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BOOK REVIEW

Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.

PROPERTY RIGHTS IN AMERICAN HISTORY. Series Editor James W. Ely, Jr.* New York and London: Garland Publishing, 1997. Pp. 2570 (six volumes). \$450.00 (\$75.00 per individual volume).

Reviewed by *Douglas W. Kmiec***

This formidable six-volume collection by respected Vanderbilt legal historian, James W. Ely, Jr., is a paean to property as a civil right. The argument of the volumes is made through selected essays by multiple authors, covering colonial time to the present day. It is property, Ely writes in the series introduction, that secures individual autonomy from government coercion, prevents an over-concentration of political authority generally, and encourages investment and economic development.¹ Ely knows the main lesson of history is remembering. The vast literature on the institution of private property, until now, was not sufficiently culled, digested, and assembled, however, to permit this reflection. With an historian's thoughtful eye, and a property partisan's touch, Ely brings this literature into one place.

In the mind of the American framer, Ely writes or suggests through editorial inclusion, personal liberty and property rights were often one. Nevertheless, Ely contends that despite active judicial re-

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1. See Series Introduction to 1 PROPERTY RIGHTS IN AMERICAN HISTORY vii-viii (James W. Ely, Jr. ed., 1997) [hereinafter ELY].

view of economic regulation prior to the New Deal, the Supreme Court never adopted a *laissez-faire* philosophy.² Rather, the New Deal was a breach of a founding ideology that had successfully balanced the rights of private property owners against limited or restrained public need.³ Thereafter, the Court deferred to legislative judgments redistributing wealth, and it was not until the 1980s that blind confidence in regulatory direction receded and property again was—partially at least—understood as a necessary corollary to human freedom.⁴

Volume one explores property's meaning from the early republic through the Civil War. Much of this was summarized, as Ely himself notes, by Alexis de Tocqueville's observation that "[i]n no other country in the world is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned."⁵ But the observation does not obscure Ely's candid acknowledgment that the rhetoric of property rights did not deny reasonable colonial government regulation. Yet, the recent interest in civic republicanism, Ely's editorial hand suggests, overstates the extent to which individual interests were sacrificed to the commons. In fact, Ely indicates, a more balanced account reveals that colonial regulation was "rudimentary," largely designed to prevent nuisance in a restrained common law sense.⁶ Increasing numbers of historical accounts thus reveal that "colonists generally favored payment of compensation when property was taken."⁷

Ely's evidence for our early republic's acknowledgment of the importance of property is dauntingly impressive. Rights to acquire and possess property were written into early state constitutions along with compensation requirements for takings, and "the sanctity of private property was central to the new American social and political order."⁸ This was clouded by Revolutionary War confiscations of loyalists, but as Ely documents, the 1787 constitutional convention saw the preservation of property as the principal means of securing limited government.⁹

2. *See id.* at viii.

3. *See id.*

4. *See id.*

5. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 614 (J.P. Mayer ed., 1966), quoted in 1 ELY, *supra* note 1, at xi.

6. 1 ELY, *supra* note 1, at xii.

7. *Id.*

8. WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 217 n.103 (1980), quoted in 1 ELY, *supra* note 1, at xiii.

9. *See* 1 ELY, *supra* note 1, at xiii.

The second volume moves the discussion from the Civil War to the late nineteenth century. A dominating feature of the era was interstate commerce and the emergence of the railroad industry. While both would economically unify a politically tattered nation, both would also pose new economic challenges. Awakening the fear of monopoly, the railroads would weaken the influence of earlier economic interests, especially those dependent upon agriculture. Such displacement gave rhetorical power to calls for more expansive state and local regulation, but it was exactly at the time states were placed under the federal yoke of the Fourteenth Amendment. Through this Amendment, a lasting counterpoint to regulation would emerge, and at times, even dominate. In particular, the Amendment inspired legal writing and theory that would employ due process and privilege and immunity terminology to protect railroad and industrial interests.

These pro-property doctrinal claims would also reveal a fuller understanding of property beyond the physical aspects of possession, itself. Ely highlights the words of Justice Stephen J. Field in 1877: "All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession."¹⁰ While Ely's historical collection does show property to be more broadly understood in terms of market value and earning capacity, this more sweeping conception would heighten, not lessen, the demand for regulation. Indeed, Ely is careful to point out that the historical record does not support the proposition that the so-called *Lochner*¹¹ era resulted in the invalidation of all, or even most, such business regulations.¹² Ely writes: "Contrary to the exaggerated accounts of earlier historians, the federal and state courts sustained most of the economic regulations that they considered and never insisted upon a thorough laissez-faire approach to business."¹³

But whether the courts were deferential to regulation in the nineteenth century or not, the succeeding Progressive Era would insist that judges become so. The period from the turn of the century to World War II chronicled in volume three proclaimed that government regulation could better allocate property resources than

10. *Munn v. Illinois*, 94 U.S. 113, 141 (1877) (Field, J., dissenting) quoted in 2 ELY, *supra* note 1, at xii.

11. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a restriction on bakers' hours and becoming the symbol of illicit judicial activism in support of liberty).

12. See 2 ELY, *supra* note 1, at xiii (citing Mary Cornelia Porter, *That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court*, 1976 SUP. CT. REV. 135, 140-43).

13. *Id.*

private decision. It was in the early decades of this time that *Lochner* came under full-scale attack.¹⁴ As Ely dutifully notes, *Lochner* has come to symbolize judicial impropriety in the general historical account and the substitution of judicial preference for legislative policy.¹⁵ The general or standard account, however, is no longer unscathed. As Ely's comprehensive selection of materials reveals, much of the modern critique of *Lochner* hides two important realities: most legislation considered in this period continued to be judicially sustained, and that legislation which was found invalid often was impregnated with class favoritism, or what economists today call rent-seeking—the imposition of regulatory disability on competitor for economic advantage.

In truth, the most provocative revelation from the history told here is that the disregard of *Lochner* may actually be a disregard for the intended constitutional limitations securing individual rights. This is a disregard for what Ely calls the "basic constitutional tenet that private property marked the extent of legitimate government."¹⁶ This was part of the Federalist vision, and as Ely documents, reflexive or categorical judicial disregard of it poses its own problems.¹⁷ Some of these problems became manifest in the economic regulation of land use, especially as it excluded racial minorities and undermined long-vested common law expectations. Justice Oliver Wendell Holmes, who would dissent from judicial oversight of economic rights in *Lochner*, nevertheless succinctly wrote in favor of property in *Pennsylvania Coal Co. v. Mahon*, and reinvigorated within the Takings Clause the early republic's understanding of the linkage between limited government and property rights.¹⁸ Regulation must not, Holmes wrote, go "too far."¹⁹

Yet, the boundaries of what was "too far" in the good economic times of the early 1920s became even further stretched with the dark, economic misfortunes of the Great Depression. Ely does not omit this. Nevertheless, the materials assembled in volume three are less satisfying analytically. They bemoan the loss of the sanctity of property, yet, do not come to grips with the practical reality of the time. The Depression necessitated strong medicine, and therefore it

14. See DOUGLAS W. KMIEO & STEPHEN B. PRESSER, *THE AMERICAN CONSTITUTIONAL ORDER* 1121-40 (1998).

15. See 3 ELY, *supra* note 1, at xi.

16. *Id.*

17. See *id.*

18. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922).

19. *Id.* at 415.

is no more surprising to find more abstract principles in favor of property rights yielding at this time than it is to learn that Lincoln exceeded the constitutional boundaries of executive power during the Civil War. Extraordinary times, like hard cases, often make bad constitutional law. The pieces Ely has assembled reveal as much, and they dutifully recount how the Depression and the World War led to a “sustained . . . abrogation of private economic liberty, placing exercise of governmental power ahead of individual rights.”²⁰ What’s missing in the history—perhaps because it is missing in the legal logic—is some explanation for why the treatment of property rights would remain a stepchild civil liberty long after these emergency conditions ceased.

Volume four steps aside a bit to consider the constitutional protection of contracts. There was little discussion of the Contract Clause at the 1787 constitutional convention, but Ely relates the standard account that the framers were worried about debtor relief laws and other similar mischiefs—such as the issuance of paper money—that would hamper access to foreign credit markets.²¹ Ely’s collection of materials, however, throws considerable light on the age-old question of whether the Clause was intended to protect public as well as private contracts. Chief Justice John Marshall pressed for an expansive definition—and got it.²² However, the inclusion of public contracts would mean that Marshall, and certainly his successor, Roger B. Taney, would have to substantively construe public contracts narrowly in order to supply needed leeway for unforeseen development and progress.²³ Of great scholarly interest in this volume is the still-unsettled question of whether judicial action alone, such as finding that one of the contracting parties lacked statutory authority, can result in contract impairment. As Ely relates, this question was presented in its starkest terms by judicial decrees excusing municipal enforcement of bond obligations.²⁴ For a brief period, federal courts did intervene when state court opinions threatened national credit markets. This was especially true where, by method of appointment and retention, state courts were politically dominated.

This volume also coincides with another of Professor Ely’s historical recovery efforts: the reevaluation of Chief Justice Melville W.

20. 3 ELY, *supra* note 1, at xiii.

21. See 4 ELY, *supra* note 1, at xi.

22. See *id.* at xii.

23. See *id.*

24. See *id.*

Fuller.²⁵ In a recent essay apart from this collection, Professor Ely elaborates on the Fuller legacy. He posits that much of the denigration of Fuller has been unbalanced in tone and fact, and has been a covert championing of progressive, big government causes.²⁶ Yes, Ely says, Fuller often ruled in favor of "property-conscious attitudes that shaped the constitution-making process in 1787."²⁷ However, instead of the two-dimensional portrait that has usually been supplied of Fuller, Ely contributes a view of the justice that is multi-faceted. Fuller simultaneously sought to limit the scope of federal power to its enumerated classifications in deference to reserved state authority, and to preserve individual rights against state regulation itself. It was the Fuller Court, Ely reminds us, that first affirmed the judicial incorporation of the Takings Clause into the due process elements of the Fourteenth Amendment.²⁸ And yet, it was also Melville Fuller who explained just three years earlier in 1894 that the Contract Clause was necessarily subject to "the legitimate exercise of the legislative power in securing the public health, safety, and morals."²⁹

Ely correctly observes that the modern Contract Clause is but a shadow of itself, and a somewhat distorted one at that. Before the Depression, the Contract Clause had been eclipsed, most likely for worse rather than for better, by the less textual substantive due process review of the late nineteenth century. After the Depression, the Clause made brief reappearances, but it was never the same. Instead, it would be applied to limit only substantial impairments, and oddly, public contracts would occasionally seem more protectible than their private counterparts,³⁰ even though it was the latter that were always thought within the scope of Contract Clause protection. Nevertheless, from the essays Ely selects for inclusion, he reasons that "[i]t would . . . be premature to dismiss the Contract Clause as a dead letter."³¹

In volume five, Ely moves into the modern takings jurisprudence. Here, the Justices begin to create categories of easy cases,

25. See generally JAMES W. ELY JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910* (1995).

26. See James W. Ely, Jr., *Melville W. Fuller Reconsidered*, 1988 J. SUP. CT. HIST. 35, 35-36.

27. *Id.* at 41.

28. See *id.* at 44 (citing *Chicago Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897)).

29. *New York & New England R.R. Co. v. Bristol*, 151 U.S. 556, 567 (1894).

30. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977).

31. 4 ELY, *supra* note 1, at xiii.

such as holding that permanent physical occupation is *per se* compensable,³² as is the complete deprivation of economic viability.³³ The first cannot be justified as a noncompensable event with any public purpose, while the latter may be justifiable without compensation only if the regulating body is able to meet the burden of proving that the value-depriving ordinance does little more than duplicate the state's common law of nuisance. Special rules are also seemingly devised to handle illicit attempts by government to leverage public authority—that is, withholding a necessary permit unless a landowner “contributes” a property interest or concession to the regulating entity.³⁴ These exaction cases have spawned a new, tighter judicial inquiry into both the relationship between means and ends as well as the proportionality of the regulation in light of the anticipated external impacts of proposed development.

Yet, the modern era, as the materials in volume five reveal, still leaves the bulk of takings cases in a practically, though not necessarily theoretically, unbalanced state. Nominally, cases that neither involve physical invasion, deny all value, nor illicitly exact are governed by Justice Brennan's opinion in *Penn Central Transportation Co. v. New York City*.³⁵ However, as the *Penn Central* Court admitted, that opinion is merely a listing of “ad hoc” factors, ranging from the character of the government's interest to economic impact to some consideration of an owner's distinct and reasonable economic expectations.³⁶ There is little guidance within the opinion as to how those factors are to be balanced, or even what they mean. This has spawned a cottage industry of law review speculation, and the materials included in this volume, including the seminal works by Epstein and Michelman, give the reader an ample feel for the debate.

The collection in volume five does not include the sentiment that despite unanswered difficulties of practical application, there is reason to believe that the Court has resolved the core of the takings puzzle.³⁷ The police power and private property are indeterminate

32. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

33. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

34. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987).

35. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

36. *Id.* at 124.

37. See, e.g., Douglas W. Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147 (1995) [hereinafter Kmiec, *At Last*] (suggesting that the Supreme Court solved the takings puzzle in *Dolan v. City of Tigard*); Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995 (1997) (suggesting that the Supreme Court has resolved the takings issue and that any “ill-fitting pieces” now “deserve abandonment”).

concepts defined not just in relation to each other, but also in relation to the common law of property that exists in each state. *Penn Central* is a troubled opinion because it ignores the common law baseline and basically invites the Court to re-weigh, albeit under multiple heads, the policy underlying a regulatory initiative.³⁸ Thus, disapproval of a democratically-approved policy is masked as one that has too great a value impact or is too disappointing of expectations. This, of course, is *Lochner* again, and the only way federal courts have been avoiding that reality is by employing an extremely high ripeness threshold and a most deferential rational basis standard of judicial review.³⁹

The *Lucas v. South Carolina Coastal Council* opinion rediscovered the common law baseline, however.⁴⁰ This external baseline limits judicial activism because, quite simply, it supplies a definition for property that is not of the Court's own making. By the same token, the common law frames, but does not freeze, the parameters of acceptable police power limitation. As the common law of property develops concretely in litigated cases which reflect particular locales and political perspectives (as expressed by state judicial appointment and opinion), the reconnection of the takings inquiry to the common law is also importantly federalist.

At the moment, it remains unsettled whether the Court will extend its *Lucas* methodology beyond the total deprivation case. If it does, it will need to clearly confine the extreme deference of *Penn Central* to the general enactment of legislation. This will allow the Court to steer clear of second-guessing policy choices, while not leaving landowners who confront the dilatory or bad faith administration of benign policy without remedy.

Here, Ely's masterful assembly of materials is of direct assistance to those who desire not only a reminiscence of property's importance, but also a present-day reaffirmation of that fact. To illustrate, we can turn to the Supreme Court's present docket. As this is written, the Court is considering the case of *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*⁴¹ *Monterey Dunes* does not involve a physical invasion nor the permanent deprivation of all value of the property. Technically, the City has not "exacted" property in

38. See Kmiec, *At Last*, *supra* note 37, at 157.

39. See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 195 (1985) (finding that "respondent's claim is not ripe" and that the Constitution is "satisfied by a reasonable and adequate provision for obtaining compensation after the taking").

40. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

41. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, 66 U.S.L.W. 3509 (U.S. Mar. 30, 1998) (No. 97-1235).

exchange for a needed permit. None of the bright line categorical standards developed by the Court apply. Instead the City has simply rejected every plan of development submitted by the landowner, notwithstanding each plan had a density level well below that authorized in the general law.⁴² You might call the municipality's tactical strategy, the Columbo or the "and oh by the way, just one more thing" approach. Were the Court to apply *Penn Central* in the usual way, the landowner would be without remedy.

The City—with assistance from the United States Solicitor General—argues that the lack of remedy is just fine; indeed, they seek to make the availability of remedy for over-regulated landowners even more remote.⁴³ By now it is standard takings law that a regulatory taking exists *either* where regulation does not substantially advance a legitimate state interest *or* where the regulation renders the property economically nonviable.⁴⁴ The City contends that inquiring into whether regulation substantially advances a legitimate governmental interest is redundant of substantive due process.⁴⁵ The landowner, Del Monte, questions whether throwing over established regulatory takings doctrine is within the grant of certiorari, but even if it somehow is, it argues that both the City and the Solicitor General wrongly fail to see the essential difference between substantive due process review and that raised specifically under the Takings Clause.⁴⁶

Substantive due process is properly a highly deferential review of the record for arbitrary and capricious regulatory behavior. In *Nollan v. California Coastal Commission*, for example, the Court made it abundantly clear that it had no desire to resurrect the *Lochner* era and the discredited practice of judicial disagreement with legislatively chosen policy ends.⁴⁷ By contrast, Del Monte continues, the "substantially advance" inquiry promulgated by the Court in *Agin v. City of Tiburon*,⁴⁸ and followed without exception thereafter, is—as the Court explained in *Nollan*—an inquiry into the causal connection or nexus between regulatory means and ends.⁴⁹

42. See *id.* at 1425.

43. See Brief for Petitioner at *25-26, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (U.S. submitted June 4, 1998) (No. 97-1235), available in 1998 WL 297462 [hereinafter Petitioner's Brief].

44. See, e.g., *Agin v. City of Tiburon*, 447 U.S. 255, 261-63 (1980).

45. See Petitioner's Brief, *supra* note 43, at *14.

46. See Brief for Respondent at *47-48, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (U.S. submitted July 31, 1998) (No. 97-1235), available in 1998 WL 457674 [hereinafter Respondent's Brief].

47. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987).

48. *Agin*, 447 U.S. at 260.

49. See Respondent's Brief, *supra* note 46, at *39-40.

The Solicitor General labels this inquiry one of mere dictum,⁵⁰ but Del Monte identifies the Court's reliance upon it in multiple cases to resolve matters both for and against landowner claims.⁵¹ As Justice Scalia patiently explained in *Nollan*, "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical."⁵² The Solicitor General acknowledges this passage from *Nollan*, and admits that it suggests that takings analysis involves a more searching means-ends inquiry than that pursued under substantive due process, but then immediately entwines these separate causes of action again by stating, "[o]ur point is simply that where land-use regulation satisfies due process standards, it may not be deemed a taking, requiring the payment of compensation, based on a purportedly insufficient nexus between the governmental interest to be furthered and the means employed to advance that interest."⁵³

Del Monte is quick to point out that the City's and Solicitor General's argument is a defiant rejection of the holding in *Nollan* along with the elaboration of that holding in *Dolan v. City of Tigard*.⁵⁴ On this score, the Solicitor General apparently filed his brief in this case several weeks prior to the Court's plurality opinion in *Eastern Enterprises v. Apfel*, which invalidated as a regulatory taking a substantial imposition of retroactive liability for health care benefits.⁵⁵ In *Eastern Enterprises*, the Court reasserted basic distinctions between takings and due process analysis by highlighting the lack of a required nexus between the liability imposed and the fact that Eastern never promised such benefits and had long ceased operations.⁵⁶ Del Monte points out that such differentiation is consistent with the Court's stated view that when a claim can be brought under one of the explicit, separately stated guarantees in the Bill of Rights, there can be no claim for a substantive due process

50. See Brief for United States at *21 & n.11, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (U.S. submitted June 5, 1998) (No. 97-1235), available in 1998 WL 308006 [hereinafter Solicitor General's Brief].

51. See Respondent's Brief, *supra* note 46, at *45-48.

52. *Nollan*, 483 U.S. at 834 n.3.

53. Solicitor General's Brief, *supra* note 50, at *24 n.13.

54. See Respondent's Brief, *supra* note 46, at *38-41 (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

55. *Eastern Enters. v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 2149-50, 2153 (U.S. 1998).

56. *Id.* at 2158-60 (Kennedy, J., concurring in the judgment and dissenting in part).

violation,⁵⁷ a view specifically applied to regulatory takings litigation in the Ninth Circuit.⁵⁸

It should be observed that much of the argumentation in the *Monterey Dunes* litigation is devoted not to the substantive takings standard, but to a side question: whether the issue is one for the judge or the jury to decide. A larger role for the jury is a wild card. Ely's history suggests that this populist device may be just as likely to confiscate as confirm property interests. In *Monterey Dunes*, a landowner frustrated by "environmental politics" turns to his fellow citizens on the jury for help. The City contends against any compensatory rescue. Allowing juries to decide the regulatory takings issues, the City claims, will produce inconsistent results and leave cities with inadequate guidance as to why a particular regulation did not substantially advance a given regulatory objective.⁵⁹ Admitting that on its face, the second alternative takings inquiry—whether regulation deprives the owner of all economically viable use—does appear appropriate for either courts or juries, the City nevertheless posits that the inquiry is not "jury friendly."⁶⁰ The deprivation of economically viable use, the City argues, requires application of legal standards to facts and is not merely the measurement of lost value.⁶¹ Moreover, the economic viability inquiry is also influenced, the City asserts, by whether a landowner had reasonable investment-backed expectations.⁶² This factor requires consideration of the "regulatory climate," the City insists, arguing that this inquiry is just too complex for juries.⁶³ Further, should regulation result in a deprivation of all value, juries would have to determine whether the regulation could be sustained under the equivalent of a public nuisance analysis, which the City contends, given its nature and complexities, is "normally" the province of courts, not juries.⁶⁴

Del Monte responds that the Supreme Court, itself, has labeled the elements of the takings analysis as an "essentially ad hoc, factual" one.⁶⁵ Del Monte argues that it is no more complex or arcane than examining a city budget, medical care, school, police, and other policies

57. See *Graham v. Connor*, 490 U.S. 386, 395 (1989), cited in Respondent's Brief, *supra* note 46, at *47.

58. See *Armendariz v. Penman*, 75 F.3d 1311, 1319 (9th Cir. 1994).

59. See Petitioner's Brief, *supra* note 43, at *31-32.

60. *Id.* at 34.

61. See *id.* at 32-36.

62. See *id.*

63. *Id.* at 35.

64. *Id.*

65. Respondent's Brief, *supra* note 46, at *31 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

that are regularly subject to other § 1983 litigation before juries.⁶⁶ Issues of the reasonableness of a means-end fit, economic viability, and the like are factual issues, according to Del Monte, and any difficulty applying them is rectified by adequate jury instruction. Moreover, the jury is not merely re-weighing the administrative record. As the Solicitor General conceded, the jury in *Monterey Dunes* was not limited to that record, and it heard the testimony of expert witnesses introduced by both parties.⁶⁷ And specifically focusing on economic impact, Del Monte posits that when the City insisted that the only potential area for development be left undeveloped "as a preserve for unseen butterflies, the last nail was placed in the coffin of any possible private use for this land."⁶⁸ "That's not rocket science," Del Monte contends, "[a]nd it is elitist arrogance for the City and its friends to suggest that juries are unable to evaluate such evidence."⁶⁹

The jury issue is thus bound up with a question regarding the appropriate level of deference to be given local decision making. The Ninth Circuit reasoned that it was not total deference, and instead focused on proportionality. As indicated above, the Court has applied heightened scrutiny to the recent Takings Clause cases.⁷⁰ This was the point of Justice Scalia's differentiation of the Takings Clause from substantive due process in *Nollan*,⁷¹ and presumably, why Chief Justice Rehnquist in *Dolan* stated: "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"⁷² Notwithstanding, the City insists that these prior holdings are limited to their facts. *Dolan*, the City argues, involved a required land dedication, and its standard of "rough proportionality" is specifically keyed to individualized applications of general land-use rules, and particularly those that involve required dedications or exactions.⁷³ The Solicitor General agrees, writing that "[w]ith respect to land-use regulation that does not involve a compelled dedication . . . neither *Nollan* nor *Dolan* purports to

66. See *id.* at *32.

67. See Solicitor General's Brief, *supra* note 50, at *18.

68. Respondent's Brief, *supra* note 46, at *33.

69. *Id.*

70. See *supra* notes 50-58 and accompanying text.

71. *Nollan v. California Coastal Council*, 483 U.S. 825, 836-38 (1987).

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

73. See Petitioner's Brief, *supra* note 43, at *15-16, 45.

curtail the 'broad power' of governmental bodies 'to impose appropriate restrictions upon an owner's use of his property.'⁷⁴

Del Monte disagrees as to the law and the facts. Yes, *Dolan* drew a distinction between the deference owed general legislative policy and individualized assessments. That distinction, however, has no factual application where Del Monte had satisfied all general zoning requirements but was tormented for years with an endless array of individualized planning reviews and ultimately a complete inability to build on its tract, notwithstanding the nominal zoning suggesting otherwise.⁷⁵ Del Monte also argues that exactions are involved here too, only they take the form of required inutility and open space requirements. For example, the western third of the parcel must be left undeveloped for public beach use and access.⁷⁶ The only difference between a formal exaction and this case is that the burden of property taxation remains in the near term with Del Monte. Be that as it may, the City responds that rough proportionality analysis cannot be applied in a meaningful way where there are no actual physical exactions, because one can measure the impact of private development but there is nothing with which to compare it when no dedication or exaction actually changes hands.⁷⁷

Del Monte counters that the City misunderstands the Ninth Circuit's reliance upon proportionality. While *Dolan* was an example of how the concern with proportionality is administered where there are required dedications, proportionality was not invented in that case or limited to it.⁷⁸ Rather, it is at the heart of all Fifth Amendment Takings law. Close to forty years ago, the Court observed that the Amendment is "designed 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."⁷⁹

As this review is written, it is unclear whether the Court will clarify the relationship between property and police power by reaffirming property's somewhat heightened elevation as a "civil right," or accept the Solicitor General's invitation to retrench. Some members of the Court, notably Chief Justice Rehnquist and Justices Scalia, Thomas, and O'Connor, seem ready to accept Ely's history that eco-

74. Solicitor General's Brief, *supra* note 50, at *13 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982)).

75. See Respondent's Brief, *supra* note 46, at *34-37.

76. See *id.* at *37.

77. See Petitioner's Brief, *supra* note 43, at *46-47.

78. See Respondent's Brief, *supra* note 46, at *42.

79. *Id.* at *45 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

conomic and civil liberty are better understood as one. Justices Thomas and O'Connor, for example, sought to give practical application to this sentiment by dissenting from a denial of certiorari in *Parking Association of Georgia, Inc. v. City of Atlanta* a few years ago.⁸⁰ There, they urged the Court to look for an opportunity to make clear that *Dolan's* rough proportionality analysis extends beyond actual exaction cases.⁸¹ Justice Thomas wrote that "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."⁸²

Rightly, the Court wants to avoid second-guessing legislative policy determinations, especially on important environmental matters, but *Dolan* failed to fully apprehend that in land-use matters, unlike other legislative contexts, there are actually three steps: enactment of general legislative policy; application of that general policy to particular land parcels by means of a zoning map or similar enforcement device such as the multiple planning reviews that occurred in *Monterey Dunes*; and administrative demands for particular exactions. Individualized assessment occurs in both of the latter two steps, not just by formal administrative exaction, and therefore, the potential for the unconstitutional placement of disproportionate burdens—a taking—exists in both of the latter contexts.

Monterey Dunes is thus an opportunity for the Court to reaffirm much of Ely's history, and how that history is recurring in a modern case. For example, the resolution of *Monterey Dunes* would be aided by reference to the breakthrough realization in *Lucas* that the measurement of the proportionality of legislative action is accomplished in relation to the state definition of property in its own common law. *Lucas*, of course, limited such antecedent inquiry into state property law to a case in which property was deprived of all economically viable use. While the City would no doubt argue that this deprivation has not occurred in *Monterey Dunes*⁸³ in light of Del Monte's ultimate sale of the parcel to the state for a nature preserve, it is worth remembering that the Court's announced legal standard is denial of economically viable use, not whether the property has some residual value. In any event, *Lucas* left open the question of the appropriate

80. *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas and O'Connor, JJ., dissenting from denial of certiorari).

81. *See id.* at 1117-18.

82. *Id.* at 1118.

83. A transaction that Del Monte argues was virtually coerced by the regulatory obdurance. *See* Respondent's Brief, *supra* note 46, at *6.

unit or denominator of property by which to measure the economic deprivation of use. The Court gave this hint: “[T]he extent to which the regulation has interfered with distinct investment-backed expectations’ [is] keenly relevant to takings analysis generally.”⁸⁴ It is hardly speculative to recognize that Del Monte had expectations beyond owning a natural preserve without compensation.

Did the Justices at oral argument reveal any appreciation for these considerations, which as noted are manifestations of Ely’s historical survey? Let’s examine that argumentation briefly before completing the review of the final Ely volumes. Here is part of the colloquy between the Justices, the City of Monterey, and Del Monte, the landowner. My editorial and narrative comments appear in italics. It starts with the Justices expressing disbelief that the regulatory process rejected multiple attempts by the landowner to comply:

City: . . .The City was faced with a complex decision it had to reconcile competing interests. . . .

Justice: Five times[?]

City: It did so, Your Honor. . . .

Justice: This was the fifth presented plan, right? Each one successively rejected for a different reason each time?

* * *

Justice: And this is typical, you say?

City: It is typical in this kind of complex. . . .⁸⁵

*As noted earlier in this review essay, the Court was also struggling with whether judge or jury should assess reasonableness, and what that means.*⁸⁶

Justice: Well, you cast the case as if the jury is going to be assessing the reasonableness of the zoning ordinance, but that’s not what the jury was instructed. That’s not what you argued to the jury. . . . They said, was this decision a reasonable implementation of that ordinance, and that’s different, and juries talk about reasonableness all the time. . . .⁸⁷

The Court has nicely drawn a distinction between the improper judicial (or jury) assessment of legislative purpose (that only needs to be rational and free from arbitrariness) and the evaluation of whether the means of achieving that purpose comport with the avoidance of disproportionate burden as commanded by the Takings Clause. The

84. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8. (1992) (quoting *Penn Cent. Co. v. New York*, 438 U.S. 104, 124 (1978)).

85. Oral Argument at *4, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (U.S. Oct. 7, 1998) (No. 97-1235), available in 1998 WL 721087 [hereinafter Oral Argument].

86. See *supra* notes 59-69 and accompanying text.

87. Oral Argument, *supra* note 85, at *12.

City claimed this issue had to be packed into the inquiry of economic impact, but the Justices couldn't see why that was so. Strategically, of course, the City knew that because Lucas has yet to be extended beyond the total deprivation context, it would be advantaged by insisting that inadequate or bad faith means of implementation be limited to that context. This would deprive the landowner, Del Monte, of remedy, since it had lost millions of dollars, but not everything. The Court was not inclined to see the City's view.

Justice: . . . Why do you insist that we force this under the economically viable use criteria rather than under whether it substantially furthers any valid purpose?

City: Because, looking at the—what the jury was instructed in this case as to a valid public purpose, which was habitat protection, health and safety, the denial of this development, you know, did unquestionably have a relationship.

Justice: Not if there was bad faith. If there was bad faith it rationally could further that purpose but it wasn't being used for that purpose.⁸⁸

The United States Solicitor General, as amicus, insisted that inquiring into the appropriateness of the means was improper under the Takings Clause because it was more akin to a substantive due process inquiry. Yet, this missed the essential distinction between inquiring as to ends which the demise of Lochner largely precludes, and the quite different matter of requiring a City to explain its means, at least in reference to the pre-regulatory state property law. In the end, the Justices seemed inclined to give remedy.

Justice: The landowner here essentially thinks that it was getting jerked around, that basically the city didn't want this land used for anything and wanted to retain it empty so it could be used as a seashore. That's what this thing is about.⁸⁹

Not surprisingly, Del Monte agreed with this assessment, and put this agreement into the language of the modern takings cases, which Ely's final volumes digest.

Ely's selections in the sixth and last volume reveal his hope that property is returning to a higher level of constitutional importance. As the *Monterey Dunes* colloquy underscores, the Court has reminded the regulatory state that the Fifth Amendment is a critically important part of the Constitution. It is not intended as some sort of poor relation in the Bill of Rights. Ely's history displays that this sentiment is not just recent invention by judicial conservatives.

88. *Id.* at *19-20.

89. *Id.* at *16-17.

As Ely recounts, Felix Frankfurter, no skeptic of government power, posited that the Takings Clause is entitled to the “same constitutional dignity as the right to be protected against unreasonable searches and seizures.”⁹⁰

This is well put, but raising it to equal dignity does not make it absolute, and importantly, should not obscure that property is itself merely a means to the protection of person and family and the freedom associated with both family life and economic initiative. No one owns property *ab initio*. Locke’s labor theory of value is misstated when restatements of it fail to acknowledge that neither man nor the property he occupies is his own creation. The private nature of property is protected not because ownership is a good in itself, but because it fulfills higher goods, including: the security against theft, civil disorder, and violence; the incentive to work and to find worth in that work and the efforts of others; and the development of neighborhoods that fulfill a deep and natural human yearning for community in both a social and political sense.

To the extent that property law at the founding or now has captured these larger purposes and the “less than fee” claim that man has to property against his Creator who supplied the earth as gift and in common, it is worthy of a secure place in the constitutional pantheon. If we are honest with ourselves and to the history that Ely has so well assembled, we will admit that claims of property rights or contractual liberty have not always been this carefully stated. When overstated, takings doctrine can easily slip into little more than an ugly endorsement of “mine and mine alone.” As it happens, the *Monterey Dunes* case is an example of regulation as theft, but honest historical appraisal also must acknowledge that some of the present takings case law is driven by avarice or partisanship.

Take for example the recent takings assault on Interest on Legal Trust Accounts—or so-called IOLTA bank accounts—used to underwrite American legal aid societies.⁹¹ In legal matters, clients often need to deposit relatively small sums with lawyers for incidental expenses, court fees, and the like. As an individual deposit, the funds are incapable of earning interest greater than bank service fees. When the funds of several clients are pooled, however, the interest earned is considerable—in the millions of dollars. But who gets that interest?

90. 6 ELY, *supra* note 1, at xi (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting)).

91. See *Phillips v. Washington Legal Found.*, 524 U.S. 156, 118 S. Ct. 1925 (1998).

Texas and all the other states answered by having this otherwise useless asset provide legal services to the poor.⁹² For the most part, legal aid lawyers deal with day-to-day landlord-tenant disputes, domestic and family law matters, and unraveling disputes concerning government benefit programs, such as Medicaid and Social Security. Some legal aid lawyers also have a penchant for leading questionable and one-sided political causes, prompting a Texas lawyer and a legal foundation to challenge the use of the interest.⁹³

Thus, the question presented is: Can the owner of property (that is, bank account interest) who is unable to make any positive use of the interest (because it is uncollectible individually) prevent others from doing some positive good with it? A five-Justice majority of the Supreme Court said it did not know, and it sent the case back to the lower court for further cogitating.⁹⁴ But the Supreme Court said this much: property is more than economic value; it also consists of a right of disposition and control.⁹⁵ In other words, the right to exclude.

Is this what the equalization of economic and civil liberty will mean? Given the inconsistent answer to this question provided by the authors of the materials supplied by Professor Ely in his final volume, one's spinning head may not honestly know. However, let me venture that if this is what equalization of civil and economic liberty yields, it is a pretty arid point, and one hardly worth the intellectual struggle. The notion that history vindicates property rights in order to allow clients who do not much care for legal aid or the poor to just let the interest in their lawyers' bank accounts go uncollected or disappear among electronic banking charges is hardly ennobling.

But then, are civil liberties always ennobling? Free speech permitted Martin Luther King, Jr. to dream of a day without invidious racial distinction on the steps of the Lincoln Memorial, but it also invites pseudo-Nazi remnants to terrorize descendant survivors of the Holocaust in Skokie, Illinois. And how many criminals have gone free because the constable has blundered by not giving sufficient *Miranda* warnings? Obviously, the exercise of civil liberty does not always advance human kindness or civil order. And as the IOLTA litigation suggests, neither does the insistence upon property rights. Sinful, imperfect human beings exercising freedom do not always devote their freedom to the good. Sometimes, many times, they

92. See *id.* at 1927-28.

93. See *id.* at 1928.

94. See *id.* at 1934.

95. See *id.* at 1933.

devote it to evil. And yet, the important point is we do not denigrate the constitutional security of civil liberty because of its misuse, and Ely's historical compilation argues, on balance, that we should not demean property either. There is justifiable resistance to understanding the municipal land use code, economic regulation, or even coerced IOLTA transfers as God's substitute enforcer of norms of generosity even as the necessity for uncoerced charity pleads for attention from within our personal human natures and the revelation that is divinely offered to guide it.

Part of the literature in the final volume understands property in this complex, and yes qualified, way. Part does not. Take for example Robert Bork's denunciation of the judicial protection of property as improper judicial behavior.⁹⁶ This endorsement of positivism elevates the state above the individual and is subversive of the American idea of a government founded on self-evident truths. The postulates of natural rights protect the individual and his or her property from both libertarian excess turned upon itself as well as majority depredation directed at others. Ours is a government by consent, to be sure, but a consent that can neither sell itself into slavery nor authorize the confiscation of a neighbor's goods. Bork's piece is driven, of course, by the wholesome desire to avoid judicial usurpation of the *Lochner* variety, but his prescribed cure—judicial abdication of rights—is as troubling as the disease.

Importantly, Robert Bork never totally turns away from the Takings Clause, and it may be only his written or rhetorical emphasis that suggests an undue reticence to read the Constitution's protection of property in light of its applied natural-law heritage—that is, as noted above, the common law of each state. If Bork is warning only against abstract generalizations of claimed rights or generalizations that exist only in the judicial mind, as opposed to a meticulously documented history like Ely's, there is no quarrel.

Professor Ely submits his own voice to his final volume. Ely's contribution to volume six, *The Engimatic Place of Property Rights in Modern Constitutional Thought*, is in many ways a personal summation of the entire multi-volume work.⁹⁷ Professor Ely is right that property is enigmatic (my word would be indeterminate), largely because as a means, it must be pliable to meet unforeseen ends. Ely,

96. See Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823-32 (1986), reprinted in 6 ELY, *supra* note 1, at 1.

97. James W. Ely Jr., *The Engimatic Place of Property Rights in Modern Constitutional Thought*, in *THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS* 87-100 (David J. Boderham & James W. Ely eds., 1993), reprinted in 6 ELY, *supra* note 1, at 11.

however, occasionally adds to the enigma by suggesting in tone that property is more absolute than it is. Part of this results because his historical explanation is filtered through the formal structures of judicial method—levels of review, allocations of burden of proof, and so forth. At times, Ely seems to cheer for these pro-property devices a bit too robustly. If it is true that property does not have rights, and people do, than this runs—at the other end of the spectrum—the Borkean risk of over-generalization or abstraction.

Nevertheless, Ely reveals that he is not advocating an unrefined claim of economic liberty. Rather, his is a genuine concern that the dichotomy that exists in judicial method—heightened scrutiny for personal rights like speech and religion, and deference for economic interests—is false. This counterfeit distinction leads, as Ely points out, to the employment of the democratic process in securing monopoly and economic advantage. This is not the use of property fostering economic or any human freedom; this is redistributive, special-interest rent-seeking masquerading as the “common good.”

Ely's review of cases applauds the Court's recent efforts to address the disproportionate burdeuing of landowners with obligations, such as the preservation of environmentally desirable lands in *Monterey Dunes*, that should be borne by the community at large.⁹⁸ Here, Ely's analysis would have benefited from a more explicit recognition that what is and is not disproportionate is a function of state property law as it pre-existed the regulation under review and any special or unique new knowledge that the state can demonstrate to exist and not merely hypothesize. Making this linkage would better reveal that property as a concept in America is not, as Ely at one point intimates, solely directed by “libertarian considerations.”⁹⁹ Property facilitates liberty well used, and that necessarily includes individual regard for the larger community. The other-regarding nature of property ownership—its communitarian consideration, if you will—necessarily must pay attention to common law development, and more arguably and imperfectly, those statutory extensions of common law in place at the time of individual investment. Absent compensation, the libertarian aspect of property will most often overwhelm the communitarian when there are dramatic changes in the positive law landscape or a substantial break from common law tradition.

98. *See id.* at 21.

99. *Id.* at 23.

Leonard Levy's essay explaining why Jefferson substituted "pursuit of happiness" for "property" in the Declaration of Independence recaptures some of the balance of the historical position that Ely's volumes in their entirety reveal.¹⁰⁰ Levy illustrates that Jefferson's list was one of *inalienable* rights, and by definition, that cannot include property. However, there was a more fundamental point, and that again is property's instrumental relationship to larger ends. In the natural law tradition of the founders, genuine happiness is unattainable in this life. To be separated from God, the embodiment of goodness, our hearts and aspirations are necessarily discontent and will remain so until that separation is healed. But as created beings with a transcendent end, we know where we are going, and that surely authorizes the pursuit, and the use, of temporal property to get there.

Levy makes the more provisional claim that, within the context of the Court's jurisprudence, there ought to be more judicial solicitude for property rights held personally than corporately. Intuitively, this has some appeal because corporations, so far as anyone knows, have no higher end. But Levy does not explain well how the Court is to workably distinguish the property of a business enterprise from that of a person. Business enterprises are fictional persons, but there are real ones behind them. Levy posits that "making a living" ought to be seen as fundamental,¹⁰¹ but why not the living of the sole proprietor who happens to exist in corporate form? And why aren't the personal fortunes of individuals through retirement and other savings devices that exist in corporate stock entitled to be secure from government overreaching—if, again, it is actually overreaching, as defined in terms of disproportionateness and state property law development?

Properly, Levy takes aim at one of the modern Court's great embarrassments: the unanimous decision in *Hawaii Housing Authority v. Midkiff*,¹⁰² virtually erasing the public use limitation from the Takings Clause. He wonders why the case has generated so little condemnation (so to speak), but of course it has been roundly denounced as atextual and economically harmful by Professor Richard Epstein in a book cited by Levy.¹⁰³ The public use limitation served to

100. See Leonard Levy, *Property as a Human Right*, in 5 CONSTITUTIONAL COMMENTARIES 169-84 (1988), reprinted in 6 ELY, *supra* note 1, at 25.

101. *Id.* at 39.

102. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

103. See Levy, *supra* note 100, at 37 n.47 (citing RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)).

remind us that property, understood in the manifold way of James Madison,¹⁰⁴ is far more than its money equivalent. Yet, for the moment, all that remains at the federal level is the just compensation limitation, and as Ely more than demonstrates, it has been exhausting enough to try to get that straight.

The balance of this final volume continues exploring, by this point, well-trod themes: Economic liberty ought not be the stepchild of personal liberty, but a sibling welcome to at least attend, if not actually dance, at the constitutional ball. As with any edited series, the lines are not always straight or consistent. Indeed, Ely's selection of materials includes a representative sampling of materials from those less congenial to economic liberty or even the protection of property as a device to secure human dignity.

There was no more undignified disconnection of the relationship between property and human flourishing than that which occurred in *Poletown Neighborhood Council v. City of Detroit*.¹⁰⁵ In *Poletown*, over three thousand modest homes of largely factory or blue collar workers were condemned and destroyed, along with churches, stores, and small businesses, in order to avert General Motors' threatened partial departure from Detroit. Reacting to a popular account of this horrific misuse of governmental power written by essayist William Safire, Professor Frank Michelman argued that it was wrong to frame the issue as that of "the sanctity of private property," or of "everyone's right to own" property.¹⁰⁶ For Michelman, like Bentham long before him, property is merely a derivative right—that is, one to be specified and redefined by legislative grace. He rejects, as formalistic, inquiring "whether the interest for which protection is claimed would have been a legally protected one under a body of traditional common law doctrines regarding property and contract."¹⁰⁷ Professor Michelman would substitute for common law or natural law conceptions of property his own theorem that property is only relevant where it is related to "self-determination" or "self-expression."¹⁰⁸ In essence, property is transformed by his calculus into a mere political right.

104. See Levy, *supra* note 100, at 33 n.34 (citing NATIONAL GAZETTE (Philadelphia), March 29, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266 (C. Hobson et al. eds., 1986)).

105. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

106. Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981), reprinted in 6 ELY, *supra* note 1, at 101-02.

107. *Id.* at 104.

108. *Id.* at 116.

Michelman's thin conception of property captures only a fraction of property's relevance. As Ely's assembled collection reveals, property not only sustains political participation, but also the conscious choice to be insulated from politics. The harm in *Poletown* is not merely the elimination of some group from the next Detroit election. There is the deeper harm to families and other intermediate associations that thrive apart from elections or government processes. The Poletown condemnation literally destroyed the larger day-to-day society that lies between individual and state. Also gone for the people of Poletown is the self-worth and identity that one draws from his or her neighborhood and the work of one's own hands as well as the subjective sentiments derived from faith and ethnicity that dwarf any political project. Professor Michelman has sympathy for these displaced persons, of course, but his political conception of property is too puny to protect them. He is only able to conclude that what is happening in Poletown is "constitutionally disquieting."¹⁰⁹

Professor Michelman's linking of property to politics, rather than individual effort and investment guided by a well-formed individual conscience, may sound benign enough, but it is in the end a disguise for the further separation of property from ownership. Once that separation happens, property is no longer a secure means for individual human flourishing, but only a policy to be pursued as it fulfills the wishes of the state.

Reflecting on Professor Michelman's theory in light of Jonathan Macey's public choice analysis of the bifurcated treatment of economic and civil liberties further reveals the risk of defining property in this way. Macey contends that the distinction between economic and civil liberty is "not supportable on the basis of logic, [but it is] consistent with a model of governmental behavior in which politicians attempt to alter citizens' preferences so as to increase the demand for diverting resources to the public sector from the private sector."¹¹⁰ Unlike Michelman, it is unassailable to Macey that an enlarged public sector is seldom thought of as an expansion of individual or family freedom. Why Professor Michelman would believe otherwise is baffling. Moreover, Michelman's theory is flawed from the public choice perspective of Macey because it assumes that "some forms of individual self-expression are inherently superior to others."¹¹¹ In the

109. *Id.* at 117.

110. Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and "Other" Rights Under the United States Constitution*, in *SOCIAL PHILOSOPHY & POLICY* 141-70 (1992), reprinted in 6 *ELY*, *supra* note 1, at 41-43.

111. *Id.* at 48.

economic terms employed by Macey, there are no sustainable means for the comparison of interpersonal utility.

If this were not enough to convince one of the ill-wisdom of separating economic and civil rights, Professor Bernard Siegan's exploration of English and American common law experience very well should. As Siegan writes, "it [was] inevitable that the U.S. Constitution would substantially limit the power of political majorities. English and American law was greatly influenced by the ideas of Locke, Coke, and Blackstone, all of whom believed that government is limited in its sovereignty over the individual."¹¹² Yet, as Siegan records, private property, as well as the individual initiative and freedom in community it engenders, has rather consistently been the subject of rent-seeking or special interest regulation.¹¹³ While Michelman posits political involvement and the consequent redefinition of property by political or regulatory process as salutary, Siegan illustrates it to be a process that leads to "legislation benefiting comparatively few people."¹¹⁴ In short, regulation redistributing wealth seldom maximizes liberty and merely enriches those with access to power. Such political behavior, in Siegan's view, ought not be encouraged. "In failing to protect [the] constitutional liberties of investors and entrepreneurs," Siegan writes, "the judiciary has not fulfilled its constitutional duty."¹¹⁵

Siegan's perspective is juxtaposed in volume six with that of Antonin Scalia. Scalia's short essay, *Economic Affairs as Human Affairs*, was written while he was an appellate judge.¹¹⁶ As the title suggests, Scalia readily subscribes to the philosophical view that these affairs are interrelated in substantial ways. Scalia writes:

[I]n the real world a stark dichotomy between economic freedoms and civil rights does not exist. Human liberties of various types are dependent on one another, and it may well be that the most humble of them is indispensable to the others—the firmament, so to speak, upon which the high spires of the most exalted freedoms ultimately rest.¹¹⁷

112. Bernard H. Siegan, *Separation of Powers and Economic Liberties*, 70 NOTRE DAME L. REV. 415-82 (1995), reprinted in 6 ELY, *supra* note 1, at 275, 331.

113. *See id.* at 336.

114. *Id.* at 337.

115. *Id.* at 341.

116. Antonin Scalia, *Economic Affairs as Human Affairs*, in ECONOMIC LIBERTIES AND THE JUDICIARY 31-37 (James A. Dorn & Henry G. Manne eds., 1987), reprinted in 6 ELY, *supra* note 1, at 343.

117. *Id.* at 343-44.

Unlike Siegan, however, Scalia would not constitutionalize property beyond its procedural protection. No longer an appellate judge, but an Associate Justice, Antonin Scalia has, thankfully, discovered that the Constitution contains both a Due Process and a Takings Clause. Indeed, the clearest thinking about takings has come from Justice Scalia in *Nollan* and *Lucas*. In his Supreme Court Takings Clause work, Antonin Scalia has actually managed to perform what he described in his essay as a task that was "infinitely more difficult today than it was fifty years ago."¹¹⁸ And what was this task? Namely, extending constitutional protection to economic rights by tying the content of those rights to text and "established (if recently forgotten) constitutional traditions."¹¹⁹ Thus, Scalia's later judicial product partially refutes Scalia the essayist.

However, Scalia's essay contains an important bit of wisdom for Professor Ely's overall historical effort. Scalia likens the prospect of greater constitutional protection for economic liberty to a commercial loan: "[Y]ou can only get it if, at the time, you don't really need it."¹²⁰ In Scalia's mind, the most enduring constitutional values are those that are deeply embedded in societal practice. Admitting that declaring something to be a constitutional right has some effect, it is the "allegiance [to the right that] comes first and the preservation afterwards."¹²¹ In this, Scalia's essay is a reminder of the founding precept that only a virtuous people can remain free, and that virtue cannot be supplied, legislated, or imposed by government decree. A genuine understanding of the importance of property and economic liberty is equally incapable of being sustained by judicial opinion only.

There are many specific entries into the Ely series that I have not been able to address, or address fully, in this limited space. Professor Carol Rose's disquisition, for example, of property as a "keystone right" is a classic exposition of property philosophy in itself.¹²² The vastness of the Ely collection, as well as its honest historical advocacy for a better-calibrated balance between economic and civil liberty, are its strengths. Anyone seeking an enhanced grasp of the complexity of property rights in American history now has a magnificent library with just Ely's six books.

118. *Id.* at 348.

119. *Id.*

120. *Id.*

121. *Id.* at 349.

122. See generally Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329-66 (1996), reprinted in 6 ELY, *supra* note 1, at 41-43.

