The Global Debate over Constitutional Property

Lessons for American Takings Jurisprudence

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The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London

Printed in the United States of America

15 14 13 12 11 10 09 08 07 06 1 2 3 4 5

ISBN: 0-226-01298-0 (cloth)

Library of Congress Cataloging-in-Publication Data

Alexander, Gregory S., 1948–
The global debate over constitutional property : lessons for American takings jurisprudence / Gregory S. Alexander.
p. cm.
Includes bibliographical references and index.
ISBN 0-226-01298-0 (cloth : alk. paper)
1. Right of property—United States. 2. Eminent domain—United States. 3. Right of property—Germany. 4. Eminent domain—Germany. 5. Right of property—South Africa. 6. Eminent domain—South Africa. I. Title.

K721.5.A44 2006
343'.0252—dc22 2006002484

♾ The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992.

To my children, Beth and Ted

PREFACE

This book was written with two sets of readers in mind. The first are readers who are interested in the general normative question whether constitutionalizing property is desirable. The second are readers who are specifically interested in the constitutional property law of the countries discussed here, primarily the United States, Germany, and South Africa. Hopefully, both sets will comprise an international rather than strictly American audience. Because the intended audience is so diverse, not all chapters will be of interest to all readers. For example, American readers who are conversant with the Supreme Court's takings jurisprudence may wish to skip chapter 2, which is aimed at readers who know little or nothing about American takings law. Chapters 3 and 4, on German and South African constitutional property law, respectively, can be read as freestanding contributions, although they discuss themes that recur throughout the entire book. Chapter 1, which discusses why the issue of making property a constitutional right is so controversial, can also be read as a freestanding essay. Nevertheless, all of the chapters were written with the intent of constituting an integrated whole.

Several aspects of constitutional property law, including some that are of keen interest to comparativists, have been excluded. Notable among these exclusions is the status of property as an international human right. I do not discuss, for example, property under the European Convention on Human Rights (1950) or the Universal Declaration on Human Rights (1948). Nor do I discuss takings disputes under the North American Free Trade Agreement. Although these aspects of comparative constitutional property law are extremely interesting and important, limitations of space as well as my own lack of expertise in these areas made it seem prudent for me to leave

these topics for other authors who are much more knowledgeable about international law than I am.

The discovery of an explicit social-obligation norm in other constitutional property clauses was what led me to write this book. Several years ago, I encountered the property clause of the German Constitution (more properly, the Basic Law). Having just completed work on a book that argued that property as the basis for "propriety," or the common social welfare, was a recurrent but underdeveloped theme in American legal thought, I was struck by the fact that the German constitutional property clause, unlike the takings clause of the American Constitution, expressly states that "[p]roperty entails obligations." The same section went on to specify, "Its use should also serve the public interest." I was interested in what differences, in rhetoric and reasoning if not in result, this social-obligation language might produce between American and German constitutional property law. So began my first undertaking in comparative law.

The idea of an explicit social-obligation norm in constitutional property law was also the basis for my interest in the property clause of South Africa's postapartheid constitutions. At an international conference on "Property Law on the Threshold of the 21st Century," which was held in Maastricht, The Netherlands, in 1995, I was first exposed to the intense debate then occurring in South Africa over whether property should be made a matter of constitutional protection in the newly democratic regime. South African scholars, all of whom were remarkably well-informed about both American and German constitutional property law, educated me about the unique aspects of the problem of constitutionalizing property in postapartheid South Africa. I was particularly struck by the way in which first the interim (1993) and later the final (1996) constitutions elaborated on the social-obligation norm far more extensively than the terse language of the German Basic Law's property clause. My interest kindled, I maintained contact with several of these scholars, particularly Andre van der Walt, over the following years and became better informed about the experiment that South Africa's constitutional property clause represents. A book that brought together the similarities and differences among the American, German, and South African approaches to constitutional property was a natural outcome of these experiences.

In a very real sense the book is also a natural successor to my earlier book, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776–1970* (1997). The idea of a social-obligation norm as a fundamental aspect of the constitutional right of property is an integral aspect of the vision of property as the material basis for promoting the com-

mon social good. While that book was intended to be strictly historical and descriptive, however, this book concerns modern law and is both descriptive and normative in its aims. Those aims are described more fully in the introduction, but it bears stating at this point that one of the book's main objectives is to encourage the development of an explicit social-obligation norm of American takings law. The experiences that other legal systems have had with such a norm seem to me a useful means of advancing that objective. That, at least, is the hope.

ACKNOWLEDGMENTS

This book has been in gestation for quite some time, and I have accumulated a number of debts in the process of working on it. I am indebted to the Max Planck Society for providing me with a grant to spend extended periods of time at the Max Planck Institute for Public Comparative and International Law, in Heidelberg, Germany, and to its past codirector, Professor Dr. Jochen Frowein, for encouraging my work during my stays there. A fellowship grant from the Stellenbosch Institute for Advanced Study, in Stellenbosch, South Africa, allowed me to spend time working through South Africa's new constitution and consulting with colleagues there. I am indebted to its director, Bernard Lategan. Generous research support also came from Cornell Law School. I am indebted to Dean Stewart Schwab for his support and encouragement. Finally, and most importantly, this book could not possibly have been completed without a year's sabbatical spent as a Fellow at the Center for Advanced Study in the Behavioral Sciences, in Stanford, California. I am indebted to the William and Flora Hewlett Foundation for funding my fellowship there and to Doug McAdam, the center's former director, for his encouragement and incomparable hospitality. The center provided a matchless environment for engaging in collaborative conversations with amazingly talented scholars about this project.

Portions of this book have been the subject of talks at several institutions, including the Max Planck Institute in Heidelberg, the University of Stellenbosch, the University of California at Berkeley, Santa Clara University, the University of Southern California, the University of Virginia, and Cornell University. I want to express my gratitude to those institutions and their members for their warm hospitality and encouraging comments. I am grateful to a number of people for helpful comments on various chapters. These readers include Annelise Riles, Steven Shiffrin, Trevor Morrison, Eric

Kades, Lauren Edelman, Martin Shapiro, Christopher Kutz, Ehud Brosh, Sia Akermark, Daniel Bell, Laura Underkuffler, and James Krier. Andre van der Walt, Hanoch Dagan, and two anonymous reviewers provided exceptionally helpful comments and suggestions on much of the book. Superb research assistance was provided by D. S. Pensley and Beth Golmar. I am deeply indebted to all of these individuals.

CONTENTS

INTRODUCTION

Constitution making is in the wind. Since the 1980s, constitution making and constitution revision have occurred at an unprecedented rate around the world. Beginning with the end of apartheid in South Africa and the fall of communist states in central and Eastern Europe and continuing with constitutional revisions throughout Africa and South America, constitution making has proliferated in recent years. These events have led American constitutional lawyers and scholars to discover the field of comparative constitutional law.[1] A comparative approach was rare in American constitutional law scholarship just a decade ago, but today it is flourishing. Prompted perhaps by what Bruce Ackerman calls the "rise of world constitutionalism,"[2] American constitutional lawyers have increasingly turned their attention to the comparative study of a wide variety of topics, ranging from federalism to abortion to free speech.[3]

Despite comparative constitutional law's revival in the United States, American constitutional scholars have generally ignored the topic of property.[4] Whereas American constitutionalists have focused a great deal of comparative attention on individual constitutional rights such as equality and privacy, they have devoted very little attention to constitutional protection of property elsewhere in the world. This book is an attempt to fill that gap.

American comparative constitutional scholars' inattention to property is strange. One of the most controversial questions confronting modern constitution makers around the world has been whether to recognize property as an entrenched right. In postapartheid South Africa, for example, property was included in the interim and final constitutions, but only after a great deal of heated debate, as I will discuss in chapter 4. A similar debate raged in Canada (discussed in chapter 1) a few years ago when the federal government proposed a property clause for inclusion in the Charter of Rights, and

the result was to reject constitutional property. And in Israel, 1992 legislation enacting a Basic Law on Human Dignity and Liberty has drawn sharp criticism for its inclusion of the right to property.[5] Similar disputes over constitutionalizing property have occurred elsewhere in the world as well.[6]

Why the Controversy?

Why has constitutional property been so controversial? Chapter 1 provides a fuller account of the arguments that have been made in debates around the world over the idea of a constitutional right of property, but a brief summary will be helpful at this point to set the stage for the entire book.

The modern debate about whether property should be made a constitutional right has tended to be less about economics than about politics. Specialists in economic development policy have debated the importance of clear property rights for economic growth,[7] but that debate has not played a major role in the constitutional debate over property. The issue for constitutionalists is not whether secure property rights are a necessary condition for economic development (although constitutionalists may and likely do care about that), but whether property should be made an entrenched right, one that enjoys a relatively high degree of immunity from the forces of ordinary democratic politics. The constitutionally salient concern is the impact of making property an entrenched right in a democracy, particularly in new democracies.

There is an old debate over the relationship between private property rights and democracy, and the modern constitutional debate has revived much of that debate. On the one hand, critics of property rights have long argued that property undermines democracy. To them, property rights are the source of inequality, of both wealth and political power, denying meaningful opportunity for political participation and self-governance. Property is a source of domination, not democracy.[8] On the other hand, some proponents of property have argued that private property rights support democracy, or at least certain versions of democracy. Cass Sunstein succinctly expresses this old view in stating that property "creates the kind of security that is indispensable to genuine citizenship in a democracy."[9]

For those who view property as the foundation of democracy, constitutional protection of property rights is very important as a tool for creating and maintaining a liberal democratic order, particularly in new democracies. As I will discuss further in chapter 1,[10] some commentators go so far as to argue that without constitutional protection, property rights are unlikely to achieve the degree of security and stability that is necessary for a properly

functioning liberal democracy as well as for an efficient free market economy, or at least that there is a substantial risk that they will not do so.

This line of argument draws on the special place that property rights have long enjoyed in classical liberal thought. According to classical liberalism, constitutionalism is marked, as Frank Michelman puts it, by a "habitual, strong inclination toward a clear demarcation between politics and law, . . . between the supposed provinces of legislatures and of courts."[11] Classical liberals understand rights as constitutive of the private sphere whose inviolability against public action is the bedrock of personal autonomy and political liberty. They consider the right of property to be the template for all individual rights.[12] The greatest threat to property's protective role, according to this view, is democracy itself. Left unchecked, democracy degenerates into the tyranny of the majority, as legislatures persistently invade the property-based private realm with actions aimed at redistributing wealth. The "power of numbers," in Claus Offe's terms, will overwhelm the "power of property."[13] The only practical solution to this dilemma, property rights theorists surmise, is to insulate property from the forces of ordinary politics by taking it out of the province of the legislature and placing it exclusively (or nearly so) in the hands of courts.

From this perspective, constitutionalizing the right of property makes great good sense. Making property a matter of constitutional protection means that questions about property—how it is distributed, how it is used, and so on—are not subject to the pathologies of ordinary politics. Property becomes "Super Property." It is substantially (although not completely) isolated from the public sphere, thereby securing the integrity of the private sphere. Where property has been given constitutional status, the courts' only legitimate role is strictly enforcing individual property rights. Specifically, it is the job of courts to protect private property interests against legislative actions that redistribute property entitlements, actions that violate the strict separation between the public and private spheres. Liberals of this persuasion hold that property, conceived as the right of individual owners to exclusive possession, use, and control of desired and scarce resources, is the very foundation upon which liberalism's categorical separation of the public and private realms is based.

This version of liberalism is deeply flawed, as critics have pointed out. One of its defects is that it rests upon the old Blackstonian conception of ownership, which depicts ownership as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[14] As any number of scholars have pointed out, this conception of ownership has

never actually existed, either in Blackstone's time or in ours.[15] It is simply a myth, but a myth that is very persistent.

The Blackstonian conception of ownership underscores classical liberalism's mistaken notion that property serves as the basis for the categorical separation of the private world from the public world. The whole notion that the private and public spheres can be kept categorically separate is a pernicious illusion. The public and private are inevitably interdependent. With respect to private property, a regime of legal property rights is simply not possible without the active engagement of the public sphere. As the American legal realists correctly pointed out, property rights are nothing more or less than allocations of the state's coercive power to individuals.[16] The enforcement of property rights requires exercise of the state's power to coerce others. In effect, then, no state, no property.

An allied theme in this critique stresses property's relational character.[17] Individual property rights are embedded in and in turn give structure to relationships. As Jennifer Nedelsky writes, rights are "a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined."[18] This relational view of rights is highly problematic for the argument that a constitutional right of property is necessary to maintain the liberal political order, which is defined as a regime in which individual interests are immune from invasions by the public will. Property's inherently relational character means that insofar as holdings are concerned, courts are inevitably in the business of redistribution. Indeed, strictly speaking, courts are constantly distributing, rather than *re*distributing, property because property, relationally understood, is always in flux. The sharp property boundaries required for the categorical separation of the private and public realms, the individual and the community, are simply not possible. Seen in this way, constitutional property is inherently distributional because property itself is inherently relational. Constitutionalization of property perpetuates the false belief that it is possible (and desirable) categorically to isolate private interests from public involvement. The cost of this illusion is a stunted form of democracy and "a system of institutions that allocates political power unequally and fails to foster political participation."[19]

Is Property a Special Case?

This problem with classical liberalism's theory of categorically separating the public and private sphere is not unique to the right of property. It is true of every individual constitutional right. If a strict or impregnable wall be-

tween the public and private realms is impossible, then no individual right can be made totally immune from collective action. The attempt to protect a right by making it a constitutional matter futilely sacrifices democracy for an illusion. Rather than eliminating the problem of collective power, the classical liberal strategy simply shifts the locus of collective control from one public body to another. It shrinks the sovereignty of the democratic legislature and expands that of unelected courts. Individual constitutional rights are protected not by removing them from the control of the state but by empowering one source of state power, the courts, over another whose legitimacy stems from the ordinary processes of democratic politics. In this respect, the decision whether to constitutionalize the right of property poses a problem that is inherent in all individual rights.

Still, property does pose a special problem for liberal constitutionalism. Property is special in two respects. First, property is inherently allocative in function. As Laura Underkuffler-Freund puts it, "[W]ith regard to property, *the giving to one person necessarily denies or takes from another.*"[20] Property rights "give to some what cannot be given to all: they allocate rights to particular individuals infinite, non-sharable resources."[21] To be sure, other individual rights, free speech, for example, may also have allocative effects, but the allocation of scarce resources is not one of the primary purposes of rights like free speech (at least not one of their commonly understood primary purposes). The allocation of scarce resources, however, is widely understood to be one of the core purposes of property rights. The inherently allocative feature of the right of property is one reason why it is so highly contentious.

Closely related to this first reason why property poses a special problem is a second. Property, not as a right but as the object of the right, or what one might call the stakes of property rights, is foundational.[22] At least some basic assets are necessary for the meaningful exercise of all other rights. Indeed, they are necessary for life itself. In this sense, property, as the access to subsistence necessities, is also foundational for the exercise of all political and constitutional rights. My rights to express dissenting political views and to vote in political elections are not very meaningful to me if I lack subsistence food and shelter. Precisely because the stakes of property rights are so high, the *right* of property, including the constitutional right of property, has been controversial. Both supporters and opponents of a constitutional right of property have tended to share the classical conception of the right of property. In its classical sense, the right of property is about *keeping,* not *getting* or *having,* access to resources, including basic subsistence resources. Those who believe that individuals should have a right to subsistence living

support, which one might consider to be an aspect of the right to *life*,[23] have opposed granting constitutional status to property rights because they have assumed that a constitutional right of property is in this sense in tension with, if not fundamentally incompatible with, a right of access to foundational goods.

These two factors have made the stakes of constitutionalizing property seem very high. Entrenching the right of property means that adjustments between competing claims to the exclusive right to appropriate the same goods cannot be made through the processes of ordinary majoritarian politics. Critics of constitutional property worry that supermajoritarian protection of property will inevitably lead to an unacceptably high degree of inequality in the distribution of scarce resources or will reinforce an existing maldistribution of wealth, including the basic necessities for human existence. In subsequent chapters of this book, I will argue that the effect of constitutionalizing property on governmental redistribution of resources depends not simply on the mere fact of whether or not a constitutional property clause exists, but also on how the clause is interpreted. Interpretation, in turn, depends on, among other factors, the character and background of a country's community of constitutional interpreters.[24] The important point to be noted here, however, is that the constitutional right of property does pose special problems.

Text Does Matter

I have indicated that one of the core themes of this book is that interpretation matters. This is not to say that text is irrelevant. Hardly. Judicial interpretation of a constitutional property clause[25] turns on many factors, among which is its text. As I will argue throughout the book, this is especially true with respect to matters related to the social-obligation dimension of the constitutional property right. What kind of property clause (and in what kind of constitution) may well influence how property rights claims are interpreted.

Constitutional property clauses are not all identical, although there are certain features that all constitutional property clauses have in common. All recognize that the state may "expropriate" or "take" property.[26] Moreover, all of them place restrictions on the state's power to expropriate property. The two notable restrictions that nearly all constitutional property clauses share are, first, that expropriations are permitted only for "public purposes" or for "public use" and, second, that such expropriations must be compen-

sated, at least to some degree.[27] Beyond these common features, certain important textual differences exist among some constitutional property clauses. Textual differences are important because they can and in some cases do influence the substantive reach of the social-obligation norm. Of these textual differences, by far the most important concerns the social-obligation norm itself. The American Constitution's property clause, the takings clause of the Fifth Amendment, contains no social-obligation provision as such. It acknowledges the limited character of the American constitutional right of property only indirectly, by permitting the state to expropriate property under particular circumstances. Beyond this, there is no formal textual recognition of the social obligation of property.

Some constitutions go further, however. They acknowledge, textually and affirmatively, that the constitutional right of property is limited by an overriding obligation that property serve the needs of society. The German Constitution, which I discuss in detail in chapter 3, is an example of such a constitutional property clause. It states, in relevant part, that "Ownership [*Eigentum*] entails obligations. Its use should also serve the public interest."[28] This social-obligation provision explicitly acknowledges, as the American takings clause does not, that owners of property have social responsibilities to society. Other national constitutions include similar language in their property clauses, and some, such as South Africa's, have textually extended the social-obligation provision beyond that of the German clause. As I will discuss in subsequent chapters, this text has facilitated judicial interpretations of both the German and South African property clauses that place significant limits on the scope and substance of the constitutional right of property. The absence of such a social-obligation textual provision in the American takings clause is one of the single most important differences between that clause and the other two property clauses that are the main examples studied in this book, the German and South African clauses. However, as I will argue in chapter 5, although the text of the American constitutional property clause lacks a social-obligation provision, its tradition does not, at least not entirely. The germ of the idea behind a social-obligation provision does exist in American takings jurisprudence. But the failure of courts expressly to acknowledge the social-obligation norm, hiding it under some murky rubric like "public-harm abating," has left it sorely underdeveloped. This is the real point separating American takings law from its German and South African counterparts. Chapter 5 proposes that American courts expressly recognize takings jurisprudence's hidden social-obligation norm and openly develop its exact contours.