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Fundamental Property Rights

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> [T]he dichotomy between personal liberties and property rights is a false one.[1]

In the last decade, the Supreme Court's Takings Clause[2] jurisprudence has experienced something of a renaissance.[3] In a series of cases, the Supreme Court has significantly broadened the scope of the Takings Clause, particularly with respect to so-called "regulatory" takings.[4] This trend is consistent with the writings of a number of scholars who have argued that property rights should be deemed no less important than liberty rights.[5] There nonetheless remains a significant area of contemporary constitutional law in which property interests have not enjoyed equal treatment with liberty interests—an area in which property rights have been relegated to the role of a "poor relation."

The Supreme Court's modern substantive due process jurisprudence, which protects "fundamental" liberty interests from governmental abridgment absent a "compelling" governmental interest,[6] has never been formally extended to encompass "fundamental" property rights.[7] One could posit a number of rea-

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1. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

2. U.S. CONST. amend. V.

3. The Supreme Court has put the matter quite plainly:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

4. *See id.* at 391-92; Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-31 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

5. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 3-9, 133-34 (1992); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 25-30 (1985); 3 FRIEDRICH A. HAYEK, *The Political Order of a Free People*, *in* LAW, LEGISLATION, AND LIBERTY 98, 110-11 (1977); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 725-30 (1984); Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 332-33 (1996). *But cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-5, at 603 (2d ed. 1988) (arguing that the contemporary Supreme Court's protection of property rights under the Takings Clause "borders on fetishism").

6. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499-500 (1977); Roe v. Wade, 410 U.S. 113, 163 (1973); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

7. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 223 (1985) (assuming for the sake of decision the existence of a property interest in being a medical student and suggesting that arbitrary or irrational abridgment of that property interest by the state would violate substantive due process);

sons for this state of affairs. The most obvious explanation would be that property rights are simply less important than liberty interests and therefore are never "fundamental."[8] However, the Supreme Court has never suggested that this is so, and, if it were, the Court's most recent Takings Clause decisions would not make overall doctrinal sense.[9]

Another explanation would be that the constitutional provisions that specifically protect property interests, such as the Takings and Contracts Clauses, provide comprehensive protection of all property interests. But this is not the case.[10] For example, neither the Takings Clause nor the Contracts Clause protects against tort reform legislation that limits compensatory damages, because such legislation affects property interests only prospectively. Nevertheless, plaintiffs with tort claims arising after the effective date of such legislation have lost the ability to recover fully for injuries to often important—sometimes "fundamental"—property interests.[11] Thus, substantive due process protection for property interests is far from superfluous, notwithstanding the existence of other preexisting rights (such as those conferred by the Takings and Contracts Clauses) that protect property interests in limited circumstances.[12]

Indeed, substantive due process protections *should* reach property interests. If economic rights are not "poor relations" of civil liberties, why should substantive due process protect the latter and not the former? Furthermore, some property interests are plainly "fundamental": a person's interest in bodily integrity[13]

Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199 (1979) (per curiam) (holding that in the absence of a fundamental property or liberty interest, a state need only act rationally to satisfy the requirements of substantive due process); *cf.* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1410-14 (9th Cir. 1989) (holding that substantive due process protects property interests, whether or not "fundamental," from arbitrary government action), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

8. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting) (arguing that property rights—unlike liberty interests—are fungible, and therefore postdeprivation process is sufficient to meet the requirements of procedural due process); *cf.* Thibodeaux v. Bordelon, 740 F.2d 329, 336-39 (5th Cir. 1984) (rejecting the argument that liberty interests are inherently less commensurable as a class than property interests).

9. *See* Dolan v. City of Tigard, 512 U.S. 374, 388-96 (1994) (holding that zoning and planning restrictions on landowner's development of commercial property constitute a taking); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1020-31 (1992) (holding that state law prohibiting development of shoreline real estate may constitute a taking).

10. *See infra* notes 328-34 and accompanying text.

11. *See* JAMES MADISON, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 266-68 (Robert A. Rutland et al. eds., 1983).

12. *Cf.* Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that when a specific constitutional right provides an avenue of relief, the federal courts need not provide additional substantive due process protection for that interest).

13. *See* Jacobson v. Massachusetts, 197 U.S. 11, 26, 29-31, 37-39 (1905); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451 (5th Cir.) (en banc), *cert. denied*, 115 S. Ct. 70 (1994); Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 503-09 (Ct. App. 1988), *rev'd*, 793 P.2d 479 (1990); *cf.* United States v. Lanier, 73 F.3d 1380, 1387-89 (6th Cir.) (en banc) (rejecting the proposition that substantive due process protects a citizen's bodily integrity from sexual assaults by state actors), *cert. granted*, 116 S. Ct. 2522 (1996).

or in her reputation[14] seems no less important or compelling than her interest in freedom of speech. Nonetheless, the Supreme Court has accorded strong protection to even the most marginal forms of social protest while refusing to afford more than minimal constitutional protection to reputation.[15] Under existing law, substantive due process fully protects a citizen's liberty interest in engaging in political expression but affords substantially less protection to her property interest in reputation or bodily integrity.[16]

Judicial protection of property rights under the doctrine of substantive due process should not differ in kind or scope from the protection of liberty interests. The outcome of a particular case should not be predetermined simply because property, rather than liberty, is at issue in a particular case.[17] Both interests, together with "life," appear in the Due Process Clauses of the Fifth and Fourteenth Amendments; they enjoy equal dignity as a textual matter and therefore also deserve equal dignity in the scope of their application.[18]

At present, the status of fundamental property rights is an open question. Most federal courts have recognized that government may not arbitrarily or irrationally abridge a nonfundamental property interest;[19] however, whether fundamental property interests qualify for a higher degree of substantive due process protection is unclear.

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14. As the Bard from Avon explained almost 400 years ago:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.

WILLIAM SHAKESPEARE, OTHELLO, act 3, sc. 3, lines 155-61 (A.L. Rowse ed., 1978).

15. *Compare* Siegert v. Gilley, 500 U.S. 226, 233-35 (1991) (refusing to recognize a constitutionally protected interest in reputation) *and* Paul v. Davis, 424 U.S. 693, 710-11 (1976) (same) *with* Texas v. Johnson, 491 U.S. 397, 414-17 (1989) (holding that the First Amendment protects flag burning) *and* Cohen v. California, 403 U.S. 15, 22-23 (1971) (holding that the First Amendment precluded California state authorities from prosecuting Mr. Cohen for wearing a jacket emblazoned with the words "Fuck the Draft" in a public courthouse). Of course, the Supreme Court's protection of fringe speech activities serves larger free speech values. *See* Ronald J. Krotoszynski, Jr., Cohen v. California: *"Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1253 (1996). Nevertheless, it seems self-evident that a citizen's interest in her property rights may be of a higher order than her interest in civil liberties. *See* Alex Kozinski, *Foreword*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY xi, xvii (James A. Dorn & Henry G. Manne eds., 1987).

16. *See, e.g.*, *Siegert*, 500 U.S. at 233-35; *Lanier*, 73 F.3d at 1387-89.

17. This is certainly true in the area of procedural due process. Once the existence of a property or liberty right is established, the process rights that the state must respect are generally not a function of whether property or liberty is at issue. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). *But cf.* Ingraham v. Wright, 430 U.S. 651, 701-03 (1977) (Stevens, J., dissenting) (arguing that property interests deserve less procedural protection than liberty interests).

18. *See infra* Part ID; *see also* William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 453 (1977) (arguing that courts should afford property interests equal treatment with liberty interests for purposes of applying the Due Process Clause).

19. *See infra* Parts IC2-5.

In the modern era,[20] the Supreme Court has not addressed whether "fundamental" property rights even exist. However, a growing number of lower federal courts have taken up this issue, with widely varying results.[21] In addition, at least one Supreme Court Justice has suggested in a concurring opinion that if substantive due process protects property rights at all, it should only protect some property rights—those that could reasonably be deemed "fundamental."[22]

Significantly, the Supreme Court *has*—albeit not recently—spoken to the issue of "fundamental" property rights as an aspect of its substantive due process jurisprudence. In *Truax v. Corrigan*[23] in 1921, it held that the states have an affirmative obligation to recognize and protect certain "fundamental" property interests from abridgment.[24] The Court has cited *Truax* favorably twice in the intervening seven decades,[25] but has never spoken directly to the continu-

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20. By this I mean the post-New Deal or the "post-*Lochner*" era. Substantive due process made its big comeback almost 30 years ago in Griswold v. Connecticut, 381 U.S. 479 (1965) (plurality opinion), a case in which the Supreme Court held that citizens enjoy a "fundamental" liberty interest in deciding whether to beget children. The plurality opinion relied on two *Lochner*-era cases, Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), to support its reasoning that a free-standing and textually nebulous right of privacy exists under the Due Process Clause of the Fourteenth Amendment. *See* Ronald J. Krotoszynski, Jr., Note, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398, 1434-40 (arguing that the Supreme Court's protection of privacy through traditions of liberty has given way to vindication of majoritarian moral choices).

In a larger sense, substantive due process never really left the scene. Since Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931), the Supreme Court has not hesitated to rely upon the Due Process Clause to "incorporate" discrete provisions of the Bill of Rights against the states. *See* David P. Currie, *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930-1941*, 1987 DUKE L.J. 800, 809-10; *see also* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 900-02 (1994) (describing the Court's process of incorporating various provisions of the Bill of Rights). If one deems this "substantive" due process—and one would be hard pressed to characterize the rights at issue as implicating "procedural" due process in any meaningful way—the Due Process Clause has served as a font of "substantive" rights for the entire twentieth century. *See generally* Albright v. Oliver, 510 U.S. 266, 275-76 (1994) (Scalia, J., concurring) (endorsing the use of substantive due process as the means of incorporating certain provisions of the Bill of Rights against state governments); Zinermon v. Burch, 494 U.S. 113, 125-28 (1990) (describing the process of incorporation).

21. *Compare* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1409-10 (9th Cir. 1989) (affirming dismissal of plaintiffs' Takings Clause claim but holding that substantive due process protects nonfundamental property interests), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc) *and* Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322, 329 (8th Cir. 1986) (same) *with* Local 342, Long Island Pub. Serv. Employees v. Town Bd., 31 F.3d 1191, 1196-97 (2d Cir. 1994) (holding that substantive due process does not protect nonfundamental property rights) *and* Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990) (same).

22. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 228-30 (1985) (Powell, J., concurring).

23. 257 U.S. 312 (1921).

24. *Id.* at 328-30. Of course, one could question whether the specific property interest at issue in *Truax*—the ability to operate a restaurant free of labor picketers—really was "fundamental." *See infra* notes 190-93 and accompanying text.

25. *See* NAACP v. Gallion, 368 U.S. 16, 16-17 (1961) (per curiam); Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 111 (1928).

ing validity of *Truax*'s central holding: that states do not enjoy unlimited discretion to create or abolish property interests as they think best.

Regardless of how one views the wisdom of substantive due process as a jurisprudential matter,[26] one must acknowledge that the contemporary Supreme Court, much like its predecessors earlier this century,[27] is willing to limit the states' freedom of action with respect to certain "fundamental" liberty interests.[28] In light of this doctrinal commitment, I argue that the federal courts cannot logically refuse to recognize the existence of "fundamental" property rights. Fundamental property rights, no less than fundamental liberty rights, merit judicial protection from federal or state legislation that would unduly burden their enjoyment. Moreover, I posit that a number of property interests should be deemed "fundamental" in light of their importance in contemporary society and their long-standing recognition in Anglo-American law.[29] In addition, substantive due process should offer some modest protection to nonfundamental property interests. As with nonfundamental liberty interests, the substantive aspect of the Due Process Clause should be construed to prohibit utterly irrational or arbitrary state behavior that abridges or burdens any cognizable property interest.[30]

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26. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY 3-5 (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA 28-32, 141-45 (1990); JOHN HART ELY, DEMOCRACY AND DISTRUST 43-72 (1980); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7-9 (1971); John Hart Ely, *On the Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 944 (1973).

27. *See* Lochner v. New York, 198 U.S. 45, 53-58 (1905); *see also Truax*, 257 U.S. at 327-30.

28. *See* Romer v. Evans, 116 S. Ct. 1620 (1996) (demonstrating the current Supreme Court's willingness to short-circuit majoritarian decisionmaking processes in order to safeguard higher-order constitutional values even when such values are not enumerated in specific constitutional text). Moreover, the Supreme Court seemingly has no intention of abandoning its fundamental liberty rights jurisprudence anytime soon. *See* Planned Parenthood v. Casey, 505 U.S. 833, 873-75 (1992) (plurality opinion) (holding that only regulations placing an undue burden on fundamental liberty rights violate the Due Process Clause). Even Chief Justice Rehnquist, a conservative's conservative, has eaten of the forbidden fruit of substantive due process. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (Rehnquist, C.J.) (recognizing a fundamental right to make decisions concerning medical treatment). The Supreme Court might once again—and arguably should—elevate fundamental liberty interests over state law when it reviews Quill v. Vacco, 80 F.3d 716 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996), and Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir.) (en banc), *cert. granted sub nom.* Washington v. Glucksburg, 117 S. Ct. 37 (1996), both of which held that substantive due process prohibits a state from criminalizing physician-assisted suicide (although *Quill* did so by coupling a substantive due process right with the Equal Protection Clause). Such a holding in these cases would represent a reasonable extension of *Cruzan*. *But cf.* Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1146 (1997) (arguing that physician-assisted suicide should not be deemed a "fundamental right" and suggesting that even if the Supreme Court concludes that it is, the Court should nonetheless "reject the constitutional challenge" because of "institutional reasons connected with the limited place of the Supreme Court in American government").

29. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937). Reputation provides an excellent example of such a property interest. *See* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (recognizing that the right to one's reputation is "at root of any decent system of ordered liberty"); *see also* Albright v. Oliver, 510 U.S. 266, 283-84 (1994) (Kennedy, J., concurring) (acknowledging the constitutional importance of certain interests, including reputation, that have long been protected under the common law).

30. *See infra* notes 406-38 and accompanying text.

In Part I, this article considers whether property rights should be accorded substantive due process protection by revisiting *Truax* and examining broadly the federal courts' approach to according property rights substantive due process protection. Part II then applies the theory of substantive due process set forth in Part I to reputation, which arguably constitutes a fundamental property right.[31] Part III raises and responds to some of the difficulties that might arise from the recognition of fundamental property rights, including the practical difficulties associated with identifying such rights. Finally, in Part IV, this article analyzes the Supreme Court's most recent pronouncement on the scope of substantive due process, which suggests that a majority of the Justices may be prepared to broaden the scope of the doctrine significantly. I conclude that the Supreme Court's current liberty-based substantive due process doctrine should be extended to fully protect fundamental property rights and to protect nonfundamental property interests from utterly arbitrary or irrational government action.

I. PROPERTY RIGHTS: TOWARD A COHERENT DOCTRINE OF SUBSTANTIVE DUE PROCESS

Despite a rich and well-developed jurisprudence interpreting the Takings Clause,[32] plaintiffs who wish to assert that the deprivation of a particular property interest violates substantive due process have had difficulty getting the contemporary Supreme Court's attention. The Court's substantive due process

31. Ultimately, if one accepts the argument that some property interests are fundamental, the particular designation of an interest as "property" or "liberty" will be far less important to selecting the appropriate standard of judicial review than properly assessing the importance of the particular interest—be it property or liberty. Current substantive due process doctrine requires that an interest be deemed a "liberty" to trigger strict scrutiny review. Accordingly, the Supreme Court strains to expand the concept of liberty to encompass virtually every important personal interest, even if the interest could more logically be classed "property" based on its nature or history. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 714-23, 729-35 (1976) (Brennan, J., dissenting) (characterizing reputation as solely a liberty interest); *cf.* Wisconsin v. Constantineau, 400 U.S. 433 (1971) (holding that due process protects reputation without specifying whether reputation constitutes a liberty or property interest). Bodily integrity provides a good example of this phenomenon. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 846, 851-53, 857 (1992) (plurality opinion) ("The controlling word in the case before us is liberty."); *id.* at 915 (Stevens, J., concurring in part and dissenting in part) (characterizing a woman's interest in bodily integrity as a "liberty" interest); Washington v. Harper, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part and dissenting in part) ("Every violation of a person's bodily integrity is an invasion of his or her liberty."); Roe v. Wade, 410 U.S. 113, 152-54 (1973) (characterizing interest in terminating a pregnancy as a "liberty" interest). Restrictions on one's movement constitute a liberty interest, but a person's interest in her physical body is more akin to a property interest. Hence, one finds workers' compensation schemes that set an economic value on the loss of a finger or a toe. *See generally* Michelle B. Bray, Note, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209 (1990).

32. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

jurisprudence reflects an almost exclusive focus on fundamental liberty rights and has largely ignored the existence of fundamental property interests.

It was not always so. At the same time that the Supreme Court was first establishing its liberty/privacy jurisprudence as an aspect of substantive due process, it also protected fundamental property interests from undue governmental burdens. In the case of *Truax* v. *Corrigan*, the Supreme Court held that states had an obligation to recognize and protect certain "fundamental" property interests.[33] In order to sort out the current confusion regarding the scope of substantive due process protection of property interests, one must go back to the roots of substantive due process: the decisions of the White and (especially) Taft Courts.[34]

Having established a historical baseline, this Part will then proceed to examine the contemporary efforts of the Supreme Court and federal appellate courts to fix the proper role (if any) of property in substantive due process analysis. This exercise will establish that *Truax* represents a coherent theory of substantive due process even if the *Truax* Court's decision to apply the theory on the facts presented in the case remains dubious.

A. BACK TO THE FUTURE?: *TRUAX V. CORRIGAN*

In *Truax*, a five-Justice majority held that an Arizona statute prohibiting the issuance of injunctions in labor disputes violated the due process rights of a restaurant owner named Truax.[35] The case easily represents the high-water mark of substantive due process protection for property rights. Although *Truax* presents a defensible theory of substantive due process, the facts of the case do not warrant its application.

In April 1916, the unionized cooks and waiters working at Truax's restaurant went on strike, complaining that the owners were not paying fair wages. Incident to the strike, the employees picketed the restaurant, urging the general public not to patronize the establishment. The strike was highly effective, and the restaurant's receipts fell precipitously. In order to avoid further losses, Truax attempted to obtain an injunction against the picketing.[36]

Three years earlier, the Arizona legislature had adopted a statute, section 1464, that prohibited the Arizona state courts from issuing injunctions in labor disputes "unless necessary to prevent irreparable injury to property or to a

33. *Truax*, 257 U.S. at 327-30.

34. *See* David P. Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 DUKE L.J. 65, 65-76 (describing the origins of due process protection in the shift between the White and Taft Courts); *see also* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 507-16 (1987); Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 269-83.

35. *Truax*, 257 U.S. at 320.

36. *Id.* at 321-22.

property right."[37] The exception to the general prohibition was further qualified by a requirement that "no [other] adequate remedy at law" be available to protect the property interest at issue.[38] Section 1464 also authorized peaceful picketing in labor disputes.[39]

Truax claimed that the former employees not only picketed the restaurant and libelled him,[40] but that they also threatened patrons and nonunion workers with violence.[41] Based on these allegations, the Supreme Court concluded that even "[v]iolence could not have been more effective" in destroying the restaurant's viability.[42]

Truax pressed two claims before the Supreme Court. First, he alleged that his business constituted a property interest and that Arizona law had failed to protect adequately that interest.[43] Alternatively, he argued that section 1464 denied him and all other similarly situated persons equal protection of the laws by withholding the injunctive relief that was otherwise available to citizens seeking injunctions in nonlabor disputes.[44]

The Supreme Court began its due process analysis by observing that "[p]laintiffs' business is a property right."[45] Moreover, it explained that "[a] law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and can not be held valid under the Fourteenth Amendment."[46] In a sweeping opinion, the majority went on to hold that Arizona had a constitutional obligation to protect Truax's property interest in his business. In this case, the state could not constitutionally refuse injunctive relief to business owners in labor disputes.[47]

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37. ARIZ. REV. STAT. ANN. § 1464 (1913); *see Truax*, 257 U.S. at 322.
38. § 1464; *Truax*, 257 U.S. at 322.
39. *See* § 1464.
40. *Truax*, 257 U.S. at 321, 327-28.
41. *Id.* at 325-26.
42. *Id.* at 328.
43. *Id.* at 322.
44. *Id.*
45. *Id.* at 327 (citation omitted).
46. *Id.* at 328.
47. *Id.* at 328-30. Indeed, the Court further required the state to protect such property interests from *private* abridgment as well. *Id.*; *see also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 876-78 (1986) (explaining, in the context of *Truax*, that the right to property has little value without protection from third parties). The recognition of fundamental property rights does not necessarily impose an open-ended affirmative duty on state governments to protect property interests from private abridgment. Rather, *Truax*'s requirement that the state provide adequate civil remedies to protect fundamental property interests may be conceptualized as a negative right: the right to be free from arbitrary or irrational limitations on the state's recognition of one's property interests. Thus, one could think of the obligation to provide adequate legal redress as necessary to avoid a violation of due process, just as courts order state governments to provide clean and safe prisons for inmates and adequate patient care in state-run mental institutions. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Wyatt v. Stickney, 344 F. Supp. 373 & 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

Describing Truax's property right as "fundamental," the Court explained that "the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve."[48] Depriving Truax of injunctive relief in the context of his labor dispute, the Court concluded, was "wholly at variance with those principles."[49]

The Supreme Court then took up Truax's equal protection claim, finding that it too had merit: "[T]he plaintiffs have been deprived of the equal protection of the law."[50] Although the Arizona legislature had discretion to create or extinguish particular kinds of judicial relief, it was not free to withhold a particular category of judicial relief—here, injunctive relief—from a specific class of plaintiffs (in this case, all parties embroiled in labor disputes).[51]

The Supreme Court's lack of deference to the Arizona legislature's decision to establish a state public policy protecting Arizona workers' right to picket could not have been more complete. Without a doubt, *Truax v. Corrigan* embodies the worst excesses of the *Lochner* era. In his dissent, Justice Holmes objected strongly to the majority's refusal to acquiesce in Arizona's entirely reasonable policy choice. He explained that "[b]y calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed."[52] Justice Holmes concluded by expressing his complete disdain with the majority's meddling:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.[53]

Another dissenter, Justice Pitney, conceded that it was "indisputable" "[t]hat

48. *Truax*, 257 U.S. at 329.

49. *Id.* at 330.

50. *Id.* at 334.

51. *Id.* at 334-42. In this respect, the reasoning of the *Truax* Court is strikingly similar to the Supreme Court's reasoning in the recent case of Romer v. Evans, 116 S. Ct. 1620, 1625 (1996) (noting that "the [Colorado] amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination"). Concluding that "[a] State cannot . . . deem a class of persons a stranger to its laws," the Supreme Court struck down an amendment to the Colorado constitution that prohibited the adoption of laws or ordinances protecting the rights of gays and lesbians. *Id.* at 1628-29. The crucial difference between *Romer* and *Truax* is the interest at stake and the reasons proffered by Colorado and Arizona in defense of their respective enactments. Arizona offered plausible arguments related to the inequality of bargaining power that existed between labor and management, emphasizing that the use of injunctions in labor disputes had tended to perpetuate this inequality. However, Colorado was unable to identify any plausible nondiscriminatory reasons that supported the Colorado electorate's adoption of Amendment 2.

52. *Truax*, 257 U.S. at 342 (Holmes, J., dissenting).

53. *Id.* at 344 (Holmes, J., dissenting).

the right to conduct a lawful business, and thereby acquire pecuniary profits . . . is property."[54] Nonetheless, Truax had no reasonable expectation that the law regulating the operation of his business would remain static: "[N]o person has a vested interest in any rule of law, entitling him to have it remain unaltered for his benefit . . . ."[55] Justice Pitney concluded that section 1464 did not deny Truax either due process or the equal protection of the laws.

Justice Brandeis also authored a separate dissent in which he incorporated the points made both by Justice Holmes and Justice Pitney. Like Justice Pitney, he acknowledged that Truax had a property interest in his business, but he emphasized that "[t]he rules governing the contest necessarily change from time to time."[56] He proceeded to survey the myriad approaches that various states and Great Britain had taken to regulating labor relations and concluded that Arizona's public policy was not arbitrary or capricious.[57]

Truax demonstrates that the issue of substantive due process protection for property interests is not a new problem. At the zenith of the *Lochner* era, the Supreme Court recognized the existence of fundamental property interests and acted to protect such interests from legislative encroachments.[58] Moreover, despite *Lochner*'s demise, the various courts of appeals have, during the last decade, issued a plethora of widely divergent opinions that consider extending more than rational-basis substantive due process protection to private property rights.[59] As will be discussed more fully in Part Ic, these cases reflect broad disagreement on rather basic questions, including whether substantive due process protects property interests at all, whether it protects only fundamental property interests, and whether it protects nonfundamental property interests.[60] The confusion that exists both within and among the lower federal courts provides compelling evidence of the need for the Supreme Court to address directly the continuing validity of *Truax*'s central premise: that substantive due process protects property and liberty equally.

B. THE LEGACY OF *TRUAX V. CORRIGAN*

For a case of such sweeping breadth, *Truax v. Corrigan*'s jurisprudential impact has proven ephemeral.[61] Even during the remaining years of the *Lochner*

54. *Id.* at 347 (Pitney, J., dissenting).

55. *Id.* at 348 (Pitney, J., dissenting).

56. *Id.* at 354-55 (Brandeis, J., dissenting).

57. *Id.* at 365-76 (Brandeis, J., dissenting).

58. *See id.* at 329-40.

59. *See, e.g.*, Armendariz v. Penman, 75 F.3d 1311, 1318-26 (9th Cir. 1996) (en banc); Love v. Pepersack, 47 F.3d 120, 122 (4th Cir. 1995); Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994); McKinney v. Pate, 20 F.3d 1550, 1556-61 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 898 (1995); Pearson v. City of Grand Blanc, 961 F.2d 1211, 1215-21 (6th Cir. 1992); Reich v. Beharry, 883 F.2d 239, 244-45 (3d Cir. 1989); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407-14 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), *overruled by Armendariz*, 75 F.3d at 1326.

60. *See infra* notes 92-188 and accompanying text.

61. *See* Louis Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 491 n.39, 501 n.54, 503 n.55 (1962) (noting that although never formally repudiated, the federal courts have

era—and notwithstanding a number of opportunities to do so—the Supreme Court never found an appropriate occasion to apply *Truax* to protect a "fundamental" property right.

For example, in *Adkins v. Children's Hospital*,[62] the Supreme Court reviewed a challenge to a District of Columbia law that established a minimum wage for women and children.[63] An employer and a female employee brought suits challenging the constitutionality of the legislation, arguing that the statute violated their property and liberty rights protected by the Due Process Clause.[64] Although the Supreme Court decided the case on substantive due process grounds, its due process analysis focused entirely on the employer and employee's liberty interest in freedom of contract rather than on the employer's property interest in its business.[65]

Adkins was a classic reprise on *Lochner*; indeed, the Supreme Court even cited *Lochner* in support of its decision to void the minimum wage law.[66] The majority placed no reliance on *Truax*, even though the interest at issue—employing women and minors to work in businesses located within the District of Columbia—could easily have been characterized as a "property" interest. Moreover, Chief Justice Taft, the author of the majority opinion in *Truax*, dissented in *Adkins*.[67]

Despite *Adkins*, *Truax* was not completely forgotten in the waning days of the *Lochner* era. In *Louis K. Liggett Co. v. Baldridge*,[68] the Supreme Court cited *Truax* for the proposition that a business constituted a property interest.[69] In *Baldridge*, the Court invalidated a Pennsylvania statute that restricted the

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never applied *Truax*'s substantive due process holding in the modern era); *see also* Currie, *supra* note 34, at 71-76 (describing and analyzing *Truax* and its implications for both substantive due process and the state action doctrine).

62. 261 U.S. 525 (1923).

63. *See* 40 Stat. 960, ch. 174 (1918).

64. *Adkins*, 261 U.S. at 542-43.

65. *Id.* at 545-46.

66. *Id.* at 545.

67. In what at first seems to be a remarkable about-face, Chief Justice Taft argued that "it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound." *Id.* at 562 (Taft, C.J., dissenting). However, the bulk of his dissent belies this sweeping assertion. Citing numerous precedents, Chief Justice Taft noted that the Supreme Court had upheld laws regulating wages when the work being regulated—for example, coal mining, smelting, heavy manufacturing—was particularly onerous or the workers (specifically, women or children) were considered especially vulnerable. *Id.* at 563-66 (Taft, C.J., dissenting). The law at issue in *Adkins* protected women from unfairly low wages and, accordingly, came within the category of constitutionally acceptable economic regulation. *Id.* at 566-67 (Taft, C.J., dissenting). Chief Justice Taft expressly reserved judgment on the larger question whether Congress or the state legislatures could enact a minimum wage limitation "for adult men." *Id.* at 566 (Taft, C.J., dissenting). Chief Justice Taft therefore could have squared his opinion in *Truax* with his dissent in *Adkins*: the Arizona law at issue in *Truax* did not protect a specific and particularly vulnerable segment of the work force, but rather constituted a generally applicable regulation of labor relations.

68. 278 U.S. 105 (1928).

69. *Id.* at 111.

ownership of pharmacies to registered pharmacists.[70] The Court did not describe the Liggett Company's interest as "fundamental," but nevertheless gave the Pennsylvania statute very little deference, essentially engaging in de novo review of the wisdom of the Pennsylvania law and applying strict scrutiny to Pennsylvania's justifications for enacting the statute.[71] The *Baldridge* Court observed that "unless justified as a valid exercise of the police power, the act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law."[72] Without resting its holding on *Truax*, the *Baldridge* Court nonetheless used substantive due process in a fashion consistent with *Truax*'s reasoning to protect a property interest.

Scarcely more than a decade later, in *Fashion Originators' Guild of America v. Federal Trade Commission*,[73] the Supreme Court reviewed a challenge to an enforcement action filed against the guild for unfair trade practices. The guild attempted to enforce de facto copyright and trademark rights against competitors who made and sold apparel similar to the guild members' designs—a practice that the guild denominated "style piracy."[74] The Supreme Court rejected the guild's challenge, concluding that the guild's practices "constituted an unfair method of competition."[75] The unanimous decision did not even consider whether the guild members had a "fundamental" property interest in their businesses or whether such an interest precluded the federal government from prohibiting their activities.[76]

Thus, *Truax*—like most of the other decisions of the *Lochner* era—had simply disappeared from the Supreme Court's repertoire by the early 1940s. Unlike some vestiges of the *Lochner* period,[77] however, *Truax* did not reappear in the 1960s.[78] Indeed, over the last seventy-five years, the lower federal courts

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70. *Id.* at 113-14.
71. *Id.* at 110-14.
72. *Id.* at 111.
73. 312 U.S. 457 (1941).
74. *Id.* at 460-62.
75. *Id.* at 464.
76. *See id.* at 464-68.
77. Meyer v. Nebraska, 262 U.S. 390, 396-99 (1923), involved a challenge to a state statute that prohibited the teaching of foreign languages in private or parochial schools. The Supreme Court struck down the statute, finding that it violated a fundamental liberty interest in child rearing. *Id.* at 399-400. Similarly, in Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court struck down a state law that required all children to attend public schools. *Id.* at 530-32. Employing reasoning virtually identical to its reasoning in *Meyer*, the Court held that it was "entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Although both *Pierce* and *Meyer* relied on *Truax* to support their holdings, *see Pierce*, 268 U.S. at 535-36; *Meyer*, 262 U.S. at 399, neither decision includes specific reliance on *Truax*'s analysis of fundamental property rights. Both *Meyer* and *Pierce* are "fundamental liberty interest" cases.
78. Although the Supreme Court cited *Truax* in 1961 for the proposition that a district court could retain jurisdiction over a case until an ongoing state court action concluded, this use of the case hardly reestablished its broader precedential authority. NAACP v. Gallion, 368 U.S. 16, 17 (1961) (per curiam); *cf.* Henkin, *supra* note 61, at 491 n.39 (suggesting that *Gallion* might represent a resurrection

also have failed to make much use of *Truax*. No lower federal court has ever directly enforced *Truax*'s holding that the substantive aspect of the Due Process Clause limits the states' ability to enact legislation that adversely affects "fundamental" property interests.[79]

C. CONTEMPORARY TREATMENT OF PROPERTY INTERESTS IN THE FEDERAL COURTS

Despite the disappearance of *Truax*, the Supreme Court and several federal courts of appeals have addressed the existence of substantive due process claims for deprivations of property rights in the post-*Lochner* era, with widely varying results.

1. The Supreme Court, Property, and Substantive Due Process

In *Regents of the University of Michigan v. Ewing*,[80] the Supreme Court assumed for the sake of decision that a medical student possessed a cognizable property interest in his status as a medical student and could therefore raise a substantive due process challenge to his expulsion from medical school.[81] The Court did not, however, hold that such a claim was viable in this case, nor did it recognize a generalized right to substantive due process protection for property interests.[82]

Concurring in the result, Justice Powell wrote separately to emphasize that in his view, a substantive due process claim for deprivation of a property interest existed only if the interest at issue bore some "resemblance to the fundamental interests that previously have been viewed as implicitly protected by the

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of *Truax* as a viable precedent in the post-*Lochner* era). History teaches that contrary to Professor Henkin's suggestion of an oblique endorsement of substantive due process, when the Supreme Court finally decided to resurrect strong substantive due process protection for selected liberty interests, it did so boldly, directly, and without apology. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (rejuvenating the *Lochner*-era precedents of *Meyer* and *Pierce*); *see also* Krotoszynski, *supra* note 20, at 1435-37 (describing the Supreme Court's resuscitation of substantive due process in the field of personal liberties).

79. The closest that any lower federal court ever came to such a holding was in 1931, when a three-judge panel relied on *Truax*'s holding to conclude that a business constituted a property interest. *See* Northwestern Nat'l Ins. Co. v. Lee, 49 F.2d 274, 279 (D. Or. 1931). However, the court did not rely on *Truax*'s substantive due process holding. Similarly, in 1970 a Ninth Circuit panel cited *Truax* (in dicta) for the proposition that the Due Process Clause "sets limits on the power of Congress retroactively to deprive [citizens] of vested property, innocently acquired." United States v. Perry, 431 F.2d 1020, 1024 (9th Cir. 1970); *cf.* Armendariz v. Penman, 75 F.3d 1311, 1318-19 (9th Cir. 1996) (en banc) (arguing that "the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited"). None of these cases, however, represents an application of *Truax*'s broader substantive due process holding. One possible explanation may be *Truax*'s overt suggestion that substantive due process encompasses affirmative rights of a (very) generalized nature against the state. As Professor David Currie has observed, this proposition runs deeply against the grain of American constitutional jurisprudence. *See* Currie, *supra* note 47, at 876-78, 886-90.

80. 474 U.S. 214 (1985).

81. *Id.* at 222-23.

82. *Id.*

Constitution."[83] In Justice Powell's view, Ewing's interest in continued enrollment in the medical school did not constitute a "fundamental" property interest and therefore enjoyed no substantive due process protection.[84]

In a similar case, *Harrah Independent School District v. Martin*,[85] a schoolteacher claimed that the school board's refusal to renew her contract violated her substantive due process rights by arbitrarily taking her property interest in continued employment.[86] The Board maintained that Martin had failed to comply with the school district's continuing education requirements and that nonrenewal of Martin's contract was a permissible sanction. The U.S. Court of Appeals for the Tenth Circuit had held that the school district's decision not to renew Martin's contract constituted an arbitrary action that "offended 'notions of fairness' generally embodied in the Due Process Clause."[87]

In a per curiam opinion, the Supreme Court reversed, reasoning that Martin's interest in continued employment was not "anything resembling the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life."[88] In the absence of such an interest—a "fundamental" interest, if you will—the school district merely had to act rationally.[89] Not surprisingly, the Court concluded that the school district's decision met this minimal obligation.[90]

Despite the seeming clarity of *Ewing* and *Martin*, the lower federal courts have had great difficulty creating and applying an analytical framework for evaluating substantive due process claims involving property rights.[91] The federal courts of appeals have split on the basic question whether substantive due process protects property rights at all; some have held that it protects only fundamental property rights, while others have permitted plaintiffs to bring substantive due process claims regardless of the nature of the property interest at issue.

2. The Ninth Circuit's Pathbreaking Approach (and Subsequent Retreat)

At one extreme, the U.S. Court of Appeals for the Ninth Circuit has broadly endorsed the use of substantive due process to protect property interests from

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83. *Id.* at 229-30 (Powell, J., concurring).

84. *Id.* at 230 (Powell, J., concurring).

85. 440 U.S. 194 (1979) (per curiam).

86. *Id.* at 194-95.

87. *Id.* at 198; *see* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (arguing that substantive due process protects citizens from arbitrary government action and that the scope of this protection should be directly related to the importance of the interest at issue).

88. *Martin*, 440 U.S. at 198 (citations and internal quotation marks omitted).

89. *See id.* at 198-99.

90. *Id.* at 199-201.

91. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 313, 328-29 (1993) (observing that the role of federal law in limiting state-defined property interests "remains unclear"). *See generally* Craig W. Hillwig, Comment, *Giving Property All the Process That's Due: A "Fundamental" Misunderstanding About Due Process*, 41 CATH. U. L. REV. 703 (1992).

arbitrary or unreasonable government action. In *Sinaloa Lake Owners Ass'n v. City of Simi Valley*,[92] the Ninth Circuit held that "the due process clause includes a substantive component which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate."[93] Even though the Ninth Circuit subsequently overruled *Sinaloa*'s substantive due process holding in *Armendariz v. Penman*,[94] Judge Alex Kozinski's opinion reflects very careful consideration of the question and considerable analytic effort; his opinion constitutes one of the most comprehensive and thoughtful recent judicial expositions on whether substantive due process protects property interests. Accordingly, the *Sinaloa* opinion merits more than passing scrutiny—*Armendariz* notwithstanding.

In *Sinaloa*, the California Division of Safety of Dams ("the Division") drained a lake in order to abate a flood threat caused in part by a leaking city water main.[95] The plaintiff, an association representing the homeowners living near the lake, sued the city and the Division for the diminution in the value of the homeowners' property, alleging violations of the Takings Clause, procedural due process, and substantive due process.[96] Following the district court's dismissal of the plaintiff's complaint, the Ninth Circuit affirmed the dismissal with respect to the Takings Clause claim but reversed as to both the procedural and substantive due process counts.[97]

Addressing the substantive due process claim, Judge Kozinski, writing for a unanimous three-judge panel, opined that "the fourteenth amendment's due process clause protects property no less than life and liberty."[98] Accordingly, "[t]o the extent that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other governmental powers from similar constitutional constraints."[99]

The court's requirements for establishing a substantive due process claim were minimal: "To establish a violation of substantive due process, the plaintiffs must prove that the government's action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' "[100] However, Judge Kozinski was quite careful to limit the scope of the federal judiciary's review of governmental action under the substan-

92. 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 73 F.3d 1311 (9th Cir. 1996) (en banc).

93. *Id.* at 1407. A panel of the Eighth Circuit has reached the same conclusion. *See* Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322, 329 (8th Cir. 1986).

94. 75 F.3d 1311 (9th Cir. 1996) (en banc).

95. *Sinaloa*, 882 F.2d at 1400-01.

96. *Id.* at 1401.

97. *Id.* at 1411.

98. *Id.* at 1408-09; *see also* Van Alstyne, *supra* note 18, at 453.

99. *Sinaloa*, 882 F.2d at 1409.

100. *Id.* at 1407 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

tive aspect of the Due Process Clause: "[G]overnmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process."[101] In order to prevail on such a claim, a plaintiff must establish that the government's action was "malicious, irrational and plainly arbitrary"—that is, unquestionably "not within the legitimate purview of the state's power."[102]

Of particular significance was the panel's refusal to hold that either *Parratt v. Taylor*[103] or *Williamson County Regional Planning Commission v. Hamilton Bank*[104] barred the plaintiff's substantive due process claim. *Parratt* generally precludes due process claims for the wrongful acts of state employees if the act in question was not authorized by law, policy, or custom.[105] The *Sinaloa* court noted that *Parratt* applied only to procedural due process claims and declined to apply it in the context of a substantive due process claim.[106] *Williamson County* holds that a would-be plaintiff with a Takings Clause claim must first exhaust any available state remedy before bringing a claim under 42 U.S.C. § 1983.[107] The *Sinaloa* court, however, found that *Williamson County* was inapplicable to a substantive due process claim, explaining that *Williamson County*'s exhaustion requirement was solely a function of the Takings Clause and "has no application to other types of constitutional claims."[108]

Judge Kozinski's approach to the recognition of substantive due process property claims makes intuitive sense: any loss of property may give rise to a substantive due process property claim, just as any limitation on liberty may give rise to a substantive due process liberty claim. In the absence of a "fundamental" property interest, however, a reviewing court should apply an extremely deferential standard of review;[109] plaintiffs should prevail only in the most extraordinary circumstances.

To be sure, Judge Kozinski's attempts to distinguish *Parratt* and *Williamson County* rest on shaky doctrinal ground. If *Parratt* can be avoided merely by denominating a challenge to government action as "substantive" rather than "procedural," *Parratt*'s precedential force is significantly undercut. Justice Kennedy has noted the potential corrosive force of this interpretation, suggesting that in the context of substantive due process, this distinction "could render

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101. *Id.* at 1409.

102. *Id.*

103. 451 U.S. 527 (1981).

104. 473 U.S. 172 (1985).

105. *Parratt*, 451 U.S. at 541-43.

106. *Sinaloa*, 882 F.2d at 1407, 1410 n.16; *cf.* Gamble v. Eau Claire County, 5 F.3d 285, 287-88 (7th Cir. 1993) (holding that *Parratt* bars substantive due process actions for the loss or impairment of property rights), *cert. denied*, 510 U.S. 1129 (1994).

107. *Williamson County*, 473 U.S. at 186-95.

108. *Sinaloa*, 882 F.2d at 1404, 1407; *cf. Gamble*, 5 F.3d at 287-88 (holding that *Williamson County* bars substantive due process actions for the loss or impairment of property rights unless the plaintiff first exhausts all avenues of relief under state law).

109. *See generally* New Orleans v. Dukes, 427 U.S. 297 (1976); Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); Williamson v. Lee Optical, 348 U.S. 483 (1955).

Parratt a dead letter."[110] Justice Kennedy's proposed solution—also endorsed by Justice Thomas—would be to apply the *Parratt* rule "[i]n the ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law," regardless of whether the claim at issue is denominated "procedural" or "substantive."[111]

Justice Stevens also has addressed the *Parratt* paradox but reached a different conclusion; he observes that "[i]f one views . . . [a] claim as one of substantive due process, *Parratt* is categorically inapplicable."[112] Like Judge Kozinski, Justice Stevens would limit *Parratt* to instances in which it is simply not possible to provide process prior to a deprivation of liberty or property—such as cases in which the deprivation is not authorized by law or policy.[113]

Given the diametrically opposed views of Justices Kennedy and Stevens and the lack of guidance on this precise point from a majority of the Supreme Court, Judge Kozinski's decision to embrace Justice Stevens's position seems reasonable. Judge Kozinski's interpretation of *Parratt* reads the decision narrowly, but plausibly: in the context of analyzing whether predeprivation process is mandatory, it makes little sense to require a governmental entity to provide process prior to a completely unauthorized act. The state agent who abridges a liberty or property interest without providing process is unlikely to be deterred by a pro forma process requirement—after all, we have already posited that the state does not condone the underlying conduct itself. When, however, the conduct is wholly irrational and arbitrary—for example, when it is both intentional and unquestionably wrongful—a would-be plaintiff should be permitted to bring a substantive due process challenge. This also constitutes sound public policy: if conduct is both intentional and plainly wrongful, a substantive due process action should have a significant deterrent effect. In sum, Judge Kozinski's contention that a substantive due process violation may exist in the absence of a procedural due process claim is ultimately quite persuasive.

Judge Kozinski's treatment of *Williamson County* also is defensible, if potentially controversial. One could argue that if a plaintiff suffering the loss of property can proceed simply by alleging a denial of substantive due process, *Williamson County* would be rendered useless. However, would-be plaintiffs cannot escape *Williamson County* so easily: under Judge Kozinski's parsing of substantive due process, a government agency can easily defeat the substantive due process claim unless it has acted in an utterly arbitrary fashion. This is a substantially more difficult test than a plaintiff would face under the Takings Clause.[114] Thus, substantive due process claims are not interchangeable with

110. Albright v. Oliver, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring).

111. *Id.* (Kennedy, J., concurring).

112. *Id.* at 313 (Stevens, J., dissenting) (citation omitted).

113. *Id.* at 315 & n.37 (Stevens, J., dissenting).

114. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122-28 (1978) (noting that relevant considerations as to whether a "taking" has occurred may include the economic impact of the regulation, the extent to which the regulation frustrates distinct investment-backed expectations, or any

Takings Clause claims.[115] Once again, Judge Kozinski's analysis rings true.

Unfortunately, the *Sinaloa* analysis no longer represents the law of the Ninth Circuit. In *Armendariz v. Penman*,[116] the Ninth Circuit disavowed the substantive due process analysis set forth by Judge Kozinski in *Sinaloa*.[117] Relying on the Supreme Court's decisions in *Albright v. Oliver*[118] and *Graham v. Connor*,[119] Judge Fletcher, writing for the en banc court, held that the Takings Clause preempted any reliance on substantive due process to protect economic or property rights.[120] The *Armendariz* court did not, however, leave persons subjected to arbitrary deprivations of property without a remedy; the court instead construed the Takings Clause to prohibit such "private takings," suggesting that the spirit of the provision would afford relief even if the government's action did not meet the letter of the Takings Clause.[121]

The Ninth Circuit's solution to the problem provides an alternative, but inferior, theoretical framework for protecting citizens from arbitrary government action. The *Armendariz* court failed to appreciate the gravamen of a substantive due process action for the arbitrary deprivation of property. It is not the loss of property that justifies the claim, but rather the arbitrary and irrational nature of the government's action.[122]

Judge Kozinski's opinion in *Sinaloa* recognized that whatever other constitutional rights citizens enjoy, they have a legitimate (and constitutionally cognizable) interest in being free from arbitrary and irrational government action. The Takings Clause does not address itself to irrational government action; to the contrary, its text speaks directly to occasions of presumptively rational government behavior: the taking of private property for a public purpose.[123]

"physical invasion" of property by the government); *see also* Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENTARY 7, 14-26 (1996) (noting that under the current doctrine judges examine only the "effect" of the challenged state action—regardless of other considerations such as intent—to determine whether a taking has occurred).

115. Moreover, even if one were to expand the universe of takings claims to include a more probing standard of review for substantive due process claims involving "fundamental" property rights, *see infra* text accompanying notes 317-22, such claims would not serve as a ready substitute for a standard takings claim. This is so because such claims would necessarily proceed on different (and more demanding) proofs and would likely provide more limited recoveries. *See generally* Brownstein, *supra* note 114, at 14-26 (noting that takings claims are generally easier to prove than substantive due process or equal protection claims).

116. 75 F.3d 1311 (9th Cir. 1996) (en banc).

117. *Id.* at 1318-26.

118. 510 U.S. 266 (1994) (plurality opinion).

119. 490 U.S. 386 (1990).

120. *Armendariz*, 75 F.3d at 1318-26. Of course, substantive due process provides the theoretical glue for applying the Takings Clause against the states. Dolan v. City of Tigard, 512 U.S. 374, 384 n.5 (1994); *cf.* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

121. *See Armendariz*, 75 F.3d at 1324-25; *see also* Covington Court, Ltd. v. Village of Oak Brook, 77 F.3d 177, 179 (7th Cir. 1996) (suggesting that the Takings Clause could be interpreted to provide relief for "a governmental taking of property for a private purpose").

122. *See* Van Alstyne, *supra* note 18, at 487-90 (arguing that "procedural grossness" should itself be prohibited by due process, regardless of whether a property or liberty interest is clearly at stake).

123. The Takings Clause appears as part of the Fifth Amendment and provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

Judge Fletcher's textual exegesis of the Takings Clause—reading it to apply to nonpublic takings—is a much bigger analytical leap than Judge Kozinski's atextual recognition of a generalized right to be free of grossly unreasonable government action affecting property interests.[124]

Contrary to Judge Fletcher's assertion, *Graham* and *Albright*—which preclude the use of substantive due process to challenge government behavior if a more specific provision of the Constitution provides a relevant decisional principle—should not be read to preclude all substantive due process protection for property interests. A would-be § 1983 plaintiff should be permitted to bring a claim for an utterly arbitrary deprivation of a property interest because the government's action in such a case goes well beyond the compass of the Takings Clause. A plaintiff should not be barred from relying on the protections afforded by substantive due process simply because she may also possess a claim—based on different facts and proofs—under the Takings Clause.[125] Indeed, the continued willingness of other courts of appeals to permit substantive due process challenges to arbitrary government actions affecting property rights demonstrates that *Graham* and *Albright* need not be read in the sweeping fashion set forth in *Armendariz*.

Perhaps *Armendariz* may best be understood as another step toward transfer-

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124. Note that the recognition of such substantive due process claims would not necessarily duplicate the protections afforded under the procedural aspect of the Due Process Clause. Sometimes the government can act in a procedurally proper way—providing notice, an opportunity to be heard, and the other various components of procedural due process—without acting rationally in a substantive way. Thus, classic procedural due process cases such as Goldberg v. Kelly, 397 U.S. 254 (1970), Perry v. Sindermann, 408 U.S. 593 (1972), Board of Regents v. Roth, 408 U.S. 564 (1972), and Mathews v. Eldridge, 424 U.S. 319 (1976), do not preempt the need for substantive due process review of government behavior. To be sure, if the process provided incorporates the various safeguards set forth in *Goldberg v. Kelly*, it is highly unlikely that the ultimate result reached in the proceedings will be utterly devoid of reason or wholly irrational. However, under the balancing employed in *Mathews v. Eldridge*, *Goldberg*-type process is not generally applicable to routine (or even trivial) liberty and property interests. *See Mathews*, 424 U.S. at 334-35, 346-49. Therefore, constitutionally adequate procedures may not prevent an arbitrary or irrational decision by an agent of the government. *See* Ingraham v. Wright, 430 U.S. 651, 677-78 (1977) (holding that the availability of civil and criminal sanctions affords adequate protection against and a remedy for unjustified corporal punishment in schools); Bishop v. Wood, 426 U.S. 341, 348-49 (1976) (finding that false reasons given by city manager for police officer's discharge, stated to him in private, had "no different" impact on the officer's reputation than if they had been true and did not support his claim that a constitutionally protected liberty interest had been impaired). In such circumstances, substantive due process should provide a final bulwark against wholly arbitrary or irrational government behavior. *See* Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994) (noting that government action might be so arbitrary that it violates substantive due process "regardless of the fairness of the procedures used"). *But see* McKinney v. Pate, 20 F.3d 1550, 1556-57 (11th Cir. 1994) (en banc) (rejecting county employee's substantive due process claim of alleged retaliatory termination in light of the court's holding that substantive rights created by state law, such as public employment, are not subject to substantive due process protection under the Due Process Clause because substantive "due process rights" are created only by the Constitution), *cert. denied*, 115 S. Ct. 898 (1995).

125. *See, e.g.*, Pearson v. City of Grand Blanc, 961 F.2d 1211, 1215-18 (6th Cir. 1992) (distinguishing six different kinds of substantive due process claims that might arise from government action affecting property).

ring substantive due process review of governmental actions from the Due Process Clause to the Takings Clause.[126] Such a transfer of constitutional load bearing makes little sense, however, because of the major reconfiguration (and expansion) necessary to accommodate all property claims within the ambit of the Takings Clause. For example, Judge Fletcher had to read the "public purpose" limitation out of the Takings Clause in order to make the clause reach the government action at issue in *Armendariz*.[127] *Graham* and *Albright* will not significantly advance the clarity of constitutional law if these decisions mean that federal appellate courts should tear constitutional provisions free of their textual moorings in order to shoehorn generalized claims into specific constitutional guarantees.[128] Whatever dangers may be associated with substantive due process review of economic regulation are no more (and arguably less) serious than the dangers posed by the loose form of antitextual interpretivism recommended by *Armendariz*.[129]

3. The Eleventh Circuit's Attempt to Close the Door on Nonfundamental Property Rights

In *McKinney v. Pate*,[130] the Eleventh Circuit systematically considered the nature of substantive due process challenges and refused to recognize a large subset of such claims. Like *Armendariz*, *McKinney* represents an incomplete (and therefore failed) effort to reconceptualize substantive due process.

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126. *See, e.g.*, Gosnell v. City of Troy, 59 F.3d 654, 657-58 (7th Cir. 1995) (characterizing "irrational action" review of government actions affecting property as a subset of Takings Clause claims). At least arguably, the Supreme Court's regulatory takings jurisprudence is also an example of this trend. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994).

127. *See Armendariz*, 75 F.3d at 1324 & n.8.

128. Judge Fletcher acknowledged that the behavior at issue—the summary closure of a number of apartment buildings in San Bernardino—could be addressed as a special subset of substantive due process. *Id.* Ironically, she characterized the Takings Clause as a "more explicit source" for the right to be free from arbitrary government action affecting a property interest while at the same time remodeling the very text of the Takings Clause to create a preemptive remedy for nonpublic takings. *Cf.* Gamble v. Eau Claire County, 5 F.3d 285, 286-87 (7th Cir. 1993) (characterizing takings claims, when conducted for a nonpublic purpose, as substantive due process claims), *cert. denied*, 510 U.S. 1129 (1994); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464-65 (7th Cir. 1988) (discussing the theoretical possibility of Takings Clause claims for takings that lack a public purpose—that is, "private purpose" takings). The local government's attempts to regulate the conditions under which apartments could be rented constituted neither a "taking" of private property nor "the use" of the property for a "public purpose." *Armendariz*, 75 F.3d at 1320-21. San Bernardino did not take control of the apartments, nor did the public benefit generally from the improved living conditions mandated by the local regulations. *See id.* at 1314-15, 1321 (describing plaintiffs' allegations that San Bernardino's enforcement program was aimed at aiding a property developer's efforts to obtain the plaintiffs' land and/or at ridding the neighborhood of undesirable residents).

129. These dangers include the specter of the federal judiciary sitting as a kind of Council of Revision over decisions that are essentially public policy choices, *see, e.g.*, Lochner v. New York, 198 U.S. 45 (1905), and the inherently subjective nature of recognizing and applying atextual constitutional rights, *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

130. 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 898 (1995); *see also* David H. Armistead, Note, *Substantive Due Process Limits on Public Officials' Powers to Terminate State-Created Property Interests*, 29 GA. L. REV. 769, 786-97 (1995) (discussing and criticizing *McKinney*).

Millard McKinney claimed that he had been unconstitutionally deprived of a property interest in continued employment with Osceola County, Florida.[131] Although the county had provided McKinney with pretermination process, McKinney argued that the process was a sham and that the county had violated his substantive due process right to be free of grossly arbitrary governmental actions affecting a cognizable state-created property interest.[132]

In an opinion by Chief Judge Tjoflat, the Eleventh Circuit—sitting en banc—announced a flat prohibition on the use of substantive due process to review irrational or arbitrary government actions affecting the employment interests of state and local workers.[133] No matter how outrageous the government's conduct, Judge Tjoflat explained, discharge from public employment can only result in a violation of *procedural* due process.[134]

The court reasoned that because public employment—a state-created property interest—is not "fundamental," it does not qualify for substantive due process protection under the "fundamental rights" rubric of substantive due process.[135] This rejection of substantive due process protection for nonfundamental property interests, such as continued employment with a public agency, is unpersuasive.

No matter how pristine the process provided, a government action that is wholly arbitrary and irrational should be subject to due process attack as a matter of substantive, rather than procedural, due process.[136] The *McKinney* court rejected this principle, relying instead on language in *Bishop v. Wood*[137] suggesting that the federal courts do not exist to serve as a civil service review board for disgruntled state employees.[138] However, the Eleventh Circuit missed the virtuous mean between the two extremes: as the Second Circuit has noted, "Substantive due process protects individuals against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against all government action that is 'incorrect or ill-advised.' "[139]

Thus, the Eleventh Circuit erred in flatly prohibiting the use of substantive

131. *McKinney*, 20 F.3d at 1554.

132. *Id.* at 1555.

133. *Id.* at 1560.

134. *Id.* at 1558-61.

135. *Id.* at 1560-61. This portion of the court's opinion makes sense, for it implicitly recognizes that a fundamental property interest *would* be protected by substantive due process. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 229-30 (1985) (Powell, J., concurring).

136. *See* Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994) (holding that arbitrary government action may violate due process regardless of procedural fairness); Interport Pilots Agency v. Sammis, 14 F.3d 133, 144 (2d Cir. 1994) (same).

137. 426 U.S. 341 (1976).

138. *See id.* at 349-50 ("The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions."); *see also McKinney*, 20 F.3d at 1559-60.

139. *Lowrance*, 20 F.3d at 537 (quoting *Bishop*, 426 U.S. at 350 (citations omitted)); *see also* Honore v. Douglas, 833 F.2d 565, 569 (5th Cir. 1987) (holding that the "measure of judicial restraint" mandated by *Bishop* "does not require slavish deference to a university's arbitrary deprivation of a vested property right").

due process to challenge arbitrary government actions affecting nonfundamental property interests in public employment. *Bishop* simply does not support such a sweeping prohibition,[140] nor is such a result doctrinally consistent with the Supreme Court's (and federal appellate courts')[141] approach to reviewing, for example, arbitrary zoning decisions.[142]

The Supreme Court's language in *Bishop* must therefore mean that in most instances, federal courts should not use substantive due process to review the merits of employment decisions. *Bishop* does not speak to extraordinary cases in which the governmental entity has acted in a completely arbitrary and lawless fashion.[143] Understood this way, *Bishop* does not pose an absurd distinction between irrational zoning decisions and irrational employment decisions.[144]

In sum, the Eleventh Circuit properly resolved the question left dangling in

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140. *See Lowrance*, 20 F.3d at 537 (distinguishing instances of mere error from instances of arbitrary, conscience-shocking, or oppressive government action); *Interport Pilots Agency*, 14 F.3d at 144 (same).

141. *See, e.g.*, Pearson v. City of Grand Blanc, 961 F.2d 1211, 1220-22 (6th Cir. 1992) (recognizing substantive due process rights implicated by allegedly arbitrary refusal to grant rezoning request).

142. Since the 1920s, the Supreme Court has demonstrated a willingness to permit the federal courts to serve as appellate zoning review boards. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 3-5 (1974) (considering substantive due process claim arising from allegedly arbitrary definition of "family" in zoning ordinance); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263 (1972) (recognizing plaintiff's right "to be free of arbitrary or irrational zoning decisions"); Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928) (considering substantive due process claim arising from allegedly arbitrary interferences with property rights by zoning ordinance). It would be odd indeed if substantive due process protected citizens from irrational zoning decisions but not irrational employment decisions. Plainly, a citizen's interest in continued employment may be of a higher order than her interest in the outcome of many zoning disputes. *See, e.g.*, DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592 (3d Cir.) (plaintiff claiming that substantive due process prohibited a local zoning board from revoking a variance permitting the operation of an automobile repair shop), *cert. denied*, 116 S. Ct. 352 (1995); Taylor Inv., Ltd. v. Upper Darby Township, 983 F.2d 1285 (3d Cir.) (plaintiff claiming that substantive due process prohibited township from arbitrarily withholding a permit to operate a billiards hall), *cert. denied*, 510 U.S. 914 (1993).

143. *See Lowrance*, 20 F.3d at 537.

144. The *McKinney* court was careful to distinguish between "legislative" and "nonlegislative" cases. A "legislative" case involves a rule of general applicability, whereas a "nonlegislative" case involves the application of preexisting rules to a particular individual. McKinney v. Pate, 20 F.3d 1550, 1557 n.9 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 898 (1995). The court held that substantive due process challenges involving legislative acts—even those implicating public employment—remain viable. *Id.*; *see also* TRM, Inc. v. United States, 52 F.3d 941, 945 n.17 (11th Cir. 1995). Conceivably, one could denominate all zoning decisions "legislative" in nature and most personnel decisions "nonlegislative," thereby avoiding the absurdity of conferring superior substantive due process rights on real property. However, this distinction should be rejected, because "[i]t may be safely said that there is 'no bright line' between the legislative and administrative functions" in the context of zoning. *Pearson*, 961 F.2d at 1221 (citation omitted).

Alternatively, the *McKinney* court's assertion that legislative acts should fall more readily under substantive due process scrutiny may be incorrect. The Second Circuit has held that legislative acts should receive *greater* deference than nonlegislative acts when being subjected to substantive due process review. *See* Interport Pilots Agency v. Sammis, 14 F.3d 133, 144-45 (2d Cir. 1994). The Second Circuit's logic is that a formal legislative policy choice deserves more judicial deference than the unauthorized and isolated act of a renegade governmental agent. *Id.* The *McKinney* court's approach is exactly the opposite: legislative acts are subject to substantive due process review, while nonlegislative acts are completely immune from such scrutiny. *McKinney*, 20 F.3d at 1557 n.9.

Sinaloa by concluding that substantive due process does protect "fundamental" property interests in the same fashion that it protects fundamental liberty interests. However, *McKinney*'s substantive due process analysis remains incomplete (and deeply flawed) because it fails to recognize that the doctrine also protects citizens from wholly irrational government action regardless of the *nonfundamental* nature of the right at issue.

4. Conflicting Intracircuit Approaches to the Protection of Property Under the Doctrine of Substantive Due Process

In addition to the Ninth and Eleventh Circuits, several other courts of appeals have addressed—often in ways quite at odds with the approaches outlined above—the question whether substantive due process protects property interests. Even at the most basic level, there is a remarkable inconsistency regarding whether substantive due process protects property interests. An examination of cases from the Third, Sixth, and Second Circuits will illustrate the current confusion in substantive due process jurisprudence and the resulting need for clarification by the Supreme Court.

a. The Third Circuit. In *Reich v. Beharry*,[145] the Third Circuit held that "not all property interests worthy of procedural due process protection are protected by the concept of substantive due process."[146] Reich, an attorney serving as a county special prosecutor, brought a substantive due process claim to recover payment for legal services that he rendered in investigating Beharry, the county controller.[147] The county could not pay Reich's bill without approval from Beharry, who had been acquitted of any wrongdoing and refused to give her consent.[148]

Under Judge Kozinski's formulation of substantive due process for nonfundamental property rights, Reich would have prevailed if we assume that Beharry's behavior was utterly arbitrary and irrational.[149] However, the Third Circuit declined to follow the Ninth Circuit's approach and instead limited the availability of substantive due process review to claims implicating "fundamental" property rights.[150] Because it declined to recognize a claim for nonfundamental property rights, the Third Circuit did not have to address the consistency of its holding with either *Williamson County* or *Parratt*.

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145. 883 F.2d 239 (3d Cir. 1989).

146. *Id.* at 244.

147. *Id.* at 239-40.

148. *Id.*

149. *See* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407-10 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc). It is possible, of course, that Beharry's behavior was not irrational. If, in fact, Reich's investigation of Beharry was completely unwarranted and an inappropriate use of taxpayer money, Beharry might have been on solid legal ground in refusing to pay Reich's bill. The reported decision does not provide sufficient facts to determine whether Beharry was a prudent guardian of the taxpayer's purse or an irrational and vindictive local bureaucrat.

150. *Reich*, 883 F.2d at 243-45.

Four years later, in *Taylor Investment, Ltd. v. Upper Darby Township*,[151] the Third Circuit revisited the viability of a substantive due process claim to protect nonfundamental property rights. The plaintiffs claimed that Upper Darby Township had arbitrarily denied them a permit to operate a billiards hall. Rather than making an administrative appeal, the plaintiffs brought a § 1983 action claiming that they had been denied procedural due process, substantive due process, and equal protection of the laws.[152] The district court dismissed the complaint, holding that the claims were not yet ripe for decision.[153]

Applying *Williamson County*, the Third Circuit affirmed the district court's dismissal.[154] However, in so doing, the court noted that "[t]o prevail on a substantive due process claim, a plaintiff must demonstrate that an arbitrary and capricious act deprived them of a protected property interest."[155] The panel found that the plaintiffs presented a viable substantive due process claim but, citing *Williamson County*, held that the claim was not ripe because the plaintiffs had failed to exhaust all state administrative remedies.[156] The panel did not cite *Reich v. Beharry* and made no attempt to square its holding with the earlier case.

More recently, in *DeBlasio v. Zoning Board of Adjustment*,[157] the Third Circuit distinguished *Reich* and granted a substantive due process claim involving a local zoning board's allegedly irrational decision that an automobile repair shop violated zoning ordinances. The panel opined that "ownership is a property interest worthy of substantive due process protection" and held that *Reich* did not preclude a substantive due process challenge to an adverse zoning decision.[158] The *DeBlasio* court evidently believed that zoning restrictions adversely affecting a property owner's use of land implicated a higher order value than an attorney attempting to collect his fee.

In fact, the Third Circuit has recognized a distinction without a difference. Reich's interest in collecting his fee is economically no different than DeBlasio's interest in operating his shop. Both claimed that government officials burdened their enjoyment of property rights for irrational or arbitrary reasons. To hold that DeBlasio stated a valid substantive due process claim while Reich did not is simply nonsensical. Accordingly, in the aftermath of *DeBlasio* it is difficult to state the law of the Third Circuit regarding the status of substantive due process property claims. (Perhaps auto mechanics enjoy substantive due process protection while attorneys do not, with the precise rights of other professions to be determined.)

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151. 983 F.2d 1285 (3d Cir.), *cert. denied*, 510 U.S. 914 (1993).
152. *Id.* at 1289.
153. *Id.*
154. *Id.* at 1287.
155. *Id.* at 1292.
156. *Id.* at 1292-93.
157. 53 F.3d 592 (3d Cir.), *cert. denied*, 116 S. Ct. 352 (1995).
158. *Id.* at 600-01.

The problem stems from the *Reich* panel's refusal to recognize a substantive due process claim for wholly arbitrary or irrational government actions or to apply a suitably deferential standard of review in such cases. The *DeBlasio* panel held—quite correctly—that substantive due process affords an avenue of relief when wholly arbitrary government action burdens a state-created property interest.[159] Of course, all property interests, whether or not "fundamental," should be afforded protection under the basic rationality requirement; on the other hand, only fundamental property interests should benefit from heightened judicial scrutiny. Unfortunately, *Reich* missed this point entirely, and *DeBlasio* failed to correct it. The result is a muddled substantive due process jurisprudence that lacks both consistency and coherence.

b. The Sixth Circuit. Like the Third Circuit, the Sixth Circuit has made contradictory statements about a plaintiff's ability to use substantive due process to protect property rights. In a line of cases beginning with *Charles v. Baesler*,[160] the Sixth Circuit has held that "[m]ost, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process."[161] Only " 'fundamental' interests" are "protected by substantive due process."[162]

Since *Charles*, however, Sixth Circuit panels have nevertheless approved the use of substantive due process to challenge arbitrary or irrational governmental actions affecting property interests of a nonfundamental nature.[163] For example, the Sixth Circuit has permitted disgruntled property owners to challenge adverse zoning decisions in federal court under the rubric of substantive due process.[164] It has also sanctioned the use of substantive due process when property rights were adversely affected by government actions that "shock the conscience."[165] One panel recently opined that "[s]ubstantive due process serves as a vehicle to limit various aspects of potentially oppressive government action," including both official and legislative infringements of fundamental rights. Moreover, it may serve "as a limitation on official misconduct, which

159. *Id.* at 601.

160. 910 F.2d 1349 (6th Cir. 1990).

161. *Id.* at 1353.

162. *Id.*

163. *See* LRL Properties v. Portage Metro Hous. Auth., 55 F.3d 1097, 1110-11 (6th Cir. 1995); Mertik v. Blalock, 983 F.2d 1353, 1367-68 (6th Cir. 1993); *see also* Mansfield Apartment Owners Ass'n v. City of Mansfield, 988 F.2d 1469, 1477 (6th Cir. 1993) (finding no deprivation of a substantive due process property right but also noting that "[s]ubstantive due process would require only that the defendants show that its scheme is rationally related to the asserted legitimate governmental purpose of maintaining a financially stable municipal entity" (citations omitted)).

164. *See* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1215-23 (6th Cir. 1992).

165. *See LRL Properties*, 55 F.3d at 1111 (holding that substantive due process rights are implicated when fundamental property interests are jeopardized, but rejecting claim that the right to participate in federal housing program amounts to a fundamental property interest); United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31, 35 (6th Cir. 1992) (holding that substantive due process rights are implicated when fundamental property interests are jeopardized, but rejecting claim that the right to government adherence to published purchasing guidelines amounted to a fundamental property interest).

although not infringing on a fundamental right, is so literally 'conscience shocking,' hence oppressive, as to rise to the level of a substantive due process violation."[166] This last description of the scope of substantive due process protection—expounded in 1996, some six years after the decision in *Charles*—completely ignores *Charles*'s admonition that *only* fundamental rights enjoy substantive due process protection.

The inconsistency in the Sixth Circuit's jurisprudence reflects the material omission committed by the *Charles* panel: substantive due process not only protects fundamental rights, but also safeguards citizens from wholly arbitrary governmental action. Accordingly, a plaintiff can raise a viable substantive due process claim, even in the absence of a fundamental right.[167] Like the Third Circuit's, the Sixth Circuit's substantive due process jurisprudence is awash in inconsistency and contradiction.

c. The Second Circuit. The Second Circuit has ostensibly limited the availability of substantive due process to claims that implicate "fundamental" rights.[168] Quoting the Sixth Circuit's decision in *Charles*, the court explained that "[w]e do not think . . . that simple, state-law contractual rights, without more, are worthy of substantive due process protection."[169] Even after this declaration, however, Second Circuit panels have continued to assert that substantive due process may be used to challenge local land use decisions[170] and "arbitrary, conscience-shocking, or oppressive" governmental actions.[171] To date, the court has failed to explain this lack of consistency in its pronouncements on the scope of substantive due process review.

5. The Seventh Circuit's Refusal to Recognize Substantive Due Process Protection for Any Property Rights

The Seventh Circuit simply has refused to recognize the existence of substantive due process protection for property interests; such claims are cognizable only when coupled with another substantive right, such as a takings claim: "[A] substantive due process claim based on a state-created property interest is cognizable where a plaintiff claims either a violation of some other substantive

166. Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996).

167. *See Pearson*, 961 F.2d at 1215-23; Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407-12 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

168. Local 342, Long Island Pub. Serv. Employees v. Town Bd., 31 F.3d 1191, 1196-97 (2d Cir. 1994).

169. *Id.*; *cf.* Fallon, *supra* note 91, at 353-55, 358-60, 363-64 (arguing that substantive due process should protect nonfundamental interests from arbitrary or irrational abridgment and suggesting that the federal Constitution also restrains the state's discretion to limit recognition of liberty and property interests).

170. Zahra v. Town of Southold, 48 F.3d 674, 680-81 (2d Cir. 1995).

171. Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995); Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994).

constitutional right or that the state law remedies are inadequate."[172] Prior to this statement, the Seventh Circuit—like the Third Circuit—had permitted substantive due process challenges to local zoning board decisions.[173] The most recent decisions of the court, however, strongly suggest that such challenges will no longer be permitted.[174]

In a pair of opinions, Chief Judge Richard Posner and Judge Frank Easterbrook have effectively incorporated substantive due process protection of nonfundamental property rights into the Takings Clause.[175] Judge Easterbrook maintains that " '[s]ubstantive due process' has the distinct disadvantage . . . of having been abolished in the late 1930s when the Supreme Court threw over *Lochner*."[176] Thus, "[e]conomic substantive due process is not just embattled; it has been vanquished."[177] In the Seventh Circuit, plaintiffs with economic or prop-

172. Polenz v. Parrott, 883 F.2d 551, 558 (7th Cir. 1989). In this regard, the Seventh Circuit's approach is similar to the Fifth Circuit's analysis in Schaper v. City of Huntsville, 813 F.2d 709, 716-18 (5th Cir. 1987). In *Schaper*, the Fifth Circuit held that substantive due process protects property interests but subordinated such claims to the *Parratt* rule in the absence of an "independent substantive interest." *Id.* at 718; *see* Sheldon H. Nahmod, *Due Process, State Remedies, and Section 1983*, 34 KAN. L. REV. 217, 233-34 (1985). Unless the plaintiff can tie the substantive due process claim to a specific guarantee of the Bill of Rights, the claim will be subject to bar under the *Parratt* rule. *Schaper*, 813 F.2d at 718. Essentially, this means that the Fifth Circuit will not permit the use of substantive due process to protect either routine or "fundamental" property interests unless the government's conduct constitutes an independent constitutional wrong—for example, a violation of the Fourth Amendment. *Id.* at 717-18. The Fifth Circuit's approach simply folds substantive due process claims into routine § 1983 claims; a plaintiff can gain no ground by relying on "substantive due process" independent of a separate constitutional right. More recently, however, the Fifth Circuit has recognized that substantive due process protects nonfundamental property rights from utterly arbitrary government abridgment. *See* FM Properties Operating Co. v. City of Austin, 93 F.3d 167, 174 (5th Cir. 1996) (holding that if "government action is 'clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare' . . . it [may] be declared unconstitutional" (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)); Honore v. Douglas, 833 F.2d 565, 568-69 (5th Cir. 1987) (holding that a sufficiently arbitrary deprivation of a nonfundamental property interest violates the guarantees of substantive due process).

173. *See Polenz*, 883 F.2d at 557-58 (citing numerous cases). Like most other U.S. Circuit Courts of Appeals, the Seventh Circuit had permitted disgruntled property owners to use § 1983 and substantive due process to challenge unfavorable local zoning decisions, presumably because the Supreme Court had expressly endorsed review of such decisions. *See supra* note 142; *see also* Clark v. Winnebago County, 817 F.2d 407, 408-09 (7th Cir. 1987) (deciding on the merits a substantive due process challenge to an adverse zoning decision); Albery v. Reddig, 718 F.2d 245, 251 (7th Cir. 1983) (same); *cf.* Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 463-68 (7th Cir. 1988) (Posner, J.) (permitting substantive due process challenge to an adverse zoning decision even while questioning the doctrinal wisdom of permitting such claims in light of the Takings Clause and the Equal Protection Clause).

174. *See Polenz*, 883 F.2d at 558-59; *see also* Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951, 958 (7th Cir. 1988) (limiting substantive due process claims to cases in which the plaintiff alleges that an independent constitutional right has been violated or that the available state remedies are inadequate).

175. *See* Gosnell v. City of Troy, 59 F.3d 654 (7th Cir. 1995); Gamble v. Eau Claire County, 5 F.3d 285 (7th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994).

176. *Gosnell*, 59 F.3d at 657 (citation omitted).

177. *Id. But see In re* Blue Diamond Coal Co., 79 F.3d 516, 521 (6th Cir. 1996) (applying rational basis review to an economic substantive due process challenge to federal labor legislation). Indeed, even the Supreme Court continues to review economic regulations under the Due Process Clause. *See, e.g.*, Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 638-41

erty claims must "make their arguments under the takings clause and the rational-basis component of equal protection analysis."[178] In somewhat less expansive language, Chief Judge Posner has written that the Takings Clause is the principal constitutional source of protection for property rights and that in any event, substantive due process claims are subject to bar under the *Parratt* and *Williamson County* decisions.[179] Although the veracity of the position espoused by Posner and Easterbrook may be subject to debate, its clarity and consistency surely are not.

Recently, several Seventh Circuit panels have followed their lead. For example, in *Covington Court, Ltd. v. Village of Oak Brook*,[180] the Seventh Circuit refused to consider a substantive due process challenge to Oak Brook's disposition of a zoning dispute.[181] The court reiterated its earlier observation that "federal courts are not boards of zoning appeals"[182] and upheld the district court's dismissal of Covington's action.[183] Essentially, the Seventh Circuit (unlike the Ninth Circuit) has broadly applied *Williamson County* and *Parratt* to bar most substantive due process property claims.[184] In consequence, such claims must be brought in state court or not at all.[185]

6. Conclusion: *E Pluribus Pluribus*

The courts of appeals have created something of a patchwork of policies regarding the viability of substantive due process property claims.[186] The basic fault lines center on whether substantive due process protects property rights at all and, if so, whether it protects both fundamental and nonfundamental property rights. A related question is how substantive due process protection of property interests can be squared with *Williamson County* and *Parratt*. For

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(1993) (applying deferential review to substantive due process challenge to legislation imposing penalty on company for withdrawal from pension plan).

178. *Gosnell*, 59 F.3d at 657.

179. *Gamble*, 5 F.3d at 286-88. *But cf.* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404-05, 1407-10 (9th Cir. 1989) (rejecting the argument that *Williamson County* and *Parratt* bar plaintiffs' § 1983 claim for breaching of a dam), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

180. 77 F.3d 177 (7th Cir. 1996).

181. *Id.* at 179-80. Oak Brook authorities failed to act on Covington's zoning application to construct a residential housing subdivision until after Covington resolved the objections of a local homeowner. After Covington spent over $100,000 on various improvements to the homeowner's property, the homeowner withdrew his protest against the planned development. *Id.* at 178.

182. *Id.* at 179.

183. *Id.* at 179-80.

184. *See id.*; River Park, Inc. v. City of Highland Park, 23 F.3d 164, 167 (7th Cir. 1994); *Gamble*, 5 F.3d at 286-87. Similarly, *Parratt* holds that postdeprivation procedures preclude a § 1983 action for the loss of property, at least where the plaintiff's claim sounds in procedural due process. Parratt v. Taylor, 451 U.S. 527, 543 (1981). Essentially, the Seventh Circuit has carried the *Parratt* rule over to substantive due process claims: there can be no § 1983 action if the state's law of torts provides an adequate remedy.

185. *See River Park*, 23 F.3d at 165-67 ("Federal litigation is not a *repêchage* round for losers of earlier contests, or for those who overslept and missed the starters' gun.").

186. For a more specific discussion of some of these cases, see Hillwig, *supra* note 91, at 718-39.

reasons that will be developed more fully below,[187] Judge Kozinski's opinion in *Sinaloa* offers the most coherent theory of substantive due process protection of nonfundamental property interests. However, his theory—at least as set forth in *Sinaloa*—is incomplete insofar as it fails to address "fundamental" property interests.[188]

D. IN PRAISE OF FOLLY: A PAEAN TO *TRUAX V. CORRIGAN*

The current confusion within the federal courts regarding the scope of substantive due process protection of property interests indicates a need to reexamine the wisdom of *Truax*—the Supreme Court's broadest application of substantive due process to property interests. I maintain that there is a place for *Truax* in the Supreme Court's contemporary substantive due process jurisprudence; it is time for the Court to come full circle and complete the task that it began with *Griswold* in 1965.[189]

Of course, no responsible constitutional lawyer would attempt to defend the result in *Truax* on the merits. The majority's approach reflects a rather naked usurpation of legislative authority over routine labor relations. The *Truax* majority also shows scant concern for the value of federalism, and it was primarily because of this lack of concern that Justices Holmes and Brandeis object to the majority's approach.[190] Notwithstanding these infirmities, there is more than a kernel of truth to the majority's basic theory of substantive due process.

All nine Justices agreed that Truax's restaurant constituted a form of property; they simply disagreed about the nature of the property right at issue. Chief Justice Taft, speaking for the five-Justice majority—and in contrast to the four

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187. *See infra* notes 405-39 and accompanying text.

188. *Cf.* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (arguing that laws which constitute "substantial arbitrary impositions and purposeless restraints" on fundamental liberties should be overturned).

189. Griswold v. Connecticut, 381 U.S. 479 (1965), was the Supreme Court's first post-New Deal invocation and application of substantive due process to protect an unenumerated fundamental right. From 1937 to 1965, the Court routinely sustained state legislation, however benighted or invasive, applying a deferential "rational basis" standard of review when litigants challenged such laws on substantive due process grounds. *See, e.g.*, *Poe*, 367 U.S. at 516-19 (Douglas, J., dissenting) (describing the Supreme Court's rejection of substantive due process in the post-New Deal era and arguing for its resurrection because "to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the Court"). However, unlike the *Lochner*-era Court, the modern Supreme Court has applied substantive due process only to protected fundamental liberty interests. Logically, *Griswold* should have been interpreted as a general revival of substantive due process. *See* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 45-51, 59-61 (arguing that it is difficult, if not impossible, to draw a principled distinction that would permit substantive due process protection of personal—but not of economic—rights). To date, the Supreme Court has not spoken to the existence of fundamental property rights, preferring instead to shoehorn most important personal interests into the construct of "liberty." *See supra* note 31.

190. Truax v. Corrigan, 257 U.S. 312, 342-44 (1921) (Holmes, J., dissenting).

dissenting Justices[191]—viewed the property right at issue as "fundamental."[192] Some of the very same Justices, when presented with substantive due process claims involving "fundamental" liberty interests, would have voted to invalidate the offending state statutes.[193] Both Justice Holmes and Justice Brandeis joined the majority opinion in *Pierce v. Society of Sisters*,[194] which invalidated an Oregon prohibition on parochial education. Similarly, two years before *Pierce*, Justice Brandeis had joined the majority opinion in *Meyer v. Nebraska*,[195] which invalidated a Nebraska statute that prohibited the teaching of German.

Given their votes in *Truax v. Corrigan*, one could simply accuse Holmes and Brandeis of a foolish inconsistency. As Professor David Currie has observed, "The doctrinal basis for *Meyer* is as shaky as that of *Lochner* itself, for it is the very same."[196] In truth, the votes of Holmes and Brandeis in these substantive due process cases suggest that *Truax* should have a place in contemporary substantive due process jurisprudence.

One should begin with the rather basic observation that the facts of *Truax v. Corrigan* are utterly unremarkable. The English Kitchen, Truax's restaurant, was a restaurant, like any other restaurant. Truax and his principals were free to shutter it and to open one or a dozen new restaurants anywhere they wished in Arizona. The restaurant was a fungible good, and any economic injury that they suffered could have been redressed through the common law of torts.[197] The majority's assertion that Truax had been "stripped of all real remedy"[198] is simply false.

From these facts, careful lawyers (and careful jurists like Justices Holmes and Brandeis) should draw three conclusions. First, Arizona's decision to withdraw injunctive relief in labor disputes, codified in section 1464, did not materially diminish Truax's property rights, because Arizona law did not fail to protect his economic interests—it simply denied him an injunction to stop his former employees from picketing his restaurant.

Second, the property rights at issue were not really "fundamental." If Arizona had attempted to abolish prospectively estates held in fee simple absolute, had limited Truax's ability to transfer his property, or had otherwise tinkered

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191. *See id.* at 342-43 (Holmes, J., dissenting); *id.* at 347-48 (Pitney, J., dissenting); *id.* at 354-55 (Brandeis, J., dissenting).

192. *Id.* at 329.

193. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

194. 268 U.S. 510 (1925). For a discussion of the holding in *Pierce*, see *supra* note 77.

195. 262 U.S. 390 (1923). For a discussion of the holding in *Meyer*, see *supra* note 77.

196. Currie, *supra* note 34, at 82; *see also* Phillips, *supra* note 34, at 283-89 (arguing that the Court's modern substantive due process jurisprudence has its roots in the Court's *Lochner*-era precedents).

197. To the extent that the workers' activities exceeded peaceful picketing and included threats and intimidation, the torts of assault and tortious interference with contract provide immediate avenues of relief. Moreover, the majority itself acknowledged that Truax and his partners had been libelled. *Truax*, 257 U.S. at 326. Once again, an action in tort would have been available to Truax for this particular wrong.

198. *Id.* at 330.

with Truax's basic common law interests in the restaurant itself, Truax may have had a colorable claim that Arizona violated a "fundamental" interest. However, the statute merely limited the availability of injunctions in labor disputes, an exercise that has much more to do with the law of remedies and the scope of equity jurisdiction than with property law.

Finally, even if one accepts Chief Justice Taft's characterization of Truax's property interest as "fundamental," the state's interest in regulating labor relations is sufficiently compelling to override this interest. Given the broad-based experimentation in labor policy that was occurring in the early twentieth century,[199] it was simply not plausible to argue seriously that Truax had an absolute right to an injunction to protect his restaurant from disgruntled workers' pickets.[200]

This presents a stark contrast to the circumstances present in *Pierce* and *Meyer*. A blanket prohibition on parochial schools, coupled with compulsory attendance laws, effectively denied Oregon parents any choice in the primary and secondary education of their children. The effects of this rule were potentially devastating, particularly to religious minorities.[201] Moreover, the damage was not of a quantifiable nature; the parents could not sue the state and recover adequate compensation for their children's lost educational opportunities. In this instance, the liberty interest at issue was undeniably "fundamental," and no remedy could effectively compensate for the ill effects of the Oregon statute.

To the extent that the Nebraska statute at issue in *Meyer* prohibited the teaching of German but not other foreign languages and was directed at a separate and distinct cultural minority within the state, the Equal Protection Clause seems to provide a more sound constitutional basis for invalidating the law than the Due Process Clause. The Supreme Court, however, decided the

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199. *See id.* at 356-73 (Brandeis, J., dissenting).

200. Indeed, Congress expressly permitted this sort of activity in the Norris-La Guardia Act. *See* 29 U.S.C. §§ 101-15 (1994); Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Law*, 69 VA. L. REV. 819, 841 (1983) (describing and discussing the operation and effects of the Norris-La Guardia Act); Mark Tushnet & Jennifer Jaff, *Why the Debate Over Congress' Power to Restrict the Jurisdiction of the Federal Courts Is Unending*, 72 GEO. L.J. 1311, 1322-23 n.52 (1984) (same); *see also* JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS 224-26 (1988) (describing and discussing the history of the use of injunctions in labor disputes and Congress's response to this history in the Norris-La Guardia Act); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1148-1233 (1989) (same). Moreover, the Act also prohibits the issuance of injunctions to prohibit labor pickets. *See* 29 U.S.C. §§ 101-15.

201. It is certainly plausible to suppose that elementary and secondary education in Oregon during the 1920s included some sort of religious exercise—a daily prayer at a minimum. *See generally* David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74, 79, 84 (1968). It is doubtful, however, that these observances took into account the sensibilities of particular religious denominations. *See* Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 B.Y.U. L. REV. 569, 573-76. *See generally* Tyack, *supra*, at 80-82, 84-87, 90-92. Moreover, it is likely that religious minorities existed in 1920s Oregon; indeed, this is suggested by the existence of a strong Catholic community that wished to maintain a separate, private school system to educate its youth. *See* Tyack, *supra*, at 85-86, 92.

case on the basis of a "privacy" argument firmly grounded in substantive due process.[202] The interest at issue—educating one's children—again seems more "fundamental" than operating a restaurant free of labor pickets. As with *Pierce*, any damage caused by the statute's operation could not easily be remedied.[203]

The votes of Justice Holmes and Justice Brandeis in *Pierce* and *Meyer* are therefore not inconsistent with their votes in *Truax v. Corrigan*. One could reasonably infer that the Justices' seemingly inconsistent votes reflect the fact that the interest at issue in *Truax* simply did not measure up; it was not "fundamental" in any meaningful sense, and state-imposed burdens on nonfundamental interests—whether characterized as "liberty" or "property"—should be subject to review only for rationality. Moreover, the state's interest in adopting section 1464 did not reflect an attempt to marginalize a particular cultural minority within Arizona, but rather reflected an attempt to create a more even playing field between labor and management. The theory of fundamental property rights espoused in *Truax*, if taken to its logical conclusion, would preclude changes in the taxation of certain kinds of property (for example, commercial property) if the changes were not also applied to all other kinds of real estate. This approach to the protection of property rights is untenable, for it would prevent legislative bodies from modifying—even at the margins—a raft of statutes that affect completely fungible property interests.

Truax v. Corrigan is not wrong in theory, however. *Truax* is exactly correct as applied to nonfungible, or incommensurable, property rights. As Justice Harlan explained in the context of a substantive due process liberty claim, "certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[204] Reputation and physical integrity are two examples of such interests.[205]

Like the raising of one's children, reputation and physical integrity are

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202. *See* Meyer v. Nebraska, 262 U.S. 390, 398-402 (1923).

203. Indeed, to the extent that the statute equated speaking German with being unpatriotic, it invited children of German ancestry to abandon their cultural heritage completely. Damage of this sort is irreparable, for once the traditions of the Old Country are lost in one generation, they are gone forever. *See* KURT VONNEGUT, PALM SUNDAY 21-22 (1981) (describing the Indianapolis German community's loss of its cultural traditions following World War I because of public disapprobation of such traditions); *see also* KURT VONNEGUT, FATES WORSE THAN DEATH 199-200 (1991) (same).

204. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); *see also* Fallon, *supra* note 92, at 314-15, 353-55, 358-60, 363-64 (arguing for high level of scrutiny of state interests when government actions abridge due process liberties); Henkin, *supra* note 61, at 491 n.39 (suggesting that *Truax* may require states to protect basic property rights).

205. For a variety of reasons, notably including a consistent historical practice of limiting recoveries for damage to reputation to economic injuries, reputation should be deemed a property, rather than a liberty, interest. *See infra* Part IIA-B. Likewise, although bodily integrity could be conceptualized as either property or liberty, one's interest in one's physical body (as opposed to freedom from bodily restraint) is more approximately analogized to property than liberty. *See supra* note 31 and *infra* note 343. It seems nonsensical to describe one's physical body as a "liberty"—it is a thing, not a freedom to do or refrain from doing a particular act. Thus, it makes sense to speak of a liberty interest in being free from false imprisonment, but it seems awkward in the extreme to claim a "liberty" interest in compensation for a botched operation to remove an ingrown toenail.

incommensurable interests: no amount of money can restore them once they are lost. Indeed, one could reasonably argue that incommensurability, rather than a characterization of an interest as "liberty" or "property," should serve as the prime marker of a "fundamental" interest. Marriage,[206] the decision to have a child,[207] child rearing,[208] and voting[209] are all incommensurable interests.[210] This incommensurability helps to establish their fundamental nature.[211]

It may be, as Justice Stevens has suggested in a number of procedural due process cases, that most property interests are commensurable—they have a value that can be assessed objectively, and a person who suffers a deprivation of

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206. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that the right to marry is a fundamental liberty interest).

207. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that the right to have an abortion is a fundamental privacy interest); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that the decision to use contraceptives is among fundamental privacy interests).

208. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (holding that freedom of choice in conduct of family life is a fundamental liberty interest); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding that the right of parents to direct upbringing of their children is a fundamental liberty interest); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that the right of parents to direct the education of their children is a fundamental liberty interest).

209. *See* Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) (holding that redistricting statute which effectively denies vote to blacks violates the Fifteenth Amendment); Terry v. Adams, 345 U.S. 461, 476 (1953) (holding that manipulation of local party nominations which effectively denies votes to blacks violates the Fifteenth Amendment); Smith v. Allwright, 321 U.S. 649, 661-62 (1944) (holding that the right to vote in primary and general elections without discrimination is fundamental).

210. Some law and economics adherents would argue that all human interests are commensurable, that everything has an economic foundation. *See, e.g.*, RICHARD A. POSNER, SEX AND REASON (1992) (describing the ostensible economic foundations of love, romance, and marriage). However, most Americans do not embrace this hypercynical cosmology. The law and economics movement certainly has provided a unique and often useful means of describing human relations. To say that this approach is the only means—or even the best means—of modelling human behavior requires a leap of faith that cold economic logic cannot, on its own terms, justify. Ultimately, law and economics cannot prove its own veracity by offering up its foundational premises as a proof of its truth. *Compare* Allan C. Hutchinson, *Part of an Essay on Power and Interpretation (with Suggestions on How to Make Bouillabaisse)*, 60 N.Y.U. L. REV. 850, 878-79 (1985) (arguing that "[t]he law and economics story is a form of worldmaking that has achieved a high and undeserved political status in the world of legal theory" and "is not so much wrong as simplistic"); Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 57-60 (1993) (arguing that "market rhetoric is a form of reductionism" that fails to account satisfactorily for all relevant variables) *and* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 813-18 (1994) (questioning the ability of economic modelling to account for all of the variabilities and subject values that constitute human experience) *with* Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 691-98, 705-15 (rejecting the incommensurability objection to law and economics analysis and positing that economic models of human behavior provide a simpler, more empirically verifiable, and hence superior means of explaining and predicting human behavior).

211. Of course, tradition remains relevant to determining whether an interest is fundamental because incommensurability is a function of the social value that Americans historically have placed on particular interests. *See Moore*, 431 U.S. at 504 n.12 (citing Wisconsin v. Yoder, 406 U.S. 205, 232 (1972), for the proposition that substantive due process rights are recognized because they reflect " 'strong tradition[s]' founded on 'the history and culture of Western civilization' "). *But cf.* Fallon, *supra* note 91, at 314-20 (arguing that tradition is a difficult concept to apply consistently and predictably and suggesting that other approaches to limiting substantive due process might better serve important constitutional and prudential values).

most types of property rights can be made whole after the fact.[212] In most cases involving most property rights, this analysis likely holds true. Nevertheless, the Supreme Court should recognize that at least some property interests, like some liberty interests, are incommensurable and therefore should be deemed "fundamental."[213]

Such a result would comport not only with the text of the Due Process Clauses, but also with the Framers' broad understanding of "property" as a concept encompassing not only tangible interests, but also values, beliefs, and opinions.[214] Madison wrote that property encompasses "a man's land, or merchandize, or money."[215] However, for Madison, "[i]n its larger and juster meaning," the concept of property also "embraces every thing to which a man may attach a value and have a right," including a person's "opinions, his person, his faculties, [and] his possessions."[216] In Madison's view, "[g]overnment is instituted to protect property of every sort."[217] Although Madison's conception of property is particularly broad, his views were relatively common in late eighteenth-century America: "As a legal concept, property enjoyed greater status in the early United States than it does today," and "[t]he early legal conception of property extended far beyond physical possessions to encompass the essence of human life."[218]

Professor Laura Underkuffler has explored the remarkably comprehensive

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212. Justice Stevens consistently has espoused this point of view, most recently in Albright v. Oliver, 510 U.S. 266, 315-16 n.37 (1994) (Stevens, J., dissenting) (arguing that in some circumstances postdeprivation procedures can provide adequate due process for deprivations of liberty); *see also* Ingraham v. Wright, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting) (arguing that the constitutional requirement of due process is consistent with the conclusion that a postdeprivation remedy may be constitutionally sufficient).

213. *Cf.* Epstein, *supra* note 210, at 698-705 (arguing that legal rules need not address incommensurable values precisely because such values cannot be measured reliably). *See generally* Randolph J. Haines, Note, *Reputation, Stigma, and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191, 206 (1977) (criticizing the *Paul* Court for allowing its restrictive interpretation of the Due Process Clause to preclude a constitutional remedy pursuant to § 1983).

214. *See* MADISON, *supra* note 11, at 266-68.

215. *Id.*

216. *Id.*; *see also* James Madison, *Note to His Speech on the Right of Suffrage*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 450, 450 (Max Farrand ed., 1937) ("In civilized communities, property as well as personal rights is an essential object of the laws . . . the rights both of property [and] . . . of persons ought to be effectually guarded."); THE FEDERALIST NO. 54, at 370 (James Madison) (Jacob E. Cooke ed., 1961) ("Government is instituted no less for the protection of the property, than of the persons of individuals."); Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 271-72 (1914) ("These words [in Madison's *Property*] are important as showing the elasticity attaching to the term 'property,' as used by American statesmen, from the beginning.").

217. MADISON, *supra* note 11, at 266.

218. Catherine M. Valerio Barrad, Comment, *Genetic Information and Property Theory*, 87 NW. U. L. REV. 1037, 1053-54 (1993); *see also* Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 538-41 (1995) (arguing that the Framers' conception of property interests was remarkably broad and concluding that "there is no basis on which to limit the term artificially, and a good deal of evidence that the intuitively broad meaning—for it is a broad term—is the correct one"); Corwin, *supra* note 216, at 271-72 (noting Madison's elastic understanding of the concept of property).

conception of property held by the Framers.[219] She describes Madison's essay as "curious and provocative," but notes that "the existence of a broader understanding of property during the Founding Era has been widely recognized."[220]

Given this understanding, the textual equality of property and liberty in the Due Process Clause of the Fifth Amendment takes on added significance: the Framers conceptualized many important interests as sounding in "property" rather than in "liberty." Accordingly, the textual equality of liberty and property in the Due Process Clauses is not merely a rhetorical flourish, but rather embodies an important political idea: the notion that property facilitates personal and political self-determination.[221] Under this view, property is not a sterile collection of tangible goods and economic rights, but rather a "broad range of human rights," including "the maintenance of personal integrity in both a physical and nonphysical sense," that are intimately related to "the development of human personality."[222]

In light of the Framers' comprehensive understanding of property, Professor Underkuffler rightly asks "why ... the comprehensive approach [is] overlooked."[223] I posit that the Supreme Court's discredited experiment with "economic due process" played no small role in eviscerating the legal relevance of property as a useful construct for protecting individual rights and personal autonomy. The ghost of *Lochner* has spooked both academics and jurists into ignoring the construct of property in substantive due process theory, thereby eliminating an important subset of fundamental interests from protection against governmental abridgment. If Madison's conception of property "is radically different from the ordinary understanding of property today,"[224] it may also be said that the Supreme Court's present inability to recognize property as an attribute of both personal autonomy and political participation would be equally strange to Madison.

As a matter of text, as a matter of history, and as a matter of doctrine, this result is nonsensical. It is time for the Supreme Court to banish the ghost of *Lochner* and reestablish doctrinal symmetry between its protection of property and liberty under the umbrella of its substantive due process jurisprudence. In

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219. *See* Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 133-42 (1990).

220. *Id.* at 136. She concludes that "[t]he broad conception of property found in Madison's essay, and implicit in the writings of others in the Founding Era, is not an aberration in intellectual history." *Id.* at 137. English political philosophers, including John Locke, viewed property as including important aspects of self. *Id.* at 137-38; *see also* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 64-71 (1996) (noting the Lockean nature of Madison's conception of free speech as a kind of property interest).

221. *See* Underkuffler, *supra* note 219, at 137-42.

222. *Id.* at 138-40. In addition to Madison, Alexander Hamilton and Associate Justice Joseph Story also assimilated into the rubric of "property" autonomy interests that today constitute "liberties." *See id.* at 136-37; *cf.* THE FEDERALIST NO. 85, at 589-99 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that the Constitution will protect both liberty and property rights).

223. Underkuffler, *supra* note 219, at 141.

224. *Id.* at 136.

sum, *Truax* v. *Corrigan* is the right theory on the wrong facts; on the proper facts, the Supreme Court should once again embrace substantive due process protection of property interests.[225]

II. THE THEORY APPLIED: REPUTATION AS A FUNDAMENTAL PROPERTY RIGHT

Reputation provides an excellent example of a "fundamental" property interest. Many (if not most) people would agree that reputation constitutes a precious commodity, a commodity that they expect the state to protect under its laws.[226] Reputation also qualifies as a "natural" property.[227] Finally, the protection of reputation from both private and public harms enjoys a long and proud history in the common law of the several states.[228] It would therefore be reasonable to posit that legislative efforts to restrict or rescind the protection of reputation (for example, incident to a tort reform project) should be subjected to strict judicial scrutiny.

This view might require modification, however, upon a careful reading of *Paul v. Davis*.[229] In *Paul*, the Supreme Court held that reputation does not constitute a "liberty" interest for purposes of applying the procedural aspect of the Fourteenth Amendment's Due Process Clause.[230] To be sure, the Court did

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225. *See id.*

226. *See* Philadelphia Newspapers v. Hepps, 475 U.S. 767, 781 (1986) (Stevens, J., dissenting) (criticizing majority opinion for attaching no weight to state's interest in protecting individual reputation, thereby achieving a "pernicious result"); Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 793 n.16 (1985) (Brennan, J., dissenting) (acknowledging that individual's interest in preserving reputation is central to notions of human dignity); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 261-62 (1974) (White, J., concurring) (arguing that freedom of press has never included right to publish falsehoods that damage individual reputation and noting that the Court has always cherished the individual's interest in preserving her reputation); Rosenblatt v. Baer, 383 U.S. 75, 92-94 (1966) (Stewart, J., concurring) (arguing that the right to protection of one's reputation is "at the root of any decent system of ordered liberty"); LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION 293-94 (1978) (arguing that "the interest in one's good name" has historically received protection as an "important interest"); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 524-27 (1991) (criticizing malice standard used in libel suits as shielding makers of false and defamatory attacks on reputation from liability); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 616-17 (1990) (criticizing *Falwell* Court for ignoring essential link between individual dignity and reputation recognized at common law).

227. By this I mean a personal asset that cannot be transferred, much like one's voice or habit. However, unlike these natural properties, reputation can be taken by another, even if it cannot be possessed by another—Shakespeare's point in *Othello*. Professor Van Alstyne has described a "natural" property as

> an asset one has simply as a person, an asset one can attempt to exploit commercially to whatever grand or trivial extent one chooses, and an asset that (like one's natural freedom to move about) is in no sense dependent in the first instance upon either state law granting it or a constitutional provision establishing it.

Van Alstyne, *supra* note 18, at 479 n.97.

228. A number of state constitutions have protected "reputation" or "good name" from *state* infringement. *See infra* Part IIA1.

229. 424 U.S. 693 (1976).

230. *Id.* at 699, 701, 711-13. For a discussion of the case, see *infra* Part IIB.

not decide—and did not purport to decide—whether reputation falls under the aegis of substantive due process.[231] Nonetheless, *Paul* certainly makes it more difficult to argue plausibly that it does. If one's interest in reputation is not sufficiently weighty to trigger procedural due process protection, it may not—Shakespeare's potential objections notwithstanding—qualify for substantive protection either.

Intuitively, such a result seems misguided. After all, the complete failure to protect one's interest in reputation falls short of merely protecting reputation through postdeprivation processes. By closely examining an individual's interest in reputation, I will show that reputation indeed qualifies as a "fundamental" property interest and, moreover, that substantive due process protection of reputation is both appropriate and necessary.

A. REPUTATION AS PROPERTY

Some thirty years ago, Justice Potter Stewart described the right to recover for defamation as "a basic [right] of our constitutional system."[232] He observed:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.[233]

Justice Stewart concluded his defense of reputation by emphasizing that "the poisonous atmosphere of the easy lie can infect and degrade a whole society."[234] In the intervening three decades, the Supreme Court has repeatedly cited Justice Stewart's language to describe the importance of reputation.[235]

Both the history of the common law and the contemporary practice of the states bear out Justice Stewart's observations about the importance of reputation in American society. They do not, however, support his characterization of reputation as a "liberty" interest. Instead, a careful examination of the current and historical practices of the states reveals that reputation is essentially an interest in property and, considered conjunctively, that history, tradition, and the common law establish that reputation is a *fundamental* property interest.

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231. *Compare Paul*, 424 U.S. at 711-13 (finding respondent's claim "far afield" from decisions regarding state power to *substantively* regulate conduct) *with id.* at 710-11 n.5 (clarifying that Court's discussion is limited to *procedural* guarantees of Due Process Clause).

232. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

233. *Id.*

234. *Id.* at 94.

235. *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1, 22 (1990); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-58 (1985); Time, Inc. v. Firestone, 424 U.S. 448, 471 (1976) (Brennan, J., dissenting); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); Time, Inc. v. Hill, 385 U.S. 374, 414 n.5 (1967) (Fortas, J., dissenting).

1. Reputation and the Practice of the States

Justice Stewart's solicitude for one's interest in reputation is consistent with the importance that state constitutions and state supreme courts have historically placed on one's interest in reputation. This historic interest, in turn, reflects and incorporates long-held social values that place a premium on one's good name.

English common law long protected reputation as a property interest[236] and the American colonial governments continued this tradition in their own common laws.[237] For example, Connecticut's colonial-era "Statutory Declaration of Rights" provided that

> no man's life shall be taken away: *no man's honour or good name shall be stained*: no man's person shall be arrested, restrained, banished, dismembered, nor any ways punished: no man shall be deprived of his wife or children: no man's goods or estate shall be taken away from him, nor any ways indamaged under the colour of law, or countenance of authority; unless clearly warranted by the laws of this state.[238]

This provision was in effect from 1784 to 1818, and the first act of the Connecticut Code of 1650 contained a largely identical provision.[239] To this day, the Connecticut constitution "specifically protects a person's reputation."[240]

Nor is Connecticut's approach unusual. Other state constitutions also accord reputation explicit textual protection, often by enumerating reputation along with the more familiar "life, liberty, and property" interests set forth in the Fifth and Fourteenth Amendments of the federal Constitution.[241]

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236. *See* Frank Carr, *The English Law of Defamation*, 18 LAW Q. REV. 255 (1902).

237. *See* Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903); *see also* R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99 (discussing the history of defamation in the common law and noting that the common law of most states largely incorporates prior English rules); Colin R. Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962) (analyzing the English cases that created the law of defamation and the reasons that supported its development). *See generally* MADISON, *supra* note 11 (describing a wide variety of interests, including political and religious beliefs, as the "property" of the holder and arguing that legitimate governments must both respect and protect such property).

238. 1 Conn. Pub. Acts 24 (1808) (emphasis added); *cf.* 42 U.S.C. § 1983 (1994) (establishing liability for deprivation of "any rights, privileges, or immunities secured by the Constitution and laws"); Monroe v. Pape, 365 U.S. 167, 172 (1961) (finding that Congress, in enacting § 1983, "meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position").

239. *See* Robert I. Berdon, *The Connecticut Constitution: An Analytical Framework for Raising State Constitutional Claims in Connecticut*, 14 QUINNIPIAC L. REV. 191, 192-94 (1994); Christopher Collier, *The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition*, 15 CONN. L. REV. 87, 91 n.14 (1982).

240. Berdon, *supra* note 239, at 205; *see* CONN. CONST. art. I, § 10.

241. *See, e.g.*, TEX. CONST. art. I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."); PA. CONST. art I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring,

For example, "[a]s early as 1855, the Texas Supreme Court unequivocally recognized the fundamental nature of reputation rights."[242] The Texas Supreme Court explained that

> [e]very man has a clear and indisputable legal right to be secure not only in the enjoyment of his life, liberty, and property, but also in his reputation and good name; and for every invasion of this right he has a legal claim to redress by a civil action. He has a right to be protected from defamation of his character, which rests upon as solid a foundation as his right to be protected in his person and his property.[243]

Notwithstanding the Supreme Court's announcement in *Paul v. Davis* that the procedural aspect of the Due Process Clause does not protect reputation,[244] "[p]ersons whose reputations are threatened should rightfully expect at least as much protection from a Texas [state] court as they would have received in federal court before *Paul v. Davis*."[245]

In addition, in the absence of an express textual reference to reputation in their state constitutions, some state supreme courts have interpreted their state constitutions' due process clauses to protect reputation as an aspect of "property" or "liberty."[246] For example, the North Carolina Supreme Court held that the state constitution's due process clause protected substantive common law rights—including those protecting property—from legislative abridgment.[247]

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possessing and protecting property and reputation, and of pursuing their own happiness."); *cf.* U.S. CONST. amends. V, XIV (protecting "life, liberty, and property" interests from abridgment absent "due process of law"). Many state constitutions contain clauses that guarantee a "right to a remedy." *See* Neil H. Cogan, *Moses and Modernism*, 92 MICH. L. REV. 1347, 1362-63 (1994) (stating that "most" state constitutions guarantee a right to a remedy); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992) (listing the 39 states that guarantee a right to a remedy); *see also* IND. CONST. art. I, § 12 ("All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."). State supreme courts have interpreted these clauses in a variety of ways. *See* Schuman, *supra*, at 1203-17. Although state constitutional guarantees of a right to a remedy may be interpreted as supplemental to the protection of property interests afforded by the federal substantive due process right, such state law rights do not displace such federal rights.

242. David Richards & Chris Riley, *Developing a Coherent Due-Course-of-Law Doctrine*, 68 TEX. L. REV. 1649, 1658 (1990).

243. Yarborough v. Tate, 14 Tex. 483, 486 (1855).

244. Paul v. Davis, 424 U.S. 693, 697-99, 711-12 (1976).

245. Richards & Riley, *supra* note 242, at 1658-59.

246. *See, e.g.*, Kennedy v. Item Co., 34 So. 2d 886, 890 (La. 1948) (stating that "[a] man's reputation is recognized to be as invaluable . . . as his right to due process of law in the protection of his life, liberty, and property"); *see also* Richard P. Bullock, Comment, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 LA. L. REV. 787, 790-92, 794 n.32 (1991) (arguing that Louisiana constitution provides broader rights than may be asserted in federal courts).

247. *See* Trustees of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 87-89 (1805); *see also* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 981-84 (discussing the North Carolina Supreme Court's interpretation of the "law-of-the-land" clause in the state constitution as barring the legislature from depriving corporations and individuals of their property without due process of law);

Moreover, North Carolina's use of substantive due process to protect pre-existing common law property rights, presumably including reputation, is not unique; numerous other state supreme courts have adopted this expansive construction of due process.[248]

Finally, unlike the Supreme Court's liberty-based doctrine of substantive due process, most state constitutions give equal treatment to property interests. For example, over twenty-one states expressly guarantee the right to protect one's property and eighteen of these states describe the right as "inalienable," while two others deem the right "inherent."[249] Thus, the right to one's reputation is a basic property right in the American legal system. Certainly, it has a much cleaner historical pedigree than many liberty interests recognized by the Supreme Court, such as the right to marry, the right to vote without paying a poll tax, the right to use birth control, or the right to terminate a pregnancy.[250]

2. Reputation in a More Generalized Context

Although the historical practices of the states serve as a sure guide to identifying fundamental rights,[251] contemporary attitudes toward the value of a particular interest, such as reputation, are also relevant in determining the constitutional status of the interest.[252] A number of legal scholars, whose works

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Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1184-87 (1991) (same). For a discussion of the *Foy* decision, see Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 380-84 (1911) (arguing that *Foy* should be viewed as one of the nation's first substantive due process cases). *See generally* Louis D. Bilionis, *Liberty, "The Law of the Land," and Abortion in North Carolina*, 71 N.C. L. REV. 1839, 1845-52 (1993) (describing the North Carolina Supreme Court's activist cast and its mandate to use judicial review to enforce and protect "the law of the land" from legislative encroachments).

248. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351-59 (1890); *see also* FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW 1-18, 30-40 (1986) (describing historical interpretations of relation of "due process" to property rights); Riggs, *supra* note 247, at 981-84; Dowdle, *supra* note 247, at 1185-86, 1186 n.128; *cf.* Corwin, *supra* note 247, at 375-80 (noting state supreme courts' judicial self-restraint in several early cases involving claims under unenumerated due process rights).

249. *See* Lauri Alsup, *The Right to Protect Property*, 21 ENVTL. L. 209, 213-14 (1991) (citing and quoting various state constitutions).

250. *See* Edward G. Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1356-59 (describing the Supreme Court's decisions to uphold a mental patient's right to liberty and an interracial couple's right to marry as contrary to tradition); *see also* ELY, *supra* note 26, at 60-63 (noting the utility of tradition as a touchstone for recognizing constitutional rights but questioning tradition's reliability in light of the indeterminacy problem); Bork, *supra* note 26, at 7-11 (describing and criticizing the Supreme Court's recognition of nontextual fundamental rights).

251. *See infra* notes 345-49 and accompanying text.

252. In the context of its Eighth Amendment jurisprudence, the Supreme Court has stated that "contemporary social attitudes" are highly relevant to determining whether a particular punishment is "cruel and unusual." *See* Estelle v. Gamble, 429 U.S. 97, 102-03 (1976); Gregg v. Georgia, 428 U.S. 153, 171-73 (1976); Weems v. United States, 217 U.S. 349, 353 (1910). Likewise, contemporary attitudes toward particular liberty interests undeniably have shaped the Supreme Court's substantive due process jurisprudence. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 846-47 (1992) (plurality opinion); Roe v. Wade, 410 U.S. 113, 152-53 (1973); *cf.* Bowers v. Hardwick, 478 U.S. 186,

range from standard law review articles to more esoteric jurisprudential musings, confirm the importance of both property generally, and reputation specifically, in contemporary American society.

In his seminal analysis of a new class of entitlement-based property interests, Professor Charles Reich argued that property is central to the construction of being: "[I]n a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality."[253] In essence, the possession and exercise of property rights both define us and permit us to be self-defining. As Professor William Van Alstyne has noted, "The rightness of this view is scarcely contestable from the perspective of our own Constitution, enshrining as it does property as equal in importance with life and with liberty, of which no person shall be deprived without due process of law."[254]

The generalized importance of property interests under the Constitution is also relevant to evaluating the weight of particular property interests. For example, those property interests most closely associated with individual autonomy—i.e., property interests that facilitate the meaningful exercise of liberty interests—are central to who we are and what we aspire to be and thus deserve more than a modicum of solicitude.[255] Viewed this way, reputation should rank first among property interests because it constitutes an essential property—one

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195-96 (1986) (finding that majority belief that homosexuality is immoral is an adequate state justification for legislative proscriptions against sodomy).

253. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

254. Van Alstyne, *supra* note 18, at 453. By way of comparison, the Japanese Constitution of 1947—the individual rights and liberties provisions of which were consciously modeled on the United States Constitution—does not include property in its version of the Due Process Clause. *See* KENPŌ ch. III, art. 31 ("No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."). Professor Nobushige Ukai has explained that this omission was quite deliberate: "This Article [31] makes it clear that restrictions on property should be considered separately from questions about due process of law, thus precluding Japan from the difficulties encountered in the United States when the Supreme Court declared that an early child labor law was unconstitutional." Nobushige Ukai, *The Significance of the Reception of American Constitutional Institutions and Ideas in Japan*, *in* CONSTITUTIONALISM IN ASIA 114, 121 (Lawrence W. Beer ed., 1979); *see also* Akira Osuka, *Welfare Rights*, 53 LAW & CONTEMP. PROBS. 13, 15-16 (1990). This conscious decision to exclude property from the Japanese version of the Due Process Clause—a decision made in part by American lawyers in the aftermath of World War II—says something important about its American progenitor: even in the post-*Lochner* era, one could not logically read the protection of property out of the Due Process Clause, either as a matter of procedural or substantive due process. Accordingly, the American drafters of Article 31 simply omitted "property" from the text of the Japanese due process clause.

255. *Cf. Casey*, 505 U.S. at 851 (plurality opinion) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."). There is no principled reason to afford such protection to liberty interests while withholding it from equally fundamental property interests. Nor, for that matter, should litigants be required to engage in semantic gymnastics to force every important personal matter into the rubric of "liberty." Indeed, if one accepts the basic thesis of this article, whether a particular interest constitutes liberty or property would be largely irrelevant for purposes of determining the applicability of substantive due process; courts would instead focus on the nature and quality of the asserted interest in order to determine whether it is incommensurable and, therefore, fundamental. *See supra* text accompanying notes 182-217.

that serves to define us to others in our community perhaps more than any other.

One should also consider the centrality of particular property interests to the nation's project of democratic self-governance. Like liberty, property facilitates democratic self-governance both directly and indirectly: it does so directly by dispersing power—thereby creating a means of enforcing accountability[256]—and indirectly by facilitating the exercise of other liberties.[257] The protection of reputation is essential to democratic self-governance because it protects individual voice—the very ability to participate meaningfully in the marketplace of ideas. The ability of one citizen to destroy another citizen's reputation with impunity through the use of lies is the ability to silence dissent or unpopular points of view. Similarly, permitting a government official to defame individual citizens is fundamentally inconsistent with maintaining a viable participatory democracy.

Several contemporary trends confirm that reputation should be regarded as a fundamental property interest. Over a decade ago, Professor Rodney Smolla observed that "an astonishing shift in cultural and legal conditions has caused a dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money."[258] He posited that one of the contributing factors for this phenomenon was "a new legal and cultural seriousness about the inner self,"[259] and contended that "the rejuvenation of the law of defamation is in part the result of strongly felt cultural attitudes about the importance of protecting psychic well-being."[260]

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256. *See* Rose, *supra* note 5, at 340-45; *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 9 (1962).

257. For example, a free press is simply not possible in the absence of secure property rights.

258. Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1 (1983).

259. *Id.* at 11.

260. *Id.* at 17. Professor Smolla would probably reject my attempt to characterize reputation as a "property" interest: "[I]t seems clear that the bulk of the money paid out in damage awards in defamation suits is to compensate for psychic injury, rather than to compensate for any objectively verifiable damage to one's community standing." *Id.* at 19. This description of jury awards in defamation cases arguably describes the rationale for granting damages in cases alleging the intentional infliction of emotional distress. One could argue, however, that defamation protects the economic value of reputation—a value that is quantifiable in at least some circumstances. For example, suppose that a sheriff calls a press conference and announces that a local pediatrician is a pedophile. Further assume that the charge is baseless and reflects nothing more than a personal vendetta by the sheriff against the doctor. It is highly doubtful that the defamed pediatrician will be able to maintain his practice; even if he succeeds in prosecuting a defamation action and overcoming official immunity protection for the sheriff's statement in the process, a nontrivial portion of the community will refuse to believe that the sheriff's statement is a lie. In all probability, the pediatrician will have to relocate and rebuild his practice in some distant community. This loss of goodwill has a quantifiable economic value, and the tort of defamation provides the vehicle for recovering this value. In short, whether the pediatrician suffers "psychic" injury seems less relevant to the quantification of damages than whether his practice has been adversely affected. That said, Professor Smolla's suggestion that defamation plaintiffs use the tort to obtain "a forum for an official declaration that the attack on the victim was undeserved" certainly rings true. *Id.*; *see also* Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743, 744-45 (1986) (citing research data supporting the assertion that most defamation plaintiffs "win by suing" rather than "sue to win").

Professor Smolla's observations about the new salience of defamation law supports the assertion that reputation is fundamental. The importance of reputation in contemporary American society is demonstrated by the increasing number of Americans who seek to protect their reputations through recourse to the common law.

Even if one grants the fundamental nature of reputation as a general matter, the task of classifying it as a "liberty" or "property" interest still remains.[261] If defamation exists principally to protect the psyche, reputation is more akin to a liberty interest—for example, the right to be free from a particular distraction. If one focuses on a defamatory statement's economic impact, however, and on the common law's willingness to provide a remedy only for *that* economic injury and for no other harms, psychic or otherwise, reputation seems more akin to a property interest.[262]

Professor Robert Post has posited that reputation exists as three separate and identifiable interests: reputation as property, reputation as honor, and reputation as dignity.[263] He acknowledges that "[t]he concept of reputation that is most easily available to contemporary observers is that of reputation in the marketplace."[264] Under this paradigm, reputation "can be understood as a form of intangible property akin to goodwill."[265] This conception of reputation enjoys the blessing of history.[266] As Post notes, "The concept of reputation as property is so deeply embedded in our understanding of defamation law that a prominent nineteenth century writer could conclude that in defamation law the protection is to the property, and not to the reputation."[267]

According to Post, classifying reputation as property "create[s] a powerful and internally coherent account of defamation law."[268] He notes, however, that some aspects of libel law, such as per se libels, limitations on recoveries for defamatory statements, and assorted oddities of damages jurisprudence demonstrate that reputation is something more (and perhaps something less) than mere property.[269] Thus, he goes on to posit that conceptualizing reputation as "honor" or "dignity" may help to account for these quirks.[270]

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261. *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1734 n.116 (1993).

262. *See, e.g.*, Van Alstyne, *supra* note 18, at 479 n.97.

263. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 692-93 (1986).

264. *Id.* at 693.

265. *Id.* (citation omitted).

266. *See id.* at 694-96; *see also* THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS xx (New York, G. Lamson 1826) (stating that reputational concerns "connect themselves with credit and character, affixing to them a value, not merely ideal, but capable of pecuniary admeasurement, and consequently recommending them as the proper objects of legal protection").

267. Post, *supra* note 263, at 696 (citation and internal quotation marks omitted).

268. *Id.*; *see* Van Alstyne, *supra* note 18, at 479 n.97 (arguing that reputation could quite reasonably be denominated a property interest).

269. Post, *supra* note 263, at 697-99.

270. *See id.* at 703-07, 712-19, 720.

For purposes of applying the Due Process Clause, it makes sense to conceptualize reputation as property; as Post acknowledges, this account has the imprimatur of history and tradition.[271] As another commentator has explained:

> It is in the context of a career that reputation seems most like an individual possession. For in a career one's greatest asset is one's self, and what people think of one has a crucial bearing on one's success. One's skill, one's probity, one's character, are crucial resources in climbing the escalator of advancement in American society. Anything that would cast doubt on one's reputation in these spheres would, therefore, be directly harmful to one's life chances.[272]

Given its strongly economic cast, reputation is quite reasonably characterized as a "property" interest for substantive due process purposes.[273]

Finally, although I prefer to conceptualize reputation (like bodily integrity) as a property interest, if one accepts my central thesis that substantive due process should protect *both* property and liberty interests, the importance of labelling a given interest as "property" or "liberty" falls away: regardless of how one describes the interest, substantive due process protection applies. Rather than focusing on the characterization of a particular interest as liberty or property, courts would instead attempt to ascertain the importance of the particular interest in order to decide whether to apply strict scrutiny or rational basis review.[274] In order to choose between the two standards of review, the reviewing court would have to determine whether a particular interest is "fundamental."

B. *PAUL V. DAVIS*: REPUTATION AS A CONSTITUTIONAL INTEREST

In *Paul v. Davis*, the Supreme Court rejected the argument that reputation, standing alone, enjoys protection under the procedural aspect of the Due Process Clause. *Paul* could also be read to preclude substantive due process protection of reputation as a property interest. If read broadly to prohibit both substantive and procedural due process protection of reputation, *Paul* constitutes a major impediment to the recognition of reputation as a fundamental

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271. *Id.* at 693-95.

272. Bellah, *supra* note 260, at 744.

273. Of course, this is not to say that reputation does not also incorporate noneconomic interests. *See id.* at 744-45; Harris, *supra* note 261, at 1725-28, 1734-36 (arguing that courts have routinely used defamation law to protect myriad economic interests associated with reputation); Post, *supra* note 263, at 695-97, 720; Smolla, *supra* note 258, at 17-19.

274. Prior to Mathews v. Eldridge, 424 U.S. 319 (1976), and Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court had demonstrated a willingness to consider the importance of the interest to the individual rather than its status as "property" or "liberty" for purposes of procedural due process protection. *See* Bell v. Burson, 402 U.S. 535, 539 (1971) (holding that a driver's license, whether characterized properly as liberty or property, constituted a protected interest for purposes of procedural due process). Provided that a particular interest arguably constitutes either liberty or property, due process protections—both procedural and substantive—should attach.

property interest. In the discussion that follows, I explain why the better approach is to read *Paul* more narrowly. In addition, I examine whether *Paul* addresses the status of reputation as a liberty interest, a property interest, or both.

The facts of the case are compelling. Paul, the chief of the Louisville, Kentucky police department, printed and distributed flyers that listed Edward Davis as an "active shoplifter."[275] Paul included Davis on this list because he had been arrested for shoplifting; however, Davis had not been tried for—much less convicted of—shoplifting.[276] Davis claimed that Paul's behavior deprived him of liberty without due process of law.[277]

Relying on the Supreme Court's then-recent precedent in *Wisconsin v. Constantineau*,[278] Davis argued that Paul had an obligation to provide him with meaningful predeprivation process before posting his name as an "active shoplifter."[279] The Sixth Circuit agreed that *Constantineau* governed the case and reversed the district court's dismissal of the claim.[280]

Davis's reliance on *Constantineau* proved misplaced, however. Writing for the majority, then-Justice Rehnquist explained that "[t]he words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law."[281] Fearing that any alternative holding "would make . . . the Fourteenth Amendment a font of tort law to be superimposed upon whatever system may already be administered by the States," Justice Rehnquist refused to require the state to provide process before depriving a person of his good name.[282]

Indeed, according to Justice Rehnquist, Davis had no protected interest in his reputation. Instead, Davis's "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions."[283] He concluded his procedural due process analysis by explaining that "the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed

275. Paul v. Davis, 424 U.S. 693, 695-96 (1976).

276. *Id.*; *see also id.* at 718-20 (Brennan, J., dissenting) (describing in detail the circumstances and testimony pertaining to respondent's inclusion on the list of known shoplifters).

277. *Id.* at 697.

278. 400 U.S. 433 (1971). In *Constantineau*, the Supreme Court held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.* at 437. From Davis's perspective, his case fit nicely within the *Constantineau* framework: Paul's assertion that he was an "active shoplifter" plainly damaged his reputation, giving him a right to demand predeprivation process.

279. *Paul*, 424 U.S. at 697-98.

280. *Id.* at 696-99.

281. *Id.* at 701.

282. *Id.*

283. *Id.* at 712; *cf.* Haines, *supra* note 213, at 217-23 (describing the emphasis that the Supreme Court had placed on reputation in pre-*Paul* procedural due process cases).

against state deprivation without due process of law."[284]

Notwithstanding this unqualified language, the *Paul* Court was addressing due process protection of reputation only as a matter of procedural due process.[285] All of the precedents cited in the majority's opinion, including *Constantineau*, sound only in procedural, not substantive, due process.[286] Moreover, in a footnote, Justice Rehnquist specifically limited the *Paul* holding to "procedural due process guarantees of the Due Process Clause."[287] Accordingly, after *Paul*, the status of reputation as a matter of substantive due process remained open.[288]

1. The Academy's Reaction to *Paul*

Scholarly reaction to *Paul* was highly critical.[289] Professor Henry Monaghan authored what some regard as the most influential work on the case.[290] Although Professor Monaghan expressed grave doubts about the wisdom of the decision, his critique focuses largely on the *substantive*, rather than the *procedural*, due process aspects of the case:

> Taken at face value, *Paul* would radically reorient thinking about the nature of the "liberty" protected by the due process clause. The case's rationale would confine the *federal content* of "liberty" to specific constitutional guarantees and to the *Roe* right of privacy, and, perhaps, to the Framers' understanding of liberty as freedom from personal restraint.[291]

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284. *Paul*, 424 U.S. at 712.

285. It is also curious that Justice Rehnquist purported to decide the case on both liberty and property grounds, given that Davis only alleged a liberty interest in his reputation. *Compare id.* at 697 (Davis alleged that the state "deprived him of some 'liberty' protected by the Fourteenth Amendment" under *Constantineau*) *with id.* at 701, 712 (purporting to decide whether procedural due process protects reputation either as a "liberty" or "property" interest). Thus, Justice Rehnquist was painting with a broader brush than was necessary to dispose of the case at bar.

286. *See id.* at 702-09.

287. *Id.* at 710-11 n.5.

288. *Cf.* Siegert v. Gilley, 500 U.S. 226, 233-35 (1991) (holding that no *Bivens* action exists for damage to reputation). *Siegert* precludes recognition of a constitutionally guaranteed liberty interest in reputation. *See id.* However, it does not speak to whether a would-be *Bivens* plaintiff has a cognizable property interest in reputation; in fact, *Siegert* characterizes *Paul* as solely a liberty decision. *See id.* Full recognition of reputation as a constitutionally protected property interest would require that the Supreme Court either limit *Siegert* to instances in which an adequate state law tort remedy exists and is available to the plaintiff or overrule the decision completely.

289. *See* George C. Christie, *Injury to Reputation and Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 59-63 (1976); Henry P. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 423-29 (1977); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 324-28 (1976); Mark Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist*, 64 KY. L.J. 753, 753-54, 763-65 (1976); Haines, *supra* note 213, at 203-09; Thomas J. Stalzer, Note, *Reputation as a Constitutionally Protectible Interest*, 52 NOTRE DAME LAW. 290, 291-92, 296-99 (1976).

290. *See* Monaghan, *supra* note 289, at 423-34; *see also* Gerald L. Neuman, *Law Review Articles That Backfire*, 21 U. MICH. J.L. REF. 697, 697-706 (1988) (describing Professor Monaghan's influential article and the federal courts' mixed efforts to incorporate the ideas therein).

291. Monaghan, *supra* note 289, at 424.

Professor Monaghan's reference to *Roe v. Wade*[292] demonstrates that his principal concern is not whether Davis received constitutionally adequate process prior to being branded an "active shoplifter," but whether reputation—standing alone—is a "fundamental" interest.[293] Neither *Paul* nor *Constantineau* addresses whether substantive due process protects reputation. In this respect, Professor Monaghan was comparing apples to oranges.[294]

Although Professor Monaghan later acknowledged that *Paul* spoke only to procedural, not substantive, due process,[295] he nonetheless predicted that the Court would later apply *Paul*'s holding to a substantive due process claim involving the protection of reputation.[296] There is good reason to question this conclusion in light of *Parratt v. Taylor*,[297] *Zinermon v. Burch*,[298] and *Albright v. Oliver*,[299] all of which suggest that a different analysis should apply in cases involving substantive due process claims.

Professor Monaghan's broad reading of *Paul* presupposes that a state is free to leave its citizens at the mercy of arbitrary officials, bent on spreading the most vicious lies and falsehoods. He notes that "in a 'Constitution for a free people,' it is an unsettling conception of liberty that protects an individual against state interference with his access to liquor but not with his reputation in the community."[300] Professor Monaghan goes on to suggest that "[t]he more reprehensible and subject to legal redress the conduct, the freer the state is to engage in it—at least until that conduct bumps up against some specific constitutional guarantee or the hodgepodge right of privacy."[301] If *Paul* worked the mischief that Professor Monaghan describes, it would indeed be a terrible case of mammoth proportions. However, *Paul*'s holding is far less sweeping than Professor Monaghan suggests; it certainly does not mean that the states are free to abridge fundamental interests.

Because of *Constantineau*, Davis was content to litigate his claim under the

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292. 410 U.S. 113 (1973).

293. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

294. Professor Monaghan seems to have recognized this defect in his reasoning. In a subsequent article, he specifically exempted cases involving "fundamental" rights from the scope of the *Parratt v. Taylor* line of cases, which limit a plaintiff's ability to assert certain procedural due process claims in the federal courts by denying the existence of cognizable "property" or "liberty" interests when the alleged deprivation is not the result of official state law or policy. *See* Henry P. Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 984-86, 990-94 (1986).

295. Monaghan, *supra* note 289, at 431-33.

296. *Id.*

297. In *Parratt*, a prisoner claimed that the state violated his procedural due process rights when a prison guard destroyed a hobby kit worth $23.50 without providing predeprivation process. Parratt v. Taylor, 451 U.S. 527, 529-31 (1981). *Parratt* and subsequent cases hold that the availability of an adequate postdeprivation remedy generally satisfies the requirements of procedural due process when the conduct at issue is random or unauthorized. *See id.* at 530-31, 537-44.

298. 494 U.S. 113 (1990).

299. 510 U.S. 266 (1994) (plurality opinion).

300. Monaghan, *supra* note 289, at 426 (citation omitted).

301. *Id.* at 427.

"procedural" aspect of the Due Process Clause. Accordingly, the Supreme Court could not properly speak to the larger questions that a substantive due process claim might raise. In all probability, of course, Justice Rehnquist would have liked to close the federal courthouse door to both substantive *and* procedural due process claims that seek to establish a property or liberty interest in reputation. However, his chosen vehicle could not, and does not, support such an analytical move.[302]

In a subsequent case, *Siegert v. Gilley*,[303] the Supreme Court held (in an opinion by Chief Justice Rehnquist) that no *Bivens* action would lie for damage to reputation because there is no constitutionally cognizable liberty interest in reputation.[304] *Siegert* does what *Paul* did not: it forecloses the existence of a substantive due process liberty interest in reputation. However, *Siegert* still did not address whether a substantive due process *property* interest in reputation exists and, like *Paul*, seemed to assume that adequate state law tort remedies are readily available.[305]

2. State Remedies and Federal Rights

Paul seems to presuppose the availability of postdeprivation redress through the state tort system but fails to specify whether the state could abridge Davis's interest in his reputation without providing any meaningful postdeprivation process.[306] This interpretation of *Paul* comports with *Parratt v. Taylor*, which holds that a procedural due process claim will not lie for a negligent deprivation of a property interest.[307] As a matter of procedural due process, a postdeprivation remedy sufficiently protects both property and liberty interests.[308] *Parratt*'s scope, however, is limited to procedural due process claims; it does not encompass those claims brought under substantive due process.[309]

Thus, the majority opinion in *Paul*, odious though it may be, does not permit the state to leave the individual without any remedy for the defamatory statements of capricious state officers. Rather, when placed in the context of the *Parratt* line of cases, it would seem to hold only that a tort action for damages following a public officer's defamatory act satisfies the requirements of procedural due process.[310] The opinion simply does not speak to a state's freedom to define the law of defamation or to the possible application of the doctrine of

302. *See Paul*, 424 U.S. at 710-11 n.5.

303. 500 U.S. 226 (1991).

304. *Id.* at 233-35.

305. *See id.*

306. *Paul*, 424 U.S. at 697, 711-13; *see also* Haines, *supra* note 213, at 204 & n.88 (noting the Court's silence in *Paul* regarding the possibility of an absolute or qualified privilege in defamation suits against government officials).

307. *Parratt*, 451 U.S. at 543-44.

308. *See* Zinermon v. Burch, 494 U.S. 113, 132 (1990); Ingraham v. Wright, 430 U.S. 651, 701 (1977).

309. *Zinermon*, 494 U.S. at 125; *see* Nahmod, *supra* note 172, at 225-29.

310. *See* Nahmod, *supra* note 172, at 225-34; Shapiro, *supra* note 289, at 324-25.

official immunity to such actions as a means of denying an effective recovery. Nor, strictly speaking, does the opinion address whether a state may permit an officer or agency to defame citizens as a matter of official policy. Accordingly, it is still possible to argue that a state violates substantive due process when it infringes upon an individual citizen's reputation or permits others to do so.[311] *Paul* merely precludes the use of procedural due process as a means of challenging such state behavior.[312]

As a practical matter, *Paul* forces would-be litigants to challenge the adequacy of the state's common law of defamation when such law precludes recovery. Moreover, a would-be plaintiff might mount a substantive due process challenge to a state's law of official immunity when that doctrine would preclude recovery against a government official for a defamatory statement. Alternatively, a would-be plaintiff could attempt to show that the state's behavior was so egregious that it constituted an independent constitutional wrong.[313]

This approach is eminently reasonable: a state may provide adequate process even though its substantive law unduly burdens a fundamental right;[314] notwith-

311. *See* Tushnet, *supra* note 289, at 758 (suggesting that whether state has discretionary power or constitutionally mandated obligation to confer right to good name by adopting defamation laws, plaintiff in *Paul* had stated a constitutional claim). The Supreme Court removed any doubt about this point in a recent case involving a substantive due process claim arising from a wrongful prosecution. *See* Albright v. Oliver, 510 U.S. 266, 282-84 (1994) (Kennedy, J., concurring); *infra* Part IVA. Further confirmation comes from *Parratt v. Taylor*, in which Justice Rehnquist—again writing for the majority—relied on *Paul* to support the proposition that an adequate postdeprivation state remedy precluded a procedural due process claim for the conduct at issue. *Parratt*, 451 U.S. at 543-44. Two concurring Justices specifically distinguished substantive due process claims from the claim at issue in *Parratt*. *See id.* at 545-46 (Blackmun, J., concurring) ("I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process." (citations omitted)); *id.* at 552-53 (Powell, J., concurring) ("The Due Process Clause imposes substantive limitations on state action and under proper circumstances these limitations may extend to intentional and malicious deprivations of liberty and property, even where compensation is available under state law." (citations omitted)). Justice White joined Justice Blackmun's concurrence, *id.* at 545, and Justice Stewart authored a separate concurrence that emphasized the procedural due process nature of the claim at issue. *Id.* at 544-45 (Stewart, J., concurring). Justice Marshall did not join the majority's opinion because he did not believe that state law provided an adequate postdeprivation remedy. *Id.* at 554-56 (Marshall, J., concurring in part and dissenting in part). Thus, five Justices voted that substantive due process might apply in cases like *Parratt*, in which no procedural due process claim would lie.

312. This conclusion is certainly defensible, leaving aside the propriety of overruling sub silentio the early precedent in *Constantineau*. If the state provides adequate postdeprivation process, a defamed person is presumably not denied procedural due process. Moreover, most instances of defamation will occur on an ad hoc basis and not pursuant to an official policy; it is the offhand remark to the reporter, rather than the official policy of the state, that is likely to cause problems. Consequently, relying on postdeprivation process is not an inherently irrational approach. Applying *Mathews v. Eldridge* balancing, however, it is doubtful that the instances of state-sponsored defamation would be reduced if predeprivation process is provided. The real question is whether the Constitution permits a state to defame an individual citizen without providing a means of making the defamed individual whole. This question relates not to procedural due process, but rather to substantive due process.

313. *See* Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994). Such an argument could be premised on a substantive interest in fair treatment by the government: a "due process" interest in due process itself. *See infra* notes 425-36 and accompanying text.

314. *See* Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion).

standing the adequacy of the process provided, the state also may act arbitrarily or irrationally to deprive a citizen of a property or liberty interest.[315] *Paul* does not preclude a substantive due process attack either to the deprivation of a fundamental property or liberty interest or as a means of attacking wholly irrational governmental behavior.[316]

3. The Existence of a Freestanding Federal Remedy in the Absence of an Adequate State Remedy

Justice Kennedy recently has suggested that states have a constitutional obligation to respect "some of the interests granted historical protection by the common law of torts,"[317] citing "the interests in freedom from defamation and malicious prosecution" as examples of such interests.[318] Indeed, the concurring and dissenting opinions in *Albright v. Oliver* suggest that a majority of the Court might reconsider whether the states retain plenary authority to reshape the law of torts to deny or limit the protection traditionally afforded certain interests under the common law.[319]

Thus, *Paul*'s premise that the Constitution must not serve as a "font of tort law to be superimposed upon whatever systems may already be administered by the States"[320] may no longer command a majority of the Court.[321] If so, the Court should articulate a coherent theory of substantive due process that justifies federal court supervision of state substantive tort, contract, and property law—areas of state law that have historically been largely, if not exclusively, the province of the states since the New Deal.[322]

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315. Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407-10 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

316. *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

317. Albright v. Oliver, 510 U.S. 266, 282 (1994) (Kennedy, J., concurring).

318. *Id.*

319. *See infra* notes 380-405 and accompanying text; *see also* BMW v. Gore, 116 S. Ct. 1589, 1598-1604 (1996) (using Due Process Clause to limit punitive damages award in state tort law suit). *See generally* Tushnet, *supra* note 289, at 758 & n.24.

320. Paul v. Davis, 424 U.S. 693, 701 (1976).

321. Indeed, the Supreme Court's recent decision in *BMW v. Gore* demonstrates the Court's willingness to use the Due Process Clause as a means of policing state tort law, at least insofar as punitive damage awards are concerned. *Gore*, 116 S. Ct. at 1592. In *Gore*, the Supreme Court held that a $2 million punitive damages award was "grossly excessive" and therefore violated BMW's substantive due process rights. *Id.* at 1604. *But see* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 470-72 (1993) (Scalia, J., concurring) (arguing that the Supreme Court's supervision of punitive damage awards in state tort law constitutes an undesirable resurrection of substantive due process for economic rights). Just as substantive due process limits a state's ability to create tort remedies, it should (logically) also circumscribe their ability to abolish such remedies. *See Albright*, 510 U.S. at 284-85 (Kennedy, J., concurring) (arguing that the *Parratt* doctrine represents an appropriate balance between state autonomy and federal court enforcement of federal constitutional rights and noting that the states do not posses unbridled discretion to abolish "interests granted protection by the common law of torts"); *see also* Haines, *supra* note 213, at 206 (arguing that § 1983, which was intended to protect federal constitutional interests from state abridgment, requires federal courts to invalidate unduly restrictive state tort laws).

322. *See* Currie, *supra* note 34, at 507-16 (tracing evolution of substantive due process jurisprudence during 1930s); Phillips, *supra* note 34, at 269-85, 289 (providing an overview of Supreme Court substantive due process jurisprudence from *Lochner* era to present).

C. REPUTATION, SUBSTANTIVE DUE PROCESS, AND CONFLICTS WITH OTHER PROVISIONS OF THE CONSTITUTION

Before accepting my argument that reputation constitutes a fundamental property interest that the federal courts should safeguard under the doctrine of substantive due process, one might reasonably inquire about the ramifications of such a doctrinal shift for well-settled First Amendment law. Specifically, such a theory seems inconsistent with the Supreme Court's First Amendment holdings regarding the permissible scope of state defamation law.[323]

It is true that the Court has severely limited the states' ability to permit tort recoveries against newspapers, broadcasters, and other members of the Fourth Estate.[324] However, even after *New York Times Co. v. Sullivan*,[325] the states ostensibly "retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."[326]

Thus, recognizing a fundamental property interest in reputation would simply limit the states' ability to go beyond the dictates of *Sullivan* and subsequent cases in protecting the First Amendment prerogatives of the press. That is, the states could not abolish or otherwise restrict recoveries for defamation more than is required by the Supreme Court's First Amendment guidelines.[327]

A second potential hurdle posed by substantive due process protection of property rights (including reputation) is the recent trend toward expanding the Takings Clause to encompass an ever broader universe of property interests.[328] Dean Richard Epstein has suggested that either the Takings Clause or the Contracts Clause should serve as a basis for the expanded protection of property

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323. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

324. For a detailed description of the Supreme Court's First Amendment supervision of state defamation law, see Smolla, *supra* note 258, at 47-63; *see also* Post, *supra* note 226, at 626-39 (tracing the interplay of notions of "public discourse" and "community standards" in the Supreme Court's First Amendment jurisprudence).

325. 376 U.S. 254 (1964).

326. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46 (1974).

327. For example, a state could not require all plaintiffs to establish malice as a prerequisite to recovering compensatory damages for a slander. *See id.* at 346-50 (permitting states to choose any fault-based standard of liability to govern defamation actions brought by nonpublic figures but prohibiting the imposition of exemplary damages in the absence of a showing of actual malice). As a matter of federal constitutional law, a nonpublic figure suing a nonmedia defendant should enjoy the right to recover for a defamatory statement under a less onerous standard of liability than the *Sullivan* "actual malice" standard. *See Sullivan*, 376 U.S. at 279-80.

328. *See* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) ("One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))); Armendariz v. Penman, 75 F.3d 1311, 1320-24 (9th Cir. 1996) (en banc) (holding that because the Takings Clause provides explicit textual source against private takings, the Fifth Amendment, rather than a "more generalized notion of 'substantive due process,' " must be the basis for reviewing private takings claims (citations omitted)). In addition, Chief Judge Richard Posner and Judge Frank Easterbrook of the Seventh Circuit have indicated that they support this doctrinal trend. *See* Gosnell v. City of Troy, 59 F.3d 654, 657-59 (7th Cir. 1995); Gamble v. Eau Claire County, 5 F.3d 285, 286-88 (7th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994).

interests,[329] and his efforts to reshape the legal landscape have not been in vain. Over the last decade, the Supreme Court has significantly strengthened its "regulatory takings" jurisprudence.[330] Similarly, the Ninth Circuit recently interpreted the scope of the Takings Clause to encompass nonpublic takings, principally to avoid creating a doctrine of substantive due process protection for economic and property interests.[331] In light of these scholarly and judicial pronouncements, one might reasonably question whether anything would be gained by expanding substantive due process to reach fundamental property interests; after all, if the Takings and the Contracts Clauses specifically protect economic interests, nothing can be gained by recognizing a nontextual substantive due process right.[332] There are several problems with this analysis, the most obvious being that neither the Takings Clause nor the Contracts Clause can bear the full weight of protecting property interests unless they are torn loose from their textual moorings.

The Takings Clause provides protection for official government takings of cognizable property interests only when such takings facilitate a public purpose. To apply the Takings Clause to a government action without a public purpose is to read the "public purpose" limitation entirely out of the clause.[333]

In addition, the Takings Clause does not speak to prospective changes in the law that result in a diminution of future, as yet inchoate, property interests. For example, if a state legislature placed a $500,000 cap on damages awards for defamation actions, no "taking" occurs because there is no property interest until a cause accrues; a person defamed after the damages cap becomes law did not suffer a taking when the legislation was enacted.

The Contracts Clause prohibits states from passing laws that impair preexisting contractual relationships. It says nothing about torts or generalized property rights, however, nor does it prohibit prospective changes in the law of contracts, torts, or property. To construe it as the font of a generalized right to enjoy one's property free of irrational government action requires interpretivism of a very high order.[334]

I find it difficult to discern the benefit of avoiding one kind of interpretivism in order to engage in another. Moreover, the kind of interpretivism necessary to

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329. *See* EPSTEIN, *supra* note 5, at 279-80 (arguing that the Contracts Clause should be construed to approximate the Supreme Court's old economic substantive due process jurisprudence); Epstein, *supra* note 5, at 725-30 (same); *see also* Dowdle, *supra* note 247, at 1200 n.220 (arguing that the Takings Clause has already replaced substantive due process as the Court's preferred method of safeguarding property interests).

330. *See Dolan*, 512 U.S. at 388-92; *Lucas*, 505 U.S. at 1026-28.

331. *See Armendariz*, 75 F.3d at 1323-25 & n.8; *see also supra* text accompanying notes 120-21.

332. Moreover, if the Takings Clause and the Contracts Clause provide comprehensive protection of property and economic interests, the Supreme Court would presumably decline to endorse a free-standing substantive due process interest. *See* Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion) (holding that an explicit textual source of protection, rather than a generalized notion of due process, should guide courts); Graham v. Connor, 490 U.S. 386, 395 (1989) (same).

333. This is precisely what the Ninth Circuit did in *Armendariz*. *See* 75 F.3d at 1320-25.

334. *See, e.g.*, Epstein, *supra* note 5, at 716-17, 750-51.

transform the Takings Clause or the Contracts Clause into a general guarantee of property interests arguably extends well beyond interpretivism and constitutes a gross form of antitextualism. As a matter of sound constitutional interpretation, it makes little sense to seek greater doctrinal clarity by creating textual chaos. The Due Process Clause, which is notoriously vague, is a better source to anchor a generalized right to enjoy one's property free of governmental intrusions. Indeed, the clause specifically speaks to "life, liberty, [and] property" and therefore directly addresses the problem at hand.

Attempting to shoehorn all property interests into the Takings and Contracts Clauses also creates a doctrinal asymmetry: the Supreme Court has never attempted to fit various *liberty* interests into more specific clauses of the Constitution. The right to reproductive choice, for example, could easily have been located in the Fourth Amendment rather than the Due Process Clause. However, in both *Roe* and *Casey*, the Supreme Court was content to locate the interest in the Due Process Clause. Because the clause provides generalized protection of liberty interests, it cannot logically be read to provide no protection of property interests.

Finally, the concept of due process directly invokes a citizen's right to demand rational governance. In some instances, when a particular interest is incommensurable, rational governance means limited or no governance absent compelling circumstances. This view of rational governance begets the notion of "fundamental" rights and strict scrutiny review. Nonfundamental interests are more readily subject to the commands of the state; procedural due process speaks to the government's obligation to act rationally as a general matter when *any* aspect of a citizen's life, liberty, or property is at stake. Regardless of the nature of the interest at issue, due process also means that the government cannot act lawlessly, recklessly, or arbitrarily. This last interest sounds in substantive rather than procedural due process—it is the substantive interest in process itself.

Neither the Takings Clause nor the Contracts Clause embodies or invokes the right to rational governance. Instead, like the Third Amendment—which protects citizens from having to quarter troops—they are specific guarantees aimed at providing relief in limited circumstances.

In sum, there is no reason to tear either the Takings Clause or the Contracts Clause loose from its textual moorings in order to protect fundamental property interests or to ensure minimally rational government behavior vis-à-vis nonfundamental property interests. The Due Process Clause can provide these protections and is textually well-suited to the task. Nor, for that matter, is substantive due process protection of property interests duplicative of preexisting rights under either the Takings Clause or the Contracts Clause. Cases will arise with facts that do not implicate either the Takings Clause or the Contracts Clause, but which involve government behavior that nonetheless cannot be countenanced. In such circumstances, the substantive aspect of the Due Process Clause should serve as the principal means of seeking judicial redress.

III. OVERCOMING OBJECTIONS TO JUDICIAL RECOGNITION OF FUNDAMENTAL PROPERTY RIGHTS

As with substantive due process liberty claims, proponents of a new fundamental property rights jurisprudence must address the definitional difficulties associated with recognizing such rights. A skeptic might reasonably ask what property rights are sufficiently "fundamental" to justify application of strict scrutiny review. Moreover, the same critic might also demand some sort of analytic framework that would permit citizens to determine easily and predictably whether a particular property interest is "fundamental."[335] These questions have been asked of proponents of the Supreme Court's fundamental liberties jurisprudence and would be equally germane to a fundamental property rights jurisprudence.

A number of prominent legal scholars have defended the Supreme Court's substantive due process protections of fundamental liberty interests,[336] and there would be little point in reiterating what others have already said (and often said quite well[337]). However, beyond providing a general defense of substantive due process—a task that lies outside the scope of my project—there are a number of discrete issues that are particularly relevant to the recognition of fundamental property interests. Moreover, the principal objective of this article is not to defend substantive due process generally, but rather to argue that if the Supreme Court is committed to recognizing and protecting fundamental liberty interests, it should treat fundamental property interests no less favorably.

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335. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 122-32 (1989). Justice Scalia's proposed solution to this problem is elegant in its simplicity: when determining whether a liberty interest is fundamental, one must look to the narrowest relevant community tradition. Thus, rather than generalizing liberty claims and looking to the community's broader treatment of particular areas of human behavior (for example, marriage and procreation), one must look to the most specific taboos and prohibitions potentially on point. For a critique of this approach and its inconsistency with the Court's prior substantive due process jurisprudence, see Spitko, *supra* note 250, at 1348-60; *see also* ELY, *supra* note 26, at 60 (noting the difficulties associated with using tradition to delimit constitutional rights); Bork, *supra* note 26, at 7, 9-11 (same).

336. *See* RONALD DWORKIN, LIFE'S DOMINION 104-05, 126-28 (1994); TRIBE, *supra* note 5, § 15-10, at 1346-62; Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 664-66 (1980); Michael J. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417, 419-25 (1977); J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 569-79, 588-91, 603-08 (1977); *cf.* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1080-89 (1981) (noting the difficulties associated with a jurisprudence of fundamental rights that rests entirely on atextual normative claims); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-65 (1989) (rejecting the Court's recognition of nontextual constitutional rights and arguing that a mix of textualism and originalism is the only legitimate approach to judicial review of legislative enactments).

337. *See* Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 381-91 (1992); Fallon, *supra* note 91, at 312-29; James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 211-14 (1993); Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293, 293-312 (1986); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1059-71 (1990); Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 273-86.

A. IDENTIFYING FUNDAMENTAL PROPERTY INTERESTS

As a baseline matter, the recognition of fundamental property rights should be analytically similar to the recognition of fundamental liberty interests. Only property interests that have been "granted historical protection by the common law of torts (such as . . . defamation)" should enjoy heightened protection under the substantive aspect of the Due Process Clause.[338] Stated differently, only deprivation of those property interests that are implicit in the concept of ordered property rights should trigger strict scrutiny review.[339]

In the context of liberty interests, the Supreme Court has placed great reliance on community tradition as the touchstone for assessing limits on the scope of fundamental liberty interests.[340] The same frame of reference should also guide the recognition of fundamental property rights—only those rights that have the approval of history should be deemed "fundamental." As Justice Powell has explained, there must be "[a]ppropriate limits on substantive due process [that] come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' "[341] These seem to be reasonable limits on the scope of substantive due process; history and tradition should be highly relevant to identifying fundamental rights.[342]

Having generally defined the parameters of the right, the next step is to offer a few examples of property interests that would qualify as "fundamental." The easiest and most basic example of a fundamental property interest is a person's physical body. Absent a compelling interest, the state should not be permitted to interfere with a citizen's bodily integrity.[343] Similarly, the state should not be

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338. *See* Albright v. Oliver, 510 U.S. 266, 283 (1994) (Kennedy, J., concurring).

339. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (discussing rights that are "implicit in the concept of ordered liberty").

340. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977); *cf.* E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 584-97 (1996) (describing and criticizing the Supreme Court's use of tradition as a limitation on the recognition of substantive due process rights).

341. *Moore*, 431 U.S. at 503 (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

342. *See* Krotoszynski, *supra* note 20, at 1435-41.

343. Mandatory vaccinations provide perhaps the best example of a compelling state interest that might override this property interest in one's own body. *See* Jacobson v. Massachusetts, 197 U.S. 11, 33-35 (1905). More recently, California state courts have wrestled with whether citizens have a property interest in their own internal organs (and in the genetic codes they contain). *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990); *cf.* Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494 (Ct. App. 1988) (deciding whether Moore possessed a property right in his cells), *rev'd*, 793 P.2d 479 (Cal. 1990). Although a majority of the California Supreme Court held that he did not possess such an interest, the appellate judges at both the California Supreme Court and Court of Appeals were deeply divided on this issue. The case generated a plethora of student notes, which discuss the opinions in greater detail. *See generally* William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693 (1995); Bray, *supra* note 31; Jennifer Lavoie, Note, *Ownership of Human Tissue: Life After* Moore v. Regents of the University of California, 75 VA. L. REV. 1363 (1989). The Supreme Court will face a similar issue during the October 1996 Term when it reviews two decisions that recognize a substantive

permitted to leave a citizen without legal recourse for damage done to her body by private parties; in short, the state cannot refuse to create or recognize a property interest in physical integrity. Indeed, every state has statutory or common law tort remedies that permit individual citizens to recover for physical harms. Workers' compensation, the tort of battery, wrongful death statutes, and similar remedies recognize and incorporate the fundamental property interest in physical integrity.

Suppose, however, that a state decided to enact a program of tort reform that limited compensatory damages in medical malpractice cases to a certain sum—say, $750,000.[344] A plaintiff with actual damages in excess of that amount should enjoy a constitutional substantive due process right to collect full compensatory damages.[345] The reason is simple enough: citizens have a right to expect that long-standing property rights—just like long-standing liberty rights—will not be abrogated by the state absent a compelling state interest. Thus, the recognition of a fundamental property right in this instance vindicates a long-standing cultural expectation.

Reputation provides a second example. If history and tradition are to serve as the touchstones for identifying interests suitable for substantive due process protection—and the Supreme Court repeatedly has asserted that they are—the right to one's reputation must be deemed a "fundamental" property interest and accorded appropriate substantive due process protection.[346] Simply put, one's interest in reputation easily satisfies the Supreme Court's historical coda for demonstrating that a particular liberty interest is "fundamental": the right to

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due process interest in physician-assisted suicide. *See* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir.) (en banc), *cert. granted sub nom.* Washington v. Glucksburg, 117 S. Ct. 37 (1996); Quill v. Vacco, 80 F.3d 716 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996); *see also supra* note 31.

344. The hypothetical is not terribly far-fetched—in fact, it is not even a hypothetical. *See* IND. CODE § 27-12-14-3(a) (1993). Moreover, innumerable "tort-reform" projects are currently being debated at both the state and federal levels and various state legislatures already have adopted tort reform legislation. *See* Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1765, 1768-70 (1996); *see also* BMW v. Gore, 116 S. Ct 1589, 1604 (1996) (invalidating punitive tort remedy). Although many of these efforts involve attempts to abolish or restrict punitive damages, some of the proposals that have already been enacted limit or restrict a plaintiff's ability to recover for actual damages (e.g., pain and suffering). *See* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1121-27, 1191-93 (1995); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1587-90 (1987). Indiana's "reform" of medical malpractice liability provides a telling example. Under current Indiana law, a plaintiff cannot recover more than $750,000 for a medical malpractice claim, regardless of the actual damages incurred. *See* IND. CODE § 27-12-14-3(a); *see also* Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 598-601 (Ind. 1980) (rejecting state and federal due process and equal protection challenges to Indiana's statutory cap on medical malpractice compensatory damages). Consistent with *Truax*, this Indiana law should be subject to constitutional attack as an abridgment of a fundamental property interest, and—absent a compelling state interest—it should fall.

345. *See* Albright v. Oliver, 510 U.S. 266, 284-85 (1994) (Kennedy, J., concurring) (reaffirming that the common law, state law, and Constitution protect citizens and their rights). *But see Johnson*, 404 N.E.2d at 598-601 (holding that limiting damages for medical malpractice claims violates neither due process nor equal protection).

346. *See supra* text accompanying notes 232-74.

one's reputation is "deeply rooted in this Nation's history and tradition"[347] and is implicit in the concept of ordered property.[348] Alternatively, one could describe the right to one's reputation as "basic in our system of jurisprudence"[349] and necessary to an Anglo-American regime of ordered property.[350]

Thus, if a state failed to adequately protect a citizen's interest in her reputation, any law limiting a plaintiff's ability to recover actual compensatory damages should be subject to constitutional attack on substantive due process grounds. Suppose that a state legislature, enamored of the Supreme Court's landmark decision in *New York Times Co. v. Sullivan*, restricted all tort recoveries against the press for defamation to cases in which the plaintiff could demonstrate actual malice. The subject matter and the plaintiff's status as a public or private figure would be irrelevant to the plaintiff's burden of proof; all plaintiffs bringing libel actions would be required to establish actual malice (that is, knowledge of falsity prior to publication or reckless indifference to truth or falsity).[351]

Once again, a fundamental property interest is at stake. The right to one's reputation has deep roots in the common law, stretching back to the colonial period.[352] To this day, numerous state constitutions specifically protect the right to one's reputation among other fundamental property and liberty interests.[353] Accordingly, any state law that precluded recovery for damage to reputation should be subjected to strict scrutiny and sustained only upon the state's demonstration of a compelling need for such revision of its libel laws.[354]

As it happens, most states already adequately protect fundamental property rights,[355] so that recognition of such rights would not work a revolution in the

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347. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

348. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

349. *In re* Oliver, 333 U.S. 257, 273 (1948).

350. Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968).

351. *Cf.* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 168-69 (1979) (rejecting argument that any person engaged in criminal conduct is public figure); Hutchinson v. Proxmire, 443 U.S. 111, 136 (1979) (holding actual malice standard inapplicable because the plaintiff was not public figure); Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976) (holding that litigant need not forfeit protection of defamation law simply by virtue of status as litigant).

352. *See supra* notes 232-35 and accompanying text.

353. *See supra* notes 236-37 and accompanying text.

354. I am suggesting that the First Amendment right to a free press is the immediate neighbor of a fundamental property right in one's reputation. All that this means is that the states cannot liberalize their defamation law beyond the point compelled by *New York Times Co. v. Sullivan* and its progeny. The same sort of border exists between the right to a fair trial and the freedom of the press. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); United States v. Noriega, 917 F.2d 1543 (11th Cir. 1990) (per curiam), *cert. denied*, 498 U.S. 976 (1991). The outer limits of each right are simply defined in relation to the other right.

355. *See generally* Maureen Straub Kordesh, *"I Will Build My House with Sticks": The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 418-22 (1996) (discussing various means by which state governments routinely protect property interests). One reason may be a greater community consensus about the kinds of property rights that should be protected. Everyone wants to own real property in fee simple absolute or in an analogous kind of estate. Generally speaking, no racial, ethnic, or gender lines delineate the kinds

law. Instead, the explicit recognition of substantive due process protection for fundamental property rights would simply erect a bulwark against tort reform proposals that go too far in restricting a plaintiff's ability to recover for certain kinds of injuries.

At the federal level, however, the recognition of fundamental property rights would cast doubt on the continuing validity of a number of precedents. For example, the Supreme Court has held that mid-level government employees have absolute immunity from suit under § 1983 for defamatory statements about their underlings.[356] This blanket immunity flows solely from the federal judiciary's inherent power to create federal common law.[357] If reputation constitutes a fundamental property interest, this official immunity would be inconsistent with the employee's interest in reputation.[358] At most, the government might be able to demonstrate a compelling interest that justifies a qualified form of immunity.

However, recognition of fundamental property rights would generally not unravel the existing fabric of constitutional law. Instead, it would simply restore doctrinal symmetry to the Supreme Court's fundamental rights jurisprudence. If fundamental liberty interests enjoy heightened protection under the Due Process Clauses of the Fifth and Fourteenth Amendments, fundamental property interests should enjoy similar protection.

B. DEMONSTRATING THE LIMITS OF A FUNDAMENTAL PROPERTY RIGHTS JURISPRUDENCE: A TALE OF COUNTESS LONA

Explicit recognition of the existence of fundamental property rights would not undercut the substantial discretion states enjoy in establishing and policing the parameters of *nonfundamental* property rights. Both state governments and the federal government could continue to recognize or decline to recognize particular property rights.

Even during the *Lochner* era, the Supreme Court expressly acknowledged that the state's traditional police powers included substantial discretion to define

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of property interests that members of different subgroups of the community wish to see protected. Accordingly, it is unlikely that a state legislature or state court will act to undermine fundamental property rights; such action is likely to be wildly unpopular. Conversely, legislative, judicial, or executive actions that deny the fundamental rights of unpopular minorities are far less likely to rouse either the community's attention or its anger. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (requiring that freedom of choice to marry not be restricted by invidious racial discrimination); Brown v. Board of Educ., 347 U.S. 483, 496 (1954) (concluding that "separate but equal" doctrine has no place in the field of public education); Williams v. Wallace, 240 F. Supp. 100, 111 (M.D. Ala. 1965) (enjoining governor and agents from interfering with and failing to provide protection for plaintiffs' peaceful assembly and march). Although fundamental property rights are generally more secure than fundamental liberty rights, this is not an argument against the recognition of fundamental property rights. Public choice theory suggests that well-organized interest groups will attempt to secure self-serving legislation at every possible turn. Tort reform projects provide an example of such behavior. Indeed, from time to time, such efforts prove fruitful. In such instances, the existence of a fundamental property rights doctrine would be immediately useful and necessary.

356. *See* Barr v. Matteo, 360 U.S. 564, 571-76 (1959).

357. *See id.* at 586-87 (Brennan, J., dissenting).

358. *See id.* at 578-86 (Warren, C.J., dissenting); Christie, *supra* note 289, at 60-63.

and delimit particular property rights. *Sentell v. New Orleans & Carrollton Railroad Co.*[359] provides an excellent example of this phenomenon.

Sentell was the proud owner of a prize "Newfoundland bitch, known as 'Countess Lona.' "[360] The dog died after being struck by a streetcar and Sentell subsequently sued the railroad company—the owner of the streetcar—seeking damages for the loss of his valuable pet.[361]

Louisiana law provided that "no dog shall be entitled to the protection of the law unless the same shall have been placed upon the assessment rolls."[362] Sentell had not registered Countess Lona but still wished to obtain a full recovery against the railroad.

The Louisiana state trial court held that the state law limiting Sentell's property interest in Countess Lona violated the Due Process Clause contained in the Fourteenth Amendment.[363] Following a trial on the merits, a jury returned a verdict for $250, which the railroad company appealed.[364] The Louisiana state appellate court reversed, holding that Sentell's failure to comply with the state law requiring registration and payment of the tax barred him from recovery.[365] Sentell appealed to the U.S. Supreme Court, seeking reversal of the state court's holding that he lacked a property interest in Countess Lona absent compliance with the statute.

The Supreme Court unanimously rejected Sentell's claim. Writing for the Court, Justice Brown observed that "[i]n Louisiana there is only a conditional property in dogs."[366] Only after a dog is registered with the state and property tax is paid may the owner recover damages for injury or the death of the animal—and then in an amount not exceeding the assessed value of the beast.[367] Although the Court suggested that this scheme might be unconstitutional "if

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359. 166 U.S. 698 (1897).

360. *Id.*

361. *Id.* at 700.

362. 1882 La. Acts 107, § 2. State law also limited civil recoveries for the loss of a dog to "the amount of the value of such dog or dogs, as fixed by [the owner] in the last assessment preceding the killing or injuries complained of." *Id.* § 3.

363. *Sentell*, 166 U.S. at 699.

364. *Id.* Plainly, Countess Lona was a valuable dog indeed.

365. *Id.* at 700.

366. *Id.* at 706. Justice Brown's observation about the nature of dogs—and the concomitant need for "drastic" regulation of the ownership of the beasts—bears recounting:

> Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or fix the liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the State.

Id. at 705-06. It seems unlikely that Justice Brown owned a dog.

367. *Id.* at 706.

applied to domestic animals generally,"[368] it held that "there is nothing in [the regulations] of which the owner of a dog has any legal right to complain."[369]

At the height of the *Lochner* era, the Supreme Court reaffirmed *Sentell* by upholding a New York statute that required dog owners within the state to pay an annual two-dollar licensing fee as a precondition to claiming a protected property interest in a dog.[370] Nicchia, the petitioner, argued that conditioning the recognition of a property interest in her pet on the two-dollar payment denied her due process of law.[371] The Supreme Court breezily rejected this argument, relying principally on *Sentell*: "Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right."[372] Although the *Nicchia* Court would strike down Arizona's anti-injunction statute in *Truax* one year later, they declined, under the facts of *Nicchia*, to recognize an unqualified right to property in pooches.[373]

Ten years later, the Supreme Court held that postdeprivation remedies were adequate to redress the wrongful seizure of property in tax cases.[374] Writing for a unanimous court, Justice Brandeis explained that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."[375] Thus, the Internal Revenue Service could seize property to satisfy tax liabilities free of substantive due process challenges. "Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."[376]

These cases illustrate that even the *Lochner* Court did not deem all property rights equal. Like "fundamental" liberty rights, "fundamental" property rights enjoyed special protection; under *Truax*, legislatures did not enjoy plenary authority to revise property laws, at least insofar as the revisions touched upon "fundamental" property interests. At the same time, *Sentell* and *Nicchia* established that at least

368. *Id.* It is unclear what other "domestic animals" the Court had in mind.

369. *Id.* Simply put, "[i]t is purely within the discretion of the legislature to say how far dogs shall be recognized as property, and under what restrictions they shall be permitted to roam the streets." *Id.* Adding insult to injury, the Court suggested that, if anything, Louisiana dog owners should be grateful for the statute, because it "really puts a premium upon valuable dogs, by giving them a recognized position, and by permitting the owner to put his own estimate upon them." *Id.*

370. *See* Nicchia v. New York, 254 U.S. 228, 230-31 (1920) (McReynolds, J.).

371. *Id.* at 230.

372. *Id.*

373. *Cf.* Scharfeld v. Richardson, 133 F.2d 340, 341 (D.C. Cir. 1942) ("It is an established principle of the common law that a dog is personal property and that its owner may recover for a willful or negligent injury thereto, and it has been deemed immaterial whether the injured dog had been licensed or taxed as prescribed by law." (footnote omitted)). Judge—soon to be Justice—Vinson seemed decidedly more sympathetic to the plight of dog owners than Justices Brown and McReynolds. However, Judge Vinson also recognized that "[i]t is in the discretion of the legislature . . . to delimit these property rights in a dog." *Id.* (footnote omitted).

374. *See* Phillips v. Commissioner, 283 U.S. 589, 596 (1931).

375. *Id.* at 596-97.

376. *Id.*

with respect to some property interests, the state enjoyed broad discretion to adopt "peculiar and drastic" laws limiting nonfundamental property rights.

This distinction is sound; not all property rights merit full substantive due process protection.[377] The government should enjoy a relatively free hand when limiting nonfundamental property rights; moreover, this freedom should encompass the right occasionally to make erroneous decisions.[378] When government actions that destroy or diminish a nonfundamental property interest are utterly arbitrary, however, judicial review should lie, and *Sentell* and *Nicchia* do not hold to the contrary.

IV. TOWARD ADOPTING A THEORY OF FUNDAMENTAL PROPERTY RIGHTS

The federal courts must not shrink from overseeing the content of state statutory and common law to ensure vindication of federal constitutional rights.[379] To be sure, such review threatens cherished principles of federalism and should therefore not be undertaken lightly. Even if one gives federalism its due, however, the federal courts will occasionally still find it constitutionally necessary to intervene in state substantive law. The question is not whether federal courts should police state substantive law, but rather *how* they should do it. Recent case law suggests that substantive due process requires the federal courts to play a more active role in circumscribing the substantive content of state law.

A. *ALBRIGHT V. OLIVER* AND THE EXTENSION OF SUBSTANTIVE DUE PROCESS

Albright v. Oliver is the Supreme Court's most recent pronouncement on the general scope of substantive due process. In *Albright*, an arrestee claimed that the state unlawfully deprived him of a liberty interest by initiating a criminal

377. In this regard, one must distinguish between "rationality" and "fundamental rights" substantive due process review. Substantive due process provides a means of reviewing the basic rationality of *any* federal or state law that impinges on a cognizable liberty or property interest. *See generally* Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting). This review is not contingent on the "fundamental" nature of the right at issue. *See, e.g.*, Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407-10 (9th Cir. 1989) (holding due process review applicable where any government action is arbitrary and capricious), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc). Of course, a state need only proffer a rational basis to turn the challenge back. *See id.* at 1409. On the other hand, "fundamental rights" substantive due process review mandates probing judicial review, in which the state must establish a compelling interest in maintaining the law at issue. *See* Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

378. *See* Bishop v. Wood, 426 U.S. 341, 349-50 (1976); *see also* Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994) (applying *Bishop* and holding that absent a fundamental interest, government actions that burden either property or liberty interests need only be rational).

379. *See, e.g.*, BMW v. Gore, 116 S. Ct. 1589, 1595 (1996) (striking down a "grossly excessive" punitive damages award); *see also* Fallon, *supra* note 91, at 328-29 (arguing for federal court oversight of state substantive laws when necessary to protect federal constitutional rights); Van Alstyne, *supra* note 18, at 458 n.43, 473 n.84 (arguing that federal courts cannot constitutionally avoid determining the meaning of "liberty" and "property" independent of state substantive law if federal constitutional rights related to liberty and property are to have any substantive effect).

prosecution against him in the absence of probable cause.[380] Instead of basing his claim on the Fourth Amendment's probable cause requirement, Albright claimed only that "the action of respondents infringed his substantive due process right to be free of prosecution without probable cause."[381]

Writing for a plurality, Chief Justice Rehnquist held that Albright could not use the substantive aspect of the Due Process Clause to avoid adverse interpretations of the Fourth Amendment.[382] "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[383] Accordingly, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."[384] Although the plurality declined to apply heightened scrutiny to the state's behavior, or to create substantive standards limiting the state's ability to bring criminal charges against individual citizens,[385] the case led to a plethora of concurring and dissenting opinions: six Justices wrote separately, and seven of the nine Justices joined some or all of these individual opinions. Justice Kennedy's concurring opinion is easily the most intriguing of the group.[386]

Justice Kennedy, joined by Justice Thomas, argued that although Albright did not state a valid substantive due process claim, such claims could exist, even if

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380. Albright v. Oliver, 510 U.S. 266, 269 (1994) (plurality opinion).

381. *Id.* at 271 (plurality opinion).

382. *Id.* at 271-75 (plurality opinion).

383. *Id.* at 271-72 (plurality opinion) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

384. *Id.* (plurality opinion). Strictly speaking, this is not entirely true. As a theoretical matter, substantive due process protects any cognizable liberty or property interest. However, in the post-*Lochner* era, federal courts apply a very deferential rationality test to determine whether a state or federal law violates substantive due process. *See* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 n.9 (1982); Whitney v. Heckler, 780 F.2d 963, 969 (11th Cir. 1986); *see also* Phillips, *supra* note 35, at 283-85, 289 (noting that "a means-ends test is still applied in due process challenges to the substance of economic regulation"). What the Chief Justice no doubt meant is that the Court has historically reserved heightened scrutiny of substantive due process claims to a very small class of cases.

385. *Albright*, 510 U.S. at 271-75 (plurality opinion).

386. The other concurring opinions merit brief mention. Justice Scalia wrote to emphasize that in his view, substantive due process protects only those rights "incorporated" against the states from the Bill of Rights. *Id.* at 275-76 (Scalia, J., concurring). According to Justice Scalia, the Court's substantive due process jurisprudence does not permit it to create new constitutional protections for criminal defendants over and above the specific textual guarantees of the Fourth, Fifth, and Sixth Amendments. *Id.* (Scalia, J., concurring). Justice Ginsburg concurred separately to explain that she preferred to analyze the case through the prism of the Fourth Amendment. *Id.* at 276-81 (Ginsburg, J., concurring). Justice Souter penned a concurrence sounding a similar theme: when the Constitution contains a clause addressing a particular substantive right, that clause—not the Due Process Clause—should govern the Court's analysis. *Id.* at 286-91 (Souter, J., concurring). For Justice Souter, like Justice Ginsburg, the Fourth Amendment provided the relevant decisional framework for Albright's claim of malicious prosecution. *Id.* (Souter, J., concurring). However, unlike Justice Ginsburg, Justice Souter expressly noted that the Court could, in appropriate circumstances, recognize substantive due process rights that are coextensive with other constitutional rights. *Id.* at 288-91 (Souter, J., concurring).

they were coextensive with the procedural guarantees of the Fourth Amendment.[387] "The common law of torts long recognized that a malicious prosecution, like a defamatory statement, can cause unjustified torment and anguish—both by tarnishing one's name and by costing the accused money in legal fees and the like."[388] Kennedy reasoned that "some of the interests granted historical protection by the common law of torts (such as the interests in freedom from defamation and malicious prosecution) are protected by [the substantive aspects of] the Due Process Clause."[389]

Justice Kennedy joined in the plurality's result because, in his view, *Parratt v. Taylor* excused the state from any direct responsibility for the wrong at issue. Because state law did not sanction the prosecutor's actions, *Parratt* precluded a § 1983 action for a violation of substantive due process. Indeed, Kennedy decried the invocation of substantive due process claims to avoid *Parratt*'s bite:

> The *Parratt* rule has been avoided by attaching a substantive rather than procedural label to due process claims (a distinction that if accepted in this context could render *Parratt* a dead letter) and by treating claims based on the Due Process Clause as claims based on some other constitutional provision.[390]

For Justices Kennedy and Thomas, *Parratt* alone governed Albright's claim.

However, Justice Kennedy went on to explain that "if a State did not provide a tort remedy for malicious prosecution, there would be force to the argument that the malicious initiation of a baseless criminal prosecution infringes an interest protected by the Due Process Clause and enforceable under § 1983."[391] Given the existence of an adequate state tort remedy, "[w]e need not conduct that inquiry in this case."[392]

In this single paragraph, Justices Kennedy and Thomas essentially reject the fundamental principle of *Paul v. Davis*, which held that § 1983 could not be read to make the Fourteenth Amendment a "font of tort law to be superimposed upon whatever systems may already be administered by the States."[393] Under *Paul*, § 1983 does not "*ex propio vigore* extend to [a would-be § 1983 plaintiff] a right to be free of injury wherever the State may be characterized as the tortfeasor."[394] Justices Kennedy and Thomas reject this reasoning, at least as applied to a substantive due process claim.[395] Rather, in their view, states have

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387. *Id.* at 281-86 (Kennedy, J., concurring).
388. *Id.* at 283 (Kennedy, J., concurring).
389. *Id.* at 283-84 (Kennedy, J., concurring).
390. *Id.* at 285 (Kennedy, J., concurring).
391. *Id.* (Kennedy, J., concurring).
392. *Id.* at 286 (Kennedy, J., concurring).
393. Paul v. Davis, 424 U.S. 693, 701 (1976).
394. *Id.*
395. *Paul* involved a claim of procedural, rather than substantive, due process. *Id.* at 697. The *Paul* Court did not decide whether Davis might have been able to claim a violation of substantive due

an obligation to afford some protection to "interests granted historical protection by the common law of torts."[396] This reasoning is entirely consistent with the Court's earlier decision in *Truax*, which required Arizona to afford legal protection to certain "fundamental" property rights.[397] Under this view, the states do not possess plenary power to redefine the protection afforded certain fundamental property and liberty interests under the common law. Justice Kennedy's apparent willingness to police the substantive content of state tort law through the use of substantive due process reflects nothing less than a repudiation of *Paul*'s federalism-based policy underpinnings.

Like Justice Kennedy, Justice Stevens argued that substantive due process protections may be invoked when a state actor violates an interest protected by a long-standing common law tort principles.[398] In a dissent joined by Justice Blackmun, Justice Stevens opined that substantive due process should reach claims of malicious prosecution.[399] He noted that

> [g]iven the abundance of precedent in the Courts of Appeals, the vintage of the liberty interest at stake, and the fact that the Fifth Amendment categorically forbids the Federal Government from initiating a felony prosecution without presentment to a grand jury, it is quite wrong to characterize petitioner's claim as an invitation to enter unchartered territory. On the contrary, the claim is manifestly of constitutional dimension.[400]

Justice Stevens directly responded to Justice Kennedy's assertion that *Parratt* controlled the resolution of Albright's claim: "The remedy for a violation of the Fourteenth Amendment's Due Process Clause provided by § 1983 is not limited, as Justice Kennedy posits . . . to cases in which the injury has been caused by 'a state law, policy, or procedure.' "[401] Instead, "[s]ection 1983 provides a federal cause of action against '[e]very person' who under color of state authority causes the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws.' "[402] Because Albright's claim raised a liberty interest, rather than a property interest, he was entitled to predeprivation process as a matter of federal constitutional law.[403]

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process. *Cf.* Siegert v. Gilley, 500 U.S. 226, 233-35 (1991) (refusing to recognize or create a *Bivens*—constitutional tort—action for injury to reputation).

396. *Albright*, 510 U.S. at 283 (Kennedy, J., concurring).

397. Truax v. Corrigan, 257 U.S. 312, 329 (1921).

398. *Albright*, 510 U.S. at 313-15 (Stevens, J., dissenting).

399. *Id.* at 291-316 (Stevens, J., dissenting).

400. *Id.* at 311 (Stevens, J., dissenting).

401. *Id.* at 315 (Stevens, J., dissenting).

402. *Id.* (Stevens, J., dissenting).

403. *Id.* at 313-16 (Stevens, J., dissenting). Justice Stevens has long maintained that property interests need only be protected by adequate postdeprivation process. *See* Ingraham v. Wright, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting). It is unclear why this should be so, particularly if the property right at issue is "fundamental." *See supra* notes 182-210 and accompanying text. Justice Stevens did not participate in deciding *Paul v. Davis*, so it is difficult to gauge whether his opinion depends on the

In short, five Justices appear to believe that substantive due process can provide a basis for reviewing the adequacy of state law relief for torts. Justices Kennedy, Thomas, Stevens, Blackmun, and Souter all stated that the substantive aspect of the Due Process Clause could, under appropriate circumstances, serve as the basis for imposing tort-like liability on a state officer or agency.[404]

Unfortunately, the opinions provide little guidance as to when substantive due process should protect individual citizens from tort-like injuries at the hand of the state. Justice Kennedy's reliance on the common law suggests that tradition should serve as the touchstone of the Court's substantive due process jurisprudence. Justice Stevens's dissent also places great reliance on the "vintage of the liberty interest at stake."[405] Thus, it seems plain that at least four of the Justices view historical or traditional recognition of the interest as a prerequisite to substantive due process protection.

The fractured reasoning in *Albright* makes it difficult to predict how the Court would react if squarely presented with a claim that a state law effectively abridged a right historically protected under the common law. However, the concurring and dissenting opinions of several Justices—particularly Justice Kennedy's concurrence—suggest both an openness to considering such a claim on the merits and reason for optimism regarding the probable result.

B. A CRITICAL ANALYSIS OF SUBSTANTIVE DUE PROCESS AND PROPERTY RIGHTS

In the context of substantive due process liberty claims, Justice John Marshall Harlan cautioned that "[e]ach new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed."[406] The principal difficulty with the approaches to substantive due process property claims taken by most of the courts of appeals is that such approaches fail to properly address the importance of the threshold question whether a particular property right is "fundamental."

A hypothetical will demonstrate the problem and its potential resolution. Suppose that I smoke in the Supreme Court cafeteria, in derogation of an express policy forbidding such activity. Suppose further that a federal marshal, noting the acrid smell of nicotine and burning tobacco leaves, issues an appropriate citation, fining me $250 for my failure to observe the no-smoking policy. Having gone to law school, and suffering from a litigious bent, I decide to fight the citation. In my defense, I claim that I was denied a liberty interest—the right to smoke at a time and place of my own choosing—without constitutionally sufficient process. Moreover, I would argue that whatever process that the government deigned to afford persons like myself could never be sufficient, because the government simply cannot restrict smoking in public cafeterias in public buildings.

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nature of the property right at issue. *See* Paul v. Davis, 424 U.S. 693, 714 (1976).

404. *See Albright*, 510 U.S. at 383-85 (Kennedy, J., concurring); *id.* at 286-91 (Souter, J., concurring); *id.* at 313-16 (Stevens, J., dissenting).

405. *Id.* at 311 (Stevens, J., dissenting).

406. Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting).

A federal district judge would not be vexed for long before disposing of my pleading. With respect to the first claim, she would no doubt consider carefully any particularized claims that I wished to raise regarding the sufficiency of the process incident to the issuance of the citation, including whether the officer observed me smoking, whether the officer provided me with notice of the infraction, and whether the statute confers an opportunity to challenge the citation at a formal hearing presided over by a neutral decisionmaker. All of these issues sound in "procedural" due process and address the fundamental fairness of the government's course of conduct. These issues *do not* challenge the government's power or authority to engage in the course of conduct; they presume the underlying validity of the prohibition on smoking in the cafeteria.

Depending on the facts surrounding the issuance of my citation and the procedural protections conferred by the statute or regulation, my procedural due process claim may or may not succeed. In any event, the presiding judge would probably have to consider my procedural due process arguments on the merits.

My claim to substantive due process protection is another matter entirely. Although I have identified an interest sounding in "liberty," no court would seriously entertain the claim that individuals have a right to smoke where and when they please. In order to make out a viable claim to "substantive" due process protection, I must establish either that the liberty interest at issue is "fundamental," thereby triggering heightened scrutiny review,[407] or that the government's behavior was utterly arbitrary, therefore triggering rationality review.[408] A merely pedestrian liberty interest will not suffice; if the interest is not deeply embedded in our traditions of individual autonomy,[409] the reviewing court will not labor long before dismissing my claim.[410]

Returning to the appellate cases described earlier in Part Ic, one finds that none of them involves a property interest that plainly qualifies as "fundamental." Instead, the cases generally present a menagerie of disgruntled civil servants who feel that the state has wrongfully deprived them of a job or promotion.[411]

That many lower federal courts have struggled to explain why substantive

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407. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 121 (1989); Bowers v. Hardwick, 478 U.S. 186, 194 (1986); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

408. *See* Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994).

409. *See, e.g.*, Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

410. Arguably, the Supreme Court has never completely repudiated substantive due process review of economic regulations. Instead, the Court applies an exceedingly deferential standard of review. *See* Phillips, *supra* note 34, at 283-85, 289; *see also* Hodel v. Indiana, 452 U.S. 314, 331-38 (1981) (recognizing that economic substantive due process review still exists, but noting that the Court applies a rational basis standard of review to such claims); Exxon Corp. v. Maryland, 437 U.S. 117, 124-25 (1978) (same).

411. *See, e.g.*, Kaluczky v. City of White Plains, 57 F.3d 202, 205 (2d Cir. 1995); McKinney v. Pate, 20 F.3d 1550, 1554 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 898 (1995); Charles v. Baesler, 910 F.2d 1349, 1350-51 (6th Cir. 1990); Reich v. Beharry, 883 F.2d 239, 240-41 (3d Cir. 1989); Schaper v. City of Huntsville, 813 F.2d 709, 711-12 (5th Cir. 1987).

due process does not provide an avenue of relief in such cases is somewhat puzzling. Because the property interests at issue were far from "fundamental," the courts should have rejected the claim to substantive due process protection out of hand, absent a showing of wholly irrational governmental conduct.[412] Once again, Justice Powell's concurrence in *Regents of the University of Michigan v. Ewing*[413] lights the path. Unless a particular property interest is on par with the right to vote, the right to choose whether to beget a child, the right to marry a person of one's choosing, or the right to decide whether to seek medical treatment, the substantive due process analysis should be rather short.[414]

This is not to say that no property interest could qualify for strict scrutiny substantive due process protection. To foreclose a category of fundamental property rights because many claims are frivolous begs the question of a court's obligation in that rare case when the claim is *not* frivolous. The federal courts should not foreclose the possibility of protecting other, sufficiently weighty liberty interests such as suffrage, procreation, and medical treatment simply because someone would argue that smoking in public buildings is a fundamental liberty interest. Nevertheless, some of the courts of appeals have used language that seems to foreclose the existence of any fundamental property rights simply because the case before them did not raise a serious claim.[415]

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412. In the words of Justice Harlan, substantive due process encompasses "freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, 367 U.S. 497, 543 (1961) (citations omitted) (Harlan, J., dissenting); *see* Fallon, *supra* note 91, at 314-15, 356-60, 363-64; Phillips, *supra* note 34, at 267.

413. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J., concurring).

414. Indeed, a simple one-paragraph order would have sufficed in most of the lower federal court cases decided to date:

> Substantive due process protects only those rights, whether characterized as "liberty" or "property," that may reasonably be deemed "fundamental" in a free society. That is to say, a right must be "deeply embedded in our Anglo-American law," or "implicit in the concept of ordered liberty [or property]." Palko v. Connecticut, 302 U.S. 319, 325 (1937). Appellant claims that "x" is such a property right. With respect, we must disagree. Absent a long-standing tradition of affording "x" particular solicitude, the strict scrutiny component of substantive due process simply does not apply. Because no plausible argument can be made that "x" comes within the limited class of "fundamental" property interests, we must reject appellant's claim. Substantive due process also protects citizens from utterly irrational and arbitrary government action affecting nonfundamental liberty and property interests. Although we cannot say that government's behavior was without blame or fault, it was not completely devoid of reason. AFFIRMED.

Cf. DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 599-601 (3d Cir.) (holding that any ownership interest is sufficiently "fundamental" to trigger full substantive due process protection, but applying only rational basis review), *cert. denied*, 116 S. Ct. 352 (1995).

415. Another reason for refusing to accord property interests substantive due process protection stems from a concern that such a holding would effectively overrule Parratt v. Taylor, 451 U.S. 527 (1981), Daniels v. Williams, 474 U.S. 327 (1986), and Hudson v. Palmer, 468 U.S. 517 (1984). Plainly, this concern is unjustified. *Parratt*, *Daniels*, and *Hudson* are *procedural* due process cases; they involve attempts by the state officials to deny property without adequate predeprivation process, in contravention of applicable state laws or policies. Moreover, none of these cases involves fundamental rights. *See*

There remains, of course, the objection that federal courts have no business supervising state substantive law, and that explicit recognition of fundamental property rights would necessarily entail a tremendous expansion of federal court review of state laws. This objection is not without force; however, it presumes a state of affairs that no longer exists. Vast areas of state substantive law have already been constitutionalized.[416]

The federal courts already supervise the definitions of "property" for purposes of applying the substantive guarantees of the Fourth and Fifth Amendments.[417] The federal courts cannot escape policing state-created definitions of property if either the Fourth Amendment or the Takings Clause is to have any substance.[418] Incorporating (or, more accurately, re-incorporating) a doctrine of fundamental property rights would simply expand the scope of the federal judiciary's superintendence of state substantive property, contract, and tort law.

Moreover, if the Supreme Court's recent decision in *BMW v. Gore*[419] provides any guidance, a majority of the Court appears untroubled by the prospect of overseeing state substantive law on a massive scale.[420] Dr. Ira Gore pur-

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Daniels, 474 U.S. at 329, 331-32 (holding that Due Process Clause was not implicated by negligence of state prison officials in slip and fall accident); *Hudson*, 468 U.S. at 520-22, 530-33 (holding that Due Process Clause was not implicated when prison officials intentionally destroyed inmate's property); *Parratt*, 451 U.S. at 530-31, 537-44 (holding that Due Process Clause was not implicated when prison officials negligently lost inmate's property); *see also* Zinermon v. Burch, 494 U.S. 113, 128 (1990) (applying *Parratt* and *Daniels* to deprivation of liberty interest). They do not speak to a state's ability to define the property interest in the first place or to state officials' ability to burden sufficiently important property interests. Therefore, recognizing that the state bears a special burden of care when select property interests are at stake would not affect the continuing validity of *Parratt*, *Daniels*, or *Hudson*. Indeed, the relevant inquiry is whether the Supreme Court would itself follow these decisions if a fundamental right were at issue. For example, if a prison warden knew that a guard routinely beat prisoners with a rubber hose, the state's failure to act would constitute a deprivation of a fundamental interest, even if the warden and the guard were acting outside the scope of their delegated authority. *See* Estelle v. Gambel, 429 U.S. 97, 104 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976); Robinson v. California, 370 U.S. 660, 667 (1962); Weems v. United States, 217 U.S. 349, 382 (1910); *see also* Van Alstyne, *supra* note 18, at 482 (arguing that substantive due process should protect fundamental property rights). These facts take the case beyond the realm of procedural due process, which presumes the validity of the state's policy, and into the realm of substantive due process, which establishes firm boundaries that the state cannot cross, whether deliberately or on an ad hoc basis.

416. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-50 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *cf.* Elaine W. Shoben, *Uncommon Law and the Bill of Rights: The Woes of Constitutionalizing State Common Law Torts*, 1992 U. ILL. L. REV. 173, 183-86 (arguing that constitutionalizing state tort law would be unwise because of federalism concerns).

417. *See* Van Alstyne, *supra* note 18, at 458 & n.43, 473 n.84.

418. *See* Fallon, *supra* note 91, at 328-29, 353-55, 358-60, 363-64.

419. 116 S. Ct. 1589 (1996).

420. *See id.* at 1595-98. Indeed, given the breadth of the Court's holding, coupled with the paucity of guidance to the lower federal courts, it is certain that the federal judiciary will be spending a great deal of time establishing the parameters of the newly constitutionalized law of punitive damages. *Cf.* Shoben, *supra* note 415, at 173-77, 186-87 (arguing that constitutionalization of state tort law will be both time-consuming and ultimately unsatisfactory). Furthermore, as Justice Ginsburg has observed, many (if not most) of the decisions will come into the federal system directly at the Supreme Court level via direct review of state supreme court decisions. *See Gore*, 116 S. Ct. at 1617 (Ginsburg, J.,

chased a "new" BMW sports sedan that the manufacturer had repainted. However, BMW failed to inform Gore that his automobile's paint job had been damaged and repaired prior to delivery of his new vehicle.[421] A jury awarded Gore $2 million in punitive damages, and BMW appealed.[422] The Supreme Court began its analysis of the case by reiterating its prior holding that a grossly excessive punitive damages award violates a substantive due process interest in property.[423] After considering the degree of BMW's culpability, the disparity between the harm that BMW inflicted on Gore and the amount of the punitive damages award, and the lack of similar punitive damages awards in comparable cases, the Court concluded that the punitive damages judgment was "grossly excessive" and, accordingly, struck down the award on substantive due process grounds.[424]

BMW v. Gore demonstrates the viability of substantive due process as a check on arbitrary or irrational government actions or laws.[425] However, the Court needs to close the circle by making explicit that which is only implicit in its punitive damages award cases: property rights, like liberty rights, enjoy substantive due process protection.

Gore, *Albright*, and other cases like them demonstrate conclusively that it is far too late in the day to protest the federal courts' oversight of vast areas of state substantive law. Indeed, one could argue that the objection has been moot since *Marbury v. Madison*[426] and *Martin v. Hunter's Lessee*.[427]

Finally, one might argue that providing substantive due process protection for nonfundamental property rights would "trivialize" the Constitution.[428] This

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dissenting); *cf. id.* at 1604 n.41 (Stevens, J.) (arguing that concerns regarding the scope of the undertaking "surely do[] not justify an abdication of our responsibility to enforce constitutional protections in an extraordinary case such as this one").

421. *Id.* at 1593.

422. *Id.*

423. *Id.* at 1595-98; *see also id.* at 1604 (Breyer, J., concurring); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 453-58 (1993) (holding that damage award was not so "grossly excessive" as to violate due process); *id.* at 470-71 (Scalia, J., concurring) (arguing that due process requires review of damage award only for reasonableness).

424. *Gore*, 116 S. Ct. at 1592-98.

425. *Id.* at 1595-98; *TXO Prod. Corp.*, 509 U.S. at 453-58; *id.* at 470-71 (Scalia, J., concurring); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991).

426. 5 U.S. (1 Cranch) 137 (1803).

427. 14 U.S. (1 Wheat.) 304 (1816); *see also* Fallon, *supra* note 91, at 353-54, 358-60 (arguing that federal courts have historically relied on state tort law to indicate substantive due process rights); Van Alstyne, *supra* note 18, at 458 n.43 (arguing that the definition of "property" has always been a federal question under the Fourteenth Amendment).

428. *See* Daniels v. Williams, 474 U.S. 327, 330 (1986); Parratt v. Taylor, 451 U.S. 527, 545 (1981) (Stewart, J., concurring); *id.* at 548-49, 554 n.13 (Powell, J., concurring); *see also* Rodney A. Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies:* Parratt v. Taylor *and* Logan v. Zimmerman Brush Company, 1982 U. ILL. L. REV. 831, 840-47 (noting that "[t]he critics of *Paul v. Davis* have never fully explained satisfactorily how a section 1983 action is in any substantive law sense an improvement on the law of libel" and concluding that the result in *Paul* was "sound" because state law adequately protected Davis's interest in his reputation); *cf.* Roberta M. Kania, Note, *A Theory of Negligence for Constitutional Torts*, 92 YALE L.J. 683, 705 n.78 (1983) (arguing that "[i]t does not

concern is misplaced, so long as one is committed to the notion that the Constitution requires agents of the government to act with at least minimum rationality.

Writing in the context of procedural due process, Professor William Van Alstyne has suggested that substantive due process ought to protect citizens from "procedural grossness."[429] Noting that "[t]he idea of freedom from adjudicative procedural arbitrariness as an element of personal liberty does not lack text, logic, flexibility, or precedent,"[430] he argues that the Due Process Clause should be applied to protect due process itself.[431] This idea that due process should guarantee at least a modicum of protection from arbitrary or irrational government behavior harkens back to Justice Harlan's famous dissent in *Poe v. Ullman*,[432] in which he posited that the requirements of the Due Process Clause exist along "a continuum."[433]

All of this leads to the conclusion that the abstention doctrine espoused in *Parratt* should not preclude suits that seek to establish the wholly arbitrary or irrational nature of particular government behavior. Arbitrary or irrational conduct by government officers constitutes a substantive constitutional wrong, regardless of the adequacy or inadequacy of the procedures surrounding the action.[434]

Of course, irrespective of whether a plaintiff claims that the government has violated his equal protection or substantive due process rights,[435] the government's action should enjoy a strong presumption of legitimacy in the absence of a fundamental interest.[436] The policy reasons that support this result in the context of the Equal Protection Clause apply with full force in the context of substantive due process: in the absence of an invidious classification or a fundamental interest, it is unreasonable to place a high burden on the government to justify its actions.[437] Applying strict scrutiny to all allegations of unfair

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trivialize the constitutional damage action to bring a case to trial where the government's conduct is on its face wrongful").

429. *See* Van Alstyne, *supra* note 18, at 487-90; *see also* Fallon, *supra* note 91, at 310, 314-17, 358-60, 363-64.

430. Van Alstyne, *supra* note 18, at 488.

431. *Id.* at 487-88; *see also* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049 (1979) (discussing the value of the rationality requirement in due process analysis).

432. 367 U.S. 497 (1961).

433. *Id.* at 543 (Harlan, J., dissenting).

434. *See* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407-12 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), *overruled by* Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc); *see also* Fallon, *supra* note 91, at 358-60 (arguing that the Due Process Clause is implicated when government officials act arbitrarily).

435. Professor Henry Monaghan has argued that the provisions have become increasingly interchangeable. *See* Monaghan, *supra* note 289, at 406.

436. *See* Pension Benefit Guar. Corp. v. R.A. Gray Co., 467 U.S. 717, 730 (1984); *see also* Fallon, *supra* note 91, at 358-60, 363-64.

437. *See* Hodel v. Indiana, 452 U.S. 314, 331-33 (1981); Williamson v. Lee Optical, 348 U.S. 144, 152 (1955); Nebbia v. New York, 291 U.S. 502, 537 (1934); *cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (holding zoning ordinance invalid under Equal Protection Clause).

or arbitrary government action would require the federal courts to micromanage the day-to-day operation of government at the local, state, and federal levels. Aside from the federal courts' inability to shoulder such a herculean task, it is doubtful that they possess the constitutional authority to undertake such an experiment.

Viewed in this light, the courts that have permitted substantive due process claims grounded in nonfundamental property rights have properly recognized that substantive due process provides a modest check on utterly arbitrary government action. As noted earlier, several federal appellate courts have recognized substantive due process claims for nonfundamental property interests and have applied a very deferential standard of review when engaged in substantive due process analyses of nonfundamental rights.[438] Their recognition of this class of claims makes doctrinal sense.

Those courts that have declined to recognize substantive due process claims for nonfundamental property rights (outside the context of zoning decisions) have missed the mark. A plaintiff should be permitted to raise a substantive due process challenge to virtually *any* government action.[439] That such substantive due process claims should routinely fail, just as equal protection claims based on noninvidious distinctions usually fail, is no excuse for refusing to give judicial cognizance to an important subclass of federal constitutional claims.[440]

V. CONCLUSION

The Supreme Court must reestablish symmetry between property and liberty in its substantive due process jurisprudence. It has already done so in the context of procedural due process, and the Court's failure to recognize the existence of fundamental property rights has created an illogical asymmetry in its fundamental rights discourse. Federal courts should permit plaintiffs to bring substantive due process property claims as a means of seeking review of virtually any government action; however, only a limited subclass of such claims—those involving fundamental rights—should merit close or probing judicial scrutiny. Such an approach, which incorporates and applies Justice Harlan's notion of substantive due process as something of a continuum, would avoid the pitfalls associated with either applying strict scrutiny to all substantive due process property claims or refusing to recognize such claims at all.

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438. *Sinaloa*, 882 F.2d at 1409; Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322 (8th Cir. 1986).

439. *See* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1215-23 (6th Cir. 1992).

440. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that the Fourteenth Amendment protects the rights created in the first 10 amendments); *Pearson*, 961 F.2d at 1215-23 (finding no substantive due process violation in denial of rezoning request); *see also* Fallon, *supra* note 91, at 358-60 (arguing that federal courts must oversee state law under substantive due process standards); Henkin, *supra* note 61, at 491 n.39 (arguing that states may be required to protect liberty and property interests); Phillips, *supra* note 34, at 283-85 (arguing that substantive due process has not been repudiated in the post-*Lochner* era); Van Alstyne, *supra* note 18, at 485-90 (arguing that freedom from "adjudicative procedural arbitrariness" is a component of substantive due process).