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Life, Liberty & Whose Property?: An Essay on Property Rights

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ESSAY

LIFE, LIBERTY & WHOSE PROPERTY?: AN ESSAY ON PROPERTY RIGHTS

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This essay explores the place that the concept of property rights occupies in our constitutional system. The word "property" has been used in a number of ways in the history of our Republic. I use it here in the way James Madison did:

> PROPERTY
>
> This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."
>
> In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*
>
> In the former sense, a man's land, or merchandize, or money is called his property.
>
> In the latter sense, a man has property in his opinions and the free communication of them.
>
> He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.
>
> He has property very dear to him in the safety and liberty of his person.
>
> He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

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* Chief Judge, United States Court of Federal Claims. I want to thank T. Kenneth Cribb, Jr., and Lawrence J. Block for taking the time to read and comment on this essay.

> In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.
>
> Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions.
>
> Where there is an excess of liberty, the effect is the same, tho' from an opposite cause.[1]

While the word "property" does not appear in the Preamble of the Constitution, the Federalist Papers make it very clear that each objective enumerated in the Preamble involved, in part, the protection of the citizen's property rights.[2] In fact, using the Madisonian conception that property includes all of the fundamental aspects of the integrity of the human person, *life, liberty and property*, the whole preamble is about protecting the citizen's rights in property and property in rights.

My thesis here is three-fold. The first premise is that the type of free society envisioned by the Framers requires the jealous protection of property, correctly understood. The second prong is that no principled distinction can be made between what we today loosely refer to as political, religious, artistic, or personal liberty, and property rights or economic liberty. The third aspect is that we have as a society and legal system, at least since the progressive era, tended to be insensitive to property rights or economic liberty.

I. PROPERTY RIGHTS & THE FREE SOCIETY

My initial point is that a free society cannot exist without the strong protection of individual property rights and the mechanism for their jealous protection. At a time when we pay lip service to the concepts of a "free society," "market economy," and a "free enterprise system" this first point may sound like a truism in little need of intellectual defense. For two reasons I think this is not so.

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1. JAMES MADISON, PROPERTY (1792) *reprinted in* 6 THE WRITINGS OF JAMES MADISON, at 101 (Gaillard Hunt ed., 1906).

2. *See, e.g.*, THE FEDERALIST Nos. 84, 85 (Alexander Hamilton).

The Nightmare

First, the world has been through a nightmare that has not yet evaporated into the morning sunshine. For over seventy years the other "superpower" on this planet subscribed to an ideology in which the core belief was a rejection of the concept of private property. Not only was Soviet ideology at its core opposed to private property and liberty, but the Soviet regime and other socialist states attempted to rigorously embody that core belief in the structure of their societies. Statutes, courts, and monetary and regulatory systems were developed with the vision and underlying rule that property rights, in virtually all their Western manifestations, did not exist.

The aftereffects of this belief, or "nightmare," will be with us for decades to come. While the wounds are healing rapidly in Hungary, the Czech Republic, and Estonia, the Russian patient will not fully recover for years, and relapses have already occurred in parts of the old empire. The fifth of the world's population that lives in China is only getting a partial dose of property and liberty, and only in certain distinct areas. Thus, the question of whether a free society can exist without property rights of the kind and level protected by our constitutional system is a real and significant issue in the world.

The question of whether a free society can exist without property rights is also, I would contend, a real and significant intellectual issue in the America of 1996. This is not because any major group, social or political, has urged the abolition or severe limitation of property rights. The reason the issue is of current relevance to law and society is, ironically, because property rights have not been a cutting edge issue for a while. Their underlying theory therefore, has fallen into disuse, and perhaps has even atrophied. We have little appreciation for what property rights mean to practical legal or legislative policy. We rarely focus on the reason for such rights in general, and the logic that may follow from accepting those premises. We often create statutory and legal policies that conflict with each other because of a confused set of underlying premises about property rights.

To further this theme, we are living at the end of an intellec-

tual era that has been rather hostile to individual property and liberty. The twentieth century has been enamored with the power, rationality, and efficacy of the State and central planning. Much of this positive feeling came from the dramatic strides made in the late nineteenth and early twentieth centuries by science and industry in remaking the physical world. The power of the rational mind to tame, and even restructure, nature, through rational human invention, held several generations in admiring awe. The railroad, telegraph, electric light, and machine made time and space itself manipulable in ways formerly only dreamed of by magicians.

Why not manipulate human beings and society with all their foibles and defects? This was the time during which social science emerged as a practical concept, and Dean Langdell was attempting to bring the organizing logic of the sciences to bear upon the common law. Slightly later, as a corollary to the concept of the social scientist there emerged the concept of the social engineer. The social engineer would create an ever more perfect society, based on social science, just as mechanical, chemical, and electrical engineers were creating ever more efficient and rational factory, production, and transportation systems. As the chemical engineers used new discoveries in chemistry to design new chemical plants and processes, the social engineers would use the new "sciences" of sociology and psychology to restructure society. Just as there is no right in a chemical plant for water not to boil at 212°F., there would be no right to resist progressive social change based on the laws of social science.

The American progressive movement, one of the first political expressions of this awe of science and rational central planning, saw individual rights and the Constitution as a barrier to needed progressive and scientific social reform. The intellectual climate, at best, looked at property as a poor relation that should not be allowed out of the kitchen to socialize with political, scientific, and artistic liberty in the front parlor. The courts and treatises became ever more sympathetic, with some exceptions, to the needs of the sovereign for more central power to solve real or perceived social and economic problems. This, of course, generally came at the expense of property rights.

As an optimist, I see this intellectual trend as having run its

course. It has burned out in the chaos of inner cities, racked by drugs, illegitimacy, and crime. It has crumbled with the Berlin Wall and the total economic and environmental disasters made visible by the collapse of socialism. It has shattered in the bombed-out buildings of a former country called Yugoslavia. At home, pollution, cancer, AIDS, nuclear waste, and product liability have all shaken to its very core our faith in the ability of science to solve human problems, and perhaps even its ability to make the world better. On the optimistic side, our faith in central power has dissipated in the flood of chaotic freedom wrought by a million Internet sites and a thousand new ways of making a living. People who are no longer tied to the factory, the neighborhood store or bank, or even required to live in a single place, tend to be rather libertarian by habit, if for no other reason.

While the anti-property rights intellectual bias has begun to disappear, it has left its mark upon our law and courts, and their basic underlying assumptions. Thus, an understanding of the role of property rights in a free society is timely.

A People of the Law

Understanding property rights is perhaps particularly timely in a society like ours, built upon a foundation of a written Constitution. In this sense America is a unique nation. Our people come from every land on Earth. Even the ancestors of Native Americans migrated here thousands of years ago across the Bering land bridge. We are a people of every racial group, every known religion, and virtually every language. What unites us as a nation is our Constitution. It is our nationality just as much as the time-immemorial connection with the land of France makes a French person French.

Anyone who subscribes by oath to uphold and defend the United States Constitution may become an American. It is our civil religion and our repository of public values. To the extent property rights lie at the heart of the document, they are at the heart of our nationhood and nationality. To the extent we lose our constitutional values, we risk the fate of a Bosnia, maybe not today, but too soon, even if it is a hundred years off.

The Dawn

Why are property rights essential to the existence of a free society? Here my theory is relatively simple. They are the only serious barrier to governmental tyranny while at the same time the only real mechanism for civilized human interaction and creativity. Of course, since property is a right, not a thing, its existence is dependent upon the jealous enforcement of property rights held by individuals against the government.

Let me illustrate the first part of the statement. Arbitrary or tyrannical governmental power is limited, according to the civics textbooks, by the power to vote, the freedom of speech, and by the courts' power to enforce these and other fundamental rights. As a mechanical description, this illustration is highly simplistic, but not fundamentally mistaken. It does not, however, fully describe the working dynamic of a free society.

Without extensive property rights, jealously defended, only the government would have the resources needed to organize political campaigns or parties of any size. Without property rights, no individual would have a base to run for office other than those who hold governmental power. Without property and contract rights, litigation in the courts would be a very limited and ineffective tool for protecting anything. The judiciaries of every former socialist country are a stark testimony to the weakness and ineffectiveness of a dependent judiciary. Without the right to advertise profit-making products, the free press and media necessary for effective free speech, would be a mere illusion.

Underlying all of our political and intellectual freedoms which make for a civilized society is a foundation of widely dispersed private property, and all the attributes of that system that Madison so clearly understood: freedom to contract, free markets, and personal security. Without this foundation, political liberty and the ability to exercise those rights guaranteed by the First Amendment would be a mere sham.

Modes of Human Interaction: Command

Let me now focus on a more neglected portion of my first point. Property rights not only serve the "negative" role of defending the individual against the state, but also serve a vital "positive" role, necessary to any free society. Human interaction only occurs in a few ways. The first is when one person commands another. This occurs in socialist command economies, in slavery, in the military, and in legal relationships. Much of the Anglo-American legal tradition has been concerned with civilizing, ameliorating, and making tolerable the limited areas where command is necessary for human interaction even in the most free of human societies.

Our criminal law, the area of administrative due process, and the Uniform Code of Military Justice are all areas where we have modified command decisions to limit their potential for tyranny and human suffering. Until we become angels, we will need these areas of the law. It is a mark of the progress of civilization that we have managed to abolish some areas of command decisions like slavery and forced religious worship.

Tradition

The second major mode of human interaction is tradition or custom. People assume relationships with each other because the culture tells them this is the way it should be. Relationships with churches and synagogues, family members, neighbors, colleagues at the bar (both kinds), and many others, all have significant components of this mode of interaction. Unfortunately, tradition and custom, as effective rules governing behavior, are fast fading into our past as television and the Internet replace the town square and extended family as our primary sources of information and socialization.

In the highly mobile America of the twentieth century (and for that matter the world), fewer and fewer people live in communities where a compact culture, sufficient to direct human interaction in any complex way, exists. Even in the most isolated American town, satellite dishes can be seen dotting the landscape. There is hardly a spot on earth where CNN does not

keep people informed hourly, rather than weekly or monthly. In 1988, traveling in very rural Pakistan in the Himalayas, I found local people following the American presidential election with information that was not two days old (and more current than what I had when I left the United States a week before)!

Cooperation: Property Rights

The only alternative to command or tradition as a basis for human interaction is rational cooperation for mutual benefit. Property rights are the only mechanism by which this cooperation can be carried out over any length of time and beyond a handful of individuals. Friends may plan a fishing trip, but no fishing fleet was ever organized except by command, custom, or the exercise of property rights. The accumulation of capital, the development of trade beyond local barter, and the specialization of labor upon which the modern world depends, all find their mechanism in property rights.

Even the most voluntary of efforts, charities, clubs, and religious institutions are organized by the mechanism of property rights. Property rights also provide the tool whereby such human interaction can be evaluated by the individuals involved. They allow the proper allocation of resources including, most importantly time, to be distributed in the mix most appropriate at any time to fulfill the goals of those cooperating.

Without a firm system guaranteeing property rights, humans are left with only command or tradition as arbitrary and very inefficient organizing principles. Without property rights they are also left with no free society.

II. LIBERTY = PROPERTY

The second aspect of my thesis, that there is no distinction between liberty and property, is best illustrated by the legal cases dealing with the freedom to advertise, so called "commercial speech." These cases have made it abundantly clear that no principled line can be drawn between speech directed to making money, and speech directed to espousing a political position. Any rationale that will allow you to suppress one will allow you to suppress the other. First Amendment theory has reluctantly

been drawn to this logic. The reluctance has been in large part due to the hostility modern legal theory has borne towards property rights and profit-making. Somehow it was not as acceptable to advertise a soap as to promote a candidate, even if the candidate was "dirty" and the soap was clean. Chief Justice Rehnquist captured the essence of this attitude when he noted in *Dolan v. City of Tigard*[3] that there is "no reason" why one right protected under the Bill of Rights "should be relegated to the status of a poor relation" of other, more frequently cited rights also protected by those constitutional provisions.[4]

Commercial Speech: Case Study

In the first cases to recognize this fact, *Bigelow v. Virginia*[5] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[6] the Supreme Court was forced to confront the fact that human motives cannot be separated by any objective test. The desire to make a buck and the desire to write a poem appear very similar. Time, place, and manner are of little use in distinguishing such disparate desires. A political commercial is hardly different in length, mass, chemical composition, or albedo than one for Pepsi or Marlboro. Even the individuals who want to build houses are no different in demographics than those who want to write short stories. Thus, the hallmark of First Amendment theory, that objective tests like time, place, and manner are constitutionally permissible restrictions, while subjective tests of content are impermissible, seems to require eliminating the distinction between commercial speech and all other kinds of speech.

If a categorical distinction cannot be maintained in such a relatively clear conceptual area as free speech theory, the problems with exercising other liberties, where the mechanics and motivations are often far more complex, become mind boggling. This complexity sometimes causes theorists to ignore such areas. The lesson I draw, however, is that perhaps our whole categorical scheme is inadequate. Civil liberty and property

3. 512 U.S. 374 (1994).
4. *Id.* at 392.
5. 421 U.S. 809 (1975).
6. 425 U.S. 748 (1976).

rights are not two types of "things," they are the same "thing." House building and poem writing are no more different than poem writing and sculpture. They are all exercises of one's fundamental rights.

III. ECONOMIC LIBERTY: CONSTITUTIONAL STEPCHILD

This brings me to the third and final aspect of my thesis. Since the Great Depression, our legal system has become insensitive to those rights associated with property or economic liberty. I have already suggested some of the intellectual currents that prompted this insensitivity. The definitive intellectual history of the anti-property-rights bias has yet to be written, though there are some good works on the subject. It would be impossible for this article to include such a history in the time, space, or purpose allowed, and the cultural reasons here are not as important for this article as the existence of the bias in our current constitutional law.

The Intellectual Vision

Before examining several of the manifestations of the anti-property rights bias, I should note that the movement away from economic liberty and towards centralized governmental power cannot be understood in primarily political terms. It is not, nor has it been, a political phenomenon though it may affect political debate. Too often this movement is portrayed in contemporary society as a political phenomenon. This may be because we have lost an understanding of how to think about society in terms other than those of political rhetoric. To be truly understood, the issue must be seen as a conflict of values, conceptions, and views of the world. The political implications of the bias may ultimately be important, but the political implications are a very secondary phenomenon—an effect, not a cause.

Today, two world views about the structure of society contend for our adherence. One view sees society in danger of disintegration without some strong central governmental authority to hold it together. The other sees individuals as fully capable of organizing most of life, with collective authority at most playing

a traffic-officer-type role. Property rights are profoundly individualistic. They thus have been seen somewhat negatively by those who hold the first world view, and positively by those who hold the second. The first view has been dominant in America for much of this century, while the second view now seems to be gaining an ascendancy.

Almost from the country's origins, the federal legal system was confronted with the task of resolving disputes between individuals claiming that the government had deprived them of rights. The government or its beneficiaries usually defended against these claims by arguing that such action was justified by the needs of the government or society. The dilemma of the legal system was always how to resolve these disputes in a principled way from a general constitutional provision. The need to resolve such disputes in a "principled way" occurs because the very essence of the common law tradition, as well as the meaning of the concept "law" within that tradition, is a principled, nonarbitrary, rationally predictable resolution of disputes by independent and noninterested persons. In fact, no legal system can long exist without this *raison d'etre*. But, how do you do it when the facts of the disputes keep changing?

Five Judicial Eras and Four Models

Looking at the Supreme Court, we can identify five distinct eras during our history.[7] The first, growing out of the Marshall Court, and generally dominant between 1801 and 1836, was the vested rights era. This can best be symbolized by *Trustees of Dartmouth College v. Woodward*.[8] This era and its approach found that where the non-government claimant had vested rights, claims based upon a common expectancy of non-intervention by the government, the government could not undertake the action, no matter how worthy. The concept of vested rights drew heavily upon common law concepts of contract and property. A strong element of its theory was that governmental policy should not act retroactively.

7. These are very rough categories, I admit, and their definitive analysis needs considerably more research.

8. 17 U.S. (4 Wheat) 518 (1819).

The second approach, which coincided with the tenure of Chief Justice Taney, and the rise of Jacksonian democracy and nationalist expansion into the West, tended to defer the conflicts to the legislative branch, which largely meant deferral to state legislatures. The doctrine of popular sovereignty reached its most dominant point during this period. This era put an abiding faith in the political process to protect individual rights from government power. Neighboring states, with empty land, served as a backup constraint upon state power when pure democratic choice threatened minorities, as it did in the case of religious minorities at that time. With respect to federal power, state sovereignty and popular democracy provided all the limits needed. The case that perhaps best symbolizes this second approach is *Charles River Bridge v. Warren Bridge*.[9]

The Civil War, and in its aftermath the repudiation of state sovereignty reflected by Reconstruction, led to a new concern with protecting liberty against state as well as national power. This ushered in the third era in my categorical scheme. Its approach relied on the federal courts using the new Fourteenth Amendment.[10] These concerns, along with the industrial revolution's need for economic liberty, became engines driving the law to defend and expand economic liberty in various sectors against state and national power. For the most part, the national government as a whole supported the goal of greater protection of economic liberty; therefore, little restraint was needed for national policies infringing upon this liberty. This era continued, with some reversals during the rise and fall of progressivism, until the Great Depression. The case that became its symbol is the much maligned *Lochner v. New York*.[11]

The fourth categorical era began in the throes of an apparent economic collapse, combined with the rise of collectivist ideologies in Europe, as well as at home. The courts, particularly the Supreme Court, no longer sought a conceptual framework to resolve disputes over claimed economic liberty violations; this was not part of the judicial role. The courts abandoned all conceptual tools that might bring them into conflict with national

9. 36 U.S. (11 Pet.) 420 (1837).
10. U.S. CONST. amend. XIV.
11. 198 U.S. 45 (1905).

economic policy as set by the President and Congress. Property became a very narrow concept where judicial scrutiny was, at most, confined to takings under the Fifth Amendment,[12] understood as the narrowest definition of property rights. Perhaps *Wickard v. Filburn*[13] symbolizes the era best. Economic liberty meant whatever the government said it meant.

The Final Chapter?

We have entered a fifth era. This era began haltingly in the mid-1970s with the commercial speech and takings cases. As yet, it lacks a coherent or comprehensive approach to resolving disputes between citizen and sovereign over the limits of governmental power. I believe, however, some things can be said about the current era's trends.

First, the Law and Economics movement in the law schools, beginning at the University of Chicago, has had the effect of sensitizing the legal system to the reality of economic effects of judicial actions, as well as the judicial and legal process itself. During previous eras, courts often acted as if the world was as simple as the hypothetical fact patterns that are often the basis of judicial law-making in the summary judgment or appellate context. In addition, the courts seemed to assume that the judicial process was cost-free, instead of being one of many factors to be considered in making economic decisions. Finally, the courts acted as if the dynamic society we live in was frozen while a decision was issued, with a slow period of thaw following which the society contemplated how to change conduct to comply with the new understanding of the law enunciated by the decision. This almost mythological view has, in part, been severely shaken by the Law and Economics movement's insights. It is hard to ignore economic liberty as an issue when the dynamism of the economy is understood. Economic analysis has changed the law's conceptual framework.

The problems of mass communication, minority enterprise, vast federal regulatory activity, and environmental quality also have also forced the courts to consider, in ever more detail, the

12. U.S. CONST. amend. V.
13. 317 U.S. 111 (1942).

connections between the free society and economic liberty. Not since the early days of New Deal legislation has the problem even seriously been back to the Supreme Court. Now, its foundational questions again are being considered. Note the almost cavalier treatment of the equal protection challenge to "economic" regulation in *New Orleans v. Dukes*,[14] even though there was some evidence of racial discrimination in the regulation. Thus, reading the tea leaves indicates that economic liberty protections in the Constitution may be seen as judicially enforceable limitations on government that are not totally obsolete. This conclusion is bolstered by the decision in *United States v. Lopez*[15] which suggested for the first time in many years some limits on the federal government's power under the Commerce Clause.

Another trend has been to take the mechanisms of economic liberty more seriously. While this has been most pronounced in the Supreme Court's attention to takings claims and advertising restrictions, it can also be found in the areas of contract rights, due process for business organizations, and the protection of intellectual property. In all these areas, however, no deep trend has developed. There is certainly no paradigm for treating economic liberty as an equal partner with other types of liberty. Nor is there any coherent framework for protecting economic liberty as such. We are not seeing a restoration of substantive due process or vested rights, nor are we likely to.

There is a high likelihood, however, that we will see a more even distribution in the courts' scrutiny over alleged constitutional violations. No longer will claimed violations of the Contract, Export, Commerce, or Spending Clauses be losers from the moment they are filed, no matter what the facts show. Those provisions of the Constitution designed to protect economic liberty again appear to have some use to the legal and judicial system. If a truly new categorical era is emerging, it will be identifiable by the development of some conceptual framework by which to balance the inevitable conflicts between alleged individual rights and claimed constitutional sources of government power. Property rights, federalism, or economic

14. 421 U.S. 961 (1975).
15. 115 S. Ct. 1624 (1995).

liberty may provide such a framework. More likely, it is a concept yet to be articulated.

A word of caution should be noted. The framers of the Constitution never intended the judiciary to be the primary guardians of liberty, economic or otherwise. They placed their hopes in the political branches emanating from a healthy and vibrant free society. The constitutional separation of powers, the system of checks and balances, and most importantly federalism, were their brilliant inventions to keep our nation from the tyranny that dominated most of the world for most of history. And, for the most part, it has worked well.

The courts work at the margins. They can restrain dominant factions for relatively short periods, but they cannot ultimately resist a majority faction that cares little for liberty or property rights. We have been blessed by a providential God, who, for most of our history, has given us a world where the mechanisms created by the Framers did their job. At present we do not need a judicial revolution for property rights. We need, rather, some fine tuning and new conceptual tools whereby the legal system can understand anew the intimate connections between life, liberty, and property, and the fundamental integrity of the human person.