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NOTES

DOES LOCHNER LIVE IN LUXEMBOURG?: AN ANALYSIS OF THE PROPERTY RIGHTS JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

Michael R. Antinori*

INTRODUCTION

The property rights jurisprudence of the U.S. Supreme Court ("Court") in the early twentieth century suppressed fundamental values of the U.S. constitutional order.¹ The U.S. Constitution explicitly promises individuals the right to be free from majoritarian interferences with their property.² In direct contradiction to this principle,³ the U.S. constitutional system recognizes that the People, exercising sovereign law making authority, can regulate private property for a publicly conceived common good.⁴ Instead of heeding the popular call for economic re-

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1. James Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 88 (1992).

2. U.S. CONST. art. I, § 10, cl. 1 ("No State shall pass any Law impairing the Obligations of Contracts"); U.S. CONST. amend. XIV, § 2 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); see *Lucas v. So. Carolina Coastal Commission*, 505 U.S. 125 (1992) (looking to Fifth Amendment of U.S. Constitution as source of economic rights); see also *Coppage v. Kansas*, 236 U.S. 1 (1915) (looking to Fourteenth Amendment as source of economic rights).

3. Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 273 (1991) ("From the nation's beginning until the present, American legal discourse about property has been dialectic. That is, at any given moment, the concept of property has contained elements that conflict with, if not contradict, one another."); James L. Oakes, *'Property Rights' in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 583 (1981) ("[T]he very philosophic concepts underlying 'property rights,' if they are not mutually conflicting, at least constitute a spectrum of relationships between the individual and the state which secures those rights."); Frank Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1110 (1981) ("[We] are dealing with 'two conflicting American ideals,' both reflected in the Constitution: 'the protection of popular government on the one hand' and the protection of property rights on the other.").

4. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922) ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."); *Lucas*, 505 U.S. at 165-67 (Blackmun, J., dissenting). Blackmun notes that historically, states have enjoyed a good measure of freedom in regulating private prop-

form, the Lochner-era Court elevated individual rights at the expense of popular sovereignty.⁵

The decline of Lochner-era jurisprudence was caused by a critique that exposed the illegitimacy of property rights jurisprudence that failed to accommodate the disparate constitutional values.⁶ According to the advocates of this critique, a jurisprudential doctrine that is not moored in the U.S. Constitution floats on the tides of dominant judicial predilection.⁷ Further, constitutional property rights were the guise under which judicial officers usurped the powers of legislative majorities and implemented their policy preferences into the economy.⁸

This critique can serve as a reference in critically examining the property rights jurisprudence of the European Court of Justice ("ECJ").⁹ The ECJ's jurisprudence threatens the current structure of the European Community ("EC" or "Community") legal system established under the EC Treaty.¹⁰ To date, the ECJ has only protected individual property rights against infringement by the political institutions of the Community.¹¹ If, however, the ECJ were to review Member State legislation, economic policy decision-making powers could be inappropriately shifted

erty. *Id.* Thus, states in the 19th century often took property for public uses without paying compensation. *Id.* at 165. It was recognized that "citizens were bound to contribute as much of [land], as by the laws of the country, were deemed necessary for the public convenience." *Id.* (quoting *M'Clenachan v. Curwin*, 3 Yeates 362, 373 (Pa. 1802)). Until the last quarter of the nineteenth century, states enjoyed almost unbounded regulatory powers over private property. *Id.*

5. Kainen, *supra* note 1, at 92; Frank Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1101 (1981).

6. Frank Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1350 (1987).

7. Kainen, *supra* note 1, at 92.

8. *Id.*

9. See Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1128 (1986) (discussing property rights jurisprudence of ECJ).

10. See Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

11. Weiler, *supra* note 9, at 1136-41.

from the Member States to the ECJ.¹² In light of this possibility, the ECJ must establish a firm grounding for its jurisprudence to preserve its integrity as an institution of law as opposed to politics.¹³

This Note examines the ECJ's property rights case law in light of the theoretical challenges to the U.S. Supreme Court's jurisprudence of the *Lochner*-era. Part I discusses the ECJ's methodology in fundamental rights cases and Member State constitutional traditions with respect to individual property rights from which the ECJ draws its norms. Part II analyzes the U.S. Supreme Court's *Lochner*-era jurisprudence and the criticism that caused its demise. Part II also studies a proposed solution to the difficulties of judicial enforcement of property rights. Part III argues that if the ECJ were to adjudicate Member State legislation under a politicized judge-made property rights norm, similar to the U.S. Supreme Court's *Lochner*-era jurisprudence, then the citizens of the Member States would be denied the right to determine economic conditions within their national borders. This Note concludes that the ECJ should not entertain the possibility of incorporating Community-defined property rights against Member States.

I. *THE PROTECTION OF PROPERTY IN THE EUROPEAN COMMUNITY*

European constitutional theory pertaining to individual property rights contains two important elements that distinguish it from its U.S. counterpart.¹⁴ Constitutional traditions and practices of the EC Member States and the relevant textual provisions of the European Convention for the Protection of Human

12. See Kainen, *supra* note 1, at 91-92 (discussing U.S. Supreme Court's jurisprudence of early twentieth century as sharp limitation on competence of states to regulate economy).

13. See generally Weiler, *supra* note 9 (discussing fundamental rights jurisprudence of ECJ in light of principles and politics).

14. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 32 (1991) [hereinafter GLENDON I]; see Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519 (1992) [hereinafter GLENDON II] (comparing U.S. welfare state with other liberal democratic welfare states); Mary Ann Glendon, *Comment on Part 4*, in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE - A GERMAN-AMERICAN SYMPOSIUM* 283 (Paul Kirchhof & Donald P. Kommers eds., 1989) [hereinafter GLENDON III] (comparing individual property rights in United States with property rights in Germany).

Rights and Fundamental Freedoms¹⁵ ("Convention") illustrate these distinguishing features of European property rights ideology.¹⁶ First, in the Member State constitutions as well as the provisions of the Convention,¹⁷ the societal right to regulate private property¹⁸ is as important a constitutional value as the individual right to property.¹⁹ Conversely, the U.S. Constitution only recognizes the individual's right to property,²⁰ and the societal right to regulate private property is a judicially-imposed limit on an otherwise absolute individual right.²¹ Second, in the United States, individual property rights are understood as an anti-redistributive principle encompassing so-called negative rights to be free from government interferences with individual property.²² Welfare is given as a matter of legislative grace.²³ In Europe,

15. European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 221 [hereinafter European Convention] Protocol No. 1 to the European Convention, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol No. 1] (adding rights to property, education, and vote). Article 1 of that Protocol provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Id. art. 1, 213 U.N.T.S. at 262.

16. GLENDON I, *supra* note 14, at 32-40.

17. Protocol No. 1, *supra* note 15, 213 U.N.T.S. 262.

18. *See, e.g.*, GRUNDGESETZ [Constitution] art. 14(2) (Ger.); COSTITUZIONE [Constitution] art. 42(2) (Italy); BUNRACHT NA HEIREANN [Constitution] art. 43(2)(2) (Ir.).

19. Weiler, *supra* note 9, at 1128.

20. U.S. CONST. amend. XIV ("nor shall any State deprive any person of . . . property without due process of law"); U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

21. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.").

22. *Jackson v. City of Joilet*, 715 F.2d 1200, 1203 (7th Cir.), *cert. denied*, 465 U.S. 1049 (1983).

[The U.S. Constitution] is a charter of negative rather than positive liberties The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 in the height of *laissez-faire* thinking, sought to protect Americans from oppression by state government, not to secure them basic government services.

Id.

23. *Id.*

property rights are understood not only as an anti-redistributive principle but also as a distributive principle encompassing a positive right to claims upon government for minimum levels of subsistence.²⁴ The welfare rights of citizens are given constitutional status.²⁵ Drawing on European constitutional property rights traditions and the provisions of the Convention, the ECJ has developed norms for protecting individual property rights.²⁶

A. Fundamental Rights Jurisprudence of the ECJ

EC citizens are not protected against infringing Community legislation by a textual catalogue of individual rights.²⁷ In the European Community, unlike the United States, individual rights are not formally expressed in a bill of rights.²⁸ Further, under the doctrine of supremacy, the ECJ has asserted that Community legislation takes precedence over Member State constitutions.²⁹ If Community legislation conflicts with the fundamental

24. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 867 (1986).

25. See Glendon II, *supra* note 14, at 521 (noting that constitutions of most liberal democracies, with exception of United States, contain language establishing welfare rights).

26. Weiler, *supra* note 9, at 1125-29.

27. GEORGE A. BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY, ELEANOR M. FOX, CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 142-49 (1993).

28. See *id.* (discussing basic rights in European Community and lack of formal bill of rights). For an argument that the EC is moving toward adoption of a bill of rights, see Mary F. Dominick, *Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights*, 14 FORDHAM INT'L L.J. 639 (1991).

29. Internationale Handelsgesellschaft mbH v. Einfuhr- Und Vorratsstelle Fur Getreide Und Futtermittel, Case 11/70, [1970] E.C.R. 1125, [1972] C.M.L.R. 225. In *Internationale Handelsgesellschaft*, the ECJ held:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that or the principles of a national constitutional structure.

Id. at 1134, [1972] C.M.L.R. at 283.

The German Constitutional Court did not originally accept the principle enunciated by the ECJ. *Internationale Handelsgesellschaft mbH v. Einfuhr- Und Vorratsstelle Fur Getreide Und Futtermittel* (Federal Constitutional Court, Second Senate, May 29,

rights guaranteed to citizens under the Member State constitutions, the Community legislation may not be adjudged unconstitutional by either Member State courts or the ECJ.³⁰

To make up for this perceived deficiency in the Community legal order, the ECJ expressed a commitment to safeguard individual rights against potentially infringing Community legislation.³¹ In a series of decisions, the ECJ has established that fundamental rights form an integral part of the Community legal order.³² The ECJ has made clear that it will review Community legislation to prohibit violations of these fundamental rights.³³

1974) Case 2 BvL 52/71, 37 BVerfGE 271, [1974] 2 CMLR 540 (1974). The German Constitutional Court held:

As long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Constitution, a reference by a court in the Federal Republic of Germany to the [German Constitutional Court] following the obtaining of a ruling of the [ECJ], is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Constitution.

Id. at 554.

30. *Internationale Handelsgesellschaft*, [1970] E.C.R. at 1134, [1972] C.M.L.R. at 283. Due to the doctrine of supremacy, Member State courts are powerless to strike down the legislation in vindication of the rights enshrined in their constitutions. See BERGMANN ET AL., *supra* note 27, at 192-202 (discussing doctrine of supremacy). The ECJ, likewise, originally refused to strike down Community legislation on the grounds that the legislation violated rights enshrined in the Member State constitution. *Internationale Handelsgesellschaft*, [1970] E.C.R. at 1134, [1972] C.M.L.R. at 283.

31. *Id.* In the 1969 case, *Strauder v. City of Ulm*, the ECJ first announced fundamental human rights, enshrined in the general principles of Community law, that would be protected by the Court. *Strauder v. City of Ulm*, Socialamt, Case 29/69, [1969] E.C.R. 419, [1970] C.M.L.R. 112. For an argument that the ECJ, in protecting individual rights, was not motivated by a benevolent interest in human rights, see Weiler, *supra* note 9, at 1110. Weiler argues that the Court anticipated serious threats to the doctrine of supremacy by Member State courts over alleged violations of human rights by the Community. *Id.* Thus, the Court of Justice began protecting human rights to quiet opposition to the doctrine of supremacy. *Id.* at 1121.

32. See, e.g., *Stauder*, [1969] E.C.R. at 419, [1970] C.M.L.R. at 112 (interpreting provisions of Community law to avoid interference with individual rights); see also *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42 (recognizing right to property).

33. See, e.g., *Hauer*, [1979] E.C.R. at 3727, [1980] 3 C.M.L.R. at 42 (reviewing compatibility of Community legislation with fundamental right to property). The ECJ, however, has yet to strike down Community legislation on the basis of violation of individual rights. See BERGMANN ET AL., *supra* note 27, at 144-45 (discussing ECJ's fundamental rights jurisprudence). The interesting difference with U.S. constitutionalism is that the EC Treaty expressly gives the ECJ the power of judicial review of Community legislation.

Due to the absence of a formal EC bill of rights from which the ECJ may start its analysis, the ECJ has referred to two sources in defining fundamental rights norms.³⁴ The ECJ draws on the constitutional traditions common to the Member States.³⁵ In defining fundamental rights norms, the ECJ examines the Member State constitutional traditions to determine whether a common practice concerning the right in question is evident.³⁶ The ECJ also draws on international human rights treaties on which the Member States have collaborated.³⁷ The ECJ incorporates the common constitutional tradition and any applicable provisions from human rights treaties into the Community legal order.³⁸ Thus, the ECJ protects fundamental rights that emanate not from Member State law or international treaties but from Community law.³⁹ The ECJ, through its jurisprudence, has established a judge-made bill of rights that functions as Community Law.⁴⁰ The right to property is one of the rights included in this bill of rights.⁴¹ Of the fundamental rights protected by the ECJ, the right to property is the most vulnerable to violation by Community legislation because the authority of the Community is

Id. The purpose of giving the ECJ the power of judicial review was to protect against abuses of authority by Community institutions. *Id.* On the other hand, the U.S. Constitution does not expressly give the federal courts the power to review legislation. U.S. CONST. The Supreme Court, however, established the power of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

34. Weiler, *supra* note 9, at 1125-29.

35. *Hauer*, [1979] E.C.R. at 3745, [1980] 3 C.M.L.R. at 65.

36. Weiler, *supra* note 9, at 1125-29.

37. *Hauer*, [1979] E.C.R. at 3745, [1980] 3 C.M.L.R. at 65. The most relevant treaty, and in fact the treaty to which the ECJ has referred, is the European Convention for the Protection of Human Rights and Fundamental Freedoms. Convention, *supra* note 15, at 221; BERMANN ET AL., *supra* note 27, at 147.

38. Weiler, *supra* note 9, at 1125-29.

39. *Id.*

40. *Id.* at 1137.

41. *Hauer*, [1979] E.C.R. at 3727, [1980] 3 C.M.L.R. at 42. An interesting comparison with U.S. constitutionalism, is that in the United States, economic rights receive less protection than personal rights, such as privacy. Compare *Roe v. Wade*, 410 U.S. 113 (evidencing high level of judicial review of legislation that infringes individual privacy) with *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955) (evidencing low level of judicial review of legislation that infringes economic rights).

The ECJ, however, has not evidenced a difference in the level of protection that it applies to economic and personal rights. Compare *Oyowe and Traore v. Commission*, Case C-100/88, [1989] E.C.R. 4285 (protecting freedom of speech) with *Hauer*, [1979] E.C.R. at 3727, [1980] 3 C.M.L.R. at 42 (protecting property rights). In both cases, the ECJ applied the same level of scrutiny to Community legislation regardless of whether the claimed infringement was of the right to property or the right to free speech.

strongest in the area of economic regulation.⁴²

B. *Member State Constitutional Traditions*

Member state constitutions generally recognize the individual right to be free from certain types of government interference with private property.⁴³ In European tradition, however, property functions as more than a barrier that separates the individual from the community and its actions.⁴⁴ Recognizing that individuals are rooted in, and part of, larger communities, European constitutions define private property in terms of its social function.⁴⁵ This gives constitutional status to societal rights to regulate property for the common good.⁴⁶ European constitutions, thus, counter-pose individual rights to be free from government intrusions with community rights to regulate property for the common good.⁴⁷ Further, many European constitutions explicitly declare that the governments they create are welfare states⁴⁸ which entitles individuals to call upon the government to affirmatively achieve social justice through necessary levels of wealth redistribution.⁴⁹ In a constitutionally declared welfare

42. See Weiler, *supra* note 9, at 1121 (noting that "property rights . . . which [are] a part of the living matrix of Community activity . . . may be considered more typical [case of violation of individual rights by the Community] than the odd case on religious freedom").

43. *Id.* at 38 (noting that idea of pre-political individual rights came to have wide appeal in Europe); Weiler, *supra* note 9, at 1128.

44. GLENDON I, *supra* note 14, at 39. Glendon notes that European thought is committed to the notion that law can and should make good citizens of the individuals who compose society. *Id.* at 86. This is an entirely different vision of law than the one that undergirds strong commitment to individual rights. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-16 (1989). That vision supposes that there is no objective measure of the 'good life' and any attempt to turn citizens into good citizens will ultimately reflect the interests of a dominant social group. *Id.* The function of individual rights is to define a sphere of autonomy so the individual can live out their own version of the good life. *Id.*

45. GLENDON I, *supra* note 14, at 39.

46. Otto Kimminich, *Property Rights, in RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 75, 86* (Christian Starck ed., 1987).

47. Weiler, *supra* note 9, at 1128. Weiler recognizes that some European societies emphasize individual interests while other European societies emphasize the collective good. *Id.* This collective good is recognized, not simply as a curb on individual rights but instead as a manifestation of constitutional values that have equal weight to individual rights. *Id.*

48. See Glendon II, *supra* note 14, at 521 (discussing concept of welfare state in Europe).

49. *Id.* at 524-25.

state, individual possessive rights can never attain a level of absoluteness.⁵⁰ Administering a welfare state requires the government to redistribute property from those who are not in need to those who are.⁵¹ Thus, the government must balance the right to freedom from want of some individuals with the right to freedom from government intrusion of other individuals.⁵²

1. Historic Influences

While U.S. property rights ideology was infused with imagery of naturalness and absoluteness primarily through the writings of John Locke, European political theory was influenced more by Jean-Jacques Rousseau.⁵³ In contrast to Locke, Rousseau relegated individual possessive rights to a lower status in the hierarchy of values of political society.⁵⁴ Rousseau's writings evidenced a suspicion and distrust toward unmitigated pursuit of private property.⁵⁵

An element of Rousseau's thought that has influenced European constitutionalism is a belief that individuals have a claim upon their government for a minimum level of subsistence.⁵⁶

50. GLENDON I, *supra* note 14, at 32-40.

51. ERNST-WOLFGANG BOCKENFORDE, *STATE, SOCIETY AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW* 61 (1990).

52. Gunter Durig, *An Introduction to the Basic Law of the Federal Republic of Germany*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 11, 20 (Ulrich Karpen ed., 1988). The administration of the welfare state in Germany has been successful in balancing the possessive rights of some individuals and the claims for government assistance of other individuals. *Id.* Durig notes:

Germany has to a large extent perfected the welfare state. [T]he state has not in a power-hungry manner usurped the important role of social provision and direction, threatening to some people. The constitution and its basic rights ensure that the social state does not become an almighty pension state and "welfare tyrant" which takes away all the risks but also destroys all liberty.

Id.

53. *Id.* at 32.

54. *Id.* at 34.

55. ROUSSEAU, *DISCOURSE ON INEQUALITY* 76 (1984).

The first man who, having enclosed a piece of ground, bethought himself of saying 'This is mine', and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars, and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes . . . and crying to his fellows: 'Beware of listening to this imposter; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody.'

Id.

56. *Id.* Currie, *supra* note 24, at 867. The conviction that the government ought to take more affirmative action to benefit the people was established early in Europe.

While the U.S. Supreme Court during the early twentieth century was striking down economic and social reform as unconstitutional violations of individual possessive rights, European efforts to create a system of government that would guarantee social justice and freedom from want began emerging.⁵⁷ European efforts sought to establish affirmative obligations on the government to provide for the needy.⁵⁸

Rousseau's refusal to place individual claims to possessive rights above societal claims to promote the public good has played a significant part in shaping European constitutional tradition.⁵⁹ According to Rousseau, individual property rights could be subordinated to community rights to regulate for a common good.⁶⁰ The modern analogue of these notions exists in European constitutions that define property in terms of its social function⁶¹ implicitly recognizing community rights to regulate property for the common good.⁶²

Only after World War II did the European political consciousness turn its efforts to guaranteeing traditional possessive property rights.⁶³ These efforts, however, did not elevate property rights to the exalted status that they have enjoyed in U.S. constitutional law.⁶⁴ While seeking to guarantee individual property rights, Europeans were unwilling to entirely abandon communitarian commitments.⁶⁵ Language guaranteeing individual property rights was, therefore, tempered by explicit recog-

Id. at 867. The French Constitution of 1791 acknowledged affirmative duties on the state to establish a system of public assistance for the needy. *Id.* Further, affirmative government action was seen as essential to individual liberty. *Id.* at 868; see Glendon II, *supra* note 14, at 523 (discussing European commitment to notion of state obligations to provide aid to those in need).

57. GLENDON I, *supra* note 14, at 37.

58. *Id.*

59. *Id.* at 32-40.

60. GLENDON I, *supra* note 14, at 34.

61. See, e.g., GRUNDGESETZ [Constitution] art. 14(2) (Ger.); COSTITUZIONE [Constitution] art. 42(2) (Italy); BUNRACHT NA HEIREANN [Constitution] art. 43(2)(2) (Ir.).

62. Kimminich, *supra* note 46, at 86.

63. GLENDON I, *supra* note 14, at 38. Glendon notes that the abuses of human rights before and during World War II led to a strong commitment to the notion of pre-political individual rights. *Id.*

64. *Id.* at 39. Glendon notes that in the United States, property conjures up notions of dominion and illusions of absoluteness. *Id.*

65. See *id.* at 40 (noting that Europeans "cram[med] socialist, Biblical, and feudal notions together in the formulation of constitutional property rights").

dition of the social element of property.⁶⁶ Judicial review as a means of enforcing individual rights was largely a new practice in post-World War II Europe.⁶⁷ Legislative supremacy⁶⁸ and an absence of mistrust of government were the norm prior to the 1950's.⁶⁹ Thus, the legislative branches were the only judge of the compatibility of law with rights enshrined in the constitution.⁷⁰ With the possible exception of Italy, Germany and Ireland that have strong constitutional courts, the institution of judicial review has not achieved the same level of force in guaranteeing individual rights as it has in the United States.⁷¹

2. The Right to Property in German Constitutional Law

The German Constitutional Court ("German Court") is one of the strongest European courts in terms of protecting individual rights.⁷² Its jurisprudence is a useful reference point for understanding European treatment of individual property rights.⁷³

66. *Id.*

67. GLENDON I, *supra* note 14, at 38.

68. Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38, 44 (Louis Henkin & Albert J. Rosenthal eds., 1989). Legislative supremacy also had its roots in Rousseau who proposed that the "law is the expression of the general will." *Id.* The law therefore could not be subject to outside review. *Id.* Only the legislature can scrutinize or limit itself:

The legislature when making law has to examine whether the law considered is consistent with the Constitution and resolve issues in that regard . . . This means that interpretation of the Constitution is to be left to Parliament. Because it is exercising the power of the sovereign, Parliament is the judge of the constitutionality of its own laws. Therefore, courts are not to interpret the Constitution; at least they do not have that power in relation to the legislature.

Id.

69. *See id.* at 43 ("[A]t that time [before World War II] constitutional review was for public law like Western and American comedy for movies - an American specialty.").

70. *Id.* at 44.

71. *See* Glendon II, *supra* note 14, at 522 (discussing difference between the U.S. and European models of judicial review); Mauro Cappelletti, *The Mighty Problem of Judicial Review and the Contributions of Comparative Analysis*, 2 LEGAL ISSUES OF EUROPEAN INTEGRATION 1, 2 (1979). Cappelletti notes:

[T]he 'problem formidable' of the democratic legitimacy of relatively unaccountable individuals (the judges) pouring their own hierarchy of values . . . into the relatively empty boxes of such vague concepts as liberty and equality, reasonableness, fairness and due process . . . has provided for centuries the justification in Europe for a rejection of judicial review.

Id.

72. *See* Favoreu, *supra* note 68, at 38-59 (discussing constitutional review by courts of various countries in Europe).

73. *See generally* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE*

The catalogue of individual rights in the German Constitution ("Basic Rights") reflects a balance of individual rights and community interests.⁷⁴ Recognizing the autonomous nature of individuals, the Basic Law guarantees traditional individual rights, creating an area of freedom within which the individual does not have to answer to society.⁷⁵ These freedoms, however, carry definitional limits to individual action and must be exercised within parameters that are set by community norms.⁷⁶ Individual rights are thereby infused with elements of social responsibility.⁷⁷ By defining and, at the same time restraining, individual rights, collectivity and individuality are counter-posed and balanced against one another in the Basic Law.⁷⁸

a. Background

The German constitutional system evidences commitment to safeguarding individual property rights.⁷⁹ This commitment is rooted in the *Rechstaat* (*Recht*, law; *Staat*, state) tradition of German constitutional and political thought.⁸⁰ The concept of

FEDERAL REPUBLIC OF GERMANY 247 (1989) (discussing property rights jurisprudence of German Court).

74. Donald P. Kommers, *The Jurisprudence of Free Speech in the U.S. and the Federal Republic of Germany*, 53 S. CAL. L. REV. 677, 677 (1980). Kommers notes:

The Basic Law . . . resounds in the language of human freedom, but a freedom restrained by certain political values, community norms, and ethical principles. Its image of man is of a person rooted in and defined by a certain kind of human community. Yet in the German constitutionalist view the person is also a transcendent being for more important than any collectivity. Thus, there is a sense in which the Basic Law is both contractarian and communitarian in its foundation: contractarian in that the Constitution carves out an area of human freedom that neither government, private groups, nor individuals may touch; communitarian in the sense that every German citizen is under obligation to abide, at least in his overt behavior, by the values and principles of the moral and political order.

Id.

75. KOMMERS, *supra* note 73, at 249; *see, e.g.*, GRUNDGESETZ [Constitution] art. 14 (Ger.) (guaranteeing right to property).

76. KOMMERS, *supra* note 73, at 249; Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 45, 55 (Ulrich Karpen ed., 1988).

77. *See* GLENDON I, *supra* note 14, at 76-108 (discussing notion of responsibility as adjunct to rights).

78. KOMMERS, *supra* note 73, at 250.

79. GLENDON I, *supra* note 14, at 39. Article 14 of the German Basic Law provides: "Property and the rights of inheritance are guaranteed." GRUNDGESETZ [Constitution] art. 14(1) (Ger.).

80. BOCKENFORDE, *supra* note 51, at 47-69.

Rechtsstaat had its genesis in liberal political ideology of government based on the rule of law.⁸¹ A rule of law that would, according to the tenets of liberalism, limit the exercise of state power protecting the individual from the state.⁸² One of the central promises of *Rechtsstaat* is freedom from state imposed interferences with individual property rights.⁸³

In addition, *Sozialstaat*, the opposing concept of *Rechtsstaat*, has also influenced German constitutional tradition.⁸⁴ *Sozialstaat* calls for a state that will look after its citizens and distribute wealth to those in need; a state that will actively intervene in market and social orders to counter inequality of conditions.⁸⁵ Commitment to an active state grew out of the perception that, in reality, freedom may be restricted not only by the state but also through factual circumstances.⁸⁶ Unless public authorities intervened by appropriate means to preserve or restore a meaningful level of individual freedom, the guarantees of *Rechtsstaat* would become empty promises for an ever increasing number of citizens.⁸⁷ *Sozialstaat* recognizes that the state can be the friend as well as the enemy of personal freedom.⁸⁸

81. *Id.* at 49. Bockenforde defines the basic elements of *Rechtsstaat* as follows:

- (1) Rejection of any kind of supra-personal idea or object of the state; the state is neither something God-given nor something divinely ordained but a 'body politic' (*res publica*) existing for the benefit of each and every individual. The starting point and point of reference for the political order is the free, equal, self-determine individual and his earthly aims in life; the furtherance of these is the underlying *ratio* of the state. 'Man's transcendental inclinations, morality and religion, lie beyond the competence of the *Rechtsstaat*.'
- (2) Restriction of the objects and functions of the state to the liberty and security of the person and of property - that is to say, to safeguarding individual liberty and facilitating individual self-fulfillment.

Id.

82. *Id.*

83. *See id.* at 60 ("[The traditional notion of *Rechtsstaat*] safeguards the distributions of goods rather than changing it, and through its forms and procedures it bars direct access to private property for the purposes of social redistribution.").

84. KOMMERS, *supra* note 73; at 249.

85. BOCKENFORDE, *supra* note 51, at 61.

86. *Id.*

87. *Id.*; see Phillip Kunig, *The Principle of Social Justice, in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 187, 188-201* (Ulrich Karpen ed., 1988) (discussing concept of social justice in German political thought). Historically, the notion that the state can promote freedom grew out of the tendency to compensate individuals for consequences originating from the development toward liberal individual rights. *Id.* at 191.

88. BOCKENFORDE, *supra* note 51, at 146-73. Bockenforde notes:

Rechtsstaat and *Sozialstaat*, as the dual basis for a constitutional order, seem to promise unavoidable incoherence.⁸⁹ It is difficult to conceive of an order that realizes both principles at the level of the constitution.⁹⁰ *Rechtsstaat* is bound up with direct and absolute guarantees of individual freedom from intervening government measures as a matter of constitutional right.⁹¹ Equally direct, absolute guarantees of *Sozialstaat* to active state assistance are not possible as a matter of constitutional right without dismantling the guarantees provided for by *Rechtsstaat*.⁹² For example, it is difficult to commit the constitutional order to directly enforceable individual property rights while at the same time committing to directly enforceable rights to redistributive state action.⁹³ To give to some necessarily entails taking from others, and the two principles logically cancel each other out.⁹⁴

This tension has been resolved by an intricate balancing of the two principles.⁹⁵ Alleviation of social inequalities, which is the concern of *Sozialstaat*, is not sought as a matter of individual right at the constitutional level.⁹⁶ While Article 20 of the Basic Law contains a descriptive statement of principle that Germany is

The resultant increase in legal regulation of individual living-relationships does not in itself imply any abolition of individual and social liberty by the state; it simply corresponds to the necessity, henceforth, for effectively preserving the liberty of the individual and society through and not, as before, against an ever-denser network of social benefits and social services.

Id.

89. See *id.* at 62-68 (discussing tension between *Sozialstaat* and *Rechtsstaat*).

90. *Id.*

91. *Id.*

92. *Id.* at 63.

[I]f the liberty enshrined in the *Rechtsstaat* is not to be revoked or dismantled, the *Sozialstaat* can only have the function of creating the *social conditions* for realising . . . liberty for all, which in particular means reducing social inequality. It therefore appears to belong at the level of administration, including legislation, and this is where it develops its full force.

Id.

93. *Id.* 62-63.

94. *Id.*

95. KOMMERS, *supra* note 73, at 249. Kommers notes that the *Sozialstaat* and the *Rechtsstaat* join in a higher union under the Basic Law. *Id.* This union, according to Kommers, can be captured in the term *sozialer Rechtsstaat*, or social legal state. *Id.*

96. Kunig, *supra* note 87, at 193. According to Kommers, there are a number of reasons, historically, why the principle was not given specificity as a constitutionally binding force. KOMMERS, *supra* note 73, at 250. Economic liberals preferred to define the obligations of the social state in broad language. *Id.* Socialists believed that the goals of the social state could be achieved by progressive legislation, and were content to leave the language as a broad statement of principle. *Id.*

a social state, no directly enforceable individual rights⁹⁷ to redistributive state action have been held to follow.⁹⁸ Rather, Article 20 places an affirmative obligation on the legislature to construct a just social order, and the Court has often reminded the legislature of its constitutional duty.⁹⁹

The *Socialstaat* principle of social justice operates at the point where social conditions and market structures are created and mandates institutions for realizing meaningful freedom for all.¹⁰⁰ In this manner, the legislature is the guardian of constitutional principles and the enforcer of rights that flow from those principles.¹⁰¹ While the Basic Law remains committed to *Socialstaat*, the legislature defines its substance.¹⁰²

Rechtsstaat fulfills its promise of constitutionally guaranteed individual property rights in Article 14 of the Basic Law.¹⁰³ Far from being an absolute guarantee, the text of Article 14 contains

97. See Currie, *supra* note 24, at 869 (discussing other German Constitutional Court judgments that recognize affirmative obligations of German government).

98. KOMMERS, *supra* note 73, at 250-51.

99. Currie, *supra* note 24, at 868-71. The German Constitutional Court has, however, interpreted Article 20 as a directly enforceable norm with respect to other individual rights. *Id.* For example, at the same time that the U.S. Supreme Court held that the U.S. Constitution forbade the government from outlawing abortion, *Roe*, 410 U.S. at 113, the German Court held that the Constitution required the government to outlaw abortion. *Id.* The German Court reasoned that a fetus was a person whose life was protected by the Basic Law guarantee of the right to life. *Id.* The Basic Law, the Court declared, not only "prohibits . . . direct government encroachments upon the developing life, but also commands the State to safeguard it from illegal encroachments by others." *Id.*

100. BOCKENFORDE, *supra* note 51, at 63.

101. See Thomas C. Grey, *Constitutionalism: An Analytic Framework*, in CONSTITUTIONALISM 189, 196-200 (Pennock & Chapman eds., 1979) (discussing 'political enforcement' model of constitutionalism). According to Grey, a constitutional norm that nominally constrains the legislature, but is subject to authoritative construction by that same legislature is still constitutional law. *Id.* The legislature under such a system becomes the enforcer of this constitutional law. *Id.*

102. KOMMERS, *supra* note 73, at 250.

103. GRUNDGESETZ [Constitution] art. 14 (Ger.). Article 14 provides:

1. Property and the rights of inheritance are guaranteed. Their content and limits shall be determined by the laws.
2. Property imposes duties. Its use should also serve the public weal.
3. Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.

Id.

built in limits.¹⁰⁴ First, Article 14(1) recognizes legislative power to define the content and limits of property.¹⁰⁵ Further, Article 14(2) states that the ownership of property implies individual duties and responsibilities to society.¹⁰⁶ The privilege of having one's property protected and guaranteed by the state imposes obligations on the individual to use property for the common good.¹⁰⁷

Article 14 recognizes a dual function of property and supports both as equally important constitutional values.¹⁰⁸ On the one hand, property, as it is defined by Article 14, has an individual function by carving out an area of individual freedom; on the other hand, Article 14 defines a social function of property as its use should serve the common good.¹⁰⁹ By collapsing the logically correlative concepts of rights and duties, Article 14 contains seemingly incompatible principles.¹¹⁰

The union of rights and restraints in Article 14 provides the framework under which the goals of *Socialstaat* can be pursued by the legislature.¹¹¹ Limitations on individual rights provide sufficient berth for the legislature to pursue economic policies designed to achieve social justice.¹¹² The legislature, in pursuing social justice as an economic policy, can activate the social function of property by calling upon the individual's duties to use their property in a manner that serves the common good.¹¹³ The values embodied in *Socialstaat* become a justification to support legislation that allegedly interferes with individual property rights.¹¹⁴ At the same time, the legislature must respect individual rights.¹¹⁵ Through this framework, the Basic Law achieves a

104. *Id.*

105. *Id.*

106. *Id.*

107. GLENDON I, *supra* note 14, at 39.

108. Gunnar Folke Schuppert, *The Right to Property*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 107, 108 (Ulrich Karpen ed., 1988).

109. *Id.*

110. See GLENDON I, *supra* note 14, at 40 (noting "[i]n theory it might seem that cramming socialist, Biblical, and feudal notions together in the formulation of constitutional property rights would involve the law in hopeless internal contradictions").

111. Kunig, *supra* note 87, at 197.

112. See KOMMERS, *supra* note 73, at 251 (noting that social justice may justify interference with individual property rights).

113. Kimminich, *supra* note 42, at 86.

114. KOMMERS, *supra* note 73, at 251.

115. *Id.* at 250.

complex union of conceptual opposites — rights/duties, negative/positive, individual/communal.¹¹⁶

b. The German Court's Jurisprudence

The German Court harmonizes these conflicting constitutional demands through the institution of judicial review by weaving together individual rights and their constraints in a coherent jurisprudential doctrine.¹¹⁷ The German Court has been required to incorporate the principles embodied in all three clauses of Article 14,¹¹⁸ the contents and limits clause,¹¹⁹ the social function clause,¹²⁰ and the individual rights clause.¹²¹ Further, the German Court maintains a dual role as guardian of individual rights and as overseer of a constitutional order committed to social justice.¹²²

The contents and limits clause of Article 14 appears to grant the legislature unbounded discretion in regulating the economy.¹²³ If the contents and limits of property are determined by law, then there appears to be nothing to limit legislative power to regulate private property and no room for judicial intervention.¹²⁴ According to the German Court, however, the legislature, in exercising its power under Article 14, must respect two constitutional values.¹²⁵ In regulating property, the legislature must adhere to the constitutional principle that property should serve the common good and must pursue economic policies designed to achieve social justice.¹²⁶ In addition, the legislature must regulate property with due respect for the constitutional value of autonomy underlying individual ownership.¹²⁷ The legislative task is to regulate private property in light of these two

116. *Id.* at 249-50.

117. *Id.*

118. GRUNDGESETZ [Constitution] art. 14 (Ger.).

119. *Id.* art. 14(1) ("[Property's] content and limits shall be determined by the laws.").

120. *Id.* art. 14(2) ("Property imposes duties. Its use should also serve the public weal.").

121. *Id.* art. 14(1) ("Property and the rights of inheritance are guaranteed.").

122. *Id.*; Kimminich, *supra* note 46, at 75-90; see Schuppert, *supra* note 108, at 107-19 (discussing property rights jurisprudence in Germany).

123. KOMMERS, *supra* note 73, at 256.

124. *Id.*

125. Schuppert, *supra* note 108, at 114.

126. *Id.*

127. *Id.*

fundamental values, and both turn out to be constitutional guidelines.¹²⁸

The function of the German Court in reviewing alleged violations of individual property rights is to determine whether the legislature has adequately considered and properly weighed the competing values.¹²⁹ The German Court, in fulfilling its role, has defined property, in terms of the constitutional guarantee, by referring to both the individual and social functions of property recognized by the Basic Law.¹³⁰ In light of the dual function of property, the German Court applies different gradations of protection based on the type of property involved.¹³¹ Different types of proprietary interests are categorized according to whether they serve a more individual or a more social function.¹³² Types of property that contribute to ensuring the personal freedom of the individual, such as one's dwelling, form the core of the individual's constitutionally protected property rights.¹³³ The legislative power over such types of interests is concomitantly curtailed.¹³⁴ Types of property that serve important social purposes, such as ownership of corporate stock, form the outer periphery of the individual's constitutionally protected property rights.¹³⁵ Legislation that interferes with these types of rights is subject to rigorous constitutional review.¹³⁶ Thus, the more a particular type of proprietary interest serves an individual function, and, thus, the closer it is to the core of the individual's constitutionally protected property rights, the greater the legislature's duty to the individual.¹³⁷ The German Court requires a greater degree of justification for legislation that touches the core of an individual's property right.¹³⁸ With regard to types of property that serve a distinctively social function, however, the legislature's duty to the public outweighs its duty to

128. *Id.*

129. KOMMERS, *supra* note 73, at 264.

130. Glendon III, *supra* note 14, at 283-85; Fritz Ossenbuhl, *Economic and Occupational Rights, in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 251, 268-70 (Kirchhof & Kommers eds., 1989).

131. Glendon III, *supra* note 14, at 285.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Schuppert, *supra* note 108, at 114-15.

138. *Id.*

the individual.¹³⁹

Under the German Court's methodology, the existing private law is not of determinative import in defining the constitutionally protected property rights of an individual.¹⁴⁰ Individuals do not necessarily have a constitutionally protected property right in the proprietary interests that they claim under the private law.¹⁴¹ Whether the individual has a constitutionally protected right in private law entitlement depends on whether it serves an individual or a social function.¹⁴²

C. *Protection of Property Under the European Convention on Human Rights*

The ECJ, in defining its fundamental rights norms, also draws upon the European Convention on the Protection of Human Rights and Fundamental Freedoms ("Convention") for guidelines.¹⁴³ The Convention, which includes a Protocol that guarantees the right to property, codifies common principles of the signatory states with respect to fundamental rights.¹⁴⁴ The legislative history of the Protocol, therefore, illuminates the signatories' shared values associated with individual property rights.¹⁴⁵ Statements made by delegates to the Convention reflect disagreement over the scope of individual property rights and whether, and to what extent, such rights should prevail over

139. *Id.*

140. KOMMERS, *supra* note 73, at 265. Kommers, quoting the German Constitutional Court, notes:

The concept of property as guaranteed by the Constitution must be derived from the Constitution itself. This concept of property in the constitutional sense cannot be derived from legal norms (ordinary statutes) lower in rank than the Constitution, nor can the scope of concrete property guarantee be determined on the basis of private law regulation.

Id.

141. *Id.*

142. *Id.* at 267.

143. Hauer v. Land Rheinland-Pfalz, Case 44/79, [1979] E.C.R. 3727, 3745-46, [1980] 3 C.M.L.R. 42, 64-65; European Convention, *supra* note 15, at 221.

144. Wolfgang Peukert, *Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights*, 2 HUMAN RIGHTS L.J. 37, 38 (1981); see R. Anthony Salgado, *Protection of National's Rights to Property Under the European Convention on Human Rights: Lithgow v. United Kingdom*, 27 VA. J. OF INT'L L. 865, 881 (1987) (discussing protection for property under Protocol); see also Peter Van Den Broek, *The Protection of Property Rights under the European Convention on Human Rights*, 1 LEGAL ISSUES EUR. INTEGRATION 52 (1986) (discussing Protocol).

145. See Peukert, *supra* note 144, at 38 (discussing common traditions of European countries that influenced debates over Protocol).

community rights to regulate the economy.¹⁴⁶ The ECJ's jurisprudence has been, and will continue to be, influenced by the jurisprudence of the European Court of Human Rights ("Court of Human Rights"), which was appointed to enforce and interpret the Convention.¹⁴⁷ Thus, examining the case-law of the Court of Human Rights provides a reference point to predict trends that may develop in the ECJ's property rights jurisprudence.¹⁴⁸

1. The Legislative History

Differences of opinion frustrated the inclusion of property rights in the list of rights and freedoms set forth in the text of the Convention.¹⁴⁹ Opposition to including a guarantee of property centered around hesitation to empower an international court to review the lawfulness of limitations imposed on private property.¹⁵⁰ Some delegates argued that permitting a court to review the lawfulness of such limitations would allow the court to define a state's economic policies.¹⁵¹ A British delegate warned that a judicially enforceable guarantee of private property would freeze existing property structures and thereby entrench the social inequalities produced by those structures.¹⁵² Further, several speakers argued if the right to ownership were guaranteed, it must be balanced against other social rights such as the right to a reasonable standard of living.¹⁵³ To include one without the other would create an unacceptable lack of balance.¹⁵⁴

The majority of delegates determined, however, that due to the important function of property in safeguarding the independence of the individual, the Convention should guarantee property rights.¹⁵⁵ Some delegates feared the recurrence of injustices

146. *Id.* at 39.

147. Louis Henkin, *Economic Rights Under the United States Constitution*, 32 COLUM. J. TRANSNAT'L L. 97, 112-13 (1994).

148. *See id.* (noting that jurisprudence of ECJ will be influenced by Convention institutions).

149. Peukert, *supra* note 144, at 39.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Salgado, *supra* note 144, at 881.

committed by totalitarian regimes before and during World War II.¹⁵⁶ These delegates argued that a guarantee should be included to avoid a situation where oppressive regimes exert pressure on individuals by confiscating their homes.¹⁵⁷ To quiet the doubts of those that were still opposed to including property rights, supporters suggested limiting the protection of property to objects in personal use.¹⁵⁸ Because of the remaining differences regarding the inclusion of property rights, the delegates believed that the Convention should stress the social function of ownership.¹⁵⁹

A Committee of Experts, appointed to consider and draft a protocol guaranteeing the right to property, agreed on a final text.¹⁶⁰ Considerable disagreement regarding the right to compensation for expropriation made it impossible to include such a right in the final text.¹⁶¹ The final text provides that expropriation shall be subject to the conditions provided for by the general principles of international law, which only requires a state to compensate non-nationals.¹⁶² Some of the delegates feared that the new provision would be construed to place limits on government nationalization of certain industries,¹⁶³ but most were confident that it did not.¹⁶⁴ The Committee expressly stated that

156. *Id.*

157. *Id.*

158. Peukert, *supra* note, 144, at 39.

159. *Id.*

160. Salgado, *supra* note 144, at 883.

161. Broek, *supra* note 144, at 54.

162. *See* Salgado, *supra* note 26, at 873-75 (discussing international principles of compensation for expropriation).

163. Peukert *supra* note 144, at 39. Nationalization is the transfer to state ownership of branches of industry and commerce. *Id.*

164. Salgado, *supra* note 26, at 885. To support one of the early proposals, the French delegate noted:

We reaffirmed that property is an extension of the personality; that it should be protected from arbitrary confiscation, that is to say, from those high-handed administrative or private measures of which all the totalitarian regimes have furnished such sinister examples. On the other hand we expressly reserved to each State the right to safeguard the social purpose of the property by appropriate legislative enactments. For this reason, nationalization laws which . . . exist in France as well as England, could never be brought before the court or the Commission and impugned before them under the text which we are proposing.

Id. The British Labor Party wanted assurances "that this Article safeguards the rights of any State to undertake schemes of nationalization." *Id.* One of the delegates replied:

I have no difficulty in giving Miss Bacon the assurances for which she asks.

the obligation to compensate for expropriation would only apply to relations between a state and non-nationals.¹⁶⁵ The different treatment was justified on the grounds that expropriation is unfair to non-nationals who had no voice in the decision to nationalize and had no ability to enjoy the benefits resulting therefrom.¹⁶⁶ Nationals of a state did not need the protection afforded by a compensation requirement because they generally benefitted from the state's economic policies and were able to influence the decision to nationalize.¹⁶⁷

2. Interpretations

The European Court of Human Rights ("Court of Human Rights") has interpreted the Protocol as encompassing three distinct rules.¹⁶⁸ First, the Protocol establishes the general principle of peaceful enjoyment of property.¹⁶⁹ The second rule covers deprivations of property, which are subject to the conditions provided for by international law.¹⁷⁰ The third rule covers measures controlling the use of property and recognizes the power of the states to pass laws that the state deems necessary to control the use of property for the general good.¹⁷¹

The Court of Human Rights originally interpreted these three rules as protecting only limited categories of proprietary interests from Member State interferences.¹⁷² The Protocol did not prevent the states from expropriating the property of its own nationals without compensation.¹⁷³ Further, compensation to non-nationals was only mandated in the limited case where an

With regard to Article 10A [right to property], provisions similar to this have been included in Constitutions in countries in which nationalization has taken place. We have precedents, and I do not think that any difficulty can arise in this connection.

Id.

165. *Id.* at 889.

166. *Id.* at 875.

167. *Id.* at 875.

168. *James v. United Kingdom*, 8 E.H.R.R. 123, 139-40 (1986).

169. *Id.*

170. *Id.*

171. *Id.*

172. See Broek, *supra* note 144, 53-90 (discussing interpretations of the Protocol); see also Peukert, *supra* note 144, at 37-75 (discussing development of Court of Human Rights case-law).

173. See Peukert, *supra* note 144, at 54-60 (discussing Court of Human Rights' expropriation jurisprudence).

individual was deprived of ownership of property.¹⁷⁴ If there was no deprivation of ownership, the measure was categorized as a control of use of property.¹⁷⁵ The Court of Human Rights did not review the compatibility of measures controlling the use of property with the Protocol maintaining that the state was the sole judge of whether the public good justified the interference.¹⁷⁶

Under the earlier interpretations of the Protocol, only certain categories of proprietary interests were defined as property as it was protected by the Protocol.¹⁷⁷ The right to be free from expropriating measures passed by one's own state was not protected by the Protocol.¹⁷⁸ Compensation was only mandated for non-nationals.¹⁷⁹ Further, the use rights relating to private property did not fall within the definition of property as it was protected by the Protocol.¹⁸⁰ States were the sole judge of whether measures controlling the use of property were justified.¹⁸¹

The Court of Human Rights' judgment in *Sporrong and Lonnroth v. Sweden* repudiated the framework of the previous interpretations of the Protocol.¹⁸² The Court of Human Rights, in *Sporrong* held that all interferences with private property must be judged in light of the first rule of the Protocol, which enunciates the general principle of the peaceful enjoyment of property.¹⁸³ Under the Court of Human Rights' holding in *Sporrong*, property, as it is protected by the Protocol, is defined by reference to all the proprietary interests of an individual.¹⁸⁴

The Court enunciated a two part test to determine whether

174. *Id.*

175. *Handyside v. United Kingdom*, 1 E.H.R.R. 737 (1976). In *Handyside*, the United Kingdom provided for the forfeiture and destruction of schoolbooks that were deemed dangerous to the general interest. *Id.* at 739. Even though the owner was permanently deprived of the books, the Court of Human Rights deemed the action to be a control of use and thus permitted under the second paragraph of Article 1 of Protocol No. 1. *Id.* at 801.

176. *Id.* at 799 ("[The second paragraph of Article 1] sets the Contracting States as the sole judges of the necessity of an interference.").

177. See Peukert, *supra* note 144, at 42-45 (discussing types of rights that are protected by Protocol).

178. *Id.*

179. *Id.*

180. *Handyside*, 1 E.H.R.R. at 799.

181. *Id.*

182. *Sporrong and Lonnroth v. Sweden*, 52 Eur. Ct. H.R. (ser. A) at 26 (1982).

183. *Id.*

184. *Id.*

interferences with private property are permissible under the Protocol.¹⁸⁵ First, interferences with private property must pursue an aim in the general interest.¹⁸⁶ Second, the measure must balance the requirements of the general interest and the individual's property rights.¹⁸⁷ Interferences with private property must not, with regard to the aim pursued, place a disproportionate burden on the individual.¹⁸⁸ Under the second prong of the test, a state may be required to compensate an individual for interferences with their property.¹⁸⁹ At some point, the burden suffered by the individual becomes so great that, regardless of what the general interest requires, the interference can only be justified upon the payment of compensation.¹⁹⁰

James v. United Kingdom provides a clear illustration of the Court of Human Rights' approach to enforcing the Protocol.¹⁹¹ The Court of Human Rights, in *James*, stated that the Member States have a large amount of discretion in determining whether a measure is in the public interest.¹⁹² The Court of Human Rights will respect the state's determination that the measure pursues an aim in the general interest unless such determination is manifestly without reasonable foundation.¹⁹³ In *James*, the United Kingdom passed the Leasehold Reform Act which gave tenants residing in houses under long-term leases the right to purchase compulsorily the freehold of the property from the landlord.¹⁹⁴ The United Kingdom claimed that the transfer of property was required in the interest of social justice because the existing system has worked unfairly against long-term tenants.¹⁹⁵ While the landlord had provided the property, often it was the tenants who had built improvements at their own expense.¹⁹⁶ The United Kingdom claimed that if justice was to be done between landlords and tenants, the law should not allow the property to revert, free of charge for the improvements, to the land-

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 26.

189. *Id.*

190. *Id.* at 30.

191. *James v. United Kingdom*, 8 E.H.R.R. 123 (1986).

192. *Id.* at 142-43.

193. *Id.*

194. *Id.* at 132-35.

195. *Id.* at 143-45.

196. *Id.*

lord.¹⁹⁷

The Court, in reviewing the justification offered by the U.K., stated that the notion of public interest is necessarily extensive.¹⁹⁸ What economic measures are in the public interest, according to the Court, involves considerations of economic and social issues on which opinions may differ widely.¹⁹⁹ The state, therefore, has a wide measure of discretion and the Court will not substitute its own judgment of whether the measure is in the public interest for that of the state's unless it is manifestly without reasonable foundation.²⁰⁰

The Court of Human Rights accepted, in principle, that measures designed to ensure equitable distributions of economic advantages can be described as being in the public interest.²⁰¹ The fairness of a system of law governing property right between private parties is, according to the Court of Human Rights, a matter of public concern.²⁰² Further, the Court noted that eliminating what are judged as social injustices is widely accepted in modern democratic societies as being in the public interest.²⁰³

Once it was determined that the measure did, in fact, pursue an aim in the general interest, the Court applied the *Sporrong* balancing test.²⁰⁴ According to the Court, the taking of property in the public interest does not strike a fair balance between the public interest and the individual property owner unless it is accompanied by the payment of compensation reasonably related to the value of the property.²⁰⁵ A compulsory transfer of the reversionary interest in the property from the landlord to the tenant would, thus, upset the balance that must be struck unless the landlord was compensated.²⁰⁶ The Leasehold Reform Act required the tenant to pay the landlord for the reversionary interest and, according to the Court, a fair balance

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 144-45.

205. *Id.*

206. *Id.*

had been struck.²⁰⁷

D. *Case Law of the European Court of Justice*

The ECJ, in its 1980 judgment in *Hauer v. Land Rheinland-Pfalz*, considered a claim that Community legislation violated an individual's right to property.²⁰⁸ To date, *Hauer* is the most comprehensive statement of the ECJ's understanding of individual property rights that are protected in the Community legal order.²⁰⁹ In *Hauer*, the Council of the European Communities passed Regulation 1162/76, which prohibited landowners within the Community from planting vine grape varieties on their property and also prohibited the Member States from granting authorization for planting such vines.²¹⁰ Hauer applied to the German authorities for permission to start growing grape vines on her property.²¹¹ When permission was denied, Hauer commenced judicial proceedings claiming that her right to property had been violated by the Community legislation.²¹²

Upon examination of both the constitutional traditions common to Member States and the provisions of the Convention relating to the right to property, Advocate General Capotorti concluded that the three rules of the Protocol reflect the dominant tendencies of Member State constitutional traditions, and should therefore be incorporated into the Community legal order.²¹³ Capotorti determined that even though there was disagreement over whether a right to compensation for expropriation exists under the Protocol, the right should be recognized as part of the property rights norm enforced by the ECJ.²¹⁴ After establishing the content of the Community norm protecting property rights, Capotorti viewed the threshold question as whether the prohibition on planting of vines should be classified as an expropriation, which would entitle Hauer to compensation, or merely as a restriction on the use of property.²¹⁵

207. *Id.*

208. *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42.

209. *Id.*

210. *Id.* at 3745, [1980] 3 C.M.L.R. at 53.

211. *Id.* at 3741, [1980] 3 C.M.L.R. at 44.

212. *Id.*

213. *Id.* at 3760, [1980] 3 C.M.L.R. at 55.

214. *Id.*

215. *Id.* at 3769, [1980] 3 C.M.L.R. at 54.

Capotorti considered several issues relevant to answering this question.²¹⁶ The first factor is whether the measure is a permanent, or merely a temporary, interference with private property.²¹⁷ A permanent interference is a necessary, but not a sufficient, condition for the measure to be considered an expropriation.²¹⁸ The next factor is the diminution in property value caused by the measure in question.²¹⁹ If the property retained an appreciable economic value despite the legislative interference with the property, then the measure could not be considered an expropriation.²²⁰ According to Capotorti, because Mrs. Hauer's land retained an appreciable economic value, and the measure at issue was only a temporary interference, it could not be considered an expropriation.²²¹ Thus, Capotorti analyzed the measure under the rule of the Protocol which permits the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.²²² Because the Protocol speaks of measures that the state deems necessary, the legislature, according to Capotorti, has a broad discretion to determine whether the measure is necessary to meet objectives of the public interest.²²³

The ECJ noted, as did Capotorti, that the second paragraph of the Protocol permits restrictions on the use of property that the State deems are necessary for the protection of the general interest.²²⁴ The ECJ reviewed the substance of the measure to determine whether the restrictions on the right to property were proportionate to the objectives of general interest pursued by the Community.²²⁵ According to the ECJ, the measure, in seeking to promote the common organization of the market in wine, did not entail any undue limitation upon the right to property and, thus, met the proportionality test.²²⁶

The ECJ's opinion in *Hauer* differs in two respects from Ad-

216. *Id.*

217. *Id.* at 3760, [1980] 3 C.M.L.R. at 55.

218. *Id.*

219. *Id.* at 3761, [1980] 3 C.M.L.R. at 56.

220. *Id.*

221. *Id.*

222. *Id.* at 3765, [1980] 3 C.M.L.R. at 57.

223. *Id.*

224. *Id.* at 3746, [1980] 3 C.M.L.R. at 65.

225. *Id.* at 3747, [1980] 3 C.M.L.R. at 66.

226. *Id.* at 3748, [1980] 3 C.M.L.R. at 68.

vocate General Capotorti's opinion. First, the ECJ, unlike Capotorti, did not consider whether the measure amounted to an expropriation of property entitling Hauer to compensation.²²⁷ Second, the ECJ, upon concluding that the measure was classified as a control of use, did not evidence the same level of deference to the legislative judgment that the measure was necessary to promote the general interest.²²⁸ According to the ECJ, measures that interfere with private property will be reviewed to determine if the legislative justification for the measure is reasonable.²²⁹

E. *The Doctrine of Incorporation*

In the United States, the U.S. Supreme Court originally construed the Bill of Rights of the U.S. Constitution as only a limitation on the authority of the federal government.²³⁰ When a state government allegedly violated the rights of its citizens, the aggrieved citizen only had recourse in the provisions of the state constitution.²³¹ The lack of federal constitutional restrictions on relations between state governments and individuals was changed after the enactment of the Fourteenth Amendment.²³² This Amendment, enacted in the wake of the Civil War, applied to the states by its express terms.²³³ Through the Due Process Clause, the Court has applied the substantive limits of the Bill of Rights against the states.²³⁴

227. *Id.* at 3746, [1980] 3 C.M.L.R. at 65.

228. *Id.*

229. *Id.* at 3747, [1980] 3 C.M.L.R. at 67-69.

230. RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW CASES AND NOTES* 359-62 (1989). In 1833, Chief Justice Marshall held that the Bill of Rights did not apply to the states. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243. In *Barron*, the plaintiff claimed that the City of Baltimore had 'taken' his property in violation of the Takings Clause. *Id.* Marshall reasoned that "had the framers . . . intended [the Bill of Rights] to be limitations on the powers of the state governments, they would have . . . expressed that intention . . . in plain and intelligible language." *Id.*

231. ROTUNDA, *supra* note 230, 359-62.

232. *Id.*

233. U.S. CONST. amend. XIV, § 1.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

234. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating First Amendment against states); *see also Chicago, Burlington & Quincy Railroad Co. v. Chi-*

Commentators have argued that the ECJ may be edging toward a similar approach.²³⁵ The ECJ's judge-made bill of rights would become a source for the ECJ to review Member State legislation.²³⁶ If Member State legislation violated individual rights that had been defined by the ECJ but did not otherwise conflict with a specific provision of Community law, the ECJ could review the legislation and in the proper case strike it down.²³⁷

The Court's opinion in *Hubert Wachauf v. Federal Republic of Germany*,²³⁸ foreshadows a willingness to incorporate fundamental rights norms developed by the Court against Member States.²³⁹ The Court, in *Hubert Wachauf*, considered a claim that a Community regulation that assigned production quotas to dairy farmers and the German implementing legislation violated individual property rights.²⁴⁰ The Community regulation made special provisions for tenant farmers who were assigned a quota while leasing their property,²⁴¹ allowing Member States to put the quota at the disposal of a tenant when the lease expires.²⁴² This provision of the Regulation was permissive.²⁴³ The German implementing legislation provided that upon the expiration of the lease, the quota reverted to the lessor.²⁴⁴ Wachauf, a tenant dairy farmer, who was denied use of the quota upon departing leased property, challenged both the Community and the German legislation as violative of his constitutionally protected property rights.²⁴⁵

ago, 166 U.S. 226 (1897) (incorporating Takings Clause against states). The Court, however, did not originally interpret the Fourteenth Amendment as establishing any individuals rights that could be enforced against the state. *Slaughter-House Cases* (Butchers' Benev. Ass'n v. Crescent City Live-Stock Landing and Slaughter-House Co.), 83 U.S. (Wall.) 36 (1872).

235. See Weiler, *supra* note 9, at 1138 (concluding, however, that incorporation is unlikely); see Rutili v. Minister for the Interior, Case 36/75, [1975] E.C.R. 1219, [1976] 1 C.M.L.R. 140 (applying provisions of Convention against Member States).

236. Weiler, *supra* note 9, at 1138.

237. *Id.* at 1130. Thus, the situation would be the same as that in the United States where an individual can go to federal court and claim that state legislation has violated his federally-protected rights. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

238. Case 5/88, [1989] E.C.R. 2609, [1991] 1 C.M.L.R. 328.

239. *Id.*

240. *Id.* at 2615, [1991] 1 C.M.L.R. at 331.

241. *Id.* at 2612, [1991] 1 C.M.L.R. at 328.

242. *Id.* at 2616, [1991] 1 C.M.L.R. at 331.

243. *Id.*

244. *Id.* at 2617, [1991] 1 C.M.L.R. at 331-32.

245. *Id.* at 2614, [1991] 1 C.M.L.R. at 330.

According to Advocate General Francis Jacobs, respect for the right to property, as guaranteed in the Community legal order, binds Member States when they implement Community law.²⁴⁶ Thus, the German legislation, which required the quota to revert to the landlord upon expiration of the lease, may violate the right to property as recognized and protected at the Community level by the ECJ.²⁴⁷ Nonetheless, Jacobs considered that the distribution of rights in the quota between tenants and landlords was left unresolved under the Community legislation.²⁴⁸ According to Jacobs, the Community legislation could be interpreted as granting either the landlord or the tenant a proprietary interest in the quota.²⁴⁹ The German legislation answered the issue of whether or not the tenant has a proprietary right in the quota in the negative.²⁵⁰ The German legislation provided that the tenant's interest in the quota ceases upon the expiration of the lease.²⁵¹ Jacobs, however, argued that, if the tenant had a proprietary interest in the quota under the Community law, then the German legislation that deprived the tenant of that interest may constitute an uncompensated taking of property in breach of the right to property.²⁵² Jacobs, however, did not find that the German legislation violated Wachauf's property rights, because the issue of ownership of the quota was left unresolved by the Community legislation.²⁵³

The ECJ agreed with Jacobs that the requirements of the protection of property rights in the Community legal order are binding on Member States when they implement Community rules.²⁵⁴ According to the ECJ, legislation that has the effect of depriving the lessee of the fruits of his labor without compensation would be incompatible with the right to property protected in the Community legal order.²⁵⁵ The ECJ stated that Germany, in implementing Community legislation, must protect the fruits

246. *Id.* at 2627, [1991] 1 C.M.L.R. at 340.

247. *Id.*

248. *Id.* at 2629, [1991] 1 C.M.L.R. at 341.

249. *Id.*

250. *Id.* at 2612, [1991] 1 C.M.L.R. at 328.

251. *Id.*

252. *Id.* at 2631, [1991] 1 C.M.L.R. at 343.

253. *Id.*

254. *Id.* at 2625, [1991] 1 C.M.L.R. at 349.

255. *Id.*

of the tenant's labor.²⁵⁶ The ECJ, like Jacobs, was not willing to hold that the German legislation violated the tenant's property rights.²⁵⁷

II. *THE RIGHT TO PROPERTY IN THE UNITED STATES: DEMOCRATIC LEGITIMACY (ILLEGITIMACY) AND CONSTITUTIONAL VALUES*

Two competing ideologies have, since the founding of the U.S. Constitution, informed political discourse about, and judicial interpretations of, the constitutional right to property.²⁵⁸ These ideologies, republicanism and liberalism, represent conflicting understandings of the role of private property in defining the relationship between the state and its citizens.²⁵⁹ Broadly stated, in republican thought, a publicly conceived common good is an adequate justification for interfering with private property;²⁶⁰ while in liberal thought, individual rights take precedence.²⁶¹ In the last century, liberalism has been the ascendent jurisprudential value and has overshadowed republicanism,²⁶²

256. *Id.*

257. *Id.* at 2627, [1991] 1 C.M.L.R. at 350.

258. Alexander, *supra* note 3, at 273; Oakes, *supra* note 3, at 583.

259. William Michael Treanor, *Republicanism and Takings Doctrine* (May 27, 1993) (on file with Author). Professor Treanor notes that it is often misleading to think that republicanism and liberalism denote neatly separable and unified categories that adequately describe the complexity of ideological debates concerning property rights. *Id.* at 4; Alexander, *supra* note 3, at 275-77. Alexander argues that historic frameworks which compartmentalize ideologies with respect to property rights into neatly separated conflicting camps such as republicanism and liberalism is flawed because it fails to capture the complexity of thought with respect to property rights. *Id.* at 276. Alexander argues that not only did these two camps not reflect a regimented and ordered whole, but also the two camps represented, at times, similar and often interdependent lines of argument. *Id.* For the purposes of this Note, however, republicanism and liberalism are presented as dialectic traditions representing a unified ideology for purposes of painting broad-stroke differences in ways of thinking about property rights.

260. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694, 699 (1985) ("[T]he sacrifice of individual interests to the greater good of the whole formed the essence of republicanism.").

261. Alexander, *supra* note 3, 274; Frank Michelman, *Tutelary Jurisprudence and Constitutional Property*, in *LIBERTY, PROPERTY AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT* 127, 128 (Ellen Paul & Howard Dickman eds., 1990) (noting that property rights in liberal political thought are seen as a "form of natural right rooted in trans-political reason"). For a discussion of the tradition behind notions of "higher law" in U.S. legal consciousness, see generally EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1928).

262. See Treanor, *supra* note 259, at 27 (noting that since early 20th Century

which has remained a sub-text.²⁶³ The early twentieth century doctrine of substantive economic due process was the Supreme Court's criticized interpretation of individual property rights.²⁶⁴ Trenchant criticisms ultimately toppled the doctrine as the paradigm of liberal jurisprudence by exposing the inescapable political choices supporting the Court's methodology.²⁶⁵ According to these critics, questions of economic policy are matters for political debate and should be decided by legislatures, not courts.²⁶⁶ The insights of this criticism call into question the democratic legitimacy of strong liberal norms protecting individual property rights.²⁶⁷ In the aftermath, attempts aimed at reconstructing appropriate judicial roles in safeguarding individual property rights conclude that jurisprudential norms must be grounded in the values associated with constitutional property rights.²⁶⁸

A. *Liberalism and Republicanism: Competing Constitutional Values*

Liberalism and republicanism can be broadly differentiated by the former's stratification of society into its constitutive parts and the later's focus on community.²⁶⁹ In the liberal vision of

Supreme Court's takings jurisprudence has been animated mostly by liberal assumptions); see also Michelman, *supra* note 6, at 1327 (noting possessive individualism has established first occupancy in U.S. constitutionalism).

263. See Carol M. Rose, *Mahon Reconstructed: Why The Takings Issue Is Still A Muddle*, 57 S. CAL. L. REV. 561, 593 (1984) (noting that republican tradition of civic virtue has not vanished). Rose argues that the republican tradition persists in federal property cases that require the "haves" to treat the "have-nots" more generously. *Id.* (citing *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077-83 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970) (making tenant's obligation to pay rent dependent on landlord's compliance with implied warranty of habitability)); *Green v. Superior Court*, 10 Cal. 3d 616, 622-29, 517 P.2d 1168, 1171-76, 111 Cal. Rptr. 704, 707-12 (recognizing implied warranty of habitability in residential leases). Rose also argues that the republican tradition has informed Supreme Court Takings cases in which citizens are required to sacrifice and bear private losses in the face of a substantially greater public good. *Id.* at 594.

264. Michelman, *supra* note 5, at 1101.

265. Michelman, *supra* note 6, at 1335-37.

266. *Id.*

267. *Id.*

268. Treanor, *supra* note 259, at 1.

269. Lance Banning, *Jeffersonian Ideology Revisited*, 43 WM. & MARY Q. 3, 11-12 (1986). Banning states:

A full blown, modern liberalism . . . posits a society of equal individuals who are motivated principally if not exclusively by their passion or self-interest; it identifies a proper government as one existing to protect these individuals' inherent rights and private pursuits. A fully classical republicanism . . . rea-

property rights, individuals have a pre-political claim of entitlement to their property.²⁷⁰ Protecting the pre-political property rights of individuals is the ends of government.²⁷¹ One of the chief problems in liberal thought is preventing the state from interfering with the rights it is appointed to protect.²⁷² In contrast, the republican vision denies the existence of pre-political individual property rights; all such rights result from political determinations reflected in law.²⁷³ Thus, the popularly determined common good is an adequate justification for subjugating individual property rights.²⁷⁴

1. Liberalism and the Right to Property

Liberalism traces its roots to John Locke²⁷⁵ whose natural

sons from the diverse capacities and characteristics of different social groups, whose members are political by nature. No republicanism will still be classical if it is not concerned with the individual's participation with others in civic decisions, where the needs and powers of others must be taken into account. Liberalism, thus defined, is comfortable with the economic man, with the individual who is intent on maximizing private satisfactions and who needs to do no more in order to serve the public good. Classical republicanism regards this merely economic man as less than fully human. Assuming a certain tension between public good and private desires, it will identify the unrestrained pursuit of purely private interests as incompatible with preservation of a commonwealth.

Id.

270. Michelman, *supra* note 261, at 128. The notion of 'pre-political' property rights was drawn from the writings of John Locke. JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* ch. 5 (*Of Property*); see CORWIN, *supra* note 261 (tracing history of notion of pre-political rights).

271. Michelman, *supra* note 261, at 128.

272. *Id.* ("[In liberal thought] the central problem of the state is to keep it from preying on the rights it is established to protect.").

273. *Id.*

274. Treanor, *supra* note 260, at 699.

275. LOCKE, *supra* note 270, §§ 25-32 (*Of Property*). Locke begins his analysis by postulating humans in a state of nature. *Id.* In this state of nature, the Earth is given to people in common. *Id.* There must be a way to appropriate the things of the Earth before anything can be of beneficial use to anyone. *Id.*

Locke reasons that as part of personhood each individual has the power to labor. *Id.* The natural wants of humankind serve as the natural stimulus to exert this power to labor. *Id.* In the exertion of this power to labor upon things in a state of nature, humans remove 'things' from the state of nature and mix them with their own labor. *Id.* As the labor is the unquestionable property of the laborer, whatever a human mixes with their labor becomes theirs by right. *Id.* These rights are the natural reward for improving things in the state of nature by laboring. *Id.*

Locke further explains the proper foundation of government. *Id.* Before society, individuals enjoyed property rights absolutely in a state of nature. *Id.* As individuals acquired increased stocks of property and property became scarce, individuals needed

law justification for property rights has had a lasting impact on our political discourse.²⁷⁶ Having its roots in natural law, the right to property pre-exists the state and its political operations.²⁷⁷ Constitutions, being creatures of the state, do not create property rights, but instead merely recognize pre-existing rights.²⁷⁸

Locke posits that individuals created the state for the purpose of protecting their pre-political rights to property.²⁷⁹ Beginning with this premise, liberal political thought maintains that the sole justification for the existence of state power, and its chief legitimate ends, is to protect individual property rights and other liberties.²⁸⁰ Accordingly, when the state exercises its power in a manner which violates the pre-political property

protection for the property they acquired. *Id.* As a result, individuals joined by social contract and created government for the purpose of protecting their rights. *Id.* Government is a necessary evil to secure the property rights of its citizens. *Id.*

For Locke, the law of natural reason legitimate the right to property. *Id.* As a philosophic truth, this law of reason is superior to the state. *Id.* The right to property pre-exists government. *Id.* As government was created for the purpose of protecting individual's right to property, the legitimate end of government is to protect the right of property. *Id.*

276. Treanor, *supra* note 259, at 1.

277. *Id.*

278. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

For the written constitution wherever found, was at first regarded as a species of social compact, entered into by sovereign individuals in a state of nature. From this point of view . . . private rights, since they preceded the constitution, gain nothing of authoritativeness from being enumerated in it. These rights are not, in other words fundamental because they find mention in the written instrument; they find mention there because fundamental.

Id. at 247-48; see J.A.C. Grant, *The "Higher Law" Background of Eminent Domain*, 6 WIS. L. REV. 67 (1945) ("[N]atural, inherent, and inalienable rights set forth in these [constitutions] owe nothing to their recognition therein. As expressed by John Adams, 'There are rights antecedent to all earthly government - rights that cannot be repealed or restrained by human laws - rights derived from the great Legislator of the Universe.'"). Grant documents case law in the early 19th century that required compensation for 'takings' of property even though no such provisions were found in the state constitutions. *Id.* at 71-81.

279. LOCKE, *supra* note 270, §§ 123-24 (*Of the Ends of Political Society and Government*). Locke explained that man consented to relinquish his unbridled freedom in a state of nature and to join others in civil society to preserve his property rights. *Id.* Thus, the justification for the state is that individuals interested in self preservation consented to join together and form a state. *Id.*; see Leslie Bender, *The Takings Clause: Principles or Politics*, 34 BUFF. L. REV. 735, 754-64 (1985) (discussing Locke's theory of justification for state).

280. Bender, *supra* note 279, at 756; JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 17 (1991).

rights of individuals, it undermines its legitimacy.²⁸¹

The framers of the U.S. Constitution who were committed to liberalism, particularly James Madison, sought to ensure that democratic government would not undermine its legitimacy.²⁸² Madison believed that in a political system founded on the principle of majority rule, individual property rights would necessarily be at risk.²⁸³ Because individuals are endowed with unequal faculties for acquiring property, unequal distributions of property would be a natural part of the human condition.²⁸⁴ This would result in a division of society into different interests and parties, or factions, with the propertyless, inevitably, in the majority.²⁸⁵

Furthermore, Madison believed that society is entirely fragmentary and is composed of individuals who are motivated principally by self interest.²⁸⁶ Due to the self-interested nature of in-

281. NEDELSKY, *supra* note 280, at 27.

282. *Id.* at 16.

283. *Id.* at 22; THE FEDERALIST NO. 10 (James Madison), reprinted in 10 JAMES MADISON, THE PAPERS OF JAMES MADISON 212 (R. Rutland ed., 1977).

284. NEDELSKY, *supra* note 280, at 29.

285. *Id.* at 39-40.

286. *Id.* at 39-40; see *id.* at 16-66 (discussing Madison's views). Madison thought that the major challenge that faced the Framers in designing the new republic was protecting the right to property. *Id.* at 16. Madison's views were based on the notion that property rights were a natural right of citizens and a fear that in a democratic government factional interest would seek to violate individual's property rights. *Id.* at 17-18.

An important aspect of Madisonian thought was his views on the relationship between property and liberty. *Id.* at 28-30. Liberty, in Madisonian thought, had its roots in natural law. *Id.* at 28. Included in this notion of liberty is the free exercise of man's faculties for acquiring property. *Id.* In order to protect this liberty possession of property must be protected. *Id.* at 30. Thus, for Madison, the protection of faculties to acquire must involve the protection of possession. *Id.*

According to Madison, protecting the free exercise of man's faculties for acquiring property would result in unequal distributions of property. *Id.* at 29. Men inherently have unequal faculties for acquiring property. *Id.* Protecting these unequal faculties for acquiring property would result in unequal distributions of property. *Id.* These unequal distributions are justified because it results from the equal protection of man's unequal faculties for acquiring property. *Id.* Thus, the inequality of distributions of property were part of the natural order in a free society. *Id.*

The next important aspect of Madisonian thought is the significant threat that he thought popular government posed to individual liberty. *Id.* at 25. Unequal distributions of property would inevitably result in a division of society into different interests and parties, or factions. *Id.* at 18. Politics would be characterized by the struggle of these factions to capture the powers of government to use them for their own ends. *Id.* The propertied class would inevitably be in the minority. *Id.* Thus, the controlling power of democratic government would rest with the propertyless majority. *Id.*

dividuals, politics would not be characterized by a pursuit of an ephemeral common good, but instead would be a struggle of factions to capture the powers of government to use them for their own ends.²⁸⁷ Because the propertyless would be in the majority, the controlling power of democratic government would rest with the propertyless majority,²⁸⁸ who, Madison feared, would seek to use government power for redistributive ends.²⁸⁹

One of the central problems was how to keep a popularly responsive government from encroaching upon individual property.²⁹⁰ Judicially enforced property rights became the favored prophylactic that curbed the redistributive tendencies of the majority.²⁹¹ Judicial review erects a barrier between government power and individual property rights that could not be breached.²⁹²

2. Republicanism and the Right to Property

In republican thought, the conception of society was entirely different than the individualistic view which characterized liberal thought.²⁹³ According to republicanism, individuals are

Madison, thus, feared the use of government power by the propertyless majority to interfere with the property rights of the propertied minority. *Id.* According to Madison, if liberty was to survive in popular government, the use of government power by the propertyless majority to interfere with the rights of the propertied minority must be curbed. *Id.*

Madison's solution was to subordinate the political principle of majority rule to the rules of justice which required the protection of property. *Id.* at 16. According to Madison, the rules of justice that required the protection of property stood above the will of the majority. *Id.* at 35-38. This rule of justice, not majority rule, would be the ultimate standard of right and wrong. *Id.* If majority rule violated this rule of justice, the majority could be prevented from implementing its will. *Id.*

287. MADISON, *supra* note 283, at 264; NEDELSKY, *supra* note 280, at 23.

288. NEDELSKY, *supra* note 280, at 5.

289. *Id.* at 36.

290. *Id.* at 16. Nedelsky argues that the Framers' focus on keeping the government from violating individual rights perverted the U.S. system of government. *Id.* at 1. Nedelsky argues that the U.S. system of government has failed to achieve its democratic potential because of the Founders' focus on individual rights. *Id.* For a critique of Nedelsky's views, see Thomas W. Merrill, *Zero-Sum Madison Private Property and the Limits of American Constitutionalism*, 90 MICH L. REV. 1392 (1992).

291. NEDELSKY, *supra* note 280, at 187-99. Chief Justice John Marshall used the power of judicial review to strike down legislative action for the first time in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (invalidating Georgia statute that repealed previous land grant).

292. NEDELSKY, *supra* note 280, at 187-99.

293. NEDELSKY, *supra* note 280, at 98. Nedelsky notes that James Wilson stands out among the Framers as the only one who thought that property was not the main object

social by nature and are inextricably bound with others in political society.²⁹⁴ Thus, society represented an organic whole, instead of representing an amalgamation of individual interests.²⁹⁵ Reasoning from a social view of human nature, it made sense to posit a common good that was primary to, and transcended, individual interests.²⁹⁶

Republican views on private property reflected this focus on society rather than the individual.²⁹⁷ The unmitigated individual pursuit of property was distrusted in republican thought.²⁹⁸ It corrupted the individual because it led to the placing of individual interests before public interests.²⁹⁹ The possession of a certain amount of property, however, was necessary for the individual to participate in the political process.³⁰⁰ If an individual

of government. *Id.* Wilson gave priority to the political liberty of the people. *Id.* He did not fear that the exercise of political liberty would threaten property in the way that Madison thought. *Id.* Wilson thought that a common interest pervaded society and, that, individuals would under the right conditions pursue this common interest. *Id.* Thus, individuals would not, according to Wilson, seek to use government power to violate the rights of other individuals. *Id.*

294. Treanor, *supra* note 259, at 4. Until recently, legal scholars have viewed early U.S. notions of property as entirely liberal in character. *Id.* Recently, scholars have argued that a second school of thought on property rights influenced U.S. political thought. Alexander, *supra* note 3, at 280. This neoclassic republican tradition traced its roots to the writings of Aristotle, Machiavelli, and other sixteenth century humanists in Italy. *Id.* This tradition reached its zenith in U.S. political thought during the colonial period. Treanor, *supra* note 260, at 699 n.18.

295. Treanor, *supra* note 260, at 699.

296. Alexander, *supra* note 3, at 280.

297. Treanor, *supra* note 260, at 699.

298. Treanor, *supra* note 259, at 5. In a letter to Madison, Thomas Jefferson wrote: I am conscious that an equal distribution of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, taking care to let their subdivisions go hand in hand with the natural affections of the human mind. The descent of property of every kind therefore to all the children, to all the brothers and sisters, or other relations in equal degree is a political measure, and a practicable one. Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise. Whenever there is any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live on.

Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *reprinted in* THE PORTABLE THOMAS JEFFERSON 395, 396-97 (M. Peterson ed. 1975).

299. Treanor, *supra* note 259, at 5.

300. *Id.* at 6. Charles Reich has revived this insight and argued for its acceptance in modern understandings of property. Charles Reich, *The New Property*, 73 *YALE L.J.*

had no property, then he was dependent on others for livelihood.³⁰¹ A dependent individual participating in the political process is more likely to serve the interests of those on whom he is dependent rather than serving the interests of the common good.³⁰²

Due to the belief in a transcendent common good, republican thought never accorded the same primacy to individual property rights that characterized liberal ideology.³⁰³ Property rights did not pre-exist the state as was posited by liberal ideology, but instead had their source in the political process.³⁰⁴ Assuming a conflict between individual rights and a politically conceived common good, an individual was expected to sacrifice,³⁰⁵ because individual rights exerted no claim of primacy over the political process.³⁰⁶

B. *The Debate Over Lochner-Era Jurisprudence*

The Supreme Court's substantive economic due process jurisprudence, called Lochner-era jurisprudence after its most well-known case, is the paradigm of liberal jurisprudence in U.S. constitutional law.³⁰⁷ The debate engendered by the Court's jurisprudence calls into question the democratic legitimacy of judicial norms protecting individual property rights that are grounded entirely in liberal values.³⁰⁸ Judicial enforcement of individual property rights strips the majority of its competence

733 (1964). Reich argues that political liberty must have its basis in property. *Id.* at 768-74. The exercise of political rights presupposes that individuals have the means to act independently. *Id.* Possession of property ensures that individuals have the means to act independently by guaranteeing that individuals have the capacity to resist domination by others. *Id.* Reich uses this premise to justify the treatment of government largess as a property right. *Id.* If political liberty is dependent on the possession of property, then individuals should be ensured through government largess the minimal amounts of property they need to remain politically independent. *Id.*

Michelman argues that these were the underpinnings of distributive norms with respect to property. Michelman, *supra* note 262, at 1329. Distributive concerns regarding property are derived from the notion that property should be distributed so that all individuals are ensured enough property to remain independent. *Id.*

301. Michelman, *supra* note 6, at 1329.

302. *Id.*

303. Michelman, *supra* note 261, at 128.

304. *Id.*

305. Alexander, *supra* note 3, at 280.

306. *Id.*

307. Michelman, *supra* note 6, at 1327.

308. *Id.* at 1350.

to implement certain types of decisions of how the economy should be structured.³⁰⁹ The critics of *Lochner*-era jurisprudence argued that the Court struck down legislative attempts to implement economic policy based on its own economic policy preferences, which would be fundamentally illegitimate from the standpoint of democratic theory.³¹⁰ Some scholars have argued that the lesson to be learned³¹¹ from the insights advanced by critics of *Lochner*-era jurisprudence is that judicially enforced property rights may never be anything more than economic policy making from the bench.³¹² Nonetheless, other scholars have argued that courts can reconstruct a proper role in policing economic legislation without undue affront to democratic theory.³¹³

1. *Lochner*-Era Jurisprudence

During the *Lochner*-era, the Court incorporated the entitlement defined at common law as the constitutional definition of property rights.³¹⁴ The Court also aggressively enforced limits

309. *Id.*

310. Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA, 1730-1940*, at 117 (1983). Justice Holmes, who regularly dissented in the Court's economic substantive due process cases, is the most well known advocate of this criticism known as legal realism. EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 74-75 (1973).

311. Kainen, *supra* note, 1, at 87. Modern attempts to revive strong judicial protection for economic rights has been framed in terms of this criticism. *Id.* Revitalization of economic rights protection may depend on answering the criticism that leveled economic substantive due process. *Id.*

312. Robert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 38-44 (1973). Between 1923 and 1937 the concept of judicial supervision of economic legislation was discredited in the minds of the Supreme Court jurists. *Id.* at 38. Thus, the judiciary abdicated the field of reviewing economic legislation. *Id.* Thus, today, under the due process clause, the federal courts still review economic legislation, however, the level of review is so tolerant that no law is likely to violate it. *Id.*; see Gordon, *supra* note 310, at 117-18 (discussing growing awareness of ideological tensions in judicial protection for economic rights).

313. Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1700 (1984) [hereinafter Sunstein I]. Most of the following discussion of the Supreme Court's substantive economic due process jurisprudence is based on the insights of Cass Sunstein. See Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987) [hereinafter Sunstein II] (discussing assumptions underlying *Lochner*-era jurisprudence); see also CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 17-67 [hereinafter SUNSTEIN III] (discussing legal and political developments of *Lochner*-era).

314. Michelman, *supra* note 5, at 1101 ("[T]he Court . . . formalistically adopted, as the unalterable definition of a constitutionally mandated system of property rights, the categories and doctrines of late-nineteenth-century common law.").

on the powers of government to alter existing distributions of common law entitlement.³¹⁵ Hence, the period has been called the era of laissez-faire constitutionalism.³¹⁶

a. Background.

In order to understand the effect of Lochner-era jurisprudence on the early twentieth-century economy, the social, economic, and political landscape of that period must be presented.³¹⁷ During the later part of the nineteenth century, the popular agenda was characterized by a desire for market reform that would correct imbalance in economic power.³¹⁸ During the late 1800's, industrial expansion created sharp economic dislocation.³¹⁹ As businesses became larger and more powerful, employees' power to dictate the terms of their employment diminished.³²⁰ An emerging progressive movement began to push for a more active government role in regulating the economy to control large scale enterprises.³²¹ The popular desire for reform manifested itself in social and economic legislation designed to mitigate the hardships associated with the new economic conditions.³²² This legislation sought to alter existing market conditions, for instance, by imposing safety and health standards in the workplace, establishing minimum wage, and limiting the number of hours that an employer could require an employee to work.³²³

Liberal theorists were suspicious of the reformist movement's remedial legislation.³²⁴ They feared that liberty and property, paramount goals of the state, would never be secure so long as regulation of the economy was left solely to the whim of

315. Sunstein I, *supra* note 313, at 1700.

316. JAMES W. ELY, *THE GUARDIAN OF EVERY OTHER RIGHT* (1992). The Court's jurisprudence came to be known as laissez-faire constitutionalism. Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 293 (1985). The basic notion of laissez faire was that government regulation of the economy was doomed to failure. *Id.*

317. See ELY, *supra* note 316, at 101-06 (discussing social and economic conditions of early 20th century).

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Benedict, *supra* note 316, at 306.

legislative majorities.³²⁵ Liberal fears stemmed from the perception that, unless majoritarian reform was curbed, government power would be used to distribute wealth to one group rather than another solely on the ground that the beneficiaries have used the majoritarian political process to obtain their goals.³²⁶ Instead of being a neutral instrument of the common good, government power would be transformed into an instrument used by majorities to distribute wealth for their own private benefit.³²⁷ According to liberal theorists, liberty and property would not be secure if government powers could be used to benefit some individuals at the expense of others.³²⁸

The *Lochner*-era Supreme Court shared the liberal distrust of majoritarian economic and social reform.³²⁹ According to the Court, if individual property rights were to be secure, economic regulation could not be left solely to the whim of legislative majorities.³³⁰ Majorities could not be trusted to use government power to promote the public good.³³¹ Thus, the Court entertained constitutional challenges to economic reform legislation and reviewed the compatibility of such legislation with individual property rights.³³²

325. *Id.* at 311.

326. *Id.* at 311; Sunstein I, *supra* note 313, at 1689.

327. Benedict, *supra* note 316, at 311-12.

328. *Id.* at 306. Liberal theorist of the late 19th Century saw the willingness to enact interest group legislation as the first step on the road to socialism or communism. *Id.* If government powers could be used in this manner, individuals would constantly seek to use the powers of government to distribute resources to themselves at the expense of other individuals. *Id.*

329. Stephen Siegal, *Understanding the Lochner Era: Lessons From the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 260-63 (1984); Stephen Siegal, *Understanding the Nineteenth Century Contracts Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 105-06 (1986).

330. See Siegal, *supra* note 329, at 260 (noting that *Lochner*-era decisions had deep roots in liberal tradition that was fearful of government domination of society through market intervention).

331. See Sunstein I, *supra* note 313, at 1690-98 (discussing substantive due process as judicial effort to prevent abuse of government power for purely private ends).

332. *Adair v. United States*, 208 U.S. 161 (1908) (invalidating federal legislation forbidding employers to require employees to agree not to join union); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating state legislation forbidding employers to require employees to agree not to join a union); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (invalidating state law regulating gas prices); *Ribnik v. McBride*, 277 U.S. 350 (1928) (invalidating state law regulating employment agencies); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating law restricting entry into ice manufacturing business). The dissents in these cases were often vigorous. See, e.g., *Coppage*, 236 U.S. at 10 (J., Holmes, dissenting).

b. Choosing the Appropriate Baseline

The Court had to determine which types of proprietary interests would be protected as property for purposes of the Fourteenth Amendment.³³³ Property in the constitutional sense was not self-defining, and, thus, a theory of entitlement, or set of distributional rules, was needed to determine which types of legal relations would be constitutionally protected.³³⁴ Without a set of distributional rules, the Court could not determine who was entitled to what.³³⁵ The Court defined constitutionally protected property rights by reference to the interest and entitlement of the individual that would have been protected under the common law rules of property, tort, and contract.³³⁶ Interests that would have been legally protected at common law counted as constitutional property, and interests that would not have been protected did not.³³⁷ For instance, the right of an employer to fire an employee at will, which would have been protected under the common law employment at will doctrine, was an interest that was considered by the Court to be property in the constitutional sense.³³⁸ The Court could then conclude that legislation that denied an employer the right to fire an employee at will interfered with the employer's property rights.³³⁹

Proceeding from this definitional starting point, the Court

333. See Michelman, *supra* note 3, at 1099 (discussing different approaches to defining property in constitutional sense); see Siegal, *supra* note 329, at 75-81 (discussing changing definitions of property during nineteenth century). During the nineteenth century, property as the term was used in the constitutional sense referred to only possession. *Id.* By the end of the nineteenth century, a definition of property that was limited to possession was obsolete. See Siegal, *supra* note 329, at 211-63 (discussing how property came to be defined by value and not possession).

334. See Michelman, *supra* note 3, at 1099 (discussing Court's approach to defining property rights during Lochner-era).

335. See Michelman, *supra* note 3, at 1099-1102 (discussing difficulties in defining property).

336. *Id.* at 1101.

337. *Id.*

338. See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915) (holding that employer's right to fire employee at will is constitutionally protected right).

339. *Id.* at 4. The Court noted:

It was the legal right of the [employer] to . . . discharge the [the employee] . . . as it was the legal right of [the employee] . . . to quit the service in which he was engaged. In all such particulars, the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can justify in a free land.

Id.

used status quo distributions of wealth and entitlement under common law rules as the baseline for constitutional scrutiny of economic legislation.³⁴⁰ Market legislation that altered status quo distributions of entitlement under the common law was subject to the Court's review.³⁴¹ If, however, legislative intervention brought about the same distributional result that would have been obtained under the common law, the watchful eye of the Court was temporarily diverted.³⁴² For example, under the common law, certain harmful uses of property could be enjoined as a nuisance.³⁴³ If legislation controlled or curtailed uses of property that were considered a nuisance at common law, then the legislation achieved a distributional result identical to what would have been obtained under the common law and was, therefore, not constitutionally suspect.³⁴⁴ If, on the other hand, the regulated property use would not have been considered a common law nuisance, the legislation altered the distribution of entitlement that would have been obtained under the common law, and, therefore, would be considered an interference with constitutional protected property rights.³⁴⁵ Because property in the constitutional sense was defined as the rights and interests of an individual that would have been protected under the common law, status quo distributions of common law entitlement formed a baseline that could not be altered legislatively without the Court's approval.³⁴⁶

The Court enforced nearly absolute limits on the power of government to alter existing distributions of wealth under the common law baseline.³⁴⁷ The Court imposed strict limits on the power of government by restricting the category of permissible legislative ends.³⁴⁸ The only legitimate legislative ends, accord-

340. Sunstein II, *supra* note 313, at 874.

341. *Id.*

342. *Id.*

343. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926).

344. *Id.* For a modern Supreme Court case decided under the same assumptions, see *Lucas v. South Carolina Coastal Commission*, ___ U.S. ___, 112 S.Ct. 2886 (1992). In *Lucas*, the Court held that a statute that denied a property owner of all economically viable use of property is a taking entitling the individual to compensation. *Id.* at 2887. If, however, the use of property that was regulated amounted to a common law nuisance, then the state would not be obligated to compensate the individual. *Id.* at 2900.

345. *Village of Euclid*, 272 U.S. at 388.

346. Sunstein II, *supra* note 313, at 874.

347. *Id.* at 877.

348. Sunstein I, *supra* note 313, at 1697.

ing to the Court³⁴⁹, were to achieve goals that furthered the total public interest.³⁵⁰ This seemingly unobtrusive requirement turned out to be a sharp limitation on government power, because the definition of what was in the public interest was not open to political determination.³⁵¹ The Court had its own conception of what was in the public interest regardless of the assertion of the legislature.³⁵² The Court was willing to scrutinize the legislature's justification for market interferences, and if the proffered justification did not comport with the Court's conception of what was in the public good, it would strike down the legislation.³⁵³

Under the Court's conception, altering distributions under the baseline set by the common law was not in the public interest.³⁵⁴ The Court perceived such alterations as an effort to readjust the market in favor of one party to the bargain for no better reason than the intrinsic desirability of treating the favored party better.³⁵⁵ As such, legislation that altered existing patterns of

349. *Lochner v. New York*, 198 U.S. 45 (1905). Legislation that touched the economic rights of individuals was deemed unconstitutional unless such legislation had a direct and substantial relation to a legitimate and appropriate government ends. *Id.* at 57.

350. *Lochner*, 198 U.S. at 45 ("[T]hese powers relate to the health, safety, morals and general welfare of the public."). The Court in *Lochner*, after considering the justifications advanced by the state for the legislation at issue, decided that the legislation was a labor law "pure and simple." *Id.* Regulating the conditions of labor was not within the category of permissible public values. *Id.*

Richard Epstein has argued that the *Lochner* Court gave too much scope to the state's police power. Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 732 (1984). Epstein contends that, under some circumstances, there is no reason to interfere with freedom of contract even for reasons of health, safety or morals. *Id.*

Post-New Deal constitutionalism posits differing limitations on the category of permissible ends depending upon what type of rights are at stake. Compare *Roe v. Wade*, 410 U.S. 113 (evidencing high level of judicial review of legislation that infringes individual privacy) with *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955) (evidencing low level of judicial review of legislation that infringes economic rights). If fundamental civil rights are at stake, such as the right to privacy, the state's interest has to be compelling. *Wade*, 410 U.S. at 119. When economic rights are at stake, the category of permissible ends have been expanded to include almost any state interest. *Williams*, 348 U.S. at 487.

351. Sunstein, *supra* note 313, at 1697.

352. See Sunstein II, *supra* note 313, at 877-80 (discussing Court's normative theory of which types of legislative goals were in public interest).

353. *Id.* at 877.

354. *Id.*

355. *Id.* at 878.

distributions responded, in the Court's view, to purely redistributive ends³⁵⁶ and private interests as opposed to the public good.³⁵⁷ Legislation that altered the common law baseline could not be justified as a measure that promoted the public interest and was, thus, constitutionally impermissible.³⁵⁸

States frequently attempted to justify legislation as remedial measures aimed at correcting unjust conditions under the existing economic order.³⁵⁹ According to the proponents of such remedial measures, existing distributions of wealth were sometimes unjust, and the public good demanded redistributing market power to balance out the scales.³⁶⁰ The Court, however, steadfast in its own conviction of what served the public good, would not accept the legislature's characterization of these measures as serving the public good.³⁶¹

The Court's refusal to accept the public interestedness of remedial legislation was supported by an assumption that common law distributions of entitlement were inherently legitimate.³⁶² By making this assumption the Court was able to view

356. See Benedict, *supra* note 316, at 327-31 (arguing that early twentieth century Court struck down economic measures in which transfer of property from one group to another was plain).

357. See Benedict, *supra* note 316, at 308-09 (noting that economic legislation came to be seen as transfers of wealth from one party to another).

358. Sunstein II, *supra* note 313, at 877.

359. *Coppage v. Kansas*, 236 U.S. 1 (1915). The state in *Coppage* attempted to justify a statute making it unlawful for employers to coerce, require, or influence employees not to join labor unions as follows:

The Kansas statute does not violate the Fourteenth Amendment but seeks further to guarantee and protect the privileges and immunities of citizens of the United States. In harmony with the Fourteenth Amendment, the State of Kansas has said, in effect, that employers must not attempt to abridge the privilege of their employees to affiliate themselves with labor unions. They must not attempt to by coercion to deprive them of their property- their financial interest in the insurance provided for their wives and children by such labor union. The State of Kansas will not fold its hands and sit idly by while employers seek to oppress and coerce their employees into a state of peonage. If all men are to be equal within the law . . . if the laboring man is to be the equal of the corporate officer; if the wage earner is to be the equal of his employer; if the poor man is to be the equal of the rich man; if [the Fourteenth Amendment] is not to be distorted into a rod of oppression, then the law under which this prosecution was based is in furtherance of that amendment and not in derogation thereof.

Id.

360. *Id.*

361. *Id.* at 4.

362. See SUNSTEIN III, *supra* note 313, at 48 ("The status of the common law as part

legislation that aimed at eradicating a perceived injustice in the existing market order as failing to respond to a public good.³⁶³ If the Court did not assume that common law distributions were inherently legitimate and, thus, challengeable as either right or wrong, then legislation that created a new pattern of distributions would not have met the same judicial opposition.³⁶⁴ The Court would have been able to view such legislation as responsive to the public good of remedying an injustice in current market orderings.³⁶⁵ Only by assuming that common law distributions of entitlement were just and legitimate could the Court, without ingenuous motivation, claim that legislative alterations of such distributions did not, and could not, respond to the public good.³⁶⁶

c. What Legitimized the Chosen Baseline?

The assumption that common law distributions were inherently legitimate and just was based on an idealized vision of the free market and the role of common law rules in structuring the market.³⁶⁷ The Court's beliefs about the market structured by common law rules were characteristic of the period called classic individualism.³⁶⁸ The central tenets of classic individualism were

of nature, or as in any case just, helped support the view that the common law should form the baseline from which to measure deviations from neutrality.”).

363. *Id.*

364. See Sunstein II, *supra* note 313, at 880-81 (noting that recognition that common law baseline was not inherently legitimate made it impossible for Court to sustain its methodology).

365. *Id.*

366. *Id.*

367. See Kennedy, *supra* note 44, at 1728-30 (discussing early-20th century views of common law). Legal thought from 1850-1940 has been classified as classical individualism. *Id.* For a discussion of the descriptive assumptions underlying common law methodology during this period, see EDWARD PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE*, 74-77 (1973). Prior to the classical period, the legal community acknowledged the political character of the common law. *Id.* 1725-27; Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 477 (1988). The common law was used during this pre-classical period to implement policy and impose notions of fairness and morality. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 160-73 (1977) (discussing use of contract rules during pre-classic period to achieve commercial fairness). For instance, most individual private relationships were defined by notions of status. Singer, *supra*, at 477. Once an individual occupied a particular status, the law imposed obligations upon the individual. *Id.* In this sense, the law was conceived as regulating the market to achieve specific goals. *Id.*

368. See Kennedy, *supra* note 44, at 1728-30 (discussing era of classic individual-

a number of inter-related normative and descriptive claims concerning the relation of the common law to individual liberty and private market activity.³⁶⁹

During this period, an aura of scientific method was cast about common law adjudication.³⁷⁰ The common law was the science of individual market liberty.³⁷¹ Through deductive rea-

ism); see also Donald H. Gjerdingen, *The Future of Our Past: The Legal Mind and the Legacy of Classic Common - Law Thought*, 68 *IND. L. J.* 743, 745 (1993) (discussing classic common law thought).

369. Kennedy, *supra* note 44, at 1728.

The Classic position can be reduced to three propositions concerning the proper definition of liability. First, the fundamental theory of our political and economic institutions is that there should exist an area of individual autonomy or freedom or liberty within which there is no responsibility at all for effects on others. Second, the meaning of this political and economic theory for private law is that there are only two legitimate sources of liability: fault, meaning intentional or negligent interference with the property or personal rights of another, and contract. Contract adds new duties, and these are enforced as a matter of right. The content of contractual duties is limited by the intent of the parties. The third proposition is that the concepts of fault and free will to contract can generate, through a process of deduction, determinate legal rules defining the boundaries and content of tort and contract duties.

Id.; Gjerdingen, *supra* note 368, at 745. Gjerdingen defines classic common law thought as follows:

In the world of common law liberalism, the status quo is prima facie legitimate and the state has no special role to play. Transactional justice dominates. If achieved through the use of historically correct moves, the status quo and the expectations associated with it reflect the desired state of affairs. Autonomous individuals make bargains with each other, governed by general free market principles tempered by the application of idealized dominant social standards. Each person is assumed to have certain rights which preexist the state and set baseline boundaries. The role of the state is to police individual moves within these boundaries without interfering with the exercise of individual autonomy.

Id.

370. See HORWITZ, *supra* note 367, at 253-66 (discussing assumption during period that legal reasoning was analogous to mathematics); PURCELL, *supra* note 367, at 74. Purcell notes:

Together with a formalistic, deductive concept of legal reasoning, a vague belief in natural law and a rigid theory of precedent became the pervasive assumptions behind American jurisprudence. That predominant legal theory claimed that reasoning proceeded syllogistically from rules and precedents that had been clearly defined historically and logically, through the particular facts of a case, to a clear decision. The function of the judge was to discover analytically the proper rules and precedents involved and to apply them to the case as first premises. Once he had done that, the judge could decide the case with certainty and uniformity.

Id.

371. Kennedy, *supra* note 44, at 1728-29.

soning, common law judges had generated a body of rules that would facilitate the exercise of liberty by market participants.³⁷² Being derived as a matter of scientific method, common law rules were entirely value free and neutral.³⁷³ These rules did not embody value judgements about what type of market activity should be promoted or which types of market participants should be favored.³⁷⁴ Instead, the common law facilitated the free decisions and private initiative of all individuals equally without injecting value judgements into the market.³⁷⁵

The market, structured by neutral common law rules, was the bastion of individual liberty and freedom from government interference.³⁷⁶ The government was not involved in the processes or the workings of the market.³⁷⁷ The market was structured by legal rules, but those rules could not, in any sense, be considered government regulation.³⁷⁸ Common law rules were not regulative because they did not structure the market to achieve economic policy, but instead merely facilitated private market activity.³⁷⁹ The market was regarded as a law-free institution within which all individuals had equal freedom.³⁸⁰

Under this conception, the government was not implicated in the distributional outcomes of the market.³⁸¹ Distribution of wealth in the market was viewed as the natural outcome of purely private activity in a law-free environment.³⁸² In the free market, individuals engaged in competition for the acquisition of wealth, and the common law rules that structured the market did no more than recognize the entitlement to wealth that an individual secured.³⁸³ The body of common law rules had no

372. *See id.* at 1730 (“[T]here was a single individualist moral-political-economic premise from which everything else followed.”).

373. *Id.*

374. Singer, *supra* note 367, at 481-82.

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*; Kennedy, *supra* note 44, at 1746-48.

382. *Id.* at 1746 (“[T]he outcome of economic activity within a common law framework of contract and tort rules mechanically applied would be a natural allocation of resources and distribution of income.”).

383. Singer, *supra* note, 367, at 481 (“Individual autonomy prevailed in the market. Free individuals could choose to bind themselves to create secured expectations.

distributional effects, but recognized pre-existing claims of entitlement to wealth acquired through private initiative.³⁸⁴ While there were some winners and some losers in the market, the outcomes of the market were the natural and just result of the exercise of individual liberty against a background of neutral common law rules that supported the winners in their state of having.³⁸⁵

Given the assumptions concerning the market outcomes under a system of common law rules, it made sense to the Lochner-era Court to use status quo distributions of entitlement under the common law as a baseline that could not be legislatively altered.³⁸⁶ Status quo distributions of entitlement resulted from private initiative in a market characterized by equal freedom and represented a morally defensible and natural state.³⁸⁷ If one was committed to the individual liberty that undergirded the market order, then it was impossible to challenge its outcomes as illegitimate.³⁸⁸ Any disparities in wealth and bargaining power had to be accepted as the natural order of a free society and could not be viewed as unjust.³⁸⁹ Remedial legislation that re-adjusted the market balance restricted individual liberty for no better reason than to benefit the favored group.³⁹⁰ Such

The state would protect and enforce these expressions of autonomy as property rights.”).

384. *Id.*

385. Kennedy, *supra* note 44, at 1746.

386. *Id.* at 1747 (“If one could believe that the common law rules were logically derived from the idea of freedom . . . it made sense to describe the legal order itself as at least neutral, nonpolitical if not really ‘natural.’”).

387. *Id.*

388. *Id.*

389. *Coppage v. Kansas*, 236 U.S. 1, 12 (1915).

390. *Id.* In *Coppage*, the state sought to justify its law on the grounds that “it was a matter of common knowledge that employees are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts for the purchase thereof.” *Id.* at 4. In other words, the public purpose asserted to support the law was to protect the employees from the effects of inequalities of bargaining power. *Id.* The Court rejected the claim, noting:

No doubt, wherever the right of property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances . . . Indeed a little reflection will show that wherever the right of private property and right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in ex-

legislation could not respond to a public purpose, because there simply was no injustice to remedy.³⁹¹ In the name of liberty and property, the Court struck down legislative attempts to readjust existing balances of market power and, thereby, reimposed the natural and just baseline pattern of distributions set by the common law.³⁹²

d. Democratic Legitimacy

During the *Lochner*-era, the Court thwarted much of the popular desire for economic and social reform.³⁹³ By preventing legislative alteration of status quo distribution of entitlement, the *Lochner*-era Court took many of the questions concerning the structure of the nation's economy out of the realm of politics.³⁹⁴ Standards for determining whether particular economic measures responded to the public interest were judicially imposed and, thus, external to majoritarian will and political deliberation.³⁹⁵ Legislative majorities could not decide, according to their own standards of good economic policy, what type of economy was best suited to the public interest; the Court substituted its own conceptions of what was in the public interest for that of legislatures.³⁹⁶

Limiting the competence of legislative majorities to determine what economic policies best promoted the common good was, according to the assumptions under which the Court was operating, entirely principled; the Court acted under a constitutional mandate to protect property rights and its jurisprudence was a justified attempt to preserve a private sphere of individual

change. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Id. at 12. Because inequalities of fortune are legitimate, the only reason the Court could see to restrict the liberty of some was that the restriction of liberty benefited others. *Id.*

391. *Id.*

392. *Id.*

393. Benedict, *supra* note 316, at 293 ("These decisions permitted the Court to frustrate efforts to secure a more just economic order in the United States until the 1930's.").

394. NEDELSKY, *supra* note 280, at 96-99.

395. Sunstein I, *supra* note 313, at 1697.

396. *Id.*

freedom from government over-reaching.³⁹⁷ The free market structured by common law rules represented a purely private sphere because within it all individuals were equally free.³⁹⁸ Aggressive judicial review of economic regulation that sought to reach into, and effectuate distributional changes in, the market place erected a barrier between the government and the private sphere.³⁹⁹ This, according to the *Lochner*-era Court, was principled judicial intervention in the name of individual liberty and property rights.⁴⁰⁰

2. The Criticism of Substantive Economic Due Process

In the mid-1930's the Court abandoned substantive economic due process.⁴⁰¹ Critics charged that the Court's jurisprudence was not principled protection of constitutional rights but

397. Benedict, *supra* note 316, at 305. This has not always been the accepted explanation of the Court's economic substantive due process jurisprudence. *Id.* at 293. Some constitutional historians had argued that the Court's rhetoric about liberty and property was merely a subterfuge designed to conceal other more sinister purposes. *Id.* These scholars argued that the major value of the Court was the protection of the business community against government. See ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* 115-35 (1960) (noting that "for [the Court] the problem was fairly simple: here is the businessman whom any just-minded judge should be honored to defend; and here is the due process clause; why not use it for that benign purpose?"). Revisionist accounts, however, of the Court's economic rights protection in the *Lochner*-era have argued that the Court's jurisprudence was a bone-fide effort to guard a sphere of individual autonomy from government intrusion. Benedict, *supra* note 316, at 298; see Morton Horowitz, *The History of the Public/Private Distinction*, 130 *UNIV. PENN. L. REV.* 1432 (1982) (discussing notion of private sphere as corner-stone of liberal thought). By the early twentieth century, the institution of private property had come to represent, in the U.S. consciousness, the quintessential sphere of individual autonomy. See Frank Michelman, *Possession v. Distribution in the Constitutional Idea of Property*, 72 *IOWA L. REV.* 1318, 1328 (1987) (noting that "[p]roperty, with its long history of naturalistic imagery of clearly demarcated 'closes', was Atlantic legal culture's very model of a private sphere rightfully guarded against human encroachment").

398. Siegal, *supra* note 329, at 259-60. Siegal notes that "[i]n nineteenth-century liberal thought, the two most important mechanisms for establishing and maintaining the proper relation between individual and collective life were limited government and the free market. The market allows individuals to seek their own ends without dominating others." *Id.*

399. *Id.*

400. See Sunstein I, *supra* note 313, at 1697 ("modern social legislation . . . appeared not as an effort to promote a public value, but instead as a raw exercise of political power by the beneficiaries of the legislation."); Benedict, *supra* note 316, at 328-31.

401. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). For a description of why the Court abandoned economic substantive due process, see SUNSTEIN III, *supra* note 313, at 40-67.

instead economic policy making from the bench. Under the weight of this criticism, the Court could no longer sustain its role as overseer of the national economy.⁴⁰² Once the constitutional bulwarks against economic reform were removed, the government began to pursue far reaching regulatory policies.⁴⁰³

a. Legal Realism

The decline of substantive economic due process was, in part, a function of awareness of the internal contradictions in the doctrine's foundations.⁴⁰⁴ The doctrine's central premise, that the common law baseline represents a just and natural distribution of entitlement, was criticized as indefensible by reactionaries to classic legal thought, known as legal realists.⁴⁰⁵ The legal realists are credited for planting the seeds of dissention in the legal community to the Court's jurisprudence.⁴⁰⁶

According to the legal realists, the common law methodology could not be described as a scientific enterprise.⁴⁰⁷ Common law adjudication was not, as classic legal thought maintained, the process of scientifically deducing the rules that would

402. See *West Coast Hotel*, 300 U.S. at 380 (*West Coast* is seen as case that abandoned economic substantive due process). In post-New Deal Constitutionalism, an economic regulation is upheld unless it has no rational relation to a state interest. See, e.g., *Williams v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that 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. The day is gone when this Court uses the Due Process Clause to strike down state laws, because they may be unwise, improvident, or out of harmony with a particular school of thought."). This 'no rational relation test' means that the category of permissible state ends is broadened and the state is accorded deference on the means used to advance those ends. Sunstein I, *supra* note 313, at 1700-03.

403. Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437 (1987).

404. Sunstein I, *supra* note 57, at 1697.

405. See Singer, *supra* note 367, at 475-500 (discussing legal realism); see also PURCELL, *supra* note 367, at 74-93 (discussing legal realism as part of broader skepticism of objectivity which effected developments in philosophy, science and sociology). For primary sources on legal realism, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); John Dewey, *Logical Method and Law*, 10 CORNELL L. REV. 17 (1924); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

406. Singer, *supra* note 367, at 475-500.

407. Cohen, *supra* note 405, at 810.

facilitate individual liberty.⁴⁰⁸ Instead, the formulation of legal rules necessarily required common law judges to make value judgments regarding what types of market activity should be promoted and which market participants should be favored.⁴⁰⁹ Common law rules, instead of representing a body of neutral rules that facilitated private activity, could only be described as the result of judicial value judgments of how the market should be structured and how wealth in the market should be distributed.⁴¹⁰

Legal realists, arguing that common law rules were inescapably evaluative, exposed the role that the government played in the market place.⁴¹¹ Common law judges had defined a body of rules that regulated private activity in the market to achieve and implement economic policy.⁴¹² Common law rules represented a form of government regulation and market intervention no less than economic legislation.⁴¹³ The market was not an institution characterized by individual freedom; *laissez-faire*, according to the legal realists, was an illusion.⁴¹⁴

Existing market distributions of wealth had been created by government intervention in the form of common law rules.⁴¹⁵ The common law could not merely recognize pre-existing claims of entitlement to wealth that were acquired as a result of private initiative in a law-free market.⁴¹⁶ A law-free market and unregu-

408. Dewey, *supra* note 405, at 19.

[T]hese logical systematization of law . . . with their reduction of a multitude of decisions to a few general principles that are logically consistent with one another while it may be an end in itself for a particular student, is clearly in last resort subservient to the economical and effective reaching of decisions in particular cases . . . while the syllogism sets forth the *results* of thinking, it has nothing to do with the *operation* of thinking.

Id.

409. Singer, *supra* note 367, at 483-92.

410. Kennedy, *supra* note 44, at 1731-33.

411. See Singer, *supra* note 367, at 482-96 (discussing in detail how legal realists exposed role of government in market).

412. *Id.*

413. *Id.*

414. See *id.* at 482 ("[A] free market system could not be distinguished in a significant sense from a regulatory system.").

415. SUNSTEIN III, *supra* note 313, at 51 ("What people had was a reflection not of nature or custom, but of government choices. This was always and simply as a matter of fact. Ownership rights were legal creations.").

416. *Id.*

lated private activity did not exist.⁴¹⁷ Instead, the common law system, through the definition of rules, distributed wealth and entitlement in a manner that comported with judicial conceptions of good economic policy.⁴¹⁸ Further, common law rules, once defined, delegated to individuals the power to invoke the aid of the state to secure the wealth to which they were entitled under the common law.⁴¹⁹ The common law distributed to some and denied to others based on economic policy choices.⁴²⁰

b. Baseline No Longer Considered Legitimate

Having exposed the presence of government power in the market, legal realists argued that existing distributions of entitlement between various market actors could not be regarded as inherently legitimate.⁴²¹ The status quo was not a natural order resulting from purely private activity, but, instead, was an entirely contingent order resulting from public policy choices of how wealth should be distributed.⁴²² Because the proper distribution of wealth was debatable, the set of choices that supported the status quo could not be considered necessarily correct.⁴²³ The set of choices supporting the status quo is only one choice

417. Singer, *supra* note 367, at 482.

418. SUNSTEIN III, *supra* note 313, at 51.

419. Cohen, *supra* note 405, at 12. Cohen argues:

But the law of property helps me directly only to exclude others from using the things which it assigns me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law confers on me a power, limited but real, to make him do what I want. The character of property as sovereign power compelling service and obedience may be obscured for us.

Id.; see Hale, *supra* note 405, at 43.

What work we should do and how much we might consume were determined by a process known as freedom of contract. Yet in that process there was more coercion, and government and law played a more significant role, than is generally realized. The owner of . . . food or any other product can insist on other people keeping their hands off his products. Should he insist, the government will back him up with force. The owner of money can likewise insist on other people keeping their hands off his money and the government will likewise back him up with force.

Id.

420. Singer, *supra* note 367, at 477.

421. SUNSTEIN III, *supra* note 313, at 50.

422. *Id.*

423. See *id.* ("The common law could not be regarded as the natural or unchosen baseline. Instead its principles amounted to a controversial regulatory system.").

among other equally plausible policy choices.⁴²⁴ The status quo could, thus, be challenged as the wrong or improper distribution of wealth.⁴²⁵

The Court, evidently aware of these insights, was no longer willing to strike down legislation that altered the baseline established by the status quo as violative of individual property rights.⁴²⁶ The Court accepted that legislative redistribution of wealth from one group to another could respond to the general public good.⁴²⁷ Disparities in existing distributions of wealth were imposed by the government in order to implement judicial conceptions of economic policy.⁴²⁸ The economically strong had benefitted from the system of common law rules at the expense of the economically weak.⁴²⁹ To that extent, the status quo was created by government intervention that implemented unjust public policy because it resulted in such sharp disparities of wealth.⁴³⁰ Legislative alteration of the status quo responded to the general public good of creating a more just distribution of wealth and correcting the results of unjust public policy.⁴³¹ Thus,

424. *See id.* at 51-52 ("[P]roperty, contract and tort rules . . . could not be identified with liberty in an a priori way. Sometimes they disserved liberty.").

425. *Id.*

426. *Id.* at 45-47. *West Coast Hotel v. Parrish* is largely regarded as the case in which the Court abandoned substantive due process. 300 U.S. 379 (1937).

427. SUNSTEIN III, *supra* note 313, at 45-47.

428. *Id.* at 51-52.

429. *Id.*

430. *West Coast Hotel*, 300 U.S. at 381.

431. SUNSTEIN III, *supra* note 313, at 46. Sunstein explains this point by contrasting the Court's opinion in *West Coast* with an earlier opinion, *Adkins v. Childrens Hospital*, which was decided while economic substantive due process was the accepted doctrine. 261 U.S. 525 (1923). In both cases the statute at issue enacted minimum wages for women. SUNSTEIN III, *supra* note 313, at 46. In *Adkins*, the Court noted that

to the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

Adkins, 261 U.S. at 529. In *West Coast* the Court noted that

the exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage . . . casts a direct burden for their support on the community. What these workers lose in wages the taxpayer is called upon to pay . . . the community is not bound to provide what is in effect a subsidy for unconscionable employers.

West Coast Hotel, 300 U.S. at 381. Professor Sunstein observes:

The notion of a subsidy plays a crucial role in both cases. It is hard to make

the Court accepted that redistributive measures could advance the general public good.⁴³² Under this recognition, the Court could no longer sustain aggressive enforcement of individual property rights, and in 1937, the doctrine of substantive economic due process was put to rest.⁴³³

c. *Miller v. Schoene*

Miller v. Schoene illustrates the Court's change in focus.⁴³⁴ In *Miller*, the Court upheld a statute requiring the destruction of cedar trees on the grounds that the measure was necessary to protect the infection of surrounding apple orchards.⁴³⁵ The Court reasoned that the state was put to a choice between the preservation of the property of the owners of cedar trees and that of the owners of apple trees.⁴³⁶ According to the Court, if the state had not acted on behalf of the apple growers by requiring the destruction of the cedar trees, a choice, nonetheless, would have been made.⁴³⁷

The Court's change in focus can be illustrated by entertaining the following assumptions.⁴³⁸ If the state has not acted legislatively, then the common law of nuisance would have resolved the conflicting claims of the apple growers and the cedar tree growers.⁴³⁹ Assuming that a common law judge held that growing of infected cedar trees in the vicinity of apple orchards did

sense of a subsidy without a baseline from which to make a measurement. We do not say that someone who is forced to return stolen property is being forced to subsidize the person from whom the property is stolen. Whether someone is being forced to subsidize someone depends on who has a legitimate claim to the item in question. A theory of rights, explaining who is entitled to what, is thus necessary to distinguish between subsidies from simple duties. When a person is being required to do something that he is justly required to do, he is not being forced to subsidize anyone, but to do what he ought to do. In *Adkins*, the minimum wage law exacted a subsidy to the public from the employer. In *West Coast*, the failure to have a minimum wage law, or put another way government respect for the common law, amounted to a subsidy from the public to the employer. The 'unregulated' common law subsidized 'unconscionable' employers.

SUNSTEIN, *supra* note 313, at 45-46.

432. *West Coast Hotel*, 300 U.S. at 379.

433. *Id.*

434. *Miller v. Schoene*, 276 U.S. 272 (1928).

435. *Id.* at 274.

436. *Id.*

437. *Id.*

438. Sunstein II, *supra* note 313, at 881.

439. *See id.* (discussing implications of *Miller*).

not constituted a nuisance, the court would have distributed an entitlement to the cedar growers to continue growing despite the harmful effect on the apple orchards.⁴⁴⁰ If no legislation had been passed, the state would have chosen, by definition and enforcement of the common law of nuisance, a distribution of entitlement that favors cedar tree growers.⁴⁴¹ The state, however, by enacting the legislation, choose a different distribution of entitlement, one that favors apple tree growers.⁴⁴² Both patterns of distribution are a function of policy choices and state power.⁴⁴³ Given this, the Court was not willing to reimpose the result that would have obtained under the common law of nuisance by striking down the legislation.⁴⁴⁴ There was simply no principle by which the Court could maintain that preservation of the status quo, defined by the common law, would better serve the public good.⁴⁴⁵ Neither pattern of distribution, the one that would result under the common law nor the one that would result under the legislation, was necessarily correct; neither was more consistent with individual property rights.⁴⁴⁶

*C. Professor Sunstein's Proposal: Reconstructing a Proper Role
for Courts*

It is possible to conclude that courts should not review economic legislation in the name of vindicating constitutionally protected property rights.⁴⁴⁷ Judicial enforcement of property rights requires limits on the ability of government to legislatively alter a baseline distribution of wealth.⁴⁴⁸ Because any conceivable distribution of wealth reflects economic policy, there is no independent reason to respect any given distribution as a natural or just order.⁴⁴⁹ The choice between preserving or altering such distributions becomes a question of economic policy and not a question of constitutional law.⁴⁵⁰ Neither choice is correct

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.* at 904.

448. *Id.*

449. *Id.*

450. *Id.*

or more consistent with respect to individual property rights.⁴⁵¹ If a court were to reimpose a given distribution by striking down legislative attempts to alter it, the court could only justify its intervention as an economic policy choice in favor of the reimposed distribution.⁴⁵²

This conclusion, however, would mean the end of judicially enforced property rights.⁴⁵³ Such abandonment is hard to justify in light of specific constitutional texts and long-standing constitutional traditions recognizing the importance of property rights.⁴⁵⁴ Unless the commitment to constitutional courts as the guarantors of specifically defined constitutional rights is qualified, this proves unsatisfactory.⁴⁵⁵

Cass Sunstein proposes an alternative that would both avoid undermining constitutional commitment to property rights and, at the same time, avoid the methodological infirmities inherent in *Lochner*-style analysis.⁴⁵⁶ Sunstein recommends that courts generate a baseline through a theory of justice derived from the animating purpose behind the constitutional commitment to property rights.⁴⁵⁷ For instance, a court may determine that commitment to constitutional property rights was meant to prevent government interferences with the types of property that individuals most closely associate with their independence, such as their home.⁴⁵⁸ Distributions of these types of property would be a baseline that could not be legislatively altered; the legislature could not transfer an individual's home to another.⁴⁵⁹

Or, a court may determine that commitment to constitutional property rights was meant to prevent a system of government market regulation that caused some individuals to be without minimum levels of subsistence.⁴⁶⁰ A pattern of wealth distribution in which all individuals had minimum levels of

451. *Id.*

452. *Id.*

453. *Id.* at 906.

454. *Id.*

455. *Id.*

456. *Id.* at 907.

457. *Id.*

458. Treanor, *supra* note 259, at 28-29.

459. *See id.* (arguing that Takings Clause should be used to protect these types of fundamental interests).

460. Michelman, *supra* note 262, at 1319.

subsistence would be a baseline that could not be altered.⁴⁶¹ Thus, if the existing system of market regulation denied such subsistence to some individuals, the court could mandate alteration of status quo distributions to reimpose the result that would exist under this baseline.⁴⁶² The important point is that the court would not, without independent justification grounded in constitutional values, take status quo distributions wealth as an unalterable baseline.⁴⁶³ Courts would generate a baseline that was derived directly from the Constitution.⁴⁶⁴

If a court were to adopt Sunstein's proposal, enforcement of individual property rights would be a more principled endeavor.⁴⁶⁵ The animating purpose of commitment to constitutional property rights is to preserve a pattern of distributions from government alteration.⁴⁶⁶ If a court generated a baseline that is derived from this animating purpose, there would be independent reason to respect it.⁴⁶⁷ A baseline, so generated, would represent the distribution of property that is most consistent with commitment to individual property rights.⁴⁶⁸ It would not be a mere economic choice between preserving or altering distributions of wealth that are entirely contingent and in no sense natural.⁴⁶⁹ Instead, it would be a choice between preserving or altering a distribution of entitlement that constitutional commitment to property rights was intended to preserve.⁴⁷⁰ Judicial intervention to thwart a political choice to alter this baseline would be a principled effort to preserve distributions that are the just order envisioned by the constitution.⁴⁷¹

III. ANALYSIS OF THE ECJ'S PROPERTY RIGHTS JURISPRUDENCE IN LIGHT OF THE LOCHNER DEBATE

In protecting property rights, the ECJ entertains assump-

461. *Id.*

462. *Id.*

463. Sunstein II, *supra* note 313, at 882.

464. Michelman, *supra* note 5, at 1099.

465. Sunstein II, *supra* note 313, at 907.

466. *Id.* at 913.

467. *Id.* at 912.

468. *Id.* at 913.

469. *Id.*

470. *Id.* at 913.

471. *Id.*

tions analogous to those that supported the U.S. Supreme Court's *Lochner*-era jurisprudence.⁴⁷² In light of possible analogies, however, the ECJ may or may not be subject to the criticisms that undermined *Lochner*-era jurisprudence. Those criticisms were based on democratic theories of institutional competence, which maintained that economic policy making functions should not be transferred from legislative majorities to judicial officers as a matter of constitutional law.⁴⁷³ In the political operations of the European Community there are no legislative majorities on the Community level, only on the Member State level. So, protecting property rights against infringing Community legislation does not implicate democratic principles. If the ECJ, however, begins reviewing Member State legislation using *Lochner*-like assumptions, the ECJ will have usurped the economic policy making role of legislative majorities.⁴⁷⁴ In such circumstances, the ECJ's approach must remain principled, and should reflect Cass Sunstein's proposal for the U.S. Supreme Court.

A. *The Lessons to Be Learned From the Lochner Debate*

Before analyzing the ECJ's property rights jurisprudence, three key elements of the *Lochner* debate that serve as departure points for worthwhile comparison must be established. First, the criticism of the *Lochner*-era jurisprudence was premised on a foundational theory about the proper role of the judiciary in a democracy. Second, critics maintained that the *Lochner*-era Court had deviated sharply from its proper role by preventing legislative majorities from altering a baseline fixed by the status quo. Third, commentators have argued that the lessons to be learned from the *Lochner* debate are that choice of an appropriate baseline is critical if courts are to maintain a principled approach to individual property rights.

1. Foundational Theory

The criticism of *Lochner* was premised on a foundational theory of the proper judicial role when enforcing constitutional

472. See *supra* notes 326-59 and accompanying text (explaining assumptions of *Lochner*-era Supreme Court).

473. See *supra* notes 394-439 and accompanying text (discussing criticisms of *Lochner*).

474. See *supra* notes 230-57 and accompanying text (discussing doctrine of incorporation and its possible application in Community law).

rights in a political system committed to democratic principles. According to this theory, effective constitutionalism in a democratic system of government requires courts to strike a balance between majoritarian will and individual rights. In democratic theory, legislative majorities, as the repositories of sovereignty, are endowed with sole and plenary authority to implement policy choices concerning such matters as the economy. To be sovereign means to answer to no higher authority, except, of course, a constitution. Recognition of constitutional property rights necessarily places limits on the power of legislatures to implement certain types of economic policy decisions. When legislation that responds to majoritarian views of desirable economic policy oversteps the bounds established by judicial norms that protect constitutional property rights, the legislation is struck down and majoritarian will is thwarted. In a constitutional democracy, the judiciary must mediate between a realm of individual rights recognized by the constitution and a realm of legislative authority recognized by principles of democracy.

2. What Was Wrong with *Lochner*?

This foundational theory made it possible for *Lochner*'s critics to argue that the Court had sharply deviated from its proper role and, in so doing, transgressed democratic principles.⁴⁷⁵ The *Lochner*-era Court prevented legislative majorities from altering a baseline set by status quo distributions of wealth. The status quo, however, was not a natural or just order, but instead was an order created as a matter of public policy and government power. Whether the public good was better served by preserving or, instead, altering the status quo baseline dissolved into questions of economic policy. The Court could not determine, as a matter of constitutional law, which choice was more consistent with individual property rights. The critics argued that, by preventing legislative alteration of the status quo, the Court had usurped authority from majoritarian legislatures based on the Court's view that it was desirable to preserve existing distributions of wealth. Instead of mediating between constitutional rights and majority will, the Court, according to these

475. See *supra* notes 394-439 and accompanying text (discussing foundation for critique of *Lochner*-era jurisprudence).

critics, became a self-ordained super legislature that structured the economy to suite its preferences.

3. Lochner's Lessons

Lochner's lesson is that the choice of an appropriate baseline for protecting property rights is critical to sustaining a principled balance between majoritarian will and constitutional rights.⁴⁷⁶ If a court fixes a baseline for protecting property rights by reference to a distribution of entitlement that does not represent a just order, the court would have usurped the role of legislative majorities to make economic policy. Such an approach is inimical to principles of democracy. If, however, the court generates a baseline through a theory of justice derived from the constitution, the court's approach would be more principled. Enforcing limits on legislative authority to alter this baseline preserves a balance between majoritarian will and individual rights. The court would prevent legislative majorities from altering a distribution of wealth that the constitution prohibits the legislature from altering. The court would be mediating between majority will and individual rights which is the proper role of courts in a constitutional democracy.

B. *Can Analogies Be Drawn?*

Before determining whether the ECJ's property rights jurisprudence is subject to the criticisms that undermined Lochner, it is necessary to establish first whether the ECJ's assumptions concerning the appropriate baseline are analogous to those made by the Lochner-era Court.⁴⁷⁷ The criticisms of Lochner were based on the Court's improper choice of baseline, and those criticisms would not be applicable to the ECJ unless it is operating under the same mistaken assumptions. Because the ECJ has only decided a handful of property rights cases, the ECJ's assumptions concerning the appropriate baseline for analysis are not yet clear. The ECJ, in developing its approach to fundamental rights, will be influenced by the jurisprudence of

476. See Sunstein II, *supra* note 313, at 883 (discussing lessons of debate over Lochner).

477. See *supra* notes 208-57 and accompanying text (discussing ECJ property rights jurisprudence).

the Court of Human Rights. Thus, examination of the caselaw of the Court of Human Rights affords a helpful starting point.

1. Use of Baseline by the Court of Human Rights

*James v. United Kingdom*⁴⁷⁸ illustrates the Court of Human Rights' view of the appropriate baseline for decision. In applying the first step of the proportionality test, the Court of Human Rights did not use a baseline set by the status quo. The Leasehold Reform Act altered status quo distributions of wealth between landlords and tenants. The landlord-tenant law that preceded the Leasehold Reform Act entitled the landlord to the reversion in the property. The Leasehold Reform Act transferred the reversionary interest to tenants. The United Kingdom claimed that the public interest justified the transfer of wealth because the existing system of property law worked unfairly against the tenant. The Court of Human Rights stated that it would not second guess the legislative judgment that considerations of justice between landlords and tenants justified altering the status quo unless it was manifestly without reasonable foundation. The Court of Human Rights was unwilling to impose its own judgment of whether the public interest would best be served by maintaining the status quo or by altering it.

The conclusion to be drawn from such deferential posture is that the Court of Human Rights does not assume that the status quo is legitimate. As long as the Court of Human Rights did not assume that the status quo was legitimate, it could not say whether alteration or preservation of the status quo would best serve the public interest. Thus, the state had almost complete discretion to determine that the status quo was, in fact, unjust and in need of alteration.

In applying the second step of the proportionality test, however, the Court of Human Rights did use the status quo as its baseline for decision.⁴⁷⁹ The Court of Human Rights stated that the transfer of the reversion to tenants, which altered the status quo distributions between landlords and tenants, could not be effectuated without compensating landlords. Under the Court

478. See *supra* notes 191-207 (discussing Court of Human Right's judgment in *James*).

479. See *supra* notes 204-07 and accompanying text (discussing Court of Human Rights' application of second part of proportionality test).

of Human Right's approach, the state had almost complete discretion to determine whether the public interest was better served by preserving or, instead, altering the status quo, however, the state could not choose to alter the status quo without compensating the burdened individual.

Interestingly, the Court of Human Rights could have applied the balancing test in a manner that resembled the U.S. Supreme Court's analysis in *Miller v. Schoene*.⁴⁸⁰ *Miller* illustrates the Supreme Court's abandonment of the status quo baseline. In *Miller*, the state had to choose between the conflicting claims of apple growers and cedar tree growers. If the state choose not to enact legislation favoring the apple tree growers, the common law would have resolved the conflicting claims by distributing an entitlement to cedar tree growers to continue growing cedar trees despite the harmful effects on apple trees. The state, through definition and enforcement of common law rules, would have distributed property from one group to another. The state choose, instead, to pass legislation that distributed property from cedar tree growers to apple growers. By choosing either to preserve the status quo set by the common law or to alter it by legislation, the state would have distributed property from one class of property owners to another. The Supreme Court would not say that one choice constituted a taking of property while the other choice did not.

Similarly, in *James*, the United Kingdom had to resolve the conflicting claims of tenants and landlords. There were two possible choices. First, by failing to enact legislation, the United Kingdom could decide to resolve the conflicting claims through application and enforcement of its existing landlord-tenant law. Under existing law, landlords were entitled to the reversion in the property including any improvements made by the tenant. Landlords would have the authority under existing law to call upon the state to remove the tenant at the end of the tenancy, by force if necessary, and the tenant would be required to forfeit any improvements. The state would have distributed property from tenants to landlords. On the other hand, the United Kingdom could have resolved, and did in fact resolve, the conflicting

480. See *supra* notes 227-39 and accompanying text (discussing *Miller* case); see also Sunstein II, *supra* note 313, at 881 (discussing implications of Court's approach in *Miller*).

claims by passing the Leasehold Reform Act which distributed the reversionary interest from landlords to tenants. Either way, the United Kingdom had to make a choice, and either choice would result in a distribution of property from one group to another. According to the Court of Human Rights, only when the United Kingdom altered the status quo was compensation mandatory.

2. Use of Baseline by the ECJ

An important difference between the approach of the Court of Human Rights and the approach of the ECJ concerns the selection of an appropriate baseline.⁴⁸¹ Under the first step of the proportionality test, the Court of Human Rights defers to the legislative judgment that altering the status quo is in the public interest unless that judgment is "manifestly without reasonable foundation." The ECJ, however, will defer to the legislative judgment that altering the status quo is in the public interest only if the ECJ considers that judgment to be reasonable. For instance, in *Hauer*, the property owner, prior to the Community legislation, had the right to grow grapes on her property under German private law relating to property use. The Community legislation altered the status quo baseline set by German private law by prohibiting Ms. Hauer from growing grapes on her property. The ECJ, unlike the Court of Human Rights, was willing to independently assess whether the justification offered by the Community legislature was in the public interest. The ECJ's analysis in *Hauer* reflects the assumption that the status quo distribution of entitlement under the baseline set by Member State property rules is presumptively legitimate.

The ECJ in *Wachauf*⁴⁸² made the same assumptions as the Court of Human Rights in its *James* analysis, which applied the second step of the proportionality test. In *Wachauf* Germany had to choose between the conflicting claims of landlords and tenants to a milk production quota. The ECJ implied that if the Community legislation at issue granted departing tenants a proprietary right in the milk production quota, German legislation that distributed the quota to the lessor of the property would be

481. See *supra* notes 208-57 and accompanying text (discussing ECJ property rights jurisprudence).

482. See *supra* notes 238-57 and accompanying text (discussing ECJ's opinion in *Wachauf*).

an impermissible 'taking' of property. The ECJ required Germany to choose to maintain status quo distributions when faced with a choice between two competing claimants to the same property.

3. Is the ECJ's Jurisprudence Analogous to Lochner-Era Jurisprudence?

Because the ECJ has only decided a few property rights cases, only tentative conclusions can be drawn concerning analogies between the ECJ's jurisprudence and that of the Lochner-era. The ECJ, like the Lochner-era Court, takes status quo distributions of wealth as its baseline for decision. Measures that alter the status quo must be justified according to the ECJ's conception of what is in the public interest. The Supreme Court during the Lochner-era, however, assumed that altering the status quo could never be in the public interest. Under the Court's jurisprudence, legislatures had no competence to alter the status quo. The ECJ, on the other hand, has not had occasion to enunciate the categories of public interests that will justify legislative alterations of existing distributions of wealth. Thus, the categories of public interests that the ECJ accepts will determine how much, or how little, competence legislatures have to alter the status quo to achieve legislatively determined economic policies.

C. Are the Criticisms That Undermined Lochner-Era Jurisprudence Applicable to the ECJ's Jurisprudence?

Having drawn tentative conclusions concerning analogies between the ECJ's and the Lochner-era Court's methodology, it can be determined whether the criticism that undermined Lochner-era jurisprudence is applicable to the ECJ's jurisprudence. The criticism of Lochner was premised on a foundational theory of the proper judicial role in enforcing individual rights against legislative majorities. Lochner's critics charged the Court with violating principles of democracy by usurping the authority of legislative majorities based on its own view of desirable economic policy. Assuming the ECJ began aggressively enforcing limits on the authority of Community legislatures to alter the status quo, the criticisms of Lochner would not be applicable.⁴⁸³ Those crit-

483. See *supra* notes 230-57 and accompanying text (discussing doctrine of incorporation and its possible application in Community law).

icisms would, however, be applicable if the ECJ enforced limits on the authority of the Member States to regulate their national economies.

1. Democratic Deficiency

ECJ enforcement of individual property rights against infringing Community legislation is not subject to criticisms based on democratic principles.⁴⁸⁴ The democratic deficiency in the Community political institutions is a recognized fact. The Community legislative processes are not responsive to majoritarian will.

Given this political reality, arguments based on democratic theory against judicial protection of individual property rights become inverted in the Community context.⁴⁸⁵ Strong judicial protection for individual property rights, ironically, reinforces democracy. The ECJ would be preventing Community legislation from altering status quo distributions of wealth and entitlement under Member State property rules. To the extent that the majoritarian political institutions of the Member States made the economic policy judgments that determine distributions of wealth under their property rules, such distributions are backed by democratic legitimacy. The ECJ would be preserving distributions of wealth that were determined as a matter of majoritarian policy making at the Member State level from alteration by Community legislation that is not popularly responsive. Strong protection for individual property rights against infringing Community legislation does not threaten to thwart majoritarian desire for economic reform. Criticisms of individual property rights protection based on democratic principles would be inapplicable in the Community context.

If, on the other hand, the ECJ remains passive in enforcing individual property rights, Community legislation could, with impunity, alter the economic orders defined at the Member State level. The passive approach to judicial review of economic legislation in the context of the Community turns out to be the greater affront to democratic principles.

The unusual correlation between strong ECJ enforcement of individual rights and democratic principles accounts for the

484. Weiler, *supra* note 9, at 1117.

485. *Id.*

difference in focus between European criticism of the ECJ's individual rights jurisprudence and U.S. criticism of the U.S. Supreme Court's jurisprudence. In the United States critics who are leery of an anti-democratic Court argue for a more passive judicial role in individual rights cases. European critics, leery of a strong anti-democratic court, have focused on the apparent reluctance of the ECJ to take a more aggressive posture in protecting individual rights.

2. Incorporation?

The danger that the ECJ may potentially incorporate its fundamental rights norms against Member States creates a different relationship between principles of democracy and strong judicial protection of individual property rights.⁴⁸⁶ If the ECJ began preventing legislative majorities on the Member State level from altering the status quo, the ECJ would be subject to the criticisms of *Lochner*. The ECJ would be limiting the competence of majoritarian institutions to implement economic policy, and thus the ECJ's approach to protection of property rights must be based on constitutional principle rather than economic policy choices.

Incorporation of rights defined by the ECJ against the Member States is a possible application of the ECJ's supremacy doctrine. The doctrine of supremacy holds that Member State law is invalid if it interferes with Community law. Even though the ECJ derives fundamental rights norms by examining Member State constitutional traditions, those norms, once defined, become a functional Community bill of rights. If the ECJ considers its individual rights norms to be Community law for purposes of the supremacy doctrine, incorporation will be accomplished. Member State law that violates those norms could thus be invalidated by the ECJ under the supremacy doctrine.

Among the rights that the ECJ has protected in its fundamental rights jurisprudence, the right to property is the most likely candidate for incorporation. The ECJ has become the enforcer of a single national economy.⁴⁸⁷ Centralizing economic policy making requires limited economic competence of Mem-

486. See *supra* notes 230-57 and accompanying text (discussing doctrine of incorporation and its possible application in Community law).

487. Weiler, *supra* note 9, at 1108.

ber State authorities. Otherwise, divergent local and regional economic policies could potentially conflict with policies defined on the federal level and, thereby, weaken the foundations of a strong central economy. Judicial enforcement of individual property rights against infringing Member State legislation could be used to limit Member States' competence to implement economic policy (e.g., the *Lochner*-era).

Whether judicial enforcement of individual property rights would serve the ECJ in preserving a single national economy depends on its choice of baseline. If the ECJ choose a baseline set by status quo distributions under Member State property rules, then aggressive enforcement of individual property rights against Member State legislation would not serve the ECJ in enforcing a strong central economy. There would not be a diminution in the level of Member States' regulation of their national economies. The status quo under Member State property rules is, after all, an economic order created by Member State regulation that implements economic policy choices made at the national level. *Laissez-faire* is a myth, and the question is never between government regulation of the economy and no government regulation; the question is always what type of government regulation. Thus, if the ECJ adopted such a baseline, the ECJ would not be motivated to incorporate property rights against Member States.

If, however, the ECJ took as its baseline for decision status quo distributions of entitlement defined by Community legislation, the motivation of the ECJ to incorporate individual property rights against Member States becomes more compelling. If Member States altered status quo distributions by redistributed entitlement enjoyed under a regime of Community legal rules, the effect on Community policy would be potentially substantial. Such redistributions may directly impede the policy goals of the Community legislation under which the individual claims the entitlement.

The ECJ's approach in the *Wachauf* case indicates a willingness on the part of the ECJ to define individual property rights by reference to entitlement enjoyed under Community legal rules. In *Wachauf*, the individual claimed a constitutionally protected property right in a milk production quota defined by Community legislation. The ECJ noted the ambiguity, under the Community legislation establishing the quota, concerning the

distribution of ownership rights in the quota. The German implementing legislation had already settled the issue of ownership rights in the quota. Under the German implementing legislation, the tenant had no ownership rights in the quota. Nonetheless, the ECJ implied that if the Community law had granted the tenant proprietary rights in the quota, then the German implementing legislation, which distributed the quota to the landlord, would have violated the tenant's property rights.

C. *The ECJ Should Adopt Professor Sunstein's Approach*

If the ECJ incorporates its property rights norms against Member States, it must heed Lochner's lesson.⁴⁸⁸ Lochner's lesson is that if a court takes the status quo as the baseline for decision when there is no independent reason for doing so, the court is making a policy choice in favor of preserving the status quo. Enforced limits on Member State regulatory competence in the economic sphere must not be based on the ECJ's view of desirable economic policy. Otherwise, the ECJ would have usurped Member State competence to structure its national economy solely because the ECJ happens to disagree with the Member State's economic policies. Democratic principles reserve such policy matters to legislative majorities. If the ECJ, however, adopts Professor Sunstein's proposal and generates a baseline through a theory of justice derived from the animating values of individual property rights, its approach would be principled.⁴⁸⁹ The generated baseline would represent a distribution of wealth that was mandated by constitutional prohibitions against interference with individual property rights. It would not be a baseline chosen by the ECJ. Instead, it would be a baseline that the ECJ was obligated to preserve as the enforcer of individual rights.

1. No Constitutional Source

Determining the animating values of individual property rights as they are recognized on the Community level would be problematic for the ECJ. In the United States, there is a specific constitutional text with an established history of judicial elucidation.

488. See Sunstein II, *supra* note 313, at 882 (discussing lessons of Lochner).

489. See *supra* notes 440-64 and accompanying text (discussing Sunstein's approach).

tion. Culling consistent values out of conflicting and diverse understandings of the U.S. Constitution is difficult, but at least U.S. courts know where to look. The EC, on the other hand, has no specific text of individual rights. The catalogue of rights is found in judge made law.⁴⁹⁰ The values that animate commitment to individual property rights on the Community level must be found in the ECJ's case-law. Thus, in generating a baseline the ECJ would turn to the values that it has enunciated in its jurisprudence.

2. Conflicting Values

Generating a baseline through a coherent theory of justice that is grounded in the animating values of property rights as defined by the ECJ would appear difficult at first. The individual functions of the social property are the two animating values of property rights enunciated by the ECJ.⁴⁹¹ Taken in their most extreme form, these values are polar opposites. The values associated with the individual element of property posit that individual rights trump community rights to distribute property in accordance with a publicly conceived common good. A baseline generated through a theory of justice grounded in the values associated with the individual function of property would encompass all ownership rights and would effectively prevent any government action that interfered with private property. The values associated with the social element of property, on the other hand, posit unbounded community rights to distribute property entitlement in a manner that reflects community consensus of the proper or desirable economic order. Accordingly, no ownership rights are bounded off from government interferences. A baseline derived from a theory of justice grounded in values associated with the social function of property would be devoid of content. In their most absolute form, both the values associated with the individual and social functions of property cannot be simultaneously recognized. The ECJ, however, must generate a baseline through a theory of justice that gives both values their due course. The social element is not merely a limit

490. See *supra* notes 28-42 and accompanying text (discussing fundamental rights in Community).

491. See *supra* notes 43-52 and accompanying text (discussing European values associated with property).

to the individual element of property, but, instead, both are equally important animating values.

3. The ECJ Should Draw Upon the Expertise of the German Constitutional Court

The ECJ could draw on the wisdom of Member State constitutional courts, such as the German Court, that have experience balancing the two competing values. The German Court does not take, as the baseline for analysis, status quo distributions of wealth under the private law.⁴⁹² The German Court has stated that the property rights of individuals cannot be defined from a source other than the constitution. The constitution, according to the German Court, contains an independent definition of property rights and mandates a baseline grounded in a theory of justice that balances both the individual and the social function of property. The German Court identifies the types of proprietary interests that are fundamental in terms of the individual function of property. Distributions of the types of property rights that are more fundamental form a baseline that cannot be altered by the legislature. The German Court also identifies the types of interests that serve the social function of property. The legislature, in dealing with these types of interests, has more latitude in altering status quo distributions to achieve economic policy.

4. Legislative History of the Human Rights Convention

An approach that would generate a baseline by identifying the types of interests that serve the individual function of property is what appears to have been contemplated by the delegates to the Convention.⁴⁹³ The legislative history of the Protocol supports the conclusion that the delegates originally sought to protect only certain types of proprietary entitlement. The initial opposition to including property rights in the Convention illustrates a conviction of some delegates that there should be no judicially enforceable limits on state power to define and pursue its economic policy. The accord that made it possible to draft a

492. See *supra* notes 117-42 and accompanying text (discussing German Court's approach to property rights).

493. See *supra* notes 149-57 and accompanying text (discussing legislative history of Protocol).

Protocol was founded on concern for protecting certain types of interests and preventing particular kinds of measures abusing those interests. For instance, many of the delegates wanted to ensure protection for personal autonomy against oppressive state conduct such as state seizure of family dwellings. Also, there was agreement that taking the property of non-nationals who did not benefit from the economy of the state and had no say in its economic policy making was unfair. It does not appear from the legislative history that the intent was to constrain the state's economic decision making any further than necessary to protect those interests. In fact, it was generally agreed that the social function of property should be defined in the text and the state's freedom to actualize it explicitly recognized.

5. A Place for Welfare Rights?

A third value that animates property rights as understood by the Member States has not been recognized by the ECJ.⁴⁹⁴ Most European countries recognize the constitutional rights of individuals to be free from the impact of existing economic conditions when those conditions become onerous, so-called affirmative or welfare rights. Recognizing welfare rights directly conflicts with the right of individuals to the entitlement that they currently possess under the standing law, so-called negative rights. Enforcing the rights of some individuals to be free from want necessarily involves distributing to those individuals resources that were previously owned by other individuals. Thus, legislation that enforces the affirmative rights of some necessarily interferes with the negative rights of others. Resolution of the affirmative-negative rights conflict necessarily involves recognizing qualifications on negative rights.

The baseline used by Member State courts in protecting individual rights is generated through a theory of justice that also recognizes the values associated with welfare rights. Such a baseline is a distribution of wealth that represents conditions of social justice, for instance, a distribution of wealth in which all individuals have minimum levels of subsistence. Thus, if legislatures impinge on the possessive rights of some individuals, the welfare rights of other individuals can justify the interference.

494. *See supra* notes 84-88 and accompanying text (discussing concept of welfare rights in German law).

Member State constitutional courts balance the welfare rights of some by recognizing necessary limits on the negative rights of others.

Welfare rights, however, will never become part of the constitutional values associated with property rights as they are protected on the Community level. The values associated with property rights as they are protected on the Community level are the values that the ECJ has recognized through its jurisprudence.⁴⁹⁵ Welfare rights are generally regarded as not judicially enforceable. Welfare rights emanate from specific constitutional texts and are enforced by legislatures. The ECJ will not recognize the values associated with welfare rights through its jurisprudence because it will never have occasion to enforce welfare rights.

Thus, if the ECJ takes over the role of primary enforcer of individual property rights within the Community, Member State constitutional practice with respect to property rights will likely be altered. Member State legislative measures that violated an individual's negative property rights could not be defended in terms of enforcing an equally important constitutional value, namely the affirmative rights of the beneficiaries of the measure. Welfare rights will simply not be part of the animating values associated with property rights defined at the Community level.

CONCLUSION

In order to preserve the identity of the Member States' economic order, the ECJ must not entertain the possibility of incorporating property rights defined at the Community level against national legislation. The existing Member State economic order preserves a well-defined balance between social justice and possessive rights. If the ECJ became the primary enforcer of individual rights, its definition of property rights would be enforced Community-wide at the expense of Member State autonomy in regulating their national economies. This development would constitute one more unwelcome step in the continuing process whereby national and local identities are being supplanted by an overshadowing federal identity through judicial fiat.

495. See *supra* note 31-42 and accompanying text (discussing fundamental rights in Community).