Property Rights in American History

James W. Ely Jr.
Vanderbilt University

Americans have long esteemed private property and economic opportunity. Well before the formation of the United States the colonists enjoyed widespread ownership of land and were increasingly receptive to an emerging free market economy based on private contracts. The framers of the Constitution treated private property as the cornerstone of a free society. "Perhaps the most important value of the Founding Fathers of the American constitutional period," a prominent scholar cogently observed, "was their belief in the necessity of securing property rights."[1] As is well known, the Constitution and Bill of Rights contain numerous provisions relating to economic interests. Consistent with the property – conscious values of the framers, both federal and state courts were actively engaged in defending property and contractual rights from legislative abridgement until the New Deal era of the mid- twentieth century. In this paper I plan to trace the high regard for property as a constitutional norm throughout much of American history, and then to discuss the declining protection afforded property rights in the wake of the political ascendancy of the New Deal.

As a threshold matter we must recognize that property can be a source of conflict. What, for example, constitutes a property interest in which one can claim ownership? The Constitution does not define property, and courts have usually looked to state law or custom to ascertain what interests should be designated as property.[2] To what extent, then, could a state abolish by legislative fiat a traditionally accepted form of property? The Supreme Court has cautioned that "a State, by ipse dixit may not transform private property into public property without compensation…"[3] This suggests that the Constitution contemplates some core meaning for property that states cannot alter, but the parameters of any such minimum constitutional requirement remain vague. After all, if the states had unfettered authority to revise the understanding of property they could eliminate all ownership rights and circumvent the constitutional protection of property.

At the same time, some forms of property have been very contentions in American history. The right to own a property interest in slaves, originally recognized in all of the North American Colonies, would give rise to bitter conflicts and lead eventually to Civil War. Indeed, it has been argued that the growing sectional hostility in the nineteenth century can best be understood as a dispute over the power to define property rights.[4] Some northern states began to abolish slavery in the 1780s. But this step raised the question of whether slave owners could be deprived of their property without payment of compensation. The knotty issue of compensated emancipation was debated until the early years of the Civil War, and was a solution urged by President Abraham Lincoln. Proposals to pay compensation were not only expensive but implicitly validated slave property. Finally, adoptions of the Thirteenth Amendment rendered this question moot, by destroying property of considerable value.[5]

Alcoholic beverages are another example of a contested type of property. Some states in the antebellum era outlawed the manufacture and sale of such beverages. They reasoned that a ban on liquor protected public health and morals by alleviating intemperance. In the landmark

case of Wynehamer v. People (1856) the New York Court of Appeals declared that alcoholic beverages had long been regarded as property, and represented an important article of commerce.[6] It then concluded that a state prohibition law destroyed the value of liquor as an item for sale, and that the legislation amounted to a deprivation of property without due process with respect to the already existing stock of alcoholic beverages. This, of course, was not the last word on the subject. Efforts to outlaw the manufacture and sale of liquor continued at the state level throughout the nineteenth and early twentieth centuries. In Mugler v. Kansas (1887) the Supreme Court sustained a state prohibition law against claims that it constituted a taking and a deprivation of property without due process.[7] On the other hand, the Court repeatedly insisted that liquor was a legitimate article of interstate commerce protected by the commerce clause against state bans on direct shipments from outside the jurisdiction.[8] This line of dormant commerce clause cases undercut state prohibition laws and fueled the drive for the ill-fated Eighteenth Amendment. The larger point is that the power to define what is property contains the potential for destruction.

Significance of private property

Why should anyone care about property rights? Before embarking upon an investigation of property rights over the course of American history we should briefly explore the role of private property in the establishment of representative self-government.[9] I submit that property serves two vital and overlapping functions in a free society. The economic utility of property dovetails with libertarian political considerations to undergird a free society.

First, stable property rights are a powerful inducement for the creation of wealth and prosperity, prerequisites for successful self-government. Conversely, as the English politician and author Edmund Burke declared:" A law against property is a law against industry."[10] John Marshall agreed that protection of property and contractual rights was crucial for economic growth. Speaking at the Virginia ratifying convention, he insisted that weak government under the Articles of Confederation "takes away the incitements to industry, by rendering property insecure and unprotected."[11] In short, as a leading scholar had stressed, "Marshall was convinced that strong protection for property and investment capital would promote national prosperity."[12] The resulting market economy would increase national wealth and benefit all citizens with increased goods.

Second, property rights have long been linked with individual liberty. "Property must be secured John Adams succinctly observed in 1790, "or liberty cannot exist."[13] An economic system grounded on respect for private ownership tends to diffuse power and to strengthen individual autonomy from government. Property was therefore traditionally seen as a safeguard of liberty because it set limits on the reach of legitimate government. By helping to preserve the economic independence of individuals, secure private property encourages participation in the political process and willingness to challenge governmental policy. Viewed in this light, the ownership of property represents personal empowerment. As one prominent historian described American society as it neared the break with England, "Men were equal in that no one of them should be dependent on the will of another, and property made this independence possible. Americans in 1776 therefore concluded that they were naturally fit for republicanism precisely because they were 'a people of property; almost every man is a freeholder'."[14]

In contrast, there are few examples of free societies that do not respect the rights of property owners. One could persuasively maintain that without guarantee of property

rights the enjoyment of other individual liberties, such as freedom of speech, would be meaningless. Put simply, the absence of a system of private property renders self-government unlikely. As Justice Joseph Story explained in 1829: "That government can scarcely be called free, where the rights of property are left solely dependent upon the will of a legislative body. The fundamental maximums of a free government seem to require, that the rights of personal liberty and private property should be held sacred."[15]

English constitutional background

Americans of the founding generation were not original in stressing the rights of property owners. Instead, their views were strongly shaped by the English constitutional tradition. Colonial Americans revered Magna Carta (1215) as a safeguard against arbitrary government. Several provisions of this famous document protected the rights of property owners:

1) The king agreed not take, imprison, or disseize a person of property "except by the lawful judgment of his peers or by the law of the land". The "law of the land "clause was the forerunner of the due process norm.

2) The king promised not to take provisions without immediate payment. This language acknowledged the principle that government must pay the owner when it acquires private property.

3) The king further pledged that "[n]o scutage or aid shall be imposed on our kingdom unless by common consent of our kingdom." This language was the origin of the norm that government could not levy taxes without consulting a representative body.

In time these as well as other provisions of Magna Carta would evolve into important principles of American constitutionalism.[16]

John Locke, who wrote in the aftermath of the Glorious Revolution of 1688, explored the nature of government and emphasized the rights of property owners as a bulwark of liberty. According to Locke, legitimate government was grounded on a compact between the people and their rulers. The people, he theorized, sustained the government in exchange for support of their inherent or natural rights. Private property, in Locke's view, existed under natural law before the establishment of political authority. It followed that a principal purpose of government was to safeguard natural property rights.[17] Locke insisted that lawmakers could not arbitrarily take property or levy taxes without popular consent. One can hardly overestimate Locke's influence on the founding generation. "By the late eighteenth century," Pauline Maier has commented, " 'Lockean' ideas on government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into the English constitutional tradition."[18]

Locke's stress on the inviolability of the rights of property owners was powerfully strengthened by William Blackstone. In his Landmark Commentaries on the Laws of England (1765-1769) Blackstone sought to restate the tenets of English common law. He gave considerable attention to the important place of private property in English law. "The third absolute right, inherent in every Englishman," Blackstone wrote, "is that of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[19] He also spoke enthusiastically about "that sole and despotic dominion which one man claims and exercises over the external things of the

world…"[20] Further, Blackstone maintained that government must pay full compensation when it takes private property for public use. Blackstone's work had an enormous impact on the legal culture of the late colonial period. As John Phillip Reid has emphasized: "In the eighteen century pantheon of British liberty there was no right more changeless and timeless than the right to property."[21]

The founding generations draw heavily upon the English legal heritage. Reid explained:

> There may have been no eighteenth-century educated Americans who did not associate defense of liberty with property. Like their British contemporaries, Americans believed that just as private rights in property could not exist without constitutional procedures, liberty could be lost if private rights in property were not protected.[22]

To Americans, then, personal and economic rights were closely joined.

Revolutionary Era

The break with England set the stage for bold constitutional experimentation at the state level. Amid debates over the formation of new governments, states included a number of provisions expressing their dedication to property and economic liberty. Several state constitutions, including Massachusetts, New Hampshire, Pennsylvania, and Virginia, affirmed that all persons had the "natural, essential, and inherent" right of "acquiring, possessing and protecting property." It is noteworthy that this language went beyond the protection of existing ownership, and affirmed the right to gain property. Five state constitutions, Massachusetts and North Carolina among them, insisted that no person could be "deprived of his life, liberty, or property but by the law of the land." Thus language derived from Magna Carta found its way into the first state constitutions. There were also moves to place constitutional restrictions on the exercise of eminent domain power. The Massachusetts Constitution of 1780 declared that "whenever the exigencies require that the property of any individual should be appropriated to public use, he shall receive a reasonable compensation therefore." This clause raised to constitutional status the common-law rule that compensation should be paid when private property was taken for public use. In addition, several state constitutions banned grants of monopoly, signaling a commitment to economic freedom.[23]

An important piece of national legislation during the post-Revolutionary era was also protective of the rights of property owners. The Northwest Ordinance of 1787, a key source for drafting the federal constitution, articulated many rights claimed by Americans. It contained a number of provisions to safeguard economic rights in the Northwest Territory. Besides a law-of-the-land clause and a takings clause, the Ordinance mandated that no law should "interfere with or affect private contacts, or engagements, bona fide, and without fraud, previously formed." This was the forerunner of the contract clause of the federal constitution. Significantly, the Ordinance prohibited slavery, thus closing the Northwest Territory to slave property.[24]

Notwithstanding these positive developments, property rights in practice were often insecure in the years following the American Revolution. Lofty rhetoric about economic rights was frequently ignored in practice. State legislatures despoiled the rights of owners in various ways. Perhaps the most dramatic example was the enactment of bills of attainder which confiscated Loyalist property without any judicial proceeding. This widespread seizure of

Loyalist land did not bode well for the safety of property rights in general. Some states, most conspicuously Virginia, enacted laws to bar the recovery of private debts owed to British merchants. This attempted debt repudiation both dishonored obligations under the 1783 Treaty of Paris and threatened commercial credit abroad. Moreover, state legislatures in the 1780s, responding to depressed economic conditions, repeatedly meddled in debtor-creditor relations with a plethora of laws designed to assist debtors. Most notorious were state laws making depreciated paper currency legal tender for the payment of debts.[25]

Neither state constitutional guarantees nor the frail central government created by Articles of Confederation proved able to halt these legislative abuses. State courts were simply unable to uphold the rights of creditors in the face of public pressure. "Americans," Forrest McDonald concluded, "were not as secure in their property rights between 1776 and 1787 as they had been during the Colonial period."[26]

Constitution and Bill of Rights

The assaults on property rights during the post-Revolutionary convinced many political leaders that a more energetic national government was essential to safeguard the rights of property owners, restore public credit, and stimulate trade. At the constitutional convention key delegates repeatedly stressed the importance of property. Not surprisingly, numerous provisions in the Constitution pertain to the protection of property interests. The Constitution banned both Congress and the states from enacting bills of attainder. This was in effect a repudiation of the widespread confiscation of Loyalist property during the Revolution, and closed the door on a similar experience in the future. The Constitution granted Congress broad taxing authority, but forbad the imposition of direct taxes unless apportioned among the states according to population. As a practical matter this requirement limited congressional tax power by rendering impractical any levy that could not be readily apportioned. The direct tax clauses figured prominently in the controversy over the 1894 income tax. A set of provisions curtained the power of the states to interfere with economic rights. The most important of these was the contract clause, which prevented the states from passing any laws "impairing the obligation of Contracts." Some types of property received special attention. The Constitution empowered Congress to award copyrights and patents to authors and inventors "for limited times." A number of provisions were designed to support the ownership of slave property established under state law.

Nonetheless, the framers were for the most part satisfied to rely on institutional arrangements to protect individual rights, including property. They believed that the creation of a limited national government and the diffusion of power among different organs of government would be sufficient to foster a safe political environment for the enjoyment of rights. Indeed, many of framers initially opposed a bill of rights for the federal constitution. They argued that a specification of rights was both unnecessary and potentially dangerous. Since it was impossible to enumerate all individual rights, they warned that the omission of some rights would lead to the inference that they did not exist. During the state ratification debates, however, it became evident that this view was politically unacceptable. Indeed, the absence of a bill of rights was one of the major difficulties in securing ratification of the Constitution. Accordingly, proponents of the Constitution informally agreed to propose a bill of rights.[27]

James Madison took the first steps in framing the Bill of Rights. In doing so he drew heavily upon traditional guarantees already recognized in state bills of rights, the Northwest

Ordinance and English common law. Madison took care to avoid controversial innovations, and sought instead to reflect a consensus about shared values. He had long demonstrated a particular interest in the protection of the rights of property owners. For example, as a Virginian legislator he successfully urged state lawmakers to require compensation when unimproved land was taken for roadways. It was hardly surprising, then, that Madison placed property rights guarantees in his proposed bill of rights. He even suggested attaching a broad theoretical declaration about the purpose of government: "That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety." Although Congress did not adopt this wording, it underscores Madison's commitment to private property as a bedrock of the new national government.[28]

Madison was able, however, to incorporate two key safeguards of property rights in the Fifth Amendment. That amendment states in part that 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." The due process clause was a direct descendant of Magna Carta, and was viewed as a check on arbitrary government. The takings clause created an additional safeguard for property owners. It limited the inherent power of eminent domain by barring seizure of property without payment of compensation. In giving constitutional status to the common-law principle of compensation, Madison closed the door on outright confiscation as a legitimate policy for the new government. The purpose behind the takings clause was to protect individual owners by requiring that the financial burden of public policy should be borne by the public as a whole and not placed on the shoulders of a few. The takings clause also helps to secure private property generally by imposing practical cost bounds on the appropriation of property by the federal government. A final point is in order. Madison placed these property clauses in the same amendment as safeguards governing criminal trials. This arrangement underlined the close tie between property rights and individual liberty in the eyes of the founding generation.

The Bill of Rights was initially understood as applying only to the federal government.[29] Yet the Constitution and Bill of Rights provided an influential model when states subsequently framed their own fundamental laws. Many states adopted the property clauses as part of their own constitutions. Thus, the Pennsylvania Constitution of 1790 included a takings and a contract clause as part of their own constitutions. Thereafter, state constitutions typically contained a contract clause, protected persons against deprivation of property without due process, and required payment of just compensation when property was taken by the state for public use. These developments at the state level were doubly significant. State constitutions strengthened the place of property and contractual rights in the polity. In addition, they provided an independent source of protection for property owners. This was particularly important in the nineteenth century when states were the primary governmental units dealing with economic activity.[30]

In a brief 1792 essay Madison stressed the close connection between the rights of property owners and individual freedom. Championing economic liberty, he insisted that property was not secure "where arbitrary restrictions, exemptions, and monopolies deny to part of [the] citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the world; but are the means of acquiring

property." Madison also denounced unequal and excessive taxation. Turning to the appropriation of private property, he pointed out that property could not "be taken *directly* even for public use without indemnification to the owner." He significantly added that a government "which *indirectly* violates their property, in their actual possessions" . . . . is not a pattern for the United States."[31] This language suggests that Madison understood the takings clause to guard against more than simply a physical acquisition of property. It seems unlikely that Madison envisioned a constitutional system in which ownership of property consisted of mere legal possession shorn of economic value. In fact, one scholar noted that what Madison feared "was not straightforward confiscation, but the more indirect infringements inherent in paper money and debtor relief laws."[32]

It bears emphasis that in this essay Madison describes such personal rights as freedom of speech and religious liberty as forms of property. This seems curious to modern eyes, but it reflected Madison undivisible understanding of liberty and property. Indeed, he probably identified liberty interests as property because property enjoyed a high level of protection. "Government," he concluded, "is instituted to protect property of every sort."[33]

The Early Republic

During the 1790s the federal courts evidenced their disposition to halt state abridgement of the rights of property owners and to effectuate the property-conscious views of the framers. In 1792, in one of the earliest examples of federal judicial review, a federal circuit court invalidated a Rhode Island debtor relief measure as an unconstitutional impairment of contract. Another major exposition of property rights occurred in the well-known case of *Vanhorne's Lessee v. Dorrance* (1795), which arose from conflicting land claims in the Wyoming Valley of the Susquehanna Valley. Justice William Paterson, who had been a leading delegate at the constitutional convention, struck down a Pennsylvania statute which vested title in one group of claimants after the land had been previously granted to another party. He reasoned that the measure amounted to both a taking of property without just compensation and a violation of the contract clause. Invoking natural law precepts reminiscent of Locke, Paterson declared:

> . . . that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact . . . .[34]

Moreover, jurists in the 1790s discussed the extent of eminent domain. Paterson famously described eminent domain as the "despotic power." Although he admitted that the authority to acquire private property was essential for government, he rejected the redistribution of property to private parties. "It is," Patterson observed, "difficult to form a case, in which the necessity of the state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen."[35] In the same vein, Justice Samuel Chase emphatically insisted in *Calder v. Bull* (1798) that "a law that takes property from A. and gives it to B." would be "contrary to the first great principles of the social compact" and "cannot be considered a rightful exercise of legislative authority."[36] This shifting from A to B maxim has been

frequently repeated by courts in later years, although there has been disagreement about its application in particular situations. For example, the Chase language was quoted by both the majority and dissent in the controversial case of *Kelo v. City of New London* (2005).[37] At the very least, these early jurists helped to establish the constitutional norm that eminent domain could not be exercised for private takings even with the payment of compensation.

Nineteenth Century

By 1800, then, constitutional safeguards for property were in place at both the national and state levels. I do not propose to comment at length on the host of judicial decisions and legislative actions that defined and protected the rights of property owners over the course of the nineteenth century. It seems more helpful to stress some prominent themes that characterized thinking about property rights.

From Chief Justice John Marshall (1801-1835) to Chief Justice Melville W. Fuller (1888-1910) the Supreme Court was solicitous of the rights of property owners, a pattern that continued until the New Deal era.[38] To be sure, the Court did not mechanically decide every case in favor of property rights claimants. In fact, the justices usually upheld state health and safety regulations as valid exercises of the police power. The notion that the Supreme Court in the nineteenth century blocked all legislative reform or sought to impose a strict laissez-faire ideology is simply a myth. Moreover, many cases involved conflicts between different claims of property rights, especially those arising from competing modes of transportation.

The key point, however, is that the rights of property owners were consistently accorded a high regard. Nineteenth-century justices never relegated economic rights to a subordinate status. On the contrary, they frequently invoked the traditional tie between respect for private property and individual liberty. Justice Stephen J. Field, the most influential jurist of the Gilded Age, forcefully articulated this view in 1890:

> It should never be forgotten that protection to property and persons cannot be separated. Where property is insecure the rights of persons are unsafe. Protection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain.[39]

The justices also viewed property and contractual rights as keystones to capital formation and a market economy.

It follows that the Supreme Court tended to look skeptically at laws designed to alter the working of the market economy or to redistribute wealth. In a number of areas the Court made clear its disapproval of redistributive policies. The Court relied on the contract clause to block efforts by local governments to repudiate their bonded debt. It also held in a line of cases that regulated industries, such as railroads and utilities, were entitled to a reasonable return on their investment, and that the federal courts would carefully inspect the reasonableness of state-imposed rates.[40] The most striking illustration of the Court's anti-redistributive principle was *Pollock v. Farmers' Loan & Trust Co.* (1895), which determined that the 1894 income tax was a direct tax that had to be apportioned among the state according to population.[41] Thus, the Court invalidated the

levy. Although framed in terms of the direct tax clauses, the basic issue in *Pollock* was the legitimacy of employing the federal taxing authority to modify the existing wealth patterns.

To be sure, the property-related issues presented to the Supreme Court changed markedly over the course of the century. The Marshall Court's first major property case, *Fletcher v. Peck* (1810), involved a state land grant.[42] The rise of the business corporation and the rapid emergence of new technologies most notably the advent of the railroad raised novel and challenging questions. Patents and copyrights became increasingly important, and the Court had to balance the exclusive privileges given inventors and authors with the public interest in gaining access to technological advances and information. By the nineteenth century's end large-scale enterprises were conducting business across state lines and creating a national market for goods.[43] The states and gradually the federal government adopted regulations to curb private economic power. Such measure necessarily limited contractual freedom and the ability of owners to use property as they saw fit, and ultimately landed on the Court's docket.

Just as the nature of cases varied over time, so did the constitutional basis for adjudication. The Marshall Court relied heavily on a vigorous reading of the contract clause, a provision largely ignored in modern constitutionalism, to oversee state laws that abridged the rights of property owners.[44] Recall that the Bill of Rights did not initially apply to the states. Adoption of the Fourteenth Amendment in 1868 changed the balance of power between the federal government and the states, a opened new avenues for the federal courts to review state legislation. Among other provisions, that Amendment barred the states from depriving "any person of life, liberty, or property, without due process of law." Although hesitant at first, the Supreme Court gradually moved toward the position that the due process clause guaranteed fundamental property rights against state interference.[45] At the same time the Court strengthened the protection of property owners under the takings clause of the Fifth Amendment. It ruled that a physical invasion, such as permanent flooding, that rendered land valueless constituted a taking of property even though title remained in the owner.[46] In the landmark case of *Chicago*, *Burlington* and *Quincy Railroad Company v. Chicago* (1897) the Court determined that payment of just compensation when private property was taken for public use was an essential element of due process guaranteed by the Fourteenth Amendment.[47] The just compensation requirement thus became the first provision of the Bill of Rights imposed on the states by virtue of the due process clause.

Notwithstanding the prominence of the Supreme Court, a good deal of the law governing economic rights in the nineteenth century was formulated by state courts. As the Supreme Court of Georgia declared in 1851: "The sacredness of private property ought not to be confined to the uncertain virtue of whose who govern."[48] State courts, for instance, were the first to grapple with issues pertaining to eminent domain and the scope of the due process guarantee. They pioneered the view that due process safeguarded the right to pursue ordinary trades and the liberty to make contracts. A few leading decisions illustrate these developments. In *Gardner v. Village of Newburgh* (1816) the celebrated New York jurist James Kent held that, even without a state constitutional provision, fundamental equity required the state to compensate an owner when it took property.[49]

With the compensation principle firmly established, state judges also took the lead in defining the meaning of the "public use" limitation on the exercise of eminent domain. They repeatedly upheld the delegation of such power to canal and railroad companies, concluding that these private enterprises were fulfilling a public purpose by improving transportation. In other words, there was a certain elasticity to the notion of "public use," and the term did not connote public ownership.[50]

State courts in the 1880s adopted the position that the due process norm protected individual liberty, including the right to use property and make contracts, from state encroachment. This was demonstrated by the famous case of *In re Jacobs* (1885), where the New York Court of Appeals voided a statute that outlawed the manufacture of cigars in residential apartments in New York City.[51] Finding a public health rationale for the act unpersuasive, the Court squarely embraced the view that liberty included the right to pursue lawful callings. Once courts found that individuals had a constitutional right to earn a livelihood and to acquire property without arbitrary interference, it was a short step to holding that liberty encompassed the right to make contracts. The idea that contractual freedom was constitutionally protected was widely recognized as an element of state constitutionalism before the Supreme Court endorsed that principle in *Allgeyer v. Louisiana* (1897).[52]

A further point warrants mention. State and federal court decisions vindicating economic rights under the due process rubric were later characterized as an expression of so-called "substantive due process." There are several problems with this terminology. First, the phrase is anachronistic when applied to decisions rendered during the nineteenth and early twentieth centuries. The term "substantive due process" was not coined until the 1940s, and was then used largely as a way to stigmatize economic rights decisions. In fact, courts and commentators did not distinguish between the procedural and substantive dimensions of due process until the New Deal era. Second, due process was historically understood to bar arbitrary interferences with property and liberty, regardless of how achieved. A unitary concept of due process prevailed before the late 1930s.[53]

Twentieth Century

Long-standing judicial solicitude for property and contractual rights was challenged and eventually overturned in the mid-twentieth century. For decades thereafter the constitutional protection afforded economic rights was of scant concern to most judges and scholars. In this section I trace the decline of property in the constitutional order.

Early in the twentieth century a broad-based reform movement, known as Progressivism, sought to address economic problems associated with the new industrial order.[54] The Progressives were particularly concerned with protection of employees in the workplace. To achieve their reform program the Progressives urged a more active role for both state and federal governments in regulating the economy. They placed great faith in governance by experts. Accordingly, they championed administrative agencies which seemed to promise a nonpartisan and scientific means of carrying out legislative policy. In addition, Progressives were instrumental in securing adoption in 1913 of the Sixteenth Amendment, which empowered Congress to levy a tax on incomes. As a practical

matter this Amendment overturned the *Pollock* decisions and greatly enlarged the revenue base of the federal government. It also created the potential for enactment of a redistributive tax policy.

Progressives were dismissive of constitutional doctrines grounded in individual liberty. The guarantees of property rights in the Constitution and Bill of Rights constrained the power of government to control the economic system. To Progressives, however, constitutional doctrines that threatened to block their reforms had to be discarded or circumvented.

So legal theorists associated with the Progressive movement launched an assault on constitutionalized property.[55] Asserting that existing constitution doctrines exaggerated the importance of property and contractual rights, they attacked the Lockean understanding that property was a pre-political natural right. These scholars insisted that property should be reconceptualized as a product of society that did not entail any fixed set of rights. This new outlook sought to weaken the very idea of property, and thus cast doubt on its high constitutional standing. Progressives claimed that they favored a "realist" jurisprudence which took account of changed circumstances, and caricatured judges who adhered to traditional constitutional theory as "formalists" a disparaging label that has stuck to this day. Critical of judicial rulings that vindicated the economic rights of private parties, Progressives called for judges to defer to legislative decisions. The full consequence of these new intellectual currents would not be realized until the New Deal era, but they paved the way for a virtual constitutional revolution. As Richard A. Epstein has observed, the Progressives "saw in constitutional interpretation the opportunity to rewrite a Constitution that showed at every turn the influence of John Locke and James Madison into a different Constitution, which reflected the wisdom of the leading intellectual reformers of their own time."[56]

The judicial reaction to the legislative program of the Progressives was mixed. The Supreme Court sustained many of the economic regulations promoted by the Progressive movement. It upheld state laws banning child labor, restricting the working hours for women, and instituting workers' compensation schemes to cover workplace accidents.

The Supreme Court was also surprisingly receptive to fledgling land use controls, although such regulations curtailed the rights of owners over their own land. The Court readily validated restrictions on the height of buildings as an appropriate measure to reduce the hazard of fire.[57] In 1916 New York City implemented the first comprehensive zoning plan, and zoning spread rapidly in the 1920s. Some state courts were at first dubious about the constitutionality of zoning, holding that zoning was exclusionary and constituted an invasion of the rights of property owners.[58] Eventually, of course, the Supreme Court in *Village of Euclid v. Ambler Realty Co.* (1926) sustained the validity of a zoning ordinance which divided a locality into residential and commercial districts.[59] In short, community control and desire to stabilize neighborhood property values prevailed over the property rights of individuals. Zoning, moreover, was congenial with the Progressive fondness for planning and reliance on experts. One consequence of zoning was to classify persons according to income.

Yet the Supreme Court drew the line at city ordinances mandating racial segregation in residential areas. In *Buchanan v. Warley* (1917) the justices found that such restrictions amounted to a deprivation of property without due process of law.[60] Pointing out that the Constitution guarded the right to acquire and dispose of property, they ruled that majority racial attitudes could not override fundamental property rights. *Buchanan* well illustrates the artificiality of separating property from other individual rights.

As *Buchanan* indicates, the Supreme Court continued its defense of property and contractual rights in the early decades of the twentieth century. The justices occasionally invoked the freedom-of-contract principle. In the famous decision of *Lochner v. New York* (1905) they invalidated a state law limiting the hours of work in bakeries as an infringement of constitutionally protected contractual freedom.[61] An undue focus on *Lochner* is misleading. In fact, the justices rejected most freedom-of-contract challenges to workplace or business regulations. But the Court did treat liberty of contract as a baseline principle and required government to demonstrate a good reason for interfering with this right. Justice George Sutherland in *Adkins v. Children's Hospital* (1923) penned a classic articulation of this view, insisting that "freedom of contract is . . . the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."[62]

The Supreme Court also took aim at laws imposing entry barriers to new and competing enterprises. This was made clear in the leading case of *New State Ice Co. v. Liebmann* (1932), in which the Court struck down a state certificate provision which had the practical effect of excluding newcomers and fostering a monopoly in ice business.[63] Equating entrepreneurial freedom with the right of free speech, the Court ruled that the statute unreasonably obstructed the right to engage in lawful private business in violation of the due process clause of the Fourteenth Amendment.

Equally significant was the Supreme Court's endorsement of the doctrine that a regulation of the use of property might be so severe as to amount to a taking of property under the Fifth Amendment. In the nineteenth century some commentators and jurists argued that economic controls might so diminish the usefulness of property as to be tantamount to an outright taking. In the seminal case of *Pennsylvania Coal Co. v. Mahon* (1922) the Supreme Court broadened the protection of landowners by affirming the regulatory takings doctrine.[64] Justice Oliver Wendell Holmes articulated the critical query: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[65] For decades, however, the Court experienced difficulty in differentiating between appropriate regulations and regulatory takings. In fact, therefore, the regulatory takings doctrine was applied sparingly.

Until the Great Depression and the advent of the New Deal both federal and state courts devoted much of their energy to defending the key place of private property and contractual rights in the constitutional order. Their work in this regard, while not perfect, was generally consistent with the preference for private property and a limited national government that guided the founding generation. This traditional conception of the role of government and centrality of economic rights would be abruptly overthrown.

After the constitutional revolution of 1937 the revamped Supreme Court moved rapidly to enlarge federal power and to limit the protection of property in the face of state and federal regulation.

The New Deal era represented a watershed in American constitutional history. Drawing heavily from the Progressive legacy, President Franklin D. Roosevelt's program was grounded on the notion that the federal government should actively promote public welfare and exert control over the economy. Like the Progressives, the New Dealers were impatient with constitutional restraints on governmental power. They quite openly set out to revise constitutional law and reduce private economic rights. Despite some initial judicial resistance, the New Dealers were remarkably successful in achieving their goals and fundamentally altering the legal landscape. Modern constitutional law bears only a faint resemblance to the original constitutional design.

The judicial response to the New Deal has been treated extensively by scholars, and will only be sketched briefly here.[66] The Supreme Court was by no means uniformly hostile to legislative efforts to mitigate the impact of the depression. In *Home Building and Loan Association v. Blaisdell* (1934) it validated a Minnesota law imposing a limited moratorium on mortgage foreclosures despite arguments that the moratorium was a violation of the contract clause. By allowing a state's interest in regulating economic conditions to override private agreements the Court virtually eviscerated the contract clause.[67] This once-powerful constitutional provision has never recovered much vitality. Similarly, in *Nebbia v. New York* (1934) the Court sustained a dubious legislative scheme to somehow assist dairy farmers by imposing minimum prices for the retail sale of milk.[68] This decision not only foreshadowed the abandonment of due process review of economic regulation, but effectively enlarged the range of industries subject to price regulation.

True, the Supreme Court invalidated a number of New Deal congressional measures in 1935 and 1936, triggering a bitter conflict between President Roosevelt and the Court. These cases for the most part turned on the extent of congressional power under the commerce clause. In the end, of course, the New Dealers prevailed. After 1937 the Court began to defer to legislative judgments about economic matters, and paid little attention to the security of private property and contractual arrangements. The liberty of contract doctrine was flatly rejected.

A central feature of emerging New Deal constitutionalism was a judicially fashioned dichotomy between the rights of property owners and other personal freedoms. The subordination of property rights was made clear in the famous footnote 4 of *United States v. Carolene Products Co.* (1938), which indicated that economic regulations were to be deemed valid, and would receive only cursory due process review under a highly deferential "rational basis" test.[69] This double standard of judicial review finds no support in the text of the Bill of Rights or in the Supreme Court's pre- 1937 decisions. As we have seen, the framers regarded economic and other personal rights as inseparably linked. There is no evidence that they expected more searching judicial scrutiny for liberty interests than for property interests. Moreover, *Carolene Products,* although framed in terms of deference to legislators, was actually a prime example of judicial activism because it ranked rights into categories not mentioned in the Constitution or Bill of

Rights. At root the sweeping change in the Supreme Court's jurisprudence reflected a liberal legal culture which felt property was not worthy of much judicial protection. Between 1940 and the mid- 1970s the Supreme Court heard only a handful of cases involving the rights of owners, and resolved most of those against property rights claims.[70] Thereafter the Court demonstrated a fleeting interest in economic rights, but has not restored property to its once pivotal place in the constitutional order.

Conclusion

This whirlwind survey of the history of property rights is far from comprehensive. Many topics were treated briefly which warrant more extensive discussion, and some subjects were omitted altogether. The essay was designed to provide an introduction to the waxing and waning of property rights over the course of American history, and to explain how we have arrived at current constitutional doctrines. A few final words are in order.

The future of property rights in modern constitutional law remains uncertain. Although many aspects of the New Deal political hegemony have been overthrown, an abiding disinterest in property rights continues to hold sway over the academy and the federal courts. Of the property clauses in the Constitution, only the takings clause retains much viability. The Supreme Court under Chief Justice William H. Rehnquist put some teeth into the regulatory doctrine, but never demonstrated a sustained commitment to the protection of the rights of property owners. More distressing, the Court, in a series of post-World War II decisions culminating in *Kelo,* has effectively eliminated the "public use" requirement of the Fifth Amendment as a curb on the power of eminent domain.[71] This has paved the way for increasingly aggressive exercise of eminent domain to acquire private property for economic development projects. Realistically, there is little prospect for relief in the short run from either the Supreme Court or Congress.

State courts may interpret their state constitutions to provide more guarantees to property owners than are available under the federal constitution. It bears emphasis that some state courts continue to rely on state due process clauses or contract clauses to provide greater protection for economic rights than available from federal courts.[72] In particular, a number of state courts have construed the "public use" requirement of state constitutions strictly, curtailing the free-wheeling exercise of eminent domain.[73]

In 1972 Justice Potter Stewart questioned the dichotomy between personal liberties and property rights. He observed:

> In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.[74]

Unfortunately, the implicit premise of this comment□that property should receive the same degree of judicial protection as other rights□has never been realized in the post-New Deal constitutional order. In an era of big government and the welfare state perhaps the property-centered vision of the framers cannot be reclaimed. But any change must

start by fundamental rethinking about the vital place of private property in our constitutional system. If nothing else, decisions such as *Kelo* have helped to put property rights issues back in the spotlight. Heightened awareness may be the first stop toward the restoration of the constitutional safeguards for property owners.

ENDNOTES

---

* I wish to thank Jon W. Bruce who read this essay and offered helpful counsel for improvement.

[1] Stuart Bruchey, "The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic," 1980 *Wisconsin Law Review* 1135, 1136.

[2] See Thomas W. Merrill, "The Landscape of Constitutional Property," 86 *Virginia Law Review* 885 (2000).

[3] *Webbs Famous Pharmacies, Inc v. Beckwith,* 499 U.S. 155, 161 (1980). See also James V. DeLong, *Property Matters: How Property Rights Are Under Assault – And Why You Should Care* (1997), 283.

[4] See James L. Huston, "Property Rights in Slavery and the Coming of the Civil War," 65 J*ournal of Southern History* 249 (1999).

[5] See Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (2003).

[6] 13 N.Y. 378 (1856). For a discussion of *Wynehamer,* see James W. Ely Jr., "The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process," 16 *Constitutional Commentary* 315, 338-342 (1999).

[7] 123 U.S. 623 (1887).

[8] James W. Ely Jr., *The Fuller Court: Justices, Rulings, and Legacy* (2003), 140-141. See generally Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920* (1995).

[9] See generally Richard Pipes, *Property and Freedom* (1999).

[10] Edmund Burke, "Tracts Relating to Popery Laws 1765" in R. B. McDowell, ed., *The Writings and Speeches of Edmund Burke,* vol. IX (1991), 476. See generally David Landes, *The Wealth and Poverty of Nations* (1998).

[11] As quoted in James W. Ely, Jr., "The Marshall Court and Property Rights A Reappraisal," 33 *John Marshall Law Review* 1023, 1027 (2000).

[12] Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (1996), 75.

[13] John Adams, "Discourses on Davila," in Charles Francis Adams, ed., *The Works of John Adams,* vol. 6 (1851), 280.

[14] Gordon S. Wood, *The Radicalism of the American Revolution* (1991), 234.

[15] *Wilkinson v. Leland,* 27 U.S. 627, 657 (1829).

[16] Bernard H. Siegan, *Economic Liberties and the Constitution,* 2nd ed. (2006), 1-9. See also A. E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (1968).

[17] Ellen Frankel Paul, "Freedom of Contract and the 'Political Economy' of *Lochner v. New York,"* 1 *NYU Journal of Law & Liberty* 515, 528-530.

[18] Pauline Maier, *American Scripture: Making the Declaration of Independence* (1997), 87.

[19] William Blackstone, *Commentaries on the Laws of England,* vol. 1 (1765, reprint 1979), 135.

[20] Id., vol 2, (1766), at 2.

[21] John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (1986), 27.

[22] Id. at 33.

[23] James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights,* 3rd ed (2008) 30-32. See generally Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of State Constitutions in the Revolutionary Era* (1980).

[24] An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, 1 Stat. 51 (1789). See also Denis P. Duffey, "The Northwest Ordinance as a Constitutional Document," 95 *Columbia Law Review* 929 (1995).

[25] Ely, supra note 23, at 34-37.

[26] Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985), 154.

[27] Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1969), 536-543.

[28] Ely, supra note 23, at 54.

[29] *Barron v. Baltimore,* 32 U.S. 243 (1833). But see Jason Mazzone, "The Bill of Rights in the Early State Courts," 92 *Minnesota Law Review* 13, (2007) (arguing that under *Barron* "state courts were free to apply the Bill of Rights to the states").

[30] Ely, supra note 23, at 57.

[31] James Madison, "Property," National Gazette, March 29, 1792, in Robert A. Rutland and Thomas A. Mason, eds., *The Papers of James Madison,* vol. 14 (1983), 266-268.

[32] Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (1990), 30.

[33] Madison, supra note 31, at 266-268.

[34] *Vanhorne's Lessee v. Dorrance,* 2 U.S. 304, 310 (Cir. Ct. Penn. 1795).

[35] Id at 311.

[36] 3 U. S. 386, 388 (1798). See John V. Orth, *Taking From A and Giving To B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 Constitutional Commentary 337 (1997).

[37] 545 U. S. 469 (2005). Compare 545 U. S. at 476 n. 5 (Stevens, J.) with 545 U. S. at 494 (O'Connor, J.).

[38] See generally Ely, supra note 11; James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller, 1888-1910* (1995), 83-126.

[39] Stephen J. Field, "The Centenary of the Supreme Court," February 4, 1890, reprinted in 134 U.S. 729, 745.

[40] James W. Ely, Jr., *Railroads and American Law* (2001), 96-99.

[41] 157 U. S. 429 (1895); 158 U. S. 601 (1895).

[42] 10 U. S. 87 (1810).

[43] In 1890 Justice Field noted that increased commerce, new technologies, and the emergence of multi-state business operations produced cases "springing from causes which did not exist during the first quarter of the century." Field, supra note 39, at 742.

[44] Ely, supra note 11, at 1033-1047.

[45] Kermit L. Hall, *The Magic Mirror: Law in American History* (1989), 233-236.

[46] *Pumpelly v. Green Bay Company*, 80 U. S. 166 (1871).

[47] 166 U. S. 226 (1897).

[48] *Parham v. Justices of Inferior Court of Decatur County,* 9 Ga. 341, 348 (1851).

[49] 2 Johns Ch. 162 (N. Y. 1816). See Mazzone, supra note 29, at 37-43 (examining antebellum cases in which state courts applied principles derived from the Fifth Amendment takings clause).

[50] Ely, supra note 40, at 35-39.

[51] 98 N. Y. 98 (1885). See James W. Ely Jr., " 'To Pursue Any Lawful Trade or Avocation:' The Evolution of Unenumerated Economic Rights in the Nineteenth Century," 8 *University of Pennsylvania Journal of Constitutional Law* 917, 938-947 (2006).

[52] 165 U. S. 578 (1897).

[53] Wayne McCormack, "Economic Substantive Due Process and the Right to Livelihood," 82 *Kentucky Law Journal* 397, 404 (1993-1994) ("No recognized distinction between procedural and substantive due process existed until after the New Deal eliminated the substantive protections."). See also G. Edward White, *The Constitution and the New Deal* (2000), 243-245.

[54] Hall, supra note 45, at 196-197, 209. See also Herbert Hovenkamp, "The Mind and Heart of Progressive Legal Thought," 81 *Iowa Law Review* 149, 149 (1995) ("Progressive legal though was characterized by a belief that government regulation often allocates resources better than private markets.").

[55] See generally, Barbara Fried, *The Progressive Assault on Laissez-Faire: Robert Hale and the First Law and Economics Movement* (1998); Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of legal Orthodoxy* (1992), 33-63 (examining Progressive attack on freedom-of-contract doctrine); Thomas W. Merrill and Henry E. Smith, "What Happened to Property in Law and Economics?, 111 *Yale Law Journal* 357, 364-366 (2001) (observing that the legal realists "sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property").

[56] Richard A. Epstein, *How Progressives Rewrote the Constitution* (2006), 135.

[57] Welch v. Swasey, 214 U. S. 91 (1909).

[58] See, e.g., *Spann v. City of Dallas,* 111 Tex. 350, 212 S. W. 513 (1921). See also Martha A. Lees, "Preserving Property Values? Preserving Proper Homes? Preserving Privilege? The Pre-*Euclid* Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926," 56 *University of Pittsburgh Law Review* 367 (1994).

[59] 272 U. S. 365 (1926).

[60] 245 U. S. 60 (1917). See James W. Ely Jr., "Reflections on *Buchanan v. Warley*, Property Rights, and Race," 51 *Vanderbilt Law Review* 953 (1998).

[61] 198 U. S. 45 (1905). For a helpful treatment of *Lochner,* see David E. Bernstein, *Lochner v. New York*: A Centennial Retrospective," 83 *Washington University Law Quarterly* (2005).

[62] 261 U. S. 525, 546 (1923).

[63] 285 U. S. 262 (1932).

[64] 260 U. S. 393 (1922). See Lawrence M. Friedman, "A Search for Seizure: *Pennsylvania Coal Co. v. Mahon* in context," 4 *Law and History Review* 1 (1986).

[65] 260 U. S. at 415.

[66] Compare William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995) with Richard A. Epstein, "The Mistakes of 1937," 11 *George Mason University Law Review* 5 (1988).

[67] 290 U. S. 398 (1934). For assessments of *Blaisdell,* see James W. Ely Jr., "The Protection of Contractual Rights: A Tale of Two Constitutional Provisions, 1 NYU *Journal of Law & Liberty* 370, 381-382 (2005); Douglas W. Kmiec and John O. McGinnis, "The Contract Clause: A Return to the Original Understanding, 14 *Hastings Constitutional Law Quarterly* 525, 541-544 (1987).

[68] 291 U. S. 502 (1934).

[69] 304 U. S. 144, 152 n. 4 (1938).

[70] See James W. Ely Jr., "Property Rights and the Supreme Court in World War II," *Journal of Supreme Court History* (1996), Vol. 1, 19-34; Richard A. Epstein, "The Takings Jurisprudence of the Warren Court: A Constitutional Siesta," 31 *Tulsa Law Journal* 643 (1996).

[71] *Berman v. Parker,* 348 U. S. 26 (1954); *Hawaii Housing Authority v. Midkiff,* 467 U. S. 229 (1984); *Kelo v. City of New London,* 545 U. S. 469 (2005).

[72] See Peter J. Galie, "State Courts and Economic Rights," 496 *Annals of American Academy of Political and Social Science* 76 (1988); John A. C. Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 *Northwestern University Law Review* 266 (1958).

[73] Ely, supra note 23, at 157-158.

[74] *Lynch v. Household Finance Corp.,* 405 U. S. 538, 552 (1972).