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Laura S. Underkuffler
Cornell Law School, lu27@cornell.edu

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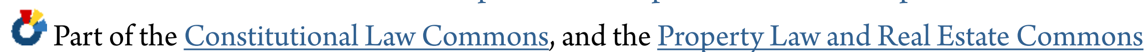
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Recommended Citation
Underkuffler, Laura S., "Property: A Special Right" (1996). *Cornell Law Faculty Publications.* Paper 576.
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RESPONSES

Property: A Special Right

*Laura S. Underkuffler-Freund**

I. Introduction

In *Property as the Keystone Right?*,[1] Professor Carol Rose examines the claim that the protection of property is an important—indeed, the *most* important—right conferred by our constitutional order.[2] Although the equality of property rights with other constitutionally protected rights occasionally has been questioned,[3] such instances are far outweighed by instances of rhetorical insistence upon the bedrock nature of individual property rights for our constitutional and democratic order.[4] With the recent collapse of statist economies in other parts of the world, and the attempted transformation of those economies into market-driven, capitalist systems, the American idea of constitutional protection of individual property rights has been exported along with other ideas believed to be fundamental to the creation and maintenance of a liberal democratic order. As one prominent commentator recently wrote, "[t]he right kind of constitution could play an important role in fueling economic development and democratic reform; indeed, under current conditions, it may be indispensable to them."[5] Central to that "right kind of constitution" is the protection of property rights, which "creates the kind of security that is indispensable to genuine citizenship in a democracy."[6]

In her article, Professor Rose questions whether property deserves this exalted place in our constitutional ordering. She examines, with great facility and biting analysis, all of the reasons traditionally advanced for the entrenched place of constitutional protection for individual property rights. The arguments that she examines are familiar, and until we read her critiques they seem obviously—perhaps even tautologically—true. The protection of property is special—the protection of property is "the keystone right"—because it makes individuals independent and, thus, capable of self-government. It provides individual security and, in the process, diffuses political power. It creates and protects material wealth and prosperity, necessary preconditions for social civility, social stability, and the maintenance of democratic governance.[7]

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* Professor, Duke University School of Law.

1 Carol M. Rose, *Property as the Keystone Right?*, 71 Notre Dame L. Rev. 329 (1996).

2 *Id.* at 333.

3 *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); *see also* Rose, *supra* note 1, at 331-32.

4 *See* Rose, *supra* note 1, at 330-33.

5 Cass R. Sunstein, *On Property and Constitutionalism*, 14 Cardozo L. Rev. 907, 907 (1993).

6 *Id.* at 908.

7 *See* Rose, *supra* note 1 *passim*.

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Professor Rose questions whether any of these arguments truly establishes the right to property as "not simply important but rather *the most important* right in a liberal constitutional order."[8] Upon examination, many of these arguments are found to contain internal, logical flaws.[9] In addition, the claim that property has primacy because it is foundational, or the "guardian of every other right," fails to explain other constitutional phenomena, such as our apparent need to independently insulate (by constitutional guarantee) other important individual rights from majoritarian trampling.[10] If the security of property accomplishes so much—if it creates wealth, diffuses political power, and so on—why, after property is secured, don't we trust the majoritarian political process to determine the rest?

In the end, Professor Rose concludes that property may have special importance, but in a way not usually argued. Property's specialness may lie in its value as an educative institution. What it takes to maintain a property regime—qualities of cooperation, attentiveness to others, responsibility, and self-reliance—is also what it takes to maintain self-government.[11]

Professor Rose's insight is intriguing. We rarely recognize the human qualities involved in maintaining property regimes, let alone their influence on other social or political behavior. The idea that the importance of property rights in our constitutional scheme may be rooted in the educative function of property regimes is an interesting and novel proposition.

In this essay, I shall agree that the protection of property is a special right. I shall disagree, however, with the conventional conclusion that because of its special nature, property is entitled to particularly rigorous protection.[12] Rather, I shall argue that although the common *idea* of property may, by its nature, be the most absolute of rights, the *institution* of property must, by its nature, be the most compromised. The special characteristics of property, which I shall identify, demand this result. They demand that property protection be given a far more complex—and contingent—interpretation than other constitutionally protected rights.

II. The American Constitutional Idea of Property

Property has been described as a "man-made institution which creates and maintains certain relations" among people.[13] It is our conclusion that—to some extent and under particular circumstances—an individual or group has a morally, legally, or otherwise grounded claim to protection from the claims or predations of others.

8 *Id.* at 362.

9 *Id.* at 333-61.

10 *Id.* at 362.

11 *Id.* at 363-65.

12 Although Professor Rose does not directly address the question of protection, her view of property regimes as involving cooperation, responsibility, and attentiveness to others seems to be likewise clearly inconsistent with the conventional view of property rights as involving particularly justified claims of individual protection. *See id.* at 365. *See also* Carol M. Rose, *Environmental Lessons*, 27 Loy. L.A. L. Rev. 1023, 1042-43 (1994) (arguing that individual claims to property protection must be evaluated in a broader social, even aesthetic, context).

13 C.B. Macpherson, *The Meaning of Property*, *in* Property: Mainstream and Critical Positions 1, 1 (C.B. Macpherson ed., 1978).

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The fact that property involves protection does not, of course, determine what the particular nature of that protection will be. Any conception of property must involve choices of: the theoretical basis for the particular rights that are called "property"; the space, or conceptual area of field, to which those rights are applied; the degree of protection that those rights, relative to others, are afforded; and whether those rights, once determined, are fixed or changing in time.[14] We can, for instance, construct an understanding of property that involves absolute rights to devise or exclude, which may be applied to land, protected equally, and unchanging in time; or an understanding that involves contingent rights[15] to transfer or use, which may be applied to land, protected unequally, and changing in time. The kind of protection that property affords will be the direct result of our answers to these questions.

The common idea of property is simple: "property" describes what we have, and that it cannot be forcibly taken from us.[16] It describes all of our possessions and entitlements—rightfully held, at this moment—and our right to shield them from predation. It is essentially concerned with our security against others. It is rooted in the "primitive, instinctive cries . . . in the playgroup or playground: 'That's not yours; its *mine.*'"[17]

When we move from the play group to the constitutional setting, there is little change in the common idea of property that undergirds our claims. The security provided in this context is that of "legally justified possession and . . . expectation."[18] Based upon the (perhaps too familiar) image of Lockean entitlements,[19] the constitutional protection of property is seen as a classic example of a "negative"[20] or "first-generation"[21] right: it is our

14 *See* Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, IX CANADIAN J.L. & JURIS. 161, 169-91 (1996) (describing the dimensions of "theory," "space," "stringency," and "time" necessary for any conception of property rights).

15 For examples of property theories that incorporate ideas of contingent or contextualized rights, see Kevin Gray, *Equitable Property*, 47 (pt. 2) CURRENT LEGAL PROBS. 157, 208-09 (1994); Rose, *supra* note 1, at 342-43; Joseph William Singer, *Jobs and Justice: Rethinking the Stakeholder Debate*, 43 U. TORONTO L.J. 475, 486-87 (1993); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 133-42 (1990).

16 *See, e.g.*, BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 97-103 (1977) (describing the layperson's "ordinary understanding" of property).

17 Gray, *supra* note 15, at 159.

18 Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1327 (1987) (discussing the common constitutional idea of property).

19 *See* John Locke, *Second Treatise of Government* § 193, *in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988) (3d ed. 1698) (property as that which "without a man's own consent . . . cannot be taken from him."). Elsewhere, I have argued that Locke's understanding of property was in fact much more comprehensive than generally believed: it encompassed a broad range of individual rights, liberties, powers, and immunities, exercised within a collective context of support and restraint. *See* Underkuffler, *supra* note 15, at 138-41.

20 The common division of rights into "positive" rights (those that require state action) and "negative" rights (those that protect individuals from state action) is generally traced to Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969) (discussing positive and negative liberty).

21 The categorization of constitutional rights into "first-generation rights" (those that refer to traditional liberal civil and political rights), "second-generation rights" (those that refer to social, cultural, and economic rights), and "third-generation rights" (those that refer to rights such as self-determination, peace, development, and a protected environment) seems to be a part of common parlance in just about all of the world's constitutional systems, other than the United States. *See* Bertus de Villiers, *Social and Economic Rights*, *in* RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER 599, 603 (Dawid van Wyk et. al. eds., 1994) [hereinafter

individual protection against the claims of others, *in particular*, others operating under the mantle of collective power. Property represents and protects the individual's autonomous sphere, asserted against the state.[22] It protects what is ours—our possessions, even our liberty—from majoritarian tyranny. As a South African scholar has written, "The US Constitution is a classic example of a property clause cast in . . . [the liberal] mould, providing constitutional protection . . . [with] life, liberty and property as the parameters of personal freedom and individuality."[23]

The depth of our commitment to this idea of property is perhaps most evident when we attempt to convince others of its wisdom. In an article addressed to Eastern European post-communism constitution drafters, Professor Cass Sunstein describes the kind of "[f]irm constitutional protection of property rights" that "provide[s] the preconditions for self-governance" and "serves a number of functions indispensable to economic development."[24] "A high degree of stability is necessary to allow people to plan their affairs, to reduce the effects of factional or interest group power in government, to promote investment, and to prevent the political process from breaking down by attempting to resolve enormous, emotionally laden issues about who is entitled to what."[25] As Professor Sunstein explains:

> Without constitutional protection of property rights, there will be continuous pressure to adjust distributions of property on an ad hoc basis. When a group of people acquires a good deal of money, it will be tempting to tax them heavily. When another group verges on bankruptcy, there will be a temptation to subsidize them. After the fact, these steps may seem fair or even necessary; but if everyone knows that government might respond in this way, there will be a powerful deterrent to the development of a market economy. No citizen—and no international or domestic investor—can be secure of his immunity from the state.
>
> . . . If property rights are insecure—if they are subject to continuous governmental examination—the system will approach equivalence to one in which there are no such rights at all.[26]

Furthermore, we can understand what this vision is by establishing what it is not. To create appropriate protection, constitution-makers must avoid "setting out very general social aspirations, or . . . imposing positive duties on government"—common features of the constitutions of prior communist regimes.[27] Aspirations and positive rights are "vaguely defined,

RIGHTS AND CONSTITUTIONALISM]; LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 24 (1994).

22 *See* Underkuffler-Freund, *supra* note 14, at 173-75; see also Rose, *supra* note 1, at 365 (discussing the "heroic autonomy" of the common rhetoric of property).

23 A.J. van der Walt, *Property Rights, Land Rights, and Environmental Rights*, *in* RIGHTS AND CONSTITUTIONALISM, *supra* note 21, at 455, 461. For a discussion of this constitutional idea of property protection in the American judicial opinions and legal scholarship, see Underkuffler-Freund, *supra* note 14 *passim*.

24 Sunstein, *supra* note 5, at 907-08, 909.

25 *Id.* at 916.

26 *Id.* at 917-18.

27 *Id.* at 919. This includes the typical trappings of a social welfare state, such as "guarantees [of] equitable remuneration, leisure time, social security, and occupational safety and health." *Id.*

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simultaneously involve the interests of numerous people, and depend for their existence on the active management of government institutions."[28] Because of their uncertain and largely unenforceable nature, the inclusion of aspirations and duties "tends to weaken the understanding that the document creates protected rights, with real meaning, against the state."[29] Such "unenforceable rights will in turn tend to destroy the negative rights—freedom of speech, freedom of religion, and so forth—that might otherwise be genuine ones."[30] They will also muddle the lines between private and public spheres. A constitution, with its prohibitions upon governmental (not private) action, is intended to emphasize and entrench the foundational principle that private actions must be distinguished from, and protected from, public ones.[31]

The idea that the American constitutional scheme involves the protection of negative rights alone has been echoed by many others. Judge Richard Posner, for instance, has argued that the American Constitution "is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."[32]

This picture of our constitutional scheme might seem to be a bit of an overly simplified or caricatured one. We can dispute it around the edges: constitutional rights, including property rights, are rarely as protected in practice as they are in theory,[33] and even purely negative, "private" rights require state action for enforcement.[34] Furthermore, as Professor Sunstein readily acknowledges, a system of liberal constitutional rights should be "accompanied by other [presumably legislative] social strategies,"[35] and in the West, where regimes of negative rights are well entrenched, "more emphasis on duties [might well] be a good idea."[36]

There is little doubt, however, but that this portrayal of the core of the American constitutional idea of rights—and its protection of property—is

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28 *Id.*

29 *Id.* at 921.

30 *Id.* at 919-20.

31 *Id.* at 921-22.

32 Jackson v. City of Joliet, 715 F.2d 1200, 1203-24 (7th Cir. 1983). Proposals to interpret the Fourteenth Amendment "to guarantee the provision of basic services such as education, poor relief, and . . . police protection" would "turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others." *Id.*

33 *See* Underkuffler-Freund, *supra* note 14, at 182-90 (discussing the "operative" model of property used in Supreme Court jurisprudence).

34 *See* Sunstein, *supra* note 5, at 918-19 ("It is, of course, misleading to think of these as genuinely negative rights. They depend for their existence on governmental institutions willing to recognize, create, and protect them.").

35 *Id.* at 917. Such protections should, however, "be created at the level of ordinary legislation, and subject to democratic discussion, rather than placed in the foundational document." *Id.* at 920.

> Properly understood, the defense of property rights is a defense of programs of redistribution as well. These programs are not designed to produce economic equality—a truly disastrous goal—but instead to bring about at least rough equality of opportunity and, even more important, freedom from desperate conditions, or from circumstances that impede basic human functioning.

Id. at 917 (footnote omitted).

36 *Id.* at 921; *see also id.* at 920.

a true one. Although we might agree that, in practice, previous entitlements must occasionally yield to the public good, or what we believed to be entitlements are (after examination) in fact not so, the idea of property as a *right*, as a *bulwark*, protecting our entitlements, is deeply rooted in the American soul. By protecting property rights, we believe that we can protect free enterprise, political liberty, and the general right to freedom from tyrannical state power.

III. PROPERTY: A SPECIAL RIGHT

Property, then, seems much like other individual, "negative" constitutional rights. It defines certain individual interests, deemed necessary for individual security, and protects them from the threat of state coercive power. In this identity and function it is no different from freedom of speech, freedom of religion, due process of law, or other rights.

Property is, of course, both *idea* and *institution*: it is both the general idea or concept of property protection, and the separate question of protection afforded to particular persons and their objects of property.[37] When we speak of the "constitutional protection of property," we tend to slur these together. We tend to assume that "property protection," in the constitutional sense, means the idea of property protection *as reflected in* existing property arrangements.

This dual nature does not, however, distinguish the right to property protection from other constitutional rights. All rights operate in this way. All are ideas—how people envision them—and also are how, as political and social institutions, they are implemented to resolve particular, conflicting claims. Indeed, we might say, a constitution is a pragmatic document: it deals with real people and real protections. The idea of rights protection, apart from its institutional aspects, has little significance. It is only the general or abstract right, *as implemented*, that has meaning in this context.[38] The fact that the idea of property may be compromised, when implemented, does not distinguish property from other rights. Each constitutionally recognized right is comprised of idea and institution; each is compromised when implemented in particular, institutional form.

However, here we must pause. Is the *institution* of property, by its fundamental nature, the same as the institutions that embody other rights? In fact, we find that the institution of property *is* different. Property involves *allocation*; with regard to property, *the giving to one person necessarily denies or takes from another*. If we award an individual the right to extract minerals, cut trees, or control land, that same right, and others that it implicates, are necessarily denied to others. Property rights are allocative because they give to some what cannot be given to all: they allocate rights to particular individuals in finite, non-sharable resources.

Indeed, in this characteristic property rights are very different from other rights. When we speak of freedom of conscience, freedom of speech,

37 *See* Macpherson, *supra* note 13, at 1; Laura S. Underkuffler, *The Perfidy of Property*, 70 TEX. L. REV. 293, 308 (1991).

38 *Cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM 170 (1986) (discussing general rights and particular instantiations of those rights).

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due process of law, and so on, we speak, in a sense, of constitutional "public goods."[39] There is no additional cost necessarily entailed, to society or to other individuals, if another person believes freely, or speaks freely, or is afforded the protection of the laws. The extension and protection of these rights is, indeed, very "cheap" in societal terms:[40] upon granting one person the right to speak, there is no *necessary* taking of that same right from another.[41]

The protection of property, however, is (in the main) quite different. It deals with goods of a reverse, or "private" kind. If the enjoyment of a particular good by one person is protected, then the enjoyment of that same good by others is denied. The extension of property protection to one person *necessarily and inevitably* denies the same right to others.[42] The constitutional right to property is different—it is special—not because it is necessarily more fundamental to political liberty, democratic governance, or other goals, but because it is, by its very nature, the only right that allocates finite, private goods to some and—at the same time—necessarily denies those goods to others.

Property rights are also special because they alone deal with rights that—at their most basic level—are necessary for the survival of life itself. Much has been written about what seems to be the deep, primeval need of living beings to appropriate.[43] As one psychologist has observed, even animals recognize possessory claims, and in human beings such ideas must be considered an innate tendency.[44] This deep impulse is undoubtedly rooted in an undeniable, biological fact: without some minimal appropria-

39 *See* DENNIS MUELLER, PUBLIC CHOICE II, at 11 (1989) (a public good has two salient characteristics: first, if the good is consumed by one person, this does not detract from the benefits enjoyed by others; and second, no one can easily be precluded from enjoying the good, once it has been produced). *See also* Joseph Raz, *Rights and Individual Well-Being*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 29, 37 (1994) (public goods are those "which . . . serve the interest of the people generally in a conflict-free, non-exclusive, and non-excludable way.").

40 One could argue that the addition of rights-holders always involves some additional cost, in the form of additional societal resources necessary for additional protection. In this limited sense, of course, all rights recognized by law are "positive" rights which impose burdens upon others for their protection. *See supra* text accompanying note 34.

41 There may, of course, be situations in which the exercise of the right to speak by one person will infringe another person's claimed right to silence, or to live in a particular kind of supportive community—rights sometimes claimed to be part of free speech rights. *See, e.g.*, Alon Harel, *The Boundaries of Justifiable Tolerance: A Liberal Perspective*, *in* TOLERATION: AN ELUSIVE VIRTUE *passim* (David Heyd ed., 1996) (discussing situations in which intolerance of the speech or actions of others is considered by a rights-holder to be a necessary and justified part of the exercise and preservation of her free speech rights). Such "environmental" claims have, however, rarely been accorded constitutional recognition. In addition, even though the right to free speech might be envisioned, under some circumstances, to include such claims, there is *no necessary and inevitable correlation* between the granting of rights to free speech to some and the infringement of the same rights of others.

42 *Cf.* Guido Calabresi & A. Douglas Malamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105-10 (1972) (when "property rules" are applied to claims of conflicting entitlements, one claim is entirely vindicated, and the other claim is entirely denied). This preclusive nature of property rules "lies at the core of the notions of 'ownership' and 'property.'" Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 716 (1996).

43 *See* Gray, *supra* note 15, at 157-59, 158 n.2 (citing studies).

44 Léon Litwinski, *Is There an Instinct of Possession?*, 33 BRIT. J. PSYCHOL. 28, 36 (1942). Litwinski cites the following observations by James Baldwin:

tion—without some minimal taking of the resources necessary to sustain life—we will die.

In our society of relative affluence, this connection between possessory claims and the essential conditions for survival may well (at least for the majority) be forgotten. But in the many societies where millions struggle for survival on a daily basis, it is not. Any scheme for the super-majoritarian protection of the appropriations by some persons means, correspondingly, the denial of the appropriation of the same goods, resources, and essentials of life by others. In its struggle to interpret the fundamental guarantees of the Indian Constitution, the Indian Supreme Court stated that "[w]e think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head . . . ."[45] Recognition of rights to these "bare necessities of life" by some people will, of course, often impinge upon the possessory claims of others; "[but] every act which offends against or impairs human dignity [will] constitute deprivation pro tanto of this right to live and it [will] have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."[46]

Indeed, this "specialness" of property makes it, in a fundamental sense, far more important than other constitutional rights which we so cherish. Freedom of speech, freedom of religion, the assurance of due process of law—all are of little value if the minimal property, necessary for life, is denied. The protection of property in this sense renders it of an a priori nature where human survival and democratic governance are concerned. As a South African commentator has written, "[c]ontemporary experience makes it clear that 'without at least some modicum of such basic necessities as food, shelter and clothing, the enjoyment of other rights appears highly theoretical.'"[47] South Africa, as a developing country, "may find it difficult to convince its millions of squatters and poverty-stricken people that the protection of civil and political rights is of value to them if

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> Psychologically, the acquisition impulse (or 'instinct') . . . seems to be very deeply rooted and to require recognition. . . . Even among animals we find the recognition of a 'meum and tuum' not only towards other individuals, as for the young of the family, but also towards things. The bird claims the nest and even the whole tree as his own, and the dog guards his kennel with his life. In certain cases also, as the squirrel's store of food, it extends to provision for future needs. Certain birds, as magpies, also appropriate and claim useless objects as their own. In children this impulse develops very early. It must be counted a native tendency, though . . . no doubt it owes much of its strength, and also the direction its development takes, to social example and precept. Its utility, from the genetic point of view, is so great, . . . that its survival and evolution would seem to be simply a great sociological fact.

JAMES MARK BALDWIN, DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY 360 (1901).

45 Francis Coralie Mullin v. Union Territory of Delhi, A.I.R. 1981 S.C. 746, at 753.

46 *Id.*

47 De Villiers, *supra* note 21, at 604 (quoting Mitchell I. Ginsberg & Leonard Lesser, *Current Developments in Economic and Social Rights: A United States Perspective*, 2 HUM. RTS. L.J. 237, 241 (1981)). *Cf.* Rose, *supra* note 1, at 362-63 (considering the necessity of some security of property, as the "backstop" for other rights).

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they do not have the material, intellectual, and social ability and circumstances to make use of such rights."[48]

Here, however, we must pause. It seems that from describing a *negative* right, or the protection of the individual from collective interference, we have slipped into describing a *positive* right, or the claim of the individual to certain, bare necessities for survival. Although we might dismiss the latter concern as something really apropos only to developing countries (and, therefore, not to ours), there is a nagging question whether this "positive rights" business has something to do with our recognized (constitutional) right to property protection, as well. Can we dismiss this question so easily? Is this "positive rights connection" just some sort of socialist mumbo jumbo for developing countries, or is it—inevitably—a part of our property schemes, as well? Does our constitutional right to property, recognized and protected, have some kind of intrinsic link to what we collectively deny—the idea of the imposition of positive individual rights or positive collective duties? Is this another, *unwelcome* characteristic of the "special right" of property protection?

The distinction between "negative" or first-generation rights, and "positive" or second- or third-generation rights, has been challenged by many in the constitutional context.[49] Numerous civil and political rights, traditionally deemed "negative" in nature, require positive state action for their exercise. The exercise of political rights or rights to due process requires the creation of a state apparatus, and all negative rights require state expenditures for enforcement. To this limited extent, all rights might be seen as "positive" in nature.[50]

The right to property protection, however, involves a far more fundamental challenge to our belief that constitutions should not include general social aspirations or impose positive duties upon government. The heart of the objection to the constitutional inclusion of positive rights is the belief that it is necessary to prevent state encroachment upon the rights of individuals, but that it is undesirable to require the state by constitutional fiat (as opposed to later, and changeable, moral or political choice) to acknowledge inequality or to take particular, positive steps toward social or

48 De Villiers, *supra* note 21, at 621; *see also* DION A. BASSON, SOUTH AFRICA'S INTERIM CONSTITUTION at xxvii (1994).

> [A] liberal state which is characterised by a representative government which is obliged to recognise the rights and freedoms of individuals . . . is merely one important dimension of the [constitutional state] . . . . The dignity of every person demands that he or she shall not merely be free from oppression, but also free from hunger, free from want and free from fear. [This includes] the right to eat, the right to work, the right to shelter, the right to health and the right to education.

Id.

49 *See, e.g.*, de Villiers, *supra* note 21, at 604.

> It is theoretically unsound to distinguish between civil and political rights, on the one hand . . . , and social and economic rights . . . , on the other, on the basis that the former constitute only negative . . . rights, while the latter [require] an active state. There are numerous rights in the category of civil and political rights that also require positive state action, such as the right to a fair trial, the right to vote, the right to legal representation, and so on.

Id. (footnote omitted).

50 *See supra* text accompanying note 34.

economic goals.[51] Indeed, the first goal is antithetical, in nature, to the second: it is impossible to protect individual rights—in particular, rights to property holdings—if the state is required, in the same breath, to upset these holdings through "protection" of social or economic rights. Although such holdings will (inevitably) be affected by social and economic legislation, the ideological primacy of the protection of individual property must remain clear. Constitutional power must be reserved for the protection of individuals against collective tyranny. The distinction between rights that confer individual protection and those that mandate state intervention must be maintained.[52]

However, this characterization—while it may be true of many liberal rights—is not true of the right to property protection. If we consider freedom of speech, freedom of religion, due process of law, or other such rights, it is possible to speak of individual *protection* without state *intervention.* Because these rights involve public goods,[53] which any number of individuals can enjoy without any necessary additional cost to or deprivation of others, we can truly speak of the exercise of rights as protected from the state and existing apart from it. But when we speak of the liberal, "Lockean" character of American constitutional rights—when we speak of them as "individual protectionist," "negative" or "first-generational" in character—we cannot, in truth, include property. For property protection involves private goods[54]; it is, in its essence, the resolution of *conflicting* claims. If my right to land is upheld, then your claim to that land is denied. If my right to create pollution, congestion, or erosion is upheld, then your claim to be free of those ills is denied. The state, by protecting the acquisitive rights of one person, *necessarily and affirmatively denies* the conflicting claims and acquisitive goals of others. Because of the inherently interconnected nature of property claims, the state cannot simply be the "watchman" for this right. It cannot protect without intervening. Property rights are, by nature, *positive* rights, *allocative* rights.

We find, in short, that property *is* a different right. It *is* special in ways that other liberal constitutional rights are not. It involves, at its most basic level, the protection of acquisitive rights—to food, clothing, shelter—that are a priori to all other rights and necessary for life itself. It is, in addition, inherently *allocative* and *state-interventionist* in nature. If one person's "right to property" is protected, another's claim, to that same property, is denied.

What do these differences mean in a *constitutional* context? Is there any special message here for our approach toward constitutional protection of individual property rights?

IV. THE MEANING OF DIFFERENCE

In her article, Professor Rose examines arguments that attempt to establish that property rights are the most important rights in a liberal consti-

51 *See* de Villiers, *supra* note 21, at 602 (discussing the common "Lockean" constitutional paradigm).

52 *See supra* text accompanying notes 31-32.

53 *See supra* text accompanying notes 39-41.

54 *See supra* text accompanying note 42.

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tutional order.[55] Those arguments carry an obvious corollary: that with "most important" status comes "most protected" status, as well.[56] If private property makes individuals independent and, thus, capable of self-government; if it diffuses political power; if it creates material wealth and prosperity, necessary preconditions for social civility, stability, and the maintenance of democratic governance[57]; then the strongest protection of those rights, in our foundational document, would obviously seem to be justified.

We have found, however, that property as a right is not so simple. Although individual property holdings might serve all of these functions, the underlying idea of the constitutional protection of liberal, negative rights—that the state, as neutral arbiter, must simply be the guardian of these rights—is not possible for property. Property, we found, is a special right. With freedom of speech, freedom of religion, or other such rights, the state can (by and large) do nothing and all can enjoy. It is not so with property. The protection of existing entitlements—the giving to some and the keeping from others—is not a neutral stance. It is a choice—an explicit, *collective* choice—of who shall enjoy, and who shall not; of who shall survive, and who shall not. With other rights, we seek protection of what we, freely and equally, naturally enjoy; with property, we seek protection of what we have, to the derogation, exclusion, and often injury of others. When a right involves goods critical to life—and when the state's actions, of necessity, allocate those goods to some and keep them from others—this right must be questioned. This nature of property—this "specialness" of property—must make it *less protected* as a right, not more.

If property is to be less protected, *how much* less protected should it be? One could, for instance, simply argue that constitutional protection for this right is wrong. By constitutionalizing rights, we attempt to place them beyond the workings of ordinary majoritarian rule. The attempt to place property rights beyond the reach of ordinary democratic power seems to contradict the special need to question, and change, property allocations. It could be argued that property protection—not being, in truth, a negative right, but rather a positive right of state action—is improperly granted constitutional protection; that it should not be placed, by deliberate design, beyond the questionings and revisions of political life and majoritarian control.

Indeed, some modern governmental charters have omitted the protection of property from the list of rights entitled to constitutional protection.[58] However, this approach—as correct as it may be in other countries—seems scarcely possible in ours. Whatever the institution of property may in fact be, the idea of property is extremely powerful in our lives. As compromised as the institution of property may be, the idea of property remains strong and defiant. What *is* property, if not security?

55 *See* Rose, *supra* note 1, at 333.

56 *See id.* at 362.

57 *See id.* at 333-61.

58 *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11. For a discussion of the reasons for omission of property from the Canadian Charter, see Alexander Alvaro, *Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms*, 24 CAN. J. POL. SCI. 309 (1991).

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What *is* property, if not protection from "contingencies" that justify takings by others? Property, we find, is the most paradoxical of rights: for just as it is that which must (as an institutional matter) be most questioned, it is also that which (as an abstract idea) is most fundamental to personal feelings of security and control. To remove the protection of property from the list of foundational constitutional rights is unthinkable to us—its idea, its security, is far too deeply rooted.

We must, instead, address what this right, in the constitutional context, should mean. All traditional (liberal) constitutional rights involve the clash between the absoluteness of their statements, as ideas, and the compromises of the institutions which implement them. In this simple characteristic, the right to property protection is certainly not unique. The protection of property is, however—*by virtue of its special characteristics*—the most paradoxical and extreme of these. It is the idea whose absoluteness we cherish most deeply. It is also the institution which, by reason of the rights that it involves, must be the most questioned and the least protected.

The specialness of property demands that we adopt a more complex and, thus, more meaningful approach to the constitutional interpretation of this right. I suggest two important principles:

1. *Property must be explicitly recognized as both idea and institution; and the role of both idea and institution must be acknowledged in the interpretation of this right.*

Property is both idea and institution; it is both how people envision it—"that is, what concept[ion] they have of it"[59]—and how it is implemented, as a political and social institution, to resolve particular conflicts in society.[60] Property, as an American constitutional idea, is a bulwark surrounding the sphere of individual liberty. It is an absolute and inalienable right, which provides a bedrock of protection. Property, as an institution is, of course, wholly (and necessarily) different. It is the resolution of conflicting claims and conflicting desires for acquisition. In this process, some will win and others will lose; it is not possible, by property's inherent nature, to protect the claims and security of all.

Explicit recognition of this dual nature of property would accomplish several important goals. First, the misconception that we are required, by constitutional fiat, to protect property rights fixed in time and unchanging thereafter would cease. Although the idea of property as protection would continue to inform and constrain our consideration of this right, deviation from this idea in practice would no longer be seen as an "obvious" violation of "unquestioned" property rights. Rather, it would be seen for what it is: the inevitable adjustment and compromise of conflicting claims necessary for the maintenance of the social and political institution of property.

2. *Social aspirations and social goals must be seen as inherent parts of the interpretation of this right.*

The interpretation of particular constitutional rights in light of social aspirations and social goals is a common approach in many of the world's constitutional systems. In India, for instance, the Supreme Court has devel-

59 Macpherson, *supra* note 13, at 1.
60 *See supra* text accompanying note 37.

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oped an interpretative approach which evaluates particular constitutional rights in light of broader goals of social and political justice, substantive equality, and human dignity.[61] This has been called a "purposive" approach to constitutional rights.[62] In Germany, the Federal Constitutional Court has repeatedly stated that the fundamental individual rights guaranteed by the country's Basic Law (*Grundgesetz*) establish an "objective order of values" for the interpretation of rights.[63] This "objective value order" has as its center the "free development of the human personality and its dignity in the social community."[64]

Our approach to many constitutional rights is, in fact, quite similar. We routinely speak, for instance, of the purposes of free speech, the goals of equal protection, and the justice afforded by due process of law. In so doing, we recognize that these rights, although "individual" in nature, must be understood and informed "not only [by] what kind of society [we have] but also [by] the one which it ought to be."[65]

The exemption of property rights from this approach is striking. Although consideration of the "purposes" of free speech is a routine part of our constitutional lexicon, there is no similar routine discussion of the "purposes" of property. Indeed, consideration of social aspirations or goals seems to be distinctly inconsistent with our view of this right. The purpose of property is protection from the state; how, then, can *collective* aspirations or *collective* goals be a part of the interpretation of this right?

Indeed, it is precisely because we believe in the primacy of the idea of property protection that we have resisted the practice—common in other Western constitutional systems—of including social and economic rights in

61 *See, e.g.*, Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1360, at 1363-67; Francis Coralie Mullin v. Union Territory of Delhi, A.I.R. 1981 S.C. 746, at 752-54. *See also* Dennis Davis et al., *Democracy and Constitutionalism: The Role of Constitutional Interpretation*, *in* RIGHTS AND CONSTITUTIONALISM, *supra* note 21, at 1, 48-52, 62-64.

62 Davis et al., *supra* note 61, at 63. The adoption of this approach has been vigorously advocated for interpretative questions under the new South African Constitution. Commentators have urged "a purposive approach [under] which the adjudicating court attempts to develop a theory as to the nature of the fundamental principles contained in a Bill of Rights, which in turn makes the most sense of the purpose of a Bill of Rights within the context of a society proclaiming democratic aspirations." *Id.* at 123; *see also* DU PLESSIS & CORDER, *supra* note 21, at 62.

63 *See* 7 BVerfGE 198, 205 (1958). Property rights are, for instance, to be interpreted in a manner which balances individual and social interests, with the common good as the basic, referential, and only limiting principle. *See* BVerfG, July 14, 1981, JZ 1981, 828, 829; 52 BVerfGE 1, 29 (1979); 25 BVerfGE 112, 118 (1969); *see also* van der Walt, *supra* note 23, at 471.

64 7 BVerfGE 198, 205 (1958). The core of German constitutionalism has been described in the following terms:

> The Basic Law . . . reflects a conscious ordering of individual freedoms and public interests. It resounds with the language of human freedom, but a freedom restrained by certain political values, community norms, and ethical principles. Its image of man is of a person rooted in and defined by a certain kind of human community. Yet in the German constitutionalist view the person is also a transcendent being far more important than any collectivity. Thus, there is a sense in which the Basic Law is both contractarian and communitarian [in nature].

Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 677 (1980); *see also* Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 855-73 (1980).

65 Davis et al., *supra* note 61, at 3.

our foundational document.[66] The purpose of the Constitution, in the words of Justice Rehnquist, is "to protect the people from the State, not to ensure that the State protect[s] them from each other."[67] Consideration of collective goals is best left to the political process.[68]

This conventional view, however, ignores the essential and special nature of this right. Property rights are, by nature, *social* rights[69]; they embody how we, *as a society*, have chosen to reward the claims of some people to finite and critical goods, and to deny the claims to the same goods by others. Try as we might to separate this right from choice, conflict, and vexing social questions, it cannot be done. To say that what *should* be done cannot be considered, is to say that what we have done and will do must be unthinking, ignorant, and blind. Why do we reward this claim, and not that one? What is our *purpose* in protecting the acquisitive activities of one person and denying protection for those of another? To deny the relevance of such questions to the interpretation of this right is to treat the most contextualized right without mention of context, the most conflicted right without mention of conflict.

André van der Walt has argued that the new South African Constitution "should provide basic protection for private property rights within a theoretical and constitutional framework which incorporates both individual and social interests."[70] For instance, land "is a special, vital, and limited resource, the use and exploitation of which have serious social implications for all."[71] "[S]ocial, environmental, physical, and other" factors must shape the fundamental nature of all constitutionally protected rights.[72] The "outdated perception of property as an exclusive and unlimited private right" which the state should not touch must be rejected.[73]

Property rights are not, in fact, private interests which the state neutrally abides. Property rights are collective, enforced, even violent decisions about who shall enjoy the privileges and resources of this society. Questions about the kind of society that we are, and the kind of society that we wish to become, must be inherent parts of the interpretation of this right.

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66 These include the right to free primary education (Constitution of Ireland); the right to work and protection of workers (Constitution of the Netherlands and Constitution of Greece); the right to health services (Constitution of Greece and Constitution of Portugal); and the right to protection of the environment (Constitution of Greece). De Villiers, *supra* note 21, at 613.

67 DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989).

68 *Id.*

69 As Joseph Singer has written:

> If 'property is a set of social relations among human beings,' the legal definition of those relationships confers—or withholds—power over others. The grant of a property right to one person leaves others vulnerable to the will of the owner. Conversely, the refusal to grant a property right leaves the claimant vulnerable to the will of others . . . .

Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. REV. 1, 41 (1991) (quoting Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 365 (1954)); *see also* Michelman, *supra* note 18, at 1335 ("[P]rivate power is power no less constituted by public law than is governmental power itself, specifically, if ironically, the very law that secures private property against encroachment.").

70 Van der Walt, *supra* note 23, at 489.

71 *Id.*

72 *Id.*

73 *Id.*

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V. Conclusion

The traditional reasons advanced in support of the constitutional protection of property rights are familiar. The protection of property, it is argued, facilitates the accumulation of wealth and the achievement of prosperity. Individual citizens, who share in this wealth, achieve material—and political—security and independence. All of these are, in turn, necessary preconditions for social civility, social stability, and the maintenance of democratic governance.

As Professor Rose concludes, all of these arguments about property's functions are undoubtedly (at least to some extent) true.[74] Property is, indeed, "special" in its performance of these functions. However, it is special in other ways as well. By involving critical, finite, and unshareable resources, property rights are of both individual *and* collective importance. Furthermore, they are, by nature, *positive* rights, *allocative* rights. The state, by protecting the property rights of one person, necessarily denies those of others. The classical liberal model of individual rights—where the state is "hands off" and all can enjoy—simply does not, and cannot, describe this right.

The idea of absolute individual property protection and the security that it brings has pervasive and enduring power in our lives. To deny that human acquisitive desires exist would be as futile as to deny the dog his bone. However, this absolute, unyielding idea of property—as vital as it is—must not solely govern our understanding of this right. We all must care about who shall eat and who shall not. We all must care about what our landscape will be. Social needs, goals, *and* aspirations must be integral parts of the contours of this special constitutional right. Learning to understand this truth—by those of us hardened, by rhetoric and belief, into the rigid mold of liberal rights—is perhaps (to borrow from Professor Rose) the deepest, *educative* task of property.

74 *See* Rose, *supra* note 1 *passim*.

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