹ See Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle, 110 Yale L.J. (forthcoming Oct. 2000); Bernard Rudden, Economic Theory v. Property Law: The *Numerus Clausus* Problem, in *Oxford Essays in Jurisprudence: Third Series* 239, 243-44 (John Eekelaar & John Bell eds., 1987).

about the types of interests that can be held as property in any given society.²⁴⁰ The standardization of property rights achieved by relying on legislation would be undermined, at least to a degree, if a layer of constitutional common law were added on top of the legislatively recognized forms.

A third implementation of the natural-property idea, in many respects most analogous to the natural-liberty strategy for interpreting "liberty" under the Constitution, would be to define a certain minimal package of property to which all citizens in the polity would be entitled as an affirmative right. This was effectively Justice Marshall's position in his dissenting opinion in *Roth*: He argued that all citizens have a property right to a government job, and hence are entitled to at least a statement of reasons when they apply for government employment and are rejected.²⁴¹ Welfare rights activists in the 1970s and their modern successors have taken up the cry, urging that every person should get a certain minimum package of property by constitutional right—forty acres and a mule²⁴² or, the modern substitute, guaranteed subsistence payments from the state.²⁴³

But there are a variety of problems with the minimum rights version of natural property. They include: (1) widespread public opposition to any guarantee of minimum resources payable to able-bodied persons who refuse to work;²⁴⁴ (2) a concern that such a guarantee would seriously undermine incentives to work;²⁴⁵ and (3) the difficulty of developing through adjudication criteria for de-

²⁴⁰ See Merrill & Smith, *supra* note 239.

²⁴¹ See *Roth*, 408 U.S. at 588–89 (Marshall, J., dissenting); see also *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) (arguing that property "do[es] not derive [its] meaning solely from the provisions of positive law . . . [but has] a normative dimension as well").

²⁴² See Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 Harv. J.L. & Pub. Pol'y 37 (1990).

²⁴³ See, e.g., Paul, *supra* note 17, at 1541–48 (suggesting that constitutional property be defined as a substantive right to shelter). See generally Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1133 n.9 (1999) (collecting the voluminous legal literature advocating some kind of substantive constitutional guarantee of welfare rights).

²⁴⁴ See Amy L. Wax, *What's So Great About a Constitutional Right to Welfare?*, 50 Duke L.J. (forthcoming 2000).

²⁴⁵ See, e.g., Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 Harv. J.L. & Pub. Pol'y 17 (1992).

termining what the minimum package of property would look like.²⁴⁶ Moreover, even if the judiciary could reach agreement about the desirability and the description of the minimum package of resources, this would not resolve the problem of how property is to be identified once we move beyond the minimal package. So Justice Marshall's version of the natural-property strategy would necessarily have to be supplemented with some other type of definition of property.

At best, any natural-property strategy would give rise to a "two-tiered" system of constitutional property, analogous to the two-tiered system we have for constitutional liberty.²⁴⁷ At the base there would be certain "core" property rights created by the Constitution itself; above the base there would be a larger set of positive property rights defined by sources such as state law. In the case of property, however, the second or positive property tier would almost certainly loom much larger than does the second tier in the case of liberty. The fact that positive property must be defined in any event, combined with the conundrums of how we would identify a core of natural property, suggest that the Court has been well advised in eschewing any effort to identify a set of property rights directly protected by the Constitution.

Passionate defenders of private property may object that without a definition of constitutional property grounded directly in the Constitution, the United States in some future moment of weak-

²⁴⁶ One can readily understand what it means to say that the Constitution confers a kind of standard package of liberties on every person in the polity: the right to freedom from bodily restraint, "to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience," and so on. *Roth*, 408 U.S. at 572. These sorts of freedoms are naturally indivisible: one either has the right to contract, to marry, or to worship, or one does not. But one cannot say very easily whether a person either does or does not have some minimum package of "necessary" resources.

²⁴⁷ The new liberty idea originated shortly after *Roth* in *Wolff v. McDonnell*, 418 U.S. 539, 555-58 (1974), and was most completely rationalized in *Meachum v. Fano*, 427 U.S. 215, 224-27 (1976). The basic idea is that even in circumstances in which individuals have no natural liberty because, for example, they have been convicted of a crime and sentenced to prison, independent sources such as state law can give rise to liberty interests protected by due process. For further applications, see, for example, *Hewitt v. Helms*, 459 U.S. 460 (1983); *Olim v. Wakinekona*, 461 U.S. 238 (1983); cases cited *infra* notes 294-98.

ness could embrace socialism, contrary to the “meta-principle” that the Constitution was designed to protect private property.²⁴⁸

But the Property Clauses of the Constitution do not mandate the existence of a private property system. “All they say is that insofar as there happens to be any property, and you happen to have some, you won’t lose what you have at the hands of the government without due process and/or just compensation.”²⁴⁹ And insofar as the need to pay just compensation would discourage the government from proceeding with socialism, it would seem that this retarding effect would be secured under any of the different definitional strategies. Under pure positivism, for example, if private property is recognized to exist by independent sources such as state law, and the government sought to nationalize this property, the Takings Clause would require that just compensation be paid in order to effectuate the transition.²⁵⁰ Adopting a natural-property definition in order to forestall some future socialist revolution would therefore appear to be both unnecessary and quixotic.

B. Pure Positivism

The second option—pure positivism—is much easier to envision, since it is essentially the one with which we have been living since the Court decided *Roth* in 1972. Property means whatever the non-constitutional decisionmakers say it means, or whatever the

²⁴⁸ See generally Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (1990) (reviewing evidence that the Framers’ objectives were in part to enhance the security of property rights).

²⁴⁹ Frank I. Michelman, *Process and Property in Constitutional Theory*, 30 *Clev. St. L. Rev.* 577, 585 (1981).

²⁵⁰ It is occasionally argued that positivism would permit the government to abolish private property in steps by, for example, declaring that any resource acquired after a certain date in the future will not be protected as property. See Monaghan, *supra* note 15, at 440; Thompson, *supra* note 20, at 1527–30. One problem with this argument is that it has been and is likely to remain a purely hypothetical concern. Property is a highly utilitarian institution and no state is likely to put itself at a competitive disadvantage by seriously undermining the security of property rights. A second problem with the argument is that the current holders of such resources might have an action for a regulatory taking based on the radical loss in value that would be created by the announcement that future transferees would have no property in the resources. In any event, to the extent that pure positivism creates a danger of abolishing property in steps, the patterning definition approach provides additional protections. See note 260 *infra*.

nonconstitutional decisionmakers choose legally to protect as a "legitimate claim of entitlement." The nominalism about the meaning of property inherent in this conception is one of the great truisms bequeathed to us by legal realism,²⁵¹ and its influence is hard to fight. The realists and their successors relentlessly championed the idea that property is a "bundle of rights," with the implication that the identity or presence of any one stick is purely contingent.²⁵² For the realists, any and all sticks can be inserted into the bundle, or better yet, taken out of the bundle, and it is still possible to call the bundle property. As the arch-realist Walton Hamilton put it, property is merely "a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth."²⁵³

This legacy of realism is without a doubt a source of the nominalism about the meaning of property reflected in *Roth*. If property is a purely contingent and ever-mutating bundle of rights, then it would be foolhardy for the Supreme Court to presume to offer a limiting conception of what "property" means in order to channel the inquiries of judges as they look out upon the vast realm of "independent source[s] such as state law." The positivist strategy also made it possible for *Roth* to rationalize the program of *Goldberg*, which was to redefine the universe of property for instrumentalist ends, to wit, providing a constitutional imprimatur to welfare rights and other government entitlement programs.

The problem with pure positivism, as we have seen, is that it leads to the positivist trap, in the form of too much or too little property relative to social expectations or other normative com-

²⁵¹ See Merrill, *supra* note 102 (contrasting essentialist and nominalist definitions of property and associating the emergence of the latter with legal realism).

²⁵² See, e.g., Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 28 (Walter Wheeler Cook ed., 1923) (stating that property "has no definite or stable connotation"); Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8 (1927). For a misguided but highly influential modern version of this perspective, see Thomas C. Grey, *The Disintegration of Property*, in *XXII NOMOS: Property* 69 (J. Roland Pennock & John W. Chapman eds., 1980). Today, the notion that property has no "intuitive core" is often stated as orthodoxy. See, e.g., Rubin, *supra* note 15, at 1086 ("[P]roperty is simply a label for whatever 'bundle of sticks' the individual has been granted."); Joan Williams, *The Rhetoric of Property*, 83 *Iowa L. Rev.* 277, 297 (1998) ("Labeling something as property does not predetermine what rights an owner does or does not have in it.").

²⁵³ 11 *Encyclopædia of the Social Sciences* 528 (Edwin R.A. Seligman ed., 1937).

mitments of the Justices about the kind of things that should be protected as property. Further, as we have seen, the Court does not have the intestinal fortitude to live with the consequences of the positivist trap. Faced with outcomes that deviate from social expectations, or that seem to threaten other values near and dear to the judicial heart, "the Court has been unwilling or unable to live by its own declared rule of self-denial."²⁵⁴ Lacking any federal definition of property, however, its response has been arbitrarily to embrace some provisions of nonconstitutional law while ignoring others, all the while covering its tracks with circular arguments, *ipse dixit*, and smoke and mirrors.

Of course, one could argue that this unedifying spectacle is part of the settled law of constitutional property, and that we have no choice at this point but to live with it. But this would be an unwarranted conclusion to draw from the data. First, there is the fact that the Court carved out a major exception to the pure positivism of *Roth* when it quashed the bitter-with-the-sweet thesis. True, in so doing the Court failed to acknowledge that *Roth*'s nominalism about the meaning of property was the source of its problem. But its action reflected a significant qualification all the same. Moreover, we have the examples of *Memphis Light* and *Logan*, which expressly endorse a third strategy—what I have called the patterning definition. These decisions have not attained great prominence, for the reasons I have described,²⁵⁵ but nevertheless they exist and have never been repudiated. And as the Court's very recent decision in *Drye* demonstrates, the patterning definition appears to be the emerging norm for defining property for federal tax purposes. Finally, and I think dispositively, we have the recent decisions in *Eastern Enterprises* and *College Savings Bank*, both of which endorse substantive limitations on the meaning of property without making any reference at all to *Roth*'s positivist strategy. These decisions create a major tension in the law regarding constitutional property, certainly enough to permit us to conclude that the undiluted *Roth* method no longer enjoys the status of settled law.

²⁵⁴ Michelman, *supra* note 249, at 583.

²⁵⁵ See *supra* notes 181–85 and accompanying text.

C. The Patterning Definition

On the one hand, this leads to the third strategy, the patterning-definition approach. Like the natural-property method, the patterning-definition approach requires that courts derive a conception of property directly from the language of the Constitution itself. But the conception of property the courts seek is not one that dictates that particular types of interests be constitutionally protected as property. Instead, they seek to discover from the Constitution's traditions general criteria that serve to differentiate property rights from other types of interests.²⁵⁶ On the other hand, like the method of pure positivism, the patterning definition approach pays a great deal of attention to understandings grounded in independent sources such as state law. But state law is consulted not to discover the definition of property; it is reviewed to determine if interests have been created that correspond to the federal criteria for the identification of constitutional property. Beyond the palpable defects of the other approaches, there are several features that commend this strategy for identifying constitutional property.

To start with a fairly mundane consideration, the patterning definition idea allows us to integrate the pronouncements of *Eastern Enterprises* and *College Savings Bank* into the preexisting jurisprudence grounded in *Roth*. *Roth* focuses on the source of constitutional property, while saying nothing about its content. *Eastern Enterprises* and *College Savings Bank* focus on the content of constitutional property, and say virtually nothing about its source. The only way to synthesize these strands into a single fabric is via an approach that speaks both to source and content. The patterning-definition idea of *Memphis Light* and *Logan* (and *Drye*) does exactly that.

A more fundamental reason to adopt the patterning-definition strategy is that it would permit the Court to engage in more princi-

²⁵⁶ Resolute originalists will want to know why we do not look for the general criteria for identifying property in the writings of the Framers or the sources with which they were familiar. The answer is supplied by Professor Stoebuck: "Down to the time when the United States and early state constitutions were adopted, the few writings there were on eminent domain spoke of the taking of 'property.' Never, in these sources . . . was there any attempt to describe or define what was meant by 'property.'" William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 599-600 (1972).

pled decisionmaking. The patterning-definition approach promises to replace the chaotic ad hocery generated by *Roth* with a process that looks like legal reasoning. You have the major premise—the federal definition of constitutional property; the minor premise—the examination of relevant sources of nonconstitutional law; and the conclusion—either there is or there is not constitutional property.

I do not wish to oversell the importance of principled decisionmaking. We have moved a long way since Herbert Wechsler and the argument that principled decisionmaking is the sole desideratum of constitutional law.²⁵⁷ In particular, if we choose a patterning definition that is principled but defective—in the sense that it regularly leads to clashes with other norms or regularly produces results at odds with social expectations—then the patterning-definition approach does not solve the problem of the positivist trap. Instead, it just makes it all the harder to escape, because unstructured ad hocery is ruled out. Nor would the patterning-definition strategy root out all willful judging. There would still be occasional opportunities to jigger the federal definition in response to unanticipated borderline questions or to fudge findings about the content of nonconstitutional law in specific cases in order to reach preferred results.

Nevertheless, the patterning-definition approach has its decided virtues. The patterning definition would tell courts what it is that they should look for when they undertake to canvas state law and other sources in search of property. It would give them a basis for saying that some provisions of nonconstitutional law count, and others do not count, in conducting this exercise. Moreover, a legal rule, rather than the whims and preferences of the Justices, would govern the process of inclusion and exclusion. Such an approach would permit more meaningful oversight of lower courts by upper courts, and more confident predictions from lawyers to clients. It might also temper the ability of courts to indulge in “political” judging, whether it be of the sort reflected in *Bowen v. Public*

²⁵⁷ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); see also, e.g., Michael J. Perry, *The Constitution, the Courts, and Human Rights* 25–27 (1982) (arguing that neutral principles are a necessary but not a sufficient condition of legitimate constitutional interpretation).

Agencies Opposed to Social Security Entrapment,²⁵⁸ where the Court sacrificed the contractual rights of state employees on the altar of Social Security solvency, or in *Phillips v. Washington Legal Foundation*,²⁵⁹ where the Court wanted to add the war-cry of "confiscation" to the Washington Legal Foundation's assault on IOLTAs.

Finally, the patterning-definition approach strikes a much better balance between flexibility and rigidity than does either the natural property idea or the pure positivism of *Roth*. Unlike natural property, the third approach does not require that constitutional property be created in any particular form, or indeed that there be any property at all. The decision to create property, and whatever powers and prerogatives are associated with it, is vested in nonconstitutional actors. On the one hand, this permits substantial experimentation and evolution of property institutions over time.²⁶⁰ On the other hand, unlike *Roth's* positivism, property is not thought to be synonymous with all of law, or at least all "legitimate claims of entitlement" recognized by law. We start, instead, with a general conception of the kinds of interests that are eligible to be called property, and hence are eligible for constitutional protection. This imposes some structure on the process of identifying constitutional property.

IV. DELINEATING APPROPRIATE PATTERNING DEFINITIONS

So much for the easier part of the analysis. The problem with the patterning-definition strategy is that it requires courts to commit to general federal constitutional criteria for the identification of property interests. There is remarkably little useful law to assist in this endeavor. Courts and commentators have been conditioned by

²⁵⁸ 477 U.S. 41 (1986).

²⁵⁹ 524 U.S. 156 (1998); see *supra* Section I.A.

²⁶⁰ The patterning definition would nevertheless help minimize the possible danger of a state seeking to eliminate constitutional protections for property through step transactions. See *supra* note 250. Under the patterning-definition approach, the label a state attaches to an interest does not inatter—it is the incidents actually recognized by state law that count. Thus, for example, if a state confers on an individual the right to exclude others from a discrete asset, that individual would have property whether or not the state calls the interest property. This makes it harder for a state to eliminate constitutional protection of property without sacrificing the utility associated with the institution.

years of legal realism to be skeptical of general definitions of "property."²⁶¹ And the reign of *Roth*—now approaching three decades—has discouraged courts from seeing any need to articulate the defining features of property. It is probably also true that most judges are by nature wary of attempting to define widely used concepts at a fairly abstract level. The judiciary needs help from legal academics with this task, but there has been very little forthcoming.

In keeping with the general perspective adopted in this Article—that of an internal participant trying to integrate the Supreme Court's pronouncements into the larger landscape of the law—I will use three evaluative standards in attempting to identify appropriate patterning definitions: (1) Does the definition demarcate a set of issues for constitutional protection that is reasonably congruent with the issues earmarked for protection by existing decisional law? (2) Is the definition reasonably congruent with other norms that are widely shared by the judiciary—that is, will it minimize positivist traps of the too little or too much property variety? (3) Is the definition reasonably congruent with social expectations about what kinds of interests should be protected as property?

The first and most fundamental question that we confront in applying these standards is whether there should be one patterning definition, or two, or three. To answer that question, we must take at least a rough cut at addressing our first standard of evaluation, and consider whether any one definition is capable of marking off the existing spheres of protection that exist under procedural due process, takings law, and substantive due process.

A. The Need for Three Definitions

The natural impulse of any trained legal interpreter is to favor giving a word the same meaning whenever it appears in a document.²⁶² Yet we are not entirely without textual support for different meanings of property, depending on the nature of the claim being asserted. Of particular significance, the Due Process

²⁶¹ See *supra* notes 251–53 and accompanying text.

²⁶² See, e.g., *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (adhering "to the 'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning'" (quoting *Department of Revenue v. ACF Indus.*, 510 U.S. 332, 342 (1994)); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (same).

Clause speaks of "property" whereas the Takings Clause refers to "private property." This may provide some support for construing property for takings purposes more narrowly to mean common law property (that is, "private" property), while adopting a broader definition in the context of substantive and procedural due process.

Moreover, there is precedent for adopting different meanings of the same word for purposes of different clauses of the Constitution. As Justice Breyer noted in *Eastern Enterprises*, the word "person" as used in the Fifth Amendment has been construed to include corporations for some purposes (for example, the Double Jeopardy Clause), but not for other purposes (for example, the Self-Incrimination Clause).²⁶³ Thus, although legal interpreters should resist attributing multiple meanings to the same word in a single document, there are contexts where this may be unavoidable, at least if our objective is to accommodate settled doctrine and to reach results that are normatively defensible.

If the range of interests protected by each doctrine under consideration were significantly overlapping, then perhaps one definition would do. If the ranges are significantly skewed, however, then in all likelihood we need more than one definition. The Court is not going to commit to any single definition that requires either the wholesale repudiation of large chunks of settled applications under one or more doctrines or, conversely, that commits it to expanding dramatically the scope of constitutional protection under particular doctrines.

With this in mind, it seems clear that the domain of procedural due process must be a relatively large one. Given the landmark decisions in *Goldberg* and *Roth*, and the legions of cases that follow them, we know that procedural due process protection cannot be confined to property in the common law sense. It must be broad enough to encompass the legislative "entitlements" such as statutorily mandated transfer payments, government employment, and professional licenses that the Court in the 1970s decided should also be protected as property for procedural due process purposes. Whether the *Goldberg* revolution and the radical expansion of procedural due process that occurred in its wake was justified or

²⁶³ See *Eastern Enterprises*, 524 U.S. at 557 (Breyer, J., dissenting).

wise are questions about which reasonable minds may differ.²⁶⁴ But there is no sign that the Court is poised to repudiate these decisions. Yet, procedural due process applies only when a relatively small number of persons are "exceptionally affected, in each case upon individual grounds."²⁶⁵ This suggests that procedural due process property should have some feature that differentiates among individual claimants and eliminates interests that apply to broad categories of persons on a similar basis. For example, a general increase in income tax rates should not trigger procedural due process protections.

The Takings Clause, in sharp contrast to procedural due process, has remained fixed within a common-law orbit.²⁶⁶ Virtually all takings cases involve common-law property interests, such as a fee simple or an easement.²⁶⁷ One reason for the congruence between takings property and common-law property is that the Takings Clause serves primarily as a restriction on the exercise of the government's power of eminent domain. Eminent domain proceedings nearly always involve the condemnation of conventional interests in land.²⁶⁸ Another reason is that the constitutional right protected by the Takings Clause is the right to just compensation. Just compensation, in turn, is ordinarily measured by market value.²⁶⁹ This means that the rights protected by the Takings Clause tend to be those that are bought and sold in the market,²⁷⁰ which in turn equate to common-law property rights.

²⁶⁴ Compare, e.g., Mashaw, *supra* note 143 (generally supportive with reservations), with Pierce, *supra* note 122 (generally critical).

²⁶⁵ *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915); see also *Texaco v. Short*, 454 U.S. 516, 531-33 (1982); cf. *Londoner v. City and County of Denver*, 210 U.S. 373, 378-79 (1908).

²⁶⁶ See Stephen J. Massey, Note, Justice Rehnquist's Theory of Property, 93 Yale L.J. 541, 542-45 (1984) (noting that the Court protects different types of interests as property under due process and takings doctrines and that the Takings Clause covers only "common law property").

²⁶⁷ See McUsic, *supra* note 17, at 608.

²⁶⁸ See Merrill, *supra* note 18, at 95 (reporting that in one sample of decisions nearly 99% (303 of 308) of eminent domain cases involved interests in land).

²⁶⁹ See, e.g., *United States v. 50 Acres of Land*, 469 U.S. 24, 25 & n.1 (1984); *United States v. Miller*, 317 U.S. 369, 374 (1943).

²⁷⁰ Or those that are otherwise susceptible to monetary valuation on some objective basis. See Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 Nw. U. L. Rev. 1143, 1163-65 (1999).

The implied limitation of the domain of the Takings Clause to common-law property rights is confirmed by the fact that when the courts have been confronted with claims that "new property" interests such as Social Security or welfare benefits are entitled to substantive constitutional protection, those claims have been rejected out of hand. One year after *Goldberg* was decided, the Court in *Richardson v. Belcher*²⁷¹ stated that while statutory entitlements may be "property" for procedural due process purposes, "the analogy drawn in *Goldberg* between social welfare and 'property' cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits."²⁷² The proposition that *Goldberg*-type "property" exists only for procedural due process purposes has been perceived to be so self-evidently correct that it has never been revisited.²⁷³ Thus, takings property should be more narrowly defined than procedural due process property.

The domain of property for substantive due process purposes is the most difficult to pin down, if only because substantive due process is so rarely enforced to protect property interests. In general, substantive due process serves as a line of last defense. This suggests, as Justices Kennedy and Breyer reasoned in *Eastern Enterprises*, that substantive due process should have a broader application than does the Takings Clause. Indeed, the cases discussing the substantive due process principle that legislation must satisfy a standard of minimum rationality appear to assume that

²⁷¹ 404 U.S. 78 (1971).

²⁷² *Id.* at 81 (citation omitted).

²⁷³ Other decisions have repeated the pronouncements in *Belcher*. See *Bowen v. Gilliard*, 483 U.S. 587, 605 (1987) (referring to the "unquestioned premise" that the government can reduce welfare benefits and that doing so "does not constitute a taking of private property without just compensation"); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980) (stating that the Takings Clause does not apply to "railroad [retirement] benefits [because such benefits], like Social Security benefits, are not contractual and may be altered or even eliminated at any time"); *Flemming v. Nestor*, 363 U.S. 603 (1960) (holding that Social Security benefits are not an "accrued property right"); see also *Kizas v. Webster*, 707 F.2d 524, 539-40 (D.C. Cir. 1983) (distinguishing between "property" for takings purposes and "property" for due process purposes, as defined in *Goldberg*); cf. *Director v. Ball*, 826 F.2d 603 (7th Cir. 1987) (holding that Social Security benefits are not "property" for purposes of computing eligibility under the Black Lung Benefits Act).

this principle applies to virtually any type of economic regulation.²⁷⁴ Similarly, the cases discussing the principle that there must be a separate justification for making legislation retroactive appear to assume that this principle applies to all economic regulation.²⁷⁵ Thus, property should probably take on the broadest possible meaning where substantive due process protection is concerned.²⁷⁶

The foregoing discussion suggests that it is desirable to have three separate patterning definitions of constitutional property, one each for procedural due process, takings law, and substantive due process. These definitions would act as allocational devices, steering different types of claims involving government interference with economic interests to different bodies of constitutional doctrine. Note also that the three definitions would be "nested." That is, takings property, which has the narrowest range, would also be property for purposes of substantive due process and procedural due process.²⁷⁷ Procedural due process property, which is the next narrowest, would also generally be property for substantive due process purposes. Substantive due process, however, would serve as the general catchall doctrine that would encompass

²⁷⁴ See, e.g., *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637–41 (1993) (reviewing under substantive due process the imposition of liability on an employer for withdrawal from multi-employer pension fund); *Bowen v. Gilliard*, 483 U.S. 587, 598–603 (1987) (reviewing under substantive due process a reduction in welfare benefits); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 222–23 (1985) (assuming without deciding that continued enrollment in a medical school program is a property interest protected by substantive due process).

²⁷⁵ See, e.g., *United States v. Carlton*, 512 U.S. 26, 31 (1994) (applying the double justification doctrine to retroactive changes in tax laws); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (suggesting the double justification requirement for retroactive lawmaking applies to all legislation); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16–18 (1976) (same).

²⁷⁶ In fact, as noted earlier, see *supra* note 4 and accompanying text, some cases from the 1960s and early 1970s appear to operate on the understanding that substantive due process does not require a showing that the claimant has any liberty or property interest at stake at all. Although *College Savings Bank* renders this interpretation untenable, it is consistent with the observation that substantive due process protection is quite broad.

²⁷⁷ This helps explain how it is that the Takings Clause, alone among the provisions of the original Bill of Rights, is incorporated into the Fourteenth Amendment through the Due Process Clause's protection of "property" rather than "liberty." See *supra* note 2. Takings property is a subset of the property protected by the Due Process Clause.

a residual class of claims that would not be covered by either procedural due process or the Takings Clause.

B. Procedural Due Process: Property-as-Entitlement

Identifying the appropriate definition of constitutional property for procedural due process purposes is probably the easiest of the tasks imposed by the patterning-definition strategy. The Court has already pointed the way for us in *Memphis Light* and *Logan*. As stated in *Logan*: "[t]he hallmark of property [at least for procedural due process purposes] . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"²⁷⁸ I will call this conception *property-as-entitlement*.

The *Memphis Light* definition was apparently derived by Justice Powell in an effort to satisfy three objectives. First, the definition is broad enough to describe a universe of interests that includes both "old property" rights recognized at common law and *Goldberg's* "new property" rights embodied in statutory benefit programs. Second, the definition is narrow enough to accommodate *Bishop v. Wood's*²⁷⁹ holding that a law requiring a statement of reasons for termination, without more, is not enough to create a property right. Third, the definition is couched so as to exclude nonconstitutional procedural rules associated with statutory entitlements, and hence avoids the positivist trap associated with the bitter-with-the-sweet thesis.

The *Memphis Light/Logan* definition appears to work reasonably well in achieving these objectives. I would offer a few modest revisions in the interests of clarity. First, the source of entitlements protected as property for procedural due process purposes is not just state law, but can also be federal statutory and regulatory law. Thus, the definition should be expressed in terms of "nonconstitutional law" rather than state law. Second, because the phrase "for cause" is a term of art with special relevance in employment cases, it may be desirable to express the root idea behind for-cause removal somewhat more broadly. I would suggest a phrase such as "specific condition justifying termination" rather than "for cause." Third, for reasons elaborated below, I would make explicit that the

²⁷⁸ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1970).

²⁷⁹ 426 U.S. 341 (1976); see *supra* note 167.

entitlements protected as property are ones that have a "monetary value" to the claimant. In sum, therefore, I would suggest that the patterning definition should ask *whether nonconstitutional sources of law confer on the claimant an entitlement having a monetary value that can be terminated only upon a finding that some specific condition has been satisfied.*

Several features of the definition merit further comment before we ask whether it satisfies the standards for evaluation.

1. Entitlement

The proposed definition, tracking *Goldberg* and subsequent decisions,²⁸⁰ describes the relevant interest as an "entitlement." One is tempted to leave this term unexplained, since the Court has seen no need to explain it over the span of nearly three decades. This element, however, is a member of a family of concepts that speak to the degree of expectation the claimant must have before we describe the interest as property. Since this dimension is present in all our definitions, a few words of explication are in order.

The Court's use of the term "entitlement," as noted earlier,²⁸¹ contains a distinct echo of the rights/privileges distinction that prevailed before *Goldberg*, and fainter echoes of the vested rights/expectancies distinction that dominated judicial thinking prior to the New Deal. These intellectual forbearers have been much criticized. The legal realists savaged the vested rights/expectancies doctrine in the early decades of the twentieth century,²⁸² and the legal process school attacked the rights/privileges distinction in the 1960s.²⁸³ Two especially telling points were advanced in each wave of criticism.

²⁸⁰ See *Goldberg*, 397 U.S. at 262 ("[Welfare benefits] are a matter of statutory entitlement for persons qualified to receive them."); see also *Roth*, 408 U.S. at 577 (stating that property includes "legitimate claim[s] of entitlement").

²⁸¹ See *supra* note 152 and accompanying text.

²⁸² See, e.g., Arthur L. Corbin, *Legal Analysis and Terminology*, 29 *Yale L.J.* 163 (1919); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 *Tex. L. Rev.* 231 (1927); Comment, *The Variable Quality of a Vested Right*, 34 *Yale L.J.* 303 (1925). See generally, Kainen, *supra* note 153, at 103–11 (describing the legal-realist assault on vested-rights analysis).

²⁸³ See, e.g., Reich, *The New Property*, *supra* note 132; William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 *Harv. L. Rev.* 1439 (1968).

First, both the rights/privileges distinction and the vested rights/expectancies distinction erroneously assume that interests fall on one side or another of a fixed dividing line, when in fact legal interests come with different degrees of expectation about how secure they are against legal change. The classic example is provided by married women's dower rights (the modification of which was often a matter of controversy in the nineteenth century).²⁸⁴ A woman who is not married has some expectation that if she marries, and if her husband acquires land, and if her husband dies while married to her, she will have dower rights; a woman who is married has a stronger expectation that if her husband acquires land, and if he dies while married to her, she will have dower rights; a woman who is married and whose husband has acquired land has an even stronger expectation that if her husband dies married to her, she will have dower rights; a widow whose husband acquired land while married has the strongest expectation of dower rights. At what point in time, as the various contingencies fall away, is a woman's expectation of receiving dower strong enough to be regarded as a "vested" right? There is no clearly correct answer to this question,²⁸⁵ and it seems artificial to insist that there is a single condition or set of circumstances that defines when interests become vested.

Second, the rights/privileges distinction and the vested rights doctrine are both prone to circularity. This is because whether an interest is regarded as a "right" or as "vested" is in part a function of whether courts find legislative interference with the interest to be a violation of the Constitution. Thus, critics maintained that the identification of an interest as a "right" or as "vested" often simply begged the question; courts enjoined legislation interfering with vested rights or required the state to compensate for taking vested rights, but the right was regarded as vested, of high security, because the court deemed it to be immune from legislative abrogation or deemed its taking to require compensation.

²⁸⁴ See Kainen, *supra* note 153, at 105-06.

²⁸⁵ Courts disagreed about the point in time when the right vested, some taking the position that this occurred only when a woman became a widow, see, e.g., *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874), and others the position that it occurred when the husband acquired property during marriage. See, e.g., *Class v. Strack*, 96 A. 405 (N.J. Ch. 1915).

These points are not without force. But they are not necessarily fatal, once we embrace the patterning definition strategy. Under the patterning definition approach, one can readily accept that different interests have different degrees of strength of expectation, but still attempt to specify *how strong* the expectation must be before an interest will qualify as property. Moreover, one can avoid problems of circularity under this approach because the relevant question is *how strong* of an expectation must be created by *non-constitutional sources of law* before an interest will be regarded as property for purposes of constitutional law. In other words, one can look to the degree of security of expectation that an interest enjoys under nonconstitutional law as one signpost or criterion of whether it should be categorized as constitutional property.

The Supreme Court's use of the term "entitlement" in procedural due process cases can be seen as invoking, in an oblique fashion, the notion that an interest must have a relatively strong degree of expectation before it becomes property. Just how strong is, of course, very difficult to pinpoint. On the one hand, *Roth* says that an "entitlement" is something grounded in positive law that reasonable persons would rely upon in their everyday lives.²⁸⁶ Thus, a purely discretionary benefit—one that a government agent is free to dispense or withhold at will—does not qualify. Moreover, those interests regarded as entitlements by *Roth* and its progeny tend to be the product of legal mandates that provide in effect that all persons who satisfy certain prescribed conditions of eligibility are entitled by law to receive prescribed benefits that can be calculated in advance. On the other hand, we know that the legislature is free to terminate *Roth*-type entitlements prospectively at any time.²⁸⁷ Thus, *Roth*-style entitlements are not irrevocable in the strong sense that they have been guaranteed for a predetermined amount of time without regard to the preferences of future legislatures.

Perhaps the best characterization of the degree of expectation associated with "entitlements" is that they are guaranteed in the present against discretionary denial in individual cases by executive

²⁸⁶ See *Roth*, 408 U.S. at 577.

²⁸⁷ See *Bowen v. Gilliard*, 483 U.S. 587, 604 (1987) ("Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level."); *Richardson v. Belcher*, 404 U.S. 78 (1971); *supra* notes 257–59 and accompanying text.

or judicial agents, but are not guaranteed against wholesale withdrawal or diminution by the legislature in the future.²⁸⁸ This degree of "vestedness" reflects a sort of intermediate degree of security, somewhere between an interest which is awarded in the discretion of executive or judicial actors (a research grant, for example) and a common law property right that is irrevocable for a determinable period of time in the future (a fee simple, a life estate, or a lease).

2. Monetary Value

Although there are no precedents that directly address the question, it also seems implicit in the concept of the *Roth*-type property-as-entitlement that these interests have some ascertainable monetary value. One basis for this conclusion is again inductive. The various interests recognized as property for procedural due process purposes nearly all have a monetary value. This generalization covers not only traditional common-law property rights, which nearly always can be sold, but also the major categories of "new" property, including welfare and Social Security benefits, government employment, and professional licenses.²⁸⁹

In addition, given the Court's recognition of positive liberty interests—liberty interests that are grounded in independent sources such as state law rather than being found directly in the Constitution²⁹⁰—it is necessary to find some basis for differentiating "new" property rights from "new" liberty rights. Positive liberty interests typically involve freedoms from restraint or punishment that the state is otherwise free to inflict, although the concept may have broader extensions.²⁹¹ In any event, "new" liberty interests typically

²⁸⁸ Cf. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1473 (1996) ("The concept of entitlement may express (better than does the concept of title) the ability of property rights to be secure in certain ways and defeasible in others.").

²⁸⁹ The right to a public education, recognized to be a property right in *Goss v. Lopez*, 419 U.S. 565, 576 (1975), is perhaps a more borderline case, although any parent who has contemplated sending their children to private schools knows that public schooling has a monetary value. *Goss*, it should be noted, also relied in part on the liberty interest in reputation implicated by a school suspension. See id.

²⁹⁰ See *supra* note 247 and accompanying text.

²⁹¹ Stigmatization by the state can provide the basis for a liberty interest when coupled with some other tangible interest. See *Paul v. Davis*, 424 U.S. 693, 708-10 (1976). Given the Court's recognition of positive liberty interests in the prison and parole context, it is possible that a state by positive regulation could create a free-

do not have a readily ascertainable monetary value, so the fact that the entitlement has a monetary value would appear to provide a reasonable basis for differentiating *Roth*-type property from new liberty interests.

Finally, requiring that entitlements have some monetary value before they can be protected as property preserves a degree of continuity between the constitutional definition and the ordinary understanding of property. "Property," in most of its uses, connotes something of value or something that enhances individual wealth.²⁹² Imposing the condition that the entitlement have monetary value therefore helps prevent the concept of constitutional property from ballooning to include "all interests valued by sensible men,"²⁹³ and losing any connection with the constitutional text.

3. Termination

The proposed definition further specifies that the individual entitlement must be one that cannot be terminated unless some specific condition is satisfied. The word "termination" is chosen advisedly. It is consistent with the formulations of *Memphis Light* ("terminate") and *Logan* ("remove"), and gains further support from recent experience in the new liberty context. The Court in this last decade has recognized two significant modifications in the threshold definition for identifying positive liberty rights, greatly complicating the task of identifying those rights.

First, in an opinion authored by Justice Blackmun, the Court ruled that new liberty hearing rights are triggered whenever non-constitutional law constrains official discretion by adopting "substantive predicates" containing "explicitly mandatory language."²⁹⁴ This formulation of the scope of positive liberty is much broader than the *Memphis Light/Logan* definition of property. In effect, the Court expanded the right beyond action *terminating* an

standing entitlement to freedom from government stigmatization.

²⁹² There are multiple dictionary definitions of property, but the one most closely on point is "[t]he exclusive right to possess, enjoy, and dispose of, a thing; ownership; in a broad sense, any valuable right or interest considered primarily as a source or element of wealth." Webster's New International Dictionary of the English Language (2d ed. 1936).

²⁹³ Monaghan, *supra* note 15, at 409.

²⁹⁴ *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462–63 (1989) (restating precedents).

interest to include any *change in status* with respect to an interest recognized by nonconstitutional law. The predictable result was too much liberty, in that prisoners (the primary beneficiaries of the positive liberty line of authority) increased their filing of suits seeking to vindicate a host of positive liberty interests.²⁹⁵

In reaction, the Court adopted a second qualification to the sphere of interests protected as positive liberty: In an opinion authored by Chief Justice Rehnquist, the Court announced that, beyond constraining official discretion, there must be state action that imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."²⁹⁶ The new limitation was adopted precisely because the Court was concerned that the focus on discretion-constrained changes in status, without more, was resulting in litigation based on interests too trivial or insubstantial to warrant the protection of procedural due process.²⁹⁷ In effect, the Court has now imposed a dual requirement for identification of a positive liberty interest in the prison context: Such an interest must be (1) protected by nonconstitutional rules that cabin official discretion, and (2) the change in status with respect to the interest must entail a "grievous loss" to the inmate.

Whatever may be said about engrafting the old "grievous loss" notion into the jurisprudence of positive liberty, there is no indication that such doctrinal complexity is needed in the property context. In contrast to the flood of litigation by prisoners raising new liberty claims, there is no sign of increasing numbers of cases raising new property claims. This is due in part to the absence of the peculiar incentives that prisoners have to litigate. But it is also due to the fact that the Court has never expanded the definition of property beyond action removing or terminating an interest to include all limitations on official discretion to effect a modification in status. Actions that terminate entitlements are likely to be perceived by both claimants and the courts as being serious claims of the sort that merit adjudicatory hearings. Lesser types of adverse actions—those that modify, reduce, or redefine entitlements—are

²⁹⁵ See *Sandin v. Conner*, 515 U.S. 472, 482–83 (1995) (collecting lower court cases involving insubstantial claims of infringement of positive liberty brought by prisoners).

²⁹⁶ *Id.* at 484.

²⁹⁷ See *id.* at 482–83.

much less likely to be regarded as giving rise to serious claims.²⁹⁸ Requiring that the threatened government action seek to terminate an entitlement thus helps allocate procedural due process rights to the types of claims that are most deserving of due process protection.²⁹⁹

4. *An Assessment of the Definition*

How does the *Memphis Light/Logan* definition (as modified and explained) fare in terms of avoiding problems of too little or too much property and otherwise tracking the expectations of persons about when they will be afforded adjudicatory hearings before adverse government action is taken? As already noted,³⁰⁰ the definition avoids any problem of the bitter-with-the-sweet, because state-law procedural requirements are irrelevant under the definition. The definition thus preserves the settled understanding that courts have the final authority to say whether any given package of procedures comports with due process of law. Similarly, by requiring that the entitlement be one that can be terminated based only upon an individual determination of "cause," the definition preserves the understanding that procedural due process applies only when the government takes action that affects particular individuals on an exceptional basis. The definition thus comports with major landmarks demarcating the domain of procedural due process rights.

²⁹⁸ Numerous psychological studies have found that individuals are prone to find the loss of an existing object or interest more painful than the failure to acquire an equivalent object or interest. See Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 *Wash. U. L.Q.* 59 (1993) (summarizing studies).

²⁹⁹ Lower courts have reached varying results in considering whether procedural due process guarantees apply to government decisions denying initial claims to benefits, and the Supreme Court has reserved judgment on the question. See *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 61 n.13 (1999). The modified *Memphis Light/Logan* definition would resolve this dispute by finding no property unless the state seeks to terminate a presently existing entitlement. This result is consistent not only with the perception that individuals experience a loss of existing benefits more sharply than they do the failure to gain new benefits, but, more importantly, with the objective of avoiding the too-much-property trap, with the inevitable watering-down of protections that follows for claimants with more serious claims.

³⁰⁰ See *supra* text accompanying note 180.

The positivist trap in the form of too much property is a greater concern, given the vast range of government "entitlements" established by existing nonconstitutional law. In general, however, the social costs of overbroad procedural due process protection are much reduced today compared to what they were in the heyday of the due process revolution. The Court in recent years has effectively confined *Goldberg's* actual holding—that a full pretermination hearing is required before government benefit payments can be terminated—to its facts. Instead, the Court has tended to defer to legislative judgments about what procedures are appropriate in different contexts, especially when those judgments have the sanction of historical practice.³⁰¹ And when it has imposed additional procedures, it has required at most only informal pretermination requirements.³⁰² This more deferential attitude has held the costs of due process hearings in check, and has tempered the strategic use of hearings by frustrated claimants. The contemporary Court's moderately deferential, not-very-intrusive procedural due process doctrine is thus much easier to couple with a broad patterning definition that includes "new" property rights than a more extreme version of procedural due process would be.

Still, the breadth of the concept of "entitlement," standing alone, could give rise to a danger of too much property. Thus, I think it is important that the patterning definition adhere to the other features of the definition—limiting protection to entitlements that have a monetary value and to government actions that terminate entitlements. As long as the Court holds the line in the property context to government actions that impinge on these kinds of interests, there is hope that there will be no need to impose additional filters, such as the grievous loss notion, to minimize problems of too much property.

³⁰¹ See, e.g., *Weiss v. United States*, 510 U.S. 163, 177 (1994) (addressing due process in the military context); *Medina v. California*, 505 U.S. 437, 446 (1992) (addressing due process in the criminal law context).

³⁰² See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985) (requiring an informal pretermination hearing before dismissal from government employment); *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (requiring no pretermination hearing before loss of Social Security disability benefits); *Goss v. Lopez*, 419 U.S. 565, 577-84 (1975) (requiring an informal pretermination hearing before school suspension).

C. Takings: Property-as-Ownership

Identifying the appropriate patterning definition of constitutional property in the takings context is a more difficult task. Since the decision in *Roth*, if not before, and up through the decision in *Phillips*, the Court's position was simply that takings property is defined by "independent source[s] such as state law," that is to say, pure positivism. Consequently, the Court made no effort to delineate the elements of a federal definition. This has changed dramatically with the decisions in *Eastern Enterprises* and *College Savings Bank*. Both cases identify, as a matter of federal constitutional law, isolated features of property for purposes of substantive constitutional protection. In each case, however, the feature is expressed merely as one necessary condition of concluding that property is at issue. The Court has made no effort to integrate either feature into the established understanding that property is created not by constitutional but rather by nonconstitutional law; nor has the Court suggested what other necessary conditions may exist for the identification of constitutional property.

In this Section, I will attempt to outline—in a preliminary fashion—what a more complete federal patterning definition of takings property might look like. I call this the *property-as-ownership* conception. In deriving this definition, I take *Eastern Enterprises* and *College Savings Bank* as starting points, and adopt the "right to exclude" condition of *College Saving Bank* and the "discrete assets" condition of *Eastern Enterprises* as crucial elements of such a definition. In addition, drawing on the larger sweep of takings law, I suggest that takings property must have a strong degree of security of expectation, which I describe as a requirement that the interest be irrevocable. Putting these elements together, we can derive a federal patterning definition for takings purposes that would ask *whether nonconstitutional sources of law confer an irrevocable right on the claimant to exclude others from specific assets*. I will discuss the rationale for each of these conditions in turn, and then briefly consider whether the resulting definition satisfies the standards of evaluation set forth above for identifying a workable patterning definition.

1. *The Right to Exclude*

The statement in *College Savings Bank* that the hallmark of property is the right to exclude others should be adopted as part of the definition of property for takings clause purposes. This of course is *not* the holding of *College Savings Bank*. The case holds that property for purposes of the Due Process Clause includes as an essential element the right to exclude others. I have my doubts about this proposition; certainly, it is untenable to insist that the right to exclude be adopted as a necessary condition of all procedural due process property, including the "new property" recognized in *Goldberg*. But I will put aside these due process puzzles for a moment and concentrate on the Takings Clause. There are several reasons why Justice Scalia's identification of the right to exclude as being a central identifying element makes sense in the takings context.

First, the right to exclude does a good job of identifying those interests that we may loosely call common-law property rights.³⁰³ Most thinkers who have devoted themselves to a sustained analysis

³⁰³ In speaking of "common-law property rights" I do not mean to distinguish between those rights created by judge-made law as opposed to those created by statute. I use common-law property as shorthand for those rights that are regarded as private property in Anglo-American legal systems, such as land, personal property, intangibles such as securities, and intellectual property. Such rights quite commonly have statutory origins. Cf. Lynn E. Blais, Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title, 70 S. Cal. L. Rev. 1 (1996) (criticizing Justice Scalia's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), for defining the nuisance exception to the total taking per se rule solely in terms of judge-made law). The fact that right-to-exclude criterion tracks those interests regarded as private property also helps rationalize the Court's statements in *Lucas* and *Phillips* intimating that takings property should be defined in terms of those interests recognized as property at common law. See *Lucas*, 505 U.S. at 1027-32 (holding that the scope of the nuisance exception to the total takings rule should be defined in terms of the common law of nuisance); *Phillips*, 524 U.S. at 165-68 (holding that the expectation of earning interest on a fund should be determined by the common-law principle that interest follows principal). If by these statements the Court meant to suggest that takings property is defined by judge-made law, then the Court was being radically underinclusive; many interests regarded as private property, including intellectual property, condominiums, and most security interests, are the product of statutory law, not judge-made law. See Merrill & Smith, *supra* note 239. But if we interpret the Court as meaning that takings property should track those entitlements recognized as private property under nonconstitutional law, then these statements are consistent with and provide further support for the right-to-exclude criterion, which reliably singles out such interests.

of the concept of property have reached the conclusion that the right to exclude, or something like it, is an invariant characteristic of private property. Whether one calls this the right to "determine how the object shall be used and by whom,"³⁰⁴ or a "right to exclude others from things which is grounded by the interest we have in the use of things,"³⁰⁵ or the right of "direct trespassory protection,"³⁰⁶ or the "gatekeeper" right,³⁰⁷ this conclusion has been independently reached over and over again. Skeptical readers are urged to read the *Dialogue on Private Property*,³⁰⁸ a posthumously published lecture by Felix Cohen. Cohen was an influential New Deal lawyer³⁰⁹ and legal realist who is best known for his attack on formalist reasoning in the law.³¹⁰ Yet when he sought to unpack the various attributes associated with property, he concluded that property could be reduced to the following functional core:

[T]hat is property to which the following label can be attached:

To the world:

Keep off *X* unless you have my permission, which I may grant or withhold.

Signed: Private citizen

Endorsed: The state³¹¹

The consensus view of scholars that the right to exclude is an essential feature of common-law property has been reached largely through a process of induction by considering the sorts of interests that are regarded as property in developed legal systems.³¹² The

³⁰⁴ Jeremy Waldron, *The Right to Private Property* 39 (1988).

³⁰⁵ J.E. Penner, *The Idea of Property in Law* 71 (1997).

³⁰⁶ J.W. Harris, *Property and Justice* 13 (1996).

³⁰⁷ Merrill, *supra* note 102, at 748.

³⁰⁸ Felix S. Cohen, *Dialogue on Private Property*, 9 *Rutgers L. Rev.* 357 (1954).

³⁰⁹ He was the author of the *Handbook on Federal Indian Law* (1941), which became the foundation of most of the modern understanding of law governing relations with Native American tribes.

³¹⁰ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809 (1935).

³¹¹ Cohen, *supra* note 308, at 374.

³¹² The following discussion draws upon Merrill, *supra* note 102, at 747–51.

right to control and manage access to the resource is obviously a feature of "full ownership" of land or chattels. But it is also the defining feature of leaseholds, where the tenant and not the landlord exercises the right to exclude. Future interests, including a landlord's reversion, may be said to represent the maturation of the right to exclude upon the occurrence of specified conditions happening in the future. Servitudes, including easements, profits, and real covenants, all include the right to exclude others from interfering with a particular use of land. Intellectual property rights are defined by the right to exclude others from the use of certain intangible ideas and images. Mortgages and liens entail the right to exclude others from impairing a security interest in resources. Even public property can be intelligibly described as property because, notwithstanding Justice Scalia's equation of public property with a *res nullius*,³¹³ the government and its agents have the right to exclude others from these resources. In short, the right to exclude, understood to mean the power to direct how a resource will be used and by whom—or as *Drye* puts it, the "power to channel" a resource³¹⁴—appears to be an invariant attribute of all common-law property.³¹⁵

Second, the right to exclude captures the central features of common-law property that make it such a valuable social institution.³¹⁶ Property is sovereignty,³¹⁷ or rather, thousands of little sovereignties parceled out among the members of society. This devolution of sovereignty over the control of resources encourages investment in and improvement of resources by allowing owners to capture the full value of their efforts.³¹⁸ It also makes it relatively easy to identify with whom one must deal to acquire resources, thereby lowering the transaction costs of exchange, and allowing

³¹³ See *College Savings Bank*, 527 U.S. at 673.

³¹⁴ See *supra* note 120 and accompanying text.

³¹⁵ As explained below, the right to exclude is not itself the property right. The property right comes about because nonconstitutional law confers an entitlement on an individual to exclude others from a discrete asset. To describe the right to exclude, considered independently of the asset, as itself a property right, would be to engage in unwarranted conceptual severance.

³¹⁶ For a succinct overview, see Emily Sherwin, Two- and Three-Dimensional Property Rights, 29 *Ariz. St. L.J.* 1075, 1080–84 (1997).

³¹⁷ See Cohen, *supra* note 252, at 8–11 (1927).

³¹⁸ See Richard A. Posner, *Economic Analysis of Law* 36 (5th ed. 1998).

resources to move to their highest and best use.³¹⁹ The right to exclude others protects subjective values associated with resources, such as homes and personal property, and thereby fosters the development of personality and the stability of communities.³²⁰ And it diffuses power in society, thus helping to preserve liberty.³²¹

Third, although I have emphasized the novelty of the Court's assertion of the right to exclude as an unqualified attribute of property, the Court's emphasis on this dimension of property draws support from previous judicial ruminations. The Court in previous takings cases has repeatedly described the right to exclude others as "one of the most essential" rights of property,³²² "one of the most treasured" rights,³²³ or something "universally held to be a fundamental element of the property right."³²⁴ Although these statements imply that the right to exclude is not the only right associated with property, no other right had been singled out for such extravagant endorsement by the Court. Thus, the Court's identification of the right to exclude as the "hallmark" of property could be said to be the logical outgrowth of its prior statements about this interest in takings cases.

Fourth, not only is *College Savings Bank* consistent with prior judicial rhetoric, it is also congruent with prior judicial holdings in the takings area. The Court's takings decisions suggest that governmental interference with the right to exclude is more likely to be considered a taking than are interferences with other traditional elements of property.³²⁵ In contrast, I am aware of no decision of

³¹⁹ See Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1331 (1993).

³²⁰ See Margaret Jane Radin, *Reinterpreting Property* 35-97 (1993).

³²¹ See, e.g., Cass R. Sunstein, *On Property and Constitutionalism*, 14 Cardozo L. Rev. 907, 914-15 (1993); Williams, *supra* note 15, at 11-12.

³²² E.g., *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

³²³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

³²⁴ *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

³²⁵ The Court has found complete abrogations of the right to exclude others with respect to a portion of land to be a taking, even if the portion in question is relatively trivial. See *Dolan*, 512 U.S. at 393; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Loretto*, 458 U.S. at 435-36 (1982) (holding that abrogation of the right to exclude others from small space on roof of apartment building was a taking); *Kaiser Aetna*, 444 U.S. at 174-80 (holding that abrogation of the right to exclude others from marina was a taking). In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court held that abrogation of the right to exclude a particular category of customers (political protesters) from a shopping center was not a taking. But later

the Court holding that a government action is a compensable taking of property that involves a resource that would not be identified as property under the right-to-exclude test. Thus, for all these reasons, it appears sensible to embrace Justice Scalia's invocation of the right to exclude as the "hallmark of property"—at least for purposes of the Takings Clause.

2. Discrete Assets

The Breyer/Kennedy position in *Eastern Enterprises* that property for purposes of the Takings Clause should be limited to specific property interests should also be adopted as part of the patterning definition of constitutional property—provided we define specific property in a way that avoids exacerbating problems of conceptual severance. Correctly understood, "specific property interest" should be understood to mean "discrete asset," not "incident of property." By discrete asset, I mean a valued resource that (1) is held by the claimant in a legally recognized property form (for example, a fee simple, a lease, an easement, and so forth), and (2) is created, exchanged or enforced by economic actors with enough frequency to be recognized as a distinct asset in the relevant community. An incident of property, in contrast, is a power or privilege that belongs to one who holds property, but is not itself a legally recognized form of property.

Some examples should help clarify the distinction. In *Hodel v. Irving*,³²⁶ the issue was whether a federal statute eliminating the right of Native Americans to inherit fractional interests in tribal property was a taking.³²⁷ The "right to inherit" is not a legally rec-

cases explained this on the ground that "the owner had not exhibited an interest in excluding all persons from his property." *Loretto*, 458 U.S. at 434. Thus, the Court viewed a partial abrogation of the right to exclude as more like a regulation of use of the property—a classic exercise of the police power rather than a taking. For an especially striking illustration of the importance of the right to exclude, see *Nixon v. United States*, 978 F.2d 1269, 1285–87 (D.C. Cir. 1992), holding that a special statute transferring control over President Nixon's presidential papers to the United States was an unconstitutional taking. Under the statute, President Nixon was allowed to continue to view and use the documents. But the court stressed that the Act "had completely abrogated Mr. Nixon's right unilaterally to exclude others from the materials," *id.* at 1286, and largely for that reason had to be regarded as a *per se* taking of his property.

³²⁶ 481 U.S. 704 (1987).

³²⁷ See *id.*; see also *Babbitt v. Youpee*, 519 U.S. 234 (1997) (invalidating an amended

ognized form of property, nor is it created, exchanged, or enforced as a separate asset. The right to inherit is, on the contrary, an incident that ordinarily attached to ownership in American society. *Irving* thus involved discrete assets, but the relevant assets were the interests in tribal lands that either would or would not be inherited. The Court was correct in concluding that the regulation affected property, but wrong to suggest that the "right to inherit" was the relevant property.³²⁸

On the other hand, *Dolan v. City of Tigard*³²⁹ involved a local government exaction of a "greenway" along the edge of a creek, to be used as a flood control area and bicycle path, in exchange for the granting of a building permit.³³⁰ The exaction was the functional equivalent of a permanent public easement on the land in question. Easements are a recognized form of property and are created, exchanged, and enforced as distinct assets. Thus, the greenway exaction was properly viewed as a discrete asset, and the Court correctly held that requiring the exaction as a quid pro quo for the permit was subject to the unconstitutional conditions doctrine.³³¹

Correctly understood, the discrete asset requirement is a necessary complement to the right to exclude, if we are to make sense of the meaning of property for takings purposes. The discrete asset requirement tells us what it is the owner has a right to exclude others *from*; the right to exclude tells us why this particular resource can be identified as something that is *owned*, as opposed to being just "stuff." Discreteness and the right to exclude should thus be seen as complementary filters. They largely, but do not completely, overlap. In most cases involving takings property, it will be obvious that there is both a readily identifiable discrete resource (the land, the chattel, the bank account) and a right to exclude with respect to

version of the statute).

³²⁸ Commentators have read *Irving* as making this suggestion. See, e.g., Frank Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1621-25 (1988). On its face, the decision merely applies the standard three-part balancing test to determine whether the interest in land was taken.

³²⁹ 512 U.S. 374 (1994).

³³⁰ See *id.* at 379-80.

³³¹ *Dolan* is often described as regulatory takings case. See, e.g., McUsic, *supra* note 17, at 631-40. It is not; it is a case about when the government can condition a benefit on an agreement by a property owner to waive her rights under the Takings Clause. See Thomas W. Merrill, *Dolan v. City of Tigard*: Constitutional Rights as Public Goods, 72 Denv. U. L. Rev. 859 (1995).

that resource (conferred by ownership of a fee simple, a lease or an easement). In other cases, both filters will be missing. In *College Savings Bank*, for example, the claim based on the loss of future customers and revenues was not based on any discrete asset—the future customers were an unascertained class—nor was it based on any legally recognized right to exclude others from dealing with these customers. If framed as a takings case, the Court would have been warranted in finding no constitutional property on either or both bases.

In a few cases, however, either the right to exclude or discreteness, but not both, will be missing, in which case there should also be a finding of no takings property. A common-law license, for example a tenant's permission to a repairman to enter an apartment to fix a dishwasher, is an example of an interest in discrete resources that does not entail any right to exclude. A license is a "permission slip" from someone with the right to exclude that allows another to gain access to a resource.³³² Such a license describes a discrete resource (the apartment), but does not give the repairman any right to exclude, and hence should not be deemed property for takings purposes.³³³

The discrete-asset limitation is also necessary if the inquiry into whether there has been a "taking" of property is to make any sense. Certainly, if we adopt the traditional view of the Takings Clause as a prohibition on expropriations (and regulations that go so far that they are the functional equivalent of expropriations),³³⁴ this limitation is necessary. In order to expropriate, confiscate, seize, or take property, one must identify a particular piece of property—a "thing"—that has been expropriated, confiscated,

³³² Cf. Saul Levmore, *Licensing: Permission Slips in Corporate and Fourth Amendment Law*, 93 Nw. U. L. Rev. 709 (1999) (developing the root concept of a license as a permission slip in different contexts).

³³³ Whether the opposite also holds—that one can have the right to exclude but not have a discrete asset—is more doubtful. I take up the question below in connection with substantive due process. See *infra* notes 361–64 and accompanying text.

³³⁴ See John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 Vt. L. Rev. 695, 696 (1993) ("[The] Takings Clause should be interpreted to apply only to outright appropriations or physical invasions of property, and to regulatory activities that are the functional equivalent of appropriations or occupations.").

seized, or taken. One cannot "take" the bottom line of a balance sheet.

But even if we are willing to relax this understanding, and accept the notion that regulations that "go[] too far" are also takings,³³⁵ the structure of the inquiry mandated by the modern decisional law presupposes that the regulation must have such an impact on a discrete resource. The standard three-part regulatory takings test focuses on (1) the extent of diminution in value caused by the government action, (2) whether the government action interferes with distinct investment-backed expectations, and (3) whether the government action entails a direct intrusion or merely an adjustment of the benefits and burdens of ownership.³³⁶ Each of these factors makes sense only in the context of government interference with a discrete resource. The diminution in value is the loss in value of a discrete thing. The interference with investment-backed expectations refers to the expectations regarding a discrete investment. And the character of the government's action, that is to say, how intrusive it is, refers to its action with respect to an identified resource.

That the three-part test makes no sense as applied to general liabilities is confirmed by Justice O'Connor's strained and implausible plurality opinion in *Eastern Enterprises*. Each factor had to be reformulated in order to generate anything even approaching a defensible conclusion. For example, diminution in value was not expressed, as is the convention, in terms of a percentage diminution before and after the challenged government action.³³⁷ Rather, it was expressed in terms of the absolute financial loss associated with the Coal Act (a \$50 to \$100 million hit).³³⁸ The plurality also found it necessary to reformulate (or effectively to ignore) the other two variables.³³⁹ The very implausibility of the exercise is most likely the reason why Justice Kennedy concurred

³³⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

³³⁶ See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986) (restating the doctrine).

³³⁷ See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992).

³³⁸ See *Eastern Enterprises*, 524 U.S. at 529.

³³⁹ See *id.* at 528–29 (reformulating interference with discrete investment-backed expectations to mean "substantially disproportionate to the parties' experience" and reformulating the nature of the government action (direct invasion versus regulation of use) to mean "imposes severe retroactive liability").

only in the judgment and signed on to Justice Breyer's suggestion that the Takings Clause was the wrong legal rubric in the first place.

3. Irrevocable Right

As in the case of procedural due process, the definition of takings property should have as one element the specification of a certain degree of security of expectation. For takings purposes, a stronger degree of expectation appears to be required than under procedural due process. Takings property must be "vested" in roughly the same sense that a common-law property right is vested and a mere license is not. Basically, takings property must be irrevocable for a predetermined period of time, and there must be no understanding, explicit or implicit, that the legislature has reserved the right to terminate the interest before this period of time elapses. In order to distinguish this degree of expectation from what we find with respect to the "individual entitlements" of procedural due process, I have described the claimant's interest as being an "irrevocable right."

The requirement that takings property must have a strong degree of security of expectation has not been highlighted in recent decisions, but is reflected in the general landscape of the law. Consider in this regard *Dames & Moore v. Regan*.³⁴⁰ When President Carter seized Iranian assets in response to the embassy hostage crisis, he issued orders that authorized Americans with claims against Iran to obtain licenses allowing attachments of Iranian assets. Later, when a diplomatic solution to the crisis was reached, the President issued orders nullifying all such attachments. The Court rejected the contention that the nullification of these attachments was a taking of property, on the ground that the licenses permitting the attachments were revocable at any time. The Court reasoned that because the licenses and hence the attachments were revocable, "petitioner did not acquire any 'property' interest in its attachments of the sort that would support a constitutional claim for compensation."³⁴¹

³⁴⁰ 453 U.S. 654 (1981).

³⁴¹ Id. at 674 n.6.

The requirement of irrevocability was also decisive in *United States ex rel. Tennessee Valley Authority v. Powelson*,³⁴² an eminent domain case. The question was whether the United States, in condemning the property of a private utility as part of the effort to put together the Tennessee Valley Authority, had to provide additional compensation because the utility had been delegated the power of eminent domain by the state—that is, whether a delegated power of eminent domain is itself a compensable property right. The Court concluded that such a power, which could be revoked by the state at any time, should be classified as a license (that is, a privilege) rather than a property right, and hence did not give rise to any right to additional compensation.³⁴³

The requirement that the right be irrevocable does not mean, of course, that it must be a fee simple absolute or otherwise have an indefinite duration. It simply means that the right is not subject to discretionary revocation for some predetermined period of time. Thus, for example, a lease for years is an irrevocable right for the term of the lease; indeed, the Court has held that leasehold interests can be property for takings purposes.³⁴⁴

4. *An Assessment of the Definition*

What would be the consequences of adopting the *property-as-ownership* definition for takings cases? Overall, I think the signs are auspicious. As we saw earlier, a key problem of *Roth* is that it generates a positivist trap, either in the form of too little or too much property. In the takings context, the primary source of the trap appears to be the divergence between the set of interests protected by nonconstitutional law and the expectations of persons about what sort of interests are or are not protected property. The best way to reduce this type of divergence, in keeping with the general patterning-definition strategy, is to adopt a federal definition that closely tracks people's actual expectations about property.

The right-to-exclude feature of the definition means that it should reliably track those interests that are regarded as "property" as a matter of private common law: real property interests,

³⁴² 319 U.S. 266 (1943).

³⁴³ See *id.* at 280–81.

³⁴⁴ See *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

personal property interests, intellectual property interests, and securities. Thus, the test should result in a very high level of congruence between those interests deemed constitutional property and those interests that people expect to be protected as property. In contrast to the undiluted *Roth* method, where the courts are left at sea to decide which elements of nonconstitutional law do or do not establish property, the proposed definition should home in on a set of interests that are regarded most frequently as being property. Structured this way, the definition should reduce the severity of the positivist trap in takings cases.

The discrete-assets element of the definition also significantly constrains the potential applications of takings law, and does so in ways that should produce greater congruence between expectations and doctrine. If "discrete asset" is understood to refer to a resource that exists in a legally recognized property form and is created, exchanged, or enforced as a distinct asset in the relevant community, it should reduce the opportunities for claimants and courts to engage in conceptual severance. Some potential for manipulation of "denominators" would remain,³⁴⁵ for example, by subdividing parcels of land into smaller physical units. But the greater danger has always been severance along the lines of separate incidents or interests in property, and the discrete-asset requirement should impose a brake on this kind of manipulation.

More controversially, the discrete-asset test would also eliminate the possibility of using the Takings Clause as an instrument for litigating issues of general distributive justice. This interpretation of the Takings Clause would bar only the singling out of specific parcels of land or other isolated property rights for special burdens; it would not affect general taxes or changes in liability rules. But this feature, too, works to confine the Takings Clause to its traditional orbit. The implicit understanding has always been that the Takings Clause has no application to legislation that imposes taxes or allo-

³⁴⁵ This is a reference to the practice of calculating the diminution in value caused by government regulation by comparing the loss due to the regulation (the "numerator") to the total value of the property before the regulation (the "denominator"). See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016-17 n.7 (1992); Michelman, *supra* note 17, at 1192-93; John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535 (1994). The smaller the denominator, the larger the percentage diminution in value.

cates government spending.³⁴⁶ Similarly, there is nothing in our constitutional traditions to support academic suggestions that the Takings Clause should be applied differently depending on the wealth of the claimant so that, for example, poor persons whose houses are taken for a highway project would be compensated, whereas rich persons would not be.³⁴⁷ The adoption of a doctrine that insulates the decisional law from such ideas simply makes official what has been understood as a matter of practice for many years.

Several other interrelated considerations provide further support for keeping the scope of the Takings Clause within fairly narrow bounds corresponding to common-law property interests. The Takings Clause is strong medicine. It is often enforced through categorical or *per se* rules—most prominently the rules making any permanent physical invasion a taking³⁴⁸ and requiring the payment of compensation for any regulation that deprives an owner of all economically viable use of property.³⁴⁹ Even the orthodox “ad hoc” balancing test for determining when property is taken is applied by the Supreme Court with little or no deference to the decisions of local officials or regulators.³⁵⁰ And the Takings Clause has been held to incorporate a self-executing waiver of state and federal sovereign immunity against claims for monetary compensation.³⁵¹ Each of these features suggests that the Takings Clause is best limited to a relatively compact and easily identified domain of controversies. The *property-as-ownership* definition should have this effect.

³⁴⁶ See, e.g., *Eastern Enterprises*, 524 U.S. at 556 (Breyer, J., dissenting); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (holding that a 1.5% deduction from a claims tribunal award was a reasonable user fee, not a taking of property); Ackerman, *supra* note 17, at 109.

³⁴⁷ See Blune & Rubinfeld, *supra* note 17, at 608–09.

³⁴⁸ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

³⁴⁹ See *Lucas*, 505 U.S. at 1003.

³⁵⁰ See, e.g., *Eastern Enterprises*, 524 U.S. 526–27 (plurality opinion); *Kaiser Aetna v. United States*, 444 U.S. 164, 174–80 (1979). See generally Michelman, *supra* note 328, at 1605–14 (arguing that the Court has adopted a form of heightened scrutiny in takings cases).

³⁵¹ See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

D. Substantive Due Process: Property-as-Wealth

By far the most difficult definitional issue is presented by substantive due process. As in the case of the Takings Clause, there is no authoritative guidance as to what sort of threshold showing must be made to invoke substantive due process protection. What is worse, because of the dearth of precedent enforcing substantive due process in the context of property rights, we do not even have a very clear road map of what kinds of economic interests are enforceable as a matter of substantive due process.³⁵²

Two things can be said in general about the domain of substantive due process protection of property interests. First, as Justices Breyer and Kennedy recognized in *Eastern Enterprises*, there are interests protected by substantive due process that are not protected by the Takings Clause. Consequently, the domain of substantive due process should be broader than that of the Takings Clause. Second, the Court has suggested over the years that all economic regulation is subject to the substantive due process requirement of minimum rationality,³⁵³ and all retroactive economic regulations have a higher burden of justification than prospective regulations.³⁵⁴ Given these propositions, which appear to be settled, it would seem that substantive due process has an even broader application than does procedural due process.³⁵⁵

Identifying a patterning definition that secures these points of reference is difficult in the absence of more concrete benchmarks upon which to draw. In general, however, the intuitive notion seems reasonably clear: For purposes of substantive due process, property should include everything relevant to calculating a person's material wealth or net worth. I will call this conception

³⁵² Other than *Eastern Enterprises*, which was regarded as a substantive due process case by only one Justice voting to invalidate the Coal Act (Kennedy), the only modern decision by the Court that strikes down state action interfering with property under the substantive due process doctrine is *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996), a punitive damages case.

³⁵³ See *supra* note 274 and accompanying text.

³⁵⁴ See *supra* note 275 and accompanying text.

³⁵⁵ Procedural due process property is limited by the "for cause" termination element, which serves to confine due process rights to those who suffer individuating injury. See *supra* note 265 and accompanying text. Substantive due process is available to whole classes of persons complaining of legislated inequities.

property-as-wealth. Exactly how to flesh out this conception with a more specific definition is less clear.

One possible point of departure is simply to embrace both *College Savings Bank* (a substantive due process decision) and *Eastern Enterprises* (which the Breyer and Kennedy opinions regarded as a substantive due process decision). This yields the following synthesis: Property for substantive due process purposes includes the right-to-exclude hallmark endorsed by five Justices in *College Savings Bank*, but does not include the discrete-asset limitation adopted by five Justices in *Eastern Enterprises* for takings property (but not due process property). In other words, substantive due process property should be defined just like takings property, minus the discrete-assets limitation.

1. Dropping the Discrete-Assets Limitation

At least half of the proposed synthesis—the half taken from the Kennedy/Breyer position in *Eastern Enterprises*—makes sense. Dropping the discrete-assets requirement is necessary if the scope of substantive due process is to be broad enough to include a number of issues not reached by the Takings Clause, such as the understanding that disproportionate punitive damages awards are unconstitutional, that retroactive economic legislation requires greater constitutional justification than does prospective legislation, and that all economic legislation must be minimally rational. Each of these settled understandings would be called into doubt if the Due Process Clause, like the Takings Clause, applied only to interference with discrete assets. Thus, if we are to preserve settled understandings—a key operating premise of the path-dependent system of constitutional common law—it is necessary to jettison the discrete-asset requirement from the definition of substantive due process property.

Differentiating between takings and substantive due process on discrete-assets grounds is also consistent with the text and history underlying the two clauses. The textual basis is the harder part, but perhaps the relevant bit of text is the distinction between the verbs—“taken” as opposed to “deprived.” To take property connotes to seize, expropriate, or confiscate some thing, that is, a

discrete asset.³⁵⁶ To deprive someone of property has a broader range of meanings; especially when coupled with the ideas of depriving someone of life or liberty, to deprive someone of property is either to dispossess them or to remove something of material value from them.³⁵⁷ Thus, the contrast between "take" and "deprive" may support the conclusion that the Due Process Clause is concerned with property in a broader sense that includes the protection of wealth against government-imposed liabilities as well as the protection of things from expropriation.

The historical understanding of the purposes of the two Clauses supports the distinction even more directly. The Takings Clause was prompted in part by concerns that emerged during the Revolutionary War years about military units requisitioning supplies without compensation.³⁵⁸ The then-recent history of expropriations of property belonging to colonists loyal to Britain and anxieties about legislative nullification of land grants may have also played a role.³⁵⁹ In any event, all the "paradigmatic cases" involved takings of discrete assets. The Due Process Clause, in contrast, was designed to cover deprivations in the form of the three types of punishment historically meted out by the state: executions ("life"), imprisonment ("liberty"), and fines and forfeitures ("property").³⁶⁰ Forfeitures, of course, implicated discrete assets. But fines were a form of general liability. A fine could be paid out of any resources the defendant could muster, either by drawing down his own assets, borrowing, or hoping for the beneficence of friends and relatives. Thus, the extension of due process protection to fines was clearly incompatible with any specific-assets limitation on the domain of the Clause.

³⁵⁶ See Webster's New International Dictionary 2569 (2d ed. 1936) (defining "take" in part as "[t]o get possession or control of . . . [t]o seize or capture physically").

³⁵⁷ See *id.* at 703 (defining "deprive" to mean "[t]o dispossess" and "deprivation" to mean in part "privation," "loss," or "want").

³⁵⁸ See 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 305-06 (Philadelphia, W.Y. Birch and A. Small, 1803).

³⁵⁹ See Gold, *supra* note 228, at 210-211; William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985).

³⁶⁰ See Easterbrook, *supra* note 15, at 97; Williams, *supra* note 15, at 20.

This allocation of claims between the two Clauses also makes rough sense from a functional perspective. As previously noted, the Takings Clause, with its *per se* rules, its lack of a tradition of deference to local authorities and agencies, and its waiver of state sovereign immunity against claims for money damages, is strong medicine, best channeled into fairly narrow paths of government liability. Substantive due process, in contrast, is a very deferential doctrine that seldom results in money judgments against the state. It functions as a kind of a catchall doctrine that polices against the most egregious forms of governmental misbehavior. This justifies broader coverage, since the costs of judicial review under this doctrine are likely to be low.

2. *A Right to Exclude Without Discrete Assets?*

The other half of the proposed synthesis—adopting Justice Scalia’s right-to-exclude hallmark for substantive due process purposes—is something about which I have greater reservations. Using the right-to-exclude criterion to identify substantive due process property appears to encounter one of two serious difficulties. Either the concept of the “right to exclude” must be interpreted in an attenuated manner, such that the right to exclude takes on a meaning closer to “right” than to “exclude,” or, if given its traditional meaning—the right to control access to a particular resource—it is likely to restrict the sphere of substantive due process property to something close to the realm of takings property, requiring a serious retrenchment of the broad scope that substantive due process doctrine is understood to enjoy. Neither option seems particularly promising.

As previously discussed,³⁶¹ the right to exclude clearly does belong in the takings definition, where it works well in tandem with the discrete-assets limitation to delineate traditional common law property interests. Once we drop the discreteness limitation, however, and admit net worth or wealth into the fold as part of “property,” then talking about a “right to exclude” takes on a distinctly different meaning. Here the right to exclude metamorphoses into something like a right to general protection against extortion. If the right to exclude is extended in this fashion beyond its common-

³⁶¹ See *supra* notes 303–24 and accompanying text.

law sense of managerial control, it loses its power to constrain judicial choice in any meaningful manner.

This kind of attenuated meaning of the "right to exclude" may in fact be what *College Savings Bank* contemplates. *College Savings Bank* holds that a statutory cause of action for false advertising by a competitor does not implicate any substantive due process property.³⁶² Justice Scalia explained that this is because such a cause of action does not itself entail any right to exclude others, nor does the underlying activity protected by the cause of action—the right to compete for future customers and revenues—entail a right to exclude others.³⁶³ But Justice Scalia conceded that the assets of a business, including business goodwill, are "property" for substantive due process purposes.³⁶⁴ Business goodwill, however, is not a discrete asset that owners manage and control like gatekeepers. It is a bookkeeping entry, based on the difference between the total assets of a company including retained earnings and its liabilities. One has a "right to exclude" others from business goodwill only in the attenuated sense that one can call upon the state and its courts to protect the company from extortion. To say that a firm has the "right to exclude" others from its business goodwill tells us little more than saying that the firm has a "right" or an "entitlement" to its business goodwill.

But, if the "right to exclude" is *not* watered down to accommodate the intuition that business assets and goodwill are property, and we continue to insist that there be a general power to manage and control access to resources, then this would severely constrict the realm of substantive due process property. For example, many contract rights, which have long been regarded as property for substantive due process purposes,³⁶⁵ would no longer enjoy constitutional protection under the Fifth Amendment. Bilateral contracts give rise to rights among the parties to the contract, but entail only weak rights to exclude others. Thus, adopting a strong right-to-exclude hallmark for substantive due process property might well

³⁶² See *College Savings Bank*, 527 U.S. at 673–74.

³⁶³ See *supra* notes 97–100 and accompanying text.

³⁶⁴ See *College Savings Bank*, 527 U.S. at 674.

³⁶⁵ See *infra* note 392 and accompanying text.

immunize all federal impairments of contract from constitutional scrutiny, contrary to at least two holdings of the Court.³⁶⁶

3. *A Different Direction*

The basic problem with *College Savings Bank's* right-to-exclude criterion in the context of substantive due process is that it takes the intuitive core of *takings* property—*property-as-ownership*—and seeks to transpose it to a doctrine that historically has performed a much broader function. For Justice Scalia, who is on record as opposing all manifestations of substantive due process,³⁶⁷ this, of course, is hardly a drawback; to the contrary, it is a step toward evisceration of an illegitimate doctrine. But from the vantage point of an internal observer seeking to preserve settled understandings such as the requirement of special justification for retroactive legislation, this move is destabilizing.

As an alternative strategy for moving toward a workable concept of substantive due process property, I suggest we to look to the other half of the Due Process Clause—procedural due process property, with its *property-as-entitlement* conception. Perhaps if we start with that definition, which omits any discrete-assets requirement, and make appropriate modifications, we can develop a more satisfactory working definition of property for substantive due process purposes. Given the scarcity of the case law, it is necessary to proceed with particular hesitation here. Nevertheless, we can perhaps tentatively suggest a definition that asks *whether nonconstitutional sources of law confer an entitlement on a claimant having a monetary value*.

Let me briefly note several features of this definition, referring the reader to earlier discussion of *property-as-entitlement* for background.³⁶⁸ The most striking aspect of the proposed definition is how spare it is. Several features previously encountered are here omitted: There is no right to exclude, no discrete-assets limitation, and no individuating requirement of termination because some specific condition has been satisfied. These features, which confine *property-as-entitlement* to adjudicated disputes, and *property-as-*

³⁶⁶ See *infra* note 393 and accompanying text.

³⁶⁷ See *supra* note 61.

³⁶⁸ See *supra* notes 280–92 and accompanying text.

ownership to common-law property interests, are deliberately left out in order to assure that substantive due process has the broadest possible application.

By adopting the term "entitlement," the definition is intended to pick up the intermediate degree of security of expectation associated with procedural due process, rather than the stronger degree of security of expectation associated with takings property. Thus, substantive due process would encompass not only interests that are irrevocable for a predetermined period of time (such as common-law property rights), but also legislated interests that are irrevocable from the perspective of executive or judicial actors, but are subject to repeal by future legislatures. This assures that disruptions to settled expectations grounded in law that escape constitutional scrutiny under the Takings Clause—such as retroactive taxes and liability rules—are nevertheless subject to review as a matter of substantive due process.³⁶⁹

Second, the proposed definition, like the procedural due process definition, requires that the individual entitlement have an ascertainable monetary value. As in the case of procedural due process, this element tracks the relevant decisional law; it serves to differentiate property interests from liberty interests; and it supplies continuity with the ordinary meaning of the word "property."

Does the proposed definition—the broadest of the three patterning definitions—mean that the Court in *College Savings Bank* erred in concluding that a suit against a state agency for false advertising implicated no property interest as a matter of substantive due process? At first blush, one might think so. The cause of action conferred by the Lanham Act, which is part of existing non-constitutional law, would seem to be an "entitlement" under the broad definition that comes to us from procedural due process. After all, recall that the Court in *Logan* (and arguably in other cases) found that an unadjudicated cause of action was property for purposes of procedural due process.³⁷⁰ And an unadjudicated cause of

³⁶⁹ Thus, for example, although "a taxpayer has no vested right in the Internal Revenue Code," *United States v. Carlton*, 512 U.S. 26, 33 (1994), a taxpayer's reliance on existing Code provisions is sufficient to trigger substantive due process review when those provisions are repealed retroactively. See *id.* at 27.

³⁷⁰ See *supra* notes 108–10 and accompanying text.

action often has a monetary value—it can be settled before trial for consideration.

But perhaps this way of thinking about causes of action is mistaken. If causes of action are property, then are defenses property too? What about other important rules of process, like burdens of proof? And why should a state not be able to replace a cause of action with other methods of adjudication, such as administrative action or arbitration?³⁷¹ Perhaps a sounder approach would focus not on the cause of action, but rather on the underlying interest that the cause of action seeks to vindicate, and would ask whether the underlying interest is itself property.³⁷² Only if the underlying interest is property would abrogation of a cause of action (without affording equivalent protection) trigger substantive due process review based on a deprivation of property.³⁷³

If we view causes of action in this way, then *College Savings Bank* was rightly decided, although the opinion should have been written somewhat differently. Assuming causes of action implicate property for substantive due process purposes only if they seek to vindicate a property right, then *College Savings Bank* had to show that its interest protected by the Lanham Act was a property interest, in the sense of *property-as-wealth*. The interest being asserted by the Bank, however, was in securing future customers and revenue that would otherwise be lost to Florida Prepaid because of the state agency's false advertising. Because the Bank had no entitlement protected by nonconstitutional law to any share of future

³⁷¹ See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (1978) (citations omitted) (“[A] person has no property, no vested interest, in any rule of the common law.”).

³⁷² Cf. Jack M. Beermann, Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity, 68 B.U. L. Rev. 277, 302–05 (1988) (arguing that all causes of action should be property); Rubin, *supra* note 15, at 1110–14 (arguing that “property” is in effect the cause of action itself).

³⁷³ This way of viewing causes of action would not necessarily mean that *Logan* was wrongly decided. The underlying interest in *Logan* was the interest in being free of employment discrimination, presumably a liberty interest. Thus, the correct inquiry in *Logan* should have been whether the state's deprivation of the cause of action interfered with a positive liberty right, not whether it deprived Logan of property. If the answer was “yes,” then the case came out the right way, even if wrongly rationalized. As previously noted, see *supra* note 110, the underlying interest in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), was a property right, so that case was also correctly decided under the alternative approach suggested here.

customers or revenues, its cause of action under the Lanham Act protected at most an interest sounding in tort.³⁷⁴ On this view, therefore, the Court correctly concluded that College Savings Bank had no property at stake in the controversy and hence Congress had no authority under Section 5 of the Fourteenth Amendment to extend the Lanham Act cause of action to state agencies.

V. CONTRACTS AS CONSTITUTIONAL PROPERTY

One last point of reference bears consideration, not only because it has been important historically,³⁷⁵ but also because it helps confirm the workability of our proposed patterning definitions. This is the question of whether, or to what extent, contract rights are constitutional property.

Here we encounter one of the major discrepancies in the way the text of the Constitution treats the federal government and the states. Article I, Section 10 prohibits the states from enacting any law "impairing the Obligation of Contracts." There is no parallel provision in Article I, Section 9, which adopts restrictions on the federal Congress. The current understanding is that the Contract Clause applies only to the states, not to the federal government,³⁷⁶ and, as a textual and historical matter, this conclusion is clearly correct.³⁷⁷

This disparity in the treatment of contract impairments has at least one significant implication for how we interpret property for constitutional purposes. Property for Takings Clause purposes should not be construed in such a broad fashion that it automatically includes all contract rights. This is because the modern Court's regulatory takings doctrine is almost certainly more protective than is the Court's Contract Clause doctrine.³⁷⁸ Thus, if all

³⁷⁴ See *supra* note 100 and accompanying text.

³⁷⁵ The Contract Clause was the most important source of federal constitutional protection of property rights through the end of the nineteenth century. See Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 *Case W. Res. L. Rev.* 597, 600-09 (1987).

³⁷⁶ See *United States v. Winstar Corp.*, 518 U.S. 839, 875-76 (1996); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732 n.9 (1984).

³⁷⁷ See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 *Cal. L. Rev.* 267, 270-87 (1988).

³⁷⁸ See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)

contract impairments were reviewed under the Takings Clause, the Contract Clause would become superfluous. Further, if contract impairments are reviewed under the Takings Clause, then the Framers' distinction between federal and state impairments of contract would be erased.³⁷⁹ Regardless of how we ultimately define property for federal constitutional purposes, those definitions should be framed in a way that preserves independent operation for the Contract Clause and maintains the principle that state impairments of contract are subject to closer scrutiny than federal impairments. Let us then give brief consideration to how contract rights would be assessed under the definitions proposed in Part IV.

In the procedural due process context, it would seem that claimants holding contracts with the government should be able to satisfy the *property-as-entitlement* definition, at least in some circumstances. The key questions would be whether the contract is irrevocable from the perspective of executive and judicial actors, whether it has a monetary value, and whether it can be terminated only on the finding that some specific condition has been satisfied. The Supreme Court appeared to assume that contract rights can give rise to property for procedural due process purposes in *Perry v. Sindermann*,³⁸⁰ the companion case to *Roth*, and the lower courts have generally agreed.³⁸¹

One interesting case testing the understanding that contract rights can form the basis of procedural due process property is *Vail v. Board of Education*.³⁸² An Illinois public school entered into a

(providing a more exacting review under a takings claim than under a Contract Clause claim); *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 416-17 (1983) (applying relatively deferential standard of review under the Contract Clause).

³⁷⁹ If federal impairments are reviewed under substantive due process, then federal impairments will be scrutinized less closely than state impairments. Compare *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451 (1985) (assessing federal impairment of contract under rational basis test), with *Allied Structural Steel Co. v. Spamaus*, 438 U.S. 234 (1978) (assessing state impairment of contract under intermediate standard of review).

³⁸⁰ 408 U.S. 593, 601 (1972); see also *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988) (treating cause of action for breach of contract as property for procedural due process purposes).

³⁸¹ See Leonard Kreymin, Note, *Breach of Contract as a Due Process Violation: Can the Constitution Be a Font of Contract Law?*, 90 Colum. L. Rev. 1098 (1990).

³⁸² 706 F.2d 1435 (7th Cir. 1983), *aff'd* by an equally divided Court, 466 U.S. 377 (1984) (*per curiam*).

two-year employment contract with an athletic coach, who was then fired before the two-year term had elapsed. The Seventh Circuit, relying on *Sindermann*, held that the two-year contract was a property right and hence that the coach was entitled to a hearing before he was dismissed.³⁸³ Judge Posner dissented, arguing that contract rights are different than property rights, and that the fired coach had nothing more than an action for damages for breach of contract against the Board. Under the definition set forth in Part IV, the majority was right. The contract satisfied the *property-as-entitlement* test, because the promise was binding from the perspective of administrative actors, it had a monetary value, and it could be terminated only upon the finding of a specific condition—that two years had elapsed.

This conclusion is potentially troubling, since it augurs the assimilation of all government contracts to the realm of procedural due process. As Judge Posner noted, even “a supplier of paper clips” would be protected by procedural due process if terminated before the contract expired.³⁸⁴ But the potential for too much property here has been largely defused by the Court’s recent decisional law injecting greater flexibility into what it means to be “deprived” of property “without due process of law.”³⁸⁵ If, under applicable nonconstitutional law, there is no right to specific performance of a particular type of contract, then the promisee will not be deprived of the right unless and until the government fails to pay damages for breach of contract. Alternatively, applying the *Mathews v. El-dridge*³⁸⁶ balancing test, the courts could find that a post-termination action for damages satisfies “due process of law.” Since either one or both conclusions is likely to be reached in a case involving the breach of an ordinary supply contract, the danger of creating too much property by assimilating binding contracts to property is not great.

With respect to the Taking Clause, the matter is more complex. The *property-as-ownership* definition requires that the claimant have an irrevocable right to exclude others from discrete assets. Some rights grounded in contract will satisfy this definition, others

³⁸³ See *Vail*, 706 F.2d at 1438.

³⁸⁴ *Id.* at 1449 (Posner, J., dissenting).

³⁸⁵ See *supra* notes 192–95 and accompanying text.

³⁸⁶ 424 U.S. 319 (1976).

will not. Most choses in action originate as contract rights, as do bonds, common stock, and even money issued by the government. These interests are commonly regarded as property and are assumed to be protected by the Takings Clause.³⁸⁷ And indeed, there is little difficulty in saying that they would satisfy the definition. They are discrete assets, both in the sense of existing in a recognized form of property and being created, exchanged, and enforced as distinct assets within the relevant community. The holder of such an interest can call upon the full force and authority of the state to exclude others from interfering with the asset. And such interests are nearly always irrevocable either for a defined period of time (as with bonds) or indefinitely (as with money).

Other contract rights will not satisfy the definition. Consider, for example, the promise made by the federal government to state employees in *Bowen v. Public Agencies Opposed to Social Security Entrapment*³⁸⁸ that they could withdraw from the Social Security system if they first elected to participate and later changed their minds.³⁸⁹ This contract right does not correspond to any established form of property (the way a share of stock or cash does), and certainly was not assignable the way property rights usually are. Nor would it make sense to say that the parties had any general right to exclude others with respect to such a contract. They may have had rights against each other, and perhaps certain rights with respect to third parties who induced breach or tortiously interfered with the contract, but such an agreement creates no general right to manage access to a discrete resource, as in the case of ordinary owned property. Thus, the Court was correct in holding that abrogation of the agreements was not subject to a takings claim. The Court should have done so, however, because the contracts did not satisfy the patterning definition of *property-as-ownership*, not because Congress in 1938 had reserved the right to repeal the Social Security Act.

Clearly there will be intermediate cases, for example, annuity contracts, that will cause some difficulty. But the general principle is clear: Contract rights are not property for takings purposes inso-

³⁸⁷ See, e.g., *Eastern Enterprises*, 524 U.S. at 555 (Breyer, J., dissenting) (listing a "specific, separately identifiable fund of money" as property).

³⁸⁸ 477 U.S. 41 (1986).

³⁸⁹ See *supra* notes 215–19 and accompanying text.

far as they reflect nothing more than a bilateral agreement; as contract rights break free from the initial contracting parties and enter into general circulation as investments or money, they become property.

One issue that has come to the fore in recent years in response to deregulatory initiatives in different industries is whether "regulatory contracts"—essentially implied promises by the government that it will forbear from certain types of regulation in the future—are protected under the Takings Clause.³⁹⁰ The *property-as-ownership* definition also provides the appropriate criteria for resolving these sorts of claims. If a regulated utility can show that nonconstitutional law gives it an irrevocable right to exclude others from a discrete asset, then it should be deemed to have a regulatory contract that is property for takings purposes. Thus, if state law unambiguously gives a public utility company a monopoly service territory for a predetermined number of years, this should qualify as a property right for takings purposes. The right to serve the territory is a valuable asset. By making it exclusive the state has given the utility the right to exclude rival companies seeking to sell within the territory. And the right is irrevocable during the term. In contrast, if a utility has simply come to expect that regulators will permit it to earn a certain rate of return on invested capital, it is hard to see how this would translate into the kind of contract that would satisfy the elements of *property-as-ownership*. If the right to earn a certain minimum return on capital is embodied in state law, then this would be a substantive due process entitlement, but the Takings Clause would not be implicated.

Substantive due process functions as the line of last defense and, as we would expect, contracts that escape protection under the Takings Clause will generally be covered by substantive due process. As suggested by the *property-as-wealth* definition, a contract would have to be binding on executive and judicial actors (vested

³⁹⁰ There are several competing perspectives. See J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract* (1997) (urging broad protection of regulatory contracts under the Takings Clause); William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. Rev. 1037 (1997) (adopting a more cautious approach); William J. Baumol & Thomas W. Merrill, *Does the Constitution Require that We Kill the Competitive Goose? Pricing Local Phone Services to Rivals*, 73 N.Y.U. L. Rev. 1122 (1998) (same).

in the weak sense), and have a monetary value, before it enjoys this level of protection. But nearly all commercial contracts should qualify.

This appears to be the Supreme Court's understanding as reflected in cases alleging contract impairment by the federal government. In such cases, the Contract Clause does not apply as it would in any case involving impairment by state governments. Although on occasion the Court has spoken as if the Takings Clause is relevant to these claims,³⁹¹ in fact the Court has without exception assessed alleged impairments of contract by the federal government under the Due Process Clause.³⁹² In two cases from the 1930s, the Court ruled that the impairment violated due process.³⁹³ Although these cases were decided before property rights began their long hibernation, they have been cited with approval in subsequent decisions³⁹⁴ and evidently are regarded by the Court as good law. They serve as a reminder that although substantive due process protection is weak, it does not represent a complete judicial abdication if the government acts in an arbitrary or oppressive fashion in depriving individuals of their contract rights against the government.

³⁹¹ See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (describing *Lynch v. United States*, 292 U.S. 571, 579 (1934), as holding that "valid contracts are property within [the] meaning of the Taking Clause"); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508, 510 (1923) (stating that the requisition of a contract by the United States would give rise to a takings claim, but finding that the government had requisitioned the property that was the subject matter of the contract, not the contract itself).

³⁹² See, e.g., *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451 (1985) (federal impairment of contract challenged under the Due Process Clause); *Perry v. United States*, 294 U.S. 330 (1935) (same); *Lynch v. United States*, 292 U.S. 571 (1934) (same—notwithstanding Court's later characterization, see *supra* note 391, that the case arose under the Takings Clause); *The Sinking-Fund Cases*, 99 U.S. 700 (1878) (same).

³⁹³ See *Perry*, 294 U.S. at 354, 358 (holding that the abrogation of gold clauses in United States financial obligations violated due process, although no damages were proven); *Lynch*, 292 U.S. at 579–80 (finding that the abrogation of life insurance policies issued to soldiers in World War I violated due process).

³⁹⁴ See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 875–76, 884–87, 894–96 & nn. 38–39 (1996); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 n.25 (1977).

CONCLUSION

The Supreme Court in recent years has offered four visions of how courts should define property in a federal system. These visions are both incomplete and disconcertingly disconnected. None of the authors of the key opinions appeared to feel any obligation to contribute to a cumulative jurisprudence of constitutional property. Rather, the reigning impulse seems to be a desire to advance some personal objective that is the product of value commitments that remain below the surface.

Chief Justice Rehnquist's unpersuasive opinion in *Phillips* appears to be the product of his dual allegiance to federalism and property rights,³⁹⁵ filtered through an increasingly indifferent attitude toward the requirements of analytical rigor. Thus, he simultaneously reaffirms *Roth's* injunction that property is not created by the Constitution, but by independent sources such as state law (the federalism allegiance), and yet ignores certain provisions of state law to achieve a symbolic vindication of a client's right to block interest payments to legal aid clinics (the property allegiance).

The opinions of Justices Kennedy and Breyer in *Eastern Enterprises* are driven by a very different concern—the specter of a revival of *Lochner v. New York*.³⁹⁶ Challenges to retroactive taxes and liability rules have been considered in recent decades under a deferential substantive due process standard. In *Eastern Enterprises*, it looked as if the pro-property faction of the Court had discovered a way around this tolerant attitude toward legislative retroactivity: by shifting the doctrinal rubric from due process to the Takings Clause. At the last minute, however, Justice Kennedy balked and joined Justice Breyer in erecting a new doctrinal barrier to such a shift—the thesis that the Takings Clause applies only to property in the form of discrete assets.

³⁹⁵ See Sue Davis, Justice Rehnquist and the Constitution 32 (1989) (concluding that Rehnquist ranks "federalism in the highest position in his hierarchy of values, with property rights in second place and individual rights in the lowest position"); Thomas W. Merrill, Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes, 25 Rutgers L.J. 621, 623, 641 (1994); David L. Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293, 294 (1976).

³⁹⁶ 198 U.S. 45 (1905).

College Savings Bank presents yet a third personal agenda on display—that of Justice Scalia. The case could have easily been resolved without making any broad pronouncements about the meaning of property. But Justice Scalia could not resist the opportunity to read what is in effect the common-law definition of property into the Constitution. This reflects a familiar theme in his jurisprudence,³⁹⁷ but in the context of *College Savings Bank* the act was a reckless one. Adopting the right to exclude as the *sine qua non* of property works reasonably well in the takings context. But *College Savings Bank* was a substantive due process case and the right-to-exclude definition is inconsistent with broad swaths of due process law.

The most recent decision, *Drye*, appears to be mercifully free of any ulterior jurisprudential objectives. But it bears the marks of being rushed into print with considerable haste: Barely one month elapsed between argument and decision.³⁹⁸ As one would expect of an opinion written and circulated for approval in such a short time, Justice Ginsburg's opinion rests on an extrapolation of prior precedent—which is to be commended, given the extraordinary inattention to precedent reflected in the prior constitutional-property decisions. On the other hand, Ginsburg's opinion makes no attempt to draw any connections between the "property" issue as it arises in federal tax law and the recent turmoil about "property" for federal constitutional purposes. This is understandable; any reference to the highly controversial constitutional question would run the risk of bogging down the process of securing a quick unanimous approval and release of the decision. The consequence, however, is to reinforce the impression of nine Justices speaking past one another about the meaning of property.

I have attempted in this Article to suggest ways in which the Court's disconnected essays might be integrated into a larger and more coherent landscape of constitutional property. The most critical step is to move beyond the pure positivism reflected in *Roth* and to adopt what I have called the federal patterning-definition

³⁹⁷ This theme is reflected most prominently in *Lucas*, where Justice Scalia recognized a nuisance exception to the rule that a complete loss in value is a taking, and defined the exception solely in terms of the common law. See *Lucas*, 505 U.S. at 1029.

³⁹⁸ *Drye* was argued on November 8, 1999, and decided on December 7, 1999.

approach to property: Federal law establishes general criteria for identifying property; state law and other nonconstitutional law sources tell us whether these criteria have been met. This move does not require that *Roth* and the many cases that follow it be overruled. All that is needed is a judicious reinterpretation, building on the due process decisions in *Memphis Light and Logan*, and cross-referencing to the method for defining property for tax purposes endorsed in *Drye*.

Identifying appropriate patterning definitions for constitutional property is the more difficult task. *Eastern Enterprises'* discrete-assets limitation on property for takings purposes, although a novel doctrine, is in fact consistent with the broad run of takings cases and offers a potentially useful line of division between takings claims and substantive due process claims. Operating in conjunction with the right to exclude—the feature of property emphasized by *College Savings Bank*—the discrete-assets test would function to confine the Takings Clause to property in the common-law sense, and would limit the clause to redressing singling-out rather than larger claims of distributive justice. This would largely confirm and consolidate existing practice.

College Savings Bank is a more troublesome precedent. Its insistence on a single “hallmark of property” in the form of the right to exclude works well in the takings context, but as a basis for determining the limits of the broad doctrine of substantive due process claims, it is not clear that the Court seized on the right element of property. Arguably the fact that an interest has a monetary value and is irrevocable from the vantage point of executive and judicial actors supplies a better basis for identifying property for substantive due process purposes than does the right to exclude.

My reconstruction of the landscape of constitutional property is offered with varying degrees of confidence, depending on the density of the landmarks that exist from one part of the landscape to another. It is my sense, however, that an integrated understanding is still possible—if just barely. A few more years of unconnected pronouncements from the Supreme Court, and even this effort will be beyond our reach. A Court that feels no obligation to reconcile its statements about constitutional meaning made in closely related contexts is no match for those who try to make things fit together.

All that will be left at that point is to pick the precedents you like, ignore the ones you don't, and hope for five votes.