THE ILLUSION OF PROPERTY AS A RIGHT AND ITS REALITY AS AN IMPERFECT ALTERNATIVE

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The Fifth Amendment provision that the government cannot take someone's property without providing compensation is often regarded as flowing from the principle that property is a human right or a natural right. Yet regulatory programs commonly reduce the value of people's property, and neither the courts nor society in general regards compensation as appropriate in this context. Neil Komesar's *Imperfect Alternatives* provides an explanation for this apparent conundrum. He shows us that the market is one of the imperfect alternatives that we can choose to achieve our political or social purposes. Property, more specifically transferable property, is simply the device that is necessary to establish a market and thus make use of this alternative. Thus, it is not a right, but a social instrumentality.

A review of Western history from its earliest times reveals that property has always been regarded as nothing more than an instrumentality, originally as a means of local governance and material maintenance, and more recently as a means of creating markets and increasing wealth in the manner that Komesar's theory suggests. The natural rights approach to property was a rhetorical argument employed for a relatively brief time. It was clearly not incorporated in the United States Constitution. The just compensation clause is not derived from the idea of property as a right but from our commitment to due process. It protects individuals from being treated unfairly by government. If government wants to take someone's property as punishment, it must do so through a fair adjudication; if it wants to do so for a public purpose, it must provide compensation. But if government takes property by general legislation that affects a group with access to the political process, it does not need to provide either an adjudication or compensation. That is because, as Komesar's analysis illuminates, property is not a right; it is an instrumentality fully subject to governmental control.

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INTRODUCTION

One of the many virtues of Neal Komesar's *Imperfect Alternatives*[1] is that it provides major insights into one of the leading jurisprudential issues of our day: the concept of property. Richard Epstein raises this issue, in the form that will be considered here, in his 1985 book, *Takings*.[2] Komesar responds to Epstein's argument at length, but at the institutional level that serves as the basis of his own book, rather than at the conceptual or jurisprudential level of Epstein's formulation. In fact, Komesar's argument provides a jurisprudential response as well, an important reconceptualization of the meaning of property. The purpose of this Article is to elucidate and extend that response.

The issue Epstein raises can be illustrated with a simple hypothetical. Imagine a privately owned 100-acre parcel of uniform, undeveloped land with a market value of $1000 per acre or $100,000 total. The government wants to take fifty acres of this land for a public purpose which, by hypothesis, will not affect the value of the remaining fifty acres.[3] It is well established that the government has the power to do so, but must pay the property owner for the owner's loss of value, which in this case is $50,000. Suppose instead that the government downzones the same 100-acre parcel from industrial to residential use, lowering the total value of the parcel from $100,000 to $50,000. It is equally well established that the government is not required to pay the property owner anything.[4] The same is true if the government precludes the industrial use

1. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

2. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

3. One might imagine that the land is taken to provide a fire break or a screen of foliage along a lightly traveled road.

4. The Supreme Court established this principle at the height of the substantive due process era, *see Gorieb v. Fox*, 274 U.S. 603 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), when it was regularly striking down other

through environmental regulations, resulting in a similar diminution of value.[5]

Why does our legal system make such a dramatic distinction between these two economically equivalent impacts, and what is the rationale for it? Epstein argues that there is no rationale, and that the distinction violates the United States Constitution.[6] His position is that reducing the value of property without just compensation allows legislatures to engage in the sort of rent seeking that the Constitution forbids, that it contradicts the Framers' original intent, and that it violates a fundamental right.[7] What follows from these arguments is that constitutional courts would be authorized to strike down legislation that reduced the value of property without providing "just compensation"—generally, monetary compensation equal to the reduction in market value. Komesar responds to this argument in terms of the comparative institutional analysis that his book develops. To recommend the invalidation of legislation on constitutional grounds, he points out, is not simply a matter of controlling an institutionally defective legislature.[8] Rather, it empowers a different institution—the judiciary—which is subject to limitations and defects of its own, to countermand legislative decisions.[9] Neither original intent nor fundamental rights arguments, Komesar observes, alter the fact that invalidating legislation on constitutional grounds involves an institutional choice.[10]

It might appear at first that Komesar has only answered the rent-seeking argument that Epstein advances, which can perhaps be characterized as his pragmatic argument, and has not addressed Epstein's conceptual argument about the nature of property or his doctrinal

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regulatory legislation on freedom of contract grounds that would no longer be considered valid, *see, e.g.*, *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (striking down regulatory law setting maximum prices); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down minimum wage law). Not surprisingly, the Court has reaffirmed its zoning decisions in the modern period. *See Agins v. Tiburon*, 447 U.S. 255 (1980).

5. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *see* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 668–74 (1986); Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

6. EPSTEIN, *supra* note 2, at 93–104, 263–82.

7. *See id.* For other arguments to this effect, see, for example, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992); Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5 (2011).

8. KOMESAR, *supra* note 1, at 3–13.

9. *Id.* at 238–55.

10. *Id.* at 256–65.

argument about the meaning of the Constitution. Thus, it might be taken to imply that we must simply accept the fact that we have an unjust society, that we cannot implement our moral values in any realistic way, and that we must also accept the fact that we have departed from the preferred interpretation of the Constitution under the pressure of contemporary circumstances. There would be nothing particularly unique about this quandary, to be sure, but since Epstein's proposal is simply not going to be implemented, as a pragmatic matter, its principal significance probably resides in the jurisprudential and doctrinal points that Komesar appears to bypass.

In fact, Komesar's theory provides an equally powerful argument against Epstein's jurisprudential and doctrinal points. That argument involves the concept of property itself. Epstein takes the term property as a given,[11] but Komesar's analysis indicates that the concept that prevails in Western society is quite different from the one Epstein employs. In fact, Epstein's use of the term reflects the position advanced by various political theorists during a delimited period of Western history, a position that was a product of that period and neither shaped the development of the property concept nor was incorporated into the concept's subsequent development. A more comprehensive history of the property concept as it has been used in our society illuminates the virtues of Komesar's approach and the inaccuracies of Epstein's. It is not a defect of Komesar's book that he does not address this history, but it is a defect of Epstein's, since the fundamental rights and originalist arguments that he relies on, and that Komesar rejects, are inherently historical in character.

I. THE PRACTICE OF PROPERTY

The definition of property has been, and continues to be, a subject of intense debate, and a definition that would be sufficiently precise for

11. EPSTEIN, *supra* note 2, at 20–24. In fact, Epstein is quite explicit about taking the term "property" as a given without making any effort to define the underlying concept. After rejecting the idea that the term is unmanageably vague, he offers a quotation from Blackstone as "powerful enough" to overcome any conceptual difficulties. *Id.* at 22. One problem with this approach is that Blackstone's definition is archaic on its face, since it refers to property as an "absolute right, inherent in every Englishman." *Id.* It is an open question whether our modern viewpoint allows for inherent, absolute rights, and whether Americans are the same as Englishmen, since our government is the product of a revolution. Second, and more serious, Blackstone states a common law definition, and one that predates the administrative state. *Id.* at 22–23. The single most important point that Epstein must demonstrate is that the advent of positive law and administrative government does not demand and create a different concept of property, and yet he defines property in a manner that assumes the result he is attempting to establish.

legal purposes lies beyond the scope of this discussion. The focus here is on the underlying concept as an operative principle in a legal system. This concept, stated in its most simple form, is the allocation of control over scarce resources to private persons,[12] or to the government in its proprietary, noncompulsory capacity.[13] For the concept to be meaningful, the resource must be scarce or limited; no one can be usefully said to own the air or a right to worship, even if the former can be defiled and the latter limited. To make the concept fully historical, and not merely contemporary, the resource must be defined to include human beings as well as physical objects and animals. But the human beings must be treated as a resource, not as members of a relationship, no matter how unequal that relationship may be. Thus, parents cannot be said to own their children, whatever the level of control that they can exercise over those children under the law, because their control is based on a unique relationship that stands apart from the children being of value and in limited supply. Similarly, the government does not own its citizens, even if it is highly oppressive; it can certainly own some of its citizens as slaves, but that is in its proprietary, not its governmental capacity.

The development of property rights in the Western, that is, post-Roman world, reveals a distinctive pattern. In describing legal systems, Ronald Dworkin usefully distinguishes among goal-based systems, rights-based systems, and duty-based systems.[14] Very roughly, he defines a "goal-based system" as one that advances the general purposes of society, a "rights-based system" as one that secures the position or status of individuals, and a "duty-based system" as one that imposes obligations on individuals.[15] While it is difficult to imagine any real legal system that does not contain elements of all three approaches, these categories are helpful in identifying the dominant approach of particular systems and determining what distinguishes one from the other.

If we consider the history of the Western world, it seems clear that the concept of property developed as a goal-based system. At the outset, the most valuable property, land, was seized and controlled by force. The

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12. *See, e.g.*, STEPHEN R. MUNZER, A THEORY OF PROPERTY 17 (1990); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 16 (2003); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 31–32 (1988).

13. Thus, when the government is subject to the same rules as it imposes on its citizens, it is acting as a property owner; when it uses its monopoly of legitimate force, *see* 1 MAX WEBER, ECONOMY AND SOCIETY 54 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (1968), it is acting in its public capacity.

14. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90–96, 169–76 (1978).

15. *Id.* at 169–73.

governments that resulted from such seizures then allocated control over land to achieve their purposes. These purposes were of course complex, since government is a complex enterprise, but the principal ones were local governance, maintenance, and productivity. With respect to chattels, the pattern is not quite as clear, probably because they were less important and in some cases—the serf's household utensils or the villein's clothes—so unimportant that no one gave much thought to them, but it appears to be generally the same. With respect to intangibles or socially created property, such as a patent or a government position, the pattern emerges once again with clarity, since these kinds of property are generally brought into existence by explicit governmental action. In all these cases, property—the private ownership of resources—was a government policy designed to achieve specific and identifiable purposes, exactly as Komesar's analysis suggests. It was not regarded as a natural right, nor was it given the symbolic significance that Epstein claims for it.

A. Local Governance

Local governance was perhaps the most important purpose that property fulfilled in the premodern era. The collapse of the Roman Empire's hierarchical command and taxation system presented a grave problem for the Germanic rulers of the kingdoms that succeeded it:[16] how were they to control the smaller but still extensive territories that they ruled? Given the primitive condition of transportation and communication, the most reliable means of doing so was to assign governance functions to local rulers and secure these rulers' loyalty, rather than attempting to assert direct control.[17] In some cases, the rulers—generally kings but sometimes counts—attempted to follow the Roman pattern of treating these local rulers as functionaries, and

16. It should be recognized that this collapse was gradual, not sudden. Although generally called "barbarians," and in one case named "Vandals," the Germanic leaders of the successor states generally tried to preserve and build upon the Roman Empire's system of taxation and governance. They were often able to do so for substantial periods of time, but by the ninth or tenth century, the systems had largely collapsed. *See* ROGER COLLINS, EARLY MEDIEVAL EUROPE 300–1000, at 100–15, 196–217 (2d ed. 1999); PATRICK GEARY, BEFORE FRANCE AND GERMANY 88–95 (1988); PETER S. WELLS, BARBARIANS TO ANGELS (2008); CHRIS WICKHAM, THE INHERITANCE OF ROME 76–149 (2009).

17. 1 MARC BLOCH, FEUDAL SOCIETY 157–60 (L.A. Manyon trans., 1961); COLLINS, *supra* note 16, at 171; F.L. GANSHOF, FEUDALISM 3–8 (Philip Grierson trans., 1996); JULIA M.H. SMITH, EUROPE AFTER ROME 187–92 (2005).

Charlemagne went so far as to rotate them from one position to another.[18] But by the end of the Early Middle Ages, it was apparent that the only practicable means of asserting control from the center was to grant local rulers property rights over the land they governed.[19]

Although compelled to recognize such grants, the kings who headed the debilitated but legally recognized central governments continued to resist the idea that the resulting rights involved complete control. They insisted that they retained the ultimate, or allodial, ownership of the land and had granted only the estate in the land, otherwise known as a fief, to the grantee or vassal.[20] The resulting property right was generally called "seisen," a sort of time-honored possession, but gradually became known as a fee (i.e., fief) simple.[21] By virtue of this partial or contingent right, the vassal continued to owe the feudal obligation of loyalty to the king or count, often with additional obligations such as military service, and the land itself remained subject to taxation and eminent domain.[22] While fiefs were not considered inheritable in the Early Middle Ages and could be reassigned by the king upon the death of the vassal, heritability had become the general rule by the tenth century.[23] But fiefs were not considered truly transferable until well into the High Middle Ages; if the vassal wanted to sell his fief, he would need to obtain permission from his lord, who would, at least in theory, retake possession from the vassal, effect the sale, and then remit the proceeds to the former vassal.[24] The vassal was, however, generally permitted to make subgrants, a process known as subinfeudation.[25]

As the royal regimes consolidated their power and became functioning central governments in the Early Modern Era (the Renaissance, Reformation, and Enlightenment, roughly 1400 or 1500, depending on the place, to 1800), they developed various mechanisms for using public officials to control their territory. Estates in land, no longer needed to secure the loyalty of local rulers, became unencumbered, inheritable, and transferable. Local landowners remained

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18. WICKHAM, *supra* note 16, at 388–89. Charlemagne also sent out appointed officials, the *missi*, to assert royal authority in the provinces. *Id.* at 389–90.

19. GANSHOF, *supra* note 17, at 56–58; SMITH, *supra* note 17, at 209–10. Neither Charlemagne's rotation of local rulers nor the office of *missi* survived the division of the Carolingian Empire in the 840s. WICKHAM, *supra* note 16, at 396–404.

20. BLOCH, *supra* note 17, at 163–75; GANSHOF, *supra* note 17, at 43–44.

21. BLOCH, *supra* note 17, at 163–75; GANSHOF, *supra* note 17, at 106–13, 126–27.

22. BLOCH, *supra* note 17, at 177.

23. *Id.* at 190–92; GANSHOF, *supra* note 17, at 133–36.

24. BLOCH, *supra* note 17, at 208–10; GANSHOF, *supra* note 17, at 144–49.

25. GANSHOF, *supra* note 17, at 144.

important in maintaining order in the countryside, but their authority was more informal and involved supplementary functions such as poor relief, rather than constituting political control.[26] The use of property as a means of governance continued, however, in the definition of many public offices as private possessions.[27] This practice, often described as farming, enabled the central government to assign administrative functions such as tax collection, licensing, and military recruitment to enterprising individuals, rather than carrying them out directly.[28] It also served as a convenient source of funds; the sale of offices was often the most important source of revenue for the French Crown, for example.[29] Of course, this reflected the French Crown's limited administrative capacities, since the practice was only viable if the farmer extracted more from his position than he had paid to obtain it.

B. Material Maintenance

A second purpose of property was to maintain the people who were subject to the government's control at various levels of material existence. In the Early Middle Ages, the military forces of the king or count had to be provided with a relatively high level of prosperity in order to secure their loyalty, which was essential for the king or count's retention of power.[30] Sometimes, this could be achieved by payments of money derived from taxation or other sources; the housecarls of Anglo-Saxon England were a salaried military force of this sort.[31] As the taxation system of the Roman Empire disintegrated, however, the most natural way to provide for the maintenance of one's followers was to

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26. For general descriptions of state formation in the Early Modern Era, see generally REINHARD BENDIX, NATION-BUILDING AND CITIZENSHIP (Univ. of Cal. Press 1977) (1964); THOMAS ERTMAN, BIRTH OF THE LEVIATHAN: BUILDING STATES AND REGIMES IN MEDIEVAL AND EARLY MODERN EUROPE (1997); SAMUEL HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 92–139 (1968); THEDA SKOCPOL, STATES AND SOCIAL REVOLUTIONS 47–99 (1979); Charles Tilly, *Reflections on the History of European State-Making*, *in* THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 3, 17–46 (Charles Tilly ed., 1975).

27. ERTMAN, *supra* note 26, at 80–82.

28. *See id.* at 75–78; PENRY WILLIAMS, THE TUDOR REGIME 82–99 (1979). The classic account is Max Weber's *Ecomony and Society*. 2 MAX WEBER, ECONOMY AND SOCIETY, *supra* note 13, at 1025–44.

29. *See* RICHARD BONNEY, THE KING'S DEBTS 1–21 (1981); MARTIN WOLFE, THE FISCAL SYSTEM OF RENAISSANCE FRANCE (1972).

30. *See* GEARY, *supra* note 16, at 154–65; SMITH, *supra* note 17, at 183–214; WICKHAM, *supra* note 16, at 121–29.

31. Nicholas Hooper, *The Housecarls in England in the Eleventh Century*, 7 ANGLO-NORMAN STUD. 161 (1984).

grant them the income from the land that they controlled for the governance purposes described above. This practice seems to have predated the heritability and transferability of land, and probably contributed to their development.

Nonmilitary people could be maintained in a wide variety of ways. For some, property played no role in their maintenance; these included slaves, household servants (serjeants), monks, and nuns, all of whom were regarded as entirely subject to an institution and were maintained by that institution.[32] These institutions were generally established by the government of the kings or counts, although the church became wealthy enough as time went on to establish monasteries on its own. Monks and nuns were free persons who entered these institutions voluntarily, at least in theory. Slaves were often people seized by force, although a number of peasants sold themselves into slavery to escape the tax burdens of the late Empire. Other nonmilitary people could own property and partially maintain themselves, even if they were servants and technically unfree, while persons could be tenants who possessed no property of their own. In addition to individuals, institutions could also own property during the Middle Ages. The most notable property-owning institution was the church, of course, and church property was usually dedicated to an identified, functional purpose, such as the general maintenance of a particular facility (a parish church, a cathedral, a monastery, a hospital, and so forth) or individual.[33]

Most medieval people lived in villages, however. This was the basic unit of social organization in premodern Europe, the Germanic successor states having imposed their rule upon the system or grid of villages that predated their arrival.[34] The village was governed by a lord—the king, vassal, or subvassal—by means of the property allocations described above. Its produce provided for the maintenance of the lord, as also just described, but the peasants in the village also had to be maintained from this same produce. Those peasants who were slaves had no property at all and were maintained by their master, but outright slavery had

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32. Regarding slavery, see BLOCH, *supra* note 17, at 255–56; HEINRICH FICHTENAU, LIVING IN THE TENTH CENTURY 371–73 (Patrick J. Geary trans., Univ. of Chi. Press 1991) (1984); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 35–37 (2d ed. 1898); and SMITH, *supra* note 17, at 155–56. Regarding monks and nuns, see NORMAN F. CANTOR, THE CIVILIZATION OF THE MIDDLE AGES 145–55 (rev. ed. 1993); and FICHTENAU, *supra*, at 262–83.

33. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 238–40 (1983).

34. EDWARD MILLER & JOHN HATCHER, MEDIEVAL ENGLAND: RURAL SOCIETY AND ECONOMIC CHANGE 1086–1348, at 20 (1978).

virtually disappeared by the High Middle Ages.[35] It was replaced by serfdom, a complex and varied status. Some serfs worked on the land managed directly by the lord (the demesne), usually through a salaried employee (the bailiff); called famuli, they generally possessed no landed property.[36] Other serfs were tenants (called villeins), and although they did not own an estate in land, they were granted a certain amount of acreage that they could farm in exchange for various obligations to the lord consisting of labor, monetary payments, and in kind contributions.[37] A half virgate (twelve to sixteen acres) enabled a family to support itself; a full virgate was typically sufficient to buy off the family's labor and in-kind obligations.[38] These tenancies were recognized as property rights in land, although they were not, of course, a fief or fee simple.[39] In addition, villeins, even though unfree, were given property rights over chattel such as livestock, farming implements, and household utensils.[40] They also owned their homes, which they typically built themselves, although these were generally flimsy structures that rarely lasted more than a generation.[41] There were also free peasants who owned land in fee simple, either through grant or through permission to purchase.[42] These properties are best regarded as aspects of maintenance, rather than governance, because peasants possessed no military power in the medieval world. In general, the complex and cross-cutting relationships between the free and unfree on the one hand, and between those who possessed some property and those who possessed none on the other, indicates that property was being used as a means of maintaining people of varied status, rather than as a right that was concomitant to status.[43]

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35. *Id.* at 22–25; SMITH, *supra* note 17, at 156.

36. BLOCH, *supra* note 17, at 268; FRANCES GIES & JOSEPH GIES, LIFE IN A MEDIEVAL VILLAGE 58 (1990); SMITH, *supra* note 17, at 155.

37. *See* BLOCH, *supra* note 17, at 255–74; FICHTENAU, *supra* note 32, at 359–70; GIES & GIES, *supra* note 36, at 67–77.

38. GIES & GIES, *supra* note 36, at 71–72.

39. *See* FICHTENAU, *supra* note 32, at 346–50; GIES & GIES, *supra* note 36, at 72–80.

40. FICHTENAU, *supra* note 32, at 334–38; GIES & GIES, *supra* note 36, at 135–38.

41. GIES & GIES, *supra* note 36, at 33–35, 88–93.

42. FICHTENAU, *supra* note 32, at 360–67.

43. *See* BLOCH, *supra* note 17, at 255–60 ("[T]his apparently sharp antithesis [between free and unfree] gives a very inaccurate picture of the real diversity of conditions."); FICHTENAU, *supra* note 32, at 359–78; *id.* at 370 ("The line of demarcation between owning property and owning nothing, between relatively free activity and complete subordination to an authority, had no name. It ran through the middle of servitude at the point at which a family's community life ended and a dormitory or workshop became the living quarters."); GIES & GIES, *supra* note 36, at 67–69.

C. Production

The third purpose of property was production, that is, increasing the general wealth of the kingdom. It is difficult to know when this was recognized as a separate purpose. The city charters granted by the kings, which made the city the owner of its land and made all its inhabitants free people who could own property of any kind, were partially intended for governance purposes.[44] Cities were natural allies of the kings against the surrounding feudal lords, and the founding of new cities served as a means of securing conquered or colonized territory.[45] But cities were often founded for primarily economic purposes and were certainly recognized as sources of taxation income.[46]

Private activity also used property as a means of increasing wealth, in the first instance the wealth of individuals, but secondarily the wealth of the kingdom or county at large. Trade, which revived and flourished during the High Middle Ages,[47] clearly depended on people's ability to acquire chattel goods as property; thus the same property rights that served to provide for people's maintenance could also serve as the basis of trade. But the growth of intangible property that had no particular relationship to maintenance indicates the instrumental nature of these property rights as a means of increasing wealth. The trade fairs that were held in various parts of Europe, most notably in thirteenth century Champagne, featured both forms of property.[48] Merchants brought cloth, spices, and various manufactured goods to the fair for sale, but to pay for these goods, they developed a wide range of financial devices, such as bills of lading, partnership shares, and negotiable instruments.[49] These instruments could not conceivably be described as natural or God-given

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44. BERMAN, *supra* note 33, at 363–99; JOSEPH GIES & FRANCES GIES, LIFE IN A MEDIEVAL CITY 199–201 (1969); J.C. HOLT, MAGNA CARTA 55–60 (2d ed. 1992); ROBERT LOPEZ, THE BIRTH OF EUROPE 171–72 (M. Evans & Co. 1967) (1962); *see also* JOHN H. MUNDY & PETER RIESENBERG, THE MEDIEVAL TOWN 46–53 (Louis L. Snyder ed., 1958).

45. ROBERT BARTLETT, THE MAKING OF EUROPE: CONQUEST, COLONIZATION AND CULTURAL CHANGE 950–1350, at 167–82 (1993).

46. FERNAND BRAUDEL, THE PERSPECTIVE OF THE WORLD 89–96 (Siân Reynolds trans., 1992); GIES & GIES, *supra* note 44, at 202–09.

47. *See, e.g.*, ROBERT S. LOPEZ, THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES, 950–1350 (Cambridge Univ. Press 1976) (1971).

48. BRAUDEL, *supra* note 46, at 111–15; GIES & GIES, *supra* note 44, at 211–23.

49. *See* GIES & GIES, *supra* note 44, at 214, 222–23; J. MILNES HOLDEN, THE HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW 22 (1955); JAMES STEVEN ROGERS, THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES 32–43, 94–124 (1995); Frederick Beutel, *The Development of Negotiable Instruments in Early English Law*, 51 HARV. L. REV. 813, 817–18 (1938).

property, being abstract and specialized, but they developed as a means of facilitating trade and increasing wealth. When one Italian merchant died in 1240, the property he left to his heirs consisted not only of his house, but also a portfolio of partnership shares.[50]

II. THE CONCEPT OF PROPERTY RIGHTS

Personal and economic conditions in the Middle Ages were defined by rights. These were highly specific, delineating a precise relationship between a person and a resource, between two people, or between two people and a resource.[51] The basis of the right could be either a written document or custom; in a largely illiterate and materially backward society, custom was by far the most reliable authority.[52] Thus, if Roger claimed a right to graze his cow on Walter's land, Roger would assert that he had always done so and that his father had before him. Serfs and tenants adjudicated disputes about their rights in the village or manor courts.[53] Higher-ranking individuals could apply to more formalized judicial institutions, such as the hundred and shire courts in England, urban residents could apply to city or borough courts, clerics could only be judged by ecclesiastical courts, and nobles had access to the royal courts.[54]

Despite the prevalence of rights, medieval society in general, and its property rules in particular, are properly regarded as a goal-based rather than a rights-based system. There was no sense that people deserved rights because of their status as human beings or citizens.[55] Rather, the view was that they had acquired rights for the purposes of local control, maintenance, or productivity.[56] This applied to the nobility as well, which was not recognized as a hereditary class until well into the High

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50. GIES & GIES, *supra* note 44, at 214. The particular type of agreement, called a *commenda*, required one partner to supply the capital and the other to undertake the arduous and sometimes dangerous journey to the fair. *Id.*

51. BERMAN, *supra* note 33, at 322–24.

52. As Frederick Pollock and Frederic Maitland note, even when medieval judges cite prior cases, they are generally doing so as evidence of custom, rather than as prior judicial authority. 1 POLLOCK & MAITLAND, *supra* note 32, at 183–84.

53. *See* BERMAN, *supra* note 33, at 323.

54. *Id.* at 325; 1 POLLOCK & MAITLAND, *supra* note 32, at 37–43; W.L. WARREN, HENRY II 317–18 (1973).

55. *See* J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 107 (1992) ("[I]t could not be said that the Christian teaching of the Early Middle Ages recognized individual private property as a natural right. The church simply accepted the existence of private property as a contemporary condition of actual life, just like slavery, and concentrated its doctrine on its right use.").

56. *See supra* Part I.

Middle Ages.[57] Each local leader had his own personal relationship with his lord, and it was this particularized relationship that generated his property rights, not his membership in some privileged stratum of society.[58]

The concept of rights as abstract entitlements, possessed by all people or at least all free people, developed slowly, and did not become a separate and socially significant concept until the Early Modern period. It was then, for the first time, and only for brief periods, that the idea of property as anything other than an instrumental arrangement appeared in Western thought. The history of rights is, of course, an enormous topic, but it can be briefly summarized for present purposes. This Part will consider due process rights, natural rights, and human rights in turn.

A. Due Process Rights

Due process rights involve the idea that adjudications must be fairly conducted, no matter at what level. The idea dates from the very beginning of Western society, although the term itself is anachronistic before the High Middle Ages. Due process applied to property rights, but also to the rights of the accused, to rights of bodily integrity, to claims for contractual performance, and to any other claim that was to be adjudicated in a court at any level.[59] By itself it did not create substantive rights, but it secured whatever rights were conferred or demanded through independent sources.[60]

Due process is undoubtedly a right, and one that protects property, but it was also consistent with the goal-based orientation of premodern government. Indirect evidence of this is that due process contributes to the goals of maintenance and productivity. When adjudicating land disputes, biased or captive courts can produce dispossessed populations who must then be maintained by other means. When adjudicating trade disputes regarding chattel property, such courts are likely to discourage commerce at the cost of productivity. The direct evidence of premodern society's goal-based orientation regarding property lies in the conflict between the original idea of fair adjudication and the final contour of due process rights. In early times, the idea of fair adjudication included the right to be judged by one's own law, that is, the prevailing customs of the

57. BLOCH, *supra* note 17, at 320–31.

58. *See id.* at 145–62; GANSHOF, *supra* note 17, at 69–98.

59. *See* BERMAN, *supra* note 33, at 292–94; HOLT, *supra* note 44, at 80–81.

60. *See generally* BERMAN, *supra* note 33, at 292–94; HOLT, *supra* note 44, at 75–87; 1 POLLOCK & MAITLAND, *supra* note 32, at 171–73.

manor, village, or county.[61] This element came into conflict with the royal regime's goal of governance, which favored uniformity. In this conflict, the governance goal of uniformity won out, and the idea of a fair adjudication was reformulated. The first large territory where legal uniformity was imposed was probably England, as a result of King Henry II's establishment of the common law in the second half of the twelfth century.[62] To be sure, the demand for due process could be asserted as a right against the central government, but with respect to property disputes, it also served as a mechanism by which central governments could assert control over powerful subordinates, who were often local landowners.[63]

B. Natural Rights

During the Early Modern Era, two other conceptions of rights developed. These were natural rights and human rights, both arguments for limiting governmental action against individuals, and thus emblematic of a rights-oriented, rather than a goal-oriented, legal system. The concept of natural rights is derived from natural law, the idea that God's established order includes rules, accessible to all rational beings, that are relevant to matters of collective governance as well as to matters of individual salvation.[64] According to this concept, the enactment of a ruler that violates natural law is not a law at all, and a ruler who consistently imposes such enactments can be justifiably deposed.[65]

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61. *See* 1 POLLOCK & MAITLAND, *supra* note 32, at 183–88; J.P. Canning, *Law, Sovereignty and Corporation Theory, 1300–1450*, *in* THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350–C. 1450, at 454, 461–62 (J.H. Burns ed., 1988). Not surprisingly, as Pollock and Maitland point out, local law followed fairly consistent patterns from one place to another. 1 POLLOCK & MAITLAND, *supra* note 32, at 185–86. Nonetheless, it was regarded as local in origin, and significant variations, in Kent for example, attest to its autonomy. *Id.* at 186–88.

62. *See* 1 POLLOCK & MAITLAND, *supra* note 32, at 136–220; WARREN, *supra* note 54, at 330–61.

63. *See* HOLT, *supra* note 44, at 75–76, 123–25; RICHARD MORTIMER, ANGEVIN ENGLAND, 1154–1258, at 51–63 (1994); WARREN,*supra* note 54, at 330–54.

64. 1 ST. THOMAS AQUINAS, SUMMA THEOLOGICA I-II Q. 94, at 1008–13 (Fathers of the English Dominican Province trans., 1947); Gratian, *Concordantium Discordantium Canonum*, *in* 1 EWART LEWIS, MEDIEVAL POLITICAL IDEAS 31, 32–36 (1954); William of Occam, *Dialogus*, *in* 1 LEWIS, *supra*, at 79, 80–85. For discussions, see OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 73–79 (Frederick Maitland trans., 1900); and BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1050–1625 (1997).

65. *See, e.g.*, 1 AQUINAS, *supra* note 64, I-II Q. 96, art. 4, reply 3, at 1020; 2 AQUINAS, *supra* note 64, II-II Q. 104, art. 6, reply 3, at 1646 ("Wherefore if the prince's authority is not just but usurped, or if he commands what is unjust, his subjects are not

Property was not regarded as an element of natural law, however. In fact, the question regarding property was whether its possession, at least in large amounts, violated natural law. A good deal of support for this position can be found in Scripture.[66] Saint Thomas Aquinas, the great proponent of natural law, concludes the contrary, but his reasons for permitting private ownership of property are purely instrumental. He says:

> [I]t is lawful for man to possess property. Moreover this is necessary to human life for three reasons. First because every man is more careful to procure what is for himself alone than that which is common to many or to all; since each one would shirk the labor and leave to another that which concerns the community . . . . Secondly, because human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself . . . . Thirdly, because a more peaceful state is ensured to man if each one is contented with his own.[67]

The striking modernity of the passage[68] results from the fact that Saint Thomas's view of property is entirely instrumental, reflecting his goal-oriented approach to this issue.[69]

When combined with the medieval concept of legal rights, natural law theory generated the idea that individuals possess natural or God-given rights that can be asserted against the government, and that prevail over the government's otherwise valid enactments. While the concept of natural rights can be traced back to late Medieval thinkers

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bound to obey him, except perhaps accidentally, in order to avoid scandal or danger."); JOHN OF SALISBURY, POLICRATICUS: OF THE FRIVOLITIES OF COURTIERS AND THE FOOTPRINTS OF PHILOSOPHERS 191 (Cary J. Nederman ed. & trans., 1990) ("[T]he tyrant, as the image of depravity, is for the most part even to be killed."). *See generally* Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 70–81 (2008).

66. *See, e.g.*, *Luke* 12:33 ("Sell what you have and give alms . . . ."); *Matthew* 6:24 ("You cannot serve God and mammon."); *Mark* 10:25 ("It is easier for a camel to go through the eye of a needle than for a rich man to enter the Kingdom of God."); *Proverbs* 11:28 ("He who trusts in his riches will fall, but the righteous will flourish like foliage.").

67. 2 AQUINAS, *supra* note 64, II-II Q. 66, art. 2, at 1477.

68. Aside from the gendered references, which were fully intended.

69. St. Thomas goes on to declare theft a violation of natural law, not because it deprives someone of property but because it violates distributive justice and involves guile or fraud. 2 AQUINAS, *supra* note 64, II-II Q. 66, art. 5, at 1479. Dante places the fraudulent, together with the malicious, in the very lowest levels of hell, below the incontinent, the violent, and the bestial. Dante Alighieri, *Inferno Cantos XVIII–XXXIV*, *in* THE DIVINE COMEDY 69, 69–138 (Melville Best Anderson trans., 1944).

such as Jean Gerson and William of Occam,[70] it did not become a prevalent mode of thought until the Early Modern Era. Its prominence resulted from the role it played in social contract theory, the leading rival to divine right monarchy as an account of political legitimacy. According to social contract theory, government resulted from a bargain among people in the state of nature. The idea of this generalized agreement was based on the commercial exchanges of the Early Modern Era, rather than the bond of loyalty characteristic of the feudal system.[71] But an imaginary construct of this sort could only be maintained if people in the state of nature possessed something that they could exchange for ordered government, and the state of nature was perceived as a primitive, precivilized era. The solution to this quandary was the idea that people were exchanging their natural liberty, the divinely granted rights that all people possessed as rational beings, that is, as a matter of natural law. Thomas Hobbes argued that people needed to relinquish all their natural liberty, except their basic right to survive, in order to establish a regime that would maintain civil order.[72] John Locke, in opposition, argued that the natural right to possess property and to retain the property one possessed was carried forward into civil society.[73] This argument constituted a major theme in the natural rights tradition.[74] In fact, so central was the idea of property to natural right theorists that they often

70. *See* ANTONY BLACK, POLITICAL THOUGHT IN EUROPE 1250–1450, at 71–78 (1992); RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 20–31 (1979).

71. THOMAS HOBBES, LEVIATHAN, ch. XIII–XIV (C.B. Macpherson ed., Penguin Books 1968) (1651); John Locke, *The Second Treatise*, *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 100, 101–06, 141–54 (Ian Shapiro ed., Yale Univ. Press 2003) (1690). For the analogy between social contract theory and commercial exchange, see C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 46–61 (1962).

72. HOBBES, *supra* note 71, at ch. XVII–XXI. The exceptions are that the sovereign may not command a person to kill himself, may not prohibit a person from buying his way out of military service, and may not require a person to incriminate himself. *Id.* at 268–70 (ch. XXI). The last is one of the rare cases of overlap between natural rights theory and human rights; English courts were just beginning to develop our modern right against self-incrimination when *Leviathan* was published. *See* LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT 42 (Macmillan Publ'g Co. 2d ed. 1986) (1968).

73. Locke, *supra* note 71, §§ 138–40. He derives this from the somewhat tautological statement that "preservation of property [is] the end of government, and that for which men enter into society." *Id.* at 161.

74. *See, e.g.*, STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME (1991); KNUD HAAKONSSEN, NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT (1996); WALDRON, *supra* note 12, at 141–71.

constructed the argument in reverse; property was the basic natural right, and liberty was simply one's property right in one's own body.[75]

C. Human Rights

Human rights, as opposed to natural rights, are a secular conception; they are not attributed to natural law, but to the intrinsic character and needs of human beings.[76] These rights can be described as specific liberties that people possess or, more accurately, as claims that they can assert against the government. They include the rights of free speech, free exercise of religion, free association, freedom from slavery, freedom from torture, and more particularized criminal procedure protections, such as the right to confront witnesses and to avoid self-incrimination. Human rights were the product of various legal reform efforts over the course of the seventeenth and eighteenth centuries, a process that was largely independent of the philosophic development of natural rights theory.[77] The distinction is illustrated by Locke's *Letter Concerning Toleration*, which bases its argument on generalized Christian principles and makes no reference to the idea of natural liberty that plays such a crucial role in his social contract theory and that generates his ideas about property rights in civil society.[78] The association of human rights with the natural rights tradition did not occur until the late eighteenth century, mainly as a result of the declarations generated by the American and French Revolutions.[79] By that time, it was a rhetorical strategy of

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75. 2 HUGO GROTIUS, *The Translation: Book I*, *in* DE JURE BELLI AC PACIS LIBRI TRES 31, 53–54 (Francis Kelsey et al. trans., The Legal Classics Library spec. ed. 1984) (1646); Locke, *supra* note 71, V, § 27; *see* MACPHERSON, *supra* note 71, at 137–48, 199–203; Laura Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).

76. For discussions of the process by which these specific rights originated, see, for example, LEWIS HANKE, ALL MANKIND IS ONE (1974) (right against slavery); LYNN HUNT, INVENTING HUMAN RIGHTS (2007) (human rights generally); LEVY, *supra* note 72, *passim* (right against self-incrimination).

77. For a more extensive discussion of the point, see EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 260–68 (2005); Edward L. Rubin, *Rethinking Human Rights*, 9 INT'L LEGAL THEORY 5, 19–34 (2003).

78. John Locke, *Letter Concerning Toleration*, *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION, *supra* note 71, at 211, 215–17.

79. *See* HUNT, *supra* note 76, at 146–75; Keith Michael Baker, *The Idea of a Declaration of Rights*, *in* THE FRENCH IDEA OF FREEDOM 154 (Dale Van Kley ed., 1994); Daniel T. Rodgers, *Rights Consciousness in American History*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 7 (David J. Bodenhamer & James W. Ely, Jr. eds., rev. ed. 2008); Dale Van Kley, *From the Lessons of French History to Truths for All Times and All People*, *in* THE FRENCH IDEA OF FREEDOM, *supra*, at 72. Clear statements about human

reform advocates, adopted after the idea of natural rights had lost most of its religious associations and philosophic significance.

The expansion of due process and the development of the natural rights and human rights traditions have changed the Western world's conception of the state. They have certainly functioned as countervailing conceptual forces to the duty-based legal systems that developed under the seventeenth and eighteenth century absolutism of France and Spain; the nineteenth century authoritarianism of Prussia, Austria, and Russia; and the twentieth century totalitarianism of Nazi Germany, the Soviet Union, and Communist China. Whether they represent a full shift of our legal system from goal-based to rights-based, in Dworkin's terms, is a more complicated question.

Whatever their general significance, however, it is important to keep the distinctions between these various notions of rights in mind when considering the concept of property rights. Due process dates back to the Middle Ages, and is designed to establish rules for judicial procedure, originally for free persons, that is, the nobility, and later for all citizens. Natural rights emerged during the Early Modern Period, and was essentially a theoretical construct to support social contract theory and related accounts of political legitimacy. Human rights were particularized legal reform efforts to end slavery, abolish judicial torture, establish free speech, and guarantee freedom of conscience. All three concepts recognize that people can be severely punished by the deprivation of their property, but due process and human rights are concerned with governmental actions that are defined independently of such deprivations, and treat loss of property, like loss of liberty, as consequences of those actions. Natural rights theory declares that governmental intrusion upon private property is itself an abuse. The status of property rights in this period of High Modernity depends on which of these concepts has prevailed.

III. PROPERTY RIGHTS IN THE HIGH MODERN ERA

High Modernity, generally regarded as the past two centuries of Western history, is characterized by a number of momentous developments: industrialization, urbanization, the administrative state, and democratic governance. The first three are universal and largely continuous in the Western world; the last experienced a more jagged

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rights, in their modern form, appear in political writing only a little earlier. *See, e.g.*, CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (David Young trans., Hackett Publ'g Co. 1986) (1764); VOLTAIRE, *A Treatise on Toleration*, *in* A TREATISE ON TOLERATION AND OTHER ESSAYS 145 (Joseph McCabe trans., Prometheus Books 1994) (1763).

trajectory but is now universal in the West as well. Since we are currently embedded in this period of High Modernity, our concept of property is necessarily a product of its worldview, and thus of the developments that are responsible for its distinctive character. Like other legal concepts, the property concept is governed by political developments such as administrative governance and democracy, and by economic and social developments such as industrialization and urbanization that are translated into law by those same political developments.

A. The Decline of Property as a Means of Governance or Maintenance

One of the principal characteristics of the administrative state is the implementation of conscious social policy. The central government, using the expanded powers of planning and management that bureaucracy provides, carries out intentional efforts to affect the economic and social systems of the nation that it rules.[80] These efforts fall into Dworkin's category of goal-based action; their prevalence and scope suggests that High Modernity can be regarded as being characterized by goal-based legal systems. This does not mean, however, that modern legal systems are exclusively goal based. It is not difficult to identify rights or duties in our legal system, but that alone is not determinative, since any complex system will contain elements of all three of Dworkin's categories. The crucial question is which category dominates, and the crucial question for present purposes is whether that dominant approach applies to private property.

Examination of our legal system as it actually exists suggests that the goal-based approach to property that has characterized the Western world since its inception has continued, and indeed been amplified, in the High Modern Era. As Stuart Banner concludes, with respect to the United States, "[p]roperty has always been a means rather than an end."[81] The purposes have shifted considerably however. There is no longer any need for central governments to use private property as a means of governance. They now possess the administrative capacities to control the territories that they rule through a hierarchy of full-time, salaried officials who will reliably carry out the central government's

80. For a full explication of this argument, see RUBIN, *supra* note 77, at 22–29.

81. STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 276–91 (2011).

commands.[82] Transportation throughout any Western nation, with the possible exception of remote, underpopulated hinterlands such as northern Canada, is effortless, and communication instantaneous. In addition, the predominance and widespread familiarity of democratic governance means that values such as managerial decentralization and local participation can be readily accommodated without any significant sacrifice of central government control. These same factors mean that the subsequent and subsidiary practice of granting property rights in public offices is no longer necessary; in fact, its advantages are so minimal compared to its obvious inefficiencies that any private practice reminiscent of proprietary office holding is typically declared a criminal offense. Under these circumstances, it can be fairly said that governance is no longer one of the purposes of private property.

The maintenance of the population continues to be a significant purpose of property rights. Perhaps democracy has made this purpose a more important one for central governments, since its leaders' retention in office depends on the economic well-being of the entire citizenry, and not only on a small minority of fighting men. The countervailing consideration is that property is no longer as central as it had been in the past to people's ability to maintain themselves. When few large, systematically organized units of economic production existed, artisans, and even agricultural workers, needed to assert a property right in their tools in order to earn income. In the modern world, with large industrial, service, and management units in place, individual property ownership is more rarely required for people's income-earning activities. The typical factory or office worker for a large organization brings nothing to her job except herself.[83]

B. The Rise of Property as a Means of Increasing Productivity

While property's role in governance has largely disappeared, and its role in maintenance has probably decreased somewhat, its third role,

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82. This is the essence of Max Weber's account of bureaucracy, which he regards as the essential mode of governance in the modern era. *See* 1 WEBER, *supra* note 13, at 212–26; 2 *id.* at 956–1003.

83. Accounts of industrial organization and workplace conditions usually omit any mention of the workers' property. *See, e.g.*, FRANK J. LANDY & JEFFREY M. CONTE, WORK IN THE 21ST CENTURY: AN INTRODUCTION TO INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY (3d ed. 2010); GARY P. LATHAM, WORK MOTIVATION: HISTORY, THEORY, RESEARCH, AND PRACTICE (2007). This is true even for independent contractors. *See, e.g.*, John Buttrick, *The Inside Contract System*, 12 J. ECON. HIST. 205 (1952); Alison Davis-Blake & Brian Uzzi, *Determinants of Employment Externalization: A Study of Temporary Workers and Independent Contractors*, 38 ADMIN. SCI. Q. 195 (1993).

which is advancing productivity, has increased enormously and now serves as the dominant reason why modern legal systems grant property rights. This role for property, and in fact the goal in its entirety, was only dimly and intermittently recognized in the premodern world, although it came into focus and assumed increased importance as the Early Modern period proceeded. It became dominant in High Modernity because it was fully consistent with the administrative state's commitment to control the economy as a matter of conscious social policy. The recognition and expansion of property rights serves as an essential vehicle for the implementation of this policy.

The reason why property plays such a central role in the efforts of modern administrative states to increase productivity is that their means of increasing productivity is to create or expand competitive markets. They do so because of the well-justified belief that in many circumstances markets maximize economic efficiency, and efficiency maximizes productivity. But a market in some item can only exist if people can possess property rights in that item. This may not be universally true, but it is true in our own society. The reason is that a market consists of the free, or relatively free, exchange of the item in question, so that the potential surplus between a willing buyer and a willing seller can be divided between them. That is precisely the source of its efficiency.[84] But people cannot engage in such exchanges unless they either own or can acquire ownership in the item, that is, unless they can control the item in a manner that allows them to benefit from that control.

Komesar's book has a great deal to tell us about courts and legislatures, about the use of the legal or political process to solve social problems and achieve social goals. The insight that goes such a long way to explaining the modern concept of property is that the market is a third and alternative process for doing so. In some situations, the market will be the most promising of our admittedly "imperfect alternatives."[85] As a descriptive matter, the force in control of the society—the constitution makers at the outset, and the constitutionally authorized decision makers thereafter—will choose the market alternative when it seems to be the best mechanism to achieve their purposes. As a normative mechanism, Komesar argues that the controlling force should choose the market

84. *See* N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 136–51 (6th ed. 2012); RICHARD POSNER, THE ECONOMICS OF JUSTICE 179–84 (1981); Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755 (1988).

85. KOMESAR, *supra* note 1, at 98–122.

alternative when the market is the best of our inevitably defective institutions for achieving the general purposes of the society.[86]

This argument illuminates the concept of property as it has been used in the period of High Modernity. Property is no longer a mechanism of local governance, and it is only secondarily a means of enabling individuals to maintain themselves. Rather, it is the mechanism—the necessary mechanism—that we use when we want, or should want, the market, rather than the political system or the judiciary, to control a particular set of social orderings. If we choose the imperfect alternative of the market, we need to confer property rights on legal actors—individuals or artificial persons. Unless people possess a transferable property right in a particular item, we will not be able to create a market in that item, and we will not be able to rely on the market process as a means of social ordering.

In contrast, if we choose the political process, one of the other alternatives that Komesar identifies, we must not confer property rights. It would be contrary to our concept of this process to grant people a property right in their votes, thereby allowing them to sell their votes to others. An arrangement of this sort would probably favor the wealthy, who could buy up less fortunate people's votes, but there is really no need to trace the consequences: the idea of buying and selling votes is completely unacceptable in any Western democracy. The same can be said for subsidiary political rights, such as the right to comment on a regulation.

The relation of property rights to the judicial system is a more complex matter. Property often constitutes the subject matter of a judicial decision (it constitutes the subject matter of the political process as well), but we do not give people a transferable property right in their access to judicial process. To sell one's general right to go to court is akin to selling oneself into slavery. On the other hand, a particular claim can be sold by means of an arbitration clause in a contract or a settlement agreement. The essential point is that we deploy such rights to make the system work the way we want, and deny such rights for the same reason. If we want to encourage class actions, for example, we can grant the holders of small claims the right to sell those claims to a legal

86. *Id.* at 108, 111–21; *see id.* at 108 ("Even if most instances of vertical integration are inefficient, the correct social response would still be no regulation if the governmental regulatory process is sufficiently expensive or biased."); *id.* at 115 ("[W]hether, when, and how the market functions is itself determined by the performance of complex, non-market processes.").

entrepreneur; if we want to discourage such actions, we can forbid such sales.[87]

Thus, Komesar's explication of the way that different means of social ordering—the political system, the judicial system, and the market—operate as alternatives to one another reveal the role of property in modern society. Despite the flurry of natural rights arguments that occurred in the sixteenth through eighteenth centuries, property has not been regarded, in our culture, as an inherent feature of the natural order nor an inalienable right of individuals. While due process and a wide range of human rights such as free speech and freedom of religion have been widely recognized, property is, and always has been in Western society, a mechanism for achieving particular social purposes. In the modern era, that purpose is productivity, which is often best achieved through the economic efficiency that the market provides.

C. Examples of the Modern Role of Property

The modern role of property as a means of increasing productivity through the creation of markets can be further explicated through some specific examples. For the first thirteen centuries of Western (i.e., post-Classical) history, it was possible to have a property right in a human being. As a result, there was a market for slaves.[88] We now regard such a property right as anathema, having shifted from a goal-based to a rights-based approach to this issue. The inevitable result is the elimination of the market. In contrast, authors could not acquire property rights in their work until the end of the Early Modern Era. At first, there was simply no legal recognition of authorship, although someone who hand-copied a manuscript could own the copy as a physical object. With the invention of the printing press, and the consequent ability to generate multiple copies of a work with ease, governments began issuing licenses that allowed some people to copy written works, but prevented the general public from doing so.[89] Whether one calls these licenses property

87. *See generally* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007).

88. *See* BLOCH, *supra* note 17, at 255–60; MARC BLOCH, SLAVERY AND SERFDOM IN THE MIDDLE AGES 1–31 (William R. Beer trans., 1975); DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD (2006); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 44–46 (1972); HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440–1870 (1997).

89. *See generally* ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 18–21 (2009); CHRISTOPHER MAY & SUSAN K. SELL,

or not is a matter of definition, but if they were property, the purpose of the property right thus created was clearly governance. Since the licenses were not transferable, they did not generate a market, and did not encourage productivity. This changed during the transition between Early and High Modernity with the enactment of the Statute of Anne in 1710.[90] The statute established a true property right in written work, and explicitly stated that the reason for doing so was to induce "learned men to compose and write useful books."[91] The current profusion of market transactions, such as the sale of DVD versions of a movie based upon a novel that has not yet been written, flow directly from this creation of property rights.[92]

Any notion that property rights have some intrinsic character or necessary relationship to particular objects can be disproven by an additional example. To build on Komesar's discussion of *Boomer v. Atlantic Cement Co.*,[93] the problem of air pollution—a problem that neither the market nor judicial alternative could satisfactorily address—was initially solved through the political process: the passage of the Clean Air Act which regulated the amount of air pollution that various stationary sources could release.[94] Based on academic proposals,[95] political decision makers (Congress, the President, and the implementing agency) concluded that efficiency of the system could be increased, or, if one prefers, that the inefficiencies of the system could be reduced, by

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INTELLECTUAL PROPERTY RIGHT: A CRITICAL HISTORY 55–56 (2005); Frank D. Prager, *A History of Intellectual Property from 1545 to 1787*, 26 J. PAT. OFF. SOC'Y 711 (1944).

90. 8 Ann., c. 19 (1709); *see* Lyman Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223 (1966); Diane Leenheer Zimmerman, *The Statute of Anne and Its Progeny: Variations without a Theme*, 47 HOUS. L. REV. 965, 969–75 (2010).

91. 8 Ann., c. 19, § 1.

92. By the time the Constitution was drafted, of course, intellectual property rights were an established part of English law, and the power to establish such rights was one of the powers granted to Congress. U.S. CONST. art. I, § 8, cl. 8. The language of this clause clearly indicates the goal-oriented nature of the property rights that Congress was being authorized to create: "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* No mention is made of any natural right to these creations that is being recognized by the provision. For the subsequent development of intellectual property law in the United States, see BANNER, *supra* note 81, at 23–161; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 327 (3d ed. 2005); Zimmerman, *supra* note 90, at 981–1009.

93. 26 N.Y.2d 219 (N.Y. 1970); *see* KOMESAR, *supra* note 1, at ch. 1.

94. 42 U.S.C. §§ 7401–671 (2006). The term refers to a series of enactments that began with a research program and was expanded into a major regulatory regime.

95. *E.g.*, Ellison S. Burton et al., *Solving the Air Pollution Control Puzzle*, 7 ENVTL. SCI. & TECH. 412 (1973).

creating a market in the amount of pollution that stationary sources were permitted to release.[96] To do so, they needed to create a property right in pollution; a firm could earn this right by reducing the pollution it released below a certain level and then selling the right to pollute to that extent to some other firm.[97] The property right thus created was an abstract relationship that existed only in the context of a comprehensive regulatory program. No matter, it was property and led directly to the development of a robust market in pollution rights.

An important caveat is that the conferral of property rights does not necessarily create a market; further rules allowing and enforcing the transferability of the right are needed, as Komesar points out.[98] If the property right is being conferred for purposes other than productivity, the decision makers may choose not to establish such rules, and to prohibit transfer or to allow it only through non-market-creating means. That was the situation regarding property interests in land during the Early Middle Ages. Because the goal of conferring property rights was governance, not productivity, transfer of landed property by sale was prohibited or restricted, and thus no active market in land developed at that time.[99]

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96. The tradable emissions (or "allowances") program was authorized by the Clean Air Act of 1990, Pub. L. No. 101-549, § 108(y), 104 Stat. 2399, 2468 (1990), with respect to sulfur dioxide emissions, a primary cause of acid rain. For a summary of the results, see U.S. ENVTL. PROT. AGENCY, EPA-430-K-08-010, ACID RAIN AND RELATED PROGRAMS: 2007 PROGRESS REPORT (2009), *available at* www.epa.gov/airmarkt/progress/docs/2007ARPReport.pdf. For the international application of this approach, see Geoffrey Bertram, *Tradeable Emission Permits and the Control of Greenhouse Gases*, 28 J. DEV. STUD. 423 (1992).

97. *See* Judson Jaffe et al., *Linking Tradable Permit Systems: A Key Element of Emerging International Climate Policy Architecture*, 36 ECOLOGY L.Q. 789, 791–94 (2009).

98. KOMESAR, *supra* note 1, at 100–05.

99. It is also worth noting that the creation of a market through property rights need not necessarily be motivated by the goal of productivity. A somewhat bizarre but illuminating example is the United States Department of Defense's proposal to create a market in the possibility of terrorist attacks on the United States by enabling people to obtain a property interest in the occurrence of such attacks. *See* Carl Hulse, *Pentagon Prepares a Futures Market on Terror Attacks*, N.Y. TIMES, July 29, 2003, at A1. This highly abstract and indeed counterintuitive property right was not conferred for purposes of productivity; the Department of Defense had no interest in actually having people profit from terrorist attacks, and certainly no interest in deriving any economic benefit of its own from the creation of the market. Rather, this market was designed to serve a political purpose, that is, to take advantage of the market's ability to generate information as means of predicting terrorist attacks. *Id.* The idea was hastily abandoned because of the obvious moral hazard problem. *See* John W. Schoen, *Pentagon Kills 'Terror Futures Market,'* MSNBC.COM (July 29, 2003), http://www.msnbc.msn.com/id/3072985/t/pentagon-kills-terror-futures-market/#.UP6nSGchQsI.

IV. PROPERTY RIGHTS IN THE CONSTITUTION

Epstein and others assert that this instrumental view of property, whatever its connection to the worldview and legal system of High Modernity, is precluded by the intent and language of the Constitution.[100] This argument, although Epstein does not phrase it in these terms, is that the view of property that political theorists advanced, as a means of opposing monarchical power in the sixteenth to eighteenth centuries, has been codified by the Constitution and overrides any general conceptions that Modernity's approach to governance suggests. To the extent that the argument rests on the legislature's tendency to engage in rent seeking, it is fully and convincingly answered by Komesar's explicit critique of Epstein. What remains to be considered are Epstein's other constitutional claims—first, that his view of property, which would preclude uncompensated reductions in value due to regulation, was the intent of the Framers and second, that it should be regarded as a fundamental right.[101]

A. The Text of the Constitution and the Intent of the Framers

Although the claim that the protection of private property was part of the Framers' intent is often advanced by scholars who see themselves as textualists and originalists,[102] this claim is completely lacking in textual support. Private property is not mentioned once in the text of the original Constitution. The only use of the term "property" appears in a clause stating that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[103] This tells us nothing about private property at all. Since the original document explicitly forbids various types of legislation, including ex post facto laws, bills of attainder, and titles of nobility, the absence of any prohibition on interference with private property seems to indicate that such a prohibition should not be

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100. EPSTEIN, *supra* note 2, at 161–94; *see* BANNER, *supra* note 81, at 263–65 (describing views of Edwin Meese); ELY, *supra* note 7, at 42–58.

101. EPSTEIN, *supra* note 2, at 3–31.

102. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); ELY, *supra* note 7; Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997) (textualism); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

103. U.S. CONST. art. IV, § 3, cl. 2.

implied, following the texualist canon of *expressio unius*.[104] Even so enthusiastic an advocate of property rights as James Ely concedes that the Constitution contains "no language that broadly affirmed the right of property. Unlike many of the early state constitutions, the Federal Constitution did not proclaim the natural right of property ownership . . . ."[105]

The argument from original intent is similarly weak. One can of course find statements about the sanctity of property in personal letters, speeches, and other noncodified sources written by the Constitution's Framers,[106] but these tell us very little. Perhaps the authors of these statements may not have felt that it was appropriate to import their personal views into a legal document; perhaps they felt it was appropriate but were simply unable to persuade the majority of their colleagues to go along with them. In any case, the absence of any language limiting government control of private property in the Constitution precludes the claim that such limitations were part of the Framer's intent. Intent-based arguments can be used to explain the meaning of included terms; they are generally not available to explain

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104. *Expressio unius est exclusio alterius*: the expression of one thing is the exclusion of another. This is not really a serious point; it is included here because scholars who argue in favor of property rights often tend to be textualists. Canons of construction are notoriously malleable. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). As Llewellyn points out, *expressio unius* is counterbalanced by the principle that "language may fairly comprehend many different cases where some only are expressly mentioned by way of example." *Id.* at 405. It might be argued that the Constitution is too important and intensely negotiated to include exemplary language. The better argument is that it is too important to be read in strictly textualist terms. For present purposes, the main point is that a textualist approach to the Constitution argues against, not in favor, of its support for property rights.

105. ELY, *supra* note 7, at 46. Despite this concession, Ely argues that many of the Constitution's clauses reflect a commitment to the protection of property. *See id.* at 42–47. Most of the examples he gives, however, are prohibitions against unfair government action, such as the bill of attainder clause, U.S. CONST. art. I, § 9, cl. 3, or prohibitions against favoritism of one state over another, such as the taxation power and direct taxation clause, *id.* § 8, cl. 1; *id.* § 9, cl. 4, or, related to the latter, protection of slavery against potential free state regulation, *id.* at art. IV, § 2, cl. 2. ELY, *supra* note 7, at 43–46. These provisions recognize the factual situation that an individual or a state can be hurt by worsening its financial situation—something that only an anchorite would deny—but they are directed to restricting some particular type of financial impact for reasons unrelated to the impact itself. Thus, they do not erect any general barrier against state action that affects people's finances or property. Several of Ely's other examples, such as the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; ELY, *supra* note 7, at 44, actually contradict his assertion, since they specifically authorize the government to regulate property.

106. *See, e.g.*, ELY, *supra* note 7, at 43, 49–50, 54.

why a particular term has been excluded, especially when the exclusion is too important to have resulted from mere oversight.[107]

There is, moreover, countervailing evidence regarding the Framers' intent. The two legal sources that would seem to indicate their general intent most clearly are the Preamble to the Constitution and the Declaration of Independence. The Preamble, which states the purposes of the document it introduces, does not mention the protection of property. Rather it envisions the creation of a strong, effective central government that will achieve various collective goals, such as common defense and the general welfare. It declares that the Constitution is designed to secure "the Blessings of Liberty,"[108] but the term "property," a natural addition to this clause had the Framers been so inclined, does not appear. The term property is also absent from the Declaration of Independence. That document charges the king with a series of injustices, but interference with private property is not included among them. Instead, it includes the famous objection to "taxation without representation," which seems to suggest that taxation itself, a means by which the value of property can be reduced without compensation, is perfectly acceptable so long as it is agreed upon by a representative government.[109]

B. The Theory of Due Process

Private property does appear in the Bill of Rights, of course, but the language is worth noting: the Fifth Amendment states that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[110] This language, reiterated and made applicable to the states by the Fourteenth Amendment,[111] does not create any right to private property; it creates a right to due process. As described above,[112]

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107. As Ely points out, several contemporaneous state constitutions included clauses protecting private property, *id.* at 47, and the Framers of the federal Constitution were undoubtedly aware of these provisions.

108. U.S. CONST. pmbl.

109. To be sure, Epstein, Robert Nozick, and other libertarians would allow taxation to establish a "night watchman state" that protects people's physical safety and personal property. *See* EPSTEIN, *supra* note 2; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–27 (1974). But eighteenth century British government went well beyond these minimal purposes, and the Declaration of Independence expresses no objection to this. It does not complain about excessive or unnecessary taxation; its position, rather, is that taxation is perfectly legitimate provided that those taxed can participate in the decision regarding the extent and use of the tax.

110. U.S. CONST. amend V.

111. *Id.* at amend XIV.

112. *See supra* Part II.

due process, unlike property, is a right that is long recognized and well established in our legal tradition. The basis of due process in the Fifth Amendment is clear enough, particularly when read in the context of an instrument that creates a representative government that is answerable to its citizens. It prevents the government from harming individuals in any way—executing them, imprisoning them, fining them, or reducing their material conditions—unless it can demonstrate that they deserve to be harmed in that manner. Such a demonstration has two components: first, a law must be enacted that establishes the specified proscription, and second, a fair procedure must be used to show that the particular individual is subject to that proscription.[113]

Thus, a person must not be imprisoned for an action unless the action is declared a crime and the person is convicted, according to the accepted criminal procedure rules, of committing that crime. Similarly, a person must not suffer an economic loss unless the governmental action that produces that loss has been authorized, and the person can be shown, according to the civil procedure rules, to fall within the category established by the authorization. In order to impose a civil fine, for example, the government must demonstrate that it has declared an action wrongful, such as engaging in unfair or deceptive trade practices, and that the individual has in fact engaged in such a practice. In order to downzone someone's real property, the government must demonstrate that it has enacted a zoning ordinance for a particular area, and that the individual property that it claims to have downzoned is located in the designated area.[114] The owner can always go to court to challenge the downzoning on the ground that it was not properly authorized or that her own property is not actually within that area. What she cannot challenge is the general legality of downzoning.[115]

This understanding of due process follows directly from the Constitution's establishment of representative government. The nature of such government is that the representatives are empowered to enact general rules governing the society. Of course, these rules will advantage some people at the expense of others; the Constitution does not enact Mr. Vilfredo Pareto's optimality principle[116] any more than it enacts Mr.

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113. *See* RUBIN, *supra* note 77, at 323–27.

114. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379–84 (1926).

115. *Gorieb v. Fox*, 274 U.S. 603, 610 (1927); *Village of Euclid*, 272 U.S. at 388–90.

116. *See* VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY *passim* (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., Augustus M. Kelley Publishers 1971) (1927).

Herbert Spencer's *Social Statics*.[117] The balance of advantages and disadvantages is to be determined by the political process, that is, the process by which the representative government acts. Each group must take its chances in that process; the struggle among them, as structured by the Constitution's rules, is the inevitable nature of what we conventionally describe as democratic politics. Individuals, however—with some rare exceptions—have no ability to influence this process; unlike the contending groups, an individual is powerless. Therefore, to protect individuals against government oppression, it is necessary to provide that an individual cannot be harmed unless the political process has determined that a larger group should be subject to such treatment and that the particular individual belongs to the group. This is the basic concept of procedural due process established by the Fifth and Fourteenth Amendments: government can impose generalized burdens on its citizens, using the democratic process, but it cannot impose individualized burdens unless it demonstrates, by procedures that we recognize as fair and accurate, that those burdens are authorized by general action.

Over the course of our history, there have been efforts to use the due process clause for substantive purposes, and specifically to limit the government's ability to regulate private property.[118] The debate about this subject need not be reiterated here.[119] At present, there is a general consensus that if any substantive limits are imposed on government, either directly or through the due process clause, those limits involve people's liberty, such as their right to choose their intimate partners or to control their bodies.[120] Limits on economic legislation, including

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

118. The well-known Supreme Court decisions to this effect include *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278–80 (1932) (declaring a law requiring a permit for manufacturing ice unconstitutional); *Adkins v. Children's Hosp.*, 261 U.S. 525, 539–40, 561–62 (1923) (declaring minimum wage law for women unconstitutional); and *Lochner*, 198 U.S. at 64–65 (declaring maximum hours legislation unconstitutional). None of these decisions are currently regarded as good law. *See United States v. Carolene Prods., Co.*, 304 U.S. 144, 153–54 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937) (overruling *Adkins*, 261 U.S. 525).

119. *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993) (Court was motivated by the desire to prevent class-based legislation); PAUL KENS, *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL (1998) (Court was motivated by the desire to preserve laissez-faire approach to the economy). Whatever the Court's motivation, the effect of the *Lochner* substantive due process doctrine was to limit the government's ability to regulate private property.

120. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (finding a state sodomy law unconstitutional); *Roe v. Wade*, 410 U.S. 113, 164–67 (1973) (declaring an

legislation that affects property values, have been resoundingly rejected.[121] One can argue that this consensus should be reversed, of course, but that argument is unlikely to convince very many people at this juncture. The point is that there is no other basis, in either the constitutional text or in the understanding of its evolution, that would justify such limitations.

Not only does the text of the Fifth and Fourteenth Amendments, as currently interpreted, fail to establish any limitation on general government regulation of property, but it explicitly authorizes individualized deprivations of private property under certain circumstances.[122] Thus, while the government can only deprive individuals of liberty through due process, it can take away their property without due process if it has a public purpose.[123] That is, the state can act against a specific individual, taking away this person's particular item of property, without a showing that the property in question falls within a general legal category. In that case, however, since the due process protection is lacking, the state must provide just compensation, which generally means market value.[124] That is why, in the hypothetical at the beginning of this essay, the government need not compensate the landowner for downzoning his property in a manner that reduces its value by $50,000, but is required to provide compensation if it takes part of his property worth $50,000. Downzoning is a general law, and thus part of the political process's vicissitudes; taking half a person's land is

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anti-abortion statute unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (holding unconstitutional a state law "forbidding the *use* of contraceptives").

121. *See, e.g.*, *Carolene Prods., Co.*, 304 U.S. at 153–54 (holding that any rational economic legislation is constitutional); *West Coast Hotel*, 300 U.S. at 393–400 (overruling *Adkins*, 261 U.S. 525).

122. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (finding that the Fourteenth Amendment incorporates to the states the Fifth Amendment's due process protections against the governmental taking of private property).

123. There is no controversy on this matter. The two areas of controversy that have generated Supreme Court decisions are first, whether the government has a public purpose in taking the property away, *see Kelo*, 545 U.S. at 483–85; *Berman v. Parker*, 348 U.S. 26, 34–36 (1954), and second, whether a regulation that decreases the value of a property constitutes a taking, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–32 (1992); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978). But the government's power to take private property for public purposes without due process is incontrovertible.

124. *See, e.g.*, *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).

an action directed against that specific person, who will not be able to influence the political process.[125]

Does this mean that the government can cancel some major category of property by general legislation, without providing compensation for any of the former owners? Of course it does. That is what the national government did when it abolished slavery, or the state governments did when they enacted prohibition prior to the passage of the Eighteenth Amendment.[126] And that is what would happen if the federal government enacted a law that banned medical marijuana. To make this last example clearer, suppose the current prohibition on heroin were abolished, on the grounds that it was ineffective, and private companies began stockpiling the drug and marketing it through specialty stores. Could it be argued that these companies were entitled to compensation for the value of their investments if the government then decided that legalization was producing adverse effects and re-imposed the prohibition?

It is sometimes argued that there is another value that property secures, this being the value of autonomy.[127] That is, property provides people with economic independence and thus acts as a countervailing force to government and a means of securing liberty. This is a difficult argument to take seriously, however. To begin with, it would only provide protection for property owners, and we are a long way past the time, that time being the High Middle Ages, when only property holders had liberty rights. Moreover, in the High Modern Era, with its industrial economy that has eradicated the traditional village, autonomy for property owners inevitably means the freedom to oppress the majority of people who are subject to their economic dominance. The further difficulty with the autonomy argument for property is that it simply is not true. While the Communists effectuated their totalitarian regime by abolishing private property, the Fascists did not. Adolf Hitler and Benito Mussolini were entirely comfortable with allowing people to retain their property, including large industrial establishments.[128] That did not stop

125. The distinction between generalized governmental action and action against a particular person, and the legal significance of this distinction, was established by two early twentieth century decisions: *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915); and *Londoner v. Denver*, 210 U.S. 373, 385–86 (1908).

126. *See* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 92–94 (2010). The amendment can be regarded as abolishing whatever property protection the original Constitution provides, but this is not true of the state prohibition laws that preceded it.

127. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 103–05 (1944). *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

128. *See* R.J.B. BOSWORTH, MUSSOLINI'S ITALY: LIFE UNDER THE FASCIST DICTATORSHIP 1915–1945, at 307–13 (2005); *e.g.*, WILLIAM MANCHESTER, THE ARMS OF KRUPP: 1587–1968, at 411, 657 (1964). On the general relationship of fascism and

them from imposing a similar level of totalitarian control, and the continued ownership of property did not empower the owners of that property to resist these savage dictators.

CONCLUSION

Property rights have been a means of implementing central government goals since the very beginning of Western civilization. The goals they were originally intended to implement were governance, maintenance, and, to a lesser extent, productivity. The advent of the administrative state did not alter this basic approach to property rights, but it did change society's goals. Property rights were no longer needed as a means of local governance, but they assumed a new importance as a means of encouraging productivity. Neil Komesar's book illuminates the basic reason for this altered role of property rights. One of the imperfect alternatives that political decision makers can choose, or critical observers can recommend, for achieving productivity, as well as certain other goals, is the market. But in order to establish a market in any given item, tangible or intangible, it is necessary to confer property rights in that item. Thus, Komesar explains the role of property rights in the modern administrative state.

For a delimited period of time, some political philosophers argued that property rights were not restricted to this role, or any other social policy such as maintenance or governance, but rather were a natural right, an aspect of the natural law that ruled all human societies. This argument was important in opposing the monarchies that were establishing, or trying to establish, absolutist regimes during the Early Modern era. It did not survive into High Modernity, however; our contemporary idea of human rights derives from distinctly different sources. Some contemporary scholars attempt to preserve the notion that private property is a natural right, asserting that it is ensconced in the Constitution. Its notable absence from the text of the original Constitution, the Bill of Rights, and the Declaration of Independence, and the uncertain evidence of the Framers' intent, makes this a difficult claim to sustain.

The other major approach to constitutional interpretation is some version of the idea that the Constitution is an evolving document. This approach cuts even more strongly against the claim that private property is a natural right, because that claim would virtually invalidate the administrative state. The administrative state is not something that we

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property rights, see MICHAEL MANN, FASCISTS 62–63 (2004); and ROBERT O. PAXTON, THE ANATOMY OF FASCISM 10–11, 145–47 (2004).

have stumbled into inadvertently, or that was imposed upon us by a foreign conqueror. It is the product of a sustained set of conscious decisions that our democratically elected government has reached during the past one hundred twenty or thirty years. To hobble it with the requirement that general regulatory rules are limited or constrained by property rights is to reject these long and well-established historical developments, which is hardly an evolutionary approach to constitutional interpretation.

Thus, the concept of property that Komesar illuminates through his discussion of imperfect alternative remains secure. Property rights are primarily a means of creating markets, an imperfect alternative that is often the best among an array of similarly suboptimal ones. That is why we allow the government to decide when property rights will be granted and when they will not, and to increase or reduce their value by means of general legislation.