

PROPERTY AND THE POLICE POWER WITHOUT REVIEWING COURTS: THREE TRUTHS

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ABSTRACT

This Article considers the relationship that exists between three major actors when the government regulates private property – (1) the property owner, (2) the government regulator, and (3) the reviewing courts that decide whether those regulations are consistent with the Constitution or equitable norms. The Article argues that the dynamic between these three actors should result in a rough balance of power, where each actor can limit the power of an actor seeking to limit another actor’s power – a condition that systems analysts call “allostasis.” When allostasis exists between competing powers within a system, no one actor is dominant, cooperation among the actors is encouraged, and each actor can exercise independent power, where that power may at times be checked by another actor. A three-actor system characterized by allostasis is a healthy system, which maintains stability through periodic change.

*The Article points out that until the mid-twentieth century, none of the three actors had become dominant. The legal power invested in each actor served as a counterbalance to the powers held by the other actors. Power equilibrium, system stability, and allostasis existed. But after the 1938 *Carolene Products* case, this balance was replaced by disequilibrium. After *Carolene Products*, courts began using a highly deferential rational basis standard of review when police power regulations affected economic and property interests. In such cases, courts simply deferred to the regulation. As a result, there arose a “*Carolene Products* Deference” to police power regulations affecting property interests, that was similar to the “*Chevron Deference*” doctrine to federal administrative regulations that arose in 1984. With both types of deference, courts ceased to provide meaningful independent judicial review, and simply upheld the choices and decisions of the regulator.*

*The universal judicial embrace of *Carolene Products* Deference over nearly ninety years has produced a deterioration of private property rights and an unchecked growth of the police power to regulate property*

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uses. This transformation, triggered by the 1938 Court's abdication of judicial review responsibility, was created by a *de facto* coalition between regulators and reviewing courts. Courts no longer provide meaningful judicial review of property regulations, and instead simply defer to the choices made by regulators. This coalition has caused the regulatory police power to become the dominant actor, resulting in the removal of courts as an effective check on over-zealous property-regulations, and a devaluation of property rights.

The Article posits that courts, especially the United States Supreme Court, should be urged to recognize three truths. If courts embrace these truths, it would re-establish system stability allostasis, where each of the three central actors again may limit the excesses of the other actors. First, the right to use private property should become more of a "fundamental right" under the Constitution, not a lesser right. Second, the police power should be bound by external Constitutional limits, as well as internal limits found in the power itself. Third, reviewing courts should rethink *Carolene Products Deference*, and assume a duty to serve as viable, meaningful, independent checks on regulators affecting private property use.

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INTRODUCTION

Allocation and use of privately-owned property typically involves three actors (1) the owner of the property; (2) the government interested in regulating the property, and (3) the reviewing courts that decide whether those regulations are consistent with property-protective constitutional and equitable norms. The first of those actors, the property owner, usually relies on common law rights bestowed on owners, particularly the rights to acquire and own, use, develop and dispose of the property.¹ These rights are grounded in centuries-old judge-made common law, state statutes that codify the common law, and the United States Constitution. The Constitution explicitly and textually protects the legitimacy of private property.² The second actor, the regulator of that property, derives its ability to affect the use of that property from the police power. This power is held by governments in order ensure that private behavior and property use are both consistent with the larger “public” welfare, and not harmful to other persons or properties.³ The third actor, the judiciary, may be activated by the first actor, the property owner, if the second actor’s use of the police power interferes with some property-protected norm found in constitutional law or equity. The power of judicial review permits courts the ability to override the police power, and provides the property owner relief if the police power transgresses any of these norms.⁴

In theory, the interactions of these three actors should result in a series of checks and balances which produce a rough equilibrium of power. The property owner begins with the original common law right to acquire, use, and dispose of the property. The common law permits the owner to assert this power to repel trespassers, to develop the property consistent with its highest and best use, and to sell or transfer the property to another, when both parties to that transaction perceive that they are benefited by the transfer. All the stakeholders in the relevant market for that property are thereby typically made better off—

1. 1 WILLIAM BLACKSTONE, COMMENTARIES *138.

2. Roger Pilon, *Property Rights and the Constitution*, in CATO HANDBOOK FOR POLICYMAKERS 173, 173-74 (8th ed. 2017), https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2017/2/cato-handbook-for-policymakers-8th-edition-16_0.pdf [<https://perma.cc/Q8FL-Y5A5>].

3. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 156 (Ian Shapiro ed., Yale Univ. Press 2003); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546-47 (1904).

4. See generally *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 649-54 (1981) (Brennan, J., dissenting).

first, by using the property, and second, by authorizing changed ownership pursuant to a voluntary market exchange.⁵

However, if the property's use causes harm to neighbors, or if the larger public welfare is threatened by the use, the second actor, the government, may impose police power limits on that use. The police power then overrides the common law right to use that property.⁶ However, the implied police power limit on property is itself limited by the third actor, the judiciary. If the exercise of the police power is contrary to various property-protective constitutional or equitable norms (e.g., the takings or due process or contract clauses in the Constitution, or equity's vested rights doctrine or equitable estoppel defense), the police power must yield, and the owner's common law right of use will once again triumph.

These checks assume that none of the three actors' powers become dominant. As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*: "[S]ome values [associated with private property ownership and use] are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation [of the police power] must have its limits"⁷ When conditions set forth in *Pennsylvania Coal* are in place (i.e., when the "implied [police power] limitation" itself has "limits" through judicial review), no one actor is dominant.⁸ A general equilibrium among our three actors should result.

One can diagram in "game theory" the checks and balances in play when these three actors are interacting. In a game theoretic mode, our three actors would become "players." Standard game theory would predict that each player (1) would adapt a strategy that permits the player to gain an advantage, (2) where any strategy chosen would have to take into account the strategy of the other players.⁹ This game theory overlay of the three-player dynamic predicts that the three players should eventually be able to achieve an equilibrium. This game theory equilibrium point, called "Nash Equilibrium," is reached when each player anticipates the strategy choices of each of the other players, and

5. See generally LOCKE, *supra* note 3, at 154-55; see also LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 50-64 (1955); JAMES W. ELY JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 11-14 (1992).

6. Scott M. Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny*, 1978 WASH. U. L.Q. 1, 4-10 (1978).

7. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

8. *Id.*

9. See generally MOSHE HOFFMAN & EREZ YOELI, *HIDDEN GAMES: THE SURPRISING POWER OF GAME THEORY TO EXPLAIN IRRATIONAL HUMAN BEHAVIOR* (2022) (game theory predicts that each player in a game will make choices based on the predicted choices of other players); AVINASH K. DIXIT & BARRY J. NALEBUFF, *THE ART OF STRATEGY: A GAME THEORIST'S GUIDE TO SUCCESS IN BUSINESS AND LIFE* 110-11 (2008); See generally AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* (1991) (strategic thinking in a game is where each player makes choices designed to give that player an advantage based on the predicted choices of other players).

has no incentive to deviate from that strategy.¹⁰ One can then predict that if our troika of property owners/regulators/courts are deemed “players,” and if they implement game theory strategies to respond to the strategies of other players, their interactions should eventually result in a state where their competing interests will be in balance.

Except for one looming problem: In three-player games, the game usually, inevitably, breaks down into coalitions. Two players will tend to create a “coalition” between them, so that this coalition becomes pitted against the third player.¹¹ The two-player coalition becomes more powerful than the third player, resulting in an imbalance of power.¹² The coalition’s interests inevitably dominate the wishes or needs of the third player.¹³ The only strategy available to the out-gunned third player is to learn how to adapt to the wishes of the two-player coalition.¹⁴

Such has been the fate of private property in the twenty-first century. What was once a three-player game among relative equals has, in effect, become a two-player game. And one of those players in the two-person game is so powerful, there is a *de facto* one-person decisionmaker and no game at all. The private property interest must face-off against a *de facto* coalition consisting of regulators and courts. This coalition not only limits and restricts what property owners may do with their property; the coalition is also able to burden the property with public duties to address social conditions not caused by the property.¹⁵ And the will of the coalition has become largely unreviewable.

10. Michael Kingston, *An Introduction to the Nash Equilibrium in Game Theory*, BUILT IN (Sept. 12, 2023), <https://builtin.com/data-science/nash-equilibrium> [<https://perma.cc/LVP9-4EE6>].

11. William P. Fox, *Solving the Three Person Game in Game Theory Using Excel*, 14 COMPUTS. IN EDUC. J. 65, 65 (2017).

12. *Id.*

13. JEFFREY CARPENTER & ANDREA ROBBETT, GAME THEORY AND BEHAVIOR 4 (2022); *See generally* BRIAN CLEGG, GAME THEORY: UNDERSTANDING THE MATHEMATICS OF LIFE (2022); William P. Fox, *Solving the Three Person Game in Game Theory Using Excel*, COMPUTS. IN EDUC. J. 65, 65 (2017); Wesam B. Zorik et al., *Zero-Determinate Strategies for Iterated Three-Player Game*, 8 J. OF GAME THEORY 32 (2019).

14. *See generally* Felix Munoz-Garcia and Daniel Toro-Gonzalez, *Mixed Strategies, Strictly Competitive Games, and Correlated Equilibria*, in STRATEGY AND GAME THEORY: PRACTICE EXERCISES WITH ANSWERS 85, 85-101 (2nd ed. 2019); *See generally* Benny Moldovanu, *Coalition-Proof Nash Equilibria and the Core in Three-Player Games*, 4 GAMES AND ECON. BEHAV. 565 (1992).

15. The Police Power is sometimes perceived as a license for the government to take property from some for the benefit of others, or for the purpose of adjusting private rights to bring about an improved larger society, even when those private rights to property are not harming others. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 107-46 (5th ed. 1993). Property attorneys have argued that governments use permit fees to extort property owners wishing to develop revenue, so taxes do not need to be raised. *See* Editorial, *The Supreme Court’s Road to El Dorado*, WALL ST. J. (Jan. 7, 2024, 4:29 PM), <https://www.wsj.com/articles/george-sheetz-v-county-of-el-dorado-property-rights-fifth-amendment-69ebc4c9> [<https://perma.cc/F7S7-QMHR>] (*cert granted* in *Sheetz v.*

Courts, which once served to impose a “limit on the implied limits” that regulators impose on property uses, now simply defer to the wishes of the regulators.¹⁶ More significantly, the “judiciary” component of the coalition has lately undermined, if not discredited, the common law right enjoyed by property owners to “use” property.

Courts no longer consider the common law right of property to be a constitutionally protected “fundamental” right.¹⁷ Courts have instead concluded that property use rights are “lesser” social-and-economic rights, no longer deserving of vigorous judicial protection.¹⁸ Like other players in three-player games where two of the players have formed a powerful coalition, property owners must now embrace a strategy where owner resistance to regulators is usually futile. Reviewing courts will typically defer to regulations addressing social, economic, and property matters.¹⁹ As a result, property owners have diminished power and must learn to adjust to the coalition-driven regulatory power.

It has not always been this way. Indeed, for almost two centuries, property owners, regulators, and reviewing courts enjoyed a condition

County of El Dorado, 2023 U.S. LEXIS 2954 (challenging permit fee imposed on home construction allegedly to mitigate traffic, but in reality to raise general revenue)).

16. The most used test under the Takings Clause, the ad hoc balancing test from *Penn Central Transportation v. New York City*, 438 U.S. 104, 124 (1978), has been considered synonymous with *de facto* rubber-standing of the regulator, where reviewing courts rarely find that government has overstepped its authority. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 349 (1993).

17. The case of the *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926), was the seminal case that seemed to declare that property “use” was no longer “fundamental,” when confronting land use zoning rules severely restricting property uses. See DENNIS J. COYLE, *PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATIONS* 21 (1993).

18. This erosion of private property rights stems from several sources. First, it has been argued that private autonomy of ownership should not be allowed to conflict with the larger public good and public welfare. Private property is allegedly conditioned by a social obligation that ensures that property uses are consistent with the public interest. John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 347-48 (1983). Second, governments are tempted to impose public burdens on private owners in lieu of financing government through taxes. If property rights were deemed “fundamental,” government would be unable to force property owners to bear public burdens. See *generally* *Pennell v. City of San Jose*, 485 U.S. 1, 21-24 (1988) (Scalia, J., concurring in part and dissenting in part).

19. The United States Supreme Court is not ambiguous about how reviewing courts should consider constitutional challenges to regulations affecting property use. See, e.g., *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148 (2021) (“To determine whether a use restriction effects a taking [of property], this Court has generally applied [a] flexible test”); *Hodel v. Irving*, 481 U.S. 704, 713 (1987) (“This Court has held that the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners.”). This judicial deference to regulations of property use applies to use restraints as varied as zoning ordinances, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926), orders barring the mining of gold, *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168-69 (1958), and regulations prohibiting the sale of eagle feathers, *Andrus v. Allard*, 444 U.S. 51, 64-66 (1979).

of rough equipoise.²⁰ Each of the three actors had independent legal power that ensured none became dominant. Property owners had common law rights of use and disposition; regulators had the police power to limit property; courts had judicial review power to limit the police power limits. It was not until the mid-twentieth century that the regulator-reviewing court coalition formed. With the advent of this coalition, property rights, especially “use rights,” became “second class” rights. They were rarely protected from the police power by reviewing courts.²¹ And this coalition meant that reviewing courts would often opt for a highly deferential standard of review when property owners asserted constitutional or equitable defenses to the now largely unreviewable police power.²²

This degradation of the common law right to use and dispose of private property is wrong, both historically and conceptually. The creation of a regulator-reviewing court coalition was, and is, a mistake. This critical error can be corrected if the judiciary, particularly the United States Supreme Court, recognizes three truths. First, the common law right to use and dispose of private property is, and has always been, a “fundamental” right, not a secondary, lesser right. Second, the police power limit on the right to use property is not without limits; the police power is bounded not only by external limits found in the text of the constitution, but also by internal limits found within the police power itself. Third, reviewing courts should not routinely defer to regulators; they have a duty to serve as a viable, independent check on regulators affecting private party use.

Part I—*A Balance of Power*—reviews how these three Truths played out in the eighteenth, nineteenth, and middle half of the twentieth centuries. Until the mid-twentieth century, none of the three

20. Judge-made common law, and state statutes codifying the common law, have for centuries provided owners with right to acquire and own, use and develop, and transfer and dispose of property. *See generally* William Blackstone, *Commentaries* * 135.

21. *See generally* Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the “Poor Relation” of Constitutional Law* (Geo. Mason Univ. of L. and Econ. Research Paper Series, Paper No. 08-53, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854 [<https://perma.cc/K447-8U7K>]; James W. Ely, Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004-2005 CATO SUP. CT. REV. 39, 40-43 (2005). *But see* Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) (property rights have been “relegated to the status of a poor relation”).

22. *See, e.g.*, Tiwari v. Friedlander, 26 F.4th 355, 361 (6th Cir. 2022) (deferential rational basis review for a due process or equal protection challenge “epitomizes a light judicial touch”) (citing *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-14 (1993)); *PBT Real Est., L.L.C. v. Town of Palm Beach*, 988 F.3d 1274, 1283-84 (11th Cir. 2021) (“Garden-variety property rights do not meet [the standard of being ‘fundamental’] and thus . . . their deprivation does not . . . concern the concept of ordered liberty [protected by the Due Process Clause]”); *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 469 (5th Cir. 2021) (rational basis review satisfied if there is “a conceivable rational basis for the official action, [and] it is immaterial . . . that some other nonsuspect irrational factors may have been considered” (quoting *Reid v. Rolling Fork Pub. Util. Dist.*, 854 F.2d 751, 754 (5th Cir. 1988) (emphasis omitted))).

central actors (property owners, regulators, or reviewing courts) had become a dominant player. The legal power invested in each actor served as a counterbalance to the powers held by the other actors. A general power equilibrium and stability was achieved among the three actors during this time.

Part II—*Disequilibrium and the Rise of Regulatory State*—chronicles the deterioration of property use rights and the ascendancy of the police power from the 1940s to the present. The primary catalyst for this dramatic restructuring of power was the United States Supreme Court’s announcement in the *Carolene Products* case of 1938 that “property” interests were considered social and economic values, which in turn were within the province of choices made by the legislature or regulator, but outside the realm of meaningful judicial review.²³ A doctrine of *Carolene Products Deference* ensued, which effectively ended meaningful judicial review of most regulations affecting uses of private property. The regulator-judicial coalition was thereby created, and power dominance became vested in the regulatory state, while property rights withered.

Part III—*The Three Truths*—explains how equilibrium can again be restored among the three actors by rethinking private property, the police power, and judicial review. Each of these three actors should be able to wield their own powers, and serve as a counterbalance to other powers, so no one becomes power dominant. When the powers of the three key actors are in balance, cooperation among them is more likely and conflict becomes minimized.²⁴ More important, when none of the three actors are dominant, when each exercises independent powers capable of being checked by another actor’s power (“a limit on the limit”), the three actors achieve a condition called “allostasis.” When allostasis exists, systems achieve stability through change. Systems are healthy when they are stable, and a system experiencing allostasis stays stable by permitting adaptive change to occur, when the actors respond to being limited by another actor.²⁵

The United States Constitution is a classic example of allostasis among competing powers. The Constitution creates three major branches of the federal government, where each is meant to limit the other two branches. While this checking function is structural, it

23. United States v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

24. See generally YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: THE TRIUMPH OF COOPERATION OVER SELF-INTEREST* 8 (2011).

25. See generally BRAD STULBERG, *MASTER OF CHANGE: HOW TO EXCEL WHEN EVERYTHING IS CHANGING – INCLUDING YOU* (2023). The concept of allostasis is used primarily in biological and ecological settings. See, e.g., Karen R. Word, Suzanne H. Austin & John C. Wingfield, *Allostasis revisited: A perception, variation, and risk framework*, *FRONTIERS ECOLOGY AND EVOLUTION*, Sept. 22, 2022, at 1, 2-3. But allostasis also describes generally how all dynamic “systems” comprised of different actors organize themselves. The interactions of property owners, regulators, and reviewing courts become such a system.

promotes system stability and separation between the branches, which in turn ensures that no one branch becomes so dominant that the other branches cannot change and adapt to new conditions. The Constitution also encourages system stability between the states and the federal government; the integrity of state sovereignty is not entirely removed by the Supremacy Clause.

As applied to our three actors, allostasis is possible, and system stability occurs, (1) when property is used consistent with common law values, (2) when police powers limit harmful property uses, and (3) when property owners can turn to reviewing courts if the police power limit itself needs to be judicially limited. Such a dynamic (but stable) system is not possible when one player, or actor, is so dominant that (1) change among the actors is deterred, and (2) separation among actors is replaced by coalitions. By contrast, when actors in a system enjoy proportionate power compared to the other actors and separation of functions is maintained, cooperation and negotiation among the actors is possible. During such negotiations, the actors must adapt to changed conditions, which in turn creates both system stability and overall system growth.²⁶

I. A BALANCE OF POWERS

This country arose in stages—first as several English colonies, then as a loose confederation, and finally as a united federal democratic republic under the Constitution. During each of these stages, a central rallying point has been the legitimacy and necessity of private property. This tradition of private ownership of property, along with the common law legal right to acquire and use property, became the foundation of our market-based capitalist nation.²⁷ As a result, the United States is now the most economically powerful country on the planet.²⁸

The common law right of property owners to use and enjoy economic gain from property development was not absolute. Other private parties could check property uses which caused harm,²⁹ and the government's police power could override private property use when the

26. STULBERG, *supra* note 25.

27. Gerald W. Scully, *The Institutional Framework and Economic Development*, 96 J. POL. ECON. 652, 652 (1989) (societies which rely on private property where owners have the legal right to pursue economic success, largely unaffected by the state, grew at three times the rate than societies where freedom of economic choice was circumscribed by the state).

28. *The Top 10 Largest Economies in the World in 2023*, FORBES INDIA (Jul. 17, 2024, 5:15 PM), <https://www.forbesindia.com/article/explainers/top-10-largest-economies-in-the-world/86159/1> [<https://perma.cc/V6DR-85UP>] (#1 United States—GDP of \$28,783 billion—compared to #2 China—\$18,536 billion); *see also* David Brooks, *The American Renaissance is Already at Hand*, N.Y. TIMES (Sept. 7, 2023), <https://www.nytimes.com/2023/09/07/opinion/economy-china-america-decline.html> [<https://perma.cc/ZXB5-UT5T>] (“China’s industrial policy illustrates the classic downsides of excessive state interference.”).

29. The common law could regulate and penalize property that created a private or public nuisance. 4 WILLIAM BLACKSTONE, COMMENTARIES *167-68.

larger community interest was thereby furthered.³⁰ To ensure that neither property owners nor police power exercises become dominant powers, reviewing courts could be petitioned by property owners burdened by excessive regulation. The proper role of the courts was to acknowledge that, while private property rights “must yield to the police power. . . . [T]he implied limitation [of the police power] must have its limits.”³¹ Those limits were constitutional and equitable norms. Property owners (player one) could assert those defenses in court (to player three) to overturn unreasonable exercises of the police power (imposed by player two). As a result, when judicial review was meaningful, the three players in the property-police power-judicial “game” could achieve a healthy state of dynamic allostasis.³²

A. *Private Property*

Property owned by non-government entities was first subject to “private law,” which settled negotiated disputes between private individuals and business. English private law became known as the *common law*, and this law enjoyed wide acceptance in England and in the United States. The common law of England was influenced by the Magna Carta of 1215, which in part decreed that the private land rights, held by English barons, existed despite the will of the King. Chapter 39 of the Great Charter said in part: “No Freeman shall be taken or imprisoned, or disseized of his freehold, or liberties . . . but by . . . the law of the land.”³³ The Magna Carta was an early acknowledgement of the fact that landownership is an important determinant of political power, which in turn has an impact on government policies.³⁴ The English Parliament ultimately adopted Chapter 39 and made it part of the common law.³⁵

The Framers of the United States Constitution were influenced by the foremost English constitutional commentators and interpreters of English law of their time: William Blackstone (1723-1780) and Edward Coke (1552-1634). Each embraced the message from Chapter 39 in their opinions and commentaries. Blackstone stated that English law recognized three fundamental rights of individuals: Life, liberty and

30. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 578 (1837).

31. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

32. See generally STULBERG, *supra* note 25; John C. Wingfield, *The Concept of Allostasis: Coping with a Capricious Environment*, 86 J. MAMMALOGY 248, 251 (2005) (the concept of allostasis, maintaining stability through change, is how healthy biological systems prevent any one component of the system from overwhelming others, by permitting all to actively adjust to both predictable and unpredictable events, and thereby experience system stability).

33. See generally MAGNA CARTA, ch. 39 (1215); GOTTFRIED DIETZE, *MAGNA CARTA AND PROPERTY* (1965) (calling the Magna Carta the first charter of property).

34. DIETZE, *supra* note 33.

35. *Id.*

private property.³⁶ Blackstone categorized property as “[t]he third absolute right, inherent in every Englishman.”³⁷ Coke construed the Magna Carta as substantively protecting the fundamental guarantees of Englishmen, which included property and economic rights.³⁸ Coke, of course, went even further in *Dr. Bonham’s Case*, where as a jurist he decided that when legislative police power acts “of Parliament” run contrary to “common right and reason, . . . the common law will control it, and adjudge such Act to be void.”³⁹ *Dr. Bonham’s Case* established an important principle—the government’s raw assertion of the police power will not control, if judicial review determines that the police power limit on the common law is contrary to the overriding limit of (constitutional norms protecting) the “common law.”⁴⁰

In addition to Blackstone and Coke, John Locke was a third critical commentator from England whose philosophy influenced the colonial populace in the eighteenth century. Locke argued that while “men” may have started in a state of nature, when they formed an organized society, they entered into a social contract. This social contract defined the authority and purposes of the government, which was responsible for protecting life, personal liberties and estates, all of which were encompassed within the broader, all-encompassing term, “property.”⁴¹ For Locke, the protection of private property in this broad sense is the essential function of the state—“the great and chief end . . . of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property.”⁴² In other words, the government’s power over property is limited because the legislature may not deprive individuals of fundamental rights, and one of the fundamental rights is to acquire, own, and use property.⁴³

Although Locke believed that the “chief end” of forming a government was the “preservation of [a person’s] property,” Locke did not mean that the appropriation or acquisition or passive ownership of the property was sufficient.⁴⁴ It was only a necessary first step to assert ownership, along with the right to exclude and right to resist governmental appropriation. Locke realized that what gives property its

36. 1 BLACKSTONE, *supra* note 1, at *119-41.

37. *Id.* at *134.

38. 2 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND 45-47, 50 (London, M. Flesher 1642).

39. (1610) 77 Eng. Rep. 646; 8 Co. Rep. 113b.

40. Nearly two hundred years after *Dr. Bonham’s Case*, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147-48 (1803), the U.S. Supreme Court established the principal of judicial review in the United States, permitting American courts to strike down laws and statutes found to violate the ultimate limit on legislative and police power limits on property—the Constitution of the United States.

41. LOCKE, *supra* note 3, at 111-12.

42. LOCKE, *supra* note 3, at 155.

43. See EPSTEIN, *supra* note 15, at 14.

44. LOCKE, *supra* note 3, at 155.

value is not mere possession, or the right to exclude, but its *use*.⁴⁵ According to Locke, when a person modifies nature by transforming and producing things through that person's work, the institution of private property is the reward for, and product of, that work.⁴⁶

Blackstone, Coke, and Locke thereby constructed a legal concept termed "property" that was embraced by the pre-1776 American colonies and the Founders. This essential property was not the commodity or asset itself—whether land, a horse, a car, or a patent. It was a relational concept, comprised of the rights to 1) acquire, own, and exclude, 2) use and develop and transform, and 3) transfer, sell, and dispose, in relation to others.⁴⁷ Part II of this paper will show that the right of *use* is the right most under attack by the police power, and most denigrated by reviewing courts in the twentieth and twenty-first centuries. However, for hundreds of years, from pre-1776 to mid-twentieth century, the right of use was of critical importance to the system of private property. The invention of property came about because of the relationships that are created by its use. These relationships occur not because we wish to observe or admire land and other property in a passive state, but because of the many ways by which the property may be used.⁴⁸ When property is used, it then has value to the owner and society. Value is realized when property is extracted, or transformed, or developed, and becomes subject to trade or sale in the marketplace.⁴⁹

The framers of the American Constitution were equally convinced that the *protection* of those property use rights was essential, because this newly created nation could not grow without secure property rights. James Madison asserted that the preservation of the private right to property was a critical object of the law: "Government is instituted to protect property of every sort This being the end of government."⁵⁰ For Madison, protection of property was important because the acquisition and use of property "was a necessary by-product of the freedom of action he deemed an essential part of liberty."⁵¹ Gouverneur Morris, another prominent Framer, expressed similar views about property: "An accurate view of the matter would nevertheless

45. LOCKE, *supra* note 3, at 113 ("[T]he chief matter of property . . . [is] [a]s much land as a man tills, plants, improves, cultivates, and can use the product . . .").

46. MATTHEW H. KRAMER, JOHN LOCKE AND THE ORIGINS OF PRIVATE PROPERTY 130 (1997).

47. See generally DAVID L. CALLIES ET. AL., CONCISE INTRODUCTION TO PROPERTY LAW 1 (1st ed. 2011).

48. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 369-74 (1954).

49. RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 20 (2008).

50. James Madison, *Property*, NAT'L GAZETTE (Mar. 29, 1792), reprinted in 6 THE WRITINGS OF JAMES MADISON 101, 102 (Gaillard Hunt ed., 1906).

51. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710 (1985).

prove that property was the main object of [s]ociety.”⁵² Alexander Hamilton agreed with this assumption about the prominence of property: “One great obj[ect] of Gov[ernment] is personal protection and the security of [p]roperty.”⁵³ To the Founders in America, property was not just an important right for individuals to possess; it was something that governments had a duty to protect.⁵⁴

For eighteenth-century Americans, the right to property was considered a *fundamental* right. Two features of private property signaled its fundamental nature. First, property and liberty were thought to be inseparable. Property was the foundation for security of both meaningful life and liberty.⁵⁵ This interconnection between liberty and property was explicitly recognized by the United States Supreme Court in the 1972 decision of *Lynch v. Household Finance Corp.*⁵⁶: “[T]he dichotomy between personal liberties and property . . . is a false one. . . . [A] fundamental interdependence exists between the personal right to liberty and the personal right in property.”⁵⁷ An even more modern Supreme Court case concurs in this connection between liberty and property. In the 2021 case of *Cedar Point Nursery v. Hassid*,⁵⁸ the Court agreed that “protection of property rights is ‘necessary to preserve freedom’ and ‘empowers persons to shape and to plan their own destiny.’”⁵⁹

This linkage of property to personal liberty can be traced back to John Locke, whose *Second Treatise of Government* announced that the terms “lives, liberties, and estates” [should be] “call[ed] by the general

52. James Madison, Notes on the Constitutional Convention (July 5, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

53. Rufus King, Notes on the Constitutional Convention (June 18, 1787), in 1 FARRAND'S RECORDS, *supra* note 52, at 302.

54. Although the framers generally agreed on the value and significance of the individual right to private property, they did not agree on the basic nature of that right. Lockean liberalism and individual libertarianism was tempered by a persistent undercurrent that private interests sometimes needed to be sacrificed for the greater public good. Indeed, some framers believed in the redistributive role of government, and the possible redistribution of property to promote the wider public good. See GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970, at 128-29 (1998); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 792-93, 823-24 (1995). In Part II of this paper, we will see that, by the mid-twentieth century, the courts became less interested in protecting the constitutional interests of private property owners, and more focused on upholding police power regulations securing the public interest in the re-allocation of property resources.

55. Edmund S. Morgan, *The American Revolution: Revisions in Need of Revising*, 14 WM. & MARY Q. 3, 11 (1957).

56. 405 U.S. 538 (1972).

57. *Id.* at 552.

58. 594 U.S. 139 (2021).

59. *Id.* at 147 (quoting *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017)).

name property.”⁶⁰ This Lockean idea of a life-liberty-property troika can be seen in the preamble of Virginia's 1776 constitution, drafted by George Mason: “[A]ll men . . . have certain inherent [and] natural rights . . . among which are the enjoyment of life and liberty, with the means of acquiring and possessing property”⁶¹ John Adams also recognized that protection of private property was indispensable to the promotion of individual liberty: “Property must be secured, or liberty cannot exist.”⁶²

This first virtue of property—its association with personal liberty—was due in part to the high value the colonists attached to land ownership. In England and much of Western Europe, land ownership was tightly concentrated in relatively few hands, who had relationships with the crown. By contrast, land was abundant and available to settle in North America, where trading companies and proprietors actively sought to attract settlers by granting fee simple titles to settlers on generous terms. The premise was: Free land would incentivize free people. Property and liberty became joined.⁶³

A second virtue of private property is consequentialist: When society chooses to govern resources by a private property regime, that society tends to be better off than a system of non-property, open-access “commons,”⁶⁴ or than where resource allocative decisions are made by the state, through central planning.⁶⁵ The societal utility of private property is reflected in the requirements of common law. Under common law, the right to property includes the critical right to exclude, and the right to use and to dispose of property. These three central rights facilitate *coordination* with other people and other owners. With ownership of resources accepted and legitimated by law, market economies may arise. Resource allocative decisions are then made on a decentralized basis by thousands of individuals and firms responding to price signals.

Individuals exercising the rights of property use and contract may seek to maximize economic benefits from the property interest. Owners can then construct an efficient market-based society. Such market-based, property-reliant systems relying on individual decisions about

60. LOCKE, *supra* note 3, at 154-55.

61. PA. GAZETTE (June 12, 1776), *reprinted in* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 126-27 (1997).

62. 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 280 (Charles Francis Adams ed., Cambridge Univ. Press 1851).

63. *See generally* James W. Ely, *supra* note 5, at 11. *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) (Friedman's thesis is that economic growth and a country's success is based on healthy, property-based markets that are largely free from government intervention).

64. Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968).

65. Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2081-82 (2012).

asset use and allocation have a better chance to succeed.⁶⁶ Although the distribution of property resources might result in some non-owners who are worse off,⁶⁷ those who are owners, or who may become owners, trend toward wise use of resources and long-term investment, while avoiding waste.⁶⁸

B. *The Police Power and Regulation of Private Property*

Throughout much of the eighteenth and nineteenth centuries, the concept of private property was central to the prevailing political theory that guided those who influenced the new nation of the United States of America. John Locke's view was that the right to private property was not just one right among many, but the paradigm right. To Locke, the preservation of private property was the essential function of the state.⁶⁹ James Madison, a primary author of the Constitution, agreed: "Government is instituted to protect property of every sort"⁷⁰ This important right to property was not limited to the mere right to acquire and possess property, and to exclude others; the property right assumed the right to *use* it, and to *transfer* it as well. This active view of the right stems from the understanding that property's use, and its role in a functioning market, is what gives the property its value.⁷¹

This prominent position of private property in the newly formed nation could not remain unchallenged. The idea of government would have been undermined if private decisions about property could never have been challenged, or limited, by the state. For a government to succeed, and for a new nation to survive, there needed to be "allostasis." A condition of allostasis is present in a system when the system is stable.⁷² Stability can occur when power is not concentrated, but where the participants in the system have the freedom to act to prevent concentration and where the other equally competing actors have the ability to adapt to the decisions of other actors.⁷³ James Madison captured this reality in *Federalist Papers No. 47* and *51*, where he warned that "the accumulation of . . . powers in the hands of one body

66. See generally EPSTEIN, *supra* note 49, at 1-2; see generally DOUGLAS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY (1981); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1266 (2005) (each of these scholars presume that capitalist systems like the United States succeed economically by having a strong property-rights tradition where owners have maximum discretion to use their property without excessive government controls).

67. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 323-42 (1988).

68. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317-25 (1993).

69. LOCKE, *supra* note 3, at 155.

70. MADISON, *supra* note 50, at 102.

71. Pilon, *supra* note 2, at 184.

72. See STULBERG, *supra* note 32.

73. *Id.*

. . . would be ‘the very definition of tyranny.’”⁷⁴ Instead, “ambition must . . . counteract ambition.”⁷⁵ In other words, when “checks” are in place to “balance” the power of the central players, these checks and balances ultimately permit system stability.

What were the checks in place to balance the looming power of private property rights? First, it was thought that the property itself was possibly encumbered by a latent public interest in the allocation of resources in an organized society. This inherent limit was outlined by Jean-Jacques Rousseau, who argued that “the right which each individual has over his own property is always subordinate to the right which the community has overall.”⁷⁶ Second, the police power may be conceptualized as a means of enforcing the common law principle governing the law of nuisance—*sic utere tuo ut alienum non laedas* (use your property so as not to injure others).⁷⁷ Third, John Locke declared that the “police power” was a fundamental power of government to protect members of the relevant community against harm from each other. According to Locke, this power in turn derived from the “Executive Power” that individuals had in a state of nature to secure their own rights.⁷⁸ Individuals gave up that power to obtain the superior protection of a civil society. By entering the social compact with others, an individual surrenders the power of self-preservation and agrees “to be regulated by laws made by the society.”⁷⁹

These theories justifying the origins of the police power encountered a tension between a seeming absolutist police power granted government, and (1) the Constitution’s premise of a limited national government and (2) the historic recognition that state police power was limited by the Declaration of Independence to only “just powers” delegated from the consent of the governed.⁸⁰ Nineteenth century courts believed “just” police powers were calculated to safeguard the rights of individuals. Legitimate exercises of the police power could take two forms: (1) “Regulations” made rightful activities (those that did not

74. David H. Rosenbloom et al., *Madison’s Ratchet: Ambition Counteracting Ambition and the Aggregation of Political, Managerial, and Legal Controls over Federal Administration*, 48 AM. REV. PUB. ADMIN. 495, 495 (2017) (quoting The Federalist No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961)).

75. *Id.*

76. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 21-22 (Charles Frankel ed., 1947) (1762).

77. *See* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-85 (1851) (“[E]very holder of property . . . holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious . . .”).

78. *See generally* LOCKE, *supra* note 3.

79. LOCKE, *supra* note 3, at 156.

80. *See generally* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 572 (2d ed. 1871). Cooley and other scholars have recognized that the “police power” of the states was never intended to be unlimited. *See, e.g.*, Daniel Rodriguez, Good Governing: The Police Power in the American States (Cambridge Univ. Press 2024).

injure others) *regular*. Such police power exercises could specify ways in which activities were conducted so as to prevent rights violations. (2) “Prohibitions” could be exercised to prohibit wrongful activities that injured others.⁸¹

Regardless of the exact origins of the idea of a government police power, there was widespread concurrence that government should have some power over private property uses in order to ensure that selfish private interests could not do damage to, or create results inconsistent with, the *public good*. In other words, property had one countervailing interest that needed to be considered by property owners: the larger public interest. If the concentration of power by property owners became too entrenched, or grandiose, the interests of the public good could resist this resulting imbalance of power in certain situations.⁸² Even during colonial and revolutionary periods, many embraced the view that property itself is in fact created by society, and may be regulated in the public interest.⁸³ For example, Benjamin Franklin wrote that “[p]rivate [p]roperty . . . is a [c]reature of [s]ociety, and is subject to the [laws]of that [s]ociety.”⁸⁴

Once the police power was established as a limit on the otherwise all-powerful right of private property,⁸⁵ two issues still remained to be resolved. First, what is, and what should be, the proper scope of the power? This first issue did not have a singular resolution in the eighteenth, nineteenth, and early twentieth centuries.⁸⁶ The police power can be exercised for the benefit of the larger society in which the private property is found. This larger society has been characterized as

81. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 328-33 (2004).

82. See generally GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1998) (discussing the historic tension between the rights of property owner and the demands of the society in which the property was located).

83. See generally Treanor, *supra* note 51, at 694–95, 698 (Treanor reminds us that eighteenth and nineteenth century jurisprudence never assumed private property was immune from government regulatory or condemnation powers); see also William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 *HASTINGS L.J.* 1061, 1070 (1994).

84. Benjamin Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania*, in 10 *THE WRITINGS OF BENJAMIN FRANKLIN* 54, 59 (Albert Henry Smyth ed., 1907).

85. See, e.g., FREUND, *supra* note 3, at 63 (the power to police is inherent in the concept of government, regardless of whether the American government is federal or state) (Freund’s entire treatise begins with the assumption that the police power did not need to be explicitly granted to states by the legislature or constitution).

86. For example, The United States Supreme Court has declared that the police power “is, and must be from its very nature, incapable of any very exact definition or limitation.” *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873).

the “rights of the community,”⁸⁷ “the general well-being,”⁸⁸ and “the public good.”⁸⁹ This larger public need can, in theory, extend to encompass literally “any ‘legitimate state interest’ that gains the endorsement of elected political bodies” that wish to wield legislative or regulatory power.⁹⁰

When the police power is properly exercised, it may override the wishes of the property owner. As one court explained, private choices “must give way, at times, to the public good.”⁹¹ Of course, the issue becomes: what are the situations that, at times, call for private interests to be supplanted by public interests? The traditional *sic utere* rule is triggered when property use will directly injure others. A parallel common law rule—*salus publica suorema lex est*—recognizes the police power as a means to prevent or avoid harm to others, even if the action has not yet harmed others. The *sic utere* and *salus publica* justifications are the easy cases because injury and harm are being created by property use. The much harder case is whether the police power can sanction redistributive activity by the state.

This issue implicates the second issue that arises under the police power: are there limits on the police power, and what, or who, can impose such limits on exercises of the police power? There has been a general consensus that the police power cannot be unlimited. If there were no limits, then every right of property and other rights expressly recognized by the United States and state constitutions (e.g., the Takings Clause or the right of freedom of speech) could be superseded and extinguished by some notion of the general welfare.⁹² Certain equitable doctrines, such as the vested rights doctrine not explicitly acknowledged in constitutional terms, seemed to serve as another check on the police power.⁹³ There also were hints of inherent limits, found in the police power itself. For example, it was thought that the police power might be contained by a “rule of reason,” ensuring that the exercise of police power authority would not go beyond the public need or be so extremist to be considered “oppressive.”⁹⁴

87. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 584 (1837).

88. *Mugler v. Kansas*, 123 U.S. 623, 669 (1887).

89. *Consol. Rock Prods. Co. v. City of Los Angeles*, 370 P.2d 342, 352 (Cal. 1962) (quoting *Township of Bloomfield v. Beardslee*, 84 N.W.2d 537, 540 (Mich. 1957)).

90. EPSTEIN, *supra* note 49, at 98.

91. *Consol. Rock*, 370 P.2d at 352.

92. See generally DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 50 (2002) (arguing that the concept of the “general welfare” is so all-encompassing that, if it were not limited by constitutional property protections, it could nullify property owners’ right to use and develop their property)

93. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423-25 (2010).

94. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388-89 (1798); see also *Appeal of Medinger*, 104 A.2d 118, 120-22 (Pa. 1954).

Another possible limit stems from how one determines what is a legitimate, or improper, exercise of the state's police power. On the one hand, it is generally conceded, and it was for centuries widely recognized, that government may regulate property which injures a neighbor's land or interferes with the neighbor's right to use the neighbor's land. In short, the police power may prevent what would be considered a private nuisance under the common law. Moreover, when a nuisance produces widespread harm, the state may protect the aggregate results of all those harmed when it would be difficult to organize multiple individual lawsuits. In doing so the state is, in effect, preventing what in the common law would be considered a public nuisance.⁹⁵ On the other hand, while it was acceptable for the police power to regulate nuisance producing activities that were harmful, what was not certain was whether the police power could restrict private property for the *benefit* of others, or to maximize the general welfare. A particularly problematic exercise of police power was when certain property owners were tasked with correcting or ameliorating a large social problem that was not caused by that group of owners. In such cases the government can rightfully be accused of misusing the police power by enabling state actors to provide public goods and benefits "off budget;" by having private property bear the cost of supplying the general need for amenity.⁹⁶

These unsettled issues needed resolution because, by the twenty-first century, the police power was routinely being used to provide the public with all manner of general benefits, especially environmental benefits. And, coinciding with this need to provide borders on the scope of the police power was the perhaps more pressing need to decide what legal institution would act as a viable check on the power of this police power. Who would provide the "ambition" to "counteract the ambition" of the police power (Madison), and who would impose "the limits" on the "implied limitation" of the police power (Holmes)? That checking function would be provided by a critical third player in this three-person game: the courts. The issue then needing resolution was this: what should be the role and function of the judiciary while property rights were clashing with the police power?

C. Reviewing Courts

For the first two centuries of the United States, from roughly 1776 to the mid-twentieth century, two central actors dominated the legal landscape defining (1) the common law right of private property, and (2) the government's concomitant right to regulate that common law right. These two rights were held by two different entities: private

95. See FREUND, *supra* note 3, at 546-47.

96. EPSTEIN, *supra* note 15, at 113-15.

“persons,”⁹⁷ and the government.⁹⁸ An important purpose of the latter right, the right to regulate, was to restrict, limit, condition, or even in some cases to prevent, the exercise of the former right—the right to own and enjoy private property. For nearly two centuries, these two countervailing rights experienced uneasy, but ongoing, parity.

Private property enjoyed a presumption that the right entailed far more than the right of acquisition, ownership, and ability to exclude; property enabled the owner to engage in active *uses*, including the ability to transform, develop, consume or dispose of property, by contract, transfer, or sale. Such property uses theoretically not only produced gains for the owner, but also increased everyone's welfare, by opening up markets and opportunities for trade.⁹⁹ Moreover, one prevailing presumption was that everything and every use was *permitted* to prevent harm to property owners, unless explicitly prohibited. Another presumption was that, while property owners could be held responsible for negative externalities caused by the property, these owners would not be expected to bear the cost of providing a public benefit that resulted from eliminating a societal problem not caused by the property.¹⁰⁰ And private property owners would not have a duty to provide “public goods” where the owner did not receive compensation.¹⁰¹

To ensure that this formidable power of private property would not dominate the burgeoning American economic marketplace, another power needed to emerge that could “check” the power of private property. Early on in our country's history it was recognized that “though property [is to be] protected, it is still to be understood[] that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the . . . annoyance of others, or of the public.”¹⁰² This broadly followed description of prevailing American law further provided that “[t]he government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens.”¹⁰³ This acceptance of “government . . . regulations” embraced

97. A legal person could be an individual, or an association, or business owned by individuals.

98. Federal government bodies derived their powers from the United States Constitution, while state and local governments derived their powers from state law.

99. EPSTEIN, *supra* note 49, at 20.

100. PILON, *supra* note 2, at 180-81.

101. In economics, a public good is a benefit enjoyed by everyone, such as a park or a lighthouse, where users cannot be banned from accessing them or prevented from using them for failure to pay for them. See generally Paul A. Samuelson, *Pitfall in the Analysis of Public Goods*, 10 J. L. AND ECON. 199, 199-204 (1967) (stating that public goods are non-excludable and non-rivalrous).

102. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (New York, O. Halsted 1827). *Commentaries on American Law* were originally published in 1826, adapted from his lectures at Columbia Law in 1794.

103. *Id.*

what is now shorthand to be the “[p]olice [p]ower,” a term that became more common in the 1880s.¹⁰⁴

The police power was thought to be the undefined body of government power reserved to the states, permitting state governments to regulate private actions including those involving property.¹⁰⁵ Gradually, the state police power was deemed to encompass a government's ability to regulate a widening array of individual behaviors. In *Barbier v. Connolly*,¹⁰⁶ the Supreme Court actually concluded that municipal police power could include an ordinance prohibiting the washing and ironing of clothes in public laundries.¹⁰⁷ In *Thorpe v. Rutland & Burlington Railroad Co.*,¹⁰⁸ a state supreme court concluded that the legislature could “control existing railways” to ensure “the protection of the lives, limbs, health, comfort, and quiet of all persons.”¹⁰⁹ In *Patterson v. Kentucky*,¹¹⁰ the U.S. Supreme Court acknowledged that the “police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights.”¹¹¹

This power to regulate was an inherent power found in state governments at all levels,¹¹² and it was the reason why states could regulate private property in order to promote public health, public safety, and public morality.¹¹³ Both *Barbier* and *Mugler v. Kansas*¹¹⁴ concluded that the Fourteenth Amendment did not take “from the [s]tates of the [u]nion those powers of police that were reserved at the time the original Constitution was adopted.”¹¹⁵ In a pre-*Lochner* period during the

104. See generally EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JURIDICAL CONCEPT 88 (1948). The term “police power” was first introduced by Chief Justice Marshall in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443-44 (1827).

105. See generally FREUND, *supra* note 3, at 706; see also License Cases, 46 U.S. (5 How.) 504, 583 (1847) (Taney, C.J.) (“[W]hat are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.”).

106. 113 U.S. 27 (1885).

107. *Id.* At 32.

108. 27 Vt. 140 (1855).

109. *Id.* at 149.

110. 97 U.S. 501 (1878).

111. *Id.* at 504.

112. See *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837) (the internal police power was not surrendered by states in America after 1788; rather, the authority to engage in internal regulation “is complete, unqualified, and exclusive”).

113. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

114. *Id.*

115. *Id.* at 663 (citing *Barbier v. Connolly*, 113 U.S. 27, 31 (1885)); accord *Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888).

late nineteenth and early twentieth centuries,¹¹⁶ these decisions gave notice that regulations affecting private property were acceptable checks on individual decision making over property, if the purpose of the regulation was to protect health, safety, or morals of the public.¹¹⁷

This growing dominance of the police power over the power of private property was present even during the time in the early twentieth century when *Lochner*-influenced judicial decisions were invalidating regulations based on substantive due process liberty-of-contract grounds.¹¹⁸ For example, in 1915, in *Hadacheck v. Sebastian*, the court upheld a police power ordinance requiring the closing of a brickyard that had operated successfully for many years because it stood in the path of urban development.¹¹⁹ In 1926, in *Village of Euclid v. Ambler Realty Co.*, the court upheld comprehensive zoning, despite the absence of properties creating nuisance like conditions, thereby justifying modern, more far-reaching land use regimes.¹²⁰ And in *Gorieb v. Fox*, the Supreme Court upheld police power regulations requiring setback limits on streets for all new buildings.¹²¹ The message to property owners from these decisions was unambiguous: the government's police power ability to limit and prohibit property uses can and will override any common law right of property use the owner might seek to exercise.

If the government's police power were to run amok, then there would be no parity, no balance, no allostasis between private property and regulation. Government dominance would prevail, and the private and social benefits of a vigorous property-based market system would be jeopardized. Perhaps because of a collective realization that private property uses should not be throttled by an unchecked police power, throughout this late nineteenth and early twentieth century period of police power growth, another key player—the judiciary—sounded a

116. *Lochner v. New York*, 198 U.S. 45 (1905), was a case that ushered in a thirty-year era where many exercises of the police power were struck down for violating the Due Process Clause of the Fourteenth Amendment's "liberty" right to contract. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 14-16 (1915).

117. Part II, below, shows that at the end of the *Lochner* era in the late 1930s, the police power continued its expansion, encompassing far more than health, safety, and morals, extending to virtually all public needs, especially those implicating economic, social, and private property interests. See, e.g., *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423-25 (1952).

118. Other U.S. Supreme Court cases during the early twentieth century besides *Day-Brite* found to be unconstitutional many federal and state statutes regulating private businesses. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 14-16, 19 (1915); *Adair v. United States*, 208 U.S. 161, 180 (1908). *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423-25 (1952).

119. 239 U.S. 394, 410 (1915). Although the ordinance significantly reduced the value of the land, the Court was unimpressed, stating that the police power is "one of the most essential [and least limitable] powers of government." *Id.*

120. 272 U.S. 365 (1926). See also EPSTEIN, *supra* note 15, at 131-34.

121. 274 U.S. 603, 608 (1927) (explaining that regulations may "interfere[] . . . with the [property] owner's general right of dominion over his property").

clarion call announcing that it would act as a check on the police power. The courts would become that “limit” on the limits imposed by the police power.

During a roughly forty-year period between 1887 and 1928, the U.S. Supreme Court counterbalanced virtually every pro police power decision with a decision reminding us that (1) private property was indeed a protected common law right under the constitution, (2) the police power was not unlimited, and (3) the reviewing courts would play an active role in maintaining allostasis between property interests, regulators, and the judiciary. To wit: For every *Barbier v. Connolly*¹²² and *Hadacheck v. Sebastian*,¹²³ there was a *Mugler v. Kansas*.¹²⁴ *Mugler* warned that the mere allegation by a state that the police power was being used would not suffice to uphold that power; courts would determine if there was a substantial relation between the regulation itself and the values thereby promoted.¹²⁵ For every *Village of Euclid v. Ambler Realty Co.*,¹²⁶ there was a *Pennsylvania Coal Co. v. Mahon*.¹²⁷ The *Pennsylvania Coal* case was where the Court famously declared “that[,] while property may be regulated to a certain extent, if [the] regulation goes too far[,] it will be recognized [by reviewing courts] as [being unconstitutional].”¹²⁸ And for every *Gorrie v. Fox*,¹²⁹ there was a *Nectow v. City of Cambridge*.¹³⁰ In *Nectow*, the Court cautioned that if a land use regulation caused “serious and highly injurious” consequences to a private property right, reviewing courts would invalidate that regulation.¹³¹

Why was the Supreme Court stubbornly insistent that the judiciary not defer or abdicate to the will of legislative regulators? After all, are not those elected to exercise legislative power presumptively more able to decide how best to have property used for the general welfare? Despite the temptation to simply defer to the lawmakers, there remained four reasons why the judiciary continued to maintain meaningful power of judicial review of regulations affecting property for nearly two centuries after 1788.

First, there was no widespread belief before mid-twentieth century that legislatures and regulators were more competent to determine the

122. 113 U.S. 27, 32 (1885).

123. 239 U.S. 394, 410 (1915).

124. 123 U.S. 623, 663-64 (1887).

125. *Id.* at 661.

126. 272 U.S. 365, 387-89 (1926).

127. 260 U.S. 393, 413-14 (1922).

128. *Id.* at 415.

129. 274 U.S. 603, 608 (1927).

130. 277 U.S. 183, 187-88 (1928).

131. *Id.* at 188; *accord* *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928) (exercises of the police power deemed by reviewing courts to be unreasonable and unnecessary restrictions on private property will be struck down).

best use of property than the judiciary or the private market. Indeed, throughout much of the nineteenth century, legal historians have documented how common law state courts were given free rein to transform traditional common law property doctrine trade to accommodate the needs of economic growth.¹³² Conversely, there was no generally held assumption that public officials were more likely to act in the public interest than property owners.¹³³

Second, while eighteenth and nineteenth century Americans seemed to trust the judiciary to advance the nation's interests, there was distrust of legislative power. Alexander Hamilton in the *Federalist Papers* reminded those viewing the unratified constitution that the judicial branch was in part established to constitute "the bulwarks of a limited Constitution against legislative encroachments," to ensure that legislatures and the agencies they authorize remain "within the limits assigned to their authority."¹³⁴ James Madison was equally concerned about legislative excesses, warning correctly that "[i]n republican government[s], the legislative authority necessarily predominates."¹³⁵ Only the judiciary was in a position to protect property rights from a power-hungry legislature.¹³⁶

Third, to permit the police power to dominate private property interests would be inconsistent with a central tenet of the new Constitution. America's conception of state and federal government was of a *limited* government, safeguarded by a system of checks and balances. Private property power under the common law was one major player in the new nation, and it was balanced against the power of government to regulate property. The judiciary was a player that curbed and checked legislative overreach. The power of judicial review was thereby central to the idea of separation of powers, giving courts the ability to invalidate legislation and police power regulations that were "inconsistent with the commands of a higher law."¹³⁷

132. See generally JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 46-47 (2010) (American courts refashioning the common law of waste to promote more efficient use of resources); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956) (the law of property and contract was shaped by common law judges to promote economic expansion).

133. EPSTEIN, *supra* note 49, at 50.

134. THE FEDERALIST NO. 78, at 467, 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

135. THE FEDERALIST NO. 51, *supra* note 134, at 322 (James Madison).

136. See *supra* note 134.

137. EPSTEIN, *supra* note 49, at 36. Among the enumerated rights in the Constitution protecting property rights were (1) the Takings Clause of the Fifth Amendment, (2) the Due Process Clauses of the Fifth and Fourteenth Amendments, and (3) the Contracts Clause of Article I, Section 10.

In the seminal decision of *Marbury v. Madison*,¹³⁸ there was an explicit and “emphatic” holding that it was the rightful power and duty of the judiciary to say what laws were acceptable.¹³⁹ Judicial review of legislative acts was also implicit in the Due Process Clause of the Fifth and Fourteenth Amendment. The text of these clauses requires that no person may be “deprived of life, liberty, or property” except by an act of a legislature that constitutes a law.¹⁴⁰ The wording of these clauses presumes that private persons so deprived are protected by being subject to due process of law. This “due process” phrase entitles judicial examination of any legislative “act,” including acts affecting property, to ensure it was a bona fide “law.”¹⁴¹

Fourth, although the police power was relentlessly in ascendance during the first two centuries of America's existence,¹⁴² the judiciary, especially the U.S. Supreme Court, consistently reminded us that (1) the police power was not without limits, and (2) the courts would be responsible for articulating the nature of these limits. In one of its first cases, the Supreme Court in *Calder v. Bull*,¹⁴³ laid out a theory of constitutional government where state legislatures were not “omnipotent[t],” and were subject to judicial review and reversal when legislation was deemed to be oppressive of individual property rights.¹⁴⁴ In another early case, *McCulloch v. Maryland*,¹⁴⁵ the court presumed that the only legitimate exercises of the states' police power were those made in good faith. *Mugler v. Kansas*¹⁴⁶ was a late nineteenth century Supreme Court case that established that state police power exercises could not be arbitrary and required a substantial relationship between the law's chosen means of accomplishing a legitimate purpose.¹⁴⁷ Commentators and state courts concurred that statutes affecting and changing vested property rights would be considered inoperative and void.¹⁴⁸ In short, before the middle of the twentieth century, the judiciary was insistent that it was a legitimate player and a power in the

138. 5 U.S. (1 Cranch) 137 (1803).

139. *Id.* at 177.

140. U.S. Const. amend. X; U.S. Const. amend. XIV, § 1.

141. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). The opinion by Justice Chase in *Calder* distinguishes between a legislative “act” and a “law.” *Id.* Legislative acts that are an abuse of legislative power because they “take away that security for personal liberty[] or private property” cannot be called a “law.” *Id.*

142. See *supra* Section I.B.

143. 3 U.S. (3 Dall.) 386(1798).

144. *Id.* at 387-88.

145. 17 U.S. (4 Wheat.) 316 (1819).

146. 123 U.S. 623 (1887).

147. *Id.* at 661, 663.

148. See generally James Kent, *Commentaries on American Law* (1826); *Merrill v. Sherburne*, 1 N.H. 199 (1818); *Dash v. Van Kleeck*, 7 Johns. 477, 480 (N.Y. Sup. Ct. 1811).

three-player “game” that emerged between private property, the police power, and reviewing courts.

II. DISEQUILIBRIUM AND THE RISE OF THE REGULATORY STATE

By the middle of the twentieth century, the three actors (or players) no longer held equal power. The nearly 200 years of checks and balances, and implied regulatory limits themselves having limits, had been largely replaced with a coalition between regulators and courts, a devalued right of private property, and an imbalance among the three actors. They were no longer equivalent powers. Allostasis had given way to disequilibrium.

What had happened to cause this condition? Private property owners were perceived as a source of negative externalities in need of police power regulation. Property owners were seen as an easy mark to supply social and economic capital needed to enhance general welfare needs “off budget.” As a result, private property was no longer considered a fundamental right;¹⁴⁹ it was no more the “guardian of every other right,” or the all-encompassing Lockean “property” that consisted of “lives, liberties, and estates.”¹⁵⁰

By contrast, government regulations and the police power were thought to typically act in the public interest, especially when regulations were directed at curtailing or conditioning private property use and disposition.¹⁵¹ And, instead of acting as a limitation when police power exercises overzealously limited property rights, reviewing courts simply, and routinely, deferred to government actions affecting property. A *de facto* coalition existed between regulators and reviewing courts. This coalition largely immunized land use and environmental regulations from judicial challenge, while empowering the government to regulate at will, so long as it was a regulation of social and economic or property interests for any “legitimate state interest.”¹⁵²

A. Private Property

Despite a nearly two century run where private property rights were both constitutionally protected and presumed to be a

149. ELY, *supra* note 5, at 9.

150. LOCKE, *supra* note 3, at 154-55.

151. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922), Justice Brandeis’s dissenting opinion foreshadowed the eventual rise of the police power. Brandeis argued that the police power regulation of property was acceptable so long as the regulation protected the public or was for a valid public purpose. If so, then as long as legal title remained with the owner, it was irrelevant if the police power had caused a dramatic reduction in the property’s value. *Id.* at 417-18.

152. EPSTEIN, *supra* note 49, at 98.

foundational element of the nation's civic purpose,¹⁵³ by the mid-twentieth century, property had devolved into a vulnerable legal interest that no longer played a significant role in our constitutional order.¹⁵⁴ Owners could rarely succeed in mounting constitutional challenges to onerous regulations because property rights were considered degraded, second class rights, usually not deserving of protection from police power regulators, or by reviewing courts.¹⁵⁵ How did this dramatic change in status come about? How did property's lesser stature manifest itself? And what caused the devaluation private property?

The United States Supreme Court had first suggested in nineteenth century cases that the Constitution would not serve as a source of unlimited protection of private property interests from the exercise of the police power. In *Charles River Bridge v. Warren Bridge*, the Court held that states may significantly alter the terms of existing contracts, so long as such alterations constituted a reasonable use of the state's police power.¹⁵⁶ The Contracts Clause of Article I, Section 10 did not serve as a bar to such state laws, despite its textual prohibition against state laws that "impair[ed]" contracts. After the Fourteenth Amendment was ratified, the Court determined in the *Slaughter-House Cases*¹⁵⁷ that the Privileges or Immunities Clause only protected legal interests deemed to be "fundamental," but property rights were not included.

By the twentieth century, the Court was happy to delegate land use planning functions to planners and lawmakers, without court interference. *Village of Euclid*¹⁵⁸ concluded private property rights were not sufficiently fundamental to warrant constitutional protection from ordinary land use planning restrictions, like zoning regulations. Several twentieth century Supreme Court cases systematically downgraded private property to "also-ran" status as a legal right seeking constitutional protection. The most significant doctrinal sea change occurred in *United States v. Carolene Products Co.*¹⁵⁹ In this case's famous footnote four, the Court announced that the federal judiciary should safeguard only particular individual rights in the constitution, such as First Amendment speech and association rights, and protect only certain vulnerable populations ("discrete and insular minorities") against

153. See generally JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 8-9 (1990); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135 (1980); see also *supra* Section I.A.

154. See EPSTEIN, *supra* note 49, at 2.

155. See generally Ely, *supra* note 21, at 44-45.

156. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

157. 83 U.S. (16 Wall.) 36 (1872).

158. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

159. 304 U.S. 144 (1938).

discrimination.¹⁶⁰ By contrast, courts should defer to legislative choices that affect social and economic interests, such as private property uses. Property uses were classified as economic in nature, and economic regulations were thought to impact interests not sufficiently fundamental to justify judicial protection.¹⁶¹ As a result of *Carolene Products* and *Euclid*, private property rights became judicially marginalized, and a powerful coalition had been created by the joining of two major actors—property regulators and courts which reviewed the validity of the regulations.

Subsequent Supreme Court cases continued to dismantle the constitutional stature of common law private property. In *Penn Central Transportation Co. v. New York City*, the Court announced that most police power land use regulations adversely affecting private property would not be “takings” if the challenged regulation satisfied a relaxed ad hoc balancing test.¹⁶² The *Penn Central* Court was not ambiguous about the likely chances of success for property litigants: “A ‘taking’ . . . [is less likely] when the interference with property . . . arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”¹⁶³ A year later, in *PruneYard Shopping Center v. Robins*,¹⁶⁴ the Court concluded that property owners had “failed to demonstrate that the right to exclude others is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a taking.”¹⁶⁵ In that same year, the Court found that not only was the property owner's right to exclude not necessarily protected from the police power, so too the outright “denial . . . [and] destruction of one ‘strand’ of the bundle [of rights, such as the right to dispose] is not a taking[] because the aggregate must be viewed in its entirety.”¹⁶⁶ Lower courts throughout the twenty-first century similarly confirmed that private property is “not a fundamental right” under the property protective clauses of the U.S. Constitution.¹⁶⁷

Property’s turnabout has been startling. Private property has gone from being the premier common law private right to has-been status. Private property appears to be a lesser, largely constitutionally-

160. *Id.* at 152 n.4.

161. See JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 354 (2022); Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003-2004 CATO SUP. CT. REV. 9, 13-16 (2004).

162. 438 U.S. 104 (1978).

163. *Id.* at 124.

164. 447 U.S. 74 (1980).

165. *Id.* at 84 (internal quotation marks omitted).

166. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

167. *Yim v. City of Seattle*, 63 F.4th 783, 798 (9th Cir. 2023) (quoting *Slidewaters LLC v. Wash. State Dep’t of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021)) (takings clause); see also *Tiwari v. Friedlander*, 26 F.4th 355, 360-61 (6th Cir. 2022) (due process clause); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012) (due process clause).

ignored legal interest. For nearly two centuries the common law bundle of property rights found constitutional protection when the police power sought to interfere with the owner's exclusive rights of possession, use, and disposition. But, by the mid-twentieth century, constitutional law seemed willing to extend high levels of protection only when the right exclude was threatened, but not to the valuable property sticks of use and disposition.¹⁶⁸

One manifestation of this loss of status for property has been a revitalization of an ideological current first embraced by some of the founders in the eighteenth century—"civic republicanism." Early civic republicans, like Benjamin Franklin, viewed private property not as a commodity, but as a social right imbuing the owner with a duty to sometimes sacrifice selfish private interests for the public good.¹⁶⁹ The civic republican tradition also embraced redistributive activities by the state, which sanctioned a redefinition of property relations in order to benefit the larger community.¹⁷⁰

Civic republicanism has become more accepted as traditional private property rights of use and disposition have become more diluted. When disputes arise about the nature and extent of private property interests, claimants are no longer just the owner of the property and property owners who are neighbors. The modern resolution of disputes about property use requires more than a consideration of the private interests of affected claimants; it requires decisionmakers to consider the *public interest* in the allocation of resources in society.

As a result, there has been a reversal of traditional presumptions relating to property use. The original founding principle of property use was that everything that is not explicitly prohibited is permitted. By contrast, a civic republican overlay now insists that everything that is not officially permitted by the state is prohibited.¹⁷¹

Why has there been such a dramatic change in who we presume is the best decision maker about whether and how property should be used? Initially, as noted in Section I.A above, the consensus was that private property owners operating freely and without restraint in an economic market should (and would) be the best judge of their properties highest and best use. But by the mid-twentieth century, deference

168. See EPSTEIN, *supra* note 49, at xvi.

169. See Treanor, *supra* note 54, at 821, 824-25; Benjamin Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania*, in 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (Albert Henry Smyth ed., 1907).

170. See generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 279 (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969); See generally Treanor, *supra* note 54, at 792-93 (showing that historians and legal scholars who have examined the history of the interplay between government and property have argued that the "public good" and "public welfare" have always been inherent limits on the discretion of property owners to use their property).

171. See Pilon, *supra* note 2, at 181.

to the choices of government officials (exercising the police power) became the norm.¹⁷² The assumption seemed to be that selfish micro-decisions about private property by the owners could not be trusted. Such private choices about property could lead to nuisances, or negative externalities, or hidden long term social and environmental costs. Government appeared to be a better decision maker regulating the validity of economic or social marketplace actions, such as property uses.¹⁷³ In some ways, property owners became suspect, while those government actors wielding the police power to regulate that property seemed more trusted.¹⁷⁴

Reviewing courts have enabled this transfer of decisional authority over property from the owner to the government. Consider the following statement by the United States Supreme Court in 1954 when considering whether a legislative judgment about land use should be made by property owners or a government planner: “The concept of the public welfare . . . is within the power of the legislature to determine Once the question of the public purpose has been decided, the amount and character of [the private] land to be taken . . . rests in the discretion of the legislative branch.”¹⁷⁵ There are two messages here: first, public officials act in the public interest while private property owners do not.¹⁷⁶ Second, if government planners wish to override the wishes of private property owners regarding the best use of land, these government actors may do so with impunity. The common law right of the owner to use property does not thwart the more powerful right of government to better determine how that property should be deployed.¹⁷⁷

B. *The Police Power and the Regulation of Property*

By the mid-twentieth century, both private property and the police power had been transformed, but in different ways. Property had gone from being the “guardian of every other right”¹⁷⁸ to a “second class”

172. See sources cited *supra* note 167.

173. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

174. See, e.g., Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141, 158, 173 (2007).

175. *Berman v. Parker*, 348 U.S. 26, 33, 33-36 (1954).

176. See EPSTEIN, *supra* note 41, at 50.

177. See generally RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 8 (2006); TIMOTHY SANDEFUR & CHRISTINA SANDEFUR, *CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA* (2d. ed. 2015) (stating that twenty-first century property rights scholars emphatically disagree with the assumption that government inevitably “knows best,” and certainly better than private market forces driven by the decisions of property owners).

178. ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA* 14 (4th ed. 1775); see also ELY, *supra* note 5, at 26.

right.¹⁷⁹ By contrast, the police power, originally conceived as a modest power of government to secure the rights of the people and to prevent property from creating harmful nuisances,¹⁸⁰ had been inflated to the point where government now had the largely unreviewable power to mandate a “well-balanced” community.¹⁸¹ The power of private owners to use property had been considerably diminished relative to the ability of the police power to limit property uses. There no longer was parity between property and the police power.

It would be difficult to foresee during the early centuries of this country that the police power would become the major player and decision maker regarding acceptable property uses. The original function of the police power was narrow and limited.¹⁸² It was not intended to interfere with property rights where the exercise of those rights was not harming others. Nor was the police power a license to take private property, or to demand concessions from property owners, in order to either benefit others or to adjust property allocations so that society's well-being was better served. And it was not a power to provide the public with needed goods or services. Rather, the initial purpose of the police power was to secure private rights by prohibiting property uses from creating harms.¹⁸³ Indeed, it was consistent with the traditional common law property norm of *sic utere tuo ut alterum non laedas* that the power of the state included the ability to prevent and prohibit uses of private property in a manner harmful to others.¹⁸⁴

Government power over private property to prevent harms was legitimate because it was a power to secure a right—a right not to be injured as a result of the exercise of a common law right of property use.¹⁸⁵ There are sound economic reasons to allow the state police power to protect individuals from the infliction of private harms. Individual property owners and individuals often cannot coordinate their activities to protect themselves from nuisance producers. Rather than require individuals to obtain separate injunctions preventing the

179. See Somin, *supra* note 21, at 3, 21-25.

180. See generally LOCKE, *supra* note 3, at 156.

181. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

182. See generally NOAH FELDMAN AND KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 518 (21st ed. 2022) (explaining that the original purpose of the police power was to ensure that private property uses would not produce public harms, but it was not wielded to force property owners to produce public benefits). See, e.g., *Weaver v. Palmer Bros.*, 270 U.S. 402 (1926); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Adair v. United States*, 208 U.S. 161 (1908). For a summary of these cases, see BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 148-79 (1942).

183. FREUND, *supra* note 3, at 546-47.

184. Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511, 511, 520-25 (2000).

185. See Pilon, *supra* note 2, at 176-78. For example, an influential 1851 state court case, written by Justice Lemuel Shaw, declared that “it is a settled principle . . . that every holder of property . . . holds it under the implied liability . . . that it shall not be injurious to . . . others” *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851).

nuisance-producing activity, the state may in effect enjoin the nuisance, without compensation, by exercising a police power restraint on the culprit. Moreover, police power regulations are sometimes needed to force individual property owners to internalize the costs associated with their actions. Such measures prevent property owners from forcing the public to bear costs that benefit the property owner but harm the public.

This harm prevention function was what Chief Justice Marshall was embracing in *Gibbons v. Ogden*,¹⁸⁶ when he acknowledged the residuary power of the state to “regulat[e] [its] own purely internal affairs, whether of trading or police.”¹⁸⁷ The police power as a harm preventer was thought to be inherent in state government and not relinquished when states entered the United States of America.¹⁸⁸ The “internal police” was the power to prevent uses of property that could become dangerous; it remained as part of the residuary sovereignty of the states.¹⁸⁹ The “police power” gradually expanded to become the “power of regulation,” and the general government power to not just prevent harms, but to benefit the public welfare.¹⁹⁰ As early as 1837 in the *Charles River Bridge* case, the Supreme Court found that the state’s power over their internal police extended to the state’s “well[being] and prosperity.”¹⁹¹ In *Mugler v. Kansas*¹⁹² the police power was said to encompass “the protection of the public morals, the public health, [and] the public safety.”¹⁹³ And in *Barbier v. Connolly*¹⁹⁴ and *Powell v. Pennsylvania*,¹⁹⁵ nineteenth century cases, the police power justified regulations “to promote . . . education[] and good order[,] . . . so as to increase the industries of the [s]tate, develop its resources, and add to its wealth and prosperity.”¹⁹⁶

186. 22 U.S. (9 Wheat.) 1 (1824).

187. *Id.* at 209-10.

188. See generally CORWIN, *supra* note 104 (stating that eighteenth and nineteenth century judges presumed that common law property rights did not include the right to use property to create a nuisance; the police power merely confirmed this pre-existing limit on property ownership).

189. *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837).

190. See generally Rebecca L. Brown, *The Art of Reading Lochner*, 1 N.Y.U. J.L. & LIBERTY 570, 589 (2005). (explaining that *Lochner* ended the gradual expansion of the police power first acknowledged by *Charles River Bridge*, which was the seminal case that had permitted constitutional protections of property to be unavailable to owners when the larger public good required that government limit property)

191. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 552 (1837).

192. 123 U.S. 623 (1887).

193. *Id.* at 661.

194. 113 U.S. 27 (1885).

195. 127 U.S. 678 (1888).

196. 113 U.S. at 31.

By the twentieth century, the police power was not limited to rooting out nuisances; it had grown to a power authorizing the state to provide for the well-being of the public, even at the expense of private property interests.¹⁹⁷ Throughout the twentieth century, the police powers dominance over property rights became unassailable. One general presumption became fixed in the case law: Property owners must bear many of the costs of regulation, without compensation under the Fifth Amendment, and without substantive due process protection under the Fourteenth Amendment, when the regulation arises under the police power.¹⁹⁸

The demise of property rights as a countervailing power with respect to the police became especially apparent regarding land use controls and zoning. Again and again, reviewing courts approved regulatory laws that removed land use decisions from the market of private property choices. Such choices about appropriate land use would, in effect, be delegated to the policies of lawmakers and land use planners exercising the police power.¹⁹⁹ In *Hadacheck v. Sebastian*,²⁰⁰ the Supreme Court upheld a regulation closing a brickyard, because it stood in the path of urban development deemed more desirable. The *Hadacheck* Court was unimpressed by the fact that the regulation had reduced the value of the owner's land significantly.²⁰¹ In *Village of Euclid v. Ambler Realty Co.*,²⁰² the police power justified comprehensive zoning, despite acknowledgement that similar regulations “a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.”²⁰³ *Goldblatt v. Town of Hempstead*²⁰⁴ upheld a land use ordinance shutting down a mining operation which was conceded to be a pre-existing “beneficial use,” and “not a common-law nuisance,” because the ordinance was “otherwise a valid police regulation.”²⁰⁵ Similarly, *Connolly v. Pension Benefit Guaranty Corp.*²⁰⁶ reminded property owners that, “[g]iven the propriety of the governmental power to regulate, it cannot be said that the [Constitution] is

197. See, e.g., *Charles River Bridge*, 36 U.S. at 548 (“While the rights of private property are sacredly guarded, we must not forget that the community also have rights . . .”).

198. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (“[T]he property owner necessarily expects the uses of his property to be restricted . . . by various measures newly enacted by the [s]tate in legitimate exercise of its police powers . . .”).

199. COYLE, *supra* note 17, at 21.

200. 239 U.S. 394 (1915).

201. *Id.* at 409-10.

202. 272 U.S. 365 (1926).

203. *Id.* at 387.

204. 369 U.S. 590 (1962).

205. *Id.* at 592-94.

206. 475 U.S. 211 (1986).

violated whenever legislation requires one person to use his or her assets for the benefit of another.”²⁰⁷

The rise of the police power and the fall of private property became even more pronounced in the twenty-first century. Lower courts consistently upheld exercises of the police power, despite property owners’ efforts to invalidate regulations as being contrary to property protective clauses in federal and state constitutions. The majority of these recent cases simply recite a boilerplate litany of the same three factors, which inevitably doom the challenge to the police power. First, the reviewing court reminds the property owner burdened by the police power that the right of property use is neither a “fundamental” nor an “important” legal interest. Second, the government action affecting the owner is the “police power,” which permits government to regulate private property without compensation so long as the government is seeking to “promote or protect” the broadly defined general welfare. Third, as long as there is any “conceivable” or even hypothetical justification for the regulation, the court will not second guess, or overturn, the judgment of the regulator. This tedious, and often repeated rationale, is the standard explanation for judicial abdication of effective review when property owners have the temerity to challenge the police power.²⁰⁸

C. Reviewing Courts

When a system contains multiple actors, that system may achieve some modicum of stability if each of the actors has power roughly equivalent to the other system actors. Similar levels of power permit each actor to adapt to the changing status of the other actors in the

207. *Id.* at 223.

208. *See, e.g.*, *Monaghan Farms, Inc. v. Bd. of Cnty. Comm’rs*, 2023 WY 31, ¶ 70, 527 P.3d 1195, 1218 n.14 (Wyo. 2023) (the “police power” is the government’s ability to regulate private activities and property to promote the general welfare) (no *taking* violation when acts done in the proper exercise of government powers); *Dodd v. Hood River Cnty.*, 855 P.2d 608, 617 (Or. 1993) (no *taking* by police power regulation); *Citizens for Fair Rates & the Env’t. v. N.M. Pub. Regul. Comm’n*, 2022-NMSC-010, ¶ 39, 503 P.3d 1138, 1153 (N.M. 2022) (property interests raised by plaintiffs affected by “economic regulation” did “not implicate important or fundamental rights”) (no *due process* violation because the challenged regulation was “economic” which did not affect “a fundamental or important constitutional right); *Hobbs v. City of Pacific Grove*, 301 Cal. Rptr. 3d 274, 287 (Cal. Ct. App. 2022) (the land use regulation under the police power “includes broad authority to determine . . . the appropriate uses of land”) (No *due process* violation as regulation entails only an “infringement on plaintiffs’ economic use of their property”); *Rondigo, L.L.C. v. Township of Richmond*, 641 F.3d 673, 682 (6th Cir. 2011) (no “fundamental right” implicated in land use context) (no *equal protection* violation unless it was impossible for police power regulation to relate to government objective); *Pratt Land & Dev., LLC v. City of Chattanooga*, 581 F. Supp. 3d. 962, 984, 989 (E.D. Tenn. 2022) (in land use context, land is a property interest that does not constitute “constitutionally protected property”) (no *equal protection* violation so long as regulation has a “conceivable” legitimate governmental objective); *Lent v. Cal. Coastal Comm’n*, 277 Cal. Rptr. 3d 106, 144 (Cal. Ct. App. 2021) (Commission did not violate plaintiffs’ due process rights by imposing a \$4,180,000 penalty for failing to remove a safety gate and staircase which intruded five feet onto beach access easement).

system so that no one actor becomes dominant. A condition of allostasis, or stability through change, then results.²⁰⁹ Although allostasis characterized private property, the police power, and reviewing courts for almost 200 years of our country's history, that stability and equivalence-of-power condition largely ceased to exist by the mid-twentieth century. Private property became judicially devalued. The police power, especially the government power to regulate property, became dominant.

But what was even more dramatic, and consequential, was that reviewing courts ceased to provide an external checking function. Private property owners could not realistically turn to courts to limit police power limits on property use. In such cases, the judiciary usually upheld the police power. The rationale for such deference to property-restrictive regulation was twofold. First, reviewing courts parroted the reasoning of the *Carolene Products* case,²¹⁰ explaining that the judiciary should abstain from second guessing legislative choices that impose social, economic, or property regulations. Courts should instead direct their efforts to (1) safeguarding only certain personal non-economic rights, and (2) defending vulnerable populations and minorities against invidious discrimination.²¹¹

Second, courts presumed that the judiciary was basically an inappropriate decision maker when it comes to reviewing laws affecting economic or property interests. Laws affecting property were not within the purview of the judiciary. As the United States Supreme Court reiterated in *Lingle v. Chevron U.S.A. Inc.*,²¹² “courts [should not] scrutinize the efficacy of a vast array of state and federal [economic] regulations—a task for which [courts] are not well suited. [Such a reviewing function] would empower—and might often require—courts to substitute their predictive judgments for those of elected [representatives] and expert agencies.”²¹³

This judicial refusal to meaningfully review police power regulations affecting property meant, and means, that in a three-player property game between owners, regulators, and courts, a *de facto* coalition has arisen with respect to two players—the regulators and courts. The third player—the property owners—no longer has sufficient power to resist, or even to negotiate with, this coalition. The government actors imposing regulatory limits on the common law right of property use

209. See STULBERG, *supra* note 32, at 8.

210. 304 U.S. 144, 152 n.4 (1938).

211. *Id.*; See generally David Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003) (explaining that when *Lochner* was overturned in the 1930s, one consequence was that reviewing courts curtailed their willingness to engage in meaningful judicial review of most economic regulations, deploying heightened scrutiny only for those limited classes of cases set out in footnote four of *Carolene Products*).

212. 544 U.S. 528 (2005).

213. *Id.* at 544.

are not susceptible to judicial oversight. System allostasis has been replaced by raw power and unchecked regulatory might.

If courts will not limit the expanding regulatory state, then regulations only become more ubiquitous. When judicial review of property use restrictions is in effect a rubber stamp review, there is no disincentive for regulators to be concerned about either overstepping their authority or intruding on property rights.²¹⁴ Judicial review of economic regulation affecting property becomes “almost empty”²¹⁵ and “meaningless.”²¹⁶ Indeed, when courts are asked by property owners to review the constitutional validity of property affecting regulations, the review in essence provides no review at all.²¹⁷

The judiciary's abdication of responsibility as a limit on the police power was a result of the decision by the United States Supreme Court in *Carolene Products* to adopt “rational basis” review as the applicable standard of review for all cases involving police power regulation of economic, social, and property matters. Rational basis review is an extremely lenient, deferential, toothless standard that is more often a conclusion that a challenged law is constitutional rather than an actual purposeful evaluation of whether the law is valid. A court applying rational basis review typically recites a canonical statement that the challenged regulation will be upheld if it is rationally related to some legitimate government purpose.²¹⁸ This loose requirement means the government action alleged to violate the Constitution will be upheld if the court can conceive of, or imagine, any valid reason for the action, regardless of whether the legislature or regulator actually had that valid reason in mind.²¹⁹ Such extraordinary judicial deference will virtually never result in government action affecting property being overturned in court.

Over eight decades, the courts have relentlessly applied rational basis review when property owners have tried to defeat regulations for

214. The “ad hoc, factual inquiries” balancing test that reviewing courts routinely apply to most takings claims, which uses the formula set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), has been criticized for encouraging “rubber-stamp deferential review that hardly ever finds government to have overstepped its authority.” Steven J. Eagle, *The Birth of the Property Rights Movement*, CATO INST. (Dec. 15 2005), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa558.pdf> [<https://perma.cc/8MYZ-7WKW>].

215. Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 410 (2016).

216. Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 426 (1995).

217. Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 80 (2018).

218. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993).

219. Under rational basis review, the challenged law is presumed constitutional, where the burden is on the property-owner plaintiff attacking the law to negate any conceivable basis which might support it. See *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012).

violating the Due Process Clause,²²⁰ the Equal Protection Clause,²²¹ the Contracts Clause,²²² and the Takings Clause.²²³ Lower courts, dutifully following the lead of the Supreme Court, have further clarified why they should not interject judicial branch power as a check on legislative or executive exercises of the police power affecting property. Judicial review must be “especially deferential to legislative choice[s],”²²⁴ since judges are not policy experts. The policy decisions embedded in the challenged regulation should not be overturned by judges; the courts reviewing regulations must “respect the judgment of those with special expertise and responsibility.”²²⁵ Moreover, regulations affecting property interests do not affect rights that are “fundamental,” because “[g]arden-variety property rights do not meet th[e] standard and thus . . . their deprivation does not [violate the Constitution].”²²⁶

Rational basis review is a declaration that the courts are not going to seriously “review” police power regulations affecting property use. This highly deferential level of review is a warning to property owners and their lawyers: Do not challenge these regulations in court; your challenge is futile. The standard rationale articulated for the abdication of the courts, and confirmation of the regulator-judiciary coalition, is the orthodoxy originally set out in the 1938 *Carolene Products* case²²⁷: Regulations involving social, economic, and property matters are best left to the judgment and discretion of lawmakers and regulators; courts should not intervene when regulators make economic choices, including choices about property use.

Three reasons have been repeatedly advanced for rejecting judicial oversight of property-affecting regulations, preferring instead deference to the presumed wisdom and judgments of elected officials and regulatory agency officials. First, politicians and planners are thought to have greater expertise and experience about property issues than

220. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 490-91 (1955).

221. See *Nordlinger v. Hahn*, 505 U.S. 1, 10, 12 (1992).

222. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 503 (1987) (“[T]he Contract Clause does not operate to obliterate the police power of the States.” (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978))).

223. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). See also *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005), where the Court reminded us in a significant Takings Clause case that the “reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.”

224. *Browne v. Indus. Claim Appeals Off.*, 2021 COA 83, ¶ 45, 495 P.3d 974, 983 (Colo. App. 2021) (quoting *Culver v. Ace Elec.*, 971 P.2d 641, 646 (Colo. 1999) (en banc)).

225. *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 470 (5th Cir. 2021) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020)).

226. *PBT Real Est., LLC v. Town of Palm Beach*, 988 F.3d 1274, 1283-84 (11th Cir. 2021); see also *Van Sant & Co. v. Town of Calhan*, 83 F.4th 1254, 1278 (10th Cir. 2023) (“[P]roperty rights are not absolute” (quoting *Stulp v. Schuman*, 2012 COA 144, ¶ 31, 410 P.3d 457, 462 (Colo. App. 2012))).

227. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

judges.²²⁸ Judges are believed to be too far removed from the on-the-ground choices that regulators must make when they restrict property use. Second, property owners do not need judicial protection because the political process protects them already.²²⁹ Property owners, it is assumed, already wield considerable political power, particularly at a local level.²³⁰ Third, a political decision to promote redistribution of wealth from financially well-off property owners to the poor should not be overridden by courts protecting property rights. The simple-minded calculus for this conclusion is this syllogism: (1) the wealthy own more property than the poor; (2) the political system may choose to redistribute this wealth to the poor; and (3) judicial protection of property rights would be a potential obstacle to redistribution.²³¹

To this list of purported arguments in favor of rational basis review for property could be added this explanation—it is incredibly easy for a busy judge using rational basis to dispose of a property owner’s argument that a regulation is unconstitutional. All a judge needs to do is recite the boilerplate language of rational basis deference, and then to summarily conclude that there is a “conceivable” valid reason for the regulation. The judge need not consult the record or seriously weigh opposing arguments. The judge can simply “imagine” or “make up” justifications to sustain the law, and the conclusion sustaining the law is usually sufficient to withstand an appeal. In short, rational basis review is a gift to reviewing courts that keeps on giving.

III. THREE TRUTHS

For nearly two decades, the three central actors in most property use and regulation dynamics were relatively equal in power. Property owners had a common law right to use and dispose of property,²³² regulators had a concomitant police power right to regulate the property,²³³ and the judiciary had a reciprocal duty to limit that regulation if it conflicted with property protective constitutional or equitable norms.²³⁴ Each actor was free to act and to adapt their actions to changing conditions, without diminishing their power. The result was stability through change, or allostasis, which characterized the three-actor system consisting of property owner-regulator-courts.

228. See *Kelo v. City of New London*, 545 U.S. 469, 488-89 (2005).

229. See Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 885 (2007).

230. See Cole, *supra* note 174, at 149.

231. See generally BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 71-107 (Harv. Univ. Press 2001)).

232. See *supra* Section I.A.

233. See *supra* Section I.B.

234. See *supra* Section I.C.

By the mid-twentieth century, a coalition had formed between the regulators and the courts. Instead of a three-player game among equals, the system had devolved to a game where one of the players—the property owner—could no longer check or limit the police power exercised by the regulator. An attempt to mount a judicial override was usually futile, thankless, and expensive. Property owners had little bargaining power to negotiate with regulators because the police power, without meaningful judicial review, was, in effect, omnipotent. Allostasis among the three players had been replaced by asymmetric power concentration, where the lawmaker, the state, and the regulator, armed with the police power, had become the dominant player. The result has been the rise of a regulatory state largely shielded from challenge by courts.²³⁵

There are two views in contrast here. In the first, private rights of property are respected and protected by courts. For the second—the current view—the police power brandished by the government is free to do what is best for the community at large.

John Locke and other Enlightenment thinkers of the eighteenth century opted for the first perspective. They argued that individuals have different beliefs about what is good for their lives. The state should provide property owners with liberty to make their own choices based on those beliefs so long as that they do not harm others.²³⁶ Conversely, the second view was embraced by John Stuart Mill. He believed the emphasis should be on community benefits and the protection of society, even if the collective good requires restrictions on the liberty of others.²³⁷

These starkly contrasting perspectives appear to present a choice between two radically different aspirations regarding private property and police power regulations. On the one hand is a system of rights empowering those who wish to maximize individual liberty to choose among property uses, minimize regulations, and prevent the state from interfering with the choices of property owners.²³⁸ On the other hand is a system of government power designed to promote the common good, and to create benefits for society as a whole, while minimizing the harm caused by an unrestrained free market.²³⁹

These two visions present a false and unnecessary dichotomy. In a system characterized by allostasis, both visions are encouraged. When

235. See generally John Braithwaite, *The Regulatory State?*, in *THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS* 407, 407-30 (Robert E. Goodin ed., 2009); Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 *J. Econ. Literature* 401, 421-22 (2003).

236. LOCKE, *supra* note 3, at 156-57.

237. See JOHN STUART MILL, *UTILITARIANISM* (Roger Crisp ed., Oxford Univ. Press, 1998) (1863).

238. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

239. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

allostasis is present, individuals with liberty of choice make decisions about their property, knowing that these decisions may be countermanded by a police power override. When police power limits on property transgress constitutionally or equitable limits, property owners may seek recourse in reviewing courts. System stability is then preserved. Future choices are done pragmatically, in light of the changing dynamic of the three-player game. However, when property rights are devalued, when reviewing courts are paralyzed by a rational basis review, when a coalition is formed between police power regulators and the judiciary, then an asymmetric power concentration results in a regulatory state. Allostasis is not possible.

Three central truths would permit the property use and regulation system to function as it once did, bringing overall system stability. System allostasis is possible only if each actor is characterized by an important, but overlooked, truth. When each of these truths is acknowledged, no one actor becomes dominant, coalitions among actors are discouraged, and each of the three actors may seek to pragmatically advance their interests within the system.

A. *TRUTH #1: The Right to Own, Use, and Dispose of Private Property is a "Fundamental Right"*

For nearly ninety years, private property use rights have been considered lesser rights, not rising to the level of a "fundamental" right deserving of meaningful judicial protection under the Constitution. As a result, when property use rights are seeking protection in court, the standard of review is deferential rational basis review.²⁴⁰ If one wishes to challenge this "second class status" of property, it is necessary to learn what the U.S. Supreme Court considers when it is ascertaining the appropriate constitutional status and ranking of a legal interest. With respect to private property, although the question of what characteristics must be present to become "fundamental" varies somewhat by property protective clauses in the Constitution, one should generally consider three factors: (1) the Court's *precedents*; (2) the Court's *historical* practice; and (3) general property law *principles*.²⁴¹

1. *Precedent*

The Supreme Court's sense of what kinds of interests are deserving of "fundamental rights" status is generally consistent, regardless of the clause in the Constitution allegedly bestowing that high level of constitutional protection. For the Takings Clause, the Court turns to the centrality of tradition when broadly defining the meaning of

240. See *supra* notes 218-225.

241. See *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2023); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 165-68 (1998).

“property.”²⁴² The Court also sees the protection of property as a means of protecting individual freedom,²⁴³ and the Court acknowledges property’s role as an integral part of the country’s free enterprise system.²⁴⁴ Under the Due Process Clause, what seems to trigger a fundamental right status is whether property is a right “deeply rooted in [our] history and tradition,” and whether the language of “the Constitution makes [an] express reference” to property.²⁴⁵ For Contracts Clause claims, when a contract holder is aggrieved by a law affecting a contract, the Court tends to adhere strictly to what the text of the Constitution explicitly says, not what it might imply.²⁴⁶ For Second Amendment issues, which do not implicate a property interest generally, the test requires that a regulation be consistent with “this Nation’s historical tradition.”²⁴⁷ For non-constitutional, equitable rights under state law, such as the vested rights doctrine, state courts ask if the offending law would be “unjust” or result in “unfairness.”²⁴⁸

From this judicial precedent, one can fashion a set of factors that should exist for private property to be deserving of, and to warrant, fundamental rights status as a matter of constitutional or equitable protection. First, the explicit text of the Constitution should list private property, or an interest that is considered property, as being subject to protection from government action. Second, an examination of the “history” and “tradition” of private property in this country needs to reveal that the Founders of the Constitution, and the ideological influencers of the original United States, believed that, and repeatedly stated that, private property was not just a right under the common law. Rather, there needs to be evidence that property was a deeply rooted keystone right. Third, an acknowledgment of property as a fundamental right would avoid unfair outcomes to property owners and be consistent with the country’s free enterprise system.

The first of these conditions is quickly satisfied, as the text of the U.S. Constitution, in the Fifth Amendment, the Fourteenth Amendment, and Article I, Section 10, expressly lists “private property,” “property,” or “contracts” as legal interests protected from various types of government actions. The Fifth Amendment of the Constitution

242. See *Tyler*, 598 U.S. at 638; *United States v. Causby*, 328 U.S. 256, 260-67 (1946).

243. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147-48 (2021); *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017).

244. *Federal Republic of Germany v. Philipp*, 592 U.S. 169, 183 (2021).

245. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 235, 237-38 (2022) (alteration in original) (quoting *Timbs v. Indiana*, 586 U.S. 146, 149-50 (2019)).

246. See *Sveen v. Melin*, 584 U.S. 811, 823 (2018) (“Not ‘every statute which affects the value of a contract’ . . . ‘impair[s] its obligation.’” (alteration in original) (quoting *Curtis v. Whitney*, 80 U.S. (13 Wall.) 68, 70 (1872))).

247. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022).

248. See, e.g., *Aurora Pub. Schs. v. A.S.*, 2023 CO 39, ¶ 13, 531 P.3d 1036, 1047 (Colo. 2023).

states that “nor shall private property be taken” The Fifth Amendment also declares that “no person shall . . . be deprived of . . . property” The Fourteenth Amendment repeats this prohibition about causing a person to be “deprive[d]” of “property,” and extends the rule to state action. Article I, Section 10 of the Constitution expressly prohibits the states from making laws “impairing the [o]bligation of [c]ontracts” A contract is considered a property interest.²⁴⁹

In short, one need not use inferences nor extrapolations to determine if the text of the Constitution protects private property. There are multiple examples within the Constitution of property interests being expressly singled out for protection from various government actions. The first condition is satisfied. Sections III.A.2 and 3 below establish that the second and third conditions are also present regarding property.

2. *History and Tradition*

Privately owned property was a central institution of the English common law tradition that began with the Norman Conquest and continued with the Magna Carta of 1215.²⁵⁰ Centuries later, private property protection was embraced by those thinkers and writers who influenced the intellectual foundations of the American Constitution. Edward Coke, William Blackstone, and John Locke were widely perceived as guideposts to the original framers of our Constitution. They believed that when individuals organize themselves into nation states, governments needed to recognize the fundamental rights of “life, liberty, and property” as central to human fulfillment in societal justice.²⁵¹ James Madison wrote that the end of just government was to protect property and “secure[] to every man, whatever is his own.”²⁵² Gouverneur Morris expressed similar views at the Constitutional Convention of 1787: “[P]roperty was the main object of Society.”²⁵³

Early state cases in the eighteenth and nineteenth centuries confirmed that private property was a fundamental right, which “shall be protected and secured by the laws of the state.”²⁵⁴ One United States Supreme Court case in 1795 interpreting the Pennsylvania constitution concluded that “the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and

249. See generally *Lynch v. United States*, 292 U.S. 571, 579 (1934); U.S. CONST. art. I, § 10, cl. 1.

250. See EPSTEIN, *supra* note 49, at 5-6.

251. See DAVID A. LOCKMILLER, *SIR WILLIAM BLACKSTONE 174* (1938); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 283, 601 (1969); LOCKE, *supra* note 3, at 155.

252. Madison, *supra* note 50.

253. Treanor, *supra* note 51.

254. See, e.g., *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. Gen. Ct. 1797).

unalienable rights of man.”²⁵⁵ A leading pre-Civil War state case, *Wynehamer v. People*,²⁵⁶ conceded that while some regulation is possible, “where [property] rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away Property is placed by the constitution in the same category [as] liberty and life.”²⁵⁷

In short, a review of the original, historic, and traditional perception of private property shows a consensus that property rights were essential to this new nation, and that these rights were to be protected from government interference. The right of private property began in England as a common law right, and when the common law was largely transferred to the colonies, and then to the states, it became both a constitutional right and perhaps also an “inherent[] and unalienable” right.²⁵⁸ Such a right should be considered fundamental as a matter of unambiguous history and tradition.²⁵⁹

3. Property Law Principles

Several principles surrounding the concept of private property reflect the critical role property performs as a precondition to successful nations, healthy economies, and human satisfaction.

Ownership of property is closely connected to individual liberty. The founding principle of this nation is that liberty and the right property are inextricably intertwined. John Locke taught that the right to own property was a natural right, which was inseparable from liberty.²⁶⁰ Locke therefore argues that the leading purpose of government is to protect private property, which would in turn ensures that individual liberty is not threatened.²⁶¹ As Arthur Lee declared in his influential publication in 1775: “The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive

255. *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (opinion by Paterson, J.).

256. 13 N.Y. 378 (1856).

257. *Id.* at 393.

258. See generally *Vanhorne’s Lessee*, 2 U.S. at 310; see also *Turpin v. Lockett*, 10 Va. (6 Call) 113 (1804) (among the inherent rights acknowledged by the Virginia Bill of Rights was “the enjoyment of life and liberty, with the means of acquiring and possessing property.”).

259. In *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 163-64 (2021), Justice Kavanaugh’s concurrence acknowledged “the backdrop of the Constitution’s strong protection of property rights” before concluding that a state supreme court justice “had it exactly right” when this justice stated that “property rights are fundamental.” (quoting *Agric. Lab. Rels. Bd. v. Superior Ct.*, 546 P.2d 687, 712 n.4 (Cal. 1976) (Clark, J., dissenting)).

260. See generally John Locke, *The Second Treatise of Government*, in *Two Treatises of Government*, §§ 27, 57, 124, 129 (1689).

261. LOCKE, *supra* note 3, at 155 (“[T]he great and chief end, therefore, of men’s uniting into commonwealths . . . is the preservation of their property.”).

them of their liberty.”²⁶² Not only was the acceptance of private property joined with the need for individual liberty, but the right of property was seen as maintaining a necessary separation between the state and the individual.²⁶³ The modern Supreme Court agrees: “[P]rotection of property rights is ‘necessary to preserve freedom’ [from government interference].”²⁶⁴

Private property lies at the center of successful organized economic and social systems—the invention and institution of private property was, and is, a necessary precondition for separate individuals to facilitate coordination and cooperation with others in a society. These societies of property owners could then create “markets” to organize economic exchanges, and these transactions permitted the invention of nation-states. Private property thereby becomes the organizing basis for legal systems grounded in liberty of choice, and capitalist economic markets.²⁶⁵

Property rights become a necessary condition for capitalism. A system evolves into a capitalist system when four elements are present: (1) private property rights; (2) free markets where property can be transferred; (3) competition to organize and incentivize property exchanges; and (4) the enforcement of contracts.²⁶⁶ Capitalism seems to expedite prosperity. Societies which adopt capitalism and respect private property have prospered, while those that have tried to abolish the institution of private property have failed.²⁶⁷ Property rights encourage the efficient use and development of resources, facilitate trade, and provide a cost-effective way of resolving conflicts.²⁶⁸

Private property abates social and environmental evils—surprisingly, government policies that produce weak property rights systems have been shown to harm the poor, while those with more secure land

262. ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775).

263. John Adams proclaimed, “Property must be secured, or liberty cannot exist.” JOHN ADAMS, DISCOURSES ON DAVILA, *reprinted in* 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 223, 280 (Charles Francis Adams ed., 1851).

264. *Cedar Point Nursery*, 594 U.S. at 147 (quoting *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017)).

265. See generally Benjamin Powell, *Private Property Rights, Economic Freedom, and Well Being* (Mercatus Ctr., George Mason Univ., Working Paper No. 19, 2002).

266. Paul H. Rubin & Tilman Klumpp, *Property Rights and Capitalism*, in THE OXFORD HANDBOOK OF CAPITALISM 204, 204 (Dennis C. Mueller ed., 2011).

267. Research has revealed that societies with well-defined and enforced property rights experience long-term economic growth and high living standards, while those without a strong property rights tradition tend to be poorer. See Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949, 983-89 (2005).

268. See Patrick Kelley & Michael Graglia, *Why Property Rights Matter*, NEW AMERICA (Mar. 10, 2017), <https://newamerica.org/future-land-housing/blog/why-property-rights-matter/> [<https://perma.cc/3EPC-M5RM>]; Tibor R. Machan, *In Defense of Property Rights and Capitalism*, FOUND. FOR ECON. EDUC. (June 1, 1993), <https://fee.org/articles/in-defense-of-property-rights-and-capitalism/> [<https://perma.cc/EN3R-DCRR>].

tenure and more protected private property rights tend to generate incomes and asset growth. When property rights are weak, the poor are more likely to have their homes and belongings seized by the state.²⁶⁹ Conversely, research suggests that when private property does not exist, or when property rights are tenuous, there is a causative link to poverty. The poor have less opportunity to access assets, especially land assets with which to generate income. Moreover, poverty is strongly associated with “landlessness” and insecure access to land ownership.²⁷⁰ But when property is both secure and more available, economic prosperity often follows.²⁷¹ Similarly, libertarian economists have long maintained that property-based legal mechanisms, like cap-and-trade schemes, are by far the most effective forms of environmental regulation.²⁷²

A final explanation for the fundamental nature of private property is the linkage that emerges between human owners of private property and the property itself. Arguments have been advanced asserting that when one owns property, the relationship is far more than a simple legal possessory connection to property interest. When a relationship to property arises, there is then an emotional, personal, and intrinsic entanglement that transcends any economic attachment.²⁷³ Social scientists have confirmed that deeply emotional and psychological complex relationships occur between humans and their possessions. Ownership seems to fill many personal needs, from security to self-confidence.²⁷⁴

269. See Ilya Somin, *America's Weak Property Rights are Harming Those Most in Need*, THE ATLANTIC (Mar. 24, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/weak-property-rights/608476/> [<https://perma.cc/AWL3-TDEX>].

270. Ruth Meinzen-Dick, *Property Rights for Poverty Reduction? 1-2* (DESA Working Paper, Paper No. 91, 2009), <https://digitallibrary.un.org/record/677285?v=pdf> [<https://perma.cc/YM5Z-BB2U>].

271. Nobel Prize winner Douglass North has argued that the eighteenth and nineteenth century industrial revolution occurred in England with the advent of better specified private property rights. DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1973).

272. See Daniel H. Cole, *Do Libertarians Have Anything Useful to Contribute to Climate Change Policy?*, in CLIMATE LIBERALISM: PERSPECTIVES ON LIBERTY, PROPERTY AND POLLUTION 53, 53-59 (Jonathan H. Adler ed., 2023); see also Helen Ding & Peter Veit, *3 Reasons Property Rights are Essential for Healthy Ecosystems*, WORLD RES. INSTITUTE (Sept. 28, 2016), <https://www.wri.org/insights/3-reasons-property-rights-are-essential-healthy-ecosystems> [<https://perma.cc/PAL7-AKW2>].

273. See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 986-87 (1982); Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL'Y 93 (2011) (arguing that the intimate relationship between property and “persons” owning the property makes property a special and unique legal right); See generally Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009). (explaining that of the “virtues” of private property is that the owner holding the legal right has an emotional, personal connection to the property)

274. See, e.g., Kyungmi Kim & Marcia K. Johnson, *Extended Self: Medial Prefrontal Activity During Transient Association of Self and Objects*, 7 SOC. COGNITIVE & AFFECTIVE

B. TRUTH #2: The Police Power is Limited by Property-Protective Clauses in the Constitution, and by Internal Limits Inherent in the Power

As noted above in section I.B, the police power is a fundamental power of government that is inherent in state law and an adjunct to express federal powers.²⁷⁵ The nature of the police power stems from the power of the members of a community to protect themselves from *harm* caused either by other members of the community or by outsiders.²⁷⁶ With respect to property, government has a legitimate, if narrow, role in regulating land use under the police power in order to prevent harm-producing private and public nuisances.²⁷⁷ In addition to these implied limits arising from the nature of a police power, express property protective clauses in the Constitution prevent exercises of the police power that take “private property,”²⁷⁸ or “deprive[]” persons of “property” without due process,²⁷⁹ or “impair[]” property interest that are “[c]ontracts.”²⁸⁰

This relatively modest, and confined, notion of the police power was replaced in the middle of the twentieth century by a far more expansive version. The modern police power is the basis for land use and resource regulations that are not meant only to allay private harm. Current regulation of property use encompasses any conceivable “legitimate state interest,” including limits or conditions on property for the purpose of maximizing the government’s own view of the well-being of the community.²⁸¹ The police power has become a license for the government to either prohibit property uses deemed contrary to a more

NEUROSCIENCE 199 (2012) (discussing that persons owning and engaged in transactions with their property have a psychological connection to the property); *See generally* Inge Bretherton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 DEV. PSYCH. 759 (1992) (stating that property owners often have emotional connections to their property, which affect their choices); *see also* MICHAEL HELLER & JAMES SALZMAN, *MINE! HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES* (2021) (discussing that property ownership entails a right that is different from other legal rights, because people have possessory connections to land and resources and personal items that sometimes transcend the purely legal relationship they have to the right)

275. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court reminded us that unlike state legislatures, the powers of Congress are limited to “enumerated powers,” which are “few and defined.” *Id.* at 552 (quoting THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)). Moreover, while the enumerated commerce power “is the power to regulate,” *id.* at 553 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)), it is *not* “a plenary police power that would authorize enactment of every type of legislation.” *Id.* at 566.

276. LOCKE, *supra* note 3, at 156.

277. *See* *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851).

278. U.S. CONST. amend. V.

279. *Id.* amends. V, XIV.

280. *Id.* art. I, § 10, cl.1.

281. *See generally* *Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 484 (1837) (permitting the “rights of community” to override common law private rights otherwise protected by the Constitution’s Contracts Clause).

socially preferred land use,²⁸² or condition property uses in order to benefit others.²⁸³

There are two central difficulties with this burgeoning, largely unlimited regulatory power over private property uses. First, there are unexpected economic and societal costs that arise when private property owners encounter an unchecked police power. Second, the police power was never meant to be unlimited. Rather, for hundreds of years it was assumed that (1) courts had a *duty* to prevent abuses of legislative and regulatory power, and (2) the police power itself was cabined by *internal limits*, triggered without any reference or linkage to property protective clauses in the Constitution.²⁸⁴

The social and economic costs of police power regulations—When the United States Supreme Court upheld comprehensive zoning in the 1926 *Euclid* case,²⁸⁵ this landmark decision began the gradual elimination of the original common law notion that property owners may use their land as they wish, unless that use would cause harm or injury

282. See, e.g., Julie Creswell, *Pork Industry Grapples With Whiplash of Shifting Regulations*, N.Y. TIMES (Sept. 5, 2023), <https://www.nytimes.com/2023/09/05/business/pork-prices-california.html> [<https://perma.cc/5QBV-HBL2>] (California law banning products made from pigs raised in small gestation pens because such pens prevent “freedom of movement”); Megan Ulu-Lani Boyanton, *Rental Policy in Mountain Towns Facing Challenges*, DENVER POST, Sept. 9, 2023, at A9 (county regulations prohibiting short-term rental bookings for residences because such rentals allegedly are creating a workforce housing shortage); Cal. Exec. Order No. 79-20 (Sept. 23, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-Climate.pdf> [<https://perma.cc/PST6-2Y9E>] (new hydraulic fracturing permits prohibited to combat “climate crisis”); Cmty. Hous. Improvement Program v. City of New York, 59 F.4th 540, 556-57 (2d Cir. 2023) (rent control ordinance upheld to make rents more affordable); Justin Wingerter, *Developer Loses Suit Against Littleton Council Over 33-Acre Project*, DENVER POST, Apr. 10, 2022, at 60 (apartment and senior housing facility build-out denied due to parking concerns); Carolyn Sackariason, *Freeze on Residential Development in Aspen Sails Through Approval*, ASPEN TIMES (Dec. 9, 2021), <https://www.aspentimes.com/news/freeze-on-residential-development-sails-through-approval/> [<https://perma.cc/Y9L5-NRZN>] (moratorium on new residential development to improve “quality of life” in Aspen); Joe Rubino, *Denver’s LoDo Food Truck Ban is Likely Unconstitutional, Law Firm Warns City Leaders*, DENVER POST (Aug. 19, 2022), <https://www.denverpost.com/2022/08/19/denver-lodo-food-truck-ban-unconstitutional/> [<https://perma.cc/ZG59-KQKG>] (ban on food trucks in Denver’s Lower Downtown nightlife district because of fear that food trucks slow dispersing crowds when bars close).

283. See, e.g., Scott Weiser, *State Air Pollution Regulators Pass Controversial \$2.55 Billion Large Building Energy Regulation*, DENVER GAZETTE (Aug. 18, 2023), https://denvergazette.com/news/environment/controversial-255billion-energy-efficiency-rule-passes/article_9e3d285c-3e21-11ee-835d-8b1652653f0f.html [<https://perma.cc/XV4Z-TV6Y>] (buildings over 50,000 square feet must reduce energy use by 20% by 2030, to reduce “building emissions”); Proposed Initiative 2023-2024 No. 3, Community Attainable Housing Fee (Colo. 2022), available at <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2023-2024/3Original.pdf> [<https://perma.cc/GGZ8-PMED>] (imposing a fee on the recording of deeds causing a transfer of real property, where the fee goes to a fund to provide lower cost “attainable” housing); Ivan Penn, *California’s Plan to Make New Building Greener Will Also Raise Costs*, N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/2021/08/30/business/energy-environment/californias-solar-housing-costs.html> [<https://perma.cc/WRY2-CE6P>] (state law requiring old and new buildings to meet non-carbon-linked fuel standards).

284. See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

285. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

to another. Instead of land development being determined by private market dynamics, control over acceptable land uses passed to government planners and regulators. Resulting land use regulations have restricted growth, made residential and business development more costly, and often impose costs on outsiders considering whether to migrate to an otherwise desirable area.²⁸⁶ Rent controls and subsidies for low income renters disincentivize those who own properties, and who might otherwise lease their properties.²⁸⁷ Environmental regulations have become the norm, especially laws reflecting concerns about how large mining operations and power grid enhancements might disfigure landscapes and threaten wildlife. But such laws have blocked or slowed American rare earth minerals operations,²⁸⁸ as well as wind and solar projects.²⁸⁹ Increasingly, business leaders cite excessive local regulations as the primary reason why economic enterprises consider making investments elsewhere.²⁹⁰

A police power limited only by the Constitution is contrary to internal limits on excessive regulations—The police power derives from the legislature, although it is often implemented by executive branch regulations. Since the source of the police power is legislative power, it bears repeating that both the Founders and early courts were concerned about “abuse[s] of legislative power.”²⁹¹ Some cases even concluded that legislative acts “contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.”²⁹² Other Supreme Court cases found that “principles of natural justice” were a limit on legislative authority.²⁹³ When the police

286. See David Schleicher, *No State or City Shall Restrict People’s Movement*, N.Y. TIMES (Nov. 7, 2021), <https://www.nytimes.com/interactive/2021/08/04/opinion/us-constitution-amendments.html> [<https://perma.cc/9QZZ-9DN2>] (zoning regulations limit housing construction and raise costs, discouraging in-migration for those who do not have sufficiently high salaries to pay to move to the more expensive destination); Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS INST. (Apr. 24, 2017), <https://www.brookings.edu/articles/reforming-land-use-regulations/> [<https://perma.cc/66XJ-53E6>]; William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105, 124-26 (2006).

287. See Editorial: *Subsidies Compound the Rental Shortage*, GAZETTE (Nov. 3, 2023), https://gazette.com/opinion/editorials/editorial-subsidies-compound-the-rental-shortage/article_7e8718e8-79e9-11ee-a3d9-8f8ad141ebfb.html [<https://perma.cc/4WLM-9XTC>].

288. See Jeffrey A. Green, *The Collapse of American Rare Earth Mining – and Lessons Learned*, DEF. NEWS (Nov. 12, 2019), <https://www.defensenews.com/opinion/commentary/2019/11/12/the-collapse-of-american-rare-earth-mining-and-lessons-learned/> [<https://perma.cc/ND2P-GP2L>].

289. See Benoit Morenne, *Energy Projects Sought Across the U.S. Face Local Hurdles*, WALL ST. J. (Aug. 20, 2022, 10:20 AM), <https://www.wsj.com/articles/energy-projects-needed-across-the-u-s-face-local-hurdles-11660968040> [<https://perma.cc/9ZTM-UC5P>].

290. See, e.g., Aldo Svaldi, *A Heavier Regulatory Burden Has Colorado Business Leaders Looking Elsewhere*, POLL SAYS, DENVER POST (Sept. 8, 2023, 6:00 AM), <https://www.denverpost.com/2023/09/08/colorado-business-regulation-poll/> [<https://perma.cc/D7WV-RBG4>].

291. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.).

292. *Id.*; see also THE FEDERALIST NO. 6, *supra* note 134, at 56-57 (Alexander Hamilton).

293. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815).

power was exercised, there was general acceptance of the notion, especially by state courts, that this power was not unlimited or plenary. Rather, the police power was inherently limited by the scope of the police power itself.²⁹⁴

Courts could and did invalidate state laws when they exceeded, or were “outside,” the police power.²⁹⁵ Moreover, not only did a state’s general police powers have inherent limits,²⁹⁶ so too were there internal limits on Congress’s more explicit regulatory powers.²⁹⁷ Internal limits on Congress’s regulatory powers are grounded in the Ninth and Fourteenth Amendments.²⁹⁸ The scope of the state police powers was typically understood to be inherently limited by its functions: the protection of health, safety, and welfare of the public.²⁹⁹

What, then, are the “internal” limits on the police power? The United States Supreme Court has consistently embraced a disclaimer that concedes the police power “is, and must be from its very nature, incapable of any very exact definition or limitation.”³⁰⁰ Nonetheless, in one 1894 case, *Lawton v. Steele*,³⁰¹ the Court suggested there were at least three “inherent limits on the police power, particularly the states’ police power. These internal limits are not triggered by property-protective clauses in the Constitution. Any positive law based on the police power (1) cannot be “unduly oppressive;” (2) must not impose restrictions on property owners that are “unnecessary;” and (3) may not be “arbitrary,” in that the law must reasonably relate to an acceptable public purpose.³⁰²

The query about whether a law is “oppressive” goes to the impact the law has on the economic and market viability of the property interest affected by the law. A law will be deemed oppressive if it is “absolute.” An oppressive law is a flat prohibition of a property use which does not harm the public. State cases have invalidated state police power exercises that halt all uses of a property interest, especially

294. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922).

295. *See, e.g., Hand v. H & R Block, Inc.*, 528 S.W.2d 916, 922-23 (Ark. 1975) (finding a legislative regulatory provision unconstitutional for being “outside the police powers of the state”).

296. *See* Daniel B. Rodriguez, *The Inscrutable (Yet Irrepressible) State Police Power*, 9 N.Y.U. J. L. & LIBERTY 662, 666 (2015).

297. *See* RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT* 303 (2021).

298. Randy E. Barnett, *The Proper Scope of the Police Power*, 70 NOTRE DAME L. REV. 429, 433 (2004).

299. BARNETT & BERNICK, *supra* note 296, at 284-85.

300. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873); *accord Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

301. 152 U.S. 133 (1894).

302. *Id.* at 137.

where the use does not cause harm to the public.³⁰³ Such laws exceed the scope of a proper and valid deployment of the police power.

The police power also cannot be imposed on a property owner where the restriction is deemed not to be necessary. A law is not necessary when the owner's use is not harmful and does not constitute a nuisance. A police power limit may also be unnecessary if the property is otherwise lawful, or if the restraint on use is not supported by some demonstrable public need.³⁰⁴ The requirement that the police power limit be necessary is linked to the third limit, which is that the police power exercise interfering with property use must be rationally justified by a public necessity.³⁰⁵

The third inherent limit on the police power, that the law not be arbitrary, has a number of components. Each of the following factual variants can trigger a finding of arbitrariness, and a resulting invalidation of the police power.³⁰⁶ First, as the Supreme Court stated in *Mugler v. Kansas*,³⁰⁷ a police power regulation will not be upheld if it is "apparent that its real object is not to protect the community, or to promote the general well-being, but, under guise of police regulation, to deprive the owner of his liberty and property."³⁰⁸ In other words, one way the government acts arbitrarily is when it imposes the police power either (1) to benefit a particular class of persons, but not the public generally, or (2) to single out individual property owners to bear the cost of advancing a broadly shared public benefit.³⁰⁹ Second, arbitrariness can be present when the challenged law has no connection to the purpose, or the "ends" sought to be achieved by the law.³¹⁰ Third, the scope of the police power is limited to achieving only certain truly *public* ends, to protect the larger community or to promote the *general* well-being.³¹¹

303. See, e.g., *In re Kelso*, 82 P. 241, 242 (Cal. 1905); *Lawton v. Stewart Dry Goods Co.*, 247 S.W. 14, 16 (Ky. 1923); *Mahony v. Township of Hampton*, 651 A.2d 525, 527 (Pa. 1994).

304. See *SP Star Enters., Inc. v. City of Los Angeles*, 93 Cal. Rptr. 3d 152, 164, 166-167 (Ct. App. 2009); *State ex rel. Carter v. Harper*, 196 N.W. 451, 453 (Wis. 1923); *Ex parte Williams*, 139 S.W.2d 485, 488 (Mo. 1940); *Campbell v. City of Frontenac*, 527 S.W.2d 643, 645-46 (Mo. Ct. App. 1975); *Bryan v. City of Chester*, 61 A. 894, 895 (Pa. 1905); *United Interchange, Inc. v. Spellacy*, 136 A.2d 801, 805 (Conn. 1957).

305. E.g., *Parking Sys., Inc., v. Kan. City Downtown Redevelopment Corp.*, 518 S.W.2d 11, 16 (Mo. 1974).

306. See generally BARNETT & BERNICK, *supra* note 296, at 289-98.

307. 123 U.S. 623 (1887).

308. *Id.* at 669.

309. See *Holden v. Hardy*, 169 U.S. 366, 398 (1898); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 429-30 (1935).

310. BARNETT & BERNICK, *supra* note 296, at 290; see also *In re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d 729, 735-36 (N.C. 1973); *City of Chicago v. Netcher*, 55 N.E. 707, 708 (Ill. 1899).

311. See *Eubank v. City of Richmond*, 226 U.S. 137, 142-43 (1912); *Alves v. Justice Ct.*, 306 P.2d 601, 603 (Cal. Ct. App. 1957); *Peppies Courtesy Cab Co. v. City of Kenosha*, 475 N.W.2d 156, 159 (Wis. 1991), see also Reynolds & Kopel, *supra* note 184, at 528.

C. TRUTH #3: The Courts Have a Constitutional Duty and Historic Responsibility to Provide Meaningful Judicial Review of Police Power Regulations

In Part I, above, a review of the three players in the property rights dynamic—owners, regulators, courts—revealed that for nearly two centuries, a general balance of powers condition existed, which resulted in a stability among the three players. However, the case of *Carolene Products* heralded a change in this dynamic.³¹² From this point onward, when property and other economic interests were being regulated, reviewing courts removed themselves as effective checks on the police power. A *de facto* coalition between courts and regulators emerged, because courts routinely deferred to legislative and executive powers affecting property rights and uses.

The repeated mantra from reviewing courts was simple and relentless: (1) Police regulations are presumed to be constitutional and valid; (2) public regulators typically act in the public interest while property owners do not; (3) reliance on the police power reflects the will and wishes of elected political bodies and their planners; (4) elected officials and planners are better than property owners and reviewing courts, and know best how to achieve legitimate state interests.³¹³ These assumptions effectively sanctioned a broad conception of the police power, while eviscerating meaningful judicial challenges to zoning and land use regulations affecting property uses.³¹⁴

When the judiciary, and meaningful judicial review, are missing in the property-police power dynamic, property owners and regulators do not have equivalent bargaining powers. Regulators and their exercises of police power became dominant because their actions are, in effect, unreviewable.³¹⁵ Such dominance means that property owners have

312. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

313. *See* Epstein, *supra* note 49, at 50, 98-99.

314. There are only two exceptions to this rule of judicial deference to police power regulations affecting property. First, courts will meaningfully intervene when the challenged law permits a complete *wipeout* of all property value, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 1027-30 (1992); EPSTEIN, *supra* note 49, at 47, a government *appropriation* of private property, *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2023), or a government “*invasion*” of property, *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021); *Horne v. Dept. of Agric.*, 576 U.S. 350, 360, 378 (2015). Second, courts will not blindly defer to government actions that impose conditions or exactions on the use of property. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385, 388-92 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013).

315. Virtually all empirical studies of property owners who have had the audacity to challenge regulations in court reveal that landowners rarely succeed when seeking judicial review. *See, e.g.*, James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 59 (2016) (an analysis of more than 2000 reported court cases shows that most were unsuccessful for the property owners); Carol N. Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1849-50 (2017) (examination of 1,700 *Lucas* cases reveals that only

little leverage or negotiating power. They must largely either concede to whatever demands are being imposed on them by regulators or cease to have aspirations about intended property uses.³¹⁶

It is time to reconsider the assumption about deferential reviewing courts originally fomented in *Carolene Products* in 1938. Reviewing courts checking police power exercises have a long tradition of historic legitimacy. Meaningful judicial review also infuses the property-police power relationship with balance and stability again. To accomplish this change, and balance, we do not need to revise the Constitution. All that is needed is for five U.S. Supreme Court justices to read it differently.³¹⁷ The times and the composition of the Court seem primed for a return of property and economic rights as deserving constitutional protections, enforced by courts.³¹⁸ The *Carolene Products* assumptions have been disrupting social and market norms in ways that are destructive of healthy interactions between owners and regulators. We should discard this long-held precedent by an examination of the historic checking role played by reviewing courts, and the essential function of the judiciary in bringing about a balance of powers.

1. *Resurrecting Meaningful Judicial Review in Light of History and Tradition*

If one looks back at what the Founders, Framers, and early courts believed should be the role of the judiciary in this country, it becomes apparent that the prevailing view was not that courts simply decided disputes. Rather, a vigorous judiciary was essential in constructing a

27 were successful); Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. B.J. 677, 696-97 (2013) (success rate for plaintiff-property owners in federal appeals courts is 8.9%); F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141 (2003) (property owners prevailed in only 13.4% of the cases). Even when the claim alleged a physical taking, normally a *per se* taking, in claims against the United States, plaintiffs were successful only 31% of the time. Dave Owen, *The Realities of Takings Litigation*, 47 BYU L. REV. 577, 608-609 (2022).

316. See generally Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 4-5 (2000) (unreviewable land use regulations constrict property owners' ability to bargain for regulatory adjustments); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 842 (1983) (Pareto improvements can be achieved only through bargaining, but land use bargains are less likely when the regulators need not concede, knowing that judicial override is rare).

317. See Jill Lepore, *Opinion, How to Stave Off Constitutional Extinction*, N.Y. TIMES (July 1, 2023), <https://www.nytimes.com/2023/07/01/opinion/constitutional-amendments-american-history.html> [https://perma.cc/7A9C-SQD6].

318. See generally Jamelle Bouie, *Opinion, There Is a Way to Break Out of Our Constitutional Stagnation*, N.Y. TIMES (Nov. 18, 2022), <https://www.nytimes.com/2022/11/18/opinion/midterms-states-constitutions.html> [https://perma.cc/QDD2-4RVL]; David French, *Opinion, I Don't See a 'Rogue' Supreme Court*, N.Y. TIMES (Aug. 4, 2023), <https://www.nytimes.com/2023/08/04/opinion/sunday/supreme-court-conservative.html> [https://perma.cc/3MJU-D5WG].

functioning government that would manage America's evolution and growth. Of primary importance was the need to have some mechanism to address the concern felt regarding failures of the political process, especially among the two political branches, the legislature and executive. The Framers feared that the ordinary political process would not adequately protect private property.³¹⁹ They assumed the courts would be the institution best able to prevent an overreaching legislature.³²⁰

One cannot overstate the anxiety expressed by several Framers about the prospect of unlimited legislative regulations. James Madison was skeptical about democracies and their tendency to be “incompatible with personal security or the rights of property.”³²¹ James Wilson expressed a common belief that even worse than royal supremacy in England was “tyranny [that] sprang up in the parliament.”³²² Alexander Hamilton was similarly concerned about the dangers posed by an unlimited legislature.³²³ The primary means of checking these “popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice and of other . . . propensities”³²⁴ was the judiciary.³²⁵ Courts were not meant to enter into a coalition with those wielding the police power; courts were intended to check the excesses and unconstitutional tendencies of the lawmaking branches.

Alexander Hamilton, in particular, argued that the new Supreme Court was empowered to “mitigat[e] the severity and . . . operation” of “unjust and partial laws.”³²⁶ The Supreme Court concurred in several nineteenth century decisions that the courts actually had a duty to rein in the legislative branch and other institutions imposing the police power.³²⁷ Other Supreme Court cases emphasize that it would be anathema to presume, as most twenty-first century courts do, that courts should routinely defer to, and not review, the judgment of the legislature when addressing regulations affecting property.³²⁸

319. Treanor, *supra* note 51, at 784.

320. *Id.* at 827, 829-30.

321. THE FEDERALIST NO. 10, *supra* note 134, at 81 (James Madison).

322. James Madison, Notes on the Constitutional Convention (Aug. 15, 1787), in 2 FARRAND'S RECORDS, *supra* note 52, at 301.

323. See THE FEDERALIST NO. 6, *supra* note 134, at 56-57 (Alexander Hamilton); KURLAND & LERNER, *supra* note 301, at 300.

324. THE FEDERALIST NO. 6, *supra* note 134, at 56 (Alexander Hamilton).

325. See THE FEDERALIST NO. 78, *supra* note 134, at 466 (Alexander Hamilton).

326. *Id.* at 470.

327. See, e.g., *Lawton v. Steele*, 152 U.S. 133, 137 (1894) (“In other words, [the Legislature’s] determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.”).

328. See generally *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); see also *Chicago, Burlington & Quincy R.R. v. State*, 66 N.W. 624 (Neb. 1896).

The Framers relied on a relatively new doctrine, the “separation of powers” requirement, as a primary means of limiting the power of the legislative and executive branches.³²⁹ To accomplish a workable separation of powers, the judiciary needed to play a meaningful role in checking legislative and executive actions that infringe on individual liberty.³³⁰ Judicial power serves to regulate not only the power of coordinate legislative and executive powers, but also to temper down power accumulations by either property owners or police power regulators. The *Carolene Products* case brings about the opposite effect; it encourages coalition building between the courts and regulators, while preventing courts from encouraging power parity between owners and regulators and courts.

A final critique of *Carolene Products* is that, if one reviews what Justice Stone actually stated in his opinion (and famous footnote four), what becomes apparent is that the standard of review currently embraced by courts reviewing regulations affecting property is *not* the type of review authorized by the opinion. As pointed out above in Section II.C, modern courts mechanically uphold virtually all forms of regulations affecting private property.³³¹ This deference is because courts believe *Carolene Products* permits them to sustain laws affecting property and economic interests so long as there is some conceivable basis, or even hypothetical justification, for the law.³³² This interpretation is at odds with both the *Carolene Products* opinion and cases that interpreted *Carolene Products* until 1951.

What Justice Stone and subsequent cases did was to make plain that, although police power regulations enjoy a presumption of constitutionality, this presumption was rebuttable on the basis of *facts* that are presented to a reviewing court.³³³ Justice Stone’s opinion called for reviewing courts to ensure “the existence of a particular state of facts [that] may be challenged by showing to the court that those facts have ceased to exist. . . . [T]he constitutionality of a statute . . . may be assailed by proof of facts tending to show that the statute as applied . . . is without support in reason.”³³⁴ In other words, the relevant standard of review is not a “conceivable basis” or “hypothetical basis” justifying the law. What courts should be using is true rational basis review,

329. See THE FEDERALIST No. 48, *supra* note 134, at 309 (James Madison); THE FEDERALIST No. 46, *supra* note 134, at 300 (James Madison).

330. See WOOD, *supra* note 170, at 151-52.

331. See generally Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

332. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955) (the law being challenged need not be logically consistent with its goals; it is acceptable under the constitution so long as “there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it” (emphasis added)).

333. United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938).

334. *Id.* at 153-54.

which requires courts to consider relevant facts and evidence in the record.³³⁵

2. A Critical Function of Courts is to Override Unconstitutional State Law

The Supreme Court has consistently established that a primary role of courts is to prevent state laws, especially those affecting property rights, from violating the Constitution. Although the Constitution leaves the law of real property to the states, courts have a duty to ensure that states not deny rights protected under the Constitution, either by invoking the rules of state substantive law in order to “take” property rights³³⁶ or by disavowing traditional property interests in assets states wish to appropriate.³³⁷ Courts likewise have an obligation to prevent “unbridled” police power regulations to become so excessive that “at last, private property disappear[s].”³³⁸ The very purpose of a meaningful Takings Clause, enforced by courts, is to restrain government from overreaching into property rights.³³⁹ Such government acts “risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”³⁴⁰

When courts judicially review police power exercises that unreasonably limit uses of private property, two significant consequences follow. First, such muscular judicial review inflates an owners’ property rights to the status of an express constitutional guarantee, deserving of a less deferential standard of review. Second, the courts then are able to prevent government from violating a critical normative principal: “[T]he unfairness of making one citizen pay . . . to remedy a social problem that is none of his creation.”³⁴¹ When the property owner does not, or is not, the cause of a social problem sought to be remedied, the owner should not be required to correct the problem. The courts should

335. See generally EPSTEIN, *supra* note 49, at 111 (arguing that realistic rational review requires that courts engage in independent realistic examination of facts and evidence supporting a law’s purpose); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841 (1987) (“[O]ur cases describe the condition for abridgement of property rights through the police power as a ‘substantial advanc[ing]’ of a legitimate state interest.” (second alteration in original)).

336. See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., dissenting).

337. See *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2023).

338. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

339. See *id.* at 1030.

340. *Id.* at 1018.

341. *Pennell v. City of San Jose*, 485 U.S. 1, 23 (1988) (Scalia, J., concurring in part and dissenting in part).

ensure that government itself pay, and thus spread the cost of redistributive measures.³⁴²

Without truly vigorous judicial review, the government, armed with its unassailable police power, will be tempted to require an unlucky few owners of property to bear the cost that will redound to the benefit of many. It is only the threat of judicial enforcement of property-protective constitutional clauses that provides a counterbalance to regulations that permit wealth transfers that could not otherwise be achieved through normal democratic processes.³⁴³

342. The Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

343. *Pennell*, 485 U.S. at 22; *accord* *Knight v. Metro. Gov’t of Nashville & Davidson Cnty.*, 67 F.4th 816, 835-36 (6th Cir. 2023) (Takings Clause violated when government made demands on permit seekers that had no connection to the social problem needing to be alleviated.).