

BICENTENNIAL ESSAYS ON THE BILL OF RIGHTS

The Guardian of Every Other Right

A Constitutional History of Property Rights



James W. Ely, Jr.

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JAMES W. ELY, JR.

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Editor's Preface

This book is part of the Bicentennial Essays on the Bill of Rights, a series that has resulted from the fruitful collaboration of the Organization of American Historians' Committee on the Bicentennial of the Constitution and Oxford University Press. In 1986 the committee concluded that one of the most appropriate ways in which historians could commemorate the then-forthcoming bicentennial of the Bill of Rights was to foster better teaching about it in undergraduate classrooms. Too often, the committee decided, students could have learned more about the history of liberty in America if they only had had basic texts analyzing the evolution of the most important provisions of the Bill of Rights. There are, of course, many fine specialized studies of the first ten amendments to the Constitution, but these works invariably concentrate on a particular Supreme Court case and technical legal developments. What the committee wanted, and what Nancy Lane at Oxford University Press vigorously supported, were books that would explore in brief compass the main themes in the evolution of civil liberties and civil rights as they have been revealed through the Bill of Rights. The books in this series, therefore, bridge a significant gap in the literature of the history of liberty, by offering synthetic examinations rooted in the best and most recent literature in history, political science, and law. Their authors have, as well, framed these nontechnical studies within the contours of American history. The authors have taken as their goal making the history of rights and liberties resonate with developments in the nation's social, cultural, and political history.

Kermit L. Hall

Preface

A widely shared desire to acquire and enjoy property has long been one of the most distinctive features of American society. Defense of economic rights figured prominently during the American Revolution and at the Constitutional Convention of 1787. The founding generation stressed the significance of property ownership as a safeguard for political liberty against arbitrary government as well as the economic utility of private property. Mirroring this attitude, the Supreme Court throughout much of American history has championed property rights against legislative interference. This exercise of judicial authority has produced more than its share of dramatic moments, perhaps the most notable being the Court's defense of economic liberty in the 1930s, which threatened the New Deal and precipitated a constitutional crisis.

Despite an impressive literature dealing with constitutional history, there is no work which provides an overview of economic rights and the Constitution. This book seeks to trace the pivotal role of property rights in fashioning the American constitutional order. It emphasizes the interplay of law, ideology, politics, and economic change in shaping constitutional thought. A work of synthesis, this volume moves rapidly over many issues that deserve more complete treatment. Yet I hope that this concise survey will encourage a better understanding of the central place of property rights in American constitutional history, and provide a historical perspective on the contemporary debate about economic liberty.

Numerous individuals made significant contributions toward the completion of this book. I owe a special debt to Kermit L. Hall, the general editor of the OAH Bicentennial Essays. He provided constant encouragement and sage advice. Michal R. Belknap and Harold M. Hyman,

members of the editorial board, offered helpful suggestions on the manuscript, as did R. Kent Newmyer for chapters 1, 2, and 3. David J. Bodenhamer and Jon W. Bruce read the entire manuscript and deserve particular thanks for their insightful comments. David Partlett and Nicholas Zeppos read large parts of the work, giving both encouragement and valuable counsel. I also benefited from the specialized knowledge of Jason S. Johnston and Robert K. Rasmussen.

Institutional support was also important. I am deeply grateful to Howard A. Hood and Peter Garland of the Vanderbilt University law library for their skill and patience in locating materials. Dean John J. Costonis provided financial assistance, and kindly granted me released time to complete the manuscript. I wish to thank Martha Waggoner for her highly effective secretarial services.

The editorial staff at Oxford University Press was consistently supportive and helpful. Nancy Lane and David Roll handled this project with skill and diligence. The manuscript was copyedited with care by Margaret Yamashita.

My daughter, Elizabeth Ely Brading, read the manuscript and made suggestions which enhanced the volume's style and clarity. This book is dedicated to my wife, Mickey, in a deep appreciation for many years of love, friendship, and support.

Nashville, Tenn.
March 1991

J.W.E., Jr.

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Introduction

For decades the protection afforded to property and economic rights under the Constitution has been of scant concern to judges and scholars. The topic, however, never entirely disappeared from view. In 1955 Justice Felix Frankfurter observed: “Yesterday the active area in this field was concerned with ‘property.’ Today it is ‘civil liberties.’ Tomorrow it may be ‘property’ again.”¹ As Frankfurter predicted, in recent years there has been a revival of interest in property issues among courts and commentators. Accordingly, it seems a propitious moment to reassess the role that property and economic rights have played in American constitutional history.

Throughout much of American history, economic liberty was an essential component of constitutionalism. From the time of Chief Justice John Marshall, the Supreme Court has favored the creation of a national market and safeguarded the rights of property owners. Moreover, property rights have often been associated with transcendent political values. In 1897, for example, Justice John M. Harlan declared: “Due protection of the rights of property has been regarded as a vital principle of republican institutions.”² The protection given to property was fully consistent with one major theme of American constitutionalism—the restraint of government power over individuals. Historically, property ownership was viewed as establishing the economic basis for freedom from governmental coercion and the enjoyment of liberty. Accordingly, a study of the constitutional status of property and economic interests reveals much about the attitudes and aspirations of successive generations.

Any investigation of the rights of property under the Constitution poses a series of difficult threshold questions. Why do we recognize rights in private property? Does private ownership promote some societal advantage? What are the parameters of ownership? Can one own a human being or an intangible concept such as an invention? What rights does ownership entail? Did thinking about private property change as American society moved from an agricultural to an industrial society? How did the growth of business corporations influence attitudes toward property ownership? These questions raise important concerns associated with the study of property rights.

The overriding issue, however, is the extent of constitutional protection for property and economic rights. The framers of the Constitution were vitally concerned with the need to safeguard property rights. Dissatisfaction with the handling of economic issues by the state governments was a major factor behind the drive for the Constitution. Yet for all of their devotion to property, it is apparent from the text of the original Constitution that the framers were initially content to rely on institutional arrangements to secure the rights of property owners. The bicameral legislative body, an independent judiciary, and the other checks and balances established by the Constitution were expected to create a political climate in which property interests would be safe. Indeed, the framers entrusted Congress with broad power to regulate interstate and foreign commerce. Only the contract clause—"No State shall . . . pass any . . . Law impairing the Obligation of Contracts"—provided a specific guarantee for existing economic relationships, and that clause did not restrict Congress.

This almost exclusive reliance on political institutions was altered by the ratification of the Bill of Rights in 1791. The Fifth Amendment contained two important clauses dealing with property: "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." Like other portions of the Bill of Rights, these clauses were designed to limit the scope of majority rule over matters deemed fundamental in a free society.

Notwithstanding these important constitutional safeguards, owners in this country have never enjoyed absolute dominion over their property. For example, under the common law doctrine of nuisance, owners could not use their land in a manner that unreasonably interfered with their

neighbors' property. Moreover, community customs permitted hunting on unenclosed land and access to bodies of water. The regulation of certain businesses, such as taverns and ferries, was also well established in the colonial era. Individuals can be divested of property by taxation. An even more drastic source of interference with property rights is eminent domain, the power to compel a transfer of property from a private owner to the government for a public purpose. The Constitution does not expressly confer eminent domain authority, but the existence of such power has long been viewed as an inherent aspect of sovereignty.

The constitutional protection of property rights has at times been a highly controversial topic. Some maintain that in safeguarding economic liberty, courts foster competition, enhance political independence, and support a system grounded on property and private enterprise. Others picture constitutionalized property as a barrier to reforms and income redistributions designed to assist the disadvantaged and as a threat to the welfare state.

Indeed, the Supreme Court's historic role of supporting economic rights has sometimes generated allegations of class bias, sentiments that have been echoed by contemporary observers. "The federal courts," one scholar charged, "have through most of the country's history been the guardians of wealth and property against the excesses of democracy."³ Such a sweeping generalization surely requires qualification. There is, of course, some truth in the contention that the Supreme Court has often aided creditors and entrepreneurs against the claims of debtors, employees, and farmers. But at no time has the Court blocked all regulatory or redistributive legislation. Furthermore, judicial review of economic and social legislation, such as health and safety regulations, has not always resulted in rulings favorable to business interests. On a more sophisticated level, one may question whether this complaint is misdirected. The Constitution and the Bill of Rights, after all, contain several express provisions to safeguard economic interests, and the Supreme Court can hardly be expected to render them nugatory. The underlying source of friction is that reformers and liberals favor a more equal distribution of wealth and economic power. Inevitably they place a lower value on property rights than did the framers of the Constitution. Thus, there is bound to be conflict between the egalitarian programs of contemporary liberal jurisprudence and the property clauses of the Constitution.

Another complexity is that disputes over the constitutional protection of economic rights have often been entangled with sectional conflict. Reflecting a rural economy based on the plantation system, the South generated little capital before 1900 and relied heavily on outside investment. The region's debtor position influenced the development of law, as southern lawmakers consistently favored the interests of debtors over those of creditors.⁴ Investors, on the other hand, were concentrated in the Northeast, and so inevitably there was a sectional dimension when the federal courts backed the claims of creditors. Assertion of federal court jurisdiction over debt collection litigation and decisions enforcing credit arrangements under the contract clause impacted forcefully on the South, fueling resentment against the Supreme Court. Similarly, the agrarian movement of the late nineteenth century pitted western farmers against eastern capitalists over the regulation of railroads.

It is important to realize that property is a dynamic concept. Forms of wealth change over the course of decades or centuries. In the eighteenth century, land was the principal form of wealth. By the late twentieth century land, though still important, had been eclipsed by intangible personal property such as stocks, bonds, and bank accounts. Many commentators, furthermore, believe that intellectual property, especially patents, will represent the most significant wealth of the next century. Not only does property take different forms, but once-common types of property may cease to have legal recognition. For instance, the abolition of slavery and the Prohibition amendment effectively destroyed property of considerable value.

Likewise, property rights are not monolithic, and there is often conflict among owners with different economic interests. Economic development was a primary objective of Americans in the nineteenth century, but steps to promote growth frequently clashed with the interests of particular property owners. In general, the Supreme Court has looked with favor on the active use of property for commercial ends rather than simply maintaining the status quo. Americans, in J. Willard Hurst's phrase, preferred "property in motion or at risk rather than property secure and at rest."⁵ As a consequence, legislators and courts often compelled existing property arrangements to give way to new economic ventures and changed circumstances. New technologies heightened this conflict by rendering obsolete older forms of property and wealth. Thus, in the nineteenth century, railroads gradually superseded canals, and in the

twentieth century, air travel captured much of the railroad's business. Nothing in the Constitution inhibited these developments, and indeed judges sought to facilitate improvements despite the loss inflicted on existing types of property.

A study of property and economic rights is also complicated by the distribution of governmental power under the federal system. It was generally contemplated that the states would exercise great latitude in governing their internal affairs. This authority, known as the police power, encompassed the power to enact laws safeguarding the health, safety, and morals of the public. As a result, important areas of economic activity remained largely under state control. Developments at the state level often foreshadowed subsequent federal action. In the early nineteenth century, for instance, state courts and legislators took the lead in formulating eminent domain policy and defining the notion of taking private property rights. A century later state legislatures enacted the first wave of social legislation that regulated working conditions and land use patterns. One cannot understand the constitutional guarantee of property by looking solely at the decisions of the Supreme Court.

The states, however, were especially susceptible to parochial influence and special-interest pressure. Many state laws were designed to suppress competition or to inflict disproportionate costs on out-of-state interests, but such legislation often frustrated national economic policy or threatened private property rights. Reflecting the dictates of economic nationalism, the Supreme Court early established the right to review state laws that burdened interstate commerce. Moreover, the Court initially used the contract clause and later the due process and takings clauses of the Fifth Amendment to fashion a powerful check on state interference with property and business enterprises. Economic rights, then, were among the first to be nationalized by the Supreme Court, thereby setting the stage for numerous constitutional battles that pitted property-minded federal judges against state lawmakers. In contrast, not until the twentieth century did freedom of speech or the rights of criminal defendants find a spot on the docket of federal judges.

Another problem is posed by the separation of powers doctrine and the ongoing debate over the appropriate role for the judiciary in American life. Judicial review of economic legislation raises the question of which branch of government should determine economic policy. Throughout much of our history there has been an undercurrent of judicial suspicion

directed toward legislative handling of law affecting property interests. The Supreme Court of Georgia expressed this attitude in 1851, declaring: "The sacredness of private property ought not to be confined to the uncertain virtue of those who govern."⁶ Starting from this premise, it was a short step to widespread judicial intervention on behalf of property owners and to increasing supervision of legislative output. Indeed, before the New Deal, judicial review was usually employed to invalidate laws affecting property rights. Critics alleged that such a process was undemocratic and prevented the elected branch of government from responding to novel social problems.

Thinking about property rights is not fixed but has evolved over time in response to changed conditions. By the late nineteenth century, urbanization and industrialization had transformed American society, creating novel pressures directed at traditional concepts of private property ownership. The emergence of the business corporation, coupled with the workings of a free-market economy, exacerbated disparities of wealth, and concentrated tremendous economic power in relatively few hands. Furthermore, land use practices that were acceptable in a largely rural nation appeared in a different light in an urban setting.

Consequently, by 1900 the focus of lawmakers shifted markedly from the promotion of economic growth to its regulation. Legislators sought to redress the unbalanced social and economic situation by, in essence, mandating a redistribution of property in favor of those viewed as disadvantaged. Thus, lawmakers passed statutes to improve working conditions, set minimum wages, regulate the conduct of business, fix prices charged the public, and tax the income of the wealthy. Regulations on land use often fastened significant economic burdens on property owners. Such measures aroused the hostility of conservative judges, resulting in a bitter and prolonged controversy over the constitutional position of property rights. The political and intellectual triumph of the New Deal seemingly settled this conflict by assigning property to a secondary status with only limited constitutional protection, a development that allowed a wide sway for economic regulation.

Finally, any quest for doctrinal precision in the analysis of property and economic rights is bound to fail. Rules devised for interpreting one clause of the Constitution frequently spill over to another. There has been a large degree of overlap, for example, between legal arguments based on the takings clause and the due process clause of the Fourteenth Amendment.