CONSTITUTIONAL WISH GRANTING AND THE PROPERTY RIGHTS GENIE

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For decades the property rights child has expressed the same wish each night at bedtime:

Star Light, Star Bright
The Very First Star I See Tonight.
I Wish The Court May,
I Wish The Court Might,
Treat Property Like Other Rights.[1]

Finally, in *Dolan v. City of Tigard*,[2] a recent Takings Clause case, Chief Justice Rehnquist seemed to suggest that the long sought after wish was about to be granted. In rejecting Justice Stevens' dissenting argument that business regulations deserved "a strong presumption of constitutional validity,"[3] the Court cited decisions invalidating warrantless searches of business property and striking down restrictions on commercial speech.[4] Rehnquist then proclaimed in unequivocal terms, "We see no

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1. See generally Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard U. Press, 1985); Bernard H. Siegan, *Economic Liberties and the Constitution* (U. of Chicago Press, 1980); F.A. Hayek, *Law, Legislation, and Liberty* (U. of Chicago Press, 1979); Milton Friedman, *Capitalism and Freedom* (U. of Chicago Press, 1962); Allison Dunham, Griggs v. Alleghany County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Sup. Ct. Rev. 63. For a contrary perspective, see C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741 (1986).

For the purposes of this article, I assume the common convention that a distinction exists between property rights under the Takings Clause and personal liberty interests such as freedom of speech, notwithstanding the occasional judicial comment that "[t]he right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

2. 114 S. Ct. 2309 (1994).

3. Id. at 2325 (Stevens, J., dissenting).

4. Id. at 2320 (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980)).

reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[5]

As any reader of fairy tales can report, however, asking powerful entities like genies or supreme court justices to grant one's wishes can be a precarious undertaking. The wish maker is often likely to end up with sausages on their spouse's nose or suffering some other unanticipated calamity.[6] The same fate can easily befall lawyers and judges who think that the doctrinal grass is always greener in the cases protecting some other right than the one they are asserting and, accordingly, demand equal treatment. Instead of doing the hard work of explaining the unique purposes that justify the protection of an interest as a right in particular circumstances, such jurists insist that an interest, such as property, deserves the same form or level of constitutional protection afforded some other distinct interest because both interests are "rights."

The purpose of this essay is to demonstrate the intellectual bankruptcy of this kind of constitutional reasoning as it applies to property rights and the Takings Clause. Taking property rights proponents at their word, I analogize property to other constitutionally recognized interests to suggest just how much currently provided protection property rights might lose if they were treated comparably to other enumerated and non-enumerated rights. I conclude that the only appropriate way to protect property for constitutional purposes is to examine this right independently of other rights and to develop a suitable jurisprudence of property rights that is grounded on the nature of property as an interest, not in terms of its poor or rich relation to other rights.

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5. *Dolan*, 114 S. Ct. at 2320. Justice Rehnquist's statement in *Dolan* was more than mere rhetoric. He raised the issue of the relationship between property and personal liberty rights in part to justify the Court's adoption of unconstitutional condition principles, a doctrine that originated in personal liberty rights cases, not in a Takings Clause decision. Id. at 2316-17.

6. See Charles Perrault, *The Foolish Wishes*, reprinted in *Beauties, Beasts and Enchantment, Classic French Fairy Tales* 64 (Jack Zipes, trans., New American Library, 1989). This classic fairy tale tells the story of a poor woodcutter who is granted the first three wishes he makes. He uses his first wish carelessly when he wishes he had sausages with his wine. His wife, enraged at his foolish wish, berates him for his carelessness. Her chastising so angers the woodcutter that he wishes the sausages were hanging from her nose. When this inadvertent wish is also literally carried out, the unfortunate woodcutter must use his final wish to get the sausage off of his wife's nose.

I. THE TAKINGS CLAUSE AND STATE ACTION

Regardless of the substantive content of a right or the purported rigor of the review provided to laws that arguably abridge the right, no constitutional issue arises unless the threshold of state action is passed.[7] Both the Takings Clause of the Fifth Amendment and takings principles incorporated into the Due Process Clause of the Fourteenth Amendment are governed by this basic limitation of the Constitution's coverage. Private individuals do not "take" property for constitutional purposes anymore than private individuals "abridge" freedom of speech. Only the state can violate the Constitution by impairing rights.

Over the last two decades, however, the Court has systematically restricted the scope of state action by narrowly construing or distinguishing earlier Warren Court precedent.[8] In doing so, it has implicitly insisted that state action principles must be applied consistently and mechanically—regardless of the underlying constitutional cause of action that is at issue.[9] Thus, if the Takings Clause deserves an equal seat in the pantheon of rights, one must necessarily conclude that Takings claims are limited by the same state action requirements that are applied to other, supposedly more favored rights.

One important state action case is *Flagg Brothers, Inc., v. Brooks*.[10] In *Flagg Brothers*, plaintiff challenged the actions of a warehouseman who proposed to sell the goods that he had been storing for her on the grounds that she was in default on her storage bill. Plaintiff argued that the sale of her belongings without a hearing and prior judicial determination that she was in default for the alleged amount owed constituted a deprivation of her

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7. See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (noting the "essential dichotomy" in the Fourteenth Amendment between state action which is subject to constitutional scrutiny and private conduct, " 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield").

8. See, e.g., Gerald Gunther, *Constitutional Law* 892-95, 915, 920 (The Foundation Press, Inc., 12th ed. 1991) (noting that in contrast to judicial decisions during the 1960's, the modern Court has refused to extend public function doctrine, has rejected statements in earlier cases that state authorization or encouragement of private conduct may constitute state action, and has generally acted to "circumscribe the scope of the state action concept"); *Jackson*, 419 U.S. at 365-66 (Marshall, J., dissenting) (criticizing majority for taking "a major step in repudiating" past precedent in its failure to find that conduct of state sanctioned, heavily regulated, public utility monopoly constitutes state action).

9. See, e.g., Thomas D. Rowe, Jr., *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of* Flagg Brothers, Inc. v. Brooks, 69 Geo. L.J. 745, 766-67 (1981) (arguing that the Court's cases preclude a balancing approach to state action issue or an analysis under which the state action threshold may vary when different constitutional rights are asserted).

10. 436 U.S. 149 (1978).

property without due process of law.[11] The warehouseman's conduct was "attributable" to the state because he was acting pursuant to a New York statute that explicitly authorized the sale of a debtor's property in circumstances of this kind.[12]

The Supreme Court dismissed plaintiff's suit. The majority opinion written by Justice Rehnquist held that commercial dispute resolution arrangements are not the exclusive prerogative of the government. Therefore, plaintiff could not establish state action by asserting that the warehouseman was engaged in a public function as were, for example, the Democratic Party's officials in the white primary cases.[13] More importantly, the Court also found that the state's statutory authorization of the sale of a defaulting debtor's goods did not constitute state action because the state merely permitted the warehouseman to take such an action. Since the state did not require the warehouseman to sell plaintiff's belongings, the governmental compulsion necessary to transform private decisions and conduct into state action was lacking in this case.[14]

From the Court's perspective, all that New York had accomplished through the adoption of its warehouseman lien statute was to deny judicial relief to debtors who protested a warehouseman's sale of their stored goods. The state's refusal to provide a remedy for plaintiff's alleged injury no more constituted state action in causing plaintiff's injury than would the state's enforcement of a statute of limitations that deprived a person of redress because they had delayed too long in filing suit.[15] Thus, Justice Rehnquist wrote,

> If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner. . . . Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondent's complaint is not that the State *has* acted, but that it has *refused* to act.[16]

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11. Id. at 153.
12. Id. at 151 n.1.
13. Id. at 158.
14. Id. at 165.
15. Id. at 166.
16. Id. at 165-66.

If property rights under the Takings Clause are equivalent to other constitutionally protected interests, they should be governed by the same state action requirements that limit procedural due process guarantees. The holding of *Flagg Brothers*—that the withdrawal of state remedies for the consequences of private conduct, permitted but not compelled by state statute, does not constitute state action—should be fully applicable to Takings Clause claims. Treating due process and substantive property rights equally under state action doctrine, however, risks significantly undermining recent Takings Clause decisions.

Consider how state action doctrine might affect the Court's decision in *Nollan v. California Coastal Commission*,[17] the case on which the Court's analysis in *Dolan* is grounded.[18] *Nollan* involved a challenge to the kind of land use dealmaking that is currently employed by many states and communities as an alternative to the direct regulation of property development. Under a dealmaking approach, the owner of land who is seeking to develop her property must meet certain pre-conditions before a development proposal will be approved. Typically, these preconditions involve the transfer of property interests the state could not obtain through direct regulation because of Takings Clause constraints.[19]

Thus, in *Nollan*, the California Coastal Commission wanted property owners to allow the public physical access across their beachfront so that people might be able to walk from one public beach to another.[20] A Commission regulation imposing a public easement over the land would constitute a permanent physical invasion of the property, however, and as such, it would violate the Takings Clause unless just compensation was paid to the owner.[21] When the property owners sought the requisite approval of their plans to construct a three bedroom house on their property, the Commission conditioned its granting of permission to construct the house on the owners' transfer of the sought after

17. 483 U.S. 825 (1987).

18. In *Nollan* the Court held that in order for government to demand an uncompensated public easement over plaintiffs' land as a condition to granting plaintiffs a permit for the development of their property, the state must demonstrate an "essential nexus" between the ends advanced by its regulation and the proposed use of plaintiffs' land. Id. at 836. In *Dolan*, the Court extended this "essential nexus" standard and adopted a "rough proportionality" requirement. After *Dolan*, then, the government must show not only that the regulation is substantially related to a legitimate state goal, but that the impact upon the proposed development is roughly proportional "both in nature and extent" to the state's legitimate regulatory objectives. *Dolan*, 114 S. Ct. at 2319.

19. *Nollan*, 483 U.S. at 831.

20. Id. at 828.

21. Id. at 831.

easement to the public. Pursuant to this "deal," the Commission argued, the Takings Clause was effectively circumvented because the owner had voluntarily given the state the easement it desired. Thus, the easement could be obtained without paying the owner compensation.[22]

The Court's decision in *Nollan* limited this dealmaking model to those situations in which an "essential nexus" exists between the condition the state imposes on the land owner and some burden or externality created by the owner's development proposal that the state may legitimately seek to mitigate or offset.[23] In the case before it, the house the owners sought to construct did not interfere with any state interest that would be advanced by providing the public access across their beachfront. Without that connection, the state's conditioning of its permission to construct a house on the granting of the requested easement was not a legitimate regulatory response to the external costs the owner's proposed construction project would impose on the public. Instead, it was little more than extortion backed by the state's authority to deny development proposals at its discretion.[24]

Nollan was an important constitutional victory for property owners, but it is important to understand the legal predicate on which the decision is based. The state only uses dealmaking instead of direct regulation in those circumstances when it cannot achieve its goals through regulation alone. If the state could arrange for public access across an owner's beachfront property directly without obtaining the owner's consent to that intrusion beforehand, the state would not have to make a deal with the owner in the first place, and the substance of the *Nollan* decision would be irrelevant and all but useless to many property owners.

The state action doctrine of *Flagg Brothers* allows a state to achieve the very result condemned in *Nollan* without paying one cent of compensation to property owners impacted by its action. All the state needs to do is to pass a law permitting, but not compelling, members of the public to cross any private beachfront property that separates public lands without fear of legal sanction. As in *Flagg Brothers*, the state would be denying judicial relief to individuals suffering a private injury. In essence, the remedy for trespass would be eliminated in certain specified circumstances, but no agent of the state would set foot on anyone's

22. Id. at 828-29.
23. Id. at 837.
24. Id.

private property. The state would simply be refusing to act to protect property against private infringement. Since the refusal to protect property against private intrusions under *Flagg Brothers* would not constitute state action, property owners could not assert a takings claim against the governmental entity that authorized the invasion of their land.

One might argue, of course, that substantive property rights are different than procedural due process rights and that it makes very little sense to subject such distinct interests to the same formal state action doctrine.[25] That is a fair response (even though

25. The dissonance between the interpretation of state action for Takings Clause purposes and the way that state action doctrine is applied when other rights are at issue is not limited to procedural due process cases. While a discussion of *Flagg Brothers* and *Nollan* clearly illustrates the uniquely "liberal" understanding of state action in takings cases, other comparisons demonstrate the same point with equal force. When freedom of speech claims are asserted, for example, the Court insists that despite its "special solicitude for the guarantees of the First Amendment," *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568 (1972), "it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminately for private purposes only." Id. at 567.

Thus, when labor union members picketing on the grounds of a privately owned shopping center protested that the owners' threat to have them arrested for trespass would violate their First Amendment rights, the Court rejected their contention, not on the merits, but because "the constitutional guarantee of free expression has no part to play in a case such as this." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1975). Since the shopping centers owners were acting as private proprietors, not as agents of the state, the First Amendment provided no protection to speakers seeking access to their property. As the Court explained, "while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself." Id. at 513.

In a constitutional regime providing parity among rights, one would assume that if there is no state action when a property owner, exercising his personal discretion, invokes state law to prevent a speaker from engaging in expressive activity on his property, there is also no state action if the state shifts its legal standard to protect the speech interests of the speaker rather than the property prerogatives of the owner. If a speaker, exercising his own discretion, invokes state law to provide him access to shopping center property for the purposes of engaging in expressive activity, an evenhanded application of state action standards would preclude the owner from asserting a Takings Clause claim based on this private invasion of his property. In both cases the state is merely permitting private conduct that interferes with constitutionally protected interests. In the former context, the property owner is allowed to silence the speaker and, in the latter context, the speaker is allowed to invade the owner's property. In this conflict between private speech and private property, state action should be equally absent regardless of the interest the state elects to protect against private abridgment.

But state action doctrine does not operate in this evenhanded way. When the California Supreme Court held as a matter of state constitutional law in *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), that speakers have the right to engage in expressive activity in private shopping centers, the shopping center owners' claim that such state authorized, but not compelled, invasions constituted a taking of their property was reviewed by the United States Supreme Court. Under the precedent of *Lloyd Corp.* and *Hudgens*, the owners' claim should have been dismissed

the Supreme Court does not purport to recognize it as such),[26] but it is largely irrelevant to our analysis. What this state action example illustrates is that property may not be such a "poor relation" to other rights after all and that property rights proponents should be grateful that property, at least on some occasions, is treated differently than protected liberty interests.[27] Indeed, this example also begins to demonstrate that demands based on the alleged greater protection provided to some rights in comparison to others may be a superficial and unhelpful way to talk about the level of protection that particular rights should receive.

II. DEFINING TAKINGS - THE PROBLEM OF PURPOSE AND EFFECT

Rights are defined in significant part by the Court's determination of what constitutes an infringement of the right.[28] In recent years, the Court has substantially reduced the protection provided to important personal liberty rights by insisting that certain rights are only abridged for constitutional purposes by deliberate governmental decisions intended to impermissibly burden the exercise of the right. The most dramatic and controversial example of this approach to defining rights is the truncated interpretation given the Free Exercise Clause in *Employment Division, Department of Human Resources of Oregon v. Smith*.[29]

Prior to the Court's decision in *Smith*, a religious individual could bring a free exercise claim against the state if the law at issue had the effect of interfering with the practitioner's ability to exercise her faith. Thus, the State of Wisconsin did not adopt compulsory education laws for high school students for the pur-

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because of a lack of state action. Instead, in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court decided the case on the merits and ruled that the permitted invasions were not sufficiently intrusive to establish a taking. Id. at 88. Despite the obvious fact that the lack of state action had been the controlling factor in those cases in which the state had favored property over speech, the Court in *Pruneyard* did not even address the question of state action in resolving petitioner's takings claims. As with procedural due process, state action parameters may limit free speech rights but are tempered or ignored when takings claims are asserted.

26. See Alan E. Brownstein and Stephen M. Hankins, *Pruning* Pruneyard*: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. Davis L. Rev. 1073, 1093-1105 (1991) (criticizing the Court's formalistic approach to state action and its failure to adequately explain decisions that deviate from this standard).

27. For the purpose of this comparative analysis, I argue that procedural due process rights should be understood to be a "liberty" right, see infra note 89.

28. See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 Hastings L.J. 867 (1994).

29. 494 U.S. 872 (1990).

pose of destroying the Amish community's ability to maintain their religious traditions, but the incidental impact of those laws were sufficiently burdensome to the Amish faith to justify a constitutionally mandated religious exemption from their application.[30] *Smith* transformed free exercise jurisprudence by holding that only laws that are purposefully directed at supressing a religious faith violate free exercise guarantees.[31]

Under this new constitutional regime, laws prohibiting the ingestion of drugs and alcoholic beverages might make it impossible for Jews to drink wine at the Passover seder, for Catholic priests to offer parishioners wine in the communion service, and for members of certain Native American faiths to use peyote as part of their religious rituals. Free exercise claims for religious exemptions would be dismissed in all of these situations despite the debilitating impact of these prohibitory laws on religious

30. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Smith*, the Court explained that *Yoder* had involved a "hybrid situation" where plaintiffs' free exercise claim was inextricably intertwined with their rights as parents. Because *Smith* involved "a free exercise claim unconnected with any communicative activity or parental right," the Court found it easily distinguishable from *Yoder*. *Smith*, 494 U.S. at 882.

31. *Smith*, 494 U.S. at 878. The analytical framework governing free exercise cases that the Court proposes in *Smith* focuses primarily on two kinds of laws, neutral laws of general applicability that incidentally interfere with religious practice and laws that prohibit acts "only when they are engaged in for religious reasons, or only because of the religious belief that they display." Id. at 877. According to the majority in *Smith*, the former laws fall outside of the protection provided by the Free Exercise Clause. The latter laws violate free exercise rights unless they can be justified under strict scrutiny. Id. at 885-90.

While the Court commits considerable effort to the task of explaining why neutral laws of general applicability should not be held to violate the Free Exercise Clause, it says almost nothing in the *Smith* opinion about why laws that prohibit acts "only when they are engaged in for religious reasons" are unconstitutional. Presumably, the Court believed that the constitutional impropriety of such laws was self-evident and required little justification. In any event, the Court does not state explicitly that it is distinguishing between laws that only incidentally affect religious practitioners and are, therefore, constitutional and laws that are purposefully directed at punishing or suppressing religious beliefs and are, therefore, invalid.

Despite the lack of any explicit description distinguishing laws that merely effect religious practices from those that are purposefully directed at religious activities, it should be clear that the *Smith* decision rests on just such a purpose and effect dichotomy. What makes a law directed exclusively at a religious practice constitutionally offensive, after all, is the fact that the law can have no purpose other than the suppression of the religion motivating the proscribed activity. The more general law that applies to an activity regardless of whether it is engaged in for religious or secular reasons is as burdensome to the religious practitioner as the narrow, discriminatory law. What makes the general law ostensibly more benign is that its effect on religious practice appears to be incidental and unintended rather than an act of deliberate hostility. See Brownstein, 45 Hastings L.J. at 933-35 (cited in note 28).

practices. Only the rare law that intentionally singled out one of these religious practices for suppression would be struck down.[32]

In a constitutional system that treats property rights as no more or less important than religious freedom, a similar restriction on the scope of the Takings Clause might be appropriate. That conclusion, however, would transform and significantly reduce the constitutional protection provided to private property. Pursuant to current doctrine, in almost all cases judges determine whether a "taking" has occurred by examining the effect of the challenged state action and almost nothing else. Thus, a law that has the effect of denying property owners any economically viable use of their land constitutes an unconstitutional taking, whether the legislative body adopting the law intended to bring about that result or not. The state need not deliberately single out particular property for the purpose of rendering it valueless for a taking to occur.[33]

Indeed, even very liberal Justices on the Supreme Court have made it clear that any attempt to restrict the scope of the Takings Clause to the deliberately intended confiscation of property rights is unacceptable. Justice Brennan, for example, argued that those who challenge the very idea of a regulatory taking

> implicitly posit the distinction that the government *intends* to take property through condemnation or physical invasion whereas it does not through police power regulations. . . But 'the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does.' . . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' . . . where the effects completely deprive the owner of all or most of his interest in the property.[34]

Brennan's refutation of the contention that regulations cannot take property because they are not intended to acquire the title of land or to physically occupy it is stated abstractly to establish the basic concept of a regulatory taking. The issue of legisla-

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32. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (holding that ordinance prohibiting ritual animal sacrifice was not of general applicability and thus impermissibly violated the Free Exercise Clause).

33. See infra note 37.

34. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652-53 (1981) (Brennan, J., dissenting). See also *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) ("As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*.").

tive purpose creates additional, more specific problems for takings claims, however, even if one accepts Brennan's argument that regulatory takings exist and are prohibited by the Constitution. In the context of a specific case, if only purposeful violations of fundamental rights are actionable, can a city be held liable for adopting a regulation that has the incidental effect of denying property owners any economically viable use of their land while trying to further a benign and clearly legitimate regulatory purpose?

The facts alleged in *MacDonald, Sommer & Frates v. Yolo County*[35] demonstrate the risk to property rights that an analogy between the Takings Clause and the Free Exercise Clause would entail. In *MacDonald*, petitioners owned 44 acres of unimproved land adjacent to the city of Davis, California which they hoped to subdivide and develop for residential housing. Petitioners' development plans were blocked, however, by local city and county decisions to preserve the subject property for agricultural uses. While much of the area surrounding Davis was restricted to and used for agricultural purposes, petitioners argued that their land could not be profitably utilized for farming. Under threat of condemnation, the topsoil on their parcel had been stripped away and used on nearby highway construction. Moreover, the remaining soil was infested with pests, and the property's proximity to nearby housing precluded the economically efficient use of pesticides to control this problem. Thus, petitioners claimed that the only use of their property they retained was "the 'right' to farm the Property at a loss."[36]

Petitioners' predicament in *MacDonald* may be uncommon, but it is hardly unique. General land use regulations that on their face allow property an economically viable use, but have the incidental effect of rendering certain parcels of land all but valueless, do not deliberately single out particular property for disadvantageous treatment.[37] They have the same relationship

35. 477 U.S. 340 (1986).

36. Appellant's Opening Brief at 6, id.

37. Some land use regulations, of course, might be successfully challenged on the grounds that they deliberately single out particular parcels and deprive them of any reasonable beneficial use. The effect of an ordinance requiring that land be left vacant to preserve "open space" in a community can hardly be described as an incidental consequence of regulation. In other circumstances, however, the owners are deprived of any reasonable beneficial use of their property because the unique characteristics of particular parcels of land make them unsuitable for the normally profitable uses permitted by applicable regulations. In *Annicelli v. Town of South Kingstown*, 463 A.2d 133 (R.I. 1983), for example, plaintiff's lot was zoned HFD (High Flood Danger) a short time after she purchased it. An HFD designation permitted several potentially profitable land uses including agriculture, commercial storage, and various recreational enterprises. The Rhode

between purpose and effect as a neutral law of general applicability that has the incidental impact of preventing religious individuals from practicing their faith. As such, if the protection provided property rights by the Takings Clause is reinterpreted to conform to the reasoning of the *Smith* case, property owners in circumstances similar to those alleged in *MacDonald* could no more raise a claim for just compensation for their losses than the

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Island Supreme Court concluded that plaintiff's property was "taken" because the size, location, and typography of her parcel rendered all of these uses impractical. Id. at 136, 141.

Similarly, in *City of Evansville v. Reis Tire Sales, Inc.*, 333 N.E.2d 800 (Ind. App. 1975), the enforcement of a single family residential zoning ordinance against a property owner was held to constitute a taking because the nature of the terrain in plaintiff's parcel (a large ravine ran through it) would cause construction costs to be so high that single family housing could not be developed profitably on the property. Id. at 802. See also *Fallini v. Hodel*, 725 F. Supp. 1113 (D. Nev. 1989), aff'd, 963 F.2d 275 (9th Cir. 1992) (holding that the Bureau of Land Management's cancellation of ground water site improvement permits constituted a taking under Fifth Amendment when cancellation increased wild horses' access to water); *City of Anderson v. Associated Furniture & Appliances, Inc.*, 423 N.E.2d 293 (Ind. 1981) (holding that denial of petition for amendment of zoning ordinance to commercial use constituted an unlawful taking when only reasonable use of land was commercial).

The fact that the burden on property owners in these cases were incidental consequences of facially legitimate land use regulations did not preclude judicial determinations that a taking of property had occurred.

Commonly, in cases of this kind, property owners will seek a variance or rezoning before they file suit. The denial of their petition for relief from unexpectedly onerous regulations by itself does not suggest as a constitutional matter that the city's actions were purposeful rather than incidental as to their impact on the subject property. There is nothing in the reasoning in *Smith* indicating that the legislature's refusal to grant an exemption from a law of general applicability to a religious group transforms the nature of the challenged law from a neutral rule to a discriminatory one.

It may be argued, however, that plaintiffs' showing of a pattern by the city of granting variances in similar situations alters the constitutional analysis. In *Smith* the Supreme Court distinguished *Sherbert v. Verner*, 374 U.S. 398 (1963), a case upholding a sabbatarian's right to receive unemployment compensation despite her refusal to work on her sabbath on free exercise grounds, because the unemployment commission denying plaintiff's benefits determined eligibility for compensation through a system of individualized assessments and exemptions. Under an analogous rational, a city that regularly granted variances from single family residential zoning requirements to owners seeking to develop their property for commercial uses might not be able to avoid constitutional scrutiny of their decisions by pointing to the general applicability of the underlying zoning requirements. See, e.g., *Metropolitan Bd. of Zoning Appeals of Marion County v. Sheehan Construction Co.*, 313 N.E.2d 78 (Ind. App. 1974) (explaining that the city's granting of numerous variances for commercial uses in area zoned for residential housing contributed to court's conclusion that restricting plaintiffs to residential uses denied them any reasonable beneficial use of their property).

Native Americans in *Smith* could invoke the Free Exercise Clause to protect their right to practice their religion.[38]

38. In an interesting, but ambiguous, exchange between Justice Stevens, in dissent, and Justice Scalia, the author of the majority opinion, in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), the relationship between takings doctrine and the Court's reasoning in *Employment Division v. Smith* is discussed at some length. Stevens criticizes the majority's conclusion that the Beachfront Management Act restricting the development of the petitioner's lots in *Lucas* constituted a taking because of the generality of the challenged statute and the large number of property owners affected by it. If a primary purpose of the Takings Clause is to prevent a small group of property owners from being forced to bear the costs of government that should be borne in fairness by the public as a whole, Stevens argues, a law that burdens a sufficiently large and general class of property owners cannot be a taking because the very breadth of its coverage insures that the costs it imposes are spread widely. *Lucas*, 112 S. Ct. at 2924 (Stevens, J., dissenting).

Stevens' basic argument about the generality of property regulations makes a valid and useful point. Certainly one of the reasons why taxes (which clearly take property in the form of currency from owners) are not routinely condemned as takings is the generality inherent in most tax statutes. Unfortunately, Stevens confuses this issue by referring to the *Smith* case as an example of the Court's concern about the need for generality in legislation. Id. at 2923 n.7. While both takings cases and *Smith* recognize the importance of the generality of legislation, they do so for different reasons. For takings purposes, the lack of generality of a law raises concerns about the law's effect. The critical issue is whether the impact of the law is being fairly allocated among those who benefit from it. For free exercise purposes, the lack of generality of a law that singles out the practices of a particular faith for suppression is problematic, not because of concerns about the law's effect (the law will often have a disproportionate impact on religious practitioners whether the law applies to non-believers or not), but rather because of suspicions about the law's purpose. It is difficult to imagine a non-invidious motive for a law that prohibits a practice only when it is preformed for religious purposes by the practitioners of a particular faith. See supra note 32.

Justice Scalia's response to Stevens' criticism is equally problematic, however. First, Scalia completely ignores the contention that a general law that spreads burdens fairly among a large group of property owners cannot constitute a taking because, by definition, it does not single out any person or group for unjustly disproportionate burdens. Second, Scalia seems to suggest that current takings doctrine is completely consistent with the reasoning of *Smith*. The correct "takings" analogy to a facially neutral law of general applicability that incidentally interferes with the practice of a religion, to Scalia, would be "a law that destroys the value of land without being aimed at land." *Lucas*, 112 S. Ct. at 2899 n.14. That kind of a generally applicable law might not constitute a taking, but any "regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions." Id.

It is hard to know what to make of this analysis or even to take it seriously. While the rationale for the Court's decision in *Smith* may be criticized because it overstates the problems inherent in subjective, value based balancing and understates the needs of religious minorities for constitutional protection against unintended interferences with their religious practices, the majority's concerns in *Smith* were at least intelligible. What possible rationale exists for distinguishing between laws directed at property and those that incidentally burden its use?

Moreover, Justice Scalia's argument distorts the meaning of the Takings Clause in several significant ways. The Takings Clause protects property, not simply land, against both physical and regulatory takings. Thus, Scalia's emphasis on real property in *Lucas* strangely narrows the scope of what the Takings Clause protects. See generally *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1572 n.32 (Fed. Cir. 1994), (describing range of property interests that Takings Clause protects). Conversely, however, Scalia's analysis also extends the scope of the Takings Clause beyond recognition. The Takings

An interpretation of the Takings Clause that limited its application to the intended consequences of state action, leaving all incidental impacts on property without constitutional remedy, would not only restrict the availability of regulatory taking claims. It would also preclude suits for just compensation based on incidental or unintended physical invasions or injuries. In the landmark case of *Pumpelly v. Green Bay Company*,[39] for exam-

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Clause has never been understood to protect the free use of property the way that the Free Exercise Clause protects the practice of religion. See, e.g., *Bowles v. United States*, 31 Fed. Cl. 37, 53 (1994) (noting that "the takings clause is not designed to limit governmental interference with property rights per se"). Instead, the clause prohibits a certain kind of government interference with property, state action that physically occupies or destroys property or, what represents the regulatory equivalent of an occupation, rendering property completely useless to its owner. A law that generally regulates most property, but incidentally destroys the value of certain parcels, is not directed to the taking of property.

Scalia's argument also seems to distort the very focus of the Takings Clause. It is not the institution or the physical embodiment of property that is protected by the Takings Clause. The clause protects the owners' interest in their property, the owners' distinct investment-backed expectations. Any law regulating the use of property that applies with equal force to owners and third parties who lack title or an investment-backed interest in the regulated goods is a law of general applicability for takings purposes since it governs those individuals whose interests are constitutionally recognized under the Takings Clause and those individuals whose uses of property would not be protected. A potential adverse possessor, ignored by the owner, would be prevented from constructing a beachfront house in South Carolina along with Mr. Lucas despite the fact that the possessor had no constitutionally protected interest in the land subject to regulation.

Finally, one can only wonder whether Justice Scalia, or any of the other Justices joining the majority opinion in *Lucas*, are truly prepared to allow the holding of *Lucas* to be circumvented by the enactment of laws that are not specifically directed at the use of land by property owners. Laws directed at avoiding environmental consequences, for example, such as regulations prohibiting all acts that adversely impact or harm an endangered species, or interfere with the availability of wetlands as a roosting area for migrating water fowl, or contribute to the erosion of beachfront, are rules of general applicability and may govern a variety of forms of behavior having little to do with the productive development of real property. See generally *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 63 U.S.L.W. 4665 (U.S. June 29, 1995) (holding that provision in Endangered Species Act using the term "harm" to define prohibition against the taking of wildlife applies to significant habitat modification or degradation as well as the direct killing of animals through hunting and other means); *Ballam v. United States*, 806 F.2d 1017, 1022 (Fed. Cir. 1986) (explaining that erosion on which plaintiffs grounded their takings claim "resulted directly and proximately from the acts of persons navigating vessels up and down the waterway, and generating waves therein"). Thus, if Justice Scalia's commitment to the reasoning of *Smith*, as it is defended in *Lucas*, is implemented as rigorously for regulations that incidentally interfere with the use of land as it is for regulations that incidentally interfere with free exercise rights, the protection provided to property rights by the *Lucas* decision will be significantly undermined. Indeed, the plaintiff in *Lucas*, himself, would have been denied just compensation under this analysis if South Carolina had prohibited him from constructing a house on his lot pursuant to a general law restricting any acts that cause beachfront erosion. As long as the regulation limited the use of boats on neighboring waterways as well as denying owners the use of their land, such a law would not be specifically directed at the use of land and, therefore, could not constitute a taking under Justice Scalia's reasoning.

39. 80 U.S. (13 Wall) 166 (1871).

ple, plaintiffs' land was flooded and rendered virtually valueless after the construction of a dam allegedly authorized by state statute. The Supreme Court concluded that plaintiffs deserved just compensation for their losses despite defendant's protests that the complained of effects were remote, consequential, and incidental to the state's legitimate exercise of its police powers to control navigable waterways.[40]

Since the Supreme Court's decision in *Pumpelly*, there have been a literal legion of cases in which the federal government has been held liable for a range of predictable and not so predictable consequences of dredging rivers and constructing dams or canals.[41] In the great majority of cases, the effects on land that are held to constitute a taking are obviously incidental to the government's objectives in the same sense that the impact of a general law on the ability of a minority faith to practice its religion is incidental to the government's goals in enacting the law. The state did not criminalize the use of peyote for the purpose of interfering with Native American religious rituals. Similarly, the government does not dredge rivers, build canals or construct dams for the purpose of eroding the banks of downstream property owners, flooding downstream property from water seeping under a dam, raising the ground water level in the area surrounding canals to inundate the root structure of nearby orchards, covering adjacent property with mud, silt, and salt water overflow from dredging deposits, or raising the water table and blocking drainage to create subterranean floods in local mining operations.[42]

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40. Id. at 181.

41. See, e.g., *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) (construction of government lock and dam permanently raised water level of river resulting in destruction of agricultural land); *King v. United States*, 427 F.2d 767 (Ct. Cl. 1970) (backwater effects of dam were underestimated by the government and plaintiff's land was permanently flooded); *Berenholz v. United States*, 1 Cl. Ct. 620 (1982), aff'd, 723 F.2d 68 (Fed. Cir. 1983) (government's repair of dike led to flooding and erosion of plaintiff's land).

42. See, e.g., *Owen v. United States*, 851 F.2d 1404 (Fed. Cir. 1988) (compensable taking found where dredging of river resulted in downstream erosion, eventually causing plaintiff's house to fall into river); *Pashley v. United States*, 156 F. Supp. 737, 738 (Ct. Cl. 1957) (taking found where plaintiff's land flooded even though "[e]very effort was made [by the government] to make the base of the dam watertight"); *L.L. Richard v. United States*, 282 F.2d 901 (Ct. Cl. 1960) (where construction and operation of a canal results in raised ground water levels, rendering plaintiff's land unsuitable for citrus tree orchard, just compensation is due); *Fonalledas v. United States*, 107 F. Supp. 1019 (Ct. Cl. 1952) (taking found where dredging of channel in a harbor resulted in plaintiff's land being buried under mud and silt); *Tri-State Materials Corp. v. United States*, 550 F.2d 1 (Ct. Cl. 1977) (taking found where dam caused rise in water table which impaired ease and profitability of plaintiff's gravel extracting business).

Nonetheless, the government is held liable for these and all other "natural and probable consequences" of its activities that permanently destroy the utility of property. As the Supreme Court explained in holding that the inevitable, but obviously undesired, erosion of property resulting from the construction of a dam constituted a taking, "If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking."[43]

Under an interpretation of the Takings Clause requiring the deliberate destruction of property as the predicate for receiving just compensation, *Pumpelly* and a host of other physical invasion or injury cases might well be decided in favor of the government defendants. It is difficult to understand why the incidental flooding and destruction of the use value of property adjacent to a dammed waterway should be distinguished from the construction of a public improvement that incidentally makes it impossible for the members of a religion to practice their faith by destroying sacred sites used for worship. If property rights receive the same protection provided to religious liberty, the economic use of land should receive no greater protection than the religious use of property. Both rights would only be protected against deliberately intended acts of abridgment.[44]

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43. *United States v. Dickinson*, 331 U.S. 745, 750 (1947).

44. The United States Supreme Court case that comes closest to illustrating this analogy is *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), a decision that foreshadowed and was cited favorably in *Smith*. *Lyng* involved a challenge to a forest service proposal to engage in logging around, and build a road through, sacred Indian religious sites located in a National Forest. The Court recognized that these government projects "could have devastating effects on traditional Indian religious practices." Id. at 451. Despite these consequences (surely the spiritual equivalent of being denied all economically viable uses of one's land), the Court rejected the Indians' free exercise claims. In sharp contrast to takings decisions, the Court held that the Free Exercise Clause "does not . . . imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." Id. at 450-51. The Court did suggest, however, that deliberate discrimination against religions "that treat particular physical sites as sacred" would violate the Constitutional protection provided religious freedom. Id. at 453.

The land at issue in *Lyng* belonged to the government, a fact the Court duly noted, but it is difficult to understand why federal ownership of the impacted property should be relevant to, much less dispositive of, the Court's decision. Indeed, in light of the Court's reasoning in *Lyng* and *Smith*, one must assume that the case would be decided the same way if plaintiffs sought to protect sacred Indian burial sites on private land from being submerged by incidental but foreseeable floods resulting from the construction of a federal dam on a navigable waterway. In either case, federal construction prerogatives would have to be limited in order to protect an individual's religious rights, a result that the Court is unwilling to accept. See generally *Thiry v. Carlson*, 887 F. Supp. 1407 (D.Kan. 1995) (holding that condemnation of private property containing gravesite of

Property rights proponents cannot hope to avoid the implications of a Takings Clause doctrine grounded on the purpose rather than the effect of government action by arguing that in many cases the government must certainly be aware of the potential impact of its actions and regulations on property owners even if the government does not explicitly desire to bring those consequences about. Such awareness, landowners might contend, should justify government responsibility for the natural and anticipated effect of state action whether that result was purposefully intended or not. As an abstract matter, of course, this argument has merit. In common law cases, and as a matter of common sense, one may plausibly contend that private persons (or state actors) who know with substantial certainty that adverse consequences will result from their conduct should be held to have intended those consequences for the purposes of determining legal liability for their actions.[45]

For constitutional purposes, however, neither the actual knowledge of government officials in foreseeing the results of their conduct, nor the fact that adverse consequences will directly and naturally follow state action, has been accepted as a substitute for the purposeful burdening of protected groups or interests. In equal protection cases, for example, the Court has made it clear that regulations resulting in the disproportionate burdening of suspect classes such as racial minorities or women are not unconstitutional unless plaintiffs can establish that the challenged

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religious significance to plaintiffs does not violate Free Exercise Clause because it involves a neutral law of general applicability not intended to target religious activity).

Indeed, since the Court's decision in *Smith*, several land use regulations have been challenged on free exercise grounds, but have been upheld as neutral laws of general applicability not directed at religious activity. See, e.g., *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th. Cir. 1991) (holding that neutral, generally applicable zoning law limiting churches in city's central business district cannot be subject to free exercise challenge unless plaintiff establishes that zoning law abridges "hybrid rights" involving additional protected interest); *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d. Cir. 1990) (upholding application of neutral, generally applicable, landmark preservation ordinance to church property against free exercise challenge despite resulting impact on church's religious charitable activities); *Grace Community Church v. Town of Bethel*, 1992 WL 174923 (Conn. Super. July 16, 1992) (holding that neutral, generally applicable land use regulation requiring a special use permit before church may be constructed in residential district does not violate Free Exercise Clause). But see *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (holding that city landmark preservation ordinance violates church's free exercise rights in that challenged law is not neutral and abridges hybrid rights of freedom of speech and freedom of religion).

45. See, e.g., *Garratt v. Dailey*, 279 P.2d 1091, 1093-94 (Wash. 1955) (citing the Restatement of Torts § 13a for the proposition that, for tort law purposes, defendants intend an act when they perform it for the purpose of bringing about an unconsented to contact or with substantial certainty that such a contact will occur).

laws were intended to serve a discriminatory purpose.[46] More importantly, the Court holds the legislature's recognition that a law necessarily will have a substantial discriminatory effect does not establish that this foreseeable effect is intended. Thus, in the Court's words, " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences; it implies that the decision maker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[47]

Under this analysis, in *Personnel Administrator of Massachusetts v. Feeney*,[48] the Court rejected an equal protection claim brought by women protesting the "absolute lifetime preference" Massachusetts provided to veterans in hiring civil service employees. Since the challenged preference ranked veterans above all other candidates with passing scores on civil service examinations, and 98% of veterans at the time of the lawsuit were male, the challenged system foreseeably produced "a gender-based civil service hierarchy, with women occupying low-grade clerical and secretarial jobs and men holding more responsible and remunerative positions."[49] The legislature's awareness of these predictable consequences of providing a veterans preference, however, did not establish purposeful gender discrimination without additional proof that Massachusetts was deliberately trying to "accomplish the collateral goal of keeping women in a stereotypic and predefined place in the . . . Civil Service."[50] Since plaintiffs lacked such direct proof of invidious motive, their claims could not be sustained.

If contemporary Takings Clause decisions reflected a similar analysis, property rights would be protected against purposeful invasions or purposeful regulations intended to deprive owners of all economically viable uses of their property, but not against unintended but clearly foreseeable consequences of government action. Only those construction activities engaged in (or land use regulations adopted) "because of" their adverse effect on land owners, not "in spite of" those results, would require the payment of just compensation to impacted owners. The current case

46. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

47. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 258 (1979).

48. 442 U.S. 256 (1979).

49. Id. at 285.

50. Id. at 279.

law which routinely insists on the payment of just compensation for undesired effects would be directly reversed.[51]

51. Two Supreme Court cases in the early 1920's appear to require some showing of governmental intent to acquire or damage nearby property before owners can recover just compensation for land destroyed as a consequence of the construction of public works projects. In the most explicit case, *J. Horstmann Co. v. United States*, 257 U.S. 138 (1921), the government created a system of canals to move water from one watershed to another as part of an irrigation project. In doing so, water unexpectedly seeped or percolated out of the canals in the new watershed causing a rise in lakes and groundwater that flooded the plaintiffs' property. The Court refused to find a taking, ostensibly on the grounds that the government did not intend for the flooding to occur. The case may be limited in its scope, however, in that the Court concluded that the effect on plaintiffs' property was totally unforeseeable and "it would border on the extreme to say that the government intended a taking by that which no human knowledge could even predict." Id. at 146.

In *Sanguinetti v. United States*, 264 U.S. 146 (1924), another flooding case, the Court also refers to the government's lack of intent to flood the plaintiff's property as a basis for denying just compensation. The core holding of *Sanguinetti* is particularly unclear, however, since the flooding on which plaintiffs based their claim was not only unintended, it was also unexpected and sporadic. (It did not permanently displace the owner, but merely periodically interfered with some of the uses to which the property might be put.) Further, plaintiffs' claim that the flooding was caused by the government's construction project was criticized as "conjectural" since the property in question had been subject to periodic flooding before construction of the project had commenced. Id. at 149-50.

Subsequent cases have made it clear that whatever lingering intent requirement may exist today, it has little to do with the question of whether the government wanted to bring about the flooding or other adverse impact on which property owner plaintiffs base their takings claim. Compare *Sheldon v. United States*, 7 F.3d 1022, 1031 (Fed. Cir. 1993) (concluding that "[w]hether the government had the intent" to take the property was not relevant where "the government's actions did destroy . . . and take the value [of plaintiff's property]"); *Barnes v. United States*, 538 F.2d 865, 871 (Ct. Cl. 1976) (noting that "plaintiffs need not allege or prove that defendant specifically intended to take property" as long as accumulation of excess sedimentation in river channel and subsequent flooding of plaintiffs' land was the natural consequence of dam construction by federal government); *Eyherabide v. United States*, 345 F.2d 565, 567 (Ct. Cl. 1965) (suggesting "[f]ederal law recognizes that, although there may be no official intention to acquire any property interest, certain governmental actions entail such an actual invasion of private property rights that a constitutional taking must be implied"); with *Miller v. United States*, 583 F.2d 857, 863-64 (6th Cir. 1978) (explaining that one of the factors courts have considered in determining if a flood caused by government construction project constitutes a "taking" is "an evaluation [of whether the submersion of plaintiffs' land] . . . was intended or contemplated by the Government as a necessary part of its plans"). See generally, *Poorbaugh v. United States*, 27 Fed. Cl. 628, 633 (1993) (noting "[f]or a taking to occur, there must be an intent on the part of defendant to take plaintiffs' property, or an intention to do an act the natural consequences of which was to take their property."); *Columbia Basin Orchard v. United States*, 132 F. Supp. 707 (Ct. Cl. 1955) (concluding that since government must intend to appropriate property for the use of the public for a taking to be found, unforeseeable contamination of plaintiff's orchard that may have been the result of government's negligence cannot constitute a taking).

If intent is required at all, it "can be implied from the facts" of the case. See, e.g., *Foster v. United States*, 607 F.2d 943, 950 (Ct. Cl. 1979); *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978). More importantly, to establish intent, "[t]he facts need only demonstrate that the invasion of property rights was the result of acts the natural and probable consequences of which were to effect [an invasion of plaintiffs' property]." *Berenholz v. United States*, 1 Cl. Ct. 620, 627 (1982), aff'd, 723 F.2d 68 (Fed. Cir. 1983). Indeed, many opinions explicitly reject an intent requirement or even a showing that the

Indeed, the analogy between equal protection and takings cases is an embarrassingly apt one in light of the abundance of language in takings cases suggesting that basic equality principles underlie Takings Clause decisions. The Takings Clause, we are repeatedly informed, exists primarily to prevent government from imposing discriminatory burdens on small groups of property owners instead of spreading those costs among the general public.[52] Accordingly, since the equal protection clause protects historically victimized minorities against purposeful discrimination, but not incidental harm, the Takings Clause might plausibly be interpreted to give property owners (who have not been historically disabled from using the political system to their advantage) no greater protection.[53]

III. JUSTIFYING THE INFRINGEMENT OF RIGHTS

For the most part, constitutionally protected rights are not absolute. Even the most aggressively protected interest such as freedom of speech and freedom of religion can be restricted if

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invasion of plaintiffs' land was foreseeable. See, e.g., *King v. United States*, 427 F.2d 767 (Ct. Cl. 1970) (concluding that owners of land submerged under lingering flood waters due to construction of a dam by Corps of Engineers suffered a compensable taking notwithstanding the fact that engineers underestimated backwater effect created by dam); *L.L. Richard v. United States*, 282 F.2d 901, 904 (Ct. Cl. 1960) (noting "[i]t is not even necessary for plaintiff to show that [the state] was aware . . . the taking of an interest in . . . property would naturally result from its acts."); *Cotton Land Co. v. United States*, 75 F. Supp. 232, 235 (Ct. Cl. 1948) (holding that plaintiffs need not prove "Government's agents were aware" their acts would result in a taking as long as the flooding of plaintiffs' property was natural, albeit attenuated, consequence of the construction of federal dams); *Bettini v. United States*, 4 Cl. Ct. 755, 760 (1984) (explaining that to recover just compensation for a taking, "[i]t is not necessary that the damage [to private property] be a collateral effect within the contemplation of the officials responsible for a government project").

Obviously, if the government is only obligated to pay just compensation for those consequences it deliberately sought to bring about, few, if any, of the property owners in the cases cited above could have recovered compensation for the taking of their land.

52. "One of the principle purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

53. The Takings Clause is not the only constitutional provision that limits unequal treatment and unfairness through an effects test, rather than the more limited prohibition against purposeful discrimination that defines equal protection and free exercise rights. Under the dormant Commerce Clause, for example, state regulations that have the effect of discriminating against or unreasonably burdening interstate commerce will be subjected to strict scrutiny and struck down, regardless of whether or not the challenged law was protectionist on its face or in its intent. See, e.g., *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994). Again, economic interests seem to be at least as well protected by the Constitution as their personal liberty counterparts.

the state can establish that it had a sufficiently strong reason for doing so.[54]

To be sure, the burden of justification placed on the state may be very high. In many cases, the Court applies strict scrutiny to laws that penalize the exercise of fundamental rights. A content or viewpoint discriminatory law that regulates speech, a law that substantially interferes with the right to marry, or a law that singles out and suppresses the religious practice of a particular faith will only be upheld if the state can demonstrate that the law is necessary to the furtherance of a compelling state interest. Few laws can withstand this level of review.[55]

Not all laws that interfere with the exercise of fundamental rights receive this kind of rigorous review, however. In the free speech area, for example, content neutral laws may substantially interfere with a speaker's expressive activity by restricting the time, place, and manner of speech. Yet many content neutral regulations of speech are often upheld under a multi-factor test that evaluates the importance of the state's interest, the availability of alternative avenues of expression, and the degree to which the state may be burdening substantially more speech than is necessary to advance the state's legitimate interests.[56] Similarly, certain categories of speech, such as commercial speech and offensive language, are lesser protected expression that may be regulated under a relatively lenient standard of review.[57] Finally some kinds of speech, notably obscenity and "fighting words" are unprotected by the First Amendment and may be prohibited by the state at its discretion.[58]

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54. See, e.g., *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding content discriminatory law prohibiting the distribution of political campaign material within 100 feet of the entrance of a polling place on election day); *United States v. Lee*, 455 U.S. 252, 254 (1982) (upholding "imposition of social security taxes [on members of the Amish religion] who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds.").

55. See, e.g., *Boos v. Barry*, 485 U.S. 312 (1988) (invalidating content discriminatory regulation of speech under strict scrutiny); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating law that penalizes the right to marry under strict scrutiny); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (striking down law violating free exercise rights under strict scrutiny).

56. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Frisby v. Schultz*, 487 U.S. 474 (1988). But see, *Boos v. Barry*, 485 U.S. 312 (1988) (invalidating regulation because it was found not to be content-neutral and state interest was not compelling enough to overcome this discrimination).

57. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Com'n*, 447 U.S. 557 (1980); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).

58. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

The contrast between the balancing of interests inherent in the review of laws that burden personal liberty rights and takings clause doctrine is extraordinary. There is one common ground. Certain uses of property are essentially unprotected by the Takings Clause just as certain categories of speech are unprotected under the First Amendment.[59] More specifically, any use of property that constitutes a common law nuisance falls outside of the coverage of the Takings Clause and may be prohibited by the state without the payment of just compensation.[60]

The similarity ends here, however. For all property that is constitutionally protected, essentially all uses of land other than those that constitute a common law nuisance, the Takings Clause is an absolute right. Any regulation or invasion of property that infringes the owner's property rights must result in the payment of just compensation. No governmental interest, however vital it may be to the public welfare, will outweigh an owner's right to maintain both the physical integrity and economic viability of his land. No governmental interest is sufficiently compelling to justify the taking of property without the payment of just compensation.[61]

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59. Obscenity is a classically recognized category of unprotected speech. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

60. See *Lucas*, 112 S. Ct. at 2899-902. To be more precise, the state may impose any limits on the use of land that are inherent "in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" without paying just compensation to the property owner. Id. at 2900. While limits of this kind that avoid Takings Clause constraints are most frequently recognized in the common law of nuisance, other background principles may also justify similar restrictions on land use. In *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), for example, the Oregon Supreme Court held that the doctrine of custom created a public right of access for recreational use on all dry sand beaches in the state. More importantly, custom constituted the kind of background principle of state law referred to by the Supreme Court in *Lucas* that allowed severe restrictions to be placed on the use of private land without the payment of just compensation.

The property owners petition for a writ of certiorari was denied in *Stevens*, 114 S. Ct. 1332 (1994) with Justices Scalia and O'Connor dissenting.

61. Building on some obscure and seldom implemented language in *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) suggesting that determining whether property has been taken "necessarily requires a weighing of private and public interests," some courts have advocated "judicial balancing" in takings decisions. See, e.g., *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). On closer analysis, however, it becomes clear that what such courts envision often is not really a balancing test in that the public good is never factored into the equation by weighing it against the burden on the property owner. Thus, in *Florida Rock*, for example, the Federal Circuit Court of Appeals explains that the analysis it endorses "should not be read to suggest that when Government acts in pursuit of an important public purpose, its actors are excused from liability." Id. at 1571. Rather, despite its references to "balancing," the court proposes a takings test that focuses exclusively on the impact of a law on the property owner, although it requires an evaluation of several factors. Under this ad hoc standard, courts would be concerned with whether the benefits of the challenged regulation are "general

Indeed, a comparison of conventional fundamental rights jurisprudence and Takings Clause decisions reveals an even more dramatic dissonance between property and personal liberty rights. Not only do courts refuse to balance the importance of the state's interest in regulating property against the owners' rights of use in determining whether the payment of just compensation is required, they actually reverse the traditional analysis. In determining whether a compensable taking has occurred, the courts view the benefits the public derives from regulating property, not as a justification for upholding a challenged regulation, but rather as evidence that supports the owner's demand for compensation. Thus, courts contend that the greater the benefit to the public welfare resulting from a land use regulation that interferes with the owner's use of his property, the more appro-

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and widely shared through the community and the society, while the costs are focused on a few" and whether there are "direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment." Id. Whatever the merits or drawbacks of the *Florida Rock* approach may be, it certainly does not involve a balancing test.

The great majority of courts make it clear that no matter how important the government's goals may be, they cannot outweigh the constitutional obligation to pay just compensation when property is taken for the public good. The irrelevance of the state's objective is the same whether a physical taking or a regulatory taking is at issue. In either case, public needs do not justify infringing property rights. See, e.g., *Lucas*, 112 S. Ct. at 2899 (arguing that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (insisting that "when the 'character of the governmental action' . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 (Fed. Cir. 1994) (recognizing that "[t]here can be no doubt today that every effort must be made individually and collectively to protect our natural heritage, and to pass it to future generations unspoiled" but by virtue of the Takings Clause "the cost of obtaining that public benefit" cannot be imposed on specific property owners); *Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991) (holding that the "Government's need in the interest of public health and safety to monitor . . . ground water contamination" cannot justify locating ground water wells and related equipment on plaintiffs' land without the payment of just compensation); *Maine National Bank v. United States*, 31 Fed. Cl. 626, 635 (1994), appeal granted, 42 F.3d 1409 (Fed. Cir. 1994) (noting that takings do occur even when the taking is done for the benefit of the public); *Dooley v. Town Plan and Zoning Comm'n of the Town of Fairfield*, 197 A.2d 770, 773 (Conn. 1964) (concluding that although the objective of city in changing zoning in area to flood plain district "is a laudable one and although we have no reason to doubt the high purpose of their action, these factors cannot overcome constitutional principles"); *Morris County Land Improvement Co. v. Township of Parsippany - Troy Hills*, 193 A.2d 232, 241 (N.J. 1963) (noting that regulation designating plaintiffs' property as a flood water detention basin serves "laudable public purposes," but "such factors cannot cure basic unconstitutionality").

priate it is to insist that the public pay landowners for any loss of value they experience.[62]

By renovating Takings Clause doctrine to make property rights more analogous to personal liberty rights, the immunity of property rights to governmental justifications for taking land could be reduced or even eliminated. A wide range of governmental interests have been accepted as justifying the regulation of speech, religion, and privacy and autonomy rights. It is not difficult to imagine how those same interests or analogous governmental goals might be construed to permit the taking of property without the payment of just compensation.[63]

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62. See, e.g., *Yancy v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990) (explaining that government quarantine of poultry to avoid spread of disease, resulting in substantial losses to poultry farmers, constitutes a taking on the grounds that "[i]f the intent of the poultry quarantine was to benefit the public, the public should be responsible for [property owners'] losses"); *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 176 (1985), rev'd in part on other grounds, 791 F.2d 893 (Fed. Cir. 1986) (noting that "courts do not view the public's interest in environmental and aesthetic values as a servitude upon all property, but as a public benefit that is widely shared and therefore must be paid for by all"); *Annicelli v. Town of South Kingstown*, 463 A.2d 133, 140 (R.I. 1983) (holding that compensation must be provided to owners subject to challenged land use regulation because "the overall purpose of the ordinance in question is to benefit the public welfare by protecting vital natural resources, here barrier beaches, and preserving them for posterity"); *State v. R.B. Johnson*, 265 A.2d 711, 716 (Me. 1970) (concluding that wetlands preservation law constitutes a taking because "[t]he benefits from [the preservation of wetlands] extend beyond town limits and are state-wide," and, therefore, "the cost of its preservation should be publicly borne").

63. In *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), for example, plaintiffs argued that the government's construction of the Glen Canyon Dam had resulted in the flooding of a spring, prayer site and cave "of central importance" to the religion of Navajo people living in the area. While conceding that the plaintiffs' lack of an ownership interest in the property at issue was not dispositive of their free exercise claim, the court held that the state's interest in maintaining the water and power project outweighed plaintiffs' right to the free exercise of their religion. Thus, in this pre-*Smith* free exercise case, flooding caused by federal construction projects will outweigh and justify the abridgement of free exercise rights, but it cannot outweigh or justify the abridgement of property rights without the payment of just compensation. Similarly, in *Denver Urban Renewal Authority v. Pillar of Fire*, 552 P.2d 23 (Colo. 1976), the court held that the state interest in urban renewal outweighed plaintiffs' free exercise rights and justified the condemnation of a church building even if the building was of unique significance to plaintiffs' religion.

See, also *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (holding that aesthetic goals justify prohibition against posting signs on utility poles); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (declaring that noise control objective outweighs free speech rights of musicians); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (holding that residential tranquility justifies restrictions on use of loud speakers); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (finding that aesthetics and traffic safety concerns support regulation of signs); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (regulating the location of an adult movie theatre by the city is permissible to promote quality of urban life).

IV. IDENTIFYING THE INFRINGEMENT OF PROPERTY AND PERSONAL LIBERTY RIGHTS

An anticipated response to the contention that property rights, unlike personal liberty interests, cannot be outweighed by important state interests might suggest that the inviolability of property rights against state takings is appropriate in light of the infrequency of judicial findings that a taking has occurred in the first place. While minor burdens on an individual's freedom of speech or freedom of religion or personal privacy might be recognized as infringing a constitutional right, a regulatory taking is predicated on a finding that the owner has been deprived of *any* economically viable use of her property. Given the magnitude of the burden that must be demonstrated to establish an infringement of property rights, it is hardly surprising that once a taking is determined to exist, it cannot be easily balanced away.

The argument has some merit, but it is not precisely on point. Even substantial burdens on personal liberty interests may be justified in appropriate circumstances. A total ban on certain forms of expressive activity may be upheld against first amendment challenge, for example.[64] There seems little logic in arguing that since both minor and substantial burdens on personal liberty interests will *only* be upheld if they are outweighed by sufficiently important state interests, substantial burdens on property rights should *never* be upheld without the payment of compensation because in many cases minor interferences with property rights receive no constitutional protection whatsoever. If it is true that minor infringements of personal liberty are rigorously scrutinized while minor burdens on property are ignored, that still does not explain why significant burdens on property rights can never be justified by compelling state interests. At best this comparison simply suggests that in at least one context, involving relatively minor infringments on rights, there is something to be gained by treating property rights the same way that we treat personal liberty interests.

Moreover, on closer analysis the disparate treatment of minor burdens on property and personal liberty rights may not be that obvious or extreme. First, with regard to physical takings, minor burdens are recognized as takings even if there is virtually no diminution in the value of the invaded property. In *Loretto v.*

64. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding a ban on residential picketing); *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding a ban on the posting of signs on utility poles).

Teleprompter Manhatten CATV Corp.,[65] for example, the installation of a small cable box on the roof of an apartment building was held to be a taking. Defendant's arguments that the property owner's claim " 'consists entirely of insisting that some negligible unoccupied space remain unoccupied' "[66] and that the availability of cable service " 'likely increases both the building's resale value and its attractiveness on the rental market' "[67] were dismissed as only relevant to the amount of compensation due the owner, not to the question of whether a taking had occurred.

Second, regulatory takings are sometimes found despite the fact that the subject property may retain considerable market value. The interference with plaintiffs' property must be substantial to establish a regulatory taking, but it need not involve the total elimination of the property's value.[68]

Third, and most importantly, not all liberty rights are generously protected against governmental burdens. Indeed, in some cases the Court has insisted that only the most substantial interference with the exercise of a right will invoke judicial review of an alleged infringement. The most obvious example of the limited protection provided to certain personal liberty rights under current case law is the analysis of the right to have an abortion as it is described in the joint opinion by Justices Kennedy, O'Connor, and Souter in *Planned Parenthood v. Casey*.[69]

In *Casey*, the plurality opinion interpreted the right of privacy to protect women from only those regulations that unduly burdened their decision to terminate a pregnancy. An undue burden was defined as "shorthand for the conclusion that a state

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65. 458 U.S. 419 (1982).

66. Id. at 438 n.15 (quoting state court of appeals decision, 53 N.Y.2d 124, 141 (1981), 440 N.Y.S.2d 843, 851 (1981), 423 N.E.2d 320, 328 (1981)).

67. Id.

68. See, e.g., *Lucas*, 112 S. Ct. at 2895 n.8 (rejecting the "assumption that the landowner whose deprivation is one step short of complete is [always] not entitled to compensation"); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (arguing that a regulatory taking may occur even though property owners have not been denied all economically viable uses of their property); *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990) (concluding that government quarantine that led owner of breeder turkey flock to slaughter turkeys for market and lose 75% of their value constituted a taking); *City of Anderson v. Associated Furniture & Appliances, Inc.*, 433 N.E.2d 293 296-97 (Ind. 1981) (holding that letter from real estate appraiser indicating the most desirable and logical use for property is commercial, not residential, and that land would be worth 15 times as much if zoned commercial is sufficient evidence to establish that city's failure to rezone property for commercial use constitutes a taking).

69. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). For an analysis of other rights that are only protected against substantial infringements, see Alan E. Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 Hastings L.J. 867 (1994).

regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[70] In applying this standard the plurality demonstrated that regulations that increase the cost of having an abortion, that delay the time at which an abortion might be obtained, that result in women being subjected to additional psychological distress, or that increase the health risks of having an abortion for certain women are not necessarily undue burdens.[71]

The grounding of an infringement on the right to have an abortion in *Casey* on the substantial nature of the state's interference with the exercise of that right suggests an obvious parallel between the protection provided property rights and the protection provided at least certain personal liberty interests. Indeed, while takings opinions do not use the term "undue burden" explicitly, they do strongly suggest that only excessive government regulations that "go too far" in restricting the owners' use of their property will violate the constitution.[72] This conceptual link between the idea of an "undue" burden in *Casey* and the excessive regulation of real property condemned in recent takings decisions demonstrates an already existing fungibility of treatment between property and certain personal liberty interests in the case law.[73] Certainly, it belies the notion that infringements of private property rights are always much less likely to be recognized as requiring constitutional scrutiny than are burdens on personal liberty rights.

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70. *Casey*, 112 S. Ct. at 2820.

71. For example, the plurality opinion upheld Pennsylvania's 24 hour waiting period requirement despite the district court's findings that this regulation would have the effect of " 'increasing the cost and risk of delay of abortions.' " Id. at 2825.

72. This "goes too far" language, which originated in Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), has been repeated regularly in takings cases, most recently in *Lucas*, 112 S. Ct. at 2893.

73. The language used by courts to describe the magnitude of effect that will constitute a taking often parallels the plurality's description of an undue burden in *Casey*. See, e.g., *Skaw v. United States*, 740 F.2d 932, 939 (Fed. Cir. 1984) (explaining that in reviewing a takings claim, "the heart of the inquiry is whether the governmental action is so onerous as to constitute a Fifth Amendment taking"); *Benenson v. United States*, 548 F.2d. 939, 949 (Ct. Cl. 1977) (noting that a regulation constitutes a taking if it is unacceptably "extensive, restrictive, and burdensome"); *Eyherabide v. United States*, 345 F.2d 565, 567 (Ct. Cl. 1965) (suggesting that "[t]he interference with use or possession may be so substantial and of such a character that it cannot be done without compensation") *Poorbaugh v. United States*, 27 Fed. Cl. 628, 633 (1993) (holding that "[b]ecause plaintiffs' allegations do not show a direct and substantial interference with their property rights," plaintiffs' takings claim must fail).

V. PROTECTING SETTLED EXPECTATIONS AND PROMOTING FAIRNESS

Supreme Court case law has repeatedly suggested that the Takings Clause is grounded on two basic principles: a commitment to justice and fairness in allocating the costs of government among the citizens of a community[74] and an equally strong belief in the importance of protecting the settled expectations of individuals engaged in productive undertakings.[75] The two principles are not completely distinct, of course. They overlap to some extent.

While the protection of settled expectations may primarily serve utilitarian goals by creating the kind of stable and predictable regulatory environment that motivates work and investment, there is a fairness dimension to this objective as well. It seems fundamentally unfair to allow government to change the rules in the middle of the game after important reliance interests have developed under the previous legal regime.[76] But the protection of settled expectations by itself only promotes one form of regulatory fairness. Takings doctrine also seeks some just equilibrium between those who receive the benefits of public programs and those who are asked to bear the costs of governmental activities.[77]

The exact way in which the Takings Clause operates to protect settled expectations, however, has been far less clear than the language in judicial opinions purporting to support this concern. In *Pennsylvania Central Transp. Co. v. City of New York*,[78] for example, the Court listed "the extent to which the regulation has interfered with distinct investment-backed expectations" as one of the relevant factors it would consider in determining

74. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960) to affirm that a principal purpose of the Takings Clause is to promote "fairness and justice" in the allocation of public burdens); *Lucas*, 112 S. Ct. at 2894 (explaining that Court's determination that denying owners all economically viable uses of their land constitutes a taking is grounded on recognition that losses of such severity are less likely to involve " 'adjusting the benefits and burdens of economic life' . . . in a manner that secures an 'average reciprocity of advantage' to everyone concerned").

75. See *Lucas*, 112 S. Ct. at 2899 (describing how Court's "takings jurisprudence" has traditionally recognized the importance of protecting property owner's expectations); id. at 2903 (Kennedy, J., concurring) (noting that the "Takings Clause . . . protects private expectations to ensure private investment").

76. See generally Frank I. Michelman, *Property Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

77. See *Lucas*, 112 S. Ct. at 2894.

78. 438 U.S. 104 (1978).

whether or not a regulation takes property.[79] Nonetheless, in *Penn Central,* New York's denial of the owners' application to construct an office tower over a railroad terminal was upheld on the grounds that the city's action did not interfere with the owners' "primary expectation"[80] regarding the use of their land, its continued profitable operation as a railroad terminal.

Owner expectations received more substantial protection in *Kaiser Aetna v. United States*,[81] a case involving the dredging of a channel between a private pond and navigable waterways for the purpose of constructing an expensive private marina on the pond's border. Petitioners engaged in this massive construction project with the apparent acquiescence of the Army Corp of Engineers only to be told at its conclusion that by connecting the pond to a navigable waterway they had transformed the status of their property. Since the site of the marina now fronted on a navigable waterway it could no longer be maintained as an exclusively private enterprise and was subject to a right of access by the general public.[82]

The Court rejected the Corps of Engineers' claim of a right of public access to the marina. While the status of the marina may have been uncertain as a formal matter after the dredging was completed,[83] the Court concluded that the government, through the Corps of Engineers' actions, had engendered reasonable expectations on the part of the owners that the marina they constructed would be reserved for the private benefit of the owners. "While the consent of individual officers representing the United States cannot 'estop' the United States," the Court explained, "it can lead to the fruition of a number of expectancies . . . that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property."[84]

The more recent case of *Lucas v. South Carolina Coastal Council*[85] enshrines the protection of landowner expectations to

79. Id. at 124.
80. Id. at 136.
81. 444 U.S. 164 (1979).
82. Id. at 167-68.
83. Id. at 170.
84. Id. at 179. See also *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d 402, 406 (6th Cir. 1984), vacated on ripeness grounds, 473 U.S. 172 (1985) (explaining that even if property owner did not have "a vested right under state law to finish the [proposed] development, its claim that a taking occurred would not necessarily be foreclosed . . . [if the developer] had a reasonable expectation that the development could be completed" in light of the Planning Commission's earlier decisions).
85. 112 S. Ct. 2886 (1992).

an even greater degree. After noting that " 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property,"[86] the Court concluded as a general matter that certain expectations were inherent in our constitutional culture. Without regard to whether or not the state has engaged in actions that engender such an expectation (the predicate for the Court's conclusion in *Kaiser Aetna*), all landowners have the protected expectation that the state will not deprive them of all economically viable uses of their property.[87] The only circumstances in which owners might be held to reasonably expect that their land could be so restricted in its use as to render it valueless would be those situations when state law justified restrictions of comparable severity under the common law to abate a private or public nuisance.[88]

The Takings Clause is not the only constitutional provision that purports to protect the reasonable expectations of individuals, however. Several personal liberty rights are grounded at least in part on the relationship between the protection of reasonable expectations and reliance interests and basic principles of fairness and justice. Since property rights proponents seek to bring Takings Clause doctrine more in line with the protection provided personal liberty interests, one presumes that such advocates believe that this sought after alignment will increase the Court's respect for the reasonable investment expectations of landowners. Once again, however, the allegedly preferential treatment provided personal liberty interests seems sadly overstated.

Procedural due process rights, for example, may be usefully compared to takings doctrine on this issue.[89] The liberty and property interests protected against deprivation without due pro-

86. Id. at 2899.
87. Id. at 2895.
88. Id. at 2900-01.
89. Since procedural due process rights protect both property and liberty interests, it may be argued that this right is not properly characterized as a personal liberty right. Accordingly, analogies between takings doctrine and procedural due process rights are inapposite for the purposes of this article in that two kinds of constitutional protection provided to property are being compared to each other. There is not enough of a liberty component to procedural due process to justify contrasting it with the Takings Clause.

There is a sense in which this criticism is justified. On balance, however, I believe that procedural due process rights are sufficiently grounded on a commitment to personal liberty to allow a property and liberty right comparison. Indeed, this personal liberty dimension to procedural due process exists even when the Due Process Clause is invoked to challenge a deprivation of what the Court refers to as "property".

cess are also defined in part by individual expectations and personal reliance interests.[90] While an individual's unilateral aspirations to receiving governmental largess do not fall within the coverage of the due process clause, reasonable expectations of continued employment or eligibility for other benefits has

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The contention that procedural due process is grounded on a personal liberty foundation rests on two premises. First, many of the alleged "new property" interests at issue in due process cases seem to be hybrid interests despite the fact that they may be designated by the Court as either property or liberty. The right to one's reputation and good name, see, e.g., *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the right to a driver's license, see, e.g., *Bell v. Burson*, 402 U.S. 535 (1971), and the right to continued employment, see, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976), all have characteristics that may justify their classification as either liberty or property. That the Court may choose to categorize each of these interests as either property or liberty in its cases does not diminish their uncertain nature and the extent to which they resist formal classification. Indeed, the Court has explicitly recognized that the due process "analysis as to liberty parallels the accepted due process analysis as to property" and that due process protection applies with equal force "even when the liberty itself is a statutory creation of the State." See *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (applying due process to disciplinary action of state prison authorities that results in inmate's forfeiture of state created good time credits).

Second, and most importantly, there is an intrinsic as well as an instrumental dimension to procedural due process rights. What the Constitution provides is a liberty right of individuals to be engaged in the process by which the state determines whether they will be deprived of valued interests. In Professor Tribe's words,

> [A due process] hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one.

Laurence H. Tribe, *American Constitutional Law*, § 10-7, at 666 (The Foundation Press, Inc., 2d ed. 1988).

While Tribe concedes that the current Court has regularly ignored the dignitary aspect of procedural due process and focused on the instrumental function of process rights, id. at 668-78, the participatory value of due process cannot be avoided even by a court committed to an instrumentalist approach. The right to be heard will always mean more than the right not to suffer an unjustified deprivation.

90. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (explaining that " 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms . . . [but rather denote] a broad range of interests that are secured by 'existing rules and understandings' " on which individuals reasonably rely); *Wolff*, 418 U.S. at 557 (noting that "the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him [to minimal due process]"). Indeed, the similarity between the protection of property provided by the Takings Clause and the protection of property and liberty interests provided by procedural due process requirements is so clear that some justices on the Court referred to deprivations invoking due process as "takings." See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 186 (1974) (White, J., concurring in part and dissenting in part) (inquiring whether a hearing is required "before any 'taking' of the employee's property interest in his job occurs").

been recognized as constituting "new property" on which people regularly rely "in their daily lives."[91]

Despite these ostensible similarities as to basic principles, it is clear that an individual's reasonable expectations receive far less protection in procedural due process cases than they do in takings decisions. Consider the Court's analysis in *Bishop v. Wood*,[92] a seminal procedural due process case decided three years prior to the *Kaiser Aetna* case discussed previously. Petitioner in *Bishop* was initially hired as a probationary police officer. After six months service, he became a permanent employee. A city ordinance stated that "[i]f a permanent employee fails to preform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to preform his duties, he may be dismissed by the City Manager."[93] Petitioner was fired two years after becoming a permanent employee without being provided a hearing to challenge the grounds for his dismissal.

The Supreme Court held that the petitioner in *Bishop* had not been deprived of a liberty or property interest without due process. The Court conceded that the ordinance on which petitioner relied might "fairly be read" to guarantee him continued employment subject only to his dismissal for cause.[94] Despite the ostensible reasonableness of petitioner's expectation of continued employment, the Court determined that petitioner's claim for even minimal due process was foreclosed by the ruling of the district court below. The federal district court, without the benefit of any authoritative interpretation of the ordinance at issue by a state court, had concluded on a motion for summary judgment that, as a formal matter of state law, petitioner " 'held his position at the will and pleasure of the city' " and as such could be fired at the city manager's discretion.[95] Without an entitlement to continued employment, petitioner's claim to a due process hearing could not be sustained.

The Court's reasoning in *Bishop* stands in stark contrast to the takings analysis it endorsed in *Kaiser Aetna*. For takings clause purposes, in *Kaiser Aetna* the uncertain formal status of

91. See, e.g., *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (arguing that for procedural due process purposes, "[i]t is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined").

92. 426 U.S. 341 (1976).

93. Id. at 344.

94. Id. at 345.

95. Id.

plaintiffs' property was largely ignored in light of the reasonable expectations engendered in the owners by the Army Corps of Engineers. When procedural due process rights were at issue in *Bishop*, however, the petitioner's reasonable expectations were entirely disregarded and the Court deferred to an attenuated, formal interpretation of state law.

Justice Brennan essentially made the argument in dissent in *Bishop* that the Court would later accept so willingly in *Kaiser Aetna*. Surely, Brennan argued,

> before a state law is definitively construed as not securing a "property" interest, the relevant inquiry is whether it was objectively reasonable for the employee to believe he could rely on continued employment. . . . At a minimum, this would require in this case an analysis of the common practices utilized and the expectations generated by [the city], and the manner in which the local ordinance would reasonably be read by [the city's] employees.[96]

The majority's response to this argument was to cavalierly reject what it described as Brennan's "remarkably innovative suggestion that we develop a federal common law of property rights."[97] Had this approach been carried over and applied to

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96. Id. at 353-54 (Brennan, J., dissenting).

97. Id. at 350. Since the Court's decision in *Bishop*, lower courts have regularly and consistently ignored the actual and reasonable expectations of employees and licensees in determining whether a protected property interest exists for procedural due process purposes. The only relevant issue for the courts has been whether employees have a valid entitlement to continue employment as a formal matter of state law. See, e.g., *Gregory v. Hunt*, 24 F.3d 781 (6th Cir. 1994) (holding that despite language in Personnel Manual and Employee Handbook and other factors arguably creating a subjective belief that petitioner could only be discharged for cause, under written policy of university petitioner has no protected property interest in continued employment); *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49 (1st Cir. 1990) (explaining that notwithstanding letter of engagement hiring plaintiff and seven years of unblemished service, according to state regulations plaintiff has no protected expectation of continued employment); *Wofford v. Glynn Brunswick Memorial Hospital*, 864 F.2d 117 (11th Cir. 1989) (concluding that at-will employees without written contracts cannot rely on internally administrated policies from employer's personnel manual to establish legitimate claim of entitlement to continued employment); *Neuwirth, D.D.S. v. Louisiana State Board of Dentistry*, 845 F.2d 553 (5th Cir. 1988) (determining that the use of the term "may" in licensing statute renders Board of Dentistry licensing decisions discretionary judgements that do not create protected entitlements without regard to other language of statute and common understanding of licensing framework); *Evans v. City of Dallas*, 861 F.2d 846, 850 (5th Cir. 1988) (interpreting language in personnel manual indicating that probationary employees may be discharged at any time but that "[n]evertheless, valid reasons must exist for such discharge" as not creating a guarantee of continued employment subject to dismissal for cause); *Cannon v. Beckville Independent School Dist.*, 709 F.2d 9 (5th Cir. 1983) (determining that vote of School Board to extend superintendent's contract did not create a protected expectation of continued employment since formal contract was never executed); *Bleeker v. Dukakis*, 665 F.2d 401, 403 (1st Cir. 1981) (suggesting that even if "oral contract of em-

takings clause jurisprudence, the marina owners in *Kaiser Aetna* would have been told to their dismay that the expectations engendered by the Army Corps of Engineers were irrelevant to their property rights claims. As a technical matter, if connecting their private pond to a navigable waterway altered the legal nature of their property, the formal status of the marina, not the reasonable expectations of the owners, would determine whether they could exclude the public from their new facility.[98]

Of course, a result in *Kaiser Aetna* that required the marina owners to open their new facility to the public would not only have ignored the legitimate expectations of the property owners, it would also have been profoundly unfair. This concern for basic fairness that motivates takings decisions such as *Kaiser Aetna* is also lacking in procedural due process cases involving the rights of public employees. In place of the "fairness and justice" to be afforded property owners whose reliance interests are protected by takings decisions, public employees seeking an opportunity to be heard before they are terminated without a hearing on the basis of allegedly false allegations are told that they "must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration" of government affairs.[99]

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ployment incorporated certain written 'Personnel Policies' " that provided employee with a right to a warning and an opportunity to correct unsatisfactory performance, such provisions are not sufficient to create a protected property interest); *Bates v. State of Wisconsin*, 823 F. Supp. 633, 641 (E.D. Wis. 1993) (holding that "unwritten, informal understanding" cannot create protected interest notwithstanding affidavits establishing common practice on which employee relied); *St. George v. Mak*, 842 F. Supp. 625, 629 (D. Conn. 1993) (noting that " 'mutually explicit understandings' " between employer and employee cannot create a protected interest in continued employment when they are contrary to regulations and statutes); *King v. Lensink*, 720 F. Supp. 236 (D. Conn. 1989) (explaining that employee supervisor's representation that employee would not be removed without cause does not guarantee continued employment if representation is inconsistent with authorizing statutes).

98. Perhaps the most extraordinary example of judicial unwillingness to allow a protected interest to be inferred from the reasonable expectations of an employee occurred in *Baden, M.D. v. Koch*, 638 F.2d 486 (2d Cir. 1980). In *Baden*, a provision of New York City's civil service law stated that employees in the plaintiff's position could only be fired for cause. The city's notice for civil service examinations for the position described it in similar terms. The Official Directory of the City of New York affirmed this description of plaintiff's tenure. Various articles in the New York Times confirmed this understanding. Even the Mayor of New York, who terminated the plaintiff from his position, interpreted the relevant legal framework as creating a permanent job with tenure. Id. at 488-89. Yet the Second Circuit concluded that plaintiff did not have a protected interest in continued employment in light of the court's interpretation of a city charter provision that arguably indicated that plaintiff served at the will of the Mayor. Id. at 493. Significantly, the court could not even reach a consensus on the panel as to the meaning of the purportedly dispositive charter provision with one member of the panel, Judge Mansfield, vigorously dissenting and challenging the majority's interpretation. Id. at 493-96 (Mansfield J., dissenting).

99. *Bishop*, 426 U.S. at 345-50.

The protection provided by the Fourth Amendment against unreasonable searches and seizures is also grounded on the expectations of the individual, in this case the individual's reasonable expectations of privacy.[100] As noted, the Court in *Lucas* concluded that landowners, at a minimum, have protected investment expectations rooted in our constitutional culture that their property will not be rendered valueless by state regulation. The only exception to the primacy of this expectation is the recognition that property rights are inherently subject to common law nuisance principles.[101]

It is difficult to envision a comparable commitment to an individual's expectations of privacy under contemporary Fourth Amendment holdings. Indeed, whatever expectations of privacy citizens once may have believed to be part of their constitutional heritage, those expectations have been thoroughly shredded by recent cases. The cases in this area are legion, but a few examples will suffice to make the obvious point.

A property owner, for example, does not have a reasonable expectation of privacy in the interior of a locked, windowless barn fifty yards from his boundary line which was surrounded by multiple exterior and interior fences, two of which used barbed wire. (Heavy mesh netting over the barn door could be seen through but only by jumping up and pressing one's face against it.)[102] Reasonable expections of privacy also do not exist in secluded land protected by locked gates and no trespassing signs.[103] Bank depositors also have no expectations of privacy with regard to bank deposits,[104] nor does anyone have an expectation of privacy as to the telephone numbers they call[105] or in material they throw out in their garbage.[106] Home owners also have no reasonable expectation of privacy against aerial surveillance of their backyards despite a six foot high outer fence and a ten foot inner fence surrounding the property.[107] Even large corporations, despite extensive security precautions, have no expectation of privacy with regard to property located between buildings made visible through aerial surveillance using magnification.[108]

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100. See *Katz v. United States*, 389 U.S. 347 (1967).
101. See supra note 88 and accompanying text.
102. *United States v. Dunn*, 480 U.S. 294 (1987).
103. *Maine v. Thornton*, 466 U.S. 170 (1984).
104. See *United States v. Miller*, 425 U.S. 435 (1976); *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974).
105. *Smith v. Maryland*, 442 U.S. 735 (1979).
106. *California v. Greenwood*, 486 U.S. 35 (1988).
107. *California v. Ciraola*, 476 U.S. 207 (1986).
108. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

The theme of these Fourth Amendment cases seems clear. Reasonable expectations of privacy do not depend on whether the government's statements or conduct provide individuals with any basis for anticipating unorthodox government surveillance of private activities. Rather, individuals must recognize that the abstract possibility that any third party might somehow be able to scrutinize their actions or property will render them vulnerable to government searches.[109]

If the distinct investment backed expectations of landowners received comparable treatment, it is hard to believe that numerous takings cases would continue to be resolved in favor of the property owner. Certainly, in a constitutional regime in which the abstract possibility of a helicopter hovering several hundred feet over one's property defeats an individual's reasonable expectations of privacy, the claim of the farmer whose property was damaged by the sonic booms of aircraft flying overhead in *U.S. v. Causby*[110] would have had a dubious claim to protected expectations and just compensation. Similarly, the landlord in *Loretto v. Teleprompter Manhatten CATV Corp.* who purchased her apartment building with the invading cable box of the cable television company already installed on her roof[111] would have difficulty

109. See *Florida v. Riley*, 488 U.S. 445 (1989) (arguing in plurality opinion that mere fact that members of the public might lawfully fly a helicopter 400 feet over petitioner's property establishes that petitioner had no reasonable expectation of privacy from aerial surveillance).

110. See *United States v. Causby*, 328 U.S. 256 (1946) (holding that effect of low flying government aircraft using route approved by Civil Aeronautics Authority over plaintiff's farm constitutes taking).

111. 458 U.S. 419, 421-22 (1982). Determining the plaintiff landlord's reasonable investment backed expectations in *Loretto* is muddled by the complexity of the facts surrounding her purchase of the apartment building on which the "invading" cable box was located. Plaintiff purchased the building in 1971 at which time the cable box and a variety of cables had already been installed on the building pursuant to an arrangement with the building's previous owner. At this time, however, cable service was not being provided to any of the building's tenants.

At the time the building was purchased, the cable company offered landlords five percent of the gross revenues obtained by providing cable service to a building's tenants in return for the landlord's permission to install cable equipment on a building. This arrangement changed in 1973 when the state legislature passed a law prohibiting landlords from preventing the installation of cable equipment and sharply reducing the amount that cable companies were required to pay for the privilege of installing their equipment. One can imagine a situation in which a new landlord was aware that cable equipment had been installed at the time she purchased the building but did not protest that invasion because she assumed she would receive five percent of the revenue earned by the cable company. When the law changed and the payment offered by the cable company was substantially reduced, the landlord might plausibly argue that her distinct investment backed expectations were impaired. Her argument would be premised on the assumption that a reduction in the payment provided as compensation for a physical invasion of her property had the same status for Takings Clause purposes as a new or additional, unexpected invasion of her property.

establishing a compensable taking if her property rights and investment backed expectations received no greater protection than personal liberty and privacy interests are provided under the Fourth Amendment.[112]

Whatever the merits of this assumption may be, it is of limited relevance to Mrs. Loretto's takings claim. Since she was not aware of the existence of the cable boxes at the time of the building's purchase, id. at 424, she cannot easily claim that she relied on receiving five percent of the gross revenue earned by the cable company in deciding to purchase the building. Her claim would have to be based on the contention that the bare existence of the cable boxes on the building's roof defeated her investment backed expectations despite the fact that she had not even noticed them being there, notwithstanding several inspections of the property, until some time after her purchase of the building. Id. at 443 n.2 (Blackmun, J., dissenting).

112. To be sure, the courts have been inconsistent in the degree to which they protect the investment-backed expectations of property owners. In some cases, typically not involving real property, the mere fact that property was to be used in an already heavily regulated industry was a sufficient basis for ruling that none of the owners' expectations of profitable use were justified. See, e.g., *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 122-25 (1974). But see *Colorado Springs Production Credit Assoc. v. Farm Credit Administration*, 967 F.2d 648, 656 (D.C. Cir. 1992) (expressing uncertainty as to how to apply Supreme Court's suggestion "that doing business in a regulated field might reduce an enterprise's reasonable expectation of noninterference" in takings cases in light of pervasiveness of governmental regulation).

In other cases, however, the courts refused to engage in abstract evaluations of what owners should have expected and protected the owners' investment-backed expectations as long as no obvious threat of regulatory interference with the use of property had been brought to their attention. See, e.g., *Maine National Bank v. United States*, 31 Fed. Cl. 626, 634 (1994), appeal granted, 29 Fed. Cl. 606 (1993) (explaining that "[e]ven in a heavily regulated industry, a claimant's waiver of rights is limited to what . . . the property owners's reasonable, real-world expectations are when the property was acquired."); *Bowles v. United States*, 31 Fed. Cl. 37, 51 (1994) (noting that plaintiff did not have a reasonable expectation that his property was under the Corps of Engineers jurisdiction because nothing had been done to "red flag" that possibility and bring it to his attention).

Courts are particularly likely to ignore the significance of on-going and substantial regulation of an industry in evaluating owner expectations when plaintiffs can identify specific government conduct that led to the development of their investment-backed expectations. See, e.g., *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) (explaining that in light of approval of mining company's leases by the Secretary of the Interior, and its compliance with all applicable regulations, company had reasonable investment-backed expectations that it would be allowed to mine area it had leased); *A. A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), (holding that after adoption of zoning resolution on which plaintiff had explicitly relied in acquiring and developing property, rezoning of land to obstruct development constituted a taking); *Cienega Gardens v. United States*, 33 Fed. Cl. 196, 222 (1995) (noting that while plaintiffs operated in a highly regulated field, their prepayment expectations "based on express language contained in their deed of trust notes and authorized by HUD" were reasonable and protected by the Takings Clause if investment-backed); *NRG Co. v. United States*, 24 Cl. Ct. 51 (1991) (concluding that sale of prospecting permits with Bureau of Indian Affairs approval created reasonable investment-backed expectation that permits would not be cancelled by legislation).

VI. JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT: LIMITING JUDICIAL VALUES AND SUBJECTIVITY IN THE ENFORCEMENT OF RIGHTS

In addition to disputes involving specific cases and doctrine, there has been considerable discussion in the case law and commentary regarding more abstract questions of constitutional interpretation. At the risk of oversimplifying an obviously complex set of issues, one framework of interpretation commonly discussed might be described as a model of judicial restraint. Four principles of interpretation characterize this approach. First, whenever it is possible to do so, rights should be defined to conform to the original understanding of their nature recognized by the framers and ratifiers of the Constitution.[113] Thus, for example, since executing criminals was commonly accepted as a legitimate form of punishment at the end of the eighteenth century, under an original intent analysis, the cruel and unusual punishment clause of the Eighth Amendment should not be interpreted to prohibit the death penalty.[114]

Second, judicial subjectivity in applying standards of review to enforce rights should be reduced as much as possible. Generic balancing tests, particularly balancing tests without clear guidelines as to what is to be balanced and how weights are to be assigned, should be avoided. Balancing tests are problematic because they produce unpredictable and inconsistent results. More importantly, because of their inherent subjectivity, they invite the incorporation of the judges' own values into constitutional interpretation and, thereby, politicize the judicial function.[115] Perhaps the most dramatic illustration of this concern about balancing, judicial values and subjectivity in the recent case law, and the one that has been most vigorously

113. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

114. See *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (noting "[i]t is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.").

115. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (explaining that judicial restraint is furthered by the adoption of rules that constrain judges from deciding cases based on their own "political or policy preferences" as opposed to balancing tests which permit judges "to announce that, 'on balance,' we think the law was violated here—leaving ourselves free to say in the next case that, 'on balance,' it was not"); Constitutional Law Conference, 60 U.S.L.W. 2253, 2263 (U.S. Oct. 22, 1991) (summarizing commentator's analysis of Justice Scalia's belief "that the means by which judicial decisions are arrived at under balancing tests and the like destroys the Constitution as a document of law, and makes it a policy vehicle"); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992).

criticized, is the Court's decision in *Employment Division v. Smith*.[116]

In *Smith*, the Court drastically reduced the protection the Free Exercise Clause provided to religious minorities by limiting the application of this constitutional provision to only those laws that deliberately and exclusively burden religious practices. Neutral laws of general applicability cannot violate the Free Exercise Clause under this analysis regardless of how debilitating they may be to the ability of individuals to obey the tenets of their faith. The Court recognized the burden this holding would impose on religious minorities, but defended its conclusion despite the resulting costs as clearly preferable to a system "in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[117]

The Court's aversion to judicial balancing is reflected in free speech cases as well as freedom of religion decisions. In *Ward v. Rock Against Racism*,[118] for example, the Court revised the standard of review it applied to content neutral regulations of speech in a way that precluded lower courts from balancing the increased effectiveness of a challenged regulation against the added burden the regulation imposed on expression. In approving a less restrictive alternative standard, the Court determined that as long as the government only restricts speech that contributes to the problem the state is attempting to resolve, and as long as the regulation adopted advances the government's interest more effectively than a less burdensome alternative, a content neutral law must be upheld. Judicial attempts to balance marginal gains in furthering the state's interests against substantial burdens on targeted expression are no longer part of the first amendment calculus.[119]

Third, the judicial restraint model is respectful of federalism concerns. The uniformity in governmental decisionmaking that inherently results from the extended application of constitutional standards undermines the states' role as laboratories of democ-

116. 494 U.S. 872 (1990). See, e.g., Sullivan, 106 Harv. L. Rev. at 84-86 (cited in note 115) (noting that to avoid the "arbitrary, subjective, and manipulable standards" inherent in balancing free exercise claims against state interests, the Court was willing to "deconstitutionalize the issue and remit it to politics by allocating it to the deferential tier of rationality review"); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 30-39 (criticizing the Court's concerns about balancing in *Smith*).

117. *Smith*, 494 U.S. at 890. The Court also exclaimed, "[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." Id. at 889 n.5.

118. 491 U.S. 781 (1989).

119. Id. at 798.

racy that may freely experiment with creative solutions to social problems.[120] The "dispersion of governmental power across a federal system" constitutes an effective bulwark against state oppression[121] that is undermined by an overly expansive interpretation of the procedural and substantive rights protected by the Constitution.

Fourth, and finally, a commitment to judicial restraint recognizes the primacy of political decisionmaking in a democracy and the secondary role of non-elected judges. Judicial decisions applying constitutional principles displace the people's judgment regarding the laws that govern society. The laws enacted by democratic representatives may not be wise. Indeed, they may be egregiously unfair and hurtful. Nonetheless, the appropriate response to such legislation should be political accountability, not judicial usurpation of the legislature's prerogatives.[122]

Principles of judicial restraint are not always recognized by the Court and used to limit the scope of personal liberty rights. They are being applied with increasing frequency, however, as the limitations on personal liberty interests described above

120. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) (arguing that "[i]n interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history."); *Duncan v. Louisiana*, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting) (challenging the Court's incorporation of the right to a jury trial on the grounds that varying conditions among the states support a more permissive constitutional framework that allows for state experimentation with criminal procedure); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 87 (1981) (Burger, C.J., dissenting) (noting that "[t]he towns and villages of this Nation are not, and should not be, forced into a mold cast by this Court."); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (upholding intestate succession statute that classifies on the basis of legitimacy against equal protection challenge in part because the task of arranging for the orderly disposition of property at death " 'is a matter particularly within the competence of the individual States' "); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (upholding dispersal zoning ordinance that requires separation of adult movie theatres against first amendment challenge in part because "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) (noting that " '[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action' ").

121. See *Duncan*, 391 U.S. at 173 (Harlan, J., dissenting).

122. See generally William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976); *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) (arguing that the function of balancing the dangers created by subversive expression against free speech rights is more appropriately performed by the legislature rather than the courts); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 443 (1985) (refusing to hold that mental retardation is a "quasi-suspect" classification because the problem of determining how the mentally retarded are to be treated under the law is "very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary").

demonstrate with unmistakable clarity.[123] If property rights are governed by the same principles of judicial restraint that are applied to, or advocated for, personal liberty interests in the aforementioned examples and others, a strong case can be made that the scope of Takings Clause protection would be significantly reduced.

This article is not the appropriate place to even attempt to describe and evaluate the extensive scholarship that exists purporting to recount the original understanding of the Takings Clause. Commentary can be cited that defends both a narrow and an expansive meaning of this provision.[124] What is clear, however, is that none of the Court's decisions expansively defining the Takings Clause are grounded on an historical or originalist analysis. Indeed, the Court has taken the exact opposite position. In the *Lucas* case, Justice Scalia's majority opinion provides an astonishingly non-originalist response to the pages of historical analysis presented by Justice Blackmun, in dissent, as a challenge to the majority's position on regulatory takings.[125]

Blackmun's argument that the protection provided to property rights by the majority's holding in *Lucas* "is not supported by early American experience" is all but discarded with the stark comment that this contention "is largely true, but entirely irrelevant."[126] The understanding of property and land use regulation

123. Of course, on some occasions judicial restraint principles are in conflict with each other. On those occasions, however, the principle that most narrowly circumscribes the personal liberty interest at issue seems to be dominant. The *Smith* decision, for example involved a conflict between a commitment to originalism and resistance to subjective, value based balancing. Originalism lost and free exercise rights against laws of general applicability were repudiated. See, e.g., Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. Rev. 259, 260 (1993) (criticizing Justice Scalia's decision in *Smith* on the grounds that it "totally ignores both the text and history of the Free Exercise Clause"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990).

124. Compare Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. Rev. 531 (1995) (arguing that though current Supreme Court doctrine has textual roots, there is much in Supreme Court jurisprudence that is not consistent with that text); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995) (asserting that modern takings jurisprudence has essentially ignored the original understanding of the Takings Clause); with Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995) (arguing that twentieth century Supreme Court doctrine, including takings, can be read in a way that is consistent with the text of the Constitution); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630 (1988) (asserting that the constitutional protection intended by the framers for property has not disintegrated, it is simply misunderstood).

125. See *Lucas*, 112 S. Ct. at 2914-17 (Blackmun, J., dissenting).

126. Id. at 2900 n.15.

in America at the time of the Constitution's ratification has no relevance to the Court's understanding of the Takings Clause today because the historical practices of some states, from Justice Scalia's perspective, were inconsistent with any "plausible interpretation" of the Takings Clause.[127] Scalia concedes that "Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all."[128] This historical evidence is also ignored on the grounds that it would be inconsistent with the Court's contrary conclusion in *Pennsylvania Coal v. Mahon*,[129] the pre-eminent regulatory takings case decided by the Court in 1922.

Thus, as a matter of judicial decisionmaking, the Takings Clause appears to be immune from the kind of original intent analysis that has been used to limit the scope of personal liberty interests. Accordingly, any attempt to reformulate takings doctrine to be consistent with the treatment of personal liberty rights would have to reflect the boundaries, currently ignored, that are imposed by a philosophy of judicial restraint. Those parameters may well restrict the scope of current takings clause doctrine. Indeed, the very concept of a regulatory taking requiring the payment of just compensation might be in jeopardy.[130]

If judicial restraint also counsels against the adoption of standardless, subjective balancing tests and discourages using the personal values and policy judgements of judges to give meaning to ambiguous constitutional provisions, then recent takings cases are clear examples of judicial activism and are of uncertain validity. For when property rights are at issue, judicial restraint concerns about the personal values of judges, balancing and activism seem to fall by the wayside. In the *Lucas* case, for example, the Court faced a difficult, line-drawing problem. States claimed the power to prohibit the harmful use of private property without paying just compensation to the owners. The Court recognized that an exception of this kind to conventional Takings Clause guarantees was historically grounded in precedent and could not be avoided in practical terms.[131] The problem to be addressed was how to limit the scope of this exception so that it would not be used abusively to undercut legitimate claims to just compensa-

127. Id.

128. Id.

129. 260 U.S. 393 (1922). See *Lucas*, 112 S. Ct. at 2900 n.15 (arguing that the historical evidence is inconsistent with *Mahon*).

130. See *Lucas*, 112 S. Ct. at 2914-17 (Blackmun, J., dissenting) and sources cited therein.

131. See *Lucas*, 112 S. Ct. at 2896-99.

tion by owners whose property uses could not reasonably be described as harmful to the public.[132]

It is difficult to imagine any solution to this dilemma that would not involve some judicial discretion. A commitment to judicial restraint, however, obviously required an answer that respected the legislature's role in determining what uses of property are unacceptably harmful to society. Instead, the *Lucas* Court concluded that the prerogative of deciding what uses of property are so harmful that they may be prohibited without the payment of just compensation rests exclusively on state court judges and their interpretations of common law nuisance doctrine. The legislature is to have no role whatsoever in evaluating property based harms. For constitutional purposes, the inherent limits on the use of property that define the parameters of what constitutes a taking would be controlled by state law. But they would be controlled exclusively by *judge made* state law.[133] The same judges who were constitutionally incapable of balancing claims for religious exemption against the public interest under United State Supreme Court supervision have the unrestricted ability to balance private rights of property against the public good in setting out the parameters of takings decisions. Again, the irony could not be more awkward, since few common law areas are as explicitly grounded on policy based balancing as is nuisance law.[134]

When religious freedom was the right at issue, concerns about balancing imponderables and value based decisions led the Court in *Smith* to drastically minimize the protection provided by the Free Exercise Clause to religious minorities. By deliberately directing claims for religious exemptions from laws of general applicability to the legislative arena, the Court could not help but recognize that legislators would be confronted with the same kind of value based, balancing problems that the judiciary had experienced in deciding free exercise cases. The task could not

132. Id. at 2899 (noting that if "the legislature's recitation of a noxious-use justification . . . for departing from our categorical rule that total regulatory takings must be compensated" was a sufficient basis for negating the just compensation requirement, "departure would virtually always be allowed").

133. Id. at 2899-2902. In contrast to Justice Scalia's contention that only common law nuisance principles will be recognized by the Court as establishing the kind of harm prevention regulations that might justify rendering property entirely valueless, Justice Kennedy, in his concurring opinion, explicitly recognized that the legislature also has a role in identifying unacceptably harmful uses of property. Id. at 2903 (Kennedy, J., concurring).

134. See, e.g., *Florida Rock Industries Inc. v. United States*, 18 F.3d 1560, 1565 n.10 (Fed. Cir. 1994) (explaining that "[a] nuisance defense, by definition, incorporates a degree of balancing."); Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 Va. L. Rev. 1299 (1977).

be avoided, but a commitment to judicial restraint required that the job be assigned to the legislature rather than the judiciary even if that divestiture of judicial responsibility resulted in a significant substantive curtailment of the scope of free exercise rights.[135] If property rights and personal liberty rights such as religious freedom are to receive comparable constitutional protection, then property rights also cannot be shielded against majoritarian insensitivity by standards of review that are dependent on value based judicial balancing. Like religious minorities, property owners must turn to the legislature to preform the balancing of interests that the protection of their rights requires.

Judicial restraint concerns about subjective balancing were similarly ignored in another recent takings decision, *Dolan v. City of Tigard*.[136] *Dolan* scrutinized municipal demands for public easements and land dedications that are commonly imposed on property owners as a condition to the city's granting them the permits they need to develop their property. Cities argue that the easements and dedications they seek are necessary to either mitigate, or compensate the community for, the externalities increased development creates. Property owners, in turn, typically protest that municipal demands far exceed any burdens their proposed development could impose on the public. The owners in *Dolan* sought protection against various conditional requirements of this kind under the Takings Clause.[137]

The Court's response to the landowner's claims in *Dolan* was to require judges to balance the externalities caused by developments against municipal dedication demands. In explaining the "rough proportionality" standard of review the Takings Clause required, the Court explained, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[138] If this proportionality analysis is intended to be applied with any degree of rigor, however, it is difficult to imagine a test that would more directly involve the courts in continuous, value based balancing of public and private interests.

If a new subdivision results in the construction of 1000 new homes in a community, for example, the federal courts will now

135. See *Smith*, 494 U.S.872, 890 (1990) (recognizing that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in").

136. 114 S. Ct. 2309 (1994).

137. Id. at 2313-17; id. at 2324-26 (Stevens, J., dissenting).

138. Id. at 2319-20.

have the responsibility of estimating the environmental, social, and economic consequences of the project, and, even more problematically, will also have to determine what would constitute fair mitigation and compensation for the impact of the development on the existing community. Unless previously undisclosed language in the Constitution provides courts information about the appropriate size, nature and location of parks, schools, transportation arteries, open space, pollution controls and other public goods that service communities, judges applying *Dolan's* proportionality test are going to be repeatedly using their own or someone's policy judgments and values in determining whether or not a taking has occurred. By comparison, religious minorities, after *Smith*, can only wonder why judges competent enough to apply the *Dolan* test cannot similarly decide whether the burden a law of general applicability imposes on an individual's religious practice is even "roughly proportional" to the meager benefits society may receive by insisting that a challenged law be enforced against religious dissenters without exception.

The two remaining principles of judicial restraint, a respect for federalism and local control, and a preference for decision-making by accountable elected representatives rather than appointed judges, also suggest that current takings clause doctrine is at least as activist, if not more so, than the case law implementing many personal liberty rights. Land use regulation is an intrinsically local and state concern.[139] Moreover, public policy regarding the kinds of dedication requirements imposed on landowners and developers will necessarily vary by state and locality. A state that stringently limits local taxation, as California does after the passage of Proposition 13,[140] may develop an entirely different regulatory framework for the development of property

139. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) (agreeing with the majority that "zoning is a complex and important function of the State," perhaps "the most essential function performed by local government," and that, accordingly, "deference should be given to governmental judgments concerning proper land-use allocation"); *Midkiff v. Tom*, 702 F.2d 788, 808-09 (9th Cir. 1983) (Ferguson, J., dissenting) (arguing that "[i]ssues concerning land use within a state" are part of the basic responsibilities of state governments in a federalist system because they "depend on facts and circumstances that will vary from state to state").

140. See generally *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). Oregon is another example. See generally Oregon Law Institute, Oregon Local Government Law 12-19-12-31 (Oregon Law Institute, 1993) (describing the provisions of Measure 5, a constitutional amendment limiting property tax rates approved in 1990); *Dolan v. Tigard*, 317 Or. 110, 129, 854 P.2d 437, 448 (1993), rev'd, 114 S. Ct. 2309 (1994) (Peterson J., dissenting) (noting that "The temptation, particularly in times of limited tax revenues, is to place the primary burden for funding projects on the shoulders of those whose private property happens to be in the neighborhood of the proposed projects . . .").

than will a state with a different tax structure. The *Dolan* decision itself described the rich diversity among the states regarding the legal treatment of dedication conditions.[141] Yet without even an acknowledgement of federalism concerns, the Court imposed a nationally uniform standard on every state and locality in the country.

Recent takings cases are similarly inconsistent with a basic commitment to political and legislative responsibility. Justice Kennedy's concurrence in *Lucas* demonstrates the narrow rigidity of the majority's holding that only judges can be trusted to establish the background principles on which property rights are to be grounded. "The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society," Kennedy explained. "The State should not be prevented from enacting new regulatory initiatives in response to changing conditions . . . ."[142] Certainly, the same concerns for legislative primacy that are urged as the basis for restricting the scope of personal liberty rights would support a broader role for the legislature in identifying harmful uses of property that can be prohibited without the payment of compensation than the Court was willing to recognize in *Lucas*. Once again, equalizing the treatment of personal liberty and property rights by restricting both under the rubric of judicial restraint should result in a curtailment of the constitutional protection provided private property.

CONCLUSION

The purpose of this essay is not to argue that the current protection of property provided by the Takings Clause is too generous or expansive. Obviously, despite the expansion of takings doctrine in recent cases, government conduct and regulations may still substantially interfere with uses of property and result in significant losses to property owners that need not be compensated under current constitutional standards. It is equally obvious, however, that recent Takings Clause decisions may significantly interfere with the ability of government to further important public policy goals, particularly with regard to environmental legislation. The appropriate balance to be drawn between publics needs and private property rights is a subject worthy of careful discussion, but it must be the focus of some other article, not this one.

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141. See *Dolan*, 114 S. Ct. at 2318-2319.
142. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring).

The thesis of this article is simply that property rights are not the poor, neglected second cousins of personal liberty rights. In relative terms, in a variety of circumstances, property receives favorable, or at least roughly equivalent, treatment in comparison to the protection provided personal liberty rights such as freedom of religion, freedom of speech, equal protection rights or procedural due process. Any attempt to demand that the rules, standards and principles of interpretation that are applied to personal liberty rights must be enforced with equal, although thoughtless, rigor when takings cases are decided is at least as likely to result in the undermining of property right guarantees as it is to significantly increase the constitutional protection of property. Indeed, the direction of the case law seems to clearly favor property as opposed to personal liberty and equality interests. Recent cases such as *Lucas* and *Dolan* extend the rigor and scope of Takings Clause doctrine while cases such as *Casey* and *Smith*, for example, directly reduce the protection provided abortion rights and freedom of religion. The day will arrive shortly, if it is not already here, when advocates of personal liberty rights will be demanding the same level of constitutional protection for those interests as is currently provided property.

Both arguments, however, miss an essential point about the nature of rights. The range of interests recognized and protected as rights by the constitutional case law is too broad and the nature of those interests is too varied for rights to be protected under any one set of universal principles. Doctrinal analogies are helpful if they are used as a basis for evaluation and discussion. They can assist courts and attorneys in understanding and explaining why various rights are defined in certain ways and are reviewed under particular standards. Taken as a justification for determining constitutional doctrine without further inquiry and discussion, however, analogies among rights imply a false commonality of what the Constitution protects. More critically, they substitute rhetoric for analysis and conclusions for argument.

Justice Rehnquist may or may not have been correct, in *Dolan*, in extending unconstitutional conditions doctrine to protect property owners against arguably unfair dedication demands imposed upon them by land use regulators. He certainly cannot justify that conclusion, however, by arguing that the Takings Clause is as much a part of the Bill of Rights as the First and Fourth Amendments. The characteristics of property as a right that justify the distinct treatment it receives with regard to so many doctrinal rules requires more of an explanation than this

bare assertion. Ultimately, the only truly universal principle that applies to all constitutional rights is the need to define and defend the protection provided the right in its own terms.