

CHAPTER ONE

THE FORMALIST TRAP: TEXT AND TRADITION IN THE INTERPRETATION OF CONSTITUTIONAL PROPERTY CLAUSES

Property occupies an uneasy position in the constellation of the constitutional interests of democratic societies throughout the world. Constitutional political rights such as free speech and freedom of association are relatively (though not universally¹) uncontroversial, but no such certainty exists about economic rights, notably the right to private property. The lack of anything close to a global consensus about property as a constitutional right has become apparent in recent years as new democracies have written new constitutions and some established democracies have revised existing ones.

To be sure, the constitutions of most democracies throughout the world do contain property clauses, but several advanced democracies with written constitutions or a charter of rights do not. India, whose original post-colonial constitution expressly protected property, entirely expunged a property clause from its constitution after several years' experience.² Post-apartheid South Africa's

¹Free speech and freedom of association are by no means, however, totally exempt from controversy. For example, in debates over human rights in Asian societies like China and Singapore, the status of these interests as constitutional rights has been one of the major issues. See Joanne R. Bauer and Daniel Bell, eds., *The East Asian Challenge for Human Rights*, (Cambridge, 1999).

²I discuss the Indian story more fully later in this Chapter. See text accompanying notes 156-202 *infra*.

constitution contains a property clause, but the decision to include it came only after an extended and heated debate.³ In Singapore, a country with a strong commitment to free markets, the rights to own property and to receive fair compensation for state expropriations were deliberately omitted from the post-independence constitution.⁴ The same is true of New Zealand and Canada, two countries that have no written constitution but do have a written bill of rights that entrenches individual rights. Property was deliberately omitted from New Zealand's Bill of Rights in 1990⁵ and from Canada's Charter of Rights in 1982.⁶ Underscoring the point, property nowhere appears in Franz Wieacker's "basic inventory" of rights accepted by "most western countries" as of 1989.⁷

Why is there hesitation to include property as a constitutional right? From an American perspective, it might seem natural to include property in the scheme of constitutionally-protected interests of any nation that is committed to a private property/free market system. Private law in all market-based societies takes private property rights seriously, at least as seriously as is feasible, given

³See Chapter Four *infra*.

⁴See Kevin Y.L. Tan, Economic Development, Legal Reform, and Rights in Singapore and Taiwan, in *The East Asian Challenge for Human Rights*, pp. 264, 268.

⁵See Andre van der Walt, The Constitutional Property Clause: Striking a Balance between Guarantee and Limitation, in Janet McLean ed., *Property and the Constitution* (Oxford, 1999), p. 113. On New Zealand's practice of compensated expropriations for public purpose, see Michael Taggart, Expropriation, Public Purpose, and the Constitution, in Christopher Forsyth and Ivan Ware eds., *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford, 1998), pp. 91, 107-108.

⁶I discuss Canada's rejection of a property clause more fully later in this Chapter. See text accompanying notes 88-151 *infra*.

⁷Franz Wieacker, Foundations of European Legal Culture, *American Journal of Comparative Law* 37 (1989): 1, 29.

the complications that rapidly increasing complexity both in the economies and societies of advanced countries create for their private-law regime. But private law can only do so much by way of protecting private property. A property-rights advocate might suppose that in countries that respect private property rights constitutional protection would be a logical complement to private law's protection of individual property interests. Why, then, is there any controversy about the inclusion of a clause expressly protecting private property in the constitutions of countries with free market/private property economic systems?

At least part of the answer, as I will argue this chapter, is that both sides of the debate over property as a constitutional right are victims of what I will call "the formalist trap." In the context of the property-clause issue,⁸ the formalist trap is the assumption or claim that without constitutional protection, property rights are unlikely to enjoy the degree of security and stability that is necessary for a properly-functioning liberal democracy as well as for an efficient free-market economy, or at least that there is a substantial risk that they will not do so. Stated differently, the claim, which frequently is left implicit in arguments about constitutionalizing property, is that the degree of legal protection that extant property holdings within a society enjoy is strongly affected by the existence or absence of a property clause in that country's constitution. Hence, in a liberal democracy whose written constitution expressly guards against uncompensated state expropriations, extant property holdings are likely, *by virtue of that formal constitutional guarantee*, to enjoy a high degree of security and stability. And, because

⁸There is absolutely nothing unique to the property clause issue in this regard. The formalist trap bedevils all of constitutional law, indeed all written law. For a good response to the formalist trap in the constitutional setting generally, see David A. Strauss, *The Role of a Bill of Rights*, *University of Chicago Law Review* 59 (1992): 539.

of the materially higher degree of security of individual holdings, such democracies are likely to enjoy a comparatively greater degree of economic development and more robust citizenship. Conversely, in a democracy that has not made property a constitutional or entrenched right property holdings are likely to be unstable or insecure. Concomitantly, such a society is less apt to be one characterized by a robust civic life.

To be clear about the formalist trap, no one, at least as far as I am aware, asserts that constitutional status is either a necessary or a sufficient condition for stable and secure legal property rights. The claim is weaker than that, but it is still strong. It is usually framed as a probabilistic claim, but occasionally the claim is stated in even bolder terms. Cass Sunstein, for example, in discussing inclusion of a constitutional property clause like the American takings clause in new constitutions, gives an especially clear example of a relatively strong version of the core formalist-trap claim. He states:

A provision of this general sort is indispensable on both economic and democratic grounds. Without such a provision, there is not, in fact or in law, a fully functioning system of private property.⁹

Elsewhere Sunstein states:

The right to constitutional protection of private property has a strong democratic justification: If people's holdings are subject to ongoing governmental adjustment, people cannot have the security and independence that the status of citizenship requires. . . . The right to private property helps to ensure deliberative democracy itself.¹⁰

⁹Cass R. Sunstein, On Property and Constitutionalism, *Cardozo Law Review* 14 (1993): 907, 923.

¹⁰Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (New York, 2001), p. 223.

Commentators have called for explicit constitutional protection of property in Iraq's new

In recent years the formalist trap has been most conspicuous perhaps in a political and legal agenda pursued by major international lending institutions.¹¹ Commentators have referred to this agenda using various labels, including the “new law-and-development movement,” “globalization theory,”¹² or “rule-of-law orthodoxy.” Since my focus is on the constitutional dimension of this agenda, I will primarily use Stephen Gill’s term, “the new constitutionalism.”¹³ The new constitutionalism is, as one of its critic explains, “the political project of attempting to make transnational liberalism, and if

constitution. These commentators typically base their call on the argument that a property clause is necessary for both economic and democratic development in Iraq. See Richard W. Rahn, Saving Iraq . . . From the U.N., *Washington Times*, Sept. 17, 2003, p. A18; George Mellon, In Iraqi Oil, Readers Say I Didn’t go Far Enough, *The Wall Street Journal*, Apr. 22, 2003, p. A29.

¹¹The same agenda is also evident in most bilateral investment treaties (BITs) between major investing countries, especially the United States, and borrowing nations.

¹²See Randall Peerenboom, *China’s Long March Toward Rule of Law* (Cambridge, 2002), p. 453. The original law-and-development movement occurred during the 1950s and 60s, when policymakers sought to implement Max Weber’s thesis about the relationship capitalism, rationality, and rule of law in developing countries. Their attempts to use law to produce economic development suffered serious setbacks. See *id.*, pp. 451-52. The new law-and-development movement focuses primarily on the relationship between law and economic, rather than political development, although it by no means ignores political liberalization. It shares with the original movement a commitment to the idea of institutions, especially legal institutions, matter greatly in the economic development of nations. One of its central tenets is that clear and secure property rights are vitally important, perhaps even necessary, to the process of economic growth. *Id.*, p. 452. The new law-and-development movement’s claims about the relationship between clear property rights and economic development has certainly not escaped criticisms. See, e.g., Carol A.G. Jones, Capitalism, Globalization and Rule of Law: An Alternative Legal Trajectory of Legal Change in China, *Social & Legal Studies* 3 (1994): 195 (arguing that China’s rapid economic growth, despite the absence of clear property rights, illustrates that in some societies there are substitutes for clear property rights that provide the degree of stability and predictability necessary to attract investment).

¹³Stephen Gill, Globalization, Market Civilization, and Disciplinary Neoliberalism, *Millenium: Journal of International Studies* 24 (1995): 399.

possible liberal democratic capitalism, the sole model for future development.”¹⁴ It is the neo-liberal project spearheaded by large international financial organizations like the World Bank and the IMF. As conditions for lending money to new democracies, these institutions have imposed a set of background legal requirements, both on the private law as well as constitutional side, that are designed to secure investor property rights by limiting the sovereignty of local majoritarian politics.¹⁵ The requirements, among the most important of which is a strongly phrased constitutional property clause, constitute a nearly uniform blueprint. The approach is one of standardization, where one-size-fits-all.¹⁶ Little or no account is taken of difference in social, economic, or cultural differences among borrowing nations.

The required or recommended legal institutions and practices have several purposes. Among

¹⁴*Id.*, p. 412.

¹⁵See David Schneiderman, Investment Rules and the New Constitutionalism, *Law & Society Review* 25 (2000): 757.

The new constitutionalism has older roots. Its direct lineage traces back to the work of political economists like James Buchanan, who argued explicitly and consistently for the necessity of constitutional protection to prevent majoritarian interventions in the market. He states, for example, “Until and unless *constitutional* constraints are placed upon the authority of legislative majorities to intervene in the workings of the economy, there will be no means of forestalling the continuing need for economic ‘reform,’ defined as the dismantling of prior interventions.” James M. Buchanan, *The Economics and Ethics of Constitutional Order* (Ann Arbor, MI, 1991), p. 104 (emphasis in original). Although he does not call for constitutional property clauses by name, that is doubtless what he envisions. Property clauses are ordinarily thought to be the central constitutional device for controlling majoritarian interventions in market economies.

¹⁶The private-law aspect of the rule-of-law orthodoxy’s program of standardization has been critiqued by various commentators. See, e.g., Katerina Pistor, The Standardization of Law and Its Effects on Developing Countries, G-24 Discussion Paper Series, No. 4, June 2000, U.N. Conference on Trade and Development, Harvard Center for International Development. Standardization of public law, including constitutional law, has received less attention. See, e.g., Schneiderman, Investment Rules and the New Constitutionalism; Ran Hirschl, The Political Origins of the New Constitutionalism, *Indiana Journal of Global Legal Studies* 11 (2004): 71.

the most important of these purposes is providing security for the property rights of foreign investors by constitutionally immunizing their holdings from domestic redistributive policies.¹⁷ Both international institutions like the World Bank and individual lender nations from the West consider constitutional provisions protecting property necessary to prevent democratization of property and redistribution of state assets.¹⁸ Lacking such property protection, they believe, the foreign investment that is necessary for economic development simply will not occur.¹⁹

Advocates of strong property rights do not hold a monopoly on the formalist trap. Ironically, the same assumption underlies both of the two sets of opposing arguments that repeatedly appear in legal and policy discussions about property's status in the constitutions of liberal democracies. Just as commentators like Professor Sunstein and participants in the neo-liberal economic order lapse into the formalist trap in arguing for the need for constitutional protection of property, so also political progressives have fallen victim to the same mistaken assumption. Progressives generally provide two reasons for opposing constitution protection of property.²⁰ First, they argue that making property

¹⁷See Schneiderman, Investment Rules and the New Constitutionalism, *supra*; Hirschl, The Political Origins of the New Constitutionalism, *supra*.

¹⁸See David Schneiderman, Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-liberal Constitutionalism, *Law and Contemporary Problems* 63 (2000): 83 (giving examples from Latin America of how the new (neo-liberal) constitutionalism has disciplined domestic constitutional rules).

¹⁹See Schneiderman, Investment Rules and the New Constitutionalism, *supra*.

²⁰For a particularly clear expression of the progressive arguments against constitutionalizing property, see Jennifer Nedelsky, Should Property Be Constitutionalized?: A Relational and Comparative Approach, in *Property on the Threshold of the 21st Century*, G.E. van Maanen and A.J. van der Walt eds. (Antwerp, 1996), p. 417. See also David Schneiderman, Comparative Constitutional Law in an Age of Economic Globalization, in Vicki C. Jackson and Mark Tushnet eds.,

rights a matter of constitutional protection frustrates the realization of a just society. Social justice requires a fair distribution of holdings, and constitutional property clauses make collective adjustments of property holdings much more difficult than they would be if property rights were left subject to majoritarian control. Second, they argue that by removing the question of whether the extant distribution of property holdings is fair from the agenda of ordinary democratic politics, the progressives' argument goes, constitutional property clauses create an unacceptable (and ironic) risk that many citizens will lack the material wherewithal to practice democratic citizenship.

In this chapter, I argue that, contrary to both the new constitutionalism's brief for constitutional property clauses and its progressive critics, constitutional protection of property is far from being "indispensable," as Sunstein puts it,²¹ for either economic or democratic well-being. No legal text, constitutional or otherwise, has that much effect. What proponents of the new constitutionalism and its critics have both overlooked is the effect of background non-constitutional legal and political traditions and culture on the status of property rights in new democracies. These background traditions and culture have a path-dependent effect that undermines the case for any standard approach to the questions of whether and how to constitutionalize property. In deciding whether and how to constitutionalize property, policy-makers need to pay serious attention to a variety of contextual factors. These include the following: the method of formal constitutional amendment, the relationship between

Defining the Field of Comparative Constitutional Law (Westport, CT, 2002), pp. 237, 241; Aeyal Gross, The Politics of Rights in Israeli Constitutional Law, *Israel Studies* 3 (1997): 80, 98; Ran Hirschl, The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions, *Law & Social Inquiry* 25 (2000): 91.

²¹See note 9 *supra*

the judiciary and the legislature; the nature of judicial review in the local country and local attitudes towards it; the status of property under local private law traditions and culture;²² the legal system's jurisprudential tendencies; and, finally, how politicized the general subject of property rights is within the local society. None of these factors will be given any weight if policy-makers succumb to the formalist trap.

To be clear about my thesis, I do not say that property clauses are irrelevant or otiose. Text matters, as Chapters Three and Four, discussing the German and South African property clauses, will show. The text of the property clauses of both of those countries' constitutions has made certain interpretations easier, especially with respect to issues relating to the social-obligation aspect of constitutional property. In South Africa, for example, the explicit social-welfare commitments of the property clause and cognate provisions of the constitution have made a significant difference in how housing rights cases are handled in the Constitutional Court. Conversely, the absence of specific textual locutions makes particular interpretations more difficult. As I will later discuss, the absence of a textual reference to a social obligation of ownership in the American takings clause has made interpretations like those made by the constitutional courts in Germany and South Africa more difficult, though not impossible, as Chapter Five will discuss.

At the same time and just as important, text alone is not outcome-determinative. The formalist thesis ignores or underestimates the importance of the other factor that figures in the interpretive process: background (non-constitutional) legal and political traditions and culture. Tradition and

²²The experience of South Africa is especially revealing on the importance of this topic. See Chapter Four *infra*.

culture also matter a great deal in the interpretive process. The experiences with interpretation of the constitutional property clauses of both Germany and South Africa demonstrate how traditions and culture have influenced the Constitutional Courts in those countries. In South Africa, for example, the private-law tradition of property threatens to undermine the transformative purpose of the property clause and related provisions of the 1996 constitution.

By the same token, background tradition and culture strongly influence constitutional interpretation, but they do not dictate how a legal community of interpreters will react to a new constitutional provision. The effect of a constitutional property clause may vary over time, as traditions and cultures change. No constitutional provision, including a property clause, is a true precommitment device. Constitutions can be amended, not only explicitly but also implicitly through the process of interpretation.²³ All that the decision to include a property clause in a constitution signals is the existence of a political consensus in favor of (relatively) strong property rights, *at this moment in time*. It is not a guarantee for the future.

My emphasis on the role of background traditions and culture raises one argument that is sometimes made in support of inclusion of a constitutional property clause in the new constitution of a nation. The argument is that where the new constitution is that of a nation that lacks a historical legal culture or tradition of secure property rights, there is special reason to adopt a constitutional property clause in order to promote the transition to a rights-respecting legal environment. Such a provision, that is, will serve as a catalyst for creating a new legal culture. For example, a constitutional property

²³Cf. Bruce Ackerman, *We, the People: Foundations* (Cambridge, MA, 1991).

provision might be a place to start in developing a new legal culture that is committed to those liberal values that are commonly associated these days with the label “rule-of-law order,” that is, the values of economic liberalism.

This argument has considerable force. Still, it is worth considering in any given case whether constitutionalizing property is the best way to begin creating a new legal culture, one oriented by economic and political liberalism. Especially in a society with a history of economic injustice, a constitutional property clause may be extremely controversial. A property clause may ultimately be adopted but only at a cost of substantial political capital. There may be better places to start changing the background legal culture and traditions than property clause, such as the particular characteristics of legal institutions like courts.

It is also possible that a constitutional property clause may serve as a catalyst for legal, political, and social transformation in a progressive direction. Perhaps the best current example is South Africa, where some of the proponents of the new constitution’s property clause argued that a carefully-constructed property clause, far from having the laissez-faire effects that some opponents claimed, would be a catalyst for land reform, tenure reform, and land restitution.²⁴ As we will see in Chapter Four, the most important question in South African constitutional law today is whether the new property clause will have that effect.

Finally, constitutional provisions have symbolic and expressive value. A transforming society

²⁴Andre van der Walt has been the most forceful advocate of this view. See, e.g., Andre van Walt, *The Constitutional Property Clause: Striking a Balance between Guarantee and Limitation*, in Janet McLean, ed., *Property and the Constitution* (Oxford, 1999), p. 109.

may wish to include a property clause in its new constitution simply for the purpose of expressing particular political or moral values, regardless of uncertainty about the instrumental effect of the clause. At the same time, however, the expressive value of a property clause may be negated or undermined by the government's use of the clause for propaganda purpose. History is filled with stories of dictators who have used formal constitutional rights provisions as propaganda to counter criticisms of their regimes.²⁵

My claim does not deny either of these arguments. I argue only that the instrumental effects, both political and economic, that a property clause ultimately has turns at least as much, if not more, on the two interpretive factors I briefly stated in the Introduction, namely, the country's background politico-legal traditions and culture (i.e., the path-dependency argument) and the legal institutional context within which constitutions and the courts interpreting them operate.

I argue that a comparative look at the experiences of other nations with and without constitutional property clauses suggests that what matters is less whether or not a constitutional property exists than how it is interpreted.²⁶ I agree with the South African legal scholar Andre van der

²⁵Zimbabwe is a recent example. Despite the existence of a constitutional provision requiring compensation for government expropriations of property (Constitution of Zimbabwe 1980, § 11), in recent years President Robert Mugabe's regime has routinely forced white land owners off their land with no payment of compensation whatsoever. The constitutional provision has played virtually no role in this process of forced removals. It will be interesting to see what effect, including propaganda effect, China's new constitutional property clause has in future government expropriations of land. Experience with other provisions of China's constitution indicates that the constitution is generally subordinate to party ideology. See Chris Buckley, *China Approves Amendments on Property and Human Rights*, *New York Times*, Mar. 15, 2004, p. A12.

²⁶I do not wish to imply that the property right is unique in this respect. My critique could equally be made of every other constitutional right. Indeed, others have made just that more general

Walt, who states, “[T]he problem is not the constitutional entrenchment of property, but the model of constitutional review in terms of which the property clause is interpreted and applied.”²⁷ More concretely, the thesis here is that the crucial factor affecting economic growth and democratic redistribution of wealth is the relevant country’s background non-constitutional legal and political culture (including its history). In a country whose background political-legal culture respects private property rights, constitutional protection of property is not essential for economic development. Conversely, in a country whose background political-legal culture makes individual property holdings highly vulnerable to democratic adjustments, a constitutional property clause will have little effect by way of resisting legislative action.

This chapter begins with a brief description of the two main objections to constitutional property that have been made during the course of debates over constitution-making around the world. In the next section I critically evaluate these objections, concluding that while they cannot be dismissed out of hand they are nevertheless overstated. I then discuss the experience with constitutional property in Canada, which ultimately rejected constitutionalizing property. The Canadian experience illustrates not only the fears that make the issue of constitutionalizing property so politically contentious but also why, contrary to the neo-liberal argument formal constitutional protection sometimes not a necessary condition for a regime of stable and secure property rights. Despite the absence of a formal text

point. See, e.g., David A. Strauss, *The Role of a Bill of Rights*, *University of Chicago Law Review* 59 (1992): 539. My aim here is to apply the Realist critique to the property right in hopes of shedding a little light on the continuing controversy about constitutional property around the world.

²⁷van der Walt, *Striking a Balance Between Guarantee and Limitation*, p. 128.

recognizing the right of property as an entrenched right, property rights in Canada enjoy a high degree of security and stability primarily because of a background tradition of strong property rights in Canada.

Next, I examine the case of India, a country which once had but later repudiated a regime of Super-Property. India's experience with constitutional property illustrates how interpretation and the institutional setting within which the process of interpretation takes place is what is decisive in determining what effect a constitutional property clause has. In the final section I explain the path-dependent role played by background history and political-legal culture in the interpretation process.

As to both sides of the debate over constitutionalizing property, my view can be summarized by the Scottish verdict "Not Proven." While I remain agnostic on the basic question, however, I am clear in firmly rejecting all versions of the formalist trap.

I. Two Objections to Constitutional Property

In the debates that have occurred around the world over whether to include or retain a constitutional property clause two concerns have repeatedly been expressed. Opponents argue that constitutionalizing property is undemocratic insofar as it removes questions about property, how it is used and how it is distributed, from the realm of ordinary democratic politics. Their second objection is closely related to the first. Granting property constitutional protection, they contend, exacerbates the inequality in the distribution of wealth within society. In this section I will summarize the basic arguments made along these two lines. Throughout the summary I'll use the experiences of constitutional property clauses in the United States and India to illustrate the arguments. I choose these

two because critics of constitutional protection²⁸ routinely point to them as examples of what is wrong with a regime of constitutional protection of property.²⁹

A. *Constitutionalizing Property Is Undemocratic*

The first basic concern with property as a constitutional right is that such a right shrinks the scope of democratic deliberation. By that I mean, protecting property rights not just as ordinary legal rights but as an extraordinary right—a constitutional right—exactly means that the right is beyond change, modification, or ending through ordinary political processes. The effect of property as a constitutional right, then, is that the many important political issues associated with property are removed from public debate and control.

The concern about the relationship between property and democracy is an old one. As C.B. Macpherson observed, “[N]othing has given more trouble in liberal-democratic theory than the liberal property right.”³⁰ The dilemma, as political theorists from Mill to Marx have conceived it, is simply this: government can have democracy, understood as a system of self-management, or it can have protection of property, but not both. Choosing property creates a monopoly of political power by the

²⁸Some of the main scholars arguing against a constitutional right of property are Frank Michelman, Jennifer Nedelsky, Michael Chaskalson. See, e.g., Frank I. Michelman, Socio-Political Functions of Constitutional Protection for Private Property Holdings (In Liberal Thought), in van Maanen & van der Walt eds., *Property on the Threshold of the 21st Century*, p. 433; Nedelsky, Should Property Be Constitutionalized?; Michael Chaskalson, The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth, *South African Journal on Human Rights* 9 (1993): 388.

²⁹See, e.g., Michael Chaskalson, The Problem with Property, pp. 389-408.

³⁰C.B. MacPherson, Liberal-Democracy and Property, in C.B. MacPherson ed., *Property: Mainstream and Critical Positions* (Toronto, 1978), p. 199.

propertied, denying the very defusion of power that democracy requires.³¹ Some critics, usually those on the extreme Left, flatly assert that democracy and private property are totally irreconcilable.³² Most political progressives, however, believe that reconciliation is possible, but only if property rights are closely circumscribed.

In constitutional democracies, those on the Left often believe that the problem of reconciling property rights with democracy requires the property rights not be given constitutional status.³³ Indeed, probably the most common objection to making the right of property a matter of constitutional protection is that such an action closes the door on the project of reconciling private property with democracy. Property wins; democracy loses.

Property as a constitutional right poses core questions about democracy, about how government can and should function in a democracy, critics of constitutional property argue. Making property a constitutionally protected right means that the core disputes about property, especially how it is distributed and how its use is regulated, are substantially removed from popular control through the normal processes of democratic politics. True, constitutional rights, including those designated as fundamental constitutional rights, are not totally immune from political control. Constitutional rights *can* be regulated, but government is not free to regulate them however it may wish. Constitutionalizing

³¹See Alan Ryan, *Property and Political Theory* (Oxford, 1984), pp. 112, 150.

³²See, e.g., Samuel Bowles & Herbert Gintis, *Democracy and Capitalism* (New York, 1986).

³³See, e.g., Gross, *The Politics of Rights in Israeli Constitutional Law* *supra*.

property does not mean that property rights become trumps, to use Ronald Dworkin's term,³⁴ but it does mean that majoritarian politics does not always get its way. Because of their anti-democratic function and effect, all constitutional rights, but especially property rights, with their direct impact on the use and distribution of wealth throughout society, trigger debates about the role of majorities, elites, interest groups, legislatures, and courts.

The argument from democracy, then, is basically that making property a constitutionally protected right removes property, or more accurately, the entire panoply of issues that are associated with property from the realm of public discourse and public control. Jennifer Nedelsky expresses this concern in terms of property "implicat[ing] the very core issues of politics." Nedelsky explains that those core issues include:

[W]hat system of property best achieves protection for "just deserts", the fruits of one's labour? What system will provide optimal and secure access to material resources? How should we conceptualize the distinction between public and private? What kinds of power should be allocated to individuals or groups, what kinds should be exercised through collective, democratic decision-making? How should the tensions between equality and freedom be resolved?³⁵

The result of constitutionalizing property, Nedelsky objects, is that "[This] whole set of basic issues are [sic] removed from ongoing public debate and public comprehension."³⁶

All of the issues that Nedelsky identifies directly affect the basic structure of society. Property

³⁴Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA, 1977).

³⁵Nedelsky, *Should Property Be Constitutionalized?*, p. 427.

³⁶*Ibid.*

structures society. Property is, quite literally, foundational. All rights confer power over others, but property rights are the ultimate basis of power. This is because, unlike other rights, the right of property is allocative and distributive in function. Its functions include determining how scarce resources are used and who is entitled to exclusive use of resources. Property rights grant to some individuals and simultaneously deny to others access to and control over scarce resources, including resources that are literally essential to human (and non-human) life. As Laura Underkuffler has observed, “Any scheme for the super-majoritarian [i.e., constitutional] protection of the appropriations by some persons means, correspondingly, the denial of the appropriation of the same goods, resources, and essentials of life by others.”³⁷

Property rights pose this zero-sum problem even when they are not constitutionally protected. The problem is much more aggravated, however, when property is a constitutional right. Non-constitutional rights may be altered through the ordinary processes of democratic politics, that is, simple majoritarian decision-making. When property rights acquire constitutional status, however, they are immune from such revision. They can be changed only through extraordinary political means, with the result that the whole question of how resources are distributed and used is largely removed from the realm of public deliberation. Put simply, the ability of democratic legislatures or other politically accountable bodies to engage in social engineering for the public good is severely compromised in a legal system where property rights are a matter of constitutional protection.

The notion that constitutional property and democracy are inevitably at loggerheads draws

³⁷Laura S. Underkuffler-Freund, Property: A Special Right, *Notre Dame Law Review* 71 (1996): 1033, 1044.

apparent sustenance from the standard account of the American experience with constitutional protection of property interests. The conventional story of *Lochner*³⁸ equates constitutional property with the substantive due process jurisprudence that was anti-redistributive, politically motivated, unprincipled, and undemocratic. The term “Lochner,” in fact, is a trope signifying judicial activism protecting the property rights of a few at the expense of the democratic will of majorities. American courts during the *Lochner* era are seen as illegitimately using property as the means to shrink the scope of democracy.

The message that critics of constitutional property draw from the *Lochner* experience is not simply that the constitutional property provision can be deployed for some very dysfunctional politics but, more fundamentally, that any regime of constitutional protection of property inevitably inhibits democracy. The critics equate legislative power with democracy and label judicial use of the constitutional property clause to invalidate legislative actions that limit ownership interests in some more or less direct way as undemocratic. Of course, all constitutional rights enforced through the power of judicial review can be characterized this way, but critics of constitutional property view property as especially undemocratic because of its direct effect on the distribution of wealth throughout society. The two—constitutional protection of property, indeed to some critics, the very existence of the private property as an institution,³⁹ and democracy—are seen as mutually incompatible. They stand in a zero-

³⁸For some examples, see Laurence H. Tribe, *American Constitutional Law* 2d ed. (Mineola, NY, 1988), pp. 568-571; R.W. Bauman, Property Rights in the Canadian Constitutional Context, *South African Journal on Human Rights* 8 (1992): 344, 355-359; Chaskalson, The Problem with Property, pp. 395-408.

³⁹See, e.g., Bowles & Gintis, *Democracy and Capitalism*.

sum relationship with each other; the existence of one necessarily precludes the existence of the other.

Adding to these problems in reconciling constitutional property with democracy property is the added problem that constitutional protection of property requires judicial review.⁴⁰ The objection, of course, is familiar: judicial review involves unaccountable judges overturning majority-based decisions of legislatures or politically accountable agencies. “By what license,” William Fischel asks, “are courts of law, presided over by people who are at best indirectly accountable to the electorate, to tell duly elected legislators how to conduct their business?”⁴¹ Alexander Bickel famously termed this the “countermajoritarian problem.”⁴² He articulated the problem this way:

[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.⁴³

In the context of the right to property, this objection to judicial review has been expressed in especially strong terms. Fischel captures the objection succinctly when he states, “[T]he issue is why property needs extra protection [through judicial review] in a world in which property is generally well thought of by a majority of people.”⁴⁴ In the words of another commentator, “Under a constitutional

⁴⁰See Michelman, *Socio-Political Functions of Constitutional Protection for Private Property Holdings*, pp. 433, 441-442.

⁴¹William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Cambridge, MA, 1995), p. 3.

⁴²Alexander Bickel, *The Least Dangerous Branch* (New Haven, CT, 1962).

⁴³*Id.*, p. 19.

⁴⁴Fischel, *Regulatory Takings*, p. 4.

property right the judiciary would be handed the power to regulate the regulators in the name of a right originally of its own creation, and central to its traditions. That is a worrisome prospect.⁴⁵ Since property is the basis of power, the argument goes, judicial review means that courts, not legislatures, ultimately determine the distribution of power in their societies.

Here again, the ghost of *Lochner* looms very large. According to the conventional wisdom,⁴⁶ *Lochner* was all about the excesses of judicial power and the undermining of democracy that comes with judicial review. The American Supreme Court was activist to the point of political illegitimacy. The Court misused its authority to frustrate the efforts of political majorities to provide just conditions in a new social order. Through its judicial review power the Court built a wall around the narrow property interests of elites in the marketplace, severely limiting the scope of democratic self-governance.

B. Constitutionalizing Property Entrenches Wealth Inequality

The second prominent objection to property as a constitutional right is closely related to the first. It is that constitutional protection of property has a fundamentally anti-redistributive effect, and in societies in which wealth is already unequally distributed, a constitutional property clause will entrench inequality in wealth distribution.

The argument begins with what to many critics of constitutional property is a truism: in market

⁴⁵Joel Bakan, *Against Constitutional Property Rights*, in Duncan Cameron & Miriam Smith, *Constitutional Politics* (Toronto, 1992), pp. 117, 122.

⁴⁶See note 38 *supra*.

economies property is the primary source of inequality.⁴⁷ Like the thesis that property and democracy are mutually incompatible, this premise has a long history. Proudhon's famous answer "What is property," namely, "Property is theft,"⁴⁸ is but the one example. Recently, this argument has reemerged in some new democracies that are trying to overcome histories of gross inequality in the distribution of wealth as well as political oppression. While the argument has not led these emerging democracies to abolish the right to property it has led in some of them to considerable opposition to elevating the property right to constitutional level. South Africa, whose experience I will discuss in detail in a later chapter, is the prime example. For present purposes we need only note that in South Africa's constitutional debates a concern was strongly expressed that making property rights a subject of constitutional protection would simply freeze the widely unequal pattern of land distribution that apartheid produced.⁴⁹ So long as property rights in the form of holdings to land were protected as a constitutional matter, the injustice of apartheid could never be finally eliminated. "The constitutional right to property," Michael Chaskalson argued, "is equated with the constitutional protection of existing distributions of ownership."⁵⁰ For Chaskalson and many other South Africans, the implication for a country where that distribution of ownership was egregiously unequal had to be rejection of any constitutional property right.

⁴⁷See, e.g., Nedelsky, *Should Property Be Constitutionalized?*, p. 424; Chaskalson, *The Problem with Property*, p. 389.

⁴⁸Pierre-Joseph Proudhon, *What Is Property?*, Donald R. Kelley and Bonnie G. Smith trans. (Cambridge 1994; first publ. 1840).

⁴⁹See van der Walt, *The Constitutional Property Clause*, p. 111.

⁵⁰Chaskalson, *The Problem with Property*, p. 410.

American constitutional history seems to critics clearly to support the claim that constitutional property and inequality of the distribution of wealth go hand in hand. Jennifer Nedelsky, for example, has argued that the most important consequence of property's supreme constitutional rank in the American regime has been to "place[] inequality [i.e., of wealth distribution] at the center of American constitutionalism."⁵¹ James Madison, the principle author of the American constitution, Nedelsky argues, "opposed laws with redistributive consequences."⁵² Protecting property from what he perceived to be the degradations of the democratic majorities meant that the distribution of property had to be unequal. The conception of property that Madison and other Framers of the federal constitution held was what Frank Michelman has called the "possessive" conception, which Michelman distinguishes from the "distributive" conception.⁵³ The basis of this possessive conception is, Michelman writes, that it "understand[s] property in its constitutional sense as an antiredistributive principle, opposed to governmental interventions into the extant regime of holdings for the sake of distributive ends."⁵⁴ Redistribution is considered to be a political act that requires justification, while property is a natural right that is presumptively just. While this possessive conception of property need not invariably underlie a constitutional property clause, it is highly likely to do so. Chaskalson argues, "Traditional notions of the constitutional right to property," by which he means Michelman's possessive

⁵¹*Id.*, p. 2.

⁵²*Id.*, p. 30.

⁵³Frank I. Michelman, Possession vs. Distribution in the Constitutional Idea of Property, *Iowa Law Review* 72 (1987): 1319.

⁵⁴*Id.*, p. 1319.

conception, “are very deeply entrenched.”⁵⁵ A main reason why they are so entrenched is the fact that the American constitution is the template for constitution-making throughout the world. In constitution writing as in many other things these days, as America, so goes the rest of the world. As a result, many critics believe, the decision to include a property clause in a new constitution almost certainly means replicating the historical American reality of great disparities in the distribution of wealth.

II. Responses to the Objections

A. *Property, Democracy, and the Madisonian Anxiety*

Opposed to the argument against constitutional property because of its anti-democratic effects is a theory of the relationship between property and democracy that has gained wide acceptance among American scholars in recent years.⁵⁶ This theory is rooted in a deep skepticism about the actual workings of democracy.

The modern critique of democracy focuses on the problem of factions. The term “faction” is usually attributed to James Madison, whose thought highly influenced the federal constitution.⁵⁷ His discussion in *The Federalist No. 10* is now the standard reference for what Mark Kelman calls “democracy bashing.”⁵⁸ It is not altogether clear what Madison actually *meant* by the term “faction”

⁵⁵Chaskalson, *The Problem with Property*, p. 410.

⁵⁶See generally Fischel, *Regulatory Takings*, pp. 100-140 (discussing the problem of majorities in relation to property interests and citing sources).

⁵⁷See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, KS: University Press of Kansas, 1985).

⁵⁸Mark Kelman, *On Democracy Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, *Virginia Law Review* 74 (1988): 199.

and what he saw as the core problem with democracy. Many commentators today read Madison as concerned with interest-group politics, i.e., well-defined and well-organized interest groups exerting their will on legislatures against a disorganized majority.⁵⁹ Others believe, probably more correctly, that this reading is anachronistic and that Madison thought the problem, at least at the local level, was with *majorities*, not minority special-interest groups.⁶⁰ Whoever is right in this dispute, it is clear that Madison linked the problem of factions with property.⁶¹ In *Federalist 10*, for example, Madison stated that “the most common and durable source of factions has been the various and unequal distribution of property.”⁶² Political virtue could not be relied upon, Madison argued. “It is vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good.”⁶³ The answer, he insisted in *Federalist No. 51*, was institutional: “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”⁶⁴ A strong right of private property was the key “constitutional right[] of the place.”⁶⁵ Making property the subject of constitutional protection was, then, Madison’s response to his

⁵⁹See, e.g., Peter Aronson, Calhoun’s Constitutional Economics, *Constitutional Political Economy* 2 (1991): 31.

⁶⁰See William A. Fischel, *Regulatory Takings*, pp. 104-107.

⁶¹See Fischel, pp. 104-109.

⁶²*Federalist* No. 10 (James Madison), in *The Federalist Papers*, Clinton Rossiter ed. (New York, 1961), pp. 77, 79

⁶³*Id.*, p. 80.

⁶⁴*Federalist* No. 51 (James Madison), in *The Federalist Papers*, pp. 320, 322.

⁶⁵See Laura S. Underkuffler, On Property: An Essay, *Yale Law Journal* 100 (1990):127.

anxiety about factions.

Today, skepticism about democracy comes mostly through public-choice theory and its cousin, the interest-group theory of legislation. Whether or not public-choice theory accurately expresses Madison's views about factions, their problem and solution,⁶⁶ it is now the leading theoretical foundation for doubts that democracy works and for concomitant calls for constitutionalizing property rights.⁶⁷ Public-choice theory, especially the Chicago School version thereof, takes a strikingly dim view of the propensity of democratically elected bodies to reflect majority will.⁶⁸ Public-choice theory's account of legislation is one of interest-group politics. It holds that, in the words of the noted economist Gary Becker, "[t]he basic assumption is that taxes, subsidies, regulations, and other political instruments are used to raise the welfare of more influential pressure groups."⁶⁹ As a positive theory of democratic government, public-choice theory holds that well-organized interest groups corrode and frustrate democracy by highjacking the political process and blocking popular (i.e., majoritarian) aims. It is no exaggeration to say that public-choice theory is largely based on the Madisonian anxiety is that majorities have a tendency to be taken over by factions and factions threaten private property rights by pursuing their own narrow and short-term goals at the expense of the interests of others. Scholars

⁶⁶On the similarities between Madison's views and public choice theory, see Bernard Grofman & Donald Wittman eds., *The Federalist Papers and the New Institutionalism* (New York, 1989).

⁶⁷But see Daryl J. Levinson, Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs, *University of Chicago Law Review* 67 (2000): 345, 373-377.

⁶⁸ Public choice theory and its relationship to law is well-discussed in Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago, IL, 1991).

⁶⁹Gary Becker, A Theory of Competition Among Pressure Groups for Political Influence, *Quarterly Journal of Economics* 98 (1983): 371, 373-74.

influenced by public-choice theory share Madison's belief that the best security measure against factional power is to strengthen property rights by constitutionalizing them.⁷⁰

Despite ostensibly being a strictly positive theory, public-choice theory has provided commentators with clear normative implications. Devotees of public-choice theory and its concomitant, the interest-group theory of legislation, have argued that the United State Supreme Court should police legislation to protect citizens against "rent-seeking" depredations, spearheaded by factions.⁷¹ The most important tool in that effort, they have argued,⁷² is the takings clause. Judicial interpretation of constitutional property rights as Super Property is, in their estimation, the most effective way of successfully preventing factions from thwarting the proper running of majoritarian democracy.

Interpreted as Super Property, the constitutional right of property is a "precommitment device," i.e., a voluntarily self-imposed constraint by which one prevents oneself from engaging in activities that are harmful to oneself but that are otherwise difficult to resist. (The tale of Ulysses lashing himself to the mast of his ship in order to resist the call of the Sirens is the now commonly-cited instance of such a precommitment device.⁷³) Constitutional provisions like the takings clause are the constitutional

⁷⁰For a good account of this argument, see James L. Kainen, The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights, *Cornell Law Review* 79 (1993): 87.

⁷¹William H. Riker and Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures, *Virginia Law Review* 74 (1988): 373.

⁷²*Ibid*; Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA, 1985).

⁷³See Jon R. Elster, *Ulysses and the Sirens* (Cambridge, 1979).

precommitment device by which a democratic polity protects itself from succumbing to the temptations of interest-group politics by rendering itself incapable of making decisions about how resources are distributed and used solely through normal political processes.⁷⁴ Ordinary political bargaining is not enough. Parties with competing visions of how resources should be distributed and used must bargain in the shadow of the Constitution.

It is not only academics whose opinion about the need for more robust constitutional property rights is premised on a dim view of politics. Members of the U.S. Supreme Court, Justice Antonin Scalia in particular, have unambiguously articulated the same sentiment. In the widely-discussed case of *Nollan v. California Coastal Commission*,⁷⁵ for example, the Court struck down as an unconstitutional taking of private property a regulatory land-use permit requiring that private landowners who wished to build a new and larger house on the beach provide the public lateral access across their beach. Justice Scalia dubbed the exaction scheme ““an out-and-out plan of extortion.””⁷⁶ Doubtless he, and other members of the Court, share the same view about much other legislative acts.

A recent variation on public-choice accounts of the need for constitutional protection of property is that of William Fischel. The objective of Fischel’s book, *Regulatory Takings* is, as he puts it, “to seek a viable middle ground between judicial deference to the often unfair regulations that burden

⁷⁴On constitutions as precommitment devices, see Stephen Holmes, *Precommitment and the Paradox of Democracy*, in Jon Elster and Rune Slagstad eds., *Constitutionalism and Democracy* (Cambridge, 1988).

⁷⁵483 U.S. 825 (1987).

⁷⁶*Id.* at 837 (quoting *J.E.D. Associates v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981).

property owners and judicial imposition of compensation for every legislative infringement on private rights.”⁷⁷ Fischel shares the Madisonian anxiety about majoritarian exploitation of property owners, but he seeks a more restrained role for courts than do other public-choice theorists. His basic theme is that “the comparative advantage of constitutional courts in protecting property rights is to intervene when the economic protections of ‘exit’ and the political protections of ‘voice’ are attenuated.”⁷⁸ By that, he basically means that judicial intervention to protect constitutional property rights is warranted when politics works right, i.e., when political insiders are not exploiting powerless outsiders.⁷⁹ In the context of economic regulation, the political process, Fischel argues, is most likely to malfunction when the asset being regulated is immobile—usually land—and when the individuals harmed by a regulation are non-residents or residents who are not current owners. The type of regulation where these two conditions usually exist is local land-use restrictions. It is at the level of local governments, “small republics,” as Fischel calls them,⁸⁰ that constitutional protection of property rights is most needed. James Krier effectively states Fischel’s thesis: “The majoritarian politics of small governments generate land use controls that benefit residents while foisting costs on housing consumers who live elsewhere and on builders and owners of undeveloped land (who, even if they are residents, are only a small minority).”⁸¹

⁷⁷Fischel, *Regulatory Takings*, p. 1.

⁷⁸*Id.*, p. 5.

⁷⁹See James E. Krier, Takings from Freund to Fischel, *Georgetown Law Journal* 84 (1996): 1895, 1902.

⁸⁰Fischel, *Regulatory Takings*, p. 107.

⁸¹Krier, Takings from Freund to Fischel, p. 1902 (footnote omitted).

The upshot is that judicial activism, via constitutional protection, on behalf of property rights is warranted but only with respect to local government actions.

Though more nuanced than most public-choice analyses of how property rights fare under the workings of ordinary democratic practices, Fischel's theory remains flawed. William Treanor and Daniel Farber point out that developers and property owners, having disproportionately high stakes at risk, exert more rather than less influence in ordinary local politics.⁸² Moreover, says Treanor,⁸³ even if these groups lose at the local level, they can carry their case up to the state level, where Fischel agrees ordinary democracy works well enough that constitutional solicitude is less necessary. James Krier makes the particularly telling point that because state and national government is more remote from individuals than local government, one would expect that democratic voice would be more effective at the local level, not the state or national level, as Fischel argues.⁸⁴

None of this is to say that the democracy-based concerns that supporters of Super-Property express are without any basis. Democracy obviously is not a perfect system. The challenge is to determine when, as a general matter, its ordinary processes is most apt to fail. Thus far no one has developed a model of democracy's actual operation, especially in relation to property interests, that has attracted anything close to widespread agreement.

⁸²William M. Treanor, The Original Understanding of the Takings Clause and the Political Process, *Columbia Law Review* 95 (1995): 782, 863-64; Daniel A. Farber, Economic Analysis and Just Compensation, *International Review of Law & Economics* 12 (1992): 125, 130.

⁸³Treanor, The Original Understanding, pp. 868-69.

⁸⁴Krier, Takings from Freund to Fischel, p. 1910.

B. A Constitutional Property Clause Is Distributively Indeterminate

The second argument against constitutional property, which is based on its supposed anti-redistributive effects, is also problematic. Constitutional property clauses, taken by themselves, are distributively neutral. Constitutionalizing property has no necessary effect on a society's distribution of wealth or, more generally, on the relationship between individual and community. Within any society the meaning and the effect of a constitutional property clause is determined by that society's background political traditions and culture. I am not saying that the particular language of a constitutional property clause is irrelevant to decisions about governmentally-triggered wealth redistributions. My point rather is that the sheer presence of a clause guarding against uncompensated "expropriations" or "takings" of "property" does not commit that country to a policy against governmental redistributions of wealth. Governmental policies of wealth redistribution can and have proceeded despite the presence of constitutional property clauses. Indeed, in some instances constitutional property clauses have facilitated such policies. For those who favor governmental programs of social justice based on redistribution of wealth, constitutional property clauses, in and of themselves, should not be considered anathema.

This state of affairs should hardly be surprising. How *could* any property clause effectively bar all forms of wealth redistribution while allowing effective public policy? Strictly as a matter of theory, the line between such public policy and redistribution cannot be defined with any degree of clarity. As Judge Richard Posner, no defender of the activist welfare state, has pointed out, "a good deal of compelled redistribution of wealth may be the cheapest method of preserving social peace and so may

be cost justified.”⁸⁵ As examples, Posner cites pro-labor union legislation that is designed to forestall labor violence and generous welfare benefits that reduce the risk of violence in urban slums less. One could cite many other examples. The point is that any constitutional property clause that was effective in banning all redistributive activity would throw the baby out with the bathwater. You would restrain legislative activity that clearly is in the public interest along with special-interest legislation. The general point, then, is that, for better or worse, it is virtually impossible for any constitutional property clause to be drafted in a way that is guaranteed to block all forms of wealth redistribution.

There have, of course, been experiences of strong judicial resistance to redistribution. The *Lochner* era is an obvious example. During that era, American judges did resist, though not uniformly and not with complete success, legislative efforts at wealth redistribution. But does the *Lochner* experience really support the view that the inclusion of property as a constitutional right foreordains the anti-redistributive state? The short answer is no. First, as historians have recently shown, governmental redistributive activity did not shut down during the *Lochner* period.⁸⁶ The Supreme Court’s famous decisions striking down redistributive legislation such as the eight-hour work week have obscured the fact that a great deal of public welfare legislation, legislation that was clearly redistributive, was enacted

⁸⁵ Richard A. Posner, “The Constitution as an Economic Document,” *George Washington Law Review* 56 (1987): 4, 23.

⁸⁶See, e.g., Michael Les Benedict, *Laissez-Faire and Liberty: A Reevaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, *Law & History Review* 3 (1985): 293; Alan Jones, Thomas Cooley and Laissez-Faire Constitutionalism: A Reconsideration, *Journal of American History* 53 (1967): 751; Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897, *Journal of American History* 61 (1975): 970.

during that era.⁸⁷ Second, and more basically, during the *Lochner* era and in every other instance in which courts resisted government redistribution of wealth, it was not a constitutional property clause in and of itself that compelled the judicial reaction. Rather, it was how the courts chose to use the clause, how they interpreted the clause, that was decisive. They chose to interpret their property clause in a particular way. The clause did not compel their conclusion; the judges could have chosen differently.

III. Canada: An Example of “Super-Property” Rejected

Canada is an example of a liberal constitutional democracy in which the objections to constitutional property have carried the day. Canada considered, but ultimately rejected, including a property clause in its Charter of Rights. Despite that fact, however, and contrary to what the neo-liberal argument for constitutional property would predict, property rights enjoy a high degree of legal protection in Canada. Their non-constitutional status has not made them insecure or unstable. The Canadian story, then, is an important one in analyzing the case for making property a matter of constitutional protection.

The Canadian rejection of constitutional property is, on the surface of things, surprising. In many relevant respects Canada resembles the U.S. (leading many Canadians to bear a deep resentment toward Americans, who tend to view Canadians as ersatz Americans). It has a highly democratic political system and a market-based economic system based on private property rights. Its legal property system, like ours, is based on the English common law,⁸⁸ and its modern property laws

⁸⁷See William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill, NC, 1996).

⁸⁸Quebec's legal system, of course, is based on the civil law rather than the common law.

fundamentally resembles its American counterparts. Finally, Canada's Charter of Rights and Freedoms (1982) sets out a liberal bill of rights that recognizes nearly all of the individual rights recognized in our Bill of Rights. The exception is property. The 1982 Charter does not include a property clause, and thus far no provision of the charter has been interpreted to provide substantive protection for property.⁸⁹ In this respect, Canada's constitution is something of an outlier among the liberal constitutions of the world. Relatively few constitutional democracies with written constitutions lack a property clause. (Singapore and, arguably, Japan⁹⁰ are examples.) Western written constitutions

⁸⁹The possibility that courts will read such protection into the Charter cannot be ruled out. The likely locus for the change is the Charter's analogue to the American due process clause, section 7, which states, "Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Charter, § 7. The two textual ambiguities of the clause where traction might be found for substantive protection of property are the references to "fundamental justice" and to "liberty." See Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, *International Journal of Constitutional Law* 2(2004): 1, 27-42. The Supreme Court in fact adopted a substantive interpretation of "fundamental justice" in *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486, but thus far the decision has not been used to extend substantive protection to economic interests. Indeed, in *Attorney-General of Quebec v. Irwin Toy Ltd.*, [1989] 1 S.C.R. 927, the Court held that section 7 does not protect property. Nevertheless, as Professor Choudhry points out, "Attempts to protect economic liberty by means of section 7 have continued." Choudhry, *Comparative Constitutionalism*, p. 39. These attempts have primarily been through the "liberty" prong of section 7, and they have had limited success in the lower courts. One set of cases involved challenges to regulations of professions, such as geographic restrictions on physicians' right to practice under provincial health care plans. See, e.g., *Mia v. British Columbia (Medical Service Commission)*, [1985] 61 B.C.L.R. 273 (Sup. Ct.); *Wilson v. Medical Services Commission*, [1985] 30 B.C.L.R.2d 1 (Ct. App.). The other set of cases involved challenges to suspensions of motor vehicle licenses on the grounds that driving privileges were necessary to earn a livelihood. See, e.g., *R. v. Robson*, [1984] 56 B.C.L.R. 194 (Sup. Ct.), *appeal dismissed* [1985] 28 B.C.L.R.2d 8 (Ct. App.); *R. v. Sengara*, [1988] 26 B.C.L.R.2d 71 (Sup. Ct.).

⁹⁰Whether the 1946 Japanese Constitution protects private property is somewhat debatable. Several scholars have stated that it does not do so. See, e.g., Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, *University of Chicago Law Review* 59 (1992): 519, 528 n.34; Akira Osuka, *Welfare Rights*, *Law & Contemporary Problems* 53 (1990): 13, 15-16. Glendon's and Osuka's statements, however, are probably based on the fact that although property is guaranteed in article 29,

lacking a property clause are especially rare.

On the surface of things, then, Canada, not the U.S., appears to be the exceptional case, the odd one out with respect to legal protection of property. The formalist-trap assumptions tell us that we should expect property interests in Canada to be insecure and economic growth to be anemic. Neither of these expectations comes anywhere close to conforming with reality. The reality is that property rights are highly respected and protected in Canada; there is no evidence of the kind of insecurity that the formalist trap assumptions would lead us to expect. Nor would any observer of Canada's economic condition describe it as anemic. While not as wealthy as the U.S., Canada is, by any reasonable accounting, a wealthy and economically well-developed nation in comparison with the rest of the world. Canada, then, is an important datum point casting doubt on the neo-liberal formalist reasoning that insists that formal constitutional protection of property is necessary for secure property rights, which in turn are necessary for economic well-being and, by some accounts,⁹¹ civic well-being as well.

it is absent from the due process clause of article 31. Property was intentionally omitted from the due process clause because the American drafters of the Japanese constitution were well aware of the whole *Lochner* debacle, which they wished to avoid. Their intention was "to incorporate the fruits of the New Deal . . ." Osuka, *Welfare Rights*, p. 16. Professor Nakamura affirms that article 29 of the Japanese constitution protects the right of property, specifically against uncompensated expropriations. See Mutsuo Nakamura, *Freedom of Economic Activities and the Right to Property*, *Law & Contemporary Problems* 53 (1990): 1, 8-11. Professor van der Walt also treats article 29 as a constitutional property clause which, he points out, has a "unique structure and phraseology." van der Walt, *Constitutional Property Clauses*, p. 256. See also Nobushige Ukai and Nathaniel L. Nathanson, *Protection of Property Rights and Due Process of Law in the Japanese Constitution*, in Dan Fenno Henderson ed., *The Constitution of Japan: Its First Twenty Years, 1947-67* (Seattle, WA, 1968), p. 239.

⁹¹See Sunstein, *On Property and Constitutionalism*.

Canada's general experience with property has not been marked by a pervasive anxiety that ordinary politics threatens property rights or by a sharp discord between the rhetoric of property rights and the reality of legal protection. To be sure, there have been occasional expressions of concern about the vulnerability of property rights in the Canadian constitutional regime, lacking as it does a tradition of constitutional protection.⁹² But those occasions have been the exception rather than the rule. Canada's political-legal culture on the whole reveals little concern with the possible threat that democratic politics poses for property rights, given the absence of constitutional protection.

Despite the absence of a federal constitutional property clause, the level of legal protection of property against government action in Canada is substantially on a par with that in the U.S. Indeed, one Canadian academic goes so far as to say, "[T]here exist in Canada certain measures, constitutional and *quasi*-constitutional in nature, that equal—and in some ways may even surpass—the American regime governing 'takings.'"⁹³ One must certainly acknowledge that property rights are not on exactly the same footing in Canada as they are in the U.S., but the difference in result is a matter of degree, not of fundamental difference. Canadians do not routinely experience uncompensated government expropriations; nor have Canadian state regulations encroached upon private property interests to a

⁹²For helpful discussions of Canada's experience with the constitutional status of property, see Alexander Alvaro, Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms, *Canadian Journal of Political Science* 24 (1991): 309; Richard W. Bauman, Property Rights in the Canadian Constitutional Context, *South African Journal on Human Rights* 8 (1992): 344; Joel Bakan, Against Constitutional Property Rights, in *Constitutional Politics*, Duncan Cameron and Miriam Smith eds. (Toronto, 1992).

⁹³Bruce Ziff, "Taking" Liberties: Protections for Private Property in Canada (unpub.ms 2004), p. 1.

significantly greater extent than comparable American regulatory regimes have.⁹⁴

One obvious difference between Canadian and American constitutional law that might be used to explain why property rights are relatively secure in Canada is the absence of the power to expropriate at the federal level. Neither the federal Bill of Rights of 1960 nor the 1982 Charter contains an eminent domain clause or any equivalent. One might argue, then, that there is no need for a federal constitutional property clause because the federal government lacks the requisite power to “take,” to borrow an American constitutional term, property.

This explanation, although superficially plausible, is not persuasive for several reasons. First, and most obviously, the federal government has been found to have the power to expropriate under its residual power under section 91 of the Constitution Act of 1982.⁹⁵ Second, most of the controversy over constitutional protection of property in the United States involves regulation of property rather than condemnation, and Canada’s federal government certainly possesses the power to regulate the use and enjoyment of property.⁹⁶ Third, although the federal government lacks the eminent domain power, the provinces do have the power to expropriate property by virtue of their legislative power over property and civil rights,⁹⁷ and although they have sometimes exercised that power without payment of

⁹⁴See Bauman, *Property Rights in the Canadian Constitutional Context*, p. 361.

⁹⁵See *Munro v. National Capital Comm’n*, [1966] S.C.R. 663 (Can.).

⁹⁶It does so by virtue of the second part of section 1(a) of the Bill of Rights (“the right not to be deprived thereof except by virtue of due process of law”), which effectively functions as a regulation clause.

⁹⁷See Constitution Act of 1982 § 92(13)

compensation to the owner,⁹⁸ compensation is usually paid when the expropriation power is exercised.⁹⁹

Several mechanisms place property in this protected status without the benefit of an entrenched constitutional property clause. Probably the most important of these are expropriation statutes. There are a number of diverse statutory schemes, most but not all of which are provincial, in Canadian law that protect against uncompensated expropriations of land.¹⁰⁰ All of these follow a common pattern: once the state expropriates land, the owner is granted a right of compensation. Moreover, the statutory right to compensation under these statutes is not limited to formal expropriations. The statutes also apply in cases of regulatory, or de facto, takings.¹⁰¹ Just how much interference with the traditional incidents of ownership is required to trigger the compensation requirement is difficult to say, largely

⁹⁸See, *Re Upper Churchill Water Rights*, [1984] 1 S.C.R. 297 (Can.). The Newfoundland statute in question expropriated all of the assets and water rights of a Newfoundland company generating hydro-electricity in Newfoundland and also Quebec. Although the company received no compensation, the statute did award compensation to the shareholders for the loss in value of their shares. The Supreme Court struck down the statute on the ground that it was an invalid attempt to impair a civil right (a contract right) outside the enacting province. The Court rejected an attack on the statute based on the ground that it effectively sterilized a federal company. The statute, the Court said, did not deny the company's status or its essential powers. See Peter W. Hogg, *Constitutional Law of Canada*, Looseleaf ed. (Toronto, 2004), § 28.5(d), p. 28-13.

⁹⁹See Bauman, *Property Rights in the Canadian Constitutional Context*, p. 351.

¹⁰⁰E.g., Canada Expropriation Act, R.S.C. 1985, c. E-21; Ontario Expropriation Act, R.S.O.1990, c. E-26; Alberta Expropriation Act, R.S.A. 2000, c. E-13; Nova Scotia Expropriation Act, R.S.N.S. 1989, c.156. For further examples, see the Web site of the Expropriation Law Centre: <<http://www.expropriationlaw.ca/expro005.asp>>.

¹⁰¹See Ziff, "Taking" Liberties: Protections for Private Property in Canada, p. 11. See generally Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Toronto, 1992).

because there is surprisingly little case law on the question.¹⁰² One court has stated that a de facto taking occurs only when the regulation prevents all reasonable private uses of the land.¹⁰³ In cases where the regulation destroyed most of the owner's incidents of ownership, de facto takings are always found.¹⁰⁴ How far short of denial of all or nearly all uses a regulation may go and still require compensation is unclear, making Canada's version of regulatory takings even more like its "muddled" American counterpart.

Another property-protective mechanism is a common-law presumption applicable in all Commonwealth nations. Canadian,¹⁰⁵ like other Commonwealth courts,¹⁰⁶ follow the House of Lords' decision in *Attorney General v. De Keyser's Royal Hotel, Ltd.*,¹⁰⁷ that there is a common-law presumption in favor of a right to compensation following legislative expropriations. This presumption

¹⁰²See R.J. Bauman, *Exotic Expropriations: Government Action and Compensation*, *Advocate* 52 (1994): 561; Ziff, "Taking" Liberties, p. 12.

¹⁰³*Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, [1999] 68 L.C.R. 1 (N. S. Ct. App.) (rejecting the American takings doctrine of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that a total taking occurs when development restrictions have the effect of eliminating all economic value of the property).

¹⁰⁴E.g., *The Queen (B.C.) v. Tener*, [1985] 1 S.C.R. 533 (Can.); *Casamiro Resource Corp. v. British Columbia*, [1991] 80 D.L.R.4th 1 (B.C. Ct. App).

¹⁰⁵The important decision on this issue is *Manitoba Fisheries Ltd. v. The Queen*, [1978] 88 D.L.R. 3d 462 (Can. Sup. Ct.).

¹⁰⁶In *Attorney General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.).

¹⁰⁷*Ibid.*

can be rebutted only by an explicit statutory statement denying a right to compensation.¹⁰⁸

Theoretically, uncompensated expropriations are possible as a matter of both federal and provincial law, but the expropriating legislation must explicitly provide for this, an action that is unlikely to occur, at least in the ordinary case.

The protection afforded by the common-law presumption is strengthened by the fact that Canadian case law recognizes the possibility that property regulations can constitute de facto expropriations for purposes of the common law as well as under expropriation statutes. The leading case on the issue is *Manitoba Fisheries Ltd. v. The Queen*.¹⁰⁹ There the Canadian Supreme Court treated what the legislature intended to be a regulation as a de facto deprivation, an expropriation rather than a regulation. The Court reached this decision without any reference to the federal 1960 Bill of Rights, suggesting that the common-law presumption requiring compensation applies to de facto takings generally. The decision effectively moved Canada toward a degree of legal protection of property that is close to that reached under American takings law.

A third source of strong protection for property is the federal Bill of Rights. Section 1(a) includes an explicit property guarantee as well as a due process clause that is similar to our Fifth Amendment due process clause. Although the Bill of Rights is a normal, unentrenched statute, one that can be amended like any other statute, and applies only to federal legislation, it does have some bite. It

¹⁰⁸See Thomas Allen, Commonwealth Constitutions and the Right Not to Be Deprived of Property, *International & Comparative Law Quarterly* 42 (1993): 523, 524-25.

¹⁰⁹[1978] 88 D.L.R.3d 462 (Can. Sup. Ct.)

provides due-process protection for extant property holdings.¹¹⁰ Some distinguished Canadian scholars have suggested that Section 1(a)'s due-process protection might not be limited to procedural guarantees, such as notice and a hearing, but extend to substantive protection, including compensation, as well.¹¹¹ Such an interpretation would greatly extend and deepen the degree of constitutional protection of property in Canada. Currently, the point remains unsettled, largely because there is very little case law on the protection of property under the Bill of Rights.¹¹²

A fourth source of substantive protection comes from provincial law. While only one province (British Columbia) has a written constitution (even that one is statutory only),¹¹³ several provinces have bills of (unentrenched) rights that specifically include the right of property.¹¹⁴ Each province has jurisdiction over "property and civil rights," and this gives each province the power to expropriate

¹¹⁰See Hogg, *Constitutional Law of Canada*, § 32.1, p.32-2.

¹¹¹See P.W. Hogg, Canadian Law in the South African Constitutional Court, *South African Public Law* 13 (1998): 1, 16; Bauman, Property Rights in the Canadian Constitutional Context, p. 351. A lower federal court has expressed the view that section 1(a) of the Bill of Rights provides only the conventional procedural forms of protection, such as a hearing, and no substantive protection. *Archibald v. The Queen* [1997] 146 D.L.R.4th 499, 531 (Fed. Ct. Trial Div.). Moreover, and more recently, the Supreme Court has indicated that the Bill of Rights does not provide substantive protection against confiscation. *Authorson v. (Canada) Attorney General*, [2003] 227 D.L.R.4th 385 (Can. Sup. Ct.). Neither of these ruling, however, are definitive.

¹¹²See Ziff, "Taking" Liberties: Protections for Private Property in Canada, p. 9.

¹¹³See F.L. Morton, Provincial Constitutions in Canada (unpublished paper 2004), p. 1 See also Nelson Wiseman, Clarifying Provincial Constitutions, *National Journal of Constitutional Law* 6 (1996): 269. In recent years Quebec and Alberta have shown interest in developing modern written constitutions. Morton, p. 2.

¹¹⁴Bauman, Property Rights in the Canadian Constitutional Context, p. 351. Professor Bauman cites Alberta as an example. See R.S.A. 1980 c.A-16, § 1(a).

property. Although that power can be exercised without payment of compensation, in fact, compensation is usually paid, as statutes seldom rebut the common-law presumption in favor of compensation. As one Canadian legal scholar has observed, “[A]n exercise of the power of expropriation usually is accompanied by payment of adequate compensation for the property affected.”¹¹⁵ As we will see, the provinces’ traditional jurisdiction over protection of property was a main factor leading to rejection of a proposed property clause in the federal Charter of Rights.¹¹⁶ These three sources, then, the common law, the due process provision of the federal Bill of Rights (1960), and some provincial bills of rights, place property owners in Canada, in fact, though not formally, in a position that approximates that of their American counterparts.

In view the relatively high degree of security and stability of property in Canada, the interesting questions are, first, why there was any effort to introduce an entrenched constitutional property right at all and, second, why that effort failed. To answer these questions, we need to delve into some Canadian constitutional history. That history provides a basis for understanding the standard ideology regarding constitutional property, the ideology which prevails among the overwhelming majority of the world’s liberal democracies, and how that ideology contrasts with our own.

During the debate leading up to the adoption of the Charter in 1982 and in subsequent years several proposals were made to include a property clause, but these proposals thus far have been

¹¹⁵Bauman, *Property Rights in the Canadian Constitutional Context*, p. 351.

¹¹⁶See Alvaro, *Exclusion of Property Rights from the Charter*, p.319-321.

rejected.¹¹⁷ The debates over a property clause are revealing because they provided an opportunity for the Canadian public openly to discuss the status of property as a constitutional right. These debates give us a glimpse of a more subdued rhetoric of property accompanying a reality of fairly robust property rights.

From the time modern Canada was first established under the Constitution Act of 1867 until 1960, no constitutional provision protected property. The 1960 Canadian Bill of Rights was the first national document of constitutional dimension to guarantee property. Section 1(a) recognizes a right to the “enjoyment of property” and a right not to be deprived of property “without due process of law.” This provision resembles the American constitution’s fifth and fourteenth amendment due process clauses; the Canadian Bill of Rights contains no provision analogous to the fifth amendment takings clause. Indeed, Canadian federal constitutional law has never recognized a general power of eminent domain, that is, a general power to expropriate property for public use.¹¹⁸ The Bill of Rights, moreover, is an unentrenched federal statute, and its property right has been characterized as “a

¹¹⁷The debate over substantive constitutional protection of property continues in Canada. See note [82] *supra*. See also Bauman, Property Rights in the Canadian Constitutional Context, pp. 344-45. There have been no major initiatives to include a property clause in the Canadian Charter since 1992. See Choudhry, *The Lochner Era and Comparative Constitutionalism*, p. 25 n.107.

¹¹⁸See Hogg, *Constitutional Law of Canada*, § 28.5(a), n.34. The federal government does have expropriation power, however, under a number of enumerated federal powers. For example, the federal power over navigation and shipping permits the federal government to expropriate property for the purpose of erecting works to facilitate navigation. *Id.*, pp.28-7 - 28-8. Moreover, provincial legislatures, unlike the federal Parliament, do have a general expropriation power by virtue of their legislative power over “property and civil rights in the province.” Constitutional Act of Canada, 1867, § 92(13). See Hogg, *Constitutional Law of Canada*, § 28.5(b).

relatively feeble and underemployed right.”¹¹⁹ It applies only to matters within federal jurisdiction, and as a statute, it is subject to future legislative control.

It is the Charter of Rights that creates entrenched constitutional rights. In the period leading up to the Charter’s adoption in 1982, there was considerable discussion about whether to include a property clause.¹²⁰ This public debate over the role of property and the effect of constitutionalizing property was renewed several years later when, in 1991, the Canadian federal government proposed amending the Charter in several ways, including adding a property clause.¹²¹ In both debates the federal government supported a constitutional property clause. Much of the original impetus for such a provision came from Pierre Trudeau, who, as minister of justice, first proposed a property clause in his 1968 document *A Canadian Charter of Human Rights*, and again in 1969 as Prime Minister.¹²² Trudeau renewed his efforts on behalf of a property clause several times thereafter (in 1978, 1980, and 1981), introducing proposed constitutional amendments explicitly protecting “the right of the individual to the enjoyment of property.”¹²³ Some commentators, opposing the renewed effort for a property

¹¹⁹Bauman, *Property Rights in the Canadian Constitutional Context*, p. 350.

¹²⁰For an interesting and revealing account, see Alvaro, *Exclusion of Property Rights from the Charter*.

¹²¹*Shaping Canada’s Future Together: Proposals* (Ottawa: Minister of Supply and Services 1991).

¹²²Pierre E. Trudeau, *The Constitution and the People of Canada* (Ottawa, 1969), p. 50, 52.

¹²³*Ibid.*, p. 52. See Government of Canada, *The Constitutional Amendment Bill: Text and Explanatory Notes (Bill C-60)* (Ottawa, July 1978), p. 36; Mark MacGuigan, in Canada, *House of Commons Debates*, April 29, 1983, p. 25004; Pierre E. Trudeau, in Canada, *House of Commons Debates*, January 27, 1981, p. 6595.

clause in 1991-92, predictably cited “big business” as the force behind the campaign for including property in the Charter.¹²⁴ This quasi-Marxist explanation seems overly simplistic, however (as Marxist explanations commonly are). For one thing, Pierre Trudeau, who introduced the first bill proposing a property clause¹²⁵ and who unambiguously supported all of subsequent property clause initiatives, was no toady of big business. As Prime Minister, Trudeau supported a social program that was basically social-welfarist, a program that two authors have called “big-L Liberalism.”¹²⁶ He embraced, at least at times, openly statist policies designed to redistribute wealth to the weaker and poorer segments of society.¹²⁷ He basically supported Canada’s political culture, which Canadian political commentators have characterized as “democratic-communitarian.”¹²⁸ More to the point, Trudeau’s support for a property clause stemmed from his view that the Charter was the best means of stabilizing Canadian national unity against the dynamic of provincial power that threatened to tear Canada apart.¹²⁹ The property-clause initiative was essentially an effort to stitch all of Canada’s provinces together in

¹²⁴See, e.g., Joel Bakan, Against Constitutional Property Rights, in *Constitutional Politics*, Duncan Cameron and Miriam Smith eds. (Toronto, 1992), pp. 117, 118; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto, 1994), p. 308.

¹²⁵See Alvaro, Exclusion of Property Rights from the Charter, pp. 321-22.

¹²⁶Christina McCall and Stephen Clarkson, *Trudeau and Our Times*, 2 vols. (Toronto, 1994), p.2, 11.

¹²⁷*Id.*, p. 86; see also Kevin J. Christiano, *Pierre Elliott Trudeau: Reason Before Passion* (Toronto, 1994), p. 81.

¹²⁸See Patrick Monahan, *Politics and the Constitution* (Toronto, 1987), pp. 103-06; Alvaro, Exclusion of Property Rights from the Charter, p. 310.

¹²⁹See Alvaro, Exclusion of Property Rights from the Charter, pp. 322-323.

economic matters, as part of a broader effort to strengthen national unity.

Historically, the provinces have had primary jurisdiction over property matters,¹³⁰ and the growth of the welfare state was a main source of the growth of provincial power after 1945.¹³¹ A property clause in the federal Charter threatened to undercut the provinces' prerogative. It is no coincidence that a principle source of opposition to the property-clause proposals came from several key provinces.¹³² Trudeau and others hoped that the Charter generally, and the property clause specifically, would provide an entrenched legal basis for staunching the separatist designs of these provinces, especially Quebec.¹³³ In this respect, Trudeau accorded no preferential treatment of property rights. The idea behind the property-rights clause was that the right of property was but one of a number of liberal constitutional rights that, taken together, promoted national unity.¹³⁴

Several major concerns emerged in the course of discussions over whether to create, for the first time in Canadian history, an entrenched constitutional right of property. These concerns led each property-clause initiative to fail. One concern was the American *Lochner* era. As Sujit Choudry has aptly observed, "The *Lochner* era and its multilayered legacy loom large in the Canadian constitutional

¹³⁰See Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, p. 308

¹³¹See Alvaro, *Exclusion of Property Rights from the Charter*, p. 322.

¹³²See Mandel, p. 308; Alvaro, p. 319-21.

¹³³See Clarkson and McCall, vol. 1, p. 106.

¹³⁴See Alvaro, *Exclusion of Property Rights from the Charter*, p. 323.

imagination.”¹³⁵ Opponents of a constitutional property clause pointed to the *Lochner* Court’s decisions striking down health and safety legislation like maximum work hours law as examples of the potential for a constitutional property clause to undermine Canada’s status as a social-welfare state.¹³⁶ Canadian social legislation that opponent cited as being at risk under an entrenched constitutional property right included rent control legislation, occupational safety and health regulation, marital property distribution statutes, and environmental regulation.¹³⁷ Of course, none of such forms of regulation have been successfully attacked under the American takings clause, even during the recent takings renaissance, but that fact was never acknowledged by Canadian critics of a constitutional property right.

A related argument was that the clause would constitutionalize a laissez-faire economy, contrary to the widely-shared conviction that the Charter should not entrench any particular economic system or ideology. A lower federal court in *Archibald v. The Queen*,¹³⁸ for example, stated:

The *Charter* has never before and still does not protect economic liberty or property right. A deliberate choice was made to exclude them from the document. No form of economics,

¹³⁵Choudhry, *The Lochner Era and Comparative Constitutionalism*, p.15. Professor Choudhry points out that within Canadian constitutional jurisprudence, *Lochner* has stood for three distinct lessons, laissez-faire constitutionalism being only one of them. The others are judicial activism and constitutional crisis. All three of *Lochner*’s lessons, Choudhry argues, have influenced Canadian constitutionalism. While all three concerns were evident in debates of protection of property under the Charter of Rights, the one that was most conspicuous was the fear of laissez-faire constitutionalism. *Id.*, pp. 16-27.

¹³⁶See, e.g., Hogg, *Constitutional Law of Canada*, § 44.7(b).

¹³⁷Bauman, *Property Rights in the Canadian Constitutional Context*, p. 355.

¹³⁸ [1997] 146 D.L.R.4th 499 (Can. S. Ct.).

laissez-faire or otherwise, is part of the Constitution.¹³⁹

Here again, *Lochner* was always cited as historical precedent for the likelihood that a property clause will constitutionally embed some economic theory, specifically, laissez-faire economics.¹⁴⁰ Canadian critics were fond of drawing on Holmes' famous dissent in *Lochner* as establishing a seemingly unanswerable argument against constitutionalizing property (though none of them bothered to point out the irony that it was Holmes who later, in *Pennsylvania Coal v. Mahon*, sharpened the teeth of the takings clause by announcing the regulatory taking doctrine).

No single factor explains why Canada rejected a constitutional property clause. Certainly one factor is what Canadians call "the democratic principle."¹⁴¹ That principle embodies the idea that the fundamental concern of governmental decision-making is realization of democratic will and community values.¹⁴² The democratic principle resists what one Canadian commentator calls the "proprietary"¹⁴³ idea that "the basic role of government is restricted to the preservation and protection of property."¹⁴⁴ The provinces argued that the democratic principle requires strong restrictions on the use of judicial

¹³⁹*Id.* at 530.

¹⁴⁰Choudhry, *The Lochner Era and Comparative Constitutionalism*, pp. 15-42.

¹⁴¹See Alvaro, *Exclusion of Property Rights from the Charter*, pp. 317, 321-22,

¹⁴²*Id.*, p. 310.

¹⁴³*Ibid.* This use of the term "proprietary" is strikingly different and in basic respects incompatible with an older meaning of the term. It is this older tradition of proprietary thinking that I have in mind when I used the term "propriety" in my book *Commodity & Propriety*. It is important that the two different usages of the term be kept in mind.

¹⁴⁴Alvaro, *Exclusion of Property Rights from the Charter*, p. 310.

review to frustrate or overturn legislative action that expresses democratic will. An entrenched constitutional property clause, in their view, was fundamentally incompatible with this conception of the democratic principle. As Alexander Alvaro has noted, the provinces' strong stand against a property clause "indicates the strength of the fear that, once placed in the hands of a non-elected judiciary, such a clause had the potential to subvert the seeming victory of democracy by proprietary interests, interests which desired to diminish the scope of the economic power of governments."¹⁴⁵ Conceding that a constitutional property clause would not necessarily have had that effect, the opposing provinces believed that such was the intention of the federal government.¹⁴⁶ Moreover, they pointed to the American experience with *Lochner*-era judicial activism as evidence that the clause's anti-democratic potential might be realized.¹⁴⁷ Taking the democratic principle seriously, they argued, requires a modest role for courts and that, in turn, requires rejection of any regime of Super-Property.

At end of the day, the factor that ultimately explain why Canada rejected an entrenched constitutional property right is Canada's federalism. Most of the provinces opposed a property clause.¹⁴⁸ They did so because they wished to continue their traditional prerogative with regard to regulation of property relations. Different provinces had different reasons for jealously protecting their control of economic regulation. Quebec, for example, was concerned about protecting its own income-security program, while provinces like Saskatchewan's interest was its power, which it

¹⁴⁵*Id.*, p. 317.

¹⁴⁶*Id.* p. 321.

¹⁴⁷*Id.*, p. 318.

¹⁴⁸*Id.*, p. 319.

frequently exercised, to institute province-owned crown corporations.¹⁴⁹ A constitutional property clause was thought to threaten all of these diverse province powers.

Buttressing this argument was the fact that several provinces already protected property rights through their own provincial constitutions. Alberta and Saskatchewan, for example, had recently enacted bill of rights that expressly included property clauses. They argued that local constitutions were more effective than a federal constitution in responding to local property concerns. One Alberta government minister, for example, asserted, “It is the responsibility of the Government of Alberta on behalf of the people of Alberta, to ensure that property laws for Albertans are made according to the wishes of Albertans.”¹⁵⁰

What the Canadian example illustrates, and what the neo-liberal formalist argument misses, then, is the importance of background political and legal culture.¹⁵¹ Canada’s heritage of secure property rights made constitutional protection seem unnecessary, and its version of federalism made it politically unacceptable. From the Canadian perspective, constitutional protection of property was not about economic efficiency or fairness, as neo-liberal theory suggests; it was about localism and the important role that localism plays in Canada’s background political culture.

How far can one generalize from the Canadian example? Does the fact that property rights in Canada are strong and secure despite their non-entrenched status have any lessons for countries

¹⁴⁹*Id.*, pp. 320-21.

¹⁵⁰*Id.*, pp. 320-21.

¹⁵¹Again, it is necessary to emphasize this argument is not unique to the property right. See note 26 *infra*.

emerging from a political and legal regime in which property rights were not respected or perhaps not even recognized? Or is there some peculiarity to the British Commonwealth legal tradition that makes the Canadian experience not germane to such countries? While it certainly is the case that the Commonwealth countries share with the U.K. a strong tradition of property rights that are secure despite lack of constitutional or entrenched status, they are not unique in this respect. At least some of the new democracies that have emerged from political regimes in which private property rights were either not recognized or drastically reduced have legal and political traditions of strong property rights that existed prior to the imposition of repressive regimes. Several of the countries in formerly communist Eastern Europe are examples. Poland is the clearest case. Unlike other Soviet-bloc countries Poland continued a regime of private ownership of land following the onset of communist rule. Over ninety percent of land in communist Poland was privately owned, although owners did not feel that their rights were secure under communist rule.¹⁵² The strong culture of private property rights in land in Poland is attributable to several factors, some of which, particularly the influence of the Catholic Church, make the Polish experience somewhat special but not unique. In Hungary, for example, the 1959 Civil Code recognized certain limited private property rights in a variety of assets, including land (although the communist government continued to use various tactics to induce farmers to accept collectivization).¹⁵³ This formal recognition of property rights was a response to the strong popular

¹⁵²See Krystyna Daniel, Private Farm Ownership in a Changing Poland: Myth and Reality, in Gregory S. Alexander and Grażyna Skąpska eds., *A Fourth Way: Privatization, Property, and the Emergence of New Market Economies* (New York 1994), pp. 138, 139-140.

¹⁵³See Hugh Spall, The Development of Private Property Rights in Communist Hungary and the Theory of Path Dependent Institutional Change, published in *Global Jurist Topics*, <http://www.bepress.com/gj>, p. 7.

cultural support of private property rights in land, or informal norm of property rights, that existed prior to communist rule and persisted despite attempts to end the regime of property rights. Private ownership of land had been a symbol of rank as well as insurance against economic calamity for many years.¹⁵⁴ The same experience of property rights whose path-dependency was based on strong cultural norms was repeated in other Soviet-bloc countries as well.¹⁵⁵ The general point, then, is that while the experience of property rights in Commonwealth countries like Canada may be unusual in some respects, it is not unique. The same general phenomenon of the persistence of property rights based on background culture, tradition, and informal norms rather than constitutional recognition or other methods of formal legal entrenchment can be found in a number of countries outside the ambit of the British Commonwealth. This finding further supports the general claim here: tradition and culture matter. The new constitutionalism overlooks this fundamental fact in its zeal to standardize American-style constitutional recognition of property rights.

IV. Legislative Supremacy, Wealth Redistribution, and Constitutional Property: The Case of India

The standard rendering of the story of constitutional property in India seemingly supports the argument frequently repeated by opponents of constitutional property, that constitutionalizing property has both strongly anti-democratic and anti-redistributive effects. With respect to the effect on

¹⁵⁴Bela C. Maday, *The Changing Image of the Hungarian Agriculturalist*, in Marida Hollos and Bela C. Maday eds., *New Hungarian Peasants: An East Central European Experience with Collectivization* (New York, 1983), p. 315.

¹⁵⁵See Misha Glenny, *The Balkans: Nationalism, War and the Great Powers, 1804-1999* (New York, 1999), pp. 549-556.

democracy, the tension between constitutional property and democracy played out as a protracted institutional battle between the courts and parliament. As one commentator notes, “It is a well-known story how the legislature carried on the battle against the abusive potentiality of [the] power aspect of property through enacting constitutional amendments and legislations providing for abolition of . . . agrarian intermediaries, wiping of monopolies, equitable distribution of material resources of production and protection of these economic reforms from constitutional challenges.”¹⁵⁶

The “well-known” story is in fact a highly complex story to which I cannot possibly do justice here.¹⁵⁷ For my limited purposes, it is enough to note that parliament and the courts were engaged in a pitched battle for nearly thirty years (1950-1978) over the now-defunct property clauses (Articles 19(1) and 31) of the original (1950) Indian Constitution.¹⁵⁸ To simplify the story greatly, the Indian

¹⁵⁶P. Ishwara Bhat, *Tracing Right to Property in the Bosom of Right to Life and Personal Liberty: Comparative Reflection on Recent Constitutional Developments in America, Canada and India*, *Journal of the Indian Law Institute* 38 (1996): 13, 25-26.

¹⁵⁷The following sources are valuable guides to understanding the story of constitutional property in India:

¹⁵⁸Constitution of India (1950), provided, in relevant part, as follows:

Article 19(1):

“All citizens shall have the right—
(f) To acquire, hold and dispose of property”

Article 31:

“(1) No person shall be deprived of his property save by authority of law.
(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for

Prime Minister, Nehru, pushed the two property clauses through the constitutional assembly in the belief that they would apply only to limited government expropriations and not to large-scale social engineering programs. His calculus proved false. The Indian courts persistently held that the property clauses applied to land reform and other economic reform legislation, despite the obvious fact that such reforms were badly needed. As opponents of the constitutional property clause tell the story, the Indian judges baldly wrested power away from a legislature that voiced widely-shared democratic preferences for social reforms following decades of colonial rule. Much as English colonial rulers denied an opportunity for the Indian masses to participate in democratic self-governance, the Indian judges arrogated to themselves the authority to deprive the duly-elected representatives of India's citizenry the final say over how social would be structured in what was supposed to be a new and democratic polity. Many commentators believe that it was precisely the undemocratic consequences of judicial review that led to the eventual demise of constitutional property in India. So long as India had a system of constitutional protection of property, administered by unaccountable judges, it would never realize its democratic potential. Critics of constitutional property widely regard India's experience as nearly-conclusive evidence of the inherently undemocratic character of the constitutional right to property enforced through judicial review.

compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which the compensation is to be determined and given.”

A superb and brief account of the battle over property rights under articles 19(1) and 31 of the 1950 Indian Constitution is provided in van der Walt, *The Constitutional Property Clause*, in McLean, pp. 117-123. See also John Murphy, *Insulating Land Reform from Constitutional Impugnment: An Indian Case Study*, *South African Journal on Human Rights* 8 (1992): 362.

As the courts struck down one land reform act after another, the legislature overturned their decisions through constitutional amendments. The courts fired back, deciding variously that any future constitutional amendment restricting fundamental rights, including property, would be held invalid,¹⁵⁹ that the court had the power to determine the adequacy of compensation despite a constitutional amendment declaring adequacy of compensation to be non-justiciable.¹⁶⁰ and that legislation nationalizing the 14 largest commercial banks in India was unconstitutional.¹⁶¹ The entire interaction between the courts and parliament was a battle, not a conversation. “The politicians started reviling the judges for their status-quoist [sic] and over-protective approach toward property rights—a view which was not only shared but openly expressed even by some progressive judges in and out of court.”¹⁶²

The denouement of this battle was the Forty-Fourth Amendment (1978). This amendment deleted articles 19(1)(f) and 31, the property provisions, from the fundamental rights in Part II of the Constitution.¹⁶³ In their place Parliament inserted article 300A in Part XII of the Constitution. Article 300A simply provides that “no person shall be deprived of his property save by authority of law.”¹⁶⁴ Included in Part XII rather than Part II of the Constitution, article 300A made property a constitutional

¹⁵⁹Golak Nath v. State of Punjab, A.I.R. 1967 S.C.1643.

¹⁶⁰Vajravelu v. Special Deputy Collector, A.I.R. 1965 S.C. 1017.

¹⁶¹R.C. Cooper v. Union of India (the “Bank Nationalization” Case), A.I.R. 1970 S.C. 564.

¹⁶²K.N. Goyal, Compensation: Down But Not Out, *Journal of the Indian Law Institute* 38 (1996): 1, 2.

¹⁶³Constitution (Forty-Fourth Amendment) Act of 1978, removing Articles 19(1)(f) and 31 of 1950 Constitution of India.

¹⁶⁴Subhash C. Jain, *The Constitution of India* (New Delhi, 2000), p. 229.

but not a fundamental right. It guarantees only that any deprivation of property will be made by a valid law that is within the legislature's power and that does not violate any fundamental rights or other constitutional restrictions.¹⁶⁵ The upshot, according to the general account of the story, was that democracy, widely seen as the victim of constitutional protection of property, prevailed through the exercise of public will.

For critics of constitutional property, the Indian experience provides even greater support for the view that constitutional protection of property and wealth redistribution, in this instance land reform, are mutually incompatible. Through the thirty year period during which India's constitution protected property, no meaningful progress was made in redistributing land in that country.¹⁶⁶ Literally every major government action aimed at redistribution was blocked in the name of constitutional protection of property. It was only after the entrenched property right was removed from the constitution that India succeeded in instituting significant redistributive programs.¹⁶⁷

The stock version of the Indian story is overstated in several respects. One problem with the conventional version is that it overlooks the significant fact that the Supreme Court's early cases dealing with land-reform legislation were all decided on the basis of the constitutional guarantees of equality and reasonableness rather than on the basis of the right of property. Although the decisions did invalidate

¹⁶⁵See van der Walt, *The Constitutional Property Clause: Striking a Balance between Guarantee and Limitation*, p. 123.

¹⁶⁶See John Murphy, *Insulating Land Reform from Constitutional Impugnment: An Indian Case Study*, *South African Journal on Human Rights* 8 (1992): 362, 382-83.

¹⁶⁷The success of these programs, however, is a very different question, one that is beyond the scope of this study.

aspects of the land-reform legislation before it, the Supreme Court did not invoke the right of property in order to justify its actions. It was only later, when the constitutional assembly enacted the First Amendment (1951), which ousted judicial review of certain land-reform measures, that the Court shifted the basis of its decisions from the right of equality to the right of property.¹⁶⁸

More important for our purposes is the fact that the Indian Supreme Court did not strike down all of the legislative land reform measures that came before it. Despite its reputation as reactionary during this period, the Indian Supreme Court upheld several land reform statutes that were challenged under the constitutional property clause. In fact, the court's activist posture developed only by 1960, ten years after the Constitution's adoption.¹⁶⁹ During the first ten years the court's record demonstrates a fairly sympathetic attitude toward the need for land reform. It struck down only two agrarian reform measures on constitutional grounds.¹⁷⁰ Of the two, the more important was the *Kameshwar* decision, a case that is worth extended discussion because it involved perhaps the single most important land-redistribution reforms in India's post-colonial history.

The *Kameshwar* case involved a challenge to the Bihar Land Reform Act of 1950. That act was an attack on the *zamindari* system. The *zamindaris* were Indian "tax farmers," i.e., intermediaries

¹⁶⁸van der Walt, *The Constitutional Property Clause: Striking a Balance between Guarantee and Limitation*, at pp. 118-119.

¹⁶⁹See Dhavan, *The Supreme Court of India* (Bombay, 1977), p. 129.

¹⁷⁰*Raghubir Singh v. Court of Wards Amjer*, A.I.R. 1953 S.C. 373; *State of Bihar v. Kameshwar Singh*, A.I.R. 1952 S.C. 252.

who collected revenue on land from cultivators for the Crown (and before that, Moghuls).¹⁷¹ Though strictly speaking, the *zamindaris* were not owners, over time they became more and more entrenched and increasingly took on attributes of ownership. By the end of the British rule, these intermediaries represented a powerful vested interest, controlling about 43 percent of all of India's land.¹⁷² They were the most distinctive aspect of India's land tenure system, a quasi-feudal arrangement in which the actual farmers received minimal security as tenants or sharecroppers.¹⁷³

The Bihar Land Reform Act's clear objective was abolition of the *zamindari* system. The Act represented an attempt to fulfill the Congress Party's longstanding promise of justice for the small farmer.¹⁷⁴ Under the act, the state expropriated virtually all interests and rights of the *zamindars*, with payment of compensation. The problem was with the act's treatment of the compensation issue, which was the main point of controversy throughout the twenty-year battle between the Supreme Court and Parliament.¹⁷⁵

Rather than providing for full compensation at market value, the act stipulated a sliding scale form of compensation in which the amount paid per acre was in inverse relation to the total extent of the

¹⁷¹The *zamindari* system is explained in H.C.L. Merillat, *Land and the Constitution in India* (New York, 1970), pp. 13-15.

¹⁷²Murphy, *Insulating Land Reform from Constitutional Impugnment*, p. 378.

¹⁷³*Ibid.*

¹⁷⁴Merillat, *Land and the Constitution in India*, p. 55.

¹⁷⁵See S.S. Sharma, *Property in Indian Law*, in van Maanen and van der Walt, *Property Law on the Threshold of the 21st Century*, pp. 345, 349.

land holding.¹⁷⁶ The reasons for this approach are clear. As one commentator states, “Not only would full and immediate compensation have put an impossible burden on Central and State finances, but also many in India saw the *zamindars* as usurpers of the land, minions of past rulers, and hence entitled to little or no payment.”¹⁷⁷

Whether this method of compensation was constitutionally permissible was hardly clear. During the drafting of article 31 the decision was made to use the word “compensation” without any modifier like “just” or “equitable,”¹⁷⁸ leaving it unclear whether the intention was to follow the American and Australian practice of requiring full market-value compensation. Not only was there uncertainty over the level of compensation that was due, but there was also controversy over whether courts should have the power to review the adequacy of compensation that the legislature set. Especially with respect to abolition of the *zamindaris*, there was a strong sentiment to make the question of adequacy of compensation non-justiciable.¹⁷⁹ With Prime Minister Nehru’s urging, the legislature added to article 31, the main property clause, provisions that exempted major land-reform measures like the Bihar Land Reform Act from judicial review under article 31. The clear purpose of these provisions was to vest

¹⁷⁶*Ibid.* In addition, compensation was paid in bonds, not cash, and was spread over a number of years. *Ibid.*

¹⁷⁷ Merrillat, *Land and the Constitution in India*, p.55.

¹⁷⁸Dhavan, *The Supreme Court of India and Parliamentary Sovereignty* (New Delhi, 1976), p. 196-197; Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (London, 1966), p. 88.

¹⁷⁹Merrillat, *Land and the Constitution in India*, pp. 55-56.

ultimate authority regarding social engineering reforms in the legislature rather than the courts.¹⁸⁰ The legislature's plan was frustrated, however, when a court held that the Bihar Act violated the equality clause of article 19 by discriminating between expropriatory laws passed before and after the constitution's adoption.¹⁸¹ The legislature responded by enacting the First Amendment to the constitution. This provision freed the legislature from any compensation requirement for certain expressly-identified expropriation measures, including the Bihar Act, and explicitly excluded the state acquisition of agricultural "estates" from the protection of articles 14, 19, and 31 of the constitution.¹⁸²

On appeal, the Indian Supreme Court held that while in general the Bihar Act was saved from judicial review with respect to the compensation requirement, the scope of non-justiciability was limited to the amount of compensation. The Court did go on to strike down some provisions of the Act as a colorable exercise of legislative power.¹⁸³ That aspect of the Court's decision prompted the legislature to enact the Seventh Amendment to the constitution (1956), repudiating the colorable legislation

¹⁸⁰See Tom Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge, 2000), pp. 48-50; Dhavan, *The Supreme Court of India*, pp. 146-149.

¹⁸¹A.I.R. 1951 (38) Patna 91.

¹⁸²Murphy, *Insulating Land Reform from Constitutional Impugnment*, pp. 378-381.

¹⁸³*Kameshwar Singh v. State of Bihar*, A.I.R. 1952 S.C. 252. The colorable legislation doctrine is a matter of legislative competence. The constitution expressly specifies the scope of the federal and state legislature's power. Under the colorable legislation doctrine the court review legislation to determine whether a legislative act, appearing to be competent in form, substantively exceed the prescribed scope of the legislation's authority. The term "colorable legislation" applies to action that indirectly or covertly exceed legislative competence. See Murphy, *Insulating Land Reform from Constitutional Impugnment*, p. 381, n.68.

doctrine.¹⁸⁴

Commentators have tended to be harsh in their judgments about the *Kameshwar* case. Professor van der Walt, for example, has characterized the decision as “reactionary” and states that the decision signaled the Court’s defiance of the legislature’s attempt to exercise authority with respect to land-reform legislation.¹⁸⁵ While there is considerable truth in that assessment, it is important not to exaggerate the reactionary character of the Court’s decision. As one commentator has noted, the decision “secured the constitutional future of agrarian reform by upholding the validity of art 31B [which ousted judicial review of existing land-reform legislation].”¹⁸⁶ The decision gave the legislature a green light on its existing land-reform projects. Within ten years after Indian independence the *zamindari* system, probably the most egregiously inequitable aspect of India’s colonial land regime,¹⁸⁷ had been completely dismantled.

The second aspect of the *Kameshwar* case that is important for my purposes is that the basis for the Court’s resistance to the legislature had as much to do with institutional competency and the nature of constitutional amendment in India as it did with land redistribution. The legislature was

¹⁸⁴For a critical appraisal of the Court’s reliance on the colorable legislation doctrine, see Dhavan, *The Supreme Court of India*, p. 153-154.

¹⁸⁵van der Walt, *Constitutional Property Clauses*, p. 195-96.

¹⁸⁶Murphy, *Insulating Land Reform from Constitutional Impugnment*, p. 381. Professor Rajeev Dhavan has also expressed a skeptical attitude about the degree to which the Court’s property decisions reflected political bias. See Dhavan, *The Supreme Court of India*, p. 129.

¹⁸⁷See Mohammad Ghouse, *Nehru and Agrarian Reforms*, in Rajeev Dhavan and Thomas Paul eds., *Nehru and the Constitution* (New Delhi, 1992), pp. 77, 91.

attempting to establish plenary authority on two matters: first, to effect sweeping social-economic changes and, second, to amend the constitution, including fundamental rights provision, as it saw fit.¹⁸⁸

The courts, particularly the Supreme Court, in turn, were concerned with defining the constitutional limits of the legislature's amendment power generally.¹⁸⁹

Compensation continued to be the focal point over which this struggle for institutional power continued to be fought. The legislature enacted the Constitution (Fourth Amendment) Act (1955), which inserted into the constitution's compensation provision (article 31(2)) a provision ousting the court of the power to strike down legislation on the basis of inadequate compensation. The court responded to this amendment with a series of decisions aimed at reestablishing its jurisdiction over the compensation question.¹⁹⁰

The ongoing struggle between the Supreme Court and the legislature was brought to a head by two decisions from the court, *Golak Nath v. State of Punjab*¹⁹¹ and *RC Cooper v. Union of India* (the "*Bank Nationalization*" case)¹⁹² In *Golak Nath*, the immediate issue in the case did not involve

¹⁸⁸See M.V. Pylee, *India's Constitution* (Bombay, 1979), p. 153.

¹⁸⁹See Paras Diwan, *Amending Powers and Constitutional Amendments* 2d ed. (New Delhi, 1997), pp. 112-119.

¹⁹⁰E.g., *Kochuni v. States of Madras and Kerala*, A.I.R. 1960 (47) S.C. 1080 (holding that the Fourth Amendment did not remove the court's power to review the reasonableness of "deprivations" of property under article 19 of the constitution); *Vajravelu v. The Special Deputy Collector*, A.I.R. 1965 (52) S.C. 1017 (reclaiming jurisdiction to decide whether compensation was "reasonable" though not whether compensation was adequate).

¹⁹¹A.I.R. 1967 (2) S.C. 1643.

¹⁹²A.I.R. 1970 (57) S.C. 564.

compensation as such. At issue was the validity of the Seventeenth Amendment to the constitution (1964). This provision extended the operation of the First Amendment by expanding the definition of “estates” to include tenures that the court had previously held not within the purview of the First Amendment. The court held that the amendment was invalid. The court declared that the legislature’s amending power cannot be used to deny or abridge any rights, including but not limited to property, that the constitution guarantees as fundamental. The court recognized that existing amendments could not be undone but declared that any future amendment which purported to repeal or even restrict a fundamental right was invalid. At the same time, the Court made it clear that while Parliament lacked the constitutional authority to amend the constitution to remove a right from the list of enumerated fundamental rights, if the constitutional assembly wished to do so, the constitution could be so amended by it.

In the *Bank Nationalization* case, which did involve compensation, the court struck down an act of Parliament nationalizing the fourteen largest commercial banks in India. It reasserted its jurisdiction to decide whether compensation practices were “reasonable” by invalidating the act on the ground that the act’s principles for determining the amount of compensation related to the value of certain assets only and the acquisition affected the firms in their entirety. In the court’s view, then, those principles were irrelevant and, hence, unreasonable.

The legislature responded to these decision by enacting the Twenty-Fourth and Twenty-Fifth Amendments. The Twenty-Fourth Amendment was intended to overturn the *Golak Nath* decision, and the Twenty-Fifth Amendment, aimed at the *Bank Nationalization* case, effectively tried to remove

the compensation issue from judicial review by removing the duty to pay “compensation” from article 31(2) and replacing it with a duty to pay an “amount.” Amazingly, however, when it was given a clear opportunity once again to assert its primacy over legislative power with respect to power to amend fundamental rights provisions, the court nevertheless backed down. In the important case of *Kesavananda v. State of Kerala*,¹⁹³ the court upheld both amendments. Withdrawing from the position it had taken in *Golak Nath*, it stated that the legislature *did* have the power to amend the fundamental rights provisions of the constitution so long as in doing so it did not abrogate the basic structure of the constitution. The major concession was its acknowledgment that the right of property was not such a basic feature of the constitution. This was a crucial compromise because it effectively permitted the government’s program of land redistribution to be fully implemented.¹⁹⁴

The Court’s ongoing struggle with the legislature during the period between 1950 and 1973 is as much about the institutional limits of the legislature’s competency to amend or abolish fundamental constitutional rights, *whatever they happen to be*, as it was about the redistribution of land. As one commentator has observed, “In the ultimate analysis, the successes and failures of the process of land socialisation in India were not greatly influenced by the constitutional contests between courts and parliament.”¹⁹⁵ The fact is that much, if not most of the government’s land redistribution program was

¹⁹³A.I.R. 1973 (60) S.C. 1461

¹⁹⁴The court’s turnabout seems to be most clearly attributable to the results of the 1971 election campaign, in which the Congress Party, which campaigned against the court and in support of land reform, won a sweeping victory in both houses of the Parliament.

¹⁹⁵Murphy, *Insulating Land Reform from Constitutional Impugment*, p. 385.

implemented, and the failure of the other aspects of the program were due largely to chronic problem of corruption and patronage.¹⁹⁶ The key issue affecting property rights was compensation, and by 1978, the court had conceded that issue to Parliament.¹⁹⁷

In view of that fact, it needs to be asked why did Parliament in 1978, enact the Forty-Fourth and Forty-Fifth Amendments, deleting the articles 19(1)(f) and 31, the core of the property rights provisions, from the constitution? What does this action tell us about the role of text, the constitutional property clause itself, in judicial responses to redistributive programs? The short answer, I believe, is not a great deal. Those amendments were largely about politics and political symbolism. The amendment was enacted immediately in the wake of the 1977 elections in which Prime Minister Indira Gandhi's Congress Party was soundly defeated by the Janata Party, which had campaigned on a platform of citizens rights and abolition of the constitutional property clause.

Some background is necessary to understand the role of politics and political symbolism in the passage of the Forty-Fourth and Forty-Fifth Amendments. Shortly after the *Kesavananda* decision, Gandhi's party fell into strong disfavor with the public, and Gandhi personally encountered serious problems, including a conviction by a court of corrupt electoral practices.¹⁹⁸ Her response to these problems was to announce, on June 26, 1975, a State of Emergency. During the Emergency,

¹⁹⁶See Francine R. Frankel, *India's Political Economy, 1947-1977: The Gradual Revolution* (Princeton, NJ, 1978), pp. 156-200.

¹⁹⁷Murphy, *Insulating Land Reform from Constitutional Impugnment*, p. 387.

¹⁹⁸For an account, see D. R. Mankekar and Kamla Mankekar, *Decline and Fall of Indira Gandhi* (New Delhi, 1977).

Parliament (or what remained of it after she detained many members of her own party) retroactively repealed the legislation on which her conviction was based and also enacted a constitutional amendment (Amendment Thirty-Nine) removing from the Supreme Court jurisdiction over alleged electoral offenses committed by the Prime Minister. The Supreme Court, although upholding the former, held that the Thirty-Ninth amendment violated the basic structure of the constitution by impairing free elections.¹⁹⁹ Gandhi's government reacted to this decision by circulating proposals to introduce a new constitution, one that abrogated the power of judicial review.²⁰⁰ These proposals were not pursued, however.

Finally, in 1977, some nineteen months after it was first announced, the Emergency was lifted. Shortly thereafter, elections were held, and Gandhi was defeated by a populist coalition which thereafter made good on its campaign promise by passing the Forty-Fourth and Forty-Fifth Amendments. The winning Janata Party had used the property clauses, especially article 31, as one of the main symbols of its campaign. Capitalizing on Prime Minister Gandhi's precipitous decline in popularity, especially in the wake of the Emergency, the Janata Party campaigned on a platform of returning power to the people, and the demotion of the constitutional right of property was one of the main planks in that platform.

The decision to use the constitutional right of property as a campaign mainstay was by no means arbitrary. Land reform and land redistribution was a crucial, perhaps *the* crucial political issue since India first gained independence, and the constitutional property clauses *were* relevant throughout

¹⁹⁹Indira Nehru Gandhi v. Raj Narain, AIR 1975 S.C. 2299.

²⁰⁰See Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow, 1980), p. 64.

the struggle between the Supreme Court and the legislature. Article 31, the compensation provision, in particular was, as one scholar has put it, “an important arena of constitutional politics.”²⁰¹ It was, therefore, an obvious political symbol around which to organize a populist campaign and thereafter through which to gain political legitimacy by successfully pursuing its demise.

Property, then, or more specifically the text of property clauses, certainly is relevant to understanding the Indian experience with constitutional property. But the controversy over text is best understood within a deeper context, the context of a fundamental institutional struggle between two branches of government. Constitutional property was “the focal point of the struggle for hegemony between the [Supreme] Court and Parliament.”²⁰² The property clause, as an Indian legal scholar has observed, “merely served as a peg on which have hung the vital questions of limits of State power and the role of the Court.”²⁰³ The intersection of institutional conflict and land redistribution created the “perfect storm” in Indian constitutional law and politics from 1950 until 1978.

Was the constitutional property clause (especially article 31) essential to judicial efforts to attack redistributive legislation in India? Of course, one cannot answer such a counterfactual question with any certainty, but it is at least plausible to speculate that the Supreme Court might have reached the same result, at least in some of its cases, on the basis of other provisions of the constitution. Its early decisions in land reform cases were decided on the basis of the right of equality, and in the absence of a

²⁰¹*Id.*, p. 167.

²⁰²*Ibid.*

²⁰³*Ibid.*

property clause the court might use the equality provision as the tool to resist what it considers to be *ultra vires* actions by the legislature in the realm of property redistribution. Moreover, it is possible that some of the tenure forms might have been judicially frustrated on the basis of the private-law tradition that India inherited from Britain, including that tradition's understanding of property rights. As Chapter Four will discuss, this is precisely what has happened in a number of lower court cases in post-apartheid South Africa.

All of this is possible, but speculative. The important point, however, is that while text matters, but so too do tradition and background political culture. The core weakness of the formalist thesis is its failure to acknowledge the role of tradition and culture. In this respect, the Indian experience does indeed provide a valuable lesson for questioning the formalist thesis.

V. The Key Is Interpretation

Is it possible to keep property constantly open to continual redetermination through the processes of normal democratic politics despite the existence of a constitutional clause protecting property? I think it is. The decision to have a constitutional property clause is one step; interpreting that clause is a different step. Whether questions about property, especially how it is used and how it is distributed, remain open to democratic determination depends less on the decision whether to have a constitutional property clause and more on the separate step of its interpretation. Constitutionalizing property can lead to insulation of private property-holdings from the public realm of politics, but that is not an inevitable consequence. It all depends on how courts interpret the clause.

A. "Guarantee-Oriented" Interpretation vs. "Limitation-Oriented" Interpretation

In explaining why interpretation is the key to the effect that a constitutional property clause has, Andre van der Walt draws a useful distinction between what he calls a “*guarantee-oriented*” view of a property clause and a “*limitation-oriented*” view. The distinction is this: A guarantee-oriented interpretation is based on the assumption that the role of any constitutional property clause is to create a minimalist role for government by maintaining a radical divide between the public and private spheres, while a limitation-oriented interpretation, as van der Walt defines it, “emphasizes the fact that property is intrinsically created by and therefore open to further democratic redefinition and regulation”²⁰⁴ Under this conception of a limitation-oriented interpretation, a property clause protects private holdings against arbitrary or discriminatory deprivations by the state, but it leaves holdings open to periodic readjustments made by the state through normal democratic processes so long as those adjustments are non-arbitrary and non-discriminatory. A guarantee-oriented approach to interpretation is what critics of constitutional property clauses have in mind when they assert that the necessary effect of making property a matter of constitutional protection is instantiation of *laissez-faire* or the minimalist night watchman state. “Lochnerism,” as that term is usually understood, is the result of a guarantee-oriented approach. A limitation-oriented approach avoids Lochnerism because it does not presuppose that a categorical separation of the private and public realms is a necessary presupposition of any constitutional property clause. Rather such an approach presupposes that the private and public realms are inextricably intertwined in the context of property insofar as the public realm creates the very realm of private property. No categorical separation between public and private being possible (or

²⁰⁴van der Walt, *Constitutional Property Clause*, p. 128.

desirable), the limitation-minded interpreter says, constitutional protection of property is a matter of constant adjustments between individual and social interests.

It is important to clarify what the limitation approach, at least the version that I propose, is *not*. It is not such a loose standard of judicial review that it renders all property holdings open to de facto evisceration through the exercise of a virtually unlimited power of the state to “regulate” as it sees fit. Stated in terms of American doctrine, it is not matter of reading the doctrine of regulatory takings out of existence. The limitation approach proposed here does not naively assume that all government regulation of property is the product of fair-minded and well-functioning democratic politics. Nor does it assume, with equal naiveté, that constitutional property law is an effective tool to realizing a vision of distributive justice.²⁰⁵ The point instead is to avoid an approach that is based on the Madisonian anxiety, that is, one that interprets the property clause in a way that assumes at the outset that the government measure in question is the product of some pathology in the democratic process. A balanced approach, one that steers between the two extremes of the Madisonian anxiety and the Progressive call for eviscerating the property clause in the interest of distributive justice. Thus, it rejects both a Progressive no-compensation approach, which risks harms harming the poor and other under-represented classes as much as it harms the wealthy,²⁰⁶ and a Conservative approach, which insists on

²⁰⁵For a trenchant critique of the claim that constitutional property law can effectively serve a politically progressive agenda of distributive justice, see Hanoch Dagan, Takings and Distributive Justice, *Virginia Law Review* 85 (1999): 741. See also Molly McUsic, The Ghost of *Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation, *Boston University Law Review* 76 (1996): 605, 665.

²⁰⁶For a discussion of why the Progressive no-compensation approach harms the poor and other disadvantaged groups, see Dagan, Takings and Distributive Justice, p. 761, 778.

monetary compensation for all government regulations of property unless the burdens of the regulations are completely and immediately offset by the same regulation's benefits.²⁰⁷ As I will discuss in Chapter Three, such a middle-course limitation approach is well-illustrated by the German Constitutional Court in interpreting the German Basic Law's property clause.

B. Limitation-Oriented Interpretation Is Purposive

Perhaps the most important aspect of a limitation-oriented interpretation of a property clause is the fact that it is purposive in character. By the term "purposive," I mean that the court openly and systemically inquires what substantive value underlies the decision to make property a constitutionally-protected right. An interpretation is purposive when the interpreter openly and systemically asks what is the core purpose (or core purposes) that can most plausibly be attributed to a constitutional property clause. Within liberal theory, there are, of course, competing views about the core goal of making property a constitutional right. Securing individual autonomy is obviously one candidate, but others exist as well. Indeed, one might plausibly conclude that a purposive theory of constitutional property that is most compatible with liberalism is one that is pluralist, recognizing multiple purposes inhering in constitutional protection of property.²⁰⁸ The important point for a limitation-oriented approach to interpreting constitutional property clauses is that the interpreter openly and systemically analyze the question of what core social objectives underlie the decision to make property a matter of constitutional protection. As I discuss more fully in subsequent chapters, the Constitutional Courts of Germany and

²⁰⁷See Epstein, *Takings*.

²⁰⁸For an example of such a pluralist theory of constitutional property, see Stephen P. Munzer, *A Theory of Property* (Oxford, 1990), pp. 442-69.

South Africa have engaged exactly this sort of purposive reasoning.

C. The Role of Background Legal and Political Traditions

The factor influencing that most strongly bears on how a constitutional property clause affects both political readjustments through democratic processes and wealth redistribution is the clause's non-constitutional context, particularly its background political and legal traditions and culture. In particular, three aspects of the non-constitutional political-legal background are important: the society's private-law system; its historical political ideologies; and its dominant social beliefs about the operation of ordinary democratic politics.

The first factor in the politico-legal background is the country's private law system, especially its rules and concepts relating to property. A crucial question for the meaning of any constitutional property clause is whether the constitutional concept of property is intended to follow the traditional private-law meaning of property or to have a separate constitutional meaning of property?²⁰⁹ Even if the constitutional concept of property is formally uncoupled from the traditional private-law concept, the latter will continue to influence the former. The constitution's concept may have its own life, but that life begins in the private-law concept. The private-law meaning of property invariably anchors the constitutional meaning. Regardless of how much weight judges say they have placed on property's private-law meaning, private law influences how they understand the constitution's reference to "property." Anyone who ignores the private law of property in the process of interpreting judicial

²⁰⁹See Thomas W. Merrill, *The Landscape of Constitutional Property*, *Virginia Law Review* 86 (2000): 885

interpretations of constitutional property clauses will have an incomplete picture. More than one “view of the cathedral”²¹⁰ is required in painting property’s constitutional portrait.

The second aspect of a society’s background political traditions and culture are the political ideologies that have shaped the societies’ political debates, particularly as those debates pertain to property. In the case of some societies, Germany and South Africa, for example, those ideologies may include political ideas that have now been officially repudiated. Despite such repudiation, ideologies that once formed the core of a society’s political system can never be entirely erased. National Socialism and the racist ideology that supported the apartheid regime continue to exert their influence on legal thought in Germany and South Africa, respectively, through a negative valence. They represent what Andre van der Walt calls “historical hangover[s].”²¹¹ The constitutions of both countries are explicit negations of those ideologies, but precisely because of their negations every term in those constitutions has to be interpreted in light of the negations.

The third relevant factor is the dominant social understanding of and attitude about how ordinary democratic politics work. Discussions about the effect of constitutionalizing property on democratic practices often overlook or underappreciate the importance of background political traditions and culture in liberal democracies. Democracies come in many different stripes. Some have written constitutions; others do not. Courts in some democratic regimes exercise a strong power of

²¹⁰The reference is, of course, to A. Douglas Melamed and Guido Calabresi, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, *Harvard Law Review* 85 (1972) : 1089.

²¹¹A.J. van der Walt, Dancing with Codes—Protecting, Developing and Deconstructing Property Rights in a Constitutional State, *South African Law Journal* 118 (2001): 258, 297.

judicial review, while in others the institution is much weaker. These differences result from the distinct political history and political traditions of each democracy. So there is no *a priori* reason to believe that democracies all share the same basic view about how well ordinary democratic politics works in their own countries. For instance, one country's political tradition may be based on what I have been calling the Madisonian anxiety, i.e., a concern with factions, while another democracy lacks any tradition of such a concern.

The differences among different countries' traditions regarding the operation of ordinary democratic politics compel neither the structure and content of a constitution, nor the presence or absence of any particular constitutional provision. That being said, it is also the case that countries with different understandings of democracy may and frequently do contain the same or similar constitutional terms. Moreover, the background traditions and beliefs about democracy affect not only the existence of certain provisions but how those terms are characteristically interpreted. The best way to understand a democratic country's interpretation of its constitutional property clause is as an expression of its dominant outlook on the functioning of ordinary political processes.

As we will see in later chapters, Germany and South Africa are examples of nations whose background political traditions vest considerable trust in their legislative and regulatory systems and, therefore, whose property clauses are used with a substantial degree of deference toward ordinary political processes.²¹² Their experiences contrast with that in the United States, which has a political tradition of suspicion toward ordinary democratic politics, exhibited by a strongly active judiciary

²¹²I discuss the German constitutional property clause in detail in Chapter 3 and South Africa's constitutional property clause in Chapter 4.

whose longstanding practice has been to police legislative and regulatory acts for undemocratic taint. The judicial activism of the *Lochner* era reflected a skeptical attitude toward the legislative process. As I indicated earlier, the Supreme Court of that era regarded the processes of ordinary legislative politics as being highly vulnerable to undemocratic, non-majoritarian manipulation by well-organized interest groups. During a later period of judicial activism, the Warren Court had a different concern with democracy. Its concern was that majoritarian excesses might undermine the proper functioning of democratic politics.²¹³ These two eras represent an ongoing American preoccupation that ordinary political processes are constantly prone to abuses and that strong constitutional rights, vigorously enforced by courts, are the necessary cure for democracy's diseases.

Constitution-makers need to understand that property clauses do not all have the same valence. Any analysis of the effects of such clauses must pay close attention to exogenous local factors, what I have called background traditions and cultures. Any analysis that neglects these factors is the sheerest form of empty formalism. The ultimate lesson of this chapter is to abandon formalism, once and for all.

²¹³This was the animating concern for John Hart Ely's famous process theory of judicial review. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA, 1980).