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PROPERTY RIGHTS IN THE BALANCE — THE BURGER COURT AND CONSTITUTIONAL PROPERTY

ELIZABETH G. PATTERSON

The concept of property, so fundamental to our economic and social orders, seems capable of intelligent definition, and most Americans would profess a fairly clear understanding of what the term means. It thus seems anomalous that courts attempting to apply the constitutional protections of property have difficulty distinguishing between protected and unprotected interests. For instance, the Supreme Court acknowledged recently that it has been "unable to develop any 'set formula' for determining when" private property has been taken for public use, instead basing its determination on "ad hoc, factual inquiries."¹

The concept of property is not static. It has grown from the historical concept developed in feudal England² to encompass intangible economic interests and government entitlements,³ and it is continually changing to reflect new circumstances.⁴ Because circumstances have changed significantly since the colonial era, to the modern layman or lawyer the concept of property differs from that intended by the colonial farmers and merchants who drafted and ratified the Constitution. Thus, judicial difficulty in defining and redefining "property" is not altogether surprising. To add to the difficulty, under the "bundle of rights" interpretation, the concept of property has been subdivided into potentially infinite component parts.⁵ The Constitution protects property interests, but complex definitional issues arise: An interest at what point in time qualifies as property? How narrow an interest qualifies? And most important, to what extent should the Constitution impede legislative attempts to redefine the concept of property to meet the changing needs of the public?

The jurisprudence of constitutional property has been shaped by the Supreme Court's deference to the legislative response to changing

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2. See generally C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (1962).
PROPERTY RIGHTS IN THE BALANCE

societal demands. The Court's analysis of disputes involving property rights is but one variant of an analytical framework common to all conflicts between the immediate public interest, as determined by the legislature, and the enduring public interest in protecting certain spheres of individual self-determination from majoritarian concerns. Every case in which a party seeks to insulate himself from state action by asserting an individual right, including a property right, involves a balancing of the competing constitutional interests in democracy and liberty. Cast in the role of final arbiter, the Supreme Court has interpreted the Bill of Rights and other right-guaranteeing provisions of the Constitution to require a balancing of public and private interests, rather than to require the predominance of one interest over the other.

Recognizing that choosing between the interests of various sectors of the community is primarily a legislative responsibility, and that constitutionally based determinations that result from a judicial balancing are relatively immutable, the Court has conducted much of its balancing analysis according to formulae which defer to legislative decisions. A legislative deprivation of liberty generally will be upheld unless it is irrational, that is, unless it is not reasonably calculated to further a legitimate governmental goal. As a general rule, the Court gives the demo-


7. "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right . . . ." Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

8. The democracy interest should be read to encompass both the interest in preserving democratic processes and the interest in achieving the public goal that is the subject of the challenged act. The democracy interest, of course, derives its legitimacy from the constitutional provisions establishing the federal government structure, U.S. CONST. arts. I-III, and from article IV, section 4, guaranteeing to every state "a Republican Form of Government," id. at art. IV, § 4.


A notable dispute in this area involves the insistence of several recent Justices that the first amendment protections of speech be read as absolute prohibitions. See, e.g., Konigsberg v. State Bar, 366 U.S. 36, 60-61 (1961) (Black, J., dissenting); Black, The Bill of Rights, 35 N.Y.U. L. REV. 865, 874 (1960). Some provisions, of course, anticipate by their language a balancing process, for instance, the fourth amendment's prohibition only of "unreasonable" searches and seizures.

11. "[T]hat the law shall not be unreasonable, arbitrary or capricious, and that the means
The democratic process itself the highest constitutional priority, reflecting the belief that political liberty is the primary guarantor of personal liberty. The stated limitation does no more than demand that governmental bodies exercise their authority in a rational fashion.

For the high priority democracy interest to be questioned in the balancing process, the other side of the scales must be occupied by an interest to which the Constitution accords similar primacy, such as the specific liberties enumerated in the Bill of Rights, the anti-discrimination principle inherent—at least as to race—in the civil war amendments, and other liberties which are accorded fundamental status on the basis of social consensus, constitutional penumbras, or other criteria. If high priority interests clash—the majoritarian will versus what is commonly called a "fundamental" liberty—the Court will not accept without scrutiny the superiority of the democracy interest, but will examine more closely the interests on both sides of the scales to determine which should prevail. The analysis here usually focuses on the nature of the threatened fundamental liberty interest. The Court's assessment of its importance determines how substantial a public welfare interest must be linked with the basic democracy interest on the other side of the scales in order for the latter to prevail.

Further, even if the legislation is able to selected shall have a real and substantial relation to the objective sought to be attained. Nebbia v. New York, 291 U.S. 502, 525 (1934), quoted in Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 85 (1980). Legitimate government goals derive from the power of the relevant governing body: for the states, the police power authorization to protect the public health, safety, morals, and welfare; for the federal government, the powers delegated to it by the states in the constitution.


14. See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68 (1981) (stating that the nature of the right threatened, rather than the power exercised or the limitation imposed, determines the standard of review); Carolene Products 304 U.S. at 152 n.4 (legislation that restricts areas specifically protected by Constitution subject to greater scrutiny).

15. The Court sometimes appears reluctant to perform a true balancing of the competing fundamental interests, probably because of the subjectivity inherent in any such process. Cf. Ely, supra note 13, at 1246-47 (value preferences inherent in choosing between various aspects of the public welfare). Thus, in many instances the choice of a formula also is a choice of the outcome. This was particularly true under the Warren Court's rigid two-tier equal protection standard which is still in use to some extent. Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 10-16 (1972). If
pass the stated test, the Court may require that the legislation be finely
drawn because the restriction on fundamental liberties can be no greater
than is necessary to achieve the legislative goal.\(^{16}\)

Although this analytical framework is explicitly used less often for
property cases than for cases in which other individual liberties are at
issue, the same balancing formula is apparent in property cases, though
with certain characteristics peculiar to the property context.\(^{17}\) One such
characteristic appears in the first step of the analysis—the assessment of

challenged legislation created a suspect classification (e.g., one based on race) or restricted the
exercise of a fundamental right, it must be justified by a compelling state interest. However,
no compelling state interest was ever found. If the legislation did not possess one of these
attributes, it could be justified under the rationality test, a test which was virtually always
met. \(\text{Id. at 8 (scrutiny of laws affecting fundamental rights or creating suspect classifications
was \text{'strict' in theory and fatal in fact;'} other laws received \text{'minimal scrutiny in theory and
virtually none in fact.'})}\) The two-tier standard has not been so rigidly applied by the Burger
Court. See, \textit{e.g.}, Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2035 (1983) (finding a
compelling state interest in denying tax exemption to schools practicing religiously motivated
racial discrimination). It is worth noting, of course, that the compelling state interest found
in \textit{Bob Jones} was itself of fundamental stature.

16. \textit{E.g.}, Gooding v. Wilson, 405 U.S. 518, 520-21 (1972) ("overbreadth" standard in first
amendment adjudication); Dunn v. Blumstein, 405 U.S. 330, 353 (1972) (least restrictive alter-
native standard in equal protection adjudication).

17. It might seem that the balancing methodology is inappropriate for review under the
takings clause, Michelman, \textit{Property, Utility, and Fairness: Comments on the Ethical Foundations
of "Just Compensation" Law}, 80 HARV. L. REV. 1165, 1193-96 (1967) (arguing against balancing
on utilitarian grounds), since a decision in favor of the individual right does not preclude the
government from acting but merely requires the payment of compensation to legitimize the
government act. Thus the democratic process and its majoritarian goals are not thwarted.
Nor is this argument affected by the present controversy concerning permissible remedies for
a regulation taking. See, \textit{e.g.}, Agins v. City of Tiburon, 24 Cal. 3d 266, 270, 598 P.2d 25, 28,
157 Cal. Rptr. 372, 375 (1979) (landowner may challenge zoning action by seeking mandamus
or declaratory relief but may not sue in inverse condemnation), \textit{aff'd}, 447 U.S. 255 (1980);
Buescher, \textit{Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts:
So-Called Inverse or Reverse Condemnation}, 1 URB. L. ANN. 1 (1968). If compensation is disallowed
as a remedy, such that the action results in invalidation of the regulation, the state may
subsequently reinstate the regulation by voluntarily commencing an eminent domain pro-
ceeding.

Such an argument overlooks both theoretical and practical considerations. From the
latter perspective, the realities of government finance dictate that in many, if not most, in-
stances a requirement that compensation be paid may be the practical equivalent of a com-
plete prohibition of government action. \textit{Agins}, 24 Cal. 3d at 276, 598 P.2d at 30-31, 157 Cal.
Rptr. at 377; Buescher, \textit{supra}, at 1-2, 9; Note, Eldridge v. City of Palo Alto: \textit{Aberration or New

Further, the prohibition against taking private property for public use without just
compensation must be recognized as the theoretical equivalent of the prohibition against
abridging freedom of speech. Each of these provisions establishes an individual right—in the
latter example, the right to speak freely without government interference; in the former, the
right to receive just compensation for interests in property that have been appropriated
by government. In each case the right is a high-priority constitutional value. Conflicts with
other such priority values, including that represented by the democratic process, are inevita-
table. A balancing analysis is an appropriate means for resolving such conflicts. Cf. B.
the public interest in the democratic process, the outcome of which is sought to be invalidated. Although the Burger Court is always highly deferential to the prerogatives of legislatures, particularly those of the several states,\(^{18}\) nowhere is its deference more evident than in the property context.\(^{19}\)

The deferential stance of the Burger Court is consistent with tradition.\(^{20}\) The Constitution delegates to the federal government no direct authority concerning any property other than its own,\(^{21}\) and state primacy in this area is virtually undisputed. Nevertheless, the extent to which the present Court defers to state definitions and redefinitions of property to the exclusion of substantial federal concerns, including those

\(^{18}\) The Court recently acknowledged that principles of comity and federalism “have received considerable attention in our decisions,” noting: “The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climatic regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences.” California v. United States, 438 U.S. 645, 648 (1978); see also Roberts v. United States Jaycees, 104 S. Ct. 3244, 3261 (1984) (holding that state law requiring Jaycees to admit women as members does not infringe on constitutional right of free association).

\(^{19}\) See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (state may adopt reasonable restrictions on private property); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9-11 (1978) (state law defines right to public utility service); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977) (Court has consistently held that state law governs issues relating to property).

\(^{20}\) See, e.g., Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155-56 (1944) (declining to construe federal law to override state property law). Of course, a limited federal role exists in defining and controlling property rights. For instance, when federal law creates a property interest, such as the interest of a medicaid recipient in continued benefits, federal law has a substantial role in defining the rights and responsibilities inherent in that form of property. See O’Bannon v. Town Court Nursing Center, 447 U.S. 773, 785-88 (1980). The federal government may also act within its delegated powers in a way that operates to redefine property rights. Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 275-83 (1981).

\(^{21}\) U.S. CONST. art. I; id. art. IV, § 1.
grounded on the Constitution, is notable. A series of cases involving property rights related to navigable waters dramatically illustrates the Court's deference. Reversing a long-standing trend, and at least one quite recent case, the Burger Court has repeatedly upheld state power to define property rights in most navigable waters and related lands, a power previously regarded as largely a federal constitutional preroga-

22. In the limited areas in which exercise of powers delegated to the legislative or executive branches of the federal government affects property, deference is also shown to those bodies by the Court. See, e.g., Virginia Surface Mining, 452 U.S. at 281-83 (applying rational basis test to federal strip mining regulations); Andrus v. Allard, 444 U.S. 51, 63 (1979) (upholding Secretary of Interior's interpretation of statute prohibiting commerce in eagles). In short, the Court views the role of federal courts in defining and redefining property as a very limited one.

23. A dissenter in one of the cases stated, "Only the revisionary zeal of the present majority can explain its misreading of our cases and its evident willingness to disregard them." California v. United States, 438 U.S. 645, 693 (1978) (White, J., dissenting).


25. In Corvallis Sand & Gravel Co. the Court held that state rather than federal law should determine title to land exposed by and newly submerged by a change in the course of a navigable river. Corvallis Sand & Gravel Co., 429 U.S. at 378. The Court overruled Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), which held that since the state's title to the river bed derived from federal law, federal law continued to govern in determining the scope of the state's rights pursuant to such title. The Corvallis Sand & Gravel Co. opinion essentially limited the federal government's role to that of a proprietary transferor; once having parted with unrestricted title, it no longer had the power to limit the property conveyed. The state, as sovereign, now had the power to determine the property interests of the various parties. Corvallis Sand & Gravel Co., 429 U.S. at 370-71. But see California v. United States, 457 U.S. 273, 278 (1982) (federal law determines effects of accretive or avulsive changes in waters forming interstate or international boundary).

The following year the Court again reversed direction in upholding states' power to define and restrict property rights in water where not clearly preempted by federal law. California v. United States, 438 U.S. 645, 677-79 (1978). Despite contrary dicta in a series of cases decided between 1958 and 1963, Arizona v. California, 373 U.S. 546, 586-87 (1963); City of Fresno v. California, 372 U.S. 627, 630 (1963); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 291 (1958), the Court held that the federal government must comply with state water laws in appropriating water for a federal reclamation project, so long as such laws are not inconsistent with clear congressional directives relating to the project. Specifically, the Court allowed the state to impose conditions on the control, use, or distribution of the water from the project, thus recognizing in the states the power to limit significantly the federal government's property rights in the impounded water, contrary to the tenor, if not holdings, of case law during the prior twenty years.

In a third case the following year, the Court again indicated its displeasure with the primacy of the navigation servitude, resorting solely to state law to determine property rights in a certain pond despite the pond's apparent navigability. Kaiser Aetna v. United States, 444 U.S. 164 (1979). Justice Blackmun dissented forcefully from this holding. Id. at 181-92 (Blackmun, J., dissenting). It is probably the Court's attitude toward the navigation servitude, particularly as manifested in this case, that caused him in a later case to dissent to only the following sentence in the majority opinion: "Nor as a general proposition is the United States, as opposed to the several states, possessed of residual authority that enables it to define 'property' in the first instance." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88-89 (1980) (Blackmun, J., concurring).
tive. Similarly, the Court has granted to the states the primary role in determining whether particular government benefits constitute property protected by the due process clause, despite protests that this should be a matter of federal constitutional law. The Court consistently has given greater attention and deference to the states' power to define and redefine property interests and has strongly favored state-defined property interests in the balancing process inherent in much constitutional adjudication. Thus both state restrictions on property rights and state protections of property rights that inhibit other individual liberties are given substantial weight by the Court in its balancing.

26. A substantial body of recent case law explores the question of whether entitlement to a particular government benefit such as welfare, government employment, or an education embodies the characteristics of property to such an extent that the state may not terminate the benefit without providing procedural protections. E.g., O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 786 (1980) (continued nursing home benefits); Bishop v. Wood, 426 U.S. 341, 347 (1976) (at will employment contract); Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (fixed term employment contract); see Reich, supra note 3.

The Court has rejected custom and practice as bases for protected expectancies. See Leis v. Flynt, 439 U.S. 438, 442-44 (1979) (per curiam). Where a property interest has been recognized, the basis of the interest is found in either statute, e.g., Arnett v. Kennedy, 416 U.S. 134, 163 (1974) (federal statute gives employee property interest in continued employment) or contract, e.g., Perry v. Sinderman, 408 U.S. 593, 600 (1972) (provision in Faculty Guide may give rise to property interest in tenured employment). Even where the words of a statute would appear to create a protected expectancy, the Court has held that a limiting judicial interpretation of the statute subsequent to the termination of the benefit can retroactively negate the legitimacy of the expectation. Bishop v. Wood, 426 U.S. 341, 347 (1976).

Further, various members of the Court have toyed with the idea that as part of a state's power to define property rights, it may define the procedural protections that attach to such rights, thus displacing any additional procedures that might be called for by due process. Arnett v. Kennedy, 416 U.S. 134, 163 (1974) (Rehnquist, J., joined by Burger, C.J., and Stewart, J., plurality opinion); Goss v. Lopez, 419 U.S. 565, 586-87 (1975) (Powell, J., joined by Blackmun, Rehnquist, J.J., and Burger, C.J., dissenting). Although a majority of the Justices had embraced this idea at one time or another, it has been firmly rejected in recent opinions of the Court, both before and after the replacement of Justice Stewart with Justice O'Connor. Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-32 (1982); Vitek v. Jones, 445 U.S. 480, 490-91 (1980).


30. An excellent illustration is provided by the cases concerning speech and petition activities in privately owned shopping centers. Initially presented with cases in which state law protected the property holder's right to remove participants in such activities, the Court held
Due to this deference, most challenges to legislation that restrict property rights are analyzed under the basic rationality standard. Only limited aspects of property are treated as fundamental. Thus restrictions on property rarely demand a higher level of majoritarian accountability than mere rationality. Some property interests are fundamental, however, and their identification proceeds in much the same way as the identification of other fundamental interests.

This Article will attempt to identify the fundamental aspects of the individual right to property by examining a broad spectrum of constitutional and quasi-constitutional decisions involving the concept of property. It will consider not only holdings, but also other statements that indicate the Court's attitude towards various property interests. The focus of the Article will be on opinions of the Burger Court for two reasons: First, the Burger Court has devoted more explicit discussion to property concepts than any Court since the Depression era; and second, the Court's most recent opinions evidence the treatment of property at its current evolutionary stage. The Article initially will focus on the

that the first amendment did not preclude enforcement of such laws. Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (together reversing Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968)). The state took the opposite role in a subsequent case, its highest court holding that the state's own constitutional guarantee of free speech protected such speech and petition activities. Pruneyard Shopping Center v. Robins, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). Called upon to determine whether state law in this posture represented an unconstitutional infringement of property rights, the Court once again ruled in favor of the state. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88 (1980). Thus resolution of this confrontation between private property and free speech was left completely in the hands of the states.


31. See Pruneyard, 447 U.S. at 80-88; infra note 67 and accompanying text.

32. On the present Court, only Justice Marshall has expressly recognized the concept of "core" (constitutional) property. Pruneyard, 447 U.S. at 94 (Marshall, J., dissenting). However, the Court has differentiated various personal interests served by property, according them varying weights in constitutional adjudication. E.g., United States v. Jacobsen, 104 S. Ct. 1652, 1661-63 (1984) (discussing privacy and possessory interests in fourth amendment law). A dramatic example of the Court's identifying and according constitutional protection only to those property rights deemed fundamental is found in Oliver v. United States, 104 S. Ct. 1735 (1984). In upholding a warrantless government intrusion onto undeveloped land, the Court held that the privacy interest protected by the fourth amendment is not inclusive of all rights against intrusion protected by the common law of trespass. "The existence of a property right is but one element in determining whether expectations of privacy are legitimate." Id. at 1743 ("legitimate" here connotes fundamentalness). Examination of a broad range of recent opinions reveals a notable consistency in those aspects of property that have been accorded priority in constitutional and related adjudication.
Court's method of defining property. Then the relevant decisions will be examined substantively to identify the four interests central to the Constitution's protection of property: autonomy, privacy, protection of investment, and physical control. Conclusions regarding the current definition of fundamental property can be drawn from an analysis of the Court's treatment of each of these four interests.

I. IDENTIFYING FUNDAMENTAL PROPERTY INTERESTS

The starting point for defining the fundamental aspects of property—which will here be collectively referred to as "constitutional property"—is the express protection provided by four provisions in the Bill of Rights:33 (1) the third amendment's prohibition against quartering soldiers in private homes; (2) the fourth amendment's rejection of unreasonable searches and seizures; (3) the fifth amendment's ban on deprivations of property without due process; and (4) the fifth amendment's prohibition of the taking of property without just compensation. Indeed, the existence of these four provisions, together with numerous other postures in which property questions reach the Court,34 seems to have impeded the development of a coherent doctrine of constitutional property, creating instead a fragmented approach that masks the similarities of cases arising under different clauses. Nonetheless, there are similarities in the property cases, and it is possible to derive a pattern which could serve as the framework for a doctrine of constitutional property.

Protection of "expectations" is a prevalent element of constitutional property analysis. Although particularly apparent in cases in which the Court has found governmentally derived benefits to be protected by the due process clause,35 expectations analysis also has been prominent in

33. Although the Bill of Rights itself applies only to the federal government, the due process clause of the fourteenth amendment applies to the states and has been interpreted to incorporate the protections of the fourth amendment and the takings clause of the fifth amendment. Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (search and seizure); Chicago Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236-41 (1897) (takings). The third amendment has not been made applicable to the states, and a fact situation calling for such application is unlikely. See P. Brest, supra note 10, at 397 n.1.

34. For instance, property questions arise in cases interpreting statutes not primarily concerned with property, such as the National Labor Relations Act, see supra notes 124-36 and accompanying text; in cases in which a law that protects property rights is challenged as violative of some other constitutional right, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 576 (1977) (challenging constitutionality of tort of right of publicity on first amendment ground); or in cases questioning the respective rights of state and federal governments to make decisions concerning property, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

35. E.g., Leis v. Flynt, 439 U.S. 438, 443 (1979) (per curiam) (attorneys' interest in appearing pro hac vice in a state in which they are not admitted to bar); Bishop v. Wood, 426
recent cases under the takings clause and the fourth amendment. For instance, in the landmark takings case Penn Central Transportation Co. v. New York City, the Court stated:

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," . . . and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes.

The expectations analysis apparently is based on social consensus, which has been criticized by commentators as too subjective to support a constitutional doctrine. The Court, however, appears to have limited the aspects of social consensus/expectations it will consider relevant in constitutional property analysis to expectations which are derived from certain relatively observable sources, including the property-related constitutional provisions themselves. In this context, those provisions can be viewed as reflecting, or creating, expectations that the specific constitutional prohibitions will be observed and also that the type of property interest protected by the Constitution will be respected in a more general sense—the penumbral effect. By treating the


36. See cases cited infra note 49.

37. The crucial inquiry in recent fourth amendment jurisprudence has been whether the government intruded into an area as to which the complainant held a reasonable expectation of privacy. Oliver v. United States, 104 S. Ct. 1735, 1740 (1984); Rakas v. Illinois, 439 U.S. 128, 148-50 (1978); Katz v. United States, 389 U.S. 347, 353 (1967).

38. 438 U.S. at 124-25 (1978) (citation omitted); accord Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (stating that Corps of Engineers' consent to certain improvements affecting navigable water could "lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land owner's property").


40. Using penumbras or underlying values aids in adapting the provisions of the Constitution from the social, political, and economic conditions of the late eighteenth century to the vastly altered circumstances of the present. See Wofford, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. CHI. L. REV. 502, 524-27 (1964). That natural and necessary adaptation would be unnecessarily stultified if constitutional protections were limited to the particular problems that concerned the framers and that they sought to avoid through the
express provisions as sources of expectations that, in turn, have an effect outside the realm of the source provision, a broader, more cohesive analytical framework can be achieved and the fragmentation problem alluded to earlier can be largely avoided.

Further, the Court has indicated in several areas that traditional and widely accepted concepts can also give rise to constitutionally recognized expectations.41 Traditional legal concepts such as abandonment of unused property and forfeiture of objects used in committing a criminal offense have been accepted by the Court as defining a property owner’s reasonable expectations. As a result, the Court has upheld state statutes specifying the circumstances under which a forfeiture42 or abandonment43 would occur because the statutes did not deprive the property owner of a right which he reasonably could have considered to be constitutionally guaranteed.44

Although one might argue that additional sources of expectations should be recognized,45 the use of expectations as the foundation for constitutional property law generally seems to be an acceptable method of analysis, which finds legitimacy both in the nature of constitutional

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41 See Oliver v. United States, 104 S. Ct. 1735, 1742 (1984) (historic concepts as negating expectation of privacy in open fields); Loretto, 458 U.S. at 441 (taking found based on “historically-rooted expectation”). The conservative bias of this approach is inescapable. Present concepts which perpetuate traditional views may be easier to identify and support, but they are not necessarily more indicative of present social consensus, which represents an amalgam of traditional and emerging ideas and values. Cf. Grey, Eros, Civilization and the Burger Court, LAW & CONTEMP. PROBS., Summer 1980, at 83, 90 (1980) (tradition as source of Burger Court rulings involving sex and the family).
44 To the same effect is Loretto, 458 U.S. at 441, treating traditional (late nineteenth and early twentieth century) case law in the takings area as creating in the property owner an “historically-rooted expectation” which the constitution should protect.
45 See supra notes 40-41.
adjudication and the nature of property. To a large extent, property is itself a form of expectation. In Bentham's words, it is "the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it." In determining whether an interest or claim is property, the expectations inherent in the interest must be examined. Recent Supreme Court cases involving property often cite Justice Holmes' admonition that "[t]he life of the law has not been logic. It has been experience." The national experience in regard to property is embodied in that collection of common understandings and mutual expectations "upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." Accordingly, defining reasonable expectations has been the starting point for the Burger Court in defining those property interests that are constitutionally protected.

The setting of constitutional rights analysis also bespeaks the ap-

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47. This methodology can be seen not only in the "new property" cases such as those cited supra note 35, but also quite clearly in Kaiser Aetna v. United States, 444 U.S. 164 (1979). The issue was whether assertion of the federal navigation servitude over a formerly private lake now connected with navigable water by a channel constructed as part of a private marina amounted to an unconstitutional taking. With reference to the digging of the channel, the Court stated:

We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on the petitioner's agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States, it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land owner's property. Id. at 179 (citation omitted).


50. See cases cited supra note 48. In his concurring opinion in O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980), Justice Blackmun asserted that an approach that defines expectations in terms of "reason and shared perceptions" reflects the "unremarkable reality that reasonable legal rules themselves comport with reasonable expectations." Id. at 797 (Blackmun, J., concurring).
propriateness of inquiry into expectations. If a property interest is deemed to be of fundamental stature, it will have the capacity to out-weigh duly enacted legislative measures. Thus, the immediate, particular will of the people is overridden by the underlying will of the people that the given property interest should be protected against democratic majorities. Through expectations analysis the Court ensures that the protection of a particular property interest reflects the continuing underlying will of the people.

From the above sources, then—constitutional provisions and their penumbras, traditional and widely shared property concepts—the Court has identified a congeries of property-related expectations that define the scope of constitutional property. Discussions of property in recent case law seem to relate protected expectations to four basic societal values associated with property: autonomy, privacy, the opportunity to recoup investments made in the property, and physical control (possession). The remainder of this Article will explore the Court’s treatment of each of these constitutionally protected property interests to


52. One branch of constitutional scholarship holds that the content of constitutional protections must be determined by the intent of those who drafted and/or ratified the provision, with subsequent changes in the popular will to be addressed through the amendment process. See, e.g., Berger, Paul Brest’s Brief for an Imperial Judiciary, 40 MD. L. REV. 1, 24-31 (1981). Others, however, assert that the Constitution must reflect present mores and conditions rather than those held in colonial times, and that the courts must bear primary responsibility for the adaptation. See, e.g., Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204, 228-29, 237-38 (1980); Sandalow, Constitutional Interpretation, 79 MICH. L. REV. 1033 passim (1981).

53. In cases defining the “new property,” the Court appears to use positive law and contract as the exclusive sources for constitutionally recognized expectations. See, e.g., Leis v. Flynt, 439 U.S. 438, 442-43 (1979) (per curiam); Bishop v. Wood, 426 U.S. 341, 344-45 (1976). However, these cases are not concerned with identifying constitutional property in the sense that the term is used here. The “new property” cases determine whether an entitlement constitutes property at all, such that it can qualify for basic procedural and rationality review. See supra note 26 and accompanying text. Thus, just as state law determines whether a certain expectation as to land is legally protected such that it might be termed property, state law is also used to determine whether a particular expectation in a job or government benefit is legally protected to the extent that it might appropriately be classified as property. That there is a property interest does not mean that there is a priority (here, “constitutional”) property interest capable of overriding the interest in democracy or other fundamental constitutional values. This determination requires the additional analysis set forth in the text.

54. These three interests are, of course, in many instances closely related. The relationship between autonomy and privacy—the freedom to make choices and the freedom to prevent others from knowing or seeing one’s choices—is so close that the Court generally fails to distinguish the two concepts. Henkin, supra note 51, at 1424-25. Further, a landowner’s ability to realize on his investment is intimately related to the scope of his autonomy regarding the use of the property and its management. In a competitive economy, privacy concerning these choices may also influence profitability.
determine the scope of the fundamental property interests which can evoke heightened judicial scrutiny.

II. The Autonomy Interest

Early in this century, a list of the protected property-related expectations would have featured prominently a broad-based autonomy: an inherent liberty to make decisions concerning activities on or affecting the property without government interference. In the 1920's and 30's the Supreme Court struck down numerous ameliorative business regulations in favor of property and contract rights. The regulations held to be unconstitutional included laws governing the conditions of employment, the quality of manufactured goods, and the pricing of various goods and services.

Reacting to the depression and its effect on the public perceptions of the role of government in economic activities, the Court abandoned its prior reification of property autonomy, at least with respect to business property. Instead, the Court adopted a view that property becomes "clothed with a public interest," and thus subject to the police power when used in a way that affects the public. One's expectation of autonomy in property that affects the public must encompass an expectation that government may regulate the use of the property. Thus, such regulation does not deprive the property holder of any constitutional property right. These limitations on the property holder's reasonable expectations are merely extensions of the traditional notion embodied, for instance, in nuisance law, that property does not bestow the right to use the resource in a way harmful to others. *Sic utere tuo ut

60. See P. Murphy, supra note 56, at 154-56.
61. Nebbia v. New York, 291 U.S. 502, 539 (1934) (upholding state-imposed price controls on milk); id. at 533 (reviving decisional theory used in nineteenth century cases such as Munn v. Illinois, 94 U.S. 113 (1877)).
62. Id. at 534.
alienum non laedas.64

The passage of time since these cases were decided has increased the extent to which an expectation of government intervention is imputed to the property owner. The principle that property clothed with a public interest may be regulated has itself become part of the legal tradition. The Court acknowledged the effect on a property owner's expectations of continued acceptance and restatement of a legal principle in Green v. Lindsey,65 a case concerned with the adequacy of posted notice of federal proceedings:

It is, of course, reasonable to assume that a property owner will maintain superintendence of his property, and to presume that actions physically disturbing his holdings will come to his attention . . . . The frequent restatement of this rule impresses upon the property owner the fact that a failure to maintain watch over his property may have significant legal consequences for him, providing a spur to his attentiveness, and a consequent reinforcement to the empirical foundation of the principle.66

The use of the "clothed with a public interest" principle to justify extensive government intervention into business property has been well established in constitutional doctrine since 1934.67 What is noteworthy in the opinions of the Burger Court is not its continued use of the principle in that context, but its apparent application of the "clothed with a public interest" concept to residential property as well. In Anglo-American tradition, the home has always been regarded as an inherently private place,68 in which one conducts inherently private activities.69 Thus it might be expected that the principles applicable to a home qua home would differ from those applied to a business establishment.70 Although the case law is not fully developed, the decisions to date indicate a nota-

64. "Use your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1238 (5th ed. 1979).
66. Id. at 451-52.
67. The general rule arising from Nebbia, that duly enacted state laws are consistent with due process so long as reasonably related to a legitimate state interest, has been repeated so often, see, e.g., Hodel v. Indiana, 452 U.S. 314, 331 (1981); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84-85 (1980); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955), that modern cases challenging business regulation rarely allege property infringement, instead pursuing other claims. See, e.g., American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981); Alabama Power Co. v. Costle, 606 F.2d 1068 (D.C. Cir. 1979).
68. See infra note 95 and accompanying text.
69. A home is the place where one sleeps, "eats, bathes, reads, visits, and rests, where one throws off the cares of business and surrenders to his desire for creature comforts and human associations." Jakeway v. John V. Bauer Co., 218 A.D. 302, 304, 218 N.Y.S. 193, 195 (1926).
70. A home that is serving as an office or place of employment might be treated differ-
ble consistency between the principles applicable to autonomy in residential and nonresidential premises.

Two cases involving state regulation of household composition are noteworthy. In Village of Belle Terre v. Boraas, the Court upheld an ordinance zoning an entire village for single-family dwellings and defining "family" as no more than two unrelated, or an unlimited number of related, persons living together as a single housekeeping unit. Thus, the resident property owner's choice of living companions was circumscribed severely. Rejecting without discussion an allegation that the ordinance violated rights of privacy, the Court upheld the ordinance using language essentially identical to that found in cases involving business regulation. A few years later in Moore v. City of East Cleveland, the Court struck down an ordinance limiting occupancy in a single-family zone to particular configurations of related individuals. The plurality decision relied not on any autonomy interest in the home, but on an interest described as "freedom of personal choice in matters of marriage and family life." Nor did the dissenters acknowledge that any constitutionally protected property right had been affected. Only Justice Stevens' concurring opinion argued that the right of a property owner to determine the internal composition of his household is a basic property right protected by the Constitution. One of the dissenters stated that this argument had been rejected in Village of Belle Terre. These two cases suggest that, unless a fundamental liberty interest is implicated,
residential autonomy may be restricted by the state with no greater constitutional implications than are raised by regulation of a business.

In aligning the law of residential autonomy with that applicable to business premises, the Court may have been responding once again to the traditional legal principle that property rights may be limited to the extent they affect the public. Activities within the home that affect the public have long been subject to the sanction of the criminal laws. For instance, serious crimes such as murder or rape are not insulated from state authority merely because they occur within the home. More mundane activities such as parties or sexual relations may be subjected to state intervention under laws prohibiting fornication or disturbing the peace. Nuisance law might also reach in-home activities. Thus the degree of autonomy available within the home has never been complete.

Stanley v. Georgia might seem more protective of in-home autonomy, but actually is consistent with the principle that in-house activities that affect the public are not constitutionally protected. In Stanley, the Court held that a state law criminalizing the possession of obscene materials in the home was an unconstitutional infringement on the privacy of the home. Although the Stanley Court emphasized the first amendment aspects of the case, and the Burger Court subsequently characterized the case as resting on the constitutional right to privacy, the outcome—and its contrast to the outcome in Village of Belle Terre—is consistent with the rule enunciated in the 1930s in regard to business property. When the property is used in a way that affects the public, the holder's legitimate expectations must encompass the prospect of regulation. The use of a home to house an unduly large number of people was regarded by the governing body of Belle Terre and the Supreme Court as having the requisite public effects. The Court considered the possession and perusal of pornographic materials in the home to have no public effect; accordingly, the in-home activity was constitutionally protected.

The Court's holdings in this area indicate that the autonomy inter-

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80. Id. at 565.
81. Id. This approach is typical of the Warren Court. The present Court would probably rest the opinion on a property-related privacy interest, see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973), if, indeed, it would reach the same result at all.
82. Paris Adult Theatre, 413 U.S. at 66.
84. See Stanley, 394 U.S. at 566-67. Any public effects arising from such perusal must derive from the materials' effects on the mind of the peruser. The first amendment implications of using such effects as an entree into the home may distinguish this case from others in which a state legislature has determined the existence of public effects. On the other hand, it
est in property does not impede the state from restricting activities on
the property that have a demonstrable effect on the public welfare, re-
gardless of whether the property is used for business or residential pur-
poses. The scope of activities having a public effect, however, should be
much narrower in the context of the home than in most economically
productive uses.

III. The Privacy Interest

A. The Right to Exclude

A second societal value protected by the institution of property,
and one which has a solid place in Anglo-American tradition, is pri-
vacy. Royal incursions on privacy provided a rallying point for the
American revolutionaries, and gave rise to explicit constitutional limi-
tations: the third amendment limits the quartering of soldiers in private
homes, and the fourth guarantees the "right of the people to be secure
in their persons, houses, papers, and effects, against unreasonable
searches and seizures." The privacy concepts that were developed in

would seem appropriate for the Court to carefully scrutinize any assertion of public effects
when the state seeks to limit the individual's autonomy within the home.

85. Unlike the Court, I use the term "privacy" in the traditional sense of "freedom from
intrusion." In the property context, privacy denotes a freedom from physical intrusion famil-
 iar in the tort law of "trespass" and in the property law of the "right to exclude." See, e.g., 3

86. See N. LASON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO
THE UNITED STATES CONSTITUTION 51-78 (1937) (discussing reaction of colonists to writs of
assistance). The Declaration of Independence named among the wrongs done the colonies by
the Crown the quartering of soldiers in homes. John Adams attributed the origins of the
independence movement to discontent with official intrusions on privacy, exemplified by the
writ of assistance. The writ of assistance was a transferable document issued to customs of-
ficers and authorizing them "in the day time to enter and go into the vaults cellars ware-
houses shops and other places where any prohibited goods wares or merchandizes or any
goods wares or merchandizes for which the customs or other duties shall not have been duly
and truly satisfied and paid lye concealed or are suspected to be concealed, according to the
true intent of the law to inspect and oversee and search for the said goods wares and mer-
chandizes . . . ." Thomas Hutchinson's Draft of a Writ of Assistance, in 2 LEGAL PAPERS OF JOHN
ADAMS 144, 146 (L. Wroth & H. Zobel eds. 1965). The open-ended authority thus granted to
customs officers was often abused and sorely resented by the colonists. Said Adams: "I do say
in the most solemn manner, that Mr. Otis's oration against the Writs of Assistance breathed
into this nation the breath of life. [H]e was a flame of fire! Every man of a crowded audience
appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then
and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and
there the child Independence was born." 10 C. ADAMS, THE LIFE AND WORKS OF JOHN
ADAMS 276 (1856).

87. "No soldier shall, in time of peace be quartered in any house, without the consent of
the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST.
amend. III.

88. "The right of the people to be secure in their persons, houses, papers, and effects,
the context of the express provisions have spawned broader substantive rights cognizable under the due process and takings clauses. Nonetheless the specific prohibitions of the third and fourth amendment thus provide the textual source for a fundamental interest in territorial privacy. The zones of privacy explicitly created by the third and fourth amendments have been both expanded and restricted by the Court, relying on penumbras, underlying values and tradition. Most importantly, the scope of protected privacy interests has been expanded to include commercial as well as residential property.

The language of the express provisions is particularly solicitous of the privacy of the home, and accordingly, the Court is similarly solicitous of residential privacy in interpreting the broader fundamental interest. Privacy is recognized as a primary value sought in a home, "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits." Pre-constitutional American and English legal traditions also support a fundamental right to residential privacy.

The importance that the Burger Court attaches to the residential privacy interest is noticeable in cases upholding against first amendment

against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

89. See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980) (not all rights to exclusion are so essential to value of property as to require compensation); Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (recognizing right to exclude others as a compensable property right under the takings clause); Griswold v. Connecticut, 381 U.S. at 485-86 (right to marital privacy derived from, among others, due process clause).


91. The concept of penumbras was most explicitly articulated in Justice Douglas’ majority opinion in Griswold v. Connecticut, 381 U.S. 479 (1965). The opinion gave the right to privacy infringed by state laws banning contraceptives a territorial basis, asking, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Id. at 485-86.


93. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-90 (1974) (forfeiture of object used by lessee in commission of crime not violative of lessor's constitutional rights as such objects historically have been subject to forfeiture).


96. See Payton v. New York, 445 U.S. at 597. The freedom of one's home, embodied in the adage that "a man's house is his castle," was said by John Adams to be "one of the most essential branches of English liberty." Id. at 597 (quoting 2 LEGAL PAPERS OF JOHN ADAMS 142 (L. Wroth & H. Zobel eds. 1965)).
challenge laws viewed as protective of the privacy interest in the home. Approving a law enabling a person to require that a mailer remove his name from its mailing list, the Court stated that "to hold less would tend to license a form of trespass." Similarly, in a later case, the Court upheld a Federal Communications Commission order that a radio station "could have been the subject of administrative sanctions" for an afternoon broadcast of a monologue containing "indecent" language.

A primary consideration in the Court's rejection of a first amendment challenge to the order was that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."

In a third case, the residential privacy interest occupied the other side of the balance, and again it prevailed. In Payton v. New York, the Court invalidated state statutes authorizing police officers to make a warrantless felony arrest in a private dwelling while reaffirming earlier case law allowing warrantless arrests in a public place. The Court distinguished these two situations on the basis of the suspect's interest in the sanctity of his home, and noted that the "physical entry of the house is the chief evil against which the wording of the Fourth Amendment is directed." The Payton holding was extended in United States v. Karo, in which the Court held that the fourth amendment requires a warrant to be obtained before the police can monitor an electronic tracking device (beeper) placed on a movable object which enters a pri-

97. Carey v. Brown, 447 U.S. 455 (1980), also involved a first amendment challenge to a law protecting residential privacy, though the state-supported privacy interest did not prevail in that case. The state law, which exempted labor and certain other types of picketing from a general ban on picketing a residence, was invalidated on equal protection grounds. Both majority and separate opinions, however, indicated the acceptability of a nondiscriminatory ban on residential picketing. It is interesting that in this case the Justices saw implicated a significant residential privacy interest even though no physical intrusion on private property was involved. Id. at 471.

98. Rowan v. United States Post Office Dept., 397 U.S. 728, 737 (1970). Under the statute, any householder who received advertisements that offered for sale "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative" could give notice to the Postmaster General requesting that he order the sender to refrain from further mailings to the householder and to delete his name from all mailing lists owned or controlled by the sender. 39 U.S.C. § 4009(a), quoted in Rowan, 397 U.S. at 729-30.


101. Id. at 748.


103. See id. at 590-601.

104. Id. at 585 (quoting United States v. United States Dist. Court, 407 U.S. 297, 313 (1971)).

vate residence.\textsuperscript{106} \textit{Karo} modified prior case law which permitted the warrantless monitoring of electronic tracking devices.\textsuperscript{107} These cases demonstrate that residential privacy merits a high priority in constitutional adjudication. Indeed, the Court has described its attitude toward residential privacy as one of "reverence."\textsuperscript{108}

Although the Court recently stated that "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded the individual’s home,"\textsuperscript{109} the case law indicates that the privacy interest in commercial property also has a high priority. The principles used to determine the permissibility of government intrusions in the commercial context are virtually identical to those used in the residential context.\textsuperscript{110} Moreover, in takings cases the Court has been highly solicitous of the property owner’s right to exclude third parties from business property. Characterizing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property,"\textsuperscript{111} the Court in one such case stated that "a physical invasion is a government invasion of a particularly serious character."\textsuperscript{112} Governmentally mandated intrusions on commercial as well as residential property are permissible, if at all, only if temporary and limited in nature.\textsuperscript{113} These criteria are reminiscent of the overbreadth standard attached to "preferred" first amendment rights.\textsuperscript{114} The statements and holdings of the Court thus support a conclusion that constitutional property is implicated by a government-au

\textsuperscript{106} The Court observed: "The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant." \textit{Id.} at 3303-04.

\textsuperscript{107} United States v. Knotts, 460 U.S. 276, 285 (1983) (beeper revealed nothing that could not have been permissibly observed with the naked eye).

\textsuperscript{108} Miller v. United States, 357 U.S. 301, 313 (1958).

\textsuperscript{109} Donovan v. Dewey, 452 U.S. 594, 598-99 (1981). It is appropriate that the privacy interest in commercial property be accorded less weight than in residential property. Unlike the home, business premises are not mentioned in the fourth amendment. Nor do the type of intimate personal activities that the right of territorial privacy was designed to protect characteristically take place on business premises. To the extent that they do, the privacy right should reside in the actor rather than the business entity itself. The business entity has an interest in privacy primarily as a means to enhance its ability to generate revenue; hence, this interest should be analyzed using principles applicable to the investment interest rather than the interest in personal privacy. Nevertheless, the Court seems to have adopted the latter approach.

\textsuperscript{110} See infra notes 137-67 and accompanying text.


\textsuperscript{112} \textit{Loretto}, 458 U.S. at 435.

\textsuperscript{113} \textit{Id.} at 434; Central Hardware Co. v. NLRB, 407 U.S. 539, 545 (1972).

\textsuperscript{114} See supra note 16 and accompanying text.
In contrast, the Court has held that an intrusion onto undeveloped land does not restrict fundamental property rights. The Court rejected the notion that a constitutionally protected expectation of privacy could arise from the posting of "no trespassing" signs, the erection of fences, or from other indicia of the possessor's desire for privacy. Rather, the Court focused on traditional legal concepts differentiating the home and its immediate environs from "open fields," on the type of activities that normally occur outdoors, and on the accessibility of outdoor activities to public view. The Court found that there can be no reasonable expectation of privacy in undeveloped land, and hence, the fundamental right to privacy is not violated by intrusions on such land.

B. Invitees

Constitutional restrictions on government intrusions always have been limited to situations in which the property owner does not consent; thus, the scope of the constitutional property interest does not encompass protection against intrusion by invitees. The invitee exception, long established in fourth amendment adjudication, also permeates the Court's property-related decisions arising in other contexts. In Pruneyard Shopping Center v. Robins, for example, the Court rejected a property owner's claim that state law prohibiting the owner of a large shopping center from excluding persons who were conducting orderly speech and petition activities offended the takings clause. The Court's

115. Of course, not all intrusions implicate privacy interests of equal priority. As noted, the Court has stated that residential privacy has a higher priority than commercial. Donovan v. Dewey, 452 U.S. 594, 598-99 (1981). It has also asserted repeatedly that the priority is higher when the purpose of the intrusion is to search for evidence of criminal activity. E.g., Almeida-Sanchez v. United States, 413 U.S. 266, 278 (1973); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).
117. Id. at 1741.
118. Id. at 1742. The area immediately surrounding the home, referred to at common law as the curtilage, encompasses that area to which the intimate activities associated with the home are likely to extend. It is generally accorded the same degree of protection as the home itself. Id. An "open field" is "any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech." Id. n.11. The implications of the Court's inclusion of "unoccupied" areas in the definition of an open field are uncertain.
119. Id. at 1741-42. The Court noted that even isolated portions of an "open field" may be viewed from the air.
120. E.g., Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (no fourth amendment violation when consent given to entry).
121. 447 U.S. 74 (1980).
opinion stressed that the shopping center was open to the public, and concurring Justice Marshall rejected any possibility of a meaningful claim to a right to privacy under such circumstances. The rejection of a privacy interest in relation to invitees is also apparent in the Court’s holdings that non-disruptive employee union activities on the employer’s property cannot be barred by the employer/property holder and that the fourth amendment does not shield an employer from observation by employees. By opening the premises to employees, the employer yields certain property rights, particularly its expectation of privacy in relation to its employees.

Nonetheless, a property owner retains a reasonable expectation of privacy in areas of activity or portions of the premises that are outside the scope of the invitation, and intrusions into these areas by the invitee will violate the owner’s fundamental privacy interest. As in the law of torts, privacy continues to affect the areas outside the physical scope of the invitation. Thus, portions of the premises not open to the relevant class of persons are constitutionally protected against intrusion. The state may not open the storage areas or business offices of a store to customers, or the executive suite of a corporation to employees who are normally excluded, and government inspectors of business premises may not, without a warrant, enter areas that are not open to the public.

Activities of the invitee that disrupt the use of the premises also are

122. *Id.* at 83. This factor is stressed as having been determinative in a subsequent discussion of the *Pruneyard* case contained in *Loretto*. 458 U.S. at 434.

123. *Pruneyard*, 447 U.S. at 94.

124. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 507 (1978); Eastex, Inc. v. NLRB, 437 U.S. 556, 572-73 (1978). These activities have been interpreted as coming under the protective umbrella of section 7 of the National Labor Relations Act.


127. *Restatement (Second) of Torts* § 169 (1965) (consent to enter portion of land does not create privilege to enter any part of land).

128. *See NLRB v. Visceglia*, 498 F.2d 43, 49-50 (3d Cir. 1974) (employees assigned to one building do not have right of access to separate building); *cf.* Marshall Field & Co. v. NLRB, 200 F.2d 375, 380-81 (7th Cir. 1953) (non-employees may be barred from employee restaurant); Diamond Shamrock Co. v. NLRB, 443 F.2d 52, 56-57 (3d Cir. 1971) (off-duty employees may be barred from production areas).

129. *See, e.g.*, Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (fourth amendment asserted in regard to locked liquor storeroom); Marshall v. Barlow’s, Inc., 436 U.S. at 309-10, 324 (warrant needed for passage from customer service area into work area of electrical and plumbing installation business). “[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.” *See v.*
beyond the scope of the invitation. Thus in Pruneyard Shopping Center v. Robins, while the Court held that state law may require large shopping centers to permit orderly expressive activities on the premises, several Justices emphasized in concurring opinions that the holding did not apply where serious interferences with business activity could be shown.

The concept that the scope of the invitation is limited to non-disruptive activities is apparent also in two labor cases. In Beth Israel Hospital v. NLRB, the Court upheld an NLRB ruling that restricted the areas in which employees could engage in union activities. Such activities were permitted in the hospital cafeteria, although it was used by visitors and patients, because any interference with cafeteria operations did not affect the primary functions of the hospital. Similarly, in Eastex, Inc. v. NLRB, the Court upheld an agency order requiring the employer to allow employees to distribute, in nonworking areas and on nonworking time, a union newsletter which contained material unrelated to the employees' association with the union. In rejecting the employer's property-based arguments, the Court cited the employer's failure to show any interference with production or discipline, stating "the [NLRB] is entitled to view the intrusion by employees on the property rights of City of Seattle, 387 U.S. 541, 545 (1967), quoted in Colonnade Catering Corp., 397 U.S. at 76 (emphasis added).

130. 447 U.S. 74 (1980).
131. "Even large establishments may be able to show that the number or type of persons wishing to speak on the premises would create a substantial annoyance to customers that could be eliminated only by elaborate time, place and manner restrictions." Id. at 96 (Powell, J., concurring in part); accord id. at 95 (White, J., concurring in part). The majority opinion also stressed that "There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center." Id. at 83.

132. 437 U.S. 483, 504-07 (1978). Statements and holdings in the labor cases sometimes seem more protective of property than in other cases. Compare Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972) (private parking lot "open to the public" does not assume attributes of public property), with Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84-85 (1980) (state may regulate private property that is open to the public). The labor cases, however, involve the Court in interpreting a federal statute, the National Labor Relations Act (NLRA). While the statute must be interpreted so as to allow only those intrusions permitted by the Constitution, the Court does not in these cases purport to be pushing the Constitution to the limit. Thus any entries allowed by the Court are presumptively constitutional; however, that an entry was disallowed under the NLRA does not conclusively establish that it was constitutionally barred.

133. Beth Israel Hosp., 437 U.S. at 507.
135. Id. at 572. The Court was following an earlier ruling in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), which was similar in all relevant facts except that in Eastex the literature addressed matters over which the employer did not have control. Beth Israel Hosp., 437 U.S. at 570-72.
their employer as quite limited in this context as long as the employer’s management interests are adequately protected.”

C. Implied Consent

In its early years, the Burger Court recognized another exception to the constitutional right to exclude: If a property owner accepts a government benefit or privilege conditioned on admission of specified persons, then entry by those persons does not impinge on the owner’s constitutional rights. The two best known cases in this area are *Colonnade Catering Corp. v. United States* and *United States v. Biswelld*, which involved government attempts to inspect premises on which liquor and guns, respectively, were sold. In each case the Court upheld a statute permitting warrantless searches, noting the historical pervasiveness of regulation of such businesses, including licensing requirements. The failure to require a warrant was based on a theory of implied consent. “[B]usinessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade . . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him.”

A related implied consent theory appears in the controversial case of *Wyman v. James*, which upheld mandatory caseworker visits to wel-

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136. Id. at 574. Similar principles emerge from a series of cases determining whether various communicative activities may be barred from public property. The Court has drawn a distinction between public property that serves as a public forum, such as streets and parks, and that which does not. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 103 S. Ct. 948, 954-55 (1983). In regard to the latter, the state may restrict expressive activities to those compatible with the intended purpose of the property, including restrictions based on subject matter and speaker identity that would be clearly unconstitutional if applied to a public forum. Id. at 955. Thus, during the 1970’s the Court held that forms of speech that would disrupt the operations of a military base, Greer v. Spock, 424 U.S. 828, 838-40, (1976) (partisan political activities), a prison, Jones v. North Carolina Prisoners’ Union, 433 U.S. 119, 133-135 (1977) (bulk mailings, meetings, and solicitations on behalf of a prisoner’s union), or a city bus system, Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (political advertising), could be barred. In Greer and Jones the restricted communicators were already lawfully on the premises. See generally Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121 (1982) (challenging system of differential treatment of publicly owned property).


139. 397 U.S. at 75-77 (but holding that warrantless search that included forcible entry violates fourth amendment); 406 U.S. at 315-17 (holding warrantless search of room pursuant to firearms regulation statute does not violate fourth amendment).


fare recipients' homes. The Court treated the welfare application as an implied consent to entry by the caseworker, which was a statutory adjunct to the receipt of benefits.142 Thus, the implied consent idea has been applied to limit the constitutional property interest in residential as well as commercial premises.

These three cases involved the receipt of a government perquisite,143 application for which could be viewed as implying consent to the subsequent visitations or inspections so long as actual or constructive notice was imputable to the applicant. The most recent implied consent case, however, did not involve an application and perquisite; rather, the property owner merely was doing business in a regulated industry.144 In Donovan v. Dewey, the Court allowed warrantless inspections under a statute that specifically authorized them pursuant to a pervasive regulatory program, where the regulations provided notice of the fact and nature of periodic inspections.145 The regulatory scheme, the Court noted, should itself cause the occupant of affected property to anticipate periodic inspections; thus, any expectation of privacy which might preclude an inspection is subjective and is not protected by the Constitution.146

The Dewey holding narrows the gap between the law governing territorial privacy and that governing property autonomy: If property is affected with a public interest, not only may government restrict the owner's activities, but it may also intrude onto the premises without a warrant to assure that its directives are being carried out.147 If carried to its extreme, that analysis could spell the virtual demise of the fourth

142. Id. at 324; id. at 344-45 (Marshall, J., dissenting).
143. See supra notes 137-42 and accompanying text.
144. This expansion of the theory is consistent with the long-established principle that "[t]he touchstone of public interest in any business, . . . clearly is not the enjoyment of any franchise from the state." Nebbia v. New York, 291 U.S. 502, 534 (1934).
146. Id. at 599-603; cf. Greene v. Lindsey, 456 U.S. 444, 451-53 (1982) (effect of law on expectations). Not only must the law specifically provide for inspections, Dewey, 452 U.S. at 599-600, it must be sufficiently specific in regard to such details as frequency and scope of inspections to provide for "a predictable and guided federal regulatory presence," id. at 604. Compare Dewey, 452 U.S. at 604 (frequency and scope are predictable), with Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978) (frequency and scope insufficiently detailed).
147. The idea that land uses affected with a public interest may be more readily intruded upon finds support in case law outside the fourth amendment context as well. For instance, the Court has upheld the power of the National Labor Relations Board to require that nonemployee union organizers be admitted to the premises if alternative means of communicating with employees are unavailable. Central Hardware Co. v. NLRB, 407 U.S. 539, 548 (1972) (remanding case for consideration of whether such alternative means were available); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (reversing NLRB order where alternative means are available). Further, although the Court has consistently held government-authorized intrusions on property to violate the takings clause, the analysis under which it has done so relied heavily on other factors such as the extent of the economic impact.
amendment's warrant requirement. The Court made clear, however, that it did not intend to enunciate so broad a principle. The implied consent theory is subject to certain limitations that are spelled out expressly in Dewey, or are implicit either in related case law or in the implied consent theory itself.

First, the legislation must provide adequate notice of the fact and nature of the intrusion. Otherwise, the act of commencing or continuing to operate an affected business cannot reasonably be construed as acceptance of the intrusion as a condition of doing business, and consent cannot be implied. The Federal Mine Safety and Health Act (FM-SHA), under which the Dewey inspection was performed, specified the frequency, purpose, and scope of inspections.\(^\text{149}\) In contrast, the Occupational Safety and Health Act (OSHA)\(^\text{150}\) involved in Marshall v. Barlow's, Inc., was unspecific as to those matters.\(^\text{151}\) The Court disallowed warrantless inspections in Barlow's because the statutory notice of potential inspections was an insufficient basis upon which to premise consent.\(^\text{152}\) The Barlow's Court also noted that since OSHA applied on its face to all businesses in interstate commerce, yet clearly did not contemplate inspections of all businesses, the statute did not provide sufficient


Finally, the importance of these principles is underscored by statements made in Carey v. Brown, 447 U.S. 455 (1980), in which the Court held unconstitutional, on equal protection grounds, an Illinois statute banning picketing of residences, with exceptions for "peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest." Id. at 457 (quoting ILL. REV. STAT. ch. 38, § 21.1-2 (1977)). In discussing the first amendment implications of the statute, the three dissenting Justices opined that a total ban on residential picketing, acknowledged by all to further the legitimate goal of protecting the privacy of the home, might be unconstitutional as applied if "a resident has voluntarily used his home for nonresidential uses in a way which reduces the resident's privacy interest, and the person seeking to picket the home has no alternative forum for effectively airing the grievance because it relates to the nonresidential use of the home . . . ." Id. at 479 (Rehnquist, J., dissenting) (arguing that statutory distinction was merely attempt to comply with these constitutional requirements). As an example, they cited persons who operated businesses out of their homes, such as a slum lord, with no reference to whether such businesses involved employees or other invitees into the home. Id. at 480. Emphasis was placed on the nonresidential use itself as a "waiver" of privacy. But see id. at 487 n.5 (Rehnquist, J., dissenting) (criticizing an example used by the majority "since that act does not involve the voluntary admission of strangers into the home for some nonresidential purposes"). The majority also indicates that the distinction should not turn entirely on whether persons have been invited onto the premises. Id. at 468-69.

152. Barlow's, 436 U.S. at 321-23.
notice to a particular owner that he would be inspected, and that there-
fore, the owner had no expectation of inspection.\footnote{153}

Second, the intrusion must be limited to vindicating the public in-
terest with which the property is affected. Any official acts that go be-
yond that objective exceed the scope of the implied consent. Thus, in\footnote{153} Carey v. Brown the dissenters noted that a nonresidential use of a dwelling
does not necessarily justify picketing unrelated to the nonresidential
use.\footnote{154}

Perhaps most important is the requirement, derived more from
fourth amendment history than from a theory of implied consent,\footnote{155}
that the discretion of the inspecting officer be significantly limited. His-
torically, one of the most obnoxious features of the general warrant and
the writ of assistance, abuse of which in colonial times provided the im-
petus for the fourth amendment, was their unlimited scope.\footnote{156} The offi-
cer holding either the writ or the warrant could enter any premises and
search wherever he pleased for “uncustomed” or other indicated goods
or evidence. James Otis, whose early orations against the writ of assist-
ance inspired John Adams to the cause of independence,\footnote{157} related an
instance in which a Mr. Justice Walley called before him one Mr. Ware,
a customhouse officer possessed of a writ of assistance, to answer for
some minor offense. “As soon as he had finished, Mr. Ware asked him if
he had done. He replied, ‘Yes.’ ‘Well then,’ said Mr. Ware, ‘I will show
you a little of my power. I command you to permit me to search your
house for uncustomed goods.’ And went on to search his house from the
garret to the cellar; and then served the constable in the same
manner.”\footnote{158}

The fourth amendment provisions limiting the granting and
executing of warrants prevent the officer conducting the search from
exercising such wide discretion: “no warrants shall issue, but upon
probable cause, supported by Oath or affirmation, and particularly

\footnote{153} Id. at 313-14.
\footnote{154} 447 U.S. at 484-86 (Rehnquist, J., dissenting). The property owner/employer made
an argument of this sort in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), asserting that the
National Labor Relations Act could not require it to permit distribution in the workplace of a
newsletter containing items other than official union business. The Court held that the
NLRB was not required to distinguish protected distributions on the basis of the content of
each distribution. Id. at 572-76.
\footnote{155} The requirement may be linked to consent theory through the argument that no ra-
tional person would voluntarily consent if the inspector had unlimited discretion; and hence
consent cannot reasonably be implied.
\footnote{156} See N. LASSON, supra note 86, at 45-46, 60. For an indication of the broad scope of the
writ, see supra note 86.
\footnote{157} N. LASSON, supra note 86, at 58-61.
\footnote{158} Id. at 60 (quotation unattributed).
describing the place to be searched, and the persons or things to be seized.” If the Court allows a search or inspection to proceed without a warrant, it looks for similar limitations on the discretion of the inspecting officer. Thus, the Court rejected warrantless entries by OSHA inspectors and IRS revenue agents under statutes and regulations that were open-ended as to the scope of the search. In Dewey, however, the Court regarded the scope of the inspections as sufficiently delineated.

The need to limit the inspector’s discretion suggests also that the premises which the inspector will enter must be known—that is, acknowledged by all—to be affected with the public interest to which the legislation is directed. This does not mean that all must agree that the condition or activity on the property affects the public, or with the legislative response thereto. Rather, it must be undisputed that the condition which the legislature has determined affects the public, and which demands regulation and confirmatory inspections, exists on the targeted premises. Without this prerequisite, the decision to intrude, whether based on hunch, reasonable suspicion, or probable cause, vests excessive discretion in the inspecting officer. Indeed, the selection of premises to

159. U.S. CONST. amend. IV.

160. Marshall v. Barlow’s, Inc., 436 U.S. 307, 323-24 & nn.21-22 (1978). The inspection order involved in the case included among the subjects of the inspection “‘all other things therein (including but not limited to records, files, papers, processes, controls and facilities) bearing upon whether Barlow’s, Inc. is furnishing to its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether Barlow’s, Inc. is complying with . . .’ OSHA regulations.” Id. at 324 n.22. See also G.M. Leasing Corp. v. United States, 429 U.S. 338, 357-58 (1977) (“Section 6331 . . . covers all defaults on all taxes, and we are unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring per se exempt from the warrant requirement every intrusion into privacy made in furtherance of any tax seizure.”).


[In Colonnade and Biswell, the searching officers knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns. In the present case, by contrast, there was no such assurance that the individual searched was within the proper scope of official scrutiny—that is, there was no reason whatever to believe that he or his automobile had even crossed the border, much less that he was guilty of the commission of an offense.

See also Oliver v. United States, 104 S. Ct. 1735, 1743 n.13 (1984) (Marshall, J., dissenting) (In determining whether there is reasonable expectation of privacy in certain premises, inquiry should focus on uses to which premises are susceptible rather than use for which they are actually employed, unless the actual use can be determined without violating the very privacy interest being asserted.).]
be searched was one of the primary areas of discretion that so offended the colonial population, as the Ware anecdote illustrates.

Limiting the application of the implied consent theory to premises known to be affected with the legislatively-indicated public interest effectively excludes searches intended to discover evidence of criminal activity. In general, the commission of crimes or possession of evidence of crime on certain premises is neither common knowledge nor revealed upon request to the authorities. Indeed, the presumption of innocence requires the inspector to presume that the premises do not harbor criminal activity. Thus, an impartial decisionmaker must weigh the evidence that supports criminal activity on certain premises, a discretion intended to be denied the inspector.

Although the Dewey principle might encompass intrusions into the home in a limited range of situations, it is unlikely the Court will apply the principle to permit residential intrusion, largely because of history and tradition. The Court in Dewey distinguished between residential and commercial premises, as does the language of the fourth amendment itself. With concern for privacy in the home conspicuous both currently and at the time of ratification, it is virtually inconceivable that the Court would allow a warrantless intrusion into the home based merely on authorizing legislation.

In summary, constitutional property encompasses a broad interest in territorial privacy. Indeed, there are indications that privacy merits


164. In his concurrence in Dewey, Justice Rehnquist criticized the holding of the majority, stating: "I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions." 452 U.S. at 608 (Rehnquist, J., dissenting). Justice Rehnquist's fears concerning the scope of the Dewey ruling were, as demonstrated, unfounded.

165. Regulations of the home as structure (e.g., building codes), as land use (e.g., traditional zoning ordinances), or as tax source (e.g., property or income tax provisions) would be too broadly applicable to provide the basis for an expectation of inspection. See supra note 153 and accompanying text. Further, the voluntariness of any consent that might be implied from residential use of the premises is illusory given the necessity of shelter to human health and safety. See generally Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974) (penalizing exercise of constitutional right by withholding necessities of life impermissible); Schneckloth v. Bustamonte, 412 U.S. 218, 222-23 (1973) (effective consent must be voluntary).

166. See supra note 109 and accompanying text.

167. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV (emphasis added).

168. See supra notes 95-108 and accompanying text.
the highest priority of any constitutional property interest. The property owner is not protected, however, against entries to which he has consented, either expressly or impliedly. Consent may be implied when an owner or occupant has voluntarily sought some government benefit that is conditioned on entry, or uses the property in a way that affects the public so that entry has been deemed necessary by the legislature. Consent is limited, however, to those portions of the premises and those activities that are reasonably encompassed within the consent. If the entry is authorized by statute such that consent is implied, the discretion of the inspecting officer must be reasonably confined by restricting his power to determine the site and scope of the inspection.

IV. THE INVESTMENT INTEREST

A constitutionally protected economic interest in property, referred to here as the investment interest, has textual roots in the takings clause of the fifth amendment: "nor shall private property be taken for public use without just compensation." This being the sole provision whereby the Constitution expressly concerns itself with economic recompense for government action, it may be inferred that the individual interest sought to be safeguarded was economic in nature. The meaning of the clause was relatively clear as originally construed, and hence capable of generating fairly specific expectations in the property-holding public: land or personal property has an economic value to its owner, a value which must be compensated if the public requires governmental appropriation of the land or personal property. This simple formula was discarded by the Court in Pennsylvania Coal Co. v. Mahon, the 1922 case which serves as the foundation of modern takings law with its statement that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Although Pennsylvania Coal resembles earlier case law in that the complainant was deprived of its entire economic interest in the property, its language is

169. In Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321, 2330-31 (1984), the Court held that the "public use" limitation contained in the eminent domain/takings clause is coextensive with the police power. Hence, the clause places no new restriction on government appropriation or limitation of property rights other than the requirement that compensation be paid.


171. 260 U.S. 393 (1922).

172. Id. at 415.

173. The challenged regulation forbade "the mining of anthracite coal in such a way as to cause the subsidence of" land used in certain ways, including human habitation. Id. at 412. The Court treated the regulation as totally barring the complainant from exercising its mineral interest in certain land, thus rendering that interest valueless. Id. at 413.
not so limited, and the case has been widely interpreted as establishing that the destruction of less than the total economic interest may constitute a taking.\textsuperscript{174} Indeed, it has been suggested that the provision might operate whenever \textit{any} portion of the investment interest is lost through government action.\textsuperscript{175}

\textbf{A. Investment-backed Expectations}

Despite the obvious need, guidance from the Court as to which of these diverse interpretations would govern was not forthcoming until the Burger Court undertook the task some sixty years later. As with other property interests, the Court bases its interpretation of the investment interest on expectations, the fact of investment being a threshold requirement for the reasonableness of any economic expectation. Thus, the Court’s analysis is keyed to whether the government has interfered with the property holder’s “reasonable investment-backed expectations.”\textsuperscript{176} The requirement that protected expectations arise from an investment ensures that only governmental interventions with a demonstrable effect on the property holder’s current economic situation are affected. An owner has no constitutional right to uncertain gains he hopes to derive from future uses.\textsuperscript{177}

The Court’s posture of limiting protected economic expectations to

\begin{footnotesize}
\begin{enumerate}
\item[174.] See, e.g., F. BOSSELMAN, D. CALLIES, & J. BANTA, \textit{The Taking Issue} 141-211 (1973); Michelman, \textit{supra} note 17, at 1190-93 & n.53.
\item[175.] See B. ACKERMAN, \textit{supra} note 5, at 27-28. Ackerman’s scientific adjudicator would find a taking in such circumstances, but would then conduct a second inquiry to determine whether, and in what amount, compensation was just. \textit{Id.} at 28-29.
\item[176.] \textit{E.g.}, Agins v. City of Tiburon, 447 U.S. 255, 262 (1980); Andrus v. Allard, 444 U.S. 51, 64 n.21 (1979); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). This phrase apparently was borrowed from Michelman, \textit{supra} note 17, at 1233. Michelman, arguing that a utilitarian or fairness perspective requires compensation whenever a certain governmental effect on property would demoralize the public, believed that this condition was met when the claimant was deprived “of some distinctly perceived, sharply crystallized, investment-backed expectation.” \textit{Id.}
\item[177.] The Court’s response in \textit{Andrus v. Allard} to an assertion that the complainants had been deprived of future profits by the challenged federal law highlights this concern:
Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.
\end{enumerate}
\end{footnotesize}

444 U.S. 51, 66 (1979) (citation omitted). Thus the constitutional inquiry in this area has pertained to the existing use of the property at the time of the restriction, which the Court has stated “must be regarded as [the owner’s] primary expectation concerning the parcel.” Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978). It is because of the lack of investment by the recipient that the right to receive entitlements (new property) is not protected by the takings clause. \textit{See Note, Justice Rehnquist’s Theory of Property}, 93 \textit{YALE L.J.} 341, 543-44 (1984).
those backed by an investment is consistent with its overall approach of protecting only those expectations grounded on recognized sources such as legal and cultural tradition. The investment requirement bears similarity to certain aspects of John Locke’s labor-desert theory of property. Locke’s ideas had substantial influence on the colonial political theories underlying the Bill of Rights and have continuing intuitive appeal to the American public. Beginning with the precept that God has given the earth’s resources to all mankind in common, Locke justified property interests in such resources by arguing that a person gained a right to claim something as his by mixing his labor with it in such a way as to make it more useful to mankind. Thus Locke’s natural right in property was limited to resources with which one had usefully mixed one’s labor.

The Court’s recognition of the labor-desert theory is most apparent in Zacchini v. Scripps-Howard Broadcasting Co., a case in which the Court upheld a performer’s state-created “right of publicity” against a first amendment challenge. The Court found the performer’s economic interest in his act to be a fundamental property right because “th[e] act is the product of petitioner’s own talents and energy . . . .” The idea that the Constitution protects only investment-backed expectations represents a capitalist adaption of the original Lockean idea: constitutional property is recognized only to the extent that the owner has mixed his investment with the land or other resource.

179. W. Scott, supra note 55, at 53-54. Locke’s property theories are evident in early Supreme Court case law such as Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 589-91 (1823).
182. See id. ¶¶ 27-30. This notion is also embodied in American law of adverse possession, whereby title is involuntarily terminated in one and created in another due to the latter’s occupation and use of the land for a specified period. Locke’s natural right in property was limited in other ways. See infra note 185.
183. 433 U.S. 562, 575 (1977); see also Ruckelshaus v. Monsanto, 104 S. Ct. 2862, 2874 (1984) (trade secret recognized as fundamental property right). The Court in Zacchini and Monsanto was not itself creating a property right, but was holding that it was permissible for a state to do so and that such property was of constitutional stature. Cf. Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 526 n.8 (1972) (inventor has no property right in his invention other than that granted by patent laws).
184. Cf. Hamilton, supra note 40, at 870 (“When [the] distinctive character [of mercantile capital] was no longer to be overlooked, the labor theory was made over and capital came to be justified by the pain of abstinence involved in saving.”). The Court’s concept of “investment backed” expectations should encompass expectations based on investment of labor as well as of money. No constitutional significance lies in the fact that a property holder did something himself rather than paying someone else to do it. Cf. Neponsit Property Owners’
Possibly more influential than the labor-desert theory, which has lost some of its philosophical underpinnings in the transition to modern capitalism, is the concept of vested rights. This traditional doctrine arises from the fundamental legal principle that one may rely on the state of the law at the time he acts, and if such acts are subsequently made illegal, he will not be penalized. It has been relied on from time to time by state courts to determine whether new zoning ordinances, building codes, or other land use regulations should be applied to land developments that have been commenced but are not completed. If the development has proceeded to the point that the owner's right to use the land as planned has vested, application of the new and prohibitive ordinance is constitutionally barred. Implicit in this theory is the idea

Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 258, 15 N.E.2d 793, 796 (1938) (promise to pay for something to be done is legal equivalent of promise to do the thing oneself).

185. Locke's natural right to property in land was dependent upon three important pre-requisites. First, one has a natural right only to land with which he or his servant has mixed his labor. Thus, land not being beneficially used should not be the subject of property. This limitation has less impact if capital is substituted for labor in the equation. Secondly, the natural right is limited to land which the individual needs and can use, as there is no natural right to waste the bounty of nature. J. Locke, supra note 178, ¶ 31. This limitation would be significant only in a society with no commerce, as the ability to barter or sell the product of the land over and above that needed by the individual for subsistence would prevent its being wasted. Id. ¶ 48. Most importantly, one's natural right to property in land was dependent on the continued availability of as much and as good land for others. Id. ¶ 33. In colonial America, this presented no problem, as a vast continent awaited those unable to secure land on the eastern seaboard. With the passing of the frontier, however, there remained no unclaimed land to satisfy this third condition to Locke's natural right.

186. A good discussion of vested rights theory in this context is found in Cunningham & Kremer, Vested Rights, Estoppel, and the Land Development Process, 29 Hastings L.J. 625 (1978). The vested rights theory contains at its core an even more fundamental legal principle—that one may rely on the state of the law at the time he acts, and he will not be penalized if such acts are subsequently made illegal. See, e.g., U.S. Const. art. I, § 9, cl. 3 (prohibiting ex post facto laws). In this context the term "ex post facto" law has been limited to a law "which renders an act punishable in a manner in which it was not punishable when committed." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810). The detrimental reliance principle underlyng vested rights theory appears influential in Kaiser Aetna v. United States, 444 U.S. 164 (1979). The Court made much of the fact that the developer had secured from the Corps of Engineers a permit to construct a channel connecting its private pond with Maunalua Bay, it not being mentioned at that time that such linkage would subject the pond to the federal navigational servitude.

But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States, . . . it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land owner's property. 444 U.S. at 179.

187. The concept of vested rights as connoting an interest protected by the Constitution is found in scattered Supreme Court cases. E.g., Duke Power Co. v. Carolina Envtl. Study
that until the owner invests in developing the land for a particular use, there is noconstitutionally protected right to use it in that way.

It would be an over-simplification to suggest that the current constitutional property doctrine unquestioningly adopts the facile distinctions of the vested rights theory. Nevertheless, recent opinions demonstrate the continuing significance of the distinction between existing and contemplated uses in determining the degree of constitutional protection.

B. Reasonable Expectations

An investment-backed expectation, then, relates to the existing use of the property or its inherent economic value regardless of use. Not all such expectations are protected, however; as with the other fundamental property interests, the investment-backed expectation must be reasonable.

The unreasonableness of an expectation of complete freedom from government action affecting the property was made clear at the moment the Court expressed its willingness to expand the scope of protected economic interests in Pennsylvania Coal. The Court stated, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," a statement which the Court has repeated in recent takings cases. In Agins v. City of Tiburon, the Court reinforced this idea, labeling as "incidents of ownership" the fluctuations in property

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188. Cunningham and Kremer, in their article on vested rights, point out the impact on expectations of modern building permit requirements:

When a development permit is required by law for all forms of development activity, apparently the requirement of government authorization totally preempts any claim to an inherent right to develop the land without government authorization. Because the salient characteristic of most new permit systems is a broad delegation of discretionary authority, the new permits will seldom be issued as of right but will instead almost invariably be recognized as subject to highly subjective standards and criteria. This widespread and, in many areas, long-standing requirement of a permit has also changed the expectations of developers and landowners. The public should be fully aware of the permit requirement, and cannot claim surprise or frustration of a justified expectation of an unhindered inherent right to develop land. Cunningham and Kremer, supra note 186, at 642.


value resulting from governmental indecisiveness concerning condemnation of the property. 191

The contention that a property owner has a protected right to receive gains that were anticipated at the time of investment also was decisively rejected by the Court in Andrus v. Allard. 192 That case upheld a federal law and accompanying regulations criminalizing the sale of artifacts containing the feathers of certain birds even if the artifacts predated the passage of the legislation. The artifacts were antique Indian creations dating from 1800 to the early 1950's, and valued at up to $7500 each. 193 Although it was unlikely that the owner could otherwise recover an amount even approaching his investment, the Court characterized sale as merely "the most profitable use of appellees' property," 194 and held that the loss of anticipated gains did not give rise to a taking. 195 The term "gains" should not be construed to refer to amounts in excess of the original investment, as there was no assurance that the Allard complainants would be able to recover their original investment. Indeed, the record supported the contrary proposition. 196

1. Economic Viability.—Complementing the Allard holding is the Court's express rejection in Penn Central Transportation Co. v. New York City of the diminution in value test: 197 "Appellants concede that the decisions . . . uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' . . . and that the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." 198 Thus the Court deflects the inquiry from the losses sustained by the investor as not reflective of constitutionally protected expectations. The inquiry is instead directed toward that which is permitted to the landowner under the regulatory scheme, the relevant inquiry being whether the property is capable of "economically viable

194. 444 U.S. at 66.
195. Id. at 67-68.
196. The owners of the artifacts argued that "a collection of antique artifacts is not the type of property that can generate income by being 'displayed for profit,' " Appellee's Brief, supra note 193, at 31 n.53.
197. The value of property is in large part a measure of the economic gain that can be anticipated therefrom. A. JAFFE & C. SIRMANS, REAL ESTATE INVESTMENT DECISION MAKING 6 (1982).
The only reasonable expectation arising from investment, then, is that the government will not act to deprive the thing invested in of its economic viability. While this test considerably narrows the range of protected investment interests, it is not free from ambiguity. Analysis of its linguistic components and its application is helpful in determining what the Court means by "economically viable use."

The term "viability" is most often used, both in federal jurisprudence and in society generally, in reference to the potential ability of a fetus to survive outside the mother's womb. In the abortion rights cases, the Supreme Court has refined the concept of viability somewhat, stating most recently: "Viability is reached when, in the judgment of the attending physician on the particular facts in the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." The term "sustained survival" is used to exclude circumstances in which only "momentary" survival is possible. Transposing the Court's concept of viability from the fetal to the property context, an economic viability standard would protect the investor's expectation that the land and improvements are capable of survival in the economic world—that is, capable of sustaining economic (revenue-generating) activity. Just as a fetus may be viable although afflicted with a deformity, a disease that shortens its life span to a limited—though not momentary—time, or a condition that requires technology such as an incubator or respirator for survival, a use of land may be economically viable even though it is not the preferred use, not a highly profitable use, and not a use that will necessarily generate revenue equal to the original investment. The viability concept refers to a minimal level of sustaining human life, and hence, a minimal level of economic life.

This somewhat literalist borrowing from the field of abortion law to interpret language used in quite another context is vindicated by the consistency of the resulting analysis with the holdings of the Supreme Court and the lower federal courts that apply the economic viability


202. In the bankruptcy context, a debtor's viability has been held to depend upon its "ability to generate some income available for payment of fixed charges." In re Penn Cent. Transp. Co., 325 F. Supp. 302, 304 (D. Pa. 1971). The term has also been equated with "self-sustaining." Id.

standard. The courts have focused primarily on the existence of a permitted revenue-generating use, and the suitability of the affected property for that use. This application of the economic viability standard is also apparent in *Andrus v. Allard*. Although the regulatory scheme prohibited selling the artifacts, it permitted the owner to exhibit them, a use which had only a mere possibility of generating revenue. Yet the existence of this possibility, for which the artifacts—as objects of aesthetic and historic interest—appeared suitable, was sufficient to vindicate the investment interest.

Perhaps even more emphatic is the decision in *Hodel v. Virginia Surface Mining & Reclamation Association*. Holding that the federal Surface Mining Control and Reclamation Act did not deny owners the economically viable use of their property, the Court stated:

The Surface Mining Act easily survives scrutiny under this test. First, the Act does not, on its face, prevent beneficial use of coal bearing lands. Except for the proscription of mining near certain locations, the Act does not categorically prohibit surface coal mining, it merely regulates the conditions under which such operations may be conducted. The Act does not purport to regulate alternative uses to which coal bearing

204. See infra note 212. The suitability criterion is seen most commonly in cases and statutes defining situations in which a variance from zoning laws may be granted. E.g., S.C. CODE ANN. § 6-7-740 (Law. Co-op. 1977). The purpose of the zoning variance is, of course, to assure the constitutionality of the scheme by providing for exceptions in hardship situations which could be considered “takings.”

205. The challenged ordinance was applicable only so long as the property owner was able to obtain a reasonable return on investment, and the owner did not challenge the trial court’s finding that this statutory guarantee was being met. 438 U.S. at 129 n.26. The Court found this protection sufficient, but indicated that it might be even more than was constitutionally required. Id. at 136. Other terms used in *Penn Central* to describe the constitutionally protected property interest were the ability “to profit” from the property interest, id., and the “economic viability” of the property, id. at 138 n.36. Justice Rehnquist took the majority to task for its failure to settle on a single test. Id. at 149 n.13 (Rehnquist, J., dissenting). In subsequent opinions the Court has coalesced behind the economic viability standard. See infra notes 208-18 and accompanying text.


207. See supra notes 192-96 and accompanying text.


209. 30 U.S.C. §§ 1201-1328 (1983). The district court had held unconstitutional provisions prohibiting mining in certain locations and setting performance standards for surface mining on steep slopes, including a requirement that the site be returned to its “approximate original contour.” 452 U.S. at 293.

210. Presented with no specific parcel allegedly “taken” by the statute, the Court was judging only its facial validity. 452 U.S. at 294-96.
The Court thus explicitly accepts the concept that the availability of some beneficial use satisfies the owner's reasonable investment-backed expectations. In *Virginia Surface Mining*, the Court was not presented with a specific tract allegedly unsuitable for permitted uses or with an allegation that certain existing improvements were rendered economically nonviable by the law.\(^{212}\)

The same principles are inherent in cases in which state laws that protect investment values were challenged on first amendment grounds. Zoning laws placing burdensome restrictions on certain undesirable types of "expressive" activity have been invalidated.\(^{213}\) In these cases the economic viability of nearby property was not harmed by the expressive use, and hence the investment interest added little weight to the legislative side of the balance. In contrast, in *Zacchini v. Scripps-Howard Broadcasting Co.*,\(^{214}\) the broadcast of a human cannonball's entire performance on a news program may have threatened its continued economic value: "[I]f the public can see the act free on television, it will be less willing to pay to see it at the fair."\(^{215}\) If so,\(^{216}\) the Court held, a state

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211. *Id.* at 296.

212. The lower court opinions are also consistent with a limited viability concept; typical interpretations only protect property owners against government actions that render their property "valueless," *Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981), or deny its use and enjoyment, *United States v. 2,175.86 Acres of Land*, 520 F. Supp. 75, 80 (E.D. Tex. 1981).

The courts have uniformly rejected claims that land has been deprived of economic viability by regulations permitting a use for which the site was suited, but which would generate substantially less revenue than some other intended use. *E.g.*, *Jentgen v. United States*, 657 F.2d 1210, 1213-14 (Ct. Cl. 1981); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192-93 (Ct. Cl. 1981); *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120-21 (1979). Citing *Agins* as authority, *Giuliano v. Town of Edgartown* expressly applied the economic viability standard to an ordinance limiting subdivisions to ten lots annually. 531 F. Supp. 1076, 1084-85 (1982) (citing *Agins*, 447 U.S. at 260). The plaintiff's contention that this limitation undermined the economic viability of the land by preventing the planned 50-lot subdivision was rejected by the court as merely a rephrasing of the discredited diminution in value test. *Id.* at 1085.

The *Giuliano* court used as convincing evidence of the continuing economic viability of the tract its saleability as restricted. *Id.* at 1084-85. This focus reinforces the idea that property loses its economic viability only when it becomes incapable of any use such that no one would be willing to buy it. *See supra* notes 204-10 and accompanying text. The saleability concept applied by the court evidenced no concern for the price received in the sale, but only for the fact of saleability.


215. *Id.* at 575.
law permitting the performer to recover damages from the broadcaster was not unconstitutional. Only when the entire economic value of the property\textsuperscript{217} is at stake has the investment interest had a significant impact on a balance involving limitation of first amendment rights.\textsuperscript{218}

This interpretation demonstrates a marked adherence by the Court to traditional concepts, even in the midst of what looks and sounds like a new analytical framework. In protecting only the investor’s ability to make some economically viable use of the property, the Court is forging a close link between pre- and post-\textit{Pennsylvania Coal} case law.\textsuperscript{219} Only a regulation that resembles an appropriation in all but form invades the protected investment interest. The Court never has stated explicitly that the fundamental investment interest is infringed only by a government act that constitutes an appropriation in all but form. However, the dissenting opinion in \textit{San Diego Gas & Electric Co. v. City of San Diego},\textsuperscript{220} with which four Justices joined and a fifth expressed substantial agreement,\textsuperscript{221} expressly acknowledged this approach. Noting the “essential similarity of regulatory ‘takings’ and other ‘takings,’”\textsuperscript{222} the dissent stated:

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner’s point of view, it may matter

\begin{itemize}
  \item \textsuperscript{216} The Court recognized the possibility that “the news broadcast increased the value of [the act] by stimulating the public’s interest in seeing [it] live. In these circumstances, petitioner would not be able to prove damages and thus would not recover.” \textit{Id.} at 575 n.12.
  \item \textsuperscript{217} The \textit{Zachzini} case involved a form of property unknown at the time the constitutional provisions were adopted — the “right of publicity,” that is, a property interest in one’s name, face, or in this case, performance.
  \item \textsuperscript{218} The Court also noted a number of factors that lessened the weight of the first amendment interest. The challenged state law did not prevent the broadcaster from reporting newsworthy facts about the performance. 433 U.S. at 574-75. Nor did the performer seek to enjoin the broadcast of his act; rather, compensation was sought. \textit{Id.} at 573-74. Distinguishing this case from \textit{Time, Inc. v. Hill}, 385 U.S. 374 (1967), which limited a magazine’s liability for linking an individual to a play that allegedly falsely described an incident in the individual’s life, the Court stated:

[T]he two torts [“right of publicity” and “depicting plaintiff in a false light”] differ in the degree to which they intrude on dissemination of information to the public. In “false light” cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in “right of publicity” cases the only question is who gets to do the publishing.

433 U.S. at 573.
  \item \textsuperscript{219} See supra notes 170-75 and accompanying text.
  \item \textsuperscript{220} 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).
  \item \textsuperscript{221} \textit{See id.} at 633-34 (Rehnquist, J., concurring).
  \item \textsuperscript{222} \textit{Id.} at 651.
\end{itemize}
little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.... It is only logical, then, that government action other than acquisition of title, occupancy or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.223

As thus interpreted, Pennsylvania Coal did not open wide the door to constitutional scrutiny of legislative enactments affecting property; rather, it simply debarred governments from doing by regulation that which they were not permitted to do through eminent domain—deprive an individual of the total economic value of his property.

2. Economic Value and Implied Consent.—The recent case of Ruckelshaus v. Monsanto Co.,224 goes further to suggest that even where the economic value of property is totally destroyed by government act, that act affects no fundamental property right if the elements of implied consent are present. The Court did not use the term "implied consent"225 in its analysis, but its reasoning is essentially the same as that used to vindicate government infringements of the privacy interest pursuant to an implied consent theory.226

The property involved in Monsanto was not the usual real estate or tangible personal property; it was a trade secret. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requires that any pesticide must be registered with the Environmental Protection Agency (EPA) prior to marketing.227 The application for registration must include product formulae, test data relative to the safety and efficacy of the product, and other information required by EPA.228 Some of this data, which would be classified as trade secrets under state law, was recognized by the Court as subject to a property interest.229 FIFRA has taken several positions concerning the treatment of trade secrets. Prior to 1972 it was silent on the matter. From 1972 through 1978 it prohib-

223. Id. at 652-53 (citations omitted).
225. See supra notes 137-54 and accompanying text.
226. In Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973), the description of the implied consent theory is similar to the analysis in Monsanto: "[B]usinessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him."
228. See Ruckelshaus v. Monsanto Co., 104 S. Ct. at 2865.
229. Id. at 2873-74.
ited the use or disclosure of trade secrets outside the context of the application unless the applicant consented. Amendments added in 1978, however, expressly allow public disclosure of certain data and internal use of an applicant’s data in evaluating competitors’ applications.230

In determining whether disclosure or “internal use”231 of trade secrets submitted to EPA during these various periods worked a taking of Monsanto’s fundamental property interests, the Court did not focus on the economic viability inquiry. Indeed, it acknowledged that disclosure of a trade secret totally destroyed the economic value of the property,232 which lies in the competitive advantage provided by the unavailability of the information to competitors.233 Nevertheless, the Court upheld the statute that provided for the disclosure.234 Characterizing registration as a government benefit for which Monsanto voluntarily applied,235 the Court reasoned that under the 1978 statute Monsanto had knowingly exchanged its right to prevent disclosure of its trade secrets for the ability to market pesticides in this country.236

This is the same implied consent theory the Court has used to uphold administrative searches of specifically licensed or highly regulated business properties.237 The theory has been limited in that context to government acts authorized by statutes that are industry-specific and give adequate notice of the potential government intervention such that the voluntary operation of the affected enterprise could fairly be characterized as implied consent to the intervention.238 FIFRA, as amended in 1978, meets all these criteria, and the Court’s analysis of that statute and

230. Id. at 2869-70.
231. The term “internal use” will be used to refer to EPA’s use of data submitted by one applicant for registration in evaluating the application of a competitor.
232. Monsanto, 104 S. Ct. at 2878.
233. Id. at 2878 n.15.
234. Only the disclosure of data submitted between 1972 and 1978, when the secrecy of the data was statutorily guaranteed, was held to be a taking. Id. at 2878.
235. The Court reasoned that the registration was voluntary not solely because the applicant engaged in a business enterprise, but also because the manufacturer had the alternative of foregoing registration and marketing its product only in foreign countries. Id. at 2875-76 & n.11.
236. Id. at 2876.
237. See supra notes 137-54 and accompanying text. In Monsanto, the Court mentions that the case involves the right to exclude, implying that there is a privacy interest. 104 S. Ct. at 2878-79 (discussing the period from 1972-1978). Privacy, with respect to a trade secret, however, has no significance other than as a means to economic advantage.
238. See supra notes 137-43 and accompanying text. This implied consent theory could also justify, e.g., statutes such as those requiring subdivision developers to contribute land or funds for facilities to serve the occupants of the subdivision. See N. WILLIAMS, AMERICAN LAND PLANNING LAW § 156.08 (1978). Application for the permit to subdivide would be the act evidencing consent. Indeed, the implied consent theory has potentially broad application to land development, which normally requires one or more permits. See supra note 188.
the statutes authorizing warrantless inspections of the above facilities is substantially identical.

The Court, however, also upheld EPA's disclosure and internal use of data submitted to it prior to 1972 when the Act contained no express provisions concerning disclosure. 239 Indeed, the only arguably relevant statutory provision before 1972 was the Trade Secrets Act 240 which imposed criminal penalties on federal employees who revealed trade secrets without authorization. 241 Yet the Court held that Monsanto had no reasonable expectation that its trade secrets would remain inviolate in the hands of EPA. 242 The holding concerning the pre-1972 data differs from the holding on the post-1978 data in the important respect that the Act then contained no express notice to the applicant that registration, and the consequent ability to market its product in this country, involved relinquishment of the right to prevent disclosure of its trade secrets. Notice and voluntary relinquishment have been the foundation of the Court's implied consent theory as applied to industrial and commercial property owners. The Court explained its decision to uphold the disclosure and internal use of pre-1972 data rather summarily:

In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest. 243

This statement indicates that the notice, from which arises the limitation on reasonable expectations, derives not from express statutory provisions, but from the understanding that the enactment of such statutory provisions is not unlikely in an industry "that long has been the focus of great public concern."

Elsewhere the Court referred to the express disclosure and internal use provisions as among "the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community.' " 244 Apparently significant to the Court was the fact that Mon-

239. 104 S. Ct. at 2876-77.
241. See id. Justice O'Connor argued that the Trade Secrets Act formed the basis for a reasonable expectation of nondisclosure. 104 S. Ct. at 2883-84 (O'Connor, J., dissenting in part).
242. Id. at 2877.
243. Id. at 2876.
244. Id. at 2875 (quoting Andrus v. Allard, 444 U.S. 51, 67 (1979); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting)). The strength of the public concern and extent of prior regulation were given more weight in the analysis of the pre-1972
santo voluntarily registered its trade secret with the EPA to secure the economic advantages of registration, and thus lost its right to secrecy.\textsuperscript{245} This reasoning draws from the "clothed with a public interest" analysis used in the 1930's to reject broad property autonomy;\textsuperscript{246} when property is used in a way that affects the public, its owner has no reasonable expectation of freedom from government regulation. By voluntarily commencing or continuing such an enterprise, he voluntarily relinquishes a certain amount of autonomy. Under \textit{Monsanto}, he may also be relinquishing the total economic value of certain property involved in the enterprise.

It may have been important to the court that registration, which resulted in the total loss of the economic value of the trade secret to Monsanto, also brought about economic gain, by enabling Monsanto to market its pesticide in the United States. Thus, Monsanto's overall economic position was not disadvantaged by the registration and consequent disclosure, even though the total economic value of some of its assets was destroyed. In \textit{Penn Central Transportation Co. v. New York City}, the Court stated, "[T]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."\textsuperscript{247} The Court refused to consider whether total destruction of the value of the airspace alone would be a taking, focusing rather on the parcel as a whole. It is possible that this policy against dividing a single economic unit into each conceivable segment influenced the Court in \textit{Monsanto}. Where Monsanto voluntarily undertook an action that was beneficial to the enterprise as a whole, the court would not hear its complaint that its economic position had been unfairly disadvantaged thereby.

Although the reach of \textit{Monsanto} is potentially broad, its facts suggest limitations on the theory of implied consent to the destruction of the economic interest in property. First, the \textit{Monsanto} case arose in the context of business activity, long regarded as constitutionally susceptible to wide-ranging regulation.\textsuperscript{248} Indeed, the expectation of regulation which gives rise to constructive notice under the pre-1972 statute is founded

\textsuperscript{245} Id. at 2876-77.

\textsuperscript{246} See supra notes 61-64 and accompanying text. The Court's analysis also recalls the traditional legal principle: "Every citizen in making his arrangements in reliance on the continued existence of the laws as they are, takes on himself the risk of their being changed . . ." 6 RCL \S 296 (1929).

\textsuperscript{247} 438 U.S. 104, 130 (1978).

\textsuperscript{248} See supra notes 60-67 and accompanying text.
upon Monsanto's business activity in a field of substantial public concern and prior regulatory activity. Further, to the extent that the quid pro quo aspect of the case is important—the exchange of certain economically valuable property for overall economic gain—this characterization of the facts is much more feasible in the business context. Thus, the Monsanto analysis is limited at least to the circumstances in which the government would be empowered to restrict property autonomy, and may require an even stronger showing of public interest, particularly where constructive notice is relied upon.

The second potentially limiting aspect of Monsanto is the nature of the property interest in the case—a trade secret. A trade secret is one of many types of intangible interest that recently has been recognized as a property interest. As such, its foothold in traditional beliefs and expectations is less secure, and therefore, the Court may accord it a lesser degree of protection than would be given to traditional objects of property such as land and chattels. A trade secret, moreover, is the product of the regulated business activity; before Monsanto went into the pesticide business, there was no formula and hence no property interest in the secrecy of the formula. The property is an integral and inseparable part of the business activity, and has never been the subject of investment except within the context of that activity. Its only value is a competitive advantage in the affected business context. Thus, the property itself is clothed with the public interest affecting the business in a way that is not true of interests in land or structures or bulldozers. It is much easier to label unreasonable an industrialist's expectation that the value to be derived from a trade secret will not be destroyed by government act, than similarly to label his expectation that the government will not destroy the value of land or structures.

The fact that Monsanto involved a trade secret may have influenced the Court's holding. It is unlikely, however, that the holding will be restricted to intangible property such as trade secrets. A broader interpretation of the implied consent doctrine is consistent with the Court's expansive view of legislative authority in the economic realm, which is apparent in its treatment of the autonomy and privacy cases. The notable similarity of the Monsanto analysis to the principles apparent in the autonomy and privacy areas suggests that the Court's analysis has coalesced into a unified approach to legislative restrictions on productive uses of property. Keyed to principles of the voluntariness of business activity, the pervasive effects of such activity on the public, and the power of the state to control such effects, the Court's approach sharply

249. See supra notes 41-44 and accompanying text.
limits the extent to which expectations of government nonintervention will be recognized as reasonable. The Court is likely to be more protective of investment values than those of autonomy or privacy in the business context, but may be inclined to examine the impact of a regulatory scheme on the economic interests of a property holder in the aggregate, bearing in mind the property holder's voluntary assumption of both the benefits and burdens of his chosen enterprise.

Analysis of the investment interest thus focuses primarily on the economic viability of the property rights retained by the owner following regulation. The owner's fundamental investment interest guarantees no more than the existence of some revenue-generating use such that the total economic value of the property has not been destroyed. Under Monsanto, however, even a total destruction of economic value need not affect the fundamental investment interest if the owner impliedly consents, by its voluntary application for a government privilege conditioned on the destruction of value or likely to be so conditioned in the future.

V. PHYSICAL CONTROL — THE LORETTO DECISION

The Court's recent decision in Loretto v. Manhattan Telepromoter CATV Corp. provides an interesting twist to the interpretive principles that determine the scope of the investment interest. The Court has limited constitutional protection of the investment interest to the economic viability of the property, requiring only that the owner be able to use and enjoy the property in some fashion. In that context, a very limited protection of the owner's economic interest in the property is provided. Essentially, only appropriations—depriving the owner of physical control—and regulations having an equivalent impact are recognized as affecting constitutional property. In Loretto, the Court was guided by the same legal tradition barring government appropriations, but applied the concept in a formal sense, separated from the underlying concern for the economic impact on the property owner. Under Loretto, any deprivation of physical control or use and enjoyment of any part of the property is not only a deprivation of constitutional property, but one that

250. Capacity for revenue generation is the owner's primary expectation in regard to productive resources. Privacy in this context seems almost a derivative value, being necessary to maximize the revenue-generating potential of the property.

251. Cf. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1977) ("Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.").

cannot be outweighed by even a compelling state interest.\textsuperscript{253}  

The statute ruled unconstitutional in \textit{Loretto} provided that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," demand payment from any tenant for permitting such installation, or demand payment from the cable company in excess of an amount determined reasonable by the State Commission on Cable Television.\textsuperscript{254} A reasonable amount had been set by the State Commission at one dollar.\textsuperscript{255} Despite the fact that the cable installation occupied approximately one-eighth of a cubic foot of space on the roof of the complainant's apartment building,\textsuperscript{256} was not noticed by the complainant for the first two years she owned the building,\textsuperscript{257} and was not shown to interfere with her use and enjoyment of the building or its value, the Court held that there was a taking solely because the property holder had been deprived of her possession and control.\textsuperscript{258} In so holding the Court carved out a realm of government actions that constitute per se takings: those which provide for a permanent physical occupation of the property without the owner's consent.\textsuperscript{259} In so framing its per se test, the Court expressed its concern for the owner's loss of

\textsuperscript{253} Id. at 427. \textit{See also} Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977) (exclusive control as fundamental to performer's property interest in his act). \textit{See generally} Michelman, \textit{supra} note 17, at 1184-1185 (discussing absolute rule of compensation for physical encroachment).

\textsuperscript{254} 458 U.S. at 423. Had this statute been judged on the principles applicable to non-ouster government actions, it would seem that the owner's use of the premises to provide shelter for members of the public would amount to "affecting the premises with a public interest" thus authorizing government actions protective of the tenants, particularly actions that assured that they were provided with facilities and services regarded as "necessities." \textit{See supra} notes 60-77 and accompanying text. Further, the cable company, acting at the request of the tenant, could be viewed as an invitee. \textit{See supra} notes 120-26 and accompanying text. Although the government's power to enact legislation protective of tenants would be limited by the landlord's interest in protecting his investment, this interest was not affected under the facts of \textit{Loretto}.

\textsuperscript{255} Id. at 423-24. A dissenting judge on the court of appeals had held that although the statute effected a taking, the one dollar award was just compensation. \textit{Id.} at 424.

\textsuperscript{256} Id. at 443.

\textsuperscript{257} Id. n.2.

\textsuperscript{258} Id. at 441. The Court also noted that prior to enactment of the statute, Teleprompter routinely paid substantial compensation to property owners for the rights now accorded it by statute. \textit{Id.} at 423.

\textsuperscript{259} Id. at 426. The Court used the word "occupation" to distinguish the relevant actions from those providing for a physical "invasion" such as the public right of use in \textit{Kaiser Aetna v. United States}, 444 U.S. 164 (1979). \textit{See supra} notes 111-13 and accompanying text. The Court made it clear that the \textit{Loretto per se} rule was not intended to apply to physical invasions such as the one involved in \textit{Kaiser Aetna}. \textit{Loretto}, 458 U.S. at 435 n.12. The word "permanent" is perhaps a misnomer, as the Court recognized that the servitude imposed on the land by the statute was not permanent in any strict sense of the term. \textit{Id.} at 439 & n.17. Rather, the Court used the term to connote an occupation that is continuous rather than intermittent and that will continue for a significant—perhaps indefinite—period of time. \textit{See id.} at 428-35.
possession of a part of the property, carrying with it a loss of use, enjoyment, and control.

The Loretto court relied on a body of pre-Pennsylvania Coal law holding that government action affecting property violated the takings clause only if it effected "a practical ouster of (the owner's) possession." The classic case for a taking under this rule was Pumpelly v. Green Bay Co., in which the damming of a creek, pursuant to state law, resulted in the inundation of the complainant's land. The difference between the early cases and Loretto lies in the scope of the ouster. In Pumpelly and similar cases, the ouster involved all or a large part of a tract of land held by the complainant. In Loretto, the ouster involved a few cubic inches on the exterior of an urban apartment building, having no adverse effect on the use of the building. The Court may have perceived a difficulty in future line-drawing if it made the determination of unconstitutionality dependent on the physical scope of the ouster. However, the line-drawing problem, which has existed in the area of non-ouster takings since Pennsylvania Coal, is one frequently en-

260. See Loretto, 458 U.S. at 435-36. The transfer of a right of possession in Loretto can be contrasted with the transfer of a mere right of use in Kaiser Aetna. The comparison is somewhat strained in a case such as Loretto, however, where the physical occupation is of the type provided for in the law of property by an easement or license, connoting a right of use, rather than by a possessory estate. See 3 Powell on Real Property ¶ 405 (1979) (defining and classifying easements).

261. Loretto, 458 U.S. at 436-37. The Court refers to CATV as having "complete dominion" over the affected portions of the building. Id. at 436.

262. Id. at 427-28.

263. Northern Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878), quoted in Loretto, 458 U.S. at 428. At the time, such language was intended to denote a government action which effected a physical appropriation under the guise of a regulation. See Mugler v. Kansas, 123 U.S. 623, 669 (1887). The result turned on whether the effect on the landowner appeared to be an appropriation or merely consequential damage. See, e.g., Bedford v. United States, 192 U.S. 217, 225 (1904).

264. 80 U.S. (13 Wall.) 166, 181 (1871). It is very unlikely that the Court of this era would have applied the "practical ouster" rule to a situation such as that presented in Loretto—the ouster from eight cubic inches of space on the exterior of a multistory building. In a case after Pumpelly it was said that Pumpelly represented the "extremest qualification" placed on the state's police power by the Constitution. Northern Transp. Co. v. Chicago, 99 U.S. at 642.

265. Pumpelly, 80 U.S. at 167-69. The early cases cited by the Court in support of its position did not involve this question. See Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (whether fort's firing of guns across complainant's land over a period of years constituted a taking); Western Union Tel. Co. v. Pennsylvania R.R. Co., 195 U.S. 540 (1904) (whether statute authorizing placement of telegraph lines on post roads of the United States had been intended to include placement on railroads); St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) (whether federal statute authorizing telegraph company to use public lands prohibited city from charging for use of city streets). Statements in these cases did, however, indicate the Court's view that the compensation for such partial taking should normally be accomplished through eminent domain. E.g., Western Union Tel. Co. v. Pennsylvania R.R. Co., 195 U.S. at 566-74.
countered by the Court in weighing the relative merits of legislative enactments and claims of individual right. Indeed, as noted by the dissent, the analytical framework for drawing such lines in the non-ouster context could be readily adapted to deal with ousters as well.\textsuperscript{266} Whether there was a taking in either context would depend on the impact upon the property owner's reasonable expectations with respect to privacy, autonomy, and economic use.

Nor did the Court advert to the principle so firmly established in Penn Central that "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."\textsuperscript{267} Had it done so, it would have been forced to conclude that the statute's impact on the property as a whole was negligible. It is clear that the Court was judging the statute in Loretto by a different set of rules from those applied to other types of restrictions on property, and the Court acknowledged as much. The Court adverted to the "special kind of injury when a stranger directly invades and occupies the owner's property,"\textsuperscript{268} citing as authority Professor Michelman's influential article on the takings clause.\textsuperscript{269} Acknowledging the strong public reaction that was likely to follow a governmental invasion of property, Michelman stated:

Physical possession doubtless is the most cherished prerogative, and the most dramatic index, of ownership of tangible things. Sophisticated rationalizations and assurances of overall evenness which may stand up as long as one's possessions are unmolested may wilt before the stark spectacle of an alien, uninvited presence in one's territory. The psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader.\textsuperscript{270}

Michelman was expounding a theory in which compensability is largely determined by the insecurity regarding property, and indeed social order itself, that is generated by a government act.\textsuperscript{271} Surely that theory is stretched to the limit if applied to the attachment of a cable to the exte-

\textsuperscript{266} Loretto, 458 U.S. at 442-56. Further, Michelman notes that the administrative convenience of clear line-drawing is outweighed in this instance by the inappropriateness of the line that is drawn and its failure to resolve many takings questions. Michelman, supra note 17, at 1227-28.

\textsuperscript{267} 438 U.S. 104, 130 (1978).

\textsuperscript{268} Loretto, 458 U.S. at 436 (emphasis omitted).

\textsuperscript{269} See Michelman, supra note 17, at 1228 & n.110.

\textsuperscript{270} Id. at 1228 (footnote omitted). It should be noted that Michelman drew no distinctions here between physical invasions and occupations. But see id. at 1229 n.110.

\textsuperscript{271} Id. at 1225-26.
rior of an apartment building in order to provide communication services to the tenants residing within, an act hardly likely to generate "moral outrage" of the sort posited by Michelman.\textsuperscript{272} Michelman himself criticized "physical invasion" tests on the very ground that they provide compensation for purely nominal harms based on the fortuitous circumstances of the invasion.\textsuperscript{273} His discussion ultimately rejected the physical invasion test as unacceptably arbitrary.\textsuperscript{274}

Such arbitrariness is apparent in the \textit{Loretto} opinion, which reintroduces with a vengeance the formalistic distinctions of nineteenth century case law. Whereas \textit{Pennsylvania Coal} had shifted the focus to the magnitude of the effect on property-related values, \textit{Loretto} adopts the position that the \textit{Pennsylvania Coal} magnitude principle supplemented rather than replaced the formalistic analysis of prior decisions. The artificiality of the resulting distinctions is demonstrated by the Court's express suggestion that a statute requiring the landlord to provide cable service to tenants upon request might be treated differently from the challenged statute, which authorized cable companies to provide such service to tenants.\textsuperscript{275} The impact on the landlord's essential property interests is the same in both instances, despite the Court's protestations about the landlord's greater ability to "minimize the physical, aesthetic, and other effects of the installation."\textsuperscript{276}

\textit{Loretto}, then, departs from the trend of recent Supreme Court case law involving constitutional property. Although most government actions that affect property are virtually unchallengeable unless they have certain defined effects on the owner's interests in autonomy, privacy or protection of investment, actions resulting in a "practical ouster" from even the smallest part of the property are totally beyond government authority absent compensation.\textsuperscript{277} Other than the traditional eminent

\textsuperscript{272} Id. at 1229 n.110. Michelman also suggests that "only those trespassory acts which are implicitly assertive of ownership" require compensation. Id.

\textsuperscript{273} Id. at 1227-28.

\textsuperscript{274} Id. at 1229.

\textsuperscript{275} \textit{Loretto}, 458 U.S. at 440 n.19; see also id. at 435-36; see generally Michelman, supra note 17, at 1185-86. (discussing artificiality of a similar distinction).

\textsuperscript{276} \textit{Loretto}, 458 U.S. at 440 n.19. Also disturbing is the majority's failure to recognize the extent to which the premises were affected with the public interest, being used as they were to provide housing for renters. This, plus the property interests of those renters (holders of estates for years in their respective dwellings) would suggest the appropriateness at least of a balancing test, and perhaps a low-priority balancing involving the mere rationality standard. See supra note 254. The majority were berated by the dissenters for failing to consider these interests. Id. at 445 n.3, 449, 454 (Blackmun, J., dissenting).

\textsuperscript{277} The Court felt that the size of the ouster should be dealt with in the second stage of the case, as indicative of "just compensation." Id. at 437-38.

It is uncertain whether an implied consent rule can justify invasions of the interest in physical control. The business of rental housing, in which \textit{Loretto} was engaged, is increas-
domain situations, in which the government appropriates an estate in land or an affirmative easement, government acts falling under the *Loretto* rule will be rare. The Court itself acknowledged that escape from the "per se takings" rule is as simple as rephrasing the statute to read as a restriction on the property owner rather than the creation of a power in some third party to effect a "permanent physical occupation." Thus, the limit on government power to diminish property rights will continue to be judged primarily by the effect on autonomy, privacy, and investment.

**CONCLUSION**

The Burger Court's widespread discussions and holdings concerning property are overdue. Alterations in the forms, distribution, and effects of property in American society have long demanded reconsideration of the role of private property vis-à-vis government. Initially, the Constitution was viewed as protecting the public as property holder from government intervention. Even the lynchpin of modern takings law, *Pennsylvania Coal Co. v. Mahon*, represents this perspective, as it expanded the types of government action that may be invalidated. The post-depression expansion of regulation into a wide range of property-related activities represents the view that the public in many instances requires government intervention to protect it from the excesses of property holders. Under this view, the Constitution must be interpreted with deference to the state in carrying out its protective role. Neither view is either a totally modern creation or an antiquated historical notion. Rather, property has at all times been both a foundation of, and an obstacle to, liberty. The evolution of our social and economic structure and our perceptions of social justice requires a continuing reevaluation of the delicate balance between the opposing roles of property and the constitutional response. It is thus a welcome development that the Burger Court has commenced a dialogue in this area after many years of virtual silence.

The dialogue exhibits the difficulties inherent in the task. A reading of one or several individual cases may leave an impression of hope-
less confusion and controversy. Significant disagreements among the Justices are apparent. Yet from the case law as a whole emerges a pattern of ideas that begins to provide a consistent, yet flexible, basis for reconciling the interests of the public as property owner and the public as property regulator.

The state is allowed to provide for the public welfare as it sees fit so long as certain primary values inherent in the institution of property are not disturbed beyond the range of what might reasonably have been expected. One consistent theme that emerges is the priority given to property-related activities which do not significantly affect the public. This principle reflects the post-Lochner, New Deal acceptance of a pervasive state role to protect the public from the adverse effects of property, as well as the recognition in the modern “right of privacy” cases that there are areas of activity which are simply none of the public’s business. These ideas are determinative in cases involving property-related autonomy, and are highly influential in privacy and investment cases as well. In the latter areas, however, the fact that the property is “clothed with a public interest” does not vitiate the interest of the property owner, though it may enable the state to impose otherwise impermissible restrictions through the fiction of “implied consent.” Despite public need, the property owner retains a high priority interest in physical control, and, where consent cannot be implied, priority interests in privacy and in preserving the economic viability of that in which he has invested. Government actions affecting any of these interests will be subjected to intensive scrutiny and must serve a public interest of great consequence in order to prevail, if indeed they may prevail at all.

278. One of the primary disputes concerns the extent to which the “arcane” distinctions of real property law, Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (citing Rakas v. Illinois, 439 U.S. 128, 149 n.17 (1978)), should be determinative. This dispute is apparent in Loretto, in which the dissent labeled the majority opinion “curiously anachronistic.” 458 U.S. at 442 (Blackmun, J., dissenting). It also surfaces in Justice Rehnquist’s view, apparently not shared by the majority, that a government regulation which could be characterized as the creation of an easement, should be held to be a taking. See Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (Rehnquist, J.); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 142-43 (1972) (Rehnquist, J., dissenting).

279. This perception is reflected in the following observation from Richard Reeves’ American Journey: Traveling with Tocqueville in Search of Democracy in America 55 (1982):

There is no law or system that can’t be beaten by resourceful, energetic people. Which laws were obeyed, and which disobeyed, told me something about the American character: Americans, individually, routinely, and guiltlessly violated almost all laws attempting to regulate private, personal behavior or entrepreneurial commerce and labor performed during what has traditionally been defined as personal time.

Within bounds defined by history and the energy and effectiveness of government enforcement, Americans did not consider those things lawbreaking or cheating.

280. The Court held in Loretto that no government interest is sufficiently compelling to
Much development of these basic ideas remains for future cases; however, the existing case law as synthesized in the foregoing presentation at least provides a framework within which further analysis and interpretation can proceed to give clearer definition to the troublesome concept of constitutional property.

outweigh the property owner’s interest in physical control, even where only a small portion of the tract is involved. However, the government is provided with express constitutional mechanisms for validating its actions affecting certain priority property interests: a warrant for intrusions on privacy interests and compensation for intrusions on interests in investment and physical control.