NOTE

PROTECTING ENTITLEMENT-HOLDERS WITH A UNIFORM MEANING OF FIFTH AMENDMENT PROPERTY

Cameron Misner†

Courts and commentators take it as given that the word "property" in the Fifth Amendment's Due Process Clause refers to a broader class of assets than does the word "property" in the Fifth Amendment's Takings Clause. In this Note, I challenge that assumption and argue that takings "property" ought to include the same assets that due-process "property" already includes, namely, entitlements like Social Security and tenured public employment. Both the text and purpose of the Due Process and Takings Clauses support a uniform meaning. And the consequences of leveling up takings "property" to include entitlements would be quite sensible.

† J.D., 2024. Cornell Law School. I'm grateful to the to the notes editors at Cornell Law Review for lending their talents to this Note, to Professor Gali Racabi for inspiring the research, and to Professor Michael Dorf for helpful feedback.

> "No person shall . . . be deprived of life, liberty, or *property*, without due process of law; nor shall private *property* be taken for public use, without just compensation." U.S. Const. amend. V (emphasis added).

INTRODUCTION

The Due Process Clause and the Takings Clause appear directly adjacent to one another in the Fifth Amendment. Both clauses contain explicit protections for "property." Yet the conventional wisdom is that the word "property" means something different under the Takings Clause than it does under the Due Process Clause.

"Property" for "procedural" due process purposes is quite broad.[1] The Supreme Court first signaled a broad understanding of due-process property in 1970 when, in *Goldberg v. Kelly*,[2] it held that an individual's right to welfare benefits constituted "property" to which the due-process guarantee attached.[3] Prior to *Goldberg*, due-process law had treated public assistance as a "privilege" rather than a protected property interest, so the case signaled a shift in the kinds of interests protected by the Constitution as property.[4] The Court concretized its expansion of due-process-protected property two years later in *Board of Regents v. Roth*,[5] where it provided the now-governing formulation for what constitutes "property" under the Due Process Clause. Property, the Supreme Court said, is anything to which an individual has "a legitimate claim of entitlement."[6]

Under that formulation, the *Goldberg* claimants had property interests in welfare payments because they were statutorily *entitled* to those payments under New York law if they met the requisite criteria.[7] And in *Roth*, the plaintiff-teacher did not have a property interest in his job because he had only been

---

1 In this Note I focus only on the "procedural" aspect of due process when defining "property" under the Due Process Clause. For "substantive" due process purposes, there is no authoritative guidance regarding what property interests merit protection. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 982 (2000).

2 397 U.S. 254 (1970).

3 *See* Merrill, *supra* note 1, at 918 (explaining that the *Goldberg* decision "unsettled [existing] due process law" and extended due-process protection to a "new property" interest).

4 *Id.*

5 408 U.S. 564 (1972).

6 *Id.* at 577.

7 *See Goldberg*, 397 U.S. at 262.

teaching for one year, and teachers under Wisconsin law were only entitled to tenure if they had been teaching for at least four years.[8] Under the "legitimate claim of entitlement" formulation, the Supreme Court has also found property interests in such things as public-school education,[9] federal disability benefits,[10] and federal veterans benefits.[11]

Commentators have noted that this expansion in what constitutes "property" under the Due Process Clause—often called the "due process revolution"[12]—was in part inspired by Professor Charles Reich's work, which called for the law to recognize what he called "new property."[13] Professor Reich argued that because "government largesse" had emerged as a significant source of American wealth, largely taking the place of traditional forms of property like land, the law should recognize Americans' rights to government largesse as property.[14] Although Professor Reich's vision was much broader than the path taken by the Court,[15] commentators nevertheless still use the term "new property" to describe the kinds of property interests that received due-process protection via *Goldberg* and its progeny.[16]

An important feature of the *Goldberg*/*Roth* formulation of due-process property is that its content is defined by independent sources of law, rather than the Constitution itself.[17] That is, whether the welfare claimants in *Goldberg* had property interests in the welfare payments depended entirely on whether they qualified for those payments under state law.[18] Likewise,

---

8 *Roth*, 408 U.S. at 566.

9 Goss v. Lopez, 419 U.S. 565, 573 (1975).

10 Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

11 Walters v. Nat'l. Ass'n of Radiation Survivors, 473 U.S. 305, 320 n.8 (1985).

12 *See* Merrill, *supra* note 1, at 929.

13 *Id.* at 918; *see also* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) and stating that "it may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'").

14 Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733–34 (1964).

15 *See* Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1067–68, 1104 (1984).

16 *E.g.*, Merrill, *supra* note 1, at 958; David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773 (2013); Rubin, *supra* note 15, at 1062.

17 *See* Merrill, *supra* note 1, at 920 (describing the *Goldberg*/*Roth* approach to identifying property as a "'positivist' method").

18 The Court's opinion in *Goldberg* intimated that whether an interest was protected by due process depended on whether deprivation of the interest would effect a "grievous loss." 397 U.S. at 263; *see also* Rubin, *supra* note 15, at 1062 (noting that commentators originally read *Goldberg* for the proposition that the importance of the interest was the determinative criterion for property interests).

whether the *Roth* plaintiff had a property right in his job depended entirely on whether he was entitled to tenured employment under state law.[19]

On the other hand, "property" under the Takings Clause has not seen a similar expansion. While the Supreme Court has not set forth a definition of "property" under the Takings Clause with any specificity, it has said that "the analogy drawn in *Goldberg* between social welfare and 'property' cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law."[20] The Court has also said that "benefits. . . may be altered or eliminated at any time" without violating the Takings Clause.[21]

Lower courts have relied on these statements for the explicit proposition that due-process "property" and takings "property" are not coterminous.[22] Apparently, only the Ninth Circuit has attempted to formulate a test for takings property. According to that court, "property" under the Takings Clause refers to interests that have "vested," while "property" under the Due Process Clause need not be vested.[23] "Vested" property interests are apparently those that the interest-holder can expect with certainty, rather than those that are speculative or contingent.[24] Academic commentators appear to have accepted the distinction between takings property and due-process property as well. For example, Professor Thomas W. Merrill has argued that "property" under the Takings Clause, unlike due-process

---

But the Court in *Roth* made clear that entitlement, not importance, was the determinative criterion. *See* Merrill, *supra* note 1, at 918–19.

19 Bd. of Regents v. Roth, 408 U.S. 564, 566 (1972).

20 Richardson v. Belcher, 404 U.S. 78, 81 (1971); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 636 (2012) (Ginsburg, J., dissenting) (arguing from the assumption that Congress could entirely repeal Medicaid if it wished).

21 United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980).

22 *See* Adams v. United States, 391 F.3d 1212, 1220 n.4 (Fed. Cir. 2004) ("[E]ntitlements are often referred to as 'property interests' within the meaning of the Due Process Clause in cases decided under that clause, but such references have no relevance to whether they are 'property' under the Takings Clause."); Hignell-Stark v. City of New Orleans, 46 F.4th 317, 323 (5th Cir. 2022) ("But there's a big difference between saying that something is property for purposes of procedural due process and saying that it is property for purposes of the Takings Clause."); Kizas v. Webster, 707 F.2d 524, 539 (D.C. Cir. 1983) ("[The] presupposition [that a legitimate claim of entitlement automatically qualifies as property for takings purposes] is without foundation."); Bowers v. Whitman, 671 F.3d 905, 912 (9th Cir. 2012) (contrasting due-process property with takings property).

23 *Bowers*, 671 F.3d at 912.

24 *Id.* at 913.

property, ought to hew closely to the forms of "property" recognized at common law.[25]

Neither the Supreme Court, lower courts, nor academics, however, have contended seriously with the oddity that the word "property"—used twice in the Fifth Amendment with only eight words separating each use—should have such different meanings. Indeed, they treat the proposition as self-evident.[26] I submit, however, that basic tools of interpretation suggest the opposite: that "property" under the Takings Clause ought to have the same, *Goldberg/Roth* meaning that "property" has under the due-process clause.

In Part I, I review the common-sense presumption in textual interpretation that identical words appearing in the same sentence in the same legal document ought to have the same meaning. I then consider and reject the primary textual argument against a common interpretation of "property," that argument being that the Takings Clause's reference to "private property" implies the inclusion of a narrower class of assets than does the Due Process Clause's reference only to "property" without a modifier.

In Part II, I review the purposes of the Due Process and Takings Clauses, as articulated by current doctrine, and conclude that both clauses are aimed at similarly broad goals. Due Process seeks to prevent arbitrary government action and Takings seeks to prevent the government from imposing inordinate public burdens on individuals. So a broad meaning of "property" is just as appropriate under the Takings Clause as the Due Process Clause.

In Part III, I address the worry that a Takings Clause applicable to "new," *Goldberg/Roth* property would have the consequence of freezing in place public-assistance programs and other entitlements. Building on an argument first made by Professor David Super,[27] I explain that the current takings doctrine would only be implicated if Congress or a state government suddenly and entirely or almost-entirely terminated an individual's entitlement. Congress and the states would retain the ability to prospectively terminate ("sunset") entitlement programs, and they would also retain significant flexibility to adjust existing entitlements. The Takings Clause would merely

---

25 Merrill, *supra* note 1, at 969.

26 *Id.* at 958 ("The proposition that *Goldberg*-type 'property' exists only for procedural due process purposes has been perceived to be so self-evidently correct that it has never been revisited.").

27 *See* Super, *supra* note 16, at 1871–75.

prevent Congress and the states from suddenly pulling the rug out from underneath entitlement holders.

Before concluding, I briefly explain in Part IV why the messiness of the current takings doctrine and the consequent likelihood that the doctrine will change should not counsel against an updated interpretation of takings property.

I
A TEXTUAL ANALYSIS

Begin with the text of the Fifth Amendment, which says that "[n]o person shall . . . be deprived of life, liberty, or *property* without due process of law; nor shall private *property* be taken for public use."[28] In this Part, I will first explain why we ought to begin with the presumption that "property" has the same meaning in both clauses, and then I will argue that the there is no persuasive textual justification for overcoming that presumption.

Textual interpretation of statutes frequently invokes a presumption that identical words appearing in the same legal document should have the same meaning.[29] The presumption increases in strength the closer the identical words appear to one another and is especially strong when the words appear in the same sentence.[30] The presumption is at its strongest when the word in question is used only once but is modified by more than one phrase.[31]

A similar continuum ought to apply when interpreting the constitution. Professor Akhil Reed Amar has even argued for a canon of Constitutional interpretation called "intratextualism," which uses the Constitution, with some limits, as "its own dictionary."[32] Professor Amar cites Chief Justice Marshall's interpretation in *McCulloch v. Maryland*[33] of the word "necessary" in the Necessary and Proper Clause as an example of the "intratextual" technique.[34] "Necessary," Marshall concedes, is

---

28 U.S. CONST. amend. V (emphasis added).

29 Comm'r v. Lundy, 516 U.S. 235, 250 (1996) ("The interrelationship and close proximity of these provisions of the statute 'presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990))).

30 *Id.*; *see also* Brown v. Gardner, 513 U.S. 115, 118 (1994).

31 *See* Clark v. Suarez Martinez, 543 U.S. 371, 378 (2005).

32 Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 756 (1999).

33 17 U.S. 316 (1819).

34 *See* Amar, *supra* note 32, at 755–59.

sometimes used as a term of logic to mean "indispensable."[35] But "necessary" is also frequently used to mean "convenient" or "useful."[36] One of the ways that Marshall argues for the convenient/useful interpretation is by looking to Section 10 of Article I, which allows states to lay imposts and duties only when "absolutely necessary for executing its inspection laws."[37] According to Marshall, if the Constitution used "necessary" to mean "indispensable," there would have been no reason to use the phrase "absolutely necessary" in Section 10.[38]

Chief Justice Marshall's *McCulloch* analysis demonstrates at least that the "intratextual" technique in Constitutional interpretation has a historical pedigree. Other commentators have pointed out that the merits of a strong "intratextual" canon may be quite suspect in different contexts, especially when interpreting identical words that appear in distant clauses with different aims. Professors Adrian Vermeule and Ernest A. Young have described as "startling" the proposition that, for example, the word "speech" in the Speech or Debate Clause ought to shed light on the meaning of "speech" in the First Amendment.[39]

But there appears to be no good reason for doubting the presumption of uniformity for words appearing *in the same sentence* in the Constitution.[40] Indeed, as Professor Saikrishna Prakash points out, the proliferation of dictionaries increases the likelihood that words today will have multiple meanings, so the presumption of intra-sentence uniformity may have been stronger at the founding than now.[41]

Authors writing about the presumption of intrasentence uniformity frequently illustrate why the presumption makes sense by listing examples of sentences where an identical word

---

35 *McCulloch*, 17 U.S. at 413.

36 *Id.*

37 *Id.* at 414.

38 *Id.* at 414–15.

39 Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 734–35 (2000).

40 *See id.* at 734 (suggesting no issue with "the familiar recourse to a nearby clause's use of the same word in *McCulloch*"); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2002) (describing intra*sentence* uniformity as "a more appealing and intuitive norm" than intra*textual* uniformity); Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175, 1178 (2002) (responding to Professor Prakash's article but expressing "no quarrel" with a rebuttable presumption of intrasentence uniformity).

41 Prakash, *supra* note 40, at 1156.

is used to mean *different* things. A slightly altered example by Professor Jonathan R. Siegel: "I ran ten miles on Monday[,] and [I ran] the Marathon Oil Company on Tuesday."[42] And a slightly altered example from Professor Prakash, important for our purposes because the operative word is a noun: "he taught tricks to dogs and he taught tricks to magicians."[43] I will add my own example using the word "property": "Professor Smith taught Property from 10:00–11:00 and then viewed a property at 11:30."

These examples illustrate that although it is grammatically possible to use the same word to mean different things in a single sentence and although sometimes the context will make the different meanings obvious, no careful drafter would leave these sentences in a final draft if their goal was clarity.[44] For example, "Professor Smith taught his Property course and then viewed a possible site for his new home," would be preferable to the above example. We can assume that the drafters of legal documents are motivated to write clearly,[45] so the presumption of intra-sentence uniformity appears eminently justified.

The presumption, of course, is only a presumption. The next question is whether that presumption is overcome, either by contextual clues in the relevant clauses, by the differing purposes of each clause,[46] or by the consequences of construing "property" identically under both clauses.[47]

The obvious potential clue that might suggest that takings property is more narrow than due-process property is that the Takings Clause refers to "*private* property," whereas the Due Process Clause refers only to "property."[48] But as I will explain, the addition of the word "private" to the Takings Clause

---

42 Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 366 (2005). I have altered the quote slightly to include the word "ran" twice, like how "property" appears twice in the Fifth Amendment.

43 Prakash, *supra* note 40, at 1157.

44 Another reason one might use the same word with deliberately different meanings is humor, but as Professor Siegel rightly notes, humor is not a quality one often associates with legal documents. Siegel, *supra* note 42, at 366–67.

45 Indeed, the Constitution itself requires clarity in legal documents, mandating that statutes meet a minimum threshold of clarity through the void-for-vagueness doctrine. *See, e.g.*, Skilling v. United States, 561 U.S. 358 (2010).

46 *See infra* Part II.

47 *See infra* Part III.

48 *See* Merrill, *supra* note 1, at 956 (suggesting that the Takings Clause's use of "private" "may provide some support for construing property for takings purposes more narrowly to mean common law property").

is better explained by the perspective from which that clause speaks.

The Due Process Clause incorporates the Fifth Amendment's predicate phrase, "no person shall . . .," so the due process clause begins, "no person shall . . . be deprived of. . . ." The Due Process Clause thus instructs the government about what it may not take *from a person* without affording the person due process of law. By instructing the government about what it cannot take from a person, the Due Process Clause is only applicable to private property; the government could not take public property from a person. By contrast, the Takings Clause does not incorporate the Fifth Amendment's predicate phrase and therefore does not instruct the government about what it may not take *from a person* without just compensation. Instead, it instructs the government about what it may not take, bar none, without just compensation.

Without the word "private," then, the Takings Clause would be applicable to public property and therefore require compensation when the federal government exercises its eminent domain power over property owned by state and local governments.[49] Concededly, the Supreme Court has assumed that this requirement exists anyway, but that assumption is not obviously correct,[50] or at least not obviously grounded in the Takings Clause.[51]

Moreover, without the word "private," the Takings Clause might also be read to prevent the government from taking ownership of previously unowned land without compensating someone because "property" is sometimes used colloquially to refer simply to a piece of land or a building.[52] The word "private,"

---

49 The Supreme Court has recognized that the federal government can exercise eminent domain over state land. PennEast Pipeline Co., v. New Jersey, 594 U.S. 482, 483 (2021) (citing Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941)).

50 *See* Block v. North Dakota, 461 U.S. 273, 291 (1983) (stating that North Dakota "*probably* is correct in stating that Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution," but failing to contend with the Taking Clause's reference to "private property") (emphasis added).

51 In *Block*, North Dakota argued that either the equal-footing doctrine or the 10th Amendment barred the federal government from taking title to land vested in a State by the Constitution. *Id.* at 291.

52 Modern dictionaries include this colloquial use as a secondary definition. *See Property*, CAMBRIDGE DICTIONARY (Cambridge Univ. Press), retrieved Nov. 20, 2023, at https://dictionary.cambridge.org/us/dictionary/english/property [https://perma.cc/F86G-R9SC]; *Property*, OXFORD LEARNER'S DICTIONARY (Oxford Univ. Press), retrieved Nov. 20, 2023, at https://www.oxfordlearnersdictionaries.com/us/

however, avoids such an odd reading by indicating that the property protected by the Takings Clause is owned privately.

Additionally, it is not clear how the word "private" would create a meaningful distinction between takings property and due-process property. The contention would have to be that the class of "private property" is narrower than the class of all "property." But the word "private" really only distinguishes things from those that are "public."[53] And as I explained above, due-process property cannot, as a textual matter, cover public property because the Due Process Clause applies to deprivations of property from a *person*. Thus, the most natural way that "private property" might be distinguished from all property is not a possible distinction between due-process property and takings property.

Indeed, the two suggestions I have found for a definition of "takings property" do not actually appear to rest on the existence of the word "private" in the Takings Clause. The Ninth Circuit's suggestion that takings property refers to property interests that have "vested"[54] does not engage in any textual analysis.[55] And Professor Merrill grounds his argument that takings property ought to hew closely to common-law property is an accommodation of existing doctrine and consequentialist reasoning.[56]

---

definition/english/property [https://perma.cc/NVT3-Z7VC]. Older sources also suggest that the colloquial use of "property" to mean land or buildings is not a recent development. WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER ESSAYS 28 (1923) ("Sometimes [the word "property"] is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest . . . appertaining to such physical object."); United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1945) ("It is conceivable that [the word 'property' in the Takings Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter."). Some evidence also suggests that the word "property" was used in this way by the founding generation. *See* Stanley N. Katz, *Thomas Jefferson and the Right of Property in Revolutionary America*, 19 J.L. & ECON. 467, 473 (1976) ("'Property,' to Jefferson, meant 'land.'").

53 *Private*, OXFORD ENGLISH DICTIONARY, (2d ed. 1989) ("In general, the opposite of public . . . [w]ithdrawn or separated from the public body[.]"); *Private*, WEBSTER'S DICTIONARY 1828 ("[U]nconnected with others; hence, peculiar to one's self; . . . [p]eculiar to a number in a joint concern").

54 *See supra* notes 23–24 and accompanying text.

55 *See* Bowers v. Whitman, 671 F.3d 905, 912–14 (9th Cir. 2012).

56 Merrill, *supra* note 1, at 956 ("[T]here are contexts where [construing the same word to have different meanings] may be unavoidable, at least if our

One might counter that even if Fifth Amendment "property" has a single meaning, the textual analysis does not resolve whether we should "level up" takings property or "level down" due-process property. While a full defense of the due-process revolution is beyond the scope of this Note,[57] I offer three observations that demonstrate why leveling due-process property down would be unwise. First, *Goldberg* and *Roth*'s "legitimate claim of entitlement" formulation has been good law for fifty years, allowing doctrinal development to define the parameters of due-process property; meanwhile, no similarly concrete formulation for takings property exists,[58] so it is not even clear what leveling down would look like. Second, I describe in Part II that the Due Process and Takings Clauses aim at broad goals that are better served by expansive meanings of property, so leveling down would contravene the aims of both clauses. Third, leveling down due-process property would mean that the government could, for example, arbitrarily terminate an indigent individual's only means of subsistence, and the individual's only recourse would be an after-the-fact lawsuit.[59] That seems significantly unfair.

Having identified no persuasive textual justification for overcoming the presumption of intrasentence uniformity, I will explore in the next two Parts whether the underlying purposes of the Takings and Due Process Clauses or the consequences of a uniform meaning present persuasive reasons for overcoming the presumption and retaining a different meaning of "property" under each clause.

II
A PURPOSIVE ANALYSIS

Another reason for construing identical words differently might be that the words are used for different purposes. Indeed, Justice Breyer relied without elaboration on the "somewhat different objectives" of the Due Process and Takings Clauses in concluding that "property" ought to have a different meaning

---

objective is to accommodate settled doctrine and to reach results that are normatively defensible.").

57 For contrasting accounts, see generally, e.g., Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990's?*, 96 COLUM. L. REV. 1973 (1996) (criticizing the due-process revolution); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985) (generally supporting the due-process revolution).

58 *Compare.* E. Enters. v. Apfel, 524 U.S. 498, 534 (1998) (O'Connor, J., plurality opinion), *with id.* at 554 (Breyer, J., dissenting).

59 *See* Goldberg v. Kelly, 397 U.S. 254, 265 (1970).

under each.[60] But to cite the clauses' different objectives is not necessarily to end the matter. Although their objectives are not identical, the Due Process and Takings Clauses both effectuate very broad protections for individuals from the government, and the objectives of both clauses are furthered by a broad meaning of "property."

Generally, the purpose of the Due Process Clause is "protection of the individual against arbitrary action."[61] One way the Clause does so is by requiring that the government jump through certain procedural hoops, making it harder for the government to act arbitrarily.[62] The Due Process Clause also imposes a substantive requirement, requiring that legislation meet at least a minimum level of rationality.[63]

Understanding the Due Process Clause as a mechanism for preventing arbitrary government action, the expansive meaning of "property" that arose from the due-process revolution makes sense. The broader the meaning of "property," the more governmental action subject to the requirements of due process, and in theory the less likely the government will take arbitrary action. In other words, significantly expanding the meaning of "property" to go beyond what the word would

---

60 *E. Enters.*, 524 U.S. at 557 (Breyer, J., dissenting).

61 Slochower v. Bd. of Higher Educ., 350 U.S. 551, 559 (1956) (quoting Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 302 (1932)); *see also* Kuchcinski v. Box Elder Cnty., 450 P.3d 1056, 1069 n.68 (Utah 2019) (the Due Process Clause is "[t]he constitutional provision that prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property") (citing BLACK'S LAW DICTIONARY (10th ed. 2014)).

62 *See* Bd. of Regents v. Roth, 408 U.S. 564, 584 (1972) ("[W]here the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of [] arbitrary action.") (internal quotation marks omitted); Daniels v. Williams, 474 U.S. 327, 331 (1986) ("By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions.").

63 *Daniels*, 474 U.S. at 331 ("[B]y barring certain government actions regardless of the fairness of the procedures used to implement them, [the Due Process Clause] serves to prevent governmental power from being 'used for purposes of oppression.'"); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'") (quoting Zinermon v. Burch, 494 U.S. 113, 12 (1990)). As mentioned *supra* note 1, the Supreme Court has not set forth any significant guidance for how to define the property interests protected by "substantive" due process, see Merrill, *supra* note 1, at 982 (suggesting a definition of substantive-due-process property but acknowledging the "dearth of precedent" to draw on), so I focus only on the meaning of "property" for the "procedural" prong of due-process protections.

have referred to in the 18th century does not pervert the clause beyond its central aim.

The question remains whether we can similarly expand the meaning of "property" under the Takings Clause without perverting the clause beyond its central aim. One way to view the Takings Clause's central aim is in light of its paradigmatic application to the government's "eminent domain" power.[64] "Eminent domain" refers to the government's power to appropriate and obtain title to property owned by a private citizen.[65] Founding-era evidence suggests that the framers originally intended the clause primarily to require that the government pay for the property it *physically* appropriates via its eminent domain power.[66]

Under an eminent-domain-centered view of the Takings Clause, construing the word "property" narrowly to include only the kinds of property that would have been recognized at the founding makes sense. If the Takings Clause were only aimed at government appropriation of physical things, then the clause would certainly have nothing to say about welfare benefits, tenured employment, or any of the other entitlements in the "new property" tradition.

But takings doctrine has long rejected a "physical" or "thingified" understanding of the right to just compensation: the Takings Clause's application to certain kinds of non-physical property is fairly uncontroversial.[67] The takings doctrine has also long rejected a requirement of actual appropriation or confiscation. Rather, mere temporary physical invasions are

---

64 *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (explaining that the most historically well-settled application of the Takings clause is in eminent-domain cases).

65 *Id.*

66 *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 819 (1995); *id.* at 791–92 (quoting St. George Tucker's assertion that the Takings Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war"); Rubenfeld, *supra* note 64, at 1082–83 (noting that physical appropriation was present in early takings cases but ultimately arguing that "physicalism" alone is insufficient to explain those cases); Merrill, *supra* note 1, at 957, n.268 (explaining that nearly all eminent-domain proceedings involve an interest in land).

67 Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (unanimously agreeing that trade secrets in pesticides are property interests protected by the Takings Clause); *see also* Armstrong v. United States, 364 U.S. 40, 44, 46 (1960) (materialman's lien provided for under Maine law protected by Taking Clause); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 596–602 (1935) (real estate lien protected).

takings.[68] So too are *regulations* of property interests if the regulations "den[y] . . . economically viable use" or "go[] too far."[69]

Accordingly, the current doctrine does not understand the Takings Clause as a mere right to compensation when the government exercises its eminent-domain power. Instead, the doctrine describes the aim of the Takings Clause much more broadly: "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[70] It will be useful to illustrate with an example how the doctrine views the Takings Clause as a bulwark against imposing inordinate public burdens on people, rather than merely requiring compensation when the government appropriates physical property via eminent domain.

In the first regulatory-takings case, the Supreme Court invalidated a Pennsylvania law that prohibited coal-mining companies from mining land when doing so would cause subsidence damage to above-ground structures, and that provided no compensation to the companies.[71] The law left the Pennsylvania Coal Company with an economically valueless piece of land, but the law did not transfer title of the land to the government.[72] The Court's holding that the Pennsylvania law was nevertheless a taking suggests that society as a whole ought to bear the costs of protecting above-ground structures, and that the cost ought not to fall to individual coal companies via loss of their lands' value.

Under this view of the takings doctrine, a definition of "property" under the Takings Clause that is broader than merely those interests that the common law would have recognized is justified. If the purpose of the Takings Clause is to prevent the government from singling out individuals to bear

---

68 Cedar Point Nursery v. Hassid, 594 U.S. 139, 153 (2021).

69 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992) (internal quotes omitted); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

70 Tyler v. Hennepin Cnty., 598 U.S. 631, 648 (2023) (quoting *Armstrong*, 364 U.S. at 49). Other values that might inform the takings doctrine include preventing wasteful and excessive government and protecting individual liberty by limiting the government's ability to single out political opponents. Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 613 (2014). The Court does not appear to rely heavily on these purposes, but at least the latter—protecting opponents of the majority from being targeted—would be served by a broader meaning of property because more of those opponents' wealth would be protected from the government.

71 *Pa. Coal Co.*, 260 U.S. at 412–13.

72 *Id.* at 414.

public burdens, then that purpose seems better accomplished by a broad definition of property than a narrow one.

One might counter that whether coverage of new property really is consistent with the Takings Clause's purpose depends on whether the burdens that follow deprivation of new-property interests are burdens properly borne by the public or by individuals. To some, that question might sound like a normative one that ought to be answered by the political process rather than the Constitution, given that the founding generation could not have anticipated the role that entitlements play in modern society. But the framers' inability to anticipate the shift from traditional property to new property is exactly the reason why the Takings Clause *should* be concerned with new property.

That is, at the time of the founding, individuals' wealth (and the personal security that came with it) was bound up in those traditional forms of property.[73] So the framers' decision to protect the forms of property that existed at the time was functionally a decision to protect individuals' financial well-being from being overridden by the interests of the public. And as Professor Super describes, the protection against takings of traditional property has been a "resounding success" in ensuring the financial security of those who hold their wealth in those forms of property.[74] But unlike during the founding-era, of course, a great portion of individual wealth today is bound up in government entitlements.[75] That wealth depends on a relationship with the government, rather than ownership interests in discrete assets.[76] With an increased share of individual wealth bound up in these new property interests, a Takings Clause that only protects traditional property interests will fail to ensure that many Americans' financial well-being is not overridden by the interests of the public.

Moreover, using the political process to hash out the proper level of protection for new property interests presents the same risk as would using the political process to hash out the proper level of protection for traditional property interests. At least some framers were concerned that if a governing majority faction had unfettered power to deprive its opponents of their

---

73 *See* Reich, *supra* note 14, at 738–39.

74 Super, *supra* note 16, at 1870.

75 Reich, *supra* note 14, at 738.

76 *Id.* at 733.

land, that would present too great a risk of tyranny.[77] There seems no reason to think that a majority faction with unfettered power to deprive political opponents of wealth bound up in new property is any less dangerous.

The Takings Clause broadly aims to prevent the government from imposing inordinate public burdens on individuals. This broad aim[78]—like the Due Process Clause's broad aim—is significantly furthered by a broad meaning of "property."

III
THE CONSEQUENCES OF A UNIFORM MEANING

Notwithstanding my view that the text and purpose of the Takings Clause cut in favor of understanding "property" under the Takings Clause to be coterminous with "property" under the Due Process Clause, I find compelling the worry expressed by the Supreme Court and some commentators that applying the Takings Clause to new property would risk freezing government programs in place.[79] That is, if the consequences of applying the Takings Clause to "new property" would be to hamstring the government in its ability to adjust entitlement programs, I would agree that we should not interpret the Takings Clause to apply to new property. I also freely concede that if the takings doctrine made entitlement programs

---

77 Treanor, *supra* note 66, at 819; Eagle, *supra* note 70, at 613, n.73 (explaining that abuse of power over property to "squelch opposition" has a long history, and citing an example from ancient Rome described in Iian D. Jablon, Note, *Civil Forfeiture: A Modern Perspective on Roman Custom*, 72 S. CALIF. L. REV. 247, 255 (1998)).

78 One might point out that the Takings and Due Process Clauses' "broad" purposes do not necessarily prescribe the specific meaning of the word "property." This is, of course, correct, and the proper meaning of Fifth Amendment property might actually be broader (or narrower) than the current meaning under the Due Process Clause. But because the focus of this paper is whether "property" ought to have two different Fifth Amendment meanings, I leave for another day the question of the proper meaning of Fifth Amendment property and instead take the current meaning under the Due Process Clause as given. See also *supra* notes 57–59 and accompanying text for an explanation for why we ought to "level up" takings property instead of "leveling down" due-process property.

79 *See* Flemming v. Nestor, 363 U.S. 603, 610 (1960) ("To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands.") (citing Elmer F. Wollenberg, *Vested Rights in Social-Security Benefits*, 37 ORE. L. REV. 299, 359 (1958)); Bowen v. Gilliard, 483 U.S. 587, 605 (1987) (referring to "the unquestioned premise that the Government has a right to reduce [welfare] benefits generally"); *see also* Merrill, *supra* note 1, at 956 (arguing that we need to interpret takings property to mean something different than due-process property "to reach results that are normatively defensible").

non-repealable, that would be undesirable because it might disincentivize Congress and the states from passing entitlements into law in the first place. As takings doctrine currently works, however, adding new property into the doctrine would not have those consequences.

As Professor David Super has explained, because the existing regulatory-takings doctrine focuses on regulations that either create physical invasions or "severely impair" the value of an asset, and not on regulations that have less-substantial effects, routine updates to entitlements would not implicate the takings doctrine.[80] Indeed, a regulation only becomes a taking in three circumstances:

First, a regulation effects a Taking when it compels a property owner to suffer a physical invasion.[81] This circumstance will likely not be implicated if new property is swept into the takings doctrine because new property exists in the form of rights or status rather than physical, tangible goods.[82]

Second, a regulation effects a Taking when it denies all economically viable use of the property.[83] This circumstance would be implicated most obviously when the government wholly eliminates someone's entitlement. One example would be elimination of a department of government employees—say a police department[84]—who have tenure. When a government determines that it no longer needs those positions and reorganizes accordingly, the employees holding those positions lose their tenure-protected job in full, rendering the interests they held in those jobs valueless.[85] In that circumstance, a takings

---

80 Super, *supra* note 16, at 1874; *see also* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("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.") (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

81 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

82 *See* Reich, *supra* note 14, at 734–37; *see also supra* notes 7–11 and accompanying text.

83 *Lucas*, 505 U.S. at 1015–16.

84 *See* Dondero v. Lower Milford Twp., 5 F.4th 355, 358–59 (3d Cir. 2021). Note that the Contracts Clause prohibits state and local governments from terminating tenured employees' contractually guaranteed positions unless termination of the contract is reasonable and necessary to achieve a legitimate public purpose. Elliott v. Bd. of Sch. Trs. of Madison Consol. Schs., 876 F.3d 926, 932 (7th Cir. 2017) (citing United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 25 (1977)). If those workers had property rights in their jobs under the Takings Clause, the Clause would not prevent the States from eliminating the positions but would require that just compensation be paid to the terminated workers.

85 *See id.* at 929, 932 (holding that the due-process clause does not guarantee a pre-termination hearing when an employee is terminated due to reorganization).

doctrine that included new property would be implicated. But imagine that, instead of eliminating the department entirely, the government reduced the employees' guaranteed annual raises from 4% to 2%. A loss of 2% in economic value is obviously not a "deni[al] of all economic" value[86] and would therefore not implicate the "total diminution" prong of the regulatory-takings doctrine.

Third, a regulation may still be a taking when it eliminates less than all of an asset's economic value if the magnitude and character of the burden imposed by the regulation make the regulation functionally equivalent to a direct appropriation.[87] Whether a regulation fits that vague description depends on the ever-flexible *Penn Central* balancing.[88] Under the *Penn Central* test, the reviewing court conducts an *ad hoc*, factual inquiry, weighing at least the following three factors with an eye towards ensuring that individuals are not forced to bear burdens properly borne by society writ large: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[89]

Without exhausting the *Penn Central* analysis for various kinds of entitlements, some observations about the factors will suffice to demonstrate that entitlements will not inevitably be "taken" when the government makes adjustments thereto. First, the *Penn Central* test still requires a significant diminution in value,[90] so the above example of a 2% decrease in one's annual raise would still not be a taking. Second, new property interests may implicate investment-backed expectations—for example, someone might invest in professional training to obtain a tenured government job. But investment-backed expectations must be reasonable, taking into account the government's regulatory powers.[91] And given that the government frequently adjusts entitlements, and sometimes even expressly

---

86 *Lucas*, 505 U.S. at 1015.

87 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

88 *Id.* at 538–39 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

89 Murr v. Wisconsin, 582 U.S. 383, 392–94 (2017).

90 *See Penn Cent.*, 438 U.S. at 131 (collecting prior cases where regulations causing 75% and 87.5% diminution in property value were not takings).

91 *See* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Good v. United States, 189 F.3d 1355, 1361–62 (Fed. Cir. 1999).

reserves the right to do so,[92] reasonable investment-backed expectations based on new property probably include an understanding that the new property interests are subject to a fair degree of change. Third, while the doctrine is not totally clear about what regulations are of such a character that favors finding a taking,[93] the Supreme Court has indicated that the degree of a regulation's particularization is important,[94] which suggests that broadly applicable adjustments to new property interests would be less likely to raise an issue under the third *Penn Central* factor than adjustments affecting a smaller group.

Importantly, the *Penn Central* analysis also considers measures that offset the economic harm that a regulation causes.[95] So Congress and state governments would retain a significant degree of flexibility to change the form of government assistance from, for example, cash benefits to housing and food vouchers.[96]

The foregoing discussion illustrates that routine revisions, and probably even most significant revisions, to government entitlements would not implicate the takings doctrine at all. Rather, only a total or near-total rescission of a person's entitlement accompanied by no offsetting measures would pose a takings problem. And importantly, Congress and the states would still retain the authority to prospectively terminate entitlement programs by refusing to grant eligibility to those who do not currently have a legitimate claim of entitlement to whatever benefit the government wishes to terminate.

For example, Congress could prospectively terminate Social Security by declaring that only those who currently have a legitimate claim of entitlement to benefits will get their payments, but those who have not yet become entitled will not receive any payments. Similarly, a state government could

---

92 *See* Bowen v. Pub. Agencies Opposed to Soc. Sec Entrapment, 477 U.S. 41, 44 (1986) (noting that "Congress expressly reserved to itself 'the right to alter, amend, or repeal any provision of' the [Social Security] Act""). However, a takings doctrine that included new property would call into question the validity of an entitlement provision that reserves the right to fully rescind the entitlement.

93 Eagle, *supra* note 70, at 621–22.

94 *See* E. Enters. v. Apfel, 524 U.S. 498, 543 (1998) (Kennedy, J., concurring) ("The Coal Act neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms.").

95 *See Penn Cent.*, 438 U.S. at 129–30, 138 (holding a regulation causing a sharp reduction in property value was not a taking in part because the property owner received transferable development rights worth less than the property value lost as a result of the regulation).

96 *See* Super, *supra* note 16, at 1872 n.627 (setting out this example).

declare that going forward, new law-enforcement hires will not be granted for-cause protection from termination, but every government employee who is already statutorily entitled to for-cause protection will continue to be terminable only for cause.

The primary effect of revising the meaning of takings "property" would be to prevent Congress and the states from hanging out to dry the great many Americans who are dependent on government entitlements for their livelihood. Congress could not, for example, suddenly repeal Social Security in its entirety, leaving many without their only means of retirement subsistence, unless it provided some offsetting measure or just compensation. Nor could a state terminate a tenured employee without cause unless it found that person new employment or paid just compensation. Congress and the states would, however, retain the power to adjust the form and level of entitlements and even to terminate entitlement programs entirely so long as they were properly sunset.

I acknowledge that the expansion of takings property to include new property would present some difficult follow-up questions. For example, if Congress or a state suddenly repealed an entitlement, courts would have to answer complicated statutory-interpretation questions to determine who had legitimate claims of entitlement before repeal. Courts would also have to decide whether market value or some other value is the proper measure of "just compensation," and they would have to evaluate the parties' calculations to determine what amount of compensation is just.

Some complicated follow-up analysis, however, should not be a reason to retain the narrower meaning of "property" and negate the protections that the Takings Clause might afford entitlement recipients, especially absent any compelling textual or purposive justifications or absurd doctrinal consequences. Moreover, the follow-up analysis in the due-process context is similarly complicated, and that did not stop the due-process revolution.[97] Indeed, once a court determines that a person has been deprived of an entitlement, that court has to determine whether the government afforded that person sufficient pre-termination process by balancing the importance of

---

[97] To be sure, the Supreme Court has arguably scaled back the degree of procedural protections that attach to entitlements. *See* Pierce, Jr., *supra* note 57; Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI-KENT L. REV. 1039, 1096–1100 (1997). But the legitimate-claim-of-entitlement formulation is still the law. *E.g.*, Dondero v. Lower Milford Twp., 5 F.4th 355, 358 (3d Cir. 2021).

the entitlement to the person, the probability of erroneous deprivation without the procedural safeguards requested by the person, and the government's interest in not affording the requested safeguards.[98] And so the mere fact that including entitlements in the ambit of Constitutional property creates some difficult questions has not previously been a sufficient reason to exclude them.

IV
WHAT IF THE TAKINGS DOCTRINE CHANGES?

I recognize that the practical value of including new property in the ambit of the Takings Clause—protection of individuals' entitlements from sudden and total rescission—depends on a takings doctrine that recognizes a right to compensation when a regulation severely diminishes property value. The doctrine currently does recognize such a right,[99] but as readers may have gathered, the current doctrine is messy, and many commentators and jurists have called for change.[100] It is thus fair to wonder what the effects of interpreting takings "property" to include new property would be if the takings doctrine were to change, and particularly whether including entitlements in takings property would limit the possible revisions to the doctrine.

Below I predict how takings-protected entitlements would interact with two proposed changes to the doctrine and conclude that the government's ability to terminate and revise entitlements without compensation would probably rise and fall in tandem with the government's ability to regulate traditional property interests without compensation. This suggests that including entitlements in takings property would not make revision to the takings doctrine significantly more difficult.

Take, for example, the proposal that compensation should only be due when the government presses someone's property into "public use."[101] A doctrine that required "public use" as a precondition for compensation would reach fewer government

---

98 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

99 *See supra* notes 84–86 and accompanying text.

100 Rubenfeld, *supra* note 64, at 1081; Eagle, *supra* note 70, at 602; Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 141 S. Ct. 731, 731–32 (2021) (Thomas, J., dissenting from denial of certiorari); Nekrilov v. City of Jersey City, 45 F.4th 662, 682 (2022) (Bibas, J., concurring).

101 *See generally* Rubenfeld, *supra* note 64 (arguing that governmental use should be a prerequisite to required compensation). *See also Nekrilov*, 45 F.4th at 683 (same).

actions than the current doctrine.[102] To illustrate, consider the Court's holding in *Ruckelshaus v. Monsanto Co.*[103] There, the Court found a compensable taking where the Federal Insecticide, Fungicide, and Rodenticide Act permitted the Environmental Protection Agency (EPA) to publicly disclose health and safety data—which the Court held were trade secrets—collected by pesticide manufacturers.[104] The Court held that public disclosure of the data, even absent any conscription and use of the data by the EPA itself, would be a taking because disclosure reduced the trade secrets' market value.[105] A doctrine that only required compensation for property taken *and used* by the government would likely mandate a different holding in *Monsanto*.[106]

So how would a doctrine that required governmental use intersect with entitlements? Entitlements would probably be terminable suddenly without compensation because the government probably cannot "use" someone's entitlement. For example, benefits payments are just money, and money cannot be "used" so much as "exchanged."[107] Likewise, terminating a tenured employee would not make use of anything except for maybe the money that would have otherwise been paid to the employee. True, this means that entitlement holders would not gain the same protections that they would if the current takings doctrine included entitlements. But the reason for including new property in the takings doctrine is to afford new property interests the same protection as traditional property interests. And a doctrine requiring governmental use would give the government more flexibility to regulate traditional property interests too.[108] Thus, we should view as positive the likelihood that protection of new and old property would increase or decrease in tandem following a change to the doctrine.

---

102 *See* Rubenfeld, *supra* note 64, at 1152 (explaining that a doctrine requiring governmental use would require abandoning the rule that physical invasions are *per se* takings).

103 467 U.S. 986 (1984).

104 *Id.* at 1020.

105 *Id.* at 1013–14.

106 The Court indicated that either EPA use or mere disclosure would be a taking, see *id.*, so the holding would have been limited to only instances of EPA use.

107 *See* Rubenfeld, *supra* note 64, at 1147 (explaining that money is an abstract legal right incapable of "producing any effects in the world," so it has no use value that can be exploited).

108 *See supra* note 102.

Consider also a vision of the takings doctrine that requires compensation whenever the government removes anything from the "bundle of rights" that attach to a specific asset.[109] Ownership in land, for example, might carry with it the following "bundle" of rights: the right to transfer or devise, the right to access the land, the right to build structures, and the right to extract mineral deposits. A very robust takings doctrine might guarantee compensation whenever the government removes any stick from the bundle.

This conception of the Takings Clause, combined with a meaning of "property" that included entitlements, would probably require compensation for adjustments to entitlements. Recall the example of Congress repealing a cash-assistance program and replacing it with a housing-voucher program.[110] Under those circumstances, a recipient who was previously able to use their cash assistance for whatever they wished would now only have the right to use their assistance for housing, which arguably shrinks the bundle of rights attached to the entitlement. Admittedly, the "bundle of rights" conception of property is under-theorized in the "new property" context, but intuitively, it seems right that a takings doctrine that both recognizes entitlements as property and requires compensation any time a right is removed from a property interest's bundle would mandate compensation in more circumstances than the current doctrine.

The important point is that updating the interpretation of "property" in the Takings Clause to include entitlements would not inhibit revision of the admittedly messy takings doctrine. Instead, we can revise what constitutes a compensable "taking," and the inclusion of new property in the doctrine will not cause doctrinal absurdities.

CONCLUSION

Although the accepted wisdom among courts and commentators is that takings "property" refers to a narrower class of assets than does due process "property," that understanding is not justified by traditional interpretive tools. Instead of

---

109 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 95 (1985) (setting out an expansive understanding of the Takings Clause under which "*[a]ll* regulations, *all* taxes, and *all* modifications of liability rules are takings of private property prima facie compensable by the state").

110 *See supra* note 96 and accompanying text.

continuing to operate under this faulty assumption, we should read takings "property" as broadly as we read due process "property." Otherwise, as the share of American wealth bound up in "new property" interests continues to increase, the utility of a Takings Clause that pays no attention to those interests will, without justification, only decrease.