

# The Decline and Fall of the Right to Property: Government as Universal Landlord

Edward J. Erler, Ph.D.

“[T]he right of acquiring and possessing property and having it protected, is one of the natural inherent and unalienable rights of man.”<sup>1</sup>

A few years ago, one noted political reformer applauded the “demise of property as a formal constitutional limit.” A new view of the right to property had, in this author’s opinion, begun to replace the old constitutional formalism of the inviolable and sacred right to property. Indeed, this new conception of property “requires incursions on traditional property rights. What once defined the limits to governmental power becomes the prime subject of affirmative governmental action.”<sup>2</sup> The object or purpose of governmental action should be the various kinds of “redistribution” that characterize the “regulatory welfare state.”<sup>3</sup> And, this commentator concludes, “[o]nce redistribution can be held out as a public purpose, it is difficult to see how lines can be drawn defining some redistribution as, in principle, too much or the wrong kind.”<sup>4</sup> This view of the redistributionist state—the welfare state—is premised on the discovery that the right to property is not, as Madison and the framers believed, a natural

right; it is merely a “social construct.”<sup>5</sup> As such, it has no greater value than any other social construct. And like any mere construct, it can be put in the service of human progress—a progress that is not limited by “deeply problematic” notions of “natural rights” or “limited government.”<sup>6</sup> “It is now widely accepted,” this prognosticator concludes, “that property is not a limit to legitimate governmental action, but a primary subject of it.”<sup>7</sup> At the time, these views seemed wildly inflated—mere wishful thinking on the part of an intellectual searching for “a new conceptual framework.”<sup>8</sup> The Supreme Court’s decision in *Kelo v. City of New London* (2005), brings these comments and their rejection of the views of the American Founders—not to mention the practical implications of that rejection—to the forefront and gives us an opportunity to review why the right to property is essential to the maintenance of liberty and the prevention of tyranny.

## KELO IN THE COURT OF PUBLIC OPINION

*Kelo* represents the *reductio ad absurdum* of the Supreme Court’s takings clause jurisprudence. As such,

<sup>1</sup> *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C. Pa. 1795) (Patterson, J).

<sup>2</sup> Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990), p. 262.

<sup>3</sup> *Ibid.*, p. 251.

<sup>4</sup> *Ibid.*, pp. 262–263.

<sup>5</sup> *Ibid.*, p. 255.

<sup>6</sup> *Ibid.*, p. 266.

<sup>7</sup> *Ibid.*, p. 231.

<sup>8</sup> *Ibid.*, p. 261.

it represents the Supreme Court's indifference to protecting the right of private property, which is indicative of the contempt for property rights in much of contemporary America. The Court's opinion translated the right to private property into a doctrine of public trust. The right to property must now be considered only a conditional right; property is held on the condition that no one else can use the property in a manner that better serves a public purpose. In some very important sense the right to private property has actually been abolished. In an acerbic dissent, Justice Clarence Thomas characterized the majority opinion as "far-reaching, and dangerous."<sup>9</sup> Justice Thomas's stinging rebuke struck a responsive chord in the court of public opinion. One commentator remarked that "*Kelo* sparked a conflagration of outrage that even months later showed no sign of abating."<sup>10</sup> Nearly every state legislature considered legislation to restrict the reach of the *Kelo* holding. As of January 1, 2007, 34 states passed measures protecting property in various degrees against eminent domain takings. In November 2006, 12 states had eminent domain measures on the ballot and only two of these restrictive measures failed.<sup>11</sup> Justice John Paul Stevens, writing for the majority in *Kelo*, had issued something of an invitation to the states: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline."<sup>12</sup> The states took up Justice Stevens's challenge and, for the most part, succeeded in reining in some of the more "far-reaching" aspects of the decision.

As Professor Julia Mahoney points out, however, the strong public reaction was rather surprising. After all, the Court had been steadily advancing to the *Kelo*

result since at least *Berman v. Parker* (1954) and *Hawaii v. Midkiff* (1984). Although the decision was not inevitable, it was a logical extension of the expansive language and arguments developed in these earlier decisions.<sup>13</sup> Nevertheless, *Kelo* was a 5–4 decision and one member of the majority, Justice Anthony Kennedy, expressed some reservations about the standards of review that might be developed for a "more narrowly drawn category of takings."<sup>14</sup> The newest appointments to the Court, Chief Justice John Roberts and Justice Samuel Alito, are not likely to change the result in future cases, although it must be kept in mind that the 5–4 majority in *Kelo* might be more precarious than it appears at first glance. At any rate, what probably attracted public attention—and ultimately public ire—was the facts of the case. The personal stories of the individuals who were displaced from their homes by eminent domain were compelling enough to make them appear to be sympathetic victims of overbearing and heavy-handed government action.

### THE FACTS OF KELO

In 1990 the city of New London was designated a "distressed municipality" by the state of Connecticut. State and local officials were prompted to target the city for "economic revitalization." The city resurrected the New London Development Corporation, a private, nonprofit organization first established in 1978, to formulate its economic revitalization plan. Claire Gaudiani, described by one commentator as "the civically prominent president of Connecticut College,"<sup>15</sup> was tapped to lead the Corporation's efforts. The Corporation received money from two state bond issues to support its planning activities, one for \$5.35 million and another for \$10 million. The Corporation acted quickly. By February 1998 it had persuaded the Pfizer Corporation (the employer of Gaudiani's husband)<sup>16</sup> to build a research facility on the New London waterfront, adja-

<sup>9</sup> *Kelo v. City of New London*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting).

<sup>10</sup> Julia D. Mahoney, "Kelo's Legacy: Eminent Domain and the Future of Property Rights," *Supreme Court Review* (2005), p. 104.

<sup>11</sup> David D. Savage, "Even a Supreme Court Loss Can Propel a Cause," *Los Angeles Times*, January 3, 2007, p. A10.

<sup>12</sup> *Kelo*, 489.

<sup>13</sup> Mahoney, "Kelo's Legacy," pp. 103–104.

<sup>14</sup> *Kelo*, 493.

<sup>15</sup> Mahoney, "Kelo's Legacy," p. 107.

<sup>16</sup> *Ibid.*

cent to the Fort Trumbull peninsula area which was the focus of the city's redevelopment efforts.

The city council, in accordance with state law, authorized the Corporation to purchase property needed for the development or to acquire it using the city's delegated eminent domain power. Under the Corporation's plan, some of the property to be acquired was to be leased to a private developer who would, in turn, transfer leasehold interests to other private parties.

Nine of the Fort Trumbull neighborhood property owners refused to sell their property, arguing that the proposed takings did not meet the "public use" requirements of the Fifth Amendment. The Connecticut Supreme Court eventually ruled against the property owners' Fifth Amendment challenge, arguing that economic development constituted a valid public use under both the Connecticut and federal Constitutions.

#### **KELO: PUBLIC USE AND PUBLIC PURPOSE**

The question as posed by Justice Stevens was "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."<sup>17</sup> Justice Stevens argued that a narrow or literal reading of the "public use" requirement had been abandoned long ago by the Court because "it proved to be impractical given the diverse and always evolving needs of society." In light of these "evolving needs," the Court was compelled to understand "public use" in terms of the more expansive concept of "public purpose." Not only was "public purpose" a "broader" interpretation but it was also a "more natural interpretation."<sup>18</sup> It is not entirely clear what Justice Stevens means by "more natural," but, as Justice Thomas points out in his dissent, the conflation of "public use" and "public purpose" is hardly a natural reading of the Constitution since it contravenes both the text and the spirit of the Constitution.

Justice Stevens's argument is drawn from Progressivism: The primary role of the Supreme Court is to interpret

the Constitution in a manner that best meets the "evolving needs" of society. The Court's reasoning, of course, elevates the "needs of society" over the rights of individuals without a clear argument to justify the bowdlerization of the constitutional text. There can be little doubt that the framers of the Fifth Amendment meant it to be a protection for individual rights. It is true that the framers acknowledged that the power of eminent domain was an inherent aspect of sovereignty, but they also recognized that eminent domain must always be exercised in a manner consistent with individual rights—hence the requirement that private property can be taken only for "public use" and that "just compensation" must be paid. These requirements are restrictions on government designed to protect the right to property. The Progressive "revolution" of the early twentieth century, however, made the "needs of society," not the rights of individuals, the principal focus of judicial solicitude. Since the "needs of society" are constantly evolving, it is difficult to discern what precise role the text of the Constitution plays in a judiciary inspired by Progressivism other than as a pretext for adding legitimacy to progressively evolving social constructions.<sup>19</sup>

#### **TWO POLAR PROPOSITIONS AND THE NETHER WORLD OF "PUBLIC PURPOSE"**

Justice Stevens, however, insists that the Fifth Amendment still sets limits to what can be demanded by government to meet the evolving needs of society. "[I]t has long been accepted," Stevens notes, "that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." It is also "equally clear," the Justice continues, "that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking."<sup>20</sup> Justice Stevens is quick to add, however, that

<sup>17</sup> *Kelo*, 477.

<sup>18</sup> *Ibid.*, 479.

<sup>19</sup> See Edward Erler, "Marbury v. Madison and the Progressive Transformation of Judicial Power," in John Marini and Ken Masugi, eds., *The Progressive Revolution in Politics and Political Science* (Lanham, Md.: Rowman & Littlefield, 2005), pp. 163–218.

<sup>20</sup> *Kelo*, 477.

neither of these “two polar propositions” disposes of the case at hand. The city of New London “would, no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party.”<sup>21</sup> The New London economic plan did, of course, take property from A and transfer it to private party B. But, in an argument that seems to be unparalleled in the annals of constitutional reasoning, Justice Stevens argues that since “the identities of those private parties were not known when the plan was adopted,” it is “difficult to accuse the government of having taken A’s property to benefit the private interests of B when the identity of B was unknown.”<sup>22</sup> Justice Stevens would thus rewrite the famous dictum that everyone seems to concede is the *de minimis* foundation of takings jurisprudence: No governmental agency may use eminent domain proceedings to take property from private party A for the benefit of private party B unless the identity of private party B has not been determined at the time of the taking. However one parses this bowdlerized version of the old—and justly celebrated—dictum, the fact that private party B will be known only at some future date does not lessen the fact that property has been transferred to a private party who will benefit from the government taking. The fact that the person is unknown at the time of the taking—but it is known that *some* private person will benefit from the taking—does not transform the private party into a public entity. This argument is remarkable enough on its own terms, but as Justice Kennedy points out in his concurring opinion, “[t]he identity of *most* of the private beneficiaries were unknown at the time the city formulated its plans.”<sup>23</sup> To put the best face on the matter, Justice Stevens’s argument is disingenuous, not to say dishonest.

And with respect to the second “polar proposition,” only a part of the New London economic redevelopment area was reserved for “future ‘use by the public.’”

Economic development, not public use, was the overwhelming “purpose of the taking.”<sup>24</sup> Thus, from Justice Stevens’s point of view, the *Kelo* case existed somewhere in the nether universe bounded by the “two polar propositions”—one of which was substantially redefined into an absurd proposition. Justice Stevens’s polar propositions provide no realistic limits to a takings jurisprudence that seeks to accommodate itself to the constantly evolving needs of society. The only constant in this universe is change or evolution, hardly the ground for a takings jurisprudence—or any other jurisprudence.

### LEGISLATIVE DEFERENCE AND JUDICIAL STANDARDS

To bolster his argument of the first “polar proposition,” Justice Stevens cites the famous passage from *Calder v. Bull* (1798):

An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.... A few instances will suffice to explain what I mean.... [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.<sup>25</sup>

What is immediately striking about Justice Samuel Chase’s opinion is the palpable hostility to the idea of “legislative deference” in matters involving takings. Justice Stevens relies to an extraordinary degree on legislative deference in reaching the result in *Kelo*. “For more than a century,” Stevens writes, “our public

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, 478, n. 6.

<sup>23</sup> *Ibid.*, 493 (emphasis added).

<sup>24</sup> *Ibid.*, 477.

<sup>25</sup> *Ibid.*, 478, n. 5 (quoting *Calder v. Bull*, 1 U.S. (3 Dall.) 386, 388 [1798]).

use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”<sup>26</sup> Justice William O. Douglas, writing for a unanimous Court in *Berman v. Parker* (1954) marked the culmination of a trend toward legislative deference that had been developing for decades. “Subject to specific constitutional limitations,” Douglas argued, “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by societal legislation.... This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.”<sup>27</sup> Clearly, for Douglas, the takings clause does not represent a constitutional limitation on governmental power. Indeed, as we will see, the doctrine of legislative deference converts what the framers intended to be a limit on government into a grant of power.

This view was confirmed by Justice Sandra Day O’Connor in *Hawaii v. Midkiff* (1984). After quoting *Berman*, Justice O’Connor helpfully concluded that “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”<sup>28</sup> With this grand *ipse dixit* the Court extended its regime of legislative deference to the point of *reductio ad absurdum*. One commentator aptly described it as “supine deference.”<sup>29</sup>

*Midkiff* involved state land redistribution legislation “which created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees.” The putative purpose of the legislation was to overcome “concentrat-

ed land ownership” that the state legislature believed was “responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.”<sup>30</sup> Oddly enough, the Ninth Circuit Court of Appeals found the scheme to be unconstitutional, describing it as “a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B’s private use and benefit.”<sup>31</sup> Judge Arthur L. Alarcon, writing for the majority, distinguished the situation in *Midkiff* from *Berman*. In *Berman* there was a “transformation from slum to healthy thriving community” which, according to Judge Alarcon, “represents a change in the use of the land.” The Hawaii Land Reform Act, however, “will result in no change in use of the property. The property...is currently used for residential purposes. After condemnation it will be used for residential purposes.... [This results in] simply different forms of *private* use.”<sup>32</sup> The difference was that in *Berman* the government took actual possession of the condemned property. Thus, the court concluded, “[t]he key in *Berman* is the intermediate step in which the property was transferred from the private owner to the government for a public purpose.” The Hawaii plan, however, provided for the transfer from private parties to private parties without the “intermediate step in which the government holds the property for the accomplishment of a public purpose. The lessee simply retains possession of residential property throughout the condemnation process until he receives fee simple title.” This result, according to the court, is not authorized by *Berman*: “Nothing in *Berman* permits the lessee of property to take ownership of that property from the owner involuntarily through condemnation proceedings. Nothing in *Berman* would provide, as does the Hawaii Land Reform Act, the lessee of condemned property with greater rights to that property than the owner.”<sup>33</sup>

<sup>26</sup> *Ibid.*, 483.

<sup>27</sup> *Berman v. Parker*, 384 U.S. 26, 32 (1954).

<sup>28</sup> *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984).

<sup>29</sup> James W. Ely, Jr., “‘Poor Relation’ Once More: The Supreme Court and the Vanishing Rights of Property Owners,” *2004-2005 Cato Supreme Court Review* (Washington, D.C.: Cato Institute, 2005), p. 62.

<sup>30</sup> *Midkiff*, 232.

<sup>31</sup> *Midkiff v. Tom*, 702 F.2d 788, 798 (1983).

<sup>32</sup> *Ibid.*, 796-797.

<sup>33</sup> *Ibid.*, 797.

Justice O'Connor, writing for a unanimous Court in *Midkiff*, disagreed. She argued that the Supreme Court has never struck down an exercise of state eminent domain power where the use of that power is "rationally related to a conceivable public purpose."<sup>34</sup> "Regulating oligopoly and the evils associated with it," she asserted, "is a classic exercise of a State's police powers." Whether the redistributionist scheme concocted by the legislature will actually achieve its purpose is not a proper part of the Court's consideration. It is enough that the Hawaii Legislature could have believed that the Act would promote its objectives. No proof that the legislature actually did believe that the means were calculated to secure the end was necessary. Even if the legislature did not articulate a rational ground or basis for its actions, if there was, within the Court's imagination, a possible argument to support the legislation—even though unknown to the legislature—then the rational relation requirement is met.

In response to Judge Alarcon's attempt to distinguish the *Berman* holding, Justice O'Connor merely noted that "[t]he Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."<sup>35</sup> This is a remarkable assertion: Only the purpose of the taking is subject to "Public Use Clause" scrutiny, not the means. The Court's deference to legislative determinations as to what constitutes a "public purpose" is, as we will see, almost unlimited. The means chosen by a legislature to accomplish a putative public purpose will receive no scrutiny whatsoever unless, presumably, they violate a specific constitutional prohibition. The ends, it seems, justify almost any means.

Clearly, *Midkiff* almost banished the private right to property from the Bill of Rights; the right to property has certainly been given second-class status. The

framers, of course, believed that the right to property was the comprehensive right, the right upon which all other rights rested. Today, as a result of the transformations worked by Progressivism and the New Deal, the right to property has a very tenuous place in the pantheon of rights protected by the Constitution.

Several authors have pointed out that the Court signaled its intent to relegate the rights of property to second-class status in the *Carolene Products* case. Economic rights, the Court declared, would not be subjected to the same heightened judicial solicitude as other rights protected by the Bill of Rights. In the area of economic regulation, the Court announced that it would extend the greatest possible deference to legislative determinations. "The existence of facts supporting the legislative judgment," Justice Harlan Stone declared, "is to be presumed, for regulatory legislation affecting ordinary commercial transactions."<sup>36</sup> The Court's analysis of commercial regulation will be premised on the "assumption that it rests upon some rational basis within the knowledge and experience of the legislators."<sup>37</sup> The Court's willingness to defer to legislative judgment was almost unbounded: "[A]ny state of facts either known or which could reasonably be assumed affords support" for the rational basis of economic legislation.<sup>38</sup> Professor James W. Ely notes that in *Carolene Products* "[e]conomic rights were implicitly assigned a secondary constitutional status." The decision, Ely argues, "well illustrated the scant regard for economic rights shown by the emerging liberal constitutionalism...[which] affirmed governmental power to redress social ills, resolve conflicts, regulate business, and intervene in the economy."<sup>39</sup> More

<sup>36</sup> *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). See Edward Erler, *The American Polity: Essays on the Theory and Practice of Constitutional Government* (New York: Crane Russak, 1991), pp. 91–122.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, p. 154.

<sup>39</sup> James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992), pp. 133–134. See Coyle, *Property Rights and the Constitution*, p. 43 ("The double standard of constitutional rights has enjoyed remarkable popularity, stature, and influence since the New Deal.... Even

<sup>34</sup> *Midkiff*, 241.

<sup>35</sup> *Ibid.*, 244.

recently, Professor Ely has argued that “[t]he Supreme Court does not defer to legislative decisions regarding criminal procedures or the enjoyment of free speech. In fact, among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy deference to legislatures. It is highly unlikely that the Framers intended such an anomalous result.”<sup>40</sup> Even though Justice O’Connor had argued for the broadest possible legislative deference in *Midkiff*, by the time of the *Kelo* decision she had become alarmed that the “distinction between private and public use of property” had been abandoned by the majority. “Under the banner of economic development,” O’Connor intoned, “all private property is now vulnerable to being taken and transferred to another private owner so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.”<sup>41</sup> It is difficult to understand why Justice O’Connor did not see the *Kelo* decision as the fruit of her own labor in *Midkiff*.

### PROPERTY RIGHTS AND SOCIAL COMPACT

Even more striking to modern sensibilities—and utterly lost on Justice Stevens—is Justice Chase’s reliance in *Calder v. Bull* on the “first principles of the social compact” as a test of rights and as a limit on legislative power. Three years earlier, in *Van Horne’s Lessee v. Dorrance* (1795), Justice William Paterson had also noted the social compact origins of the Constitution. “The constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity,” Paterson wrote. In contrast, “[l]aw is the work or will of the legislature in their derivative and subordinate capacity... The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move.”<sup>42</sup> And since “the

---

when property rights were acknowledged to have constitutional basis, they were considered too trivial for attention.”)

<sup>40</sup> Ely, “‘Poor Relation’ Once More,” p. 62. See Coyle, *Property Rights and the Constitution*, pp. 42–43, 119, 125, 156, 167, 175, 185, 247.

<sup>41</sup> *Kelo*, 494.

<sup>42</sup> *Van Horne’s Lessee v. Dorrance*, 304, 308.

preservation of property then is a primary object of the social compact,”<sup>43</sup> Paterson concluded, “[e]very statute, derogatory to the rights of property, or that takes away the estate of a citizen, ought to be construed strictly.”<sup>44</sup>

James Madison, the author of the Fifth Amendment, frequently voiced the opinion that “the idea of compact...is a fundamental principle of free government.” “The original compact,” Madison explained,

is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, by which the people in their social state agree to a Government over them. These two compacts may be considered as blended in the Constitution of the U.S.<sup>45</sup>

Social compact is the legitimate origin of civil society because “all men are created equal” and no one has any claim by nature to be the ruler of anyone else. Legitimate rule therefore must be grounded on the consent of those who are to be governed. The Declaration of Independence famously commands that the “just powers” of government are derived from “the consent of the governed.” It is noteworthy that not all powers are derived from consent, only the “just powers”—those powers that are employed in the service of securing the equal rights and liberties of those who consent to be governed. Thus, the purpose of the social compact is the protection of the rights of those who consent to be ruled. In slightly different terms, the purpose of government under the social compact is to ensure the equal protection of the equal rights of all those who consent to be ruled and accept the obligations of the newly formed civil society. Social compact

---

<sup>43</sup> *Ibid.*, 310.

<sup>44</sup> *Ibid.*, 316.

<sup>45</sup> James Madison, Letter to N.P. Trist, Feb. 15, 1830, in Gaillard Hunt, ed., *Writings of James Madison* (New York: G.P. Putnam’s Sons, 1900–1910), Vol. 9, p. 355. See Madison, Letter to Daniel Webster, Mar. 15, 1833, *ibid.*, Vol. 6, p. 605 and Madison, “Sovereignty,” *ibid.*, Vol. 9, pp. 570–571.

is thus the origin of the idea of equal protection—which is intrinsic to the idea of social compact.

### MADISON ON THE RIGHT TO PROPERTY

In his famous essay, “Property,” published March 27, 1792, in the *National Gazette*, Madison took an expansive view of the right to property. At the beginning of the essay, Madison quoted—or rather paraphrased—William Blackstone on property without attribution: “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.’”<sup>46</sup> Madison, however, quickly registered his disagreement with Blackstone: “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.*”<sup>47</sup> Thus Blackstone’s definition was neither large nor just, and in Madison’s view the common law did not provide an adequate basis for the right to property.

Following Locke, Madison regarded the right to property as the comprehensive right, the right that contained all other rights. Thus, as Madison remarked, “as a man is said to have a right to his property, he may be equally said to have a property in his rights.”<sup>48</sup> Rights, of course, belong to individuals in consequence of the fact that “all men are created equal”; in a word, rights derive from “self-ownership.” As Locke declares, “every Man has a *Property* in his own *Person*. This no Body has any Right to but himself.”<sup>49</sup> The result of this

self-ownership is that the right to property must be considered a private right—the product of individual labor. In addition to “land, or merchandize, or money,” Madison asserts that individuals also have “a property in [their] opinions and the free exercise of them.” Every individual, of course “has a property very dear to him in the safety and liberty of his person.” But he also has an “equal property in the free use of his faculties and free choice of the objects on which to employ them.” What is more, each individual “has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.”<sup>50</sup> Unlike some modern-day commentators who see a disjunction between “human rights” and property rights, Madison clearly argued that property rights were the core of human rights properly understood.

The connection between property rights and human rights is often contemptuously dismissed. But Locke and the American Founders saw the connection in a clear and precise light. Locke notes that one of the “Bounds” put on the legislative power “by the Society, and the Law of God and Nature” was that the legislature “must *not raise taxes* on the Property of the People, *without the Consent of the People*, given by themselves, or their Deputies.”<sup>51</sup> This idea was repeated in unequivocal terms in the Declaration of Independence. As many have pointed out, the taxes imposed upon the Colonies by the British Parliament were not particularly onerous or burdensome. In a time of relative economic prosperity they could hardly have been judged tyrannical. But they were taken as evidence of a “design to reduce [the Colonies] under absolute despotism.” Under these circumstances, the Declaration continues, it is the right of the people, “it is their duty to throw off such government and to provide new guards for their future security.” If property can be taken (or taxes imposed) without the consent of the people, then the requirement of the consent of the governed is in jeopardy because “the

<sup>46</sup>James Madison, “Property,” in Robert A. Rutland, et al., eds., *The Papers of James Madison* (Charlottesville: University Press of Virginia, 1983), Vol. 14, p. 266. The unattributed quote of Blackstone is from *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979 [originally published in 1766]), Vol. II, p. 1. Blackstone had written “the right of property; or 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*” (emphasis added).

<sup>47</sup>*Ibid.* (emphasis in original). The italicized phrase is a clear echo of Locke.

<sup>48</sup>*Ibid.*

<sup>49</sup>John Locke, *Two Treatises of Government*, Peter Laslett, ed. (Cambridge:

Cambridge University Press, 1988), II, 27 (emphasis in original).

<sup>50</sup>Madison, “Property,” p. 266.

<sup>51</sup>Locke, *Two Treatises of Government*, II.142 (emphasis in original).



right to property [is] the visible, formal protection of the right to consent.”<sup>52</sup> This is the indefeasible connection between the right to property, understood as the comprehensive political right, and human rights. The right to property is the great fence to liberty, because it is the fence to consent.

Madison is sensible of the fact that “property of every sort” as well as “the various rights of individuals” is threatened not only by “an excess of power” on the part of government but also from “an excess of liberty.” Rights thus cannot be understood apart from responsibilities. Constitutional government and the rule of law exist at the intersection of rights and obligations. The purpose of government is to protect the equal rights of all who consent to be governed; at the same time, however, constitutional government relies on the active agency of a citizenry willing and capable of performing the obligations that it has freely imposed upon itself.

Moreover, “just security to property” includes not only citizens’ “possessions” but also “the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valued property.” Most important, just government is one that protects religious liberty. “Conscience,” Madison averred,

is the most sacred of all property; other property depending in part on positive law, the exercise of that being a natural and unalienable right. To guard a man’s house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man’s conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.<sup>53</sup>

Madison is emphatic that the rights of conscience are the core of the right to property. It is the only property right that does not depend on positive law. All other aspects of the right to property require positive law for their protection, such as laws of contract, trespass, libel and so forth. Freedom of conscience depends solely on individuals and needs no support from the positive law. As Madison wrote in his essay “Sovereignty,” “the reserved rights of individuals (of conscience for example)...[are] beyond the legitimate reach of sovereignty, wherever vested or however viewed.”<sup>54</sup> Jefferson had written in the same vein many years earlier in the *Notes on the State of Virginia*. “[O]ur rulers,” Jefferson vowed, “can have authority over such natural rights only as we submitted to them. The rights of conscience we never submitted, we could not submit.”<sup>55</sup>

Both Madison and Jefferson understood that religious liberty was the foundation of constitutional government. Constitutional government is premised on the idea that politically irresolvable questions of religion are not the subject of ordinary politics and are therefore never subjected to majority vote. Constitutional government requires not only that the majority rule in the interest of the whole, i.e., not as a majority faction, but that minorities are willing to acquiesce in the decisions of the majority. Of course, minorities will never submit to the rule of the majority—nor will the majority be impartial—in the contest of religious questions. Separation of church and state is thus the necessary ground and foundation of constitutional government—government derived from “the social pact.”

For Madison, religious liberty—the rights of conscience—was probably the most important manifestation of the right to property. And it was this comprehensive understanding that put the right to property at the core of constitutional government and the rule of law.

<sup>52</sup> Harvey C. Mansfield, “The Forms of Liberty,” in Fred E. Bauman, ed., *Democratic Capitalism? Essays in Search of a Concept* (Charlottesville: University Press of Virginia, 1986), p. 19.

<sup>53</sup> Madison, “Property,” p. 267.

<sup>54</sup> Madison, “Sovereignty,” p. 571.

<sup>55</sup> *Notes on the State of Virginia*, in Merrill Peterson, ed. *Thomas Jefferson: Writings* (New York: The Library of America, 1984), Query XVII, p. 285.

The purpose of government that results from “the social pact” is, to use the language of the Declaration, the “safety and happiness” of those who consent to be governed. Madison understands “safety and happiness” in terms of the right to property properly understood in its comprehensive sense. As Madison notes,

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.<sup>56</sup>

The right to property also includes the “means of acquiring property,” which comprehends the “free use of...faculties, and free choice of...occupations.” Most particularly, however, a “just security to property” requires “maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner.”<sup>57</sup> Here Madison repeats the “public use” requirement that he had incorporated into the Fifth Amendment less than three years earlier. “Public use” as a qualification for government takings is the core of that “just security to property” which constitutes an essential restriction on the “just powers of government.”

Assaults on other forms of property, such as freedom of speech, or the free exercise of religion or the free use of faculties are often disguised and indirect and difficult to discern. Direct assaults on property under the guise of eminent domain are more difficult to disguise. Madison argued, however, that an assault on any aspect of the right to property was an assault on all aspects of that comprehensive right. An uncompensated taking—or a taking that transfers property from private person A to private person B—is, in reality, just as much an assault on freedom of speech or the free exercise of religion.

<sup>56</sup> Madison, “Property,” p. 266 (emphasis in original).

<sup>57</sup> *Ibid.*, p. 267 (emphasis in original).

There can be little doubt that Madison—and the framers generally—viewed the right to property as the comprehensive right which assumed a kind of priority in the political community. The right to property, of course, is not mentioned in the Declaration of Independence, but it was understood to be a part of the “pursuit of happiness”; property in the narrow sense is a necessary but not sufficient condition of human happiness. Property in the service of the goods of the body is a necessary precondition of human happiness which ultimately depends on the goods of the soul, most notably freedom of conscience. Property lost can be regained; liberty lost is rarely regained. Thus it is wise to take alarm at the slightest inroads upon the rights of property. The right to property therefore serves as a kind of “early warning system” to invasions of life and liberty. Madison’s emphasis on the right of property stems from his awareness that life and liberty are mainly jeopardized through the violation of property rights—that government’s demands on citizens bear most immediately and visibly on their property, whether through direct taxation, confiscation, or regulation of the use of property. It is therefore prudent, Madison reasoned, to make the right to property the measure of liberty.<sup>58</sup>

A good example of what Madison had in mind is the current (and protracted) debate about campaign finance reform. Madison would view campaign finance reform as a massive assault on the right to property and freedom of speech disguised as an attempt to promote “free and fair elections.” Free and fair elections, of course, are the hallmark of republican government—but so is the right to property and the free communication of ideas. Indeed, as Madison noted, the “right of freely examining public characters and measures” is the heart of the free elections. And this right—the core of the First Amendment—“has ever been justly deemed the only effectual guardian of

<sup>58</sup> See Edward Erler, “The Great Fence to Liberty: The Right to Property in the American Founding,” in Ellen Frankel Paul and Howard Dickman, eds., *Liberty, Property and the Foundations of the American Constitution* (Albany: State University of New York Press, 1989), p. 56.

every other right.”<sup>59</sup> The proponents of reform assume that the right to property and freedom of speech are incompatible with free and fair elections. As a matter of fairness, we are told, those who are wealthy should not have greater access to political speech, although we have yet to hear that those who possess greater eloquence or more persuasive rhetoric have an unequal and therefore unjust advantage in elections. Thus campaign finance restrictions will equalize political rights—inequality of wealth in politics leads to unequal influence in elections. Besides, money in politics always implies corruption or the appearance of corruption. The goal of campaign finance regulation is therefore two-fold: to reduce corruption (real or imagined), and to equalize the relative abilities of individuals to influence the outcome of elections. Reformers believe that any system of private campaign financing will corrupt the electoral process because it translates inequality of wealth into inequality of speech and thereby of political power and influence.

Thus public financing of elections, or severe limits on campaign spending, are said to be imperative to deliberative democracy. Reform will increase access to electoral politics, we are told, and will give a more egalitarian cast to the electoral process. But equal access will necessarily entail severe restrictions on both property and freedom of speech. Richard Gephardt, then House Minority Leader, made this startling pronouncement in 2000: “What we have here are two important values in conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can’t have both.”<sup>60</sup> No system of private campaign financing can be egalitarian, because in a free society there will inevitably be wealth disparities. Because “healthy” campaigns will not reflect the influence of wealth, such campaigns will themselves eventually become a factor in the redistribution of wealth. In the eyes of Gephardt and other campaign finance reformers, the exercise of the right to property is antithetical to the right to freedom of speech. In their eyes,

Madison was wrong when he argued that the freedom of speech was integral aspect of the right to property—and to free and fair elections.

Government control over campaign finance will inevitably mean government control over politics. Government regulation of campaign finance is inseparable from government control of the electoral process itself. Government will not be just a neutral regulator, but a faction with an interest to promote: the extension and perpetuation of the administrative state. The surface attractions of campaign finance regulation seem compelling: free and fair elections. What reform promises, however, it simply cannot deliver. Regulation works to the advantage of incumbency, and a career in politics may be a greater spur to corruption than campaign contributions. Campaign finance reform co-opts politicians into the administrative state. In return for powerful incumbency protection, politicians are eager to transfer a significant portion of First Amendment liberties to the regulators who populate the administrative state. The promise of free and fair elections will produce nothing more than elections that are regulated in the interest of government itself. Government will serve “public purposes,” but it will no longer be inconvenienced by the necessity of adhering to free and fair (unregulated) elections—or the consent of the governed. Regulation, of course, will necessitate invasions of free speech and the right to property. These invasions should not be so casually accepted because, as Madison demonstrated, the ramifications are far-reaching. The exercise of eminent domain for “public purposes,” no less than campaign finance regulation for “public purposes,” strikes at the heart of the Constitution—it strikes at the very idea of private property. This is a dangerous dalliance for a free people.

#### EMINENT DOMAIN AND SOVEREIGNTY

It is indisputable that the power of eminent domain is inherent in sovereignty. In *Vanhorne’s Lessee v. Dorrance* Justice Paterson, in perfect agreement with Madison, posits the protection of property as the first object of government. He concedes, as did Madison, that “every person ought to contribute his proportion

<sup>59</sup> *The Papers of James Madison*, Vol. 17, p. 341.

<sup>60</sup> Nancy Gibbs, “The Wake-Up Call,” *Time Magazine*, June 24, 2001.

for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large." Taking of property without compensation would be "an exercise of power and not of right" and would be

inconsistent with the principles of reason, justice, and moral rectitude; [it would be] incompatible with the comfort, peace, and happiness of mankind;...contrary to the principles of social alliance in every free government; and lastly...contrary both the letter and spirit of the constitution.<sup>61</sup>

Uncompensated takings would violate the spirit of the Constitution because it would be a direct violation of the purposes or ends of government which mandate the protection of property. It would also contravene the letter of the Constitution by infringing upon the Fifth Amendment's prohibition against taking property for public use without just compensation.

The takings clause was, of course, understood by Madison and Paterson as a limitation on government, a reservation of an essential ingredient of the people's sovereignty that was not—and could not be—ceded to government. The purposes of government cannot be controlled by government itself. Government is a means to procure those ends which are the result of the unanimous consent of the people in forming the social compact.

Justice Thomas, in his *Kelo* dissent, cited Madison's essay on "Property" to buttress his point that "[t]he Public Use Clause, like the Just Compensation Clause, is therefore an express limit on the government's power of eminent domain."<sup>62</sup> After the incorporation of the takings clause, the express limit on the federal

government also became an express limit on states as well. As we have seen, the *Kelo* decision revolved around the meaning of "public use." Justice Thomas rightly argues that the Supreme Court has blindly adopted the "public purpose" meaning of the takings clause, rejecting its "natural reading" as requiring the actual government use or public use of the confiscated property. This "blind reading," according to Justice Thomas, results from the failure to understand "the Clause's history and original meaning." The result is that the majority's decision "is further proof that the 'public purpose' standard is not susceptible of principled application."<sup>63</sup> Indeed, as Justice Thomas points out, the "public purpose" standard is virtually unlimited, as *Berman*, *Midkiff* and *Kelo* amply demonstrate. "Public use," on the other hand, is far more susceptible to precise limits. Since the takings clause was meant to be a limit on government, it defies the spirit of the Constitution, which contemplated limited government, to substitute the more expansive "public purpose" standard—this is tantamount to a grant of power rather than a restriction on power. It is, in any case, an amendment of the Constitution by interpretation—or perhaps simply by judicial fiat.

#### EMINENT DOMAIN AND PUBLIC PURPOSE

But taking property for a "public purpose," where property is taken from private citizen A and conferred on private citizen (or corporation) B because B, in the opinion of government, can use the property in a way that more effectively benefits the public good, is no less an act of tyranny than an uncompensated taking. It was this restriction on the private redistribution of property that the framers made the core of the takings clause. While conceding the necessity of eminent domain, the framers knew of its potential for abuse. The power of eminent domain touched on the very heart of civil society itself—the social compact—which had as its first object the protection of property. The power of eminent domain, the framers reasoned, must

<sup>61</sup> *Van Horne's Lessee v. Dorrance*, 304, 310.

<sup>62</sup> *Kelo*, 508.

<sup>63</sup> *Ibid.*, 514.

be carefully restricted and controlled. That is why it is so shocking to see the casual manner in which the City of New London—albeit in accordance with state law—delegated its eminent domain powers to the New London Redevelopment Corporation, an unelected and politically insulated private corporation that exercised a sovereign prerogative in determining how the city could best serve a “public purpose.” The potential for abuse of property rights under the “public purpose” standard is much greater and the temptation to confiscate property becomes almost irresistible, especially once the principles of the administrative state are routinely accepted to be the standard of public purpose. It doesn’t take a powerful imagination to predict the kinds of mischief that will transpire behind the closed doors of various redevelopment agencies around the country. Even legislatures at all levels of government will no longer find it necessary to disguise the fact that property will be taken from A for the private benefit of B. After all, there is sure to be a “public purpose,” however implausible or tendentious, lurking in every exercise of eminent domain. In Justice Stevens’s irrefragable logic, as long as the identities of private beneficiaries can be postponed or concealed, there are no real barriers—certainly no constitutional barriers—to private speculation.

Justice Thomas justly complains in dissent that

[a]llowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.<sup>64</sup>

<sup>64</sup> *Ibid.*, 521. Justice O’Connor had made the same point in her dissenting opinion: “The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms” (505).

Justice Thomas, with some bitter irony, wonders what has happened to the Court’s vaunted “heightened judicial solicitude” for “discrete and insular minorities.” Surely, Justice Thomas chides, “that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse.”<sup>65</sup> It was once believed that those who were isolated from the majoritarian political process, “discrete and insular” minorities, deserved judicial solicitude, not judicial deference. The powerless are not those who inhabit the halls of power in local communities nor are they players in redevelopment agencies. Their interests—indeed, their rights—are easily sacrificed to a concept of “public purpose” where private individuals can be the direct and indirect beneficiaries of eminent domain. This is indeed a perversion of the rule of law.

#### **PUBLIC PURPOSE AND THE ADMINISTRATIVE STATE**

The “public purpose” standard is well suited to serve the ends of the administrative state—this was clearly articulated by Justice Stevens. One great barrier to the complete victory of the administrative state is private property ownership and the stubborn refusal—even selfish—on the part of property owners to use their property for public rather than private purposes. From the point of view of the administrative state, public purpose standards for eminent domain effectively transfers all private property into the hands of government to be used at its discretion. This means that, in effect, all property is owned by government and property owners hold property only to the extent that someone else cannot use the property in a manner that better serves a public purpose. All property ownership is therefore conditioned by a “public purpose” standard that is determined by the minions of the administrative state. As long as property is used for public purposes, then the administrative state will acquiesce in its use. The

<sup>65</sup> *Ibid.*

problem, of course, is that “public purposes” are constantly evolving and creating new demands and requiring new resources. Under public purpose standards, use is only conditional; private property has been abolished in the sense that private property is no longer held as an inalienable individual right. Property now is only held in “trust” for the public. As simple examples of this doctrine, consider only wetlands regulations and endangered species regulations. Vast tracts of private land have been effectively confiscated by the operation of these two regulations. Individuals still own the land, but their use is conditioned by a “public trust.” Whether property is taken without compensation (as in the case of regulatory takings) or by eminent domain proceedings, public trust or public purpose takes precedence over private ownership.

#### **BLACKSTONE AND FEUDALISM: NATURAL RIGHTS AND PRESCRIPTIVE RIGHTS**

At the beginning of his dissent, Justice Thomas summoned Blackstone in defense of the Fifth Amendment. “Long ago,” Justice Thomas wrote, “William Blackstone wrote that ‘the law of the land...postpone[s] even public necessity to the sacred and inviolable rights of private property.’ The Framers embodied that principle in the Constitution, allowing the government to take property not for ‘public necessity,’ but instead for ‘public use.’...Defying this understanding, the Court replaces the Public Use Clause with a Public Purpose Clause... (or perhaps the ‘Diverse and Always Evolving Needs of Society Clause’).”<sup>66</sup> But as we have already seen, Madison had rejected Blackstone’s definition of “the sacred and inviolable rights of private property.” Madison sought to expand the sphere and extend the reach of the natural right to property. It is true that the common law had gradually developed a prescriptive private right to property, and it occupies a prominent place in Blackstone’s *Commentaries*. Blackstone describes the right to property as an “absolute right, inherent in every Eng-

<sup>66</sup> *Ibid.*, 505-506 (Citing Blackstone, *Commentaries On the Laws of England*, Vol. I, pp. 134-135).

lishman.” Although “the original of private property is probably founded in nature...the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of these civil advantages, in exchange for which every individual has resigned a part of his natural liberty.” While the right of property “is probably founded in nature,” it is not nature or natural right which is dispositive for Blackstone; rather it is the “antient statutes” of England that established the “absolute right” to property.

The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right...and will not authorize the least violation of it; no, not even for the general good of the whole community... In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual’s private rights.

Blackstone concedes, however, that the legislature, exercising its sovereign prerogatives, “can interpose and compel the individual to acquiesce.” But even the legislature cannot proceed “by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.” The legislature as representative of “the public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.”<sup>67</sup>

<sup>67</sup> Blackstone, *Commentaries On the Laws of England*, Vol. I, pp. 134-135.

The Founders grounded the right to property in nature, in the natural equality of human beings. Jefferson echoed Locke's analysis when he wrote, employing one of the most frequently used republican metaphors, that the Declaration embodied the "palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God." If some men were born with saddles and others with boots then nature's intention (and the will of God) would be manifest.

The necessary inference from the absence of natural rulers is that by nature, i.e. in a state of nature, every human being is naturally his own ruler, having sole proprietorship over his own life, liberty, and property. Since the individual right to life, liberty, and property is derivative from natural human equality, these rights were known to the social contract philosophers as "natural rights"—the dictates of the "laws of nature and nature's God." It was the change from historical prescription to natural rights that represents the radical core of the American Revolution and the American Founding. It was not the rights of Englishmen, as we are so often told,<sup>68</sup> that was the subject of the Declaration, but the rights of man derived, not indeed from any particular constitution or positive law, but from nature. Historical prescription is ultimately traceable to accident; the existence of natural rights can be demonstrated as a "self-evident truth" from the laws of nature and nature's God, the first principle of which is the natural equality of all human beings. Jefferson, comparing the American Revolution to the Glorious Revolution, remarked that "Our Revolution commenced on more favorable ground. It presented us an album on which we were free to write what we pleased. We had no occasion to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions

<sup>68</sup> Compare Daniel J. Boorstin, *The Genius of American Politics* (Chicago: University of Chicago Press, 1953), p. 82ff, with Harry V. Jaffa, *Equality and Liberty: Theory and Practice in American Politics* (New York: Oxford University Press, 1965) p. 120ff.

of a semi-barbarous ancestry. We appealed to those of nature, and found them engraved on our hearts."<sup>69</sup>

For the framers of the American Constitution, therefore, the right to property was a fundamental natural right and its status as a natural right dictated its comprehensive reach, one that was considerably more extensive than the right to property described by Blackstone. The prescriptive right to property found in the English common law evolved in opposition to the feudal idea of property. Blackstone notes that "it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, 'that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services'."<sup>70</sup> This necessary fiction regarded all property as belonging to the King who could, at his pleasure, allow possession on terms and conditions. Thus, strictly speaking there was no private right to property, merely the use of the King's property which would continue as long as it served the interests of the King's dominion. All property "rights" were conditional upon service or the promise of service. This fiction was too transparent to last forever and the contests between Crown and Parliament gradually eroded the idea that the King's title to the Kingdom was that of the first occupier—or more accurately, the last conqueror. But the development of the English right to property, as Blackstone makes clear, proceeded as exceptions or limitations on the King's original right as proprietor, not from natural right.

<sup>69</sup> Letter to John Cartwright, June 5, 1824, in *Jefferson: Writings*, p. 1491. In 1775, Alexander Hamilton used a similar image: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power." *Farmer Refuted*, in Harold C. Syrett, ed., *The Papers of Alexander Hamilton*, Vol. 1 (New York: Columbia University Press, 1961), p. 122.

<sup>70</sup> Blackstone, *Commentaries On the Laws of England*, Vol. II, p. 51.

Locke, of course, destroyed all lingering traces of this doctrine by arguing that labor was the only rightful title to property. Labor, Locke maintained, was the origin of private property and property could be alienated only with the consent of the rightful owner. Once the idea of a right to private property was established and accepted—as it was at the American founding—the idea of monarchy itself, and not just its feudal manifestation, was put in the course of ultimate extinction.

In the *Summary View of the Rights of British America*, Jefferson quoted without attribution Blackstone's passage, noted above, that "A general principle indeed was introduced that 'all lands in England cited above general characterization of the fundamental maxim and principle of feudal tenure.'" <sup>71</sup> Jefferson comments that the feudal law is "still the groundwork of the Common law" and remains in force where specific exemptions have not been made, such as in Magna Carta, the Petition of Right or the Declaration of Right. But Jefferson quickly adds that "America was not conquered by William the Norman, nor its lands surrendered to him or any of his successors." Indeed, Jefferson states that "our ancestors...who migrated hither, were farmers, not lawyers," i.e., adherents of Locke, not Blackstone. <sup>72</sup> Thus it is labor that constitutes the title to property, not "antient statutes." As Professor Harry Jaffa rightly notes, "Jefferson is explicit that he is asserting the equal rights of human nature under the laws of nature. The prescriptive, inherited, or historical rights of Englishmen have nothing whatever to do with the justice of the American cause." <sup>73</sup>

In another reference to Blackstone, Jefferson continues that "the fictitious principle that all lands belong originally to the king, [the early American colonists] were early persuaded to believe real, and accordingly took grants of their own lands from the crown" and because grants could be had for "small sums and on reasonable rents, there was no inducement to arrest

the error and lay it open to public view."<sup>74</sup> The "fictitious principle" now stands exposed. Locke had articulated the natural right ground of the right to private property. As Jaffa comments on this passage from Jefferson, "the individual's dominion over his property is absolute because...his dominion over his body and soul is absolute. In short, the natural right to property...is grounded in the natural right to own one's self. For the king to claim that he is the source of the right to the lands carved out of the wilderness by others is an absurdity." Jefferson's "understanding of property," Jaffa concludes, was Lockean, meaning that "personal freedom, personal property, constitutional government, and the rule of law all originate in the natural right to own one's self."<sup>75</sup>

It is almost unnecessary to add that self-ownership is the irrefragable dictate of the fact that "all men are created equal." Professor Jaffa is quite right to point out that the "natural right to one's self" includes "dominion" or the right to property both in the goods of the body and of the soul. Surely this was the idea behind Madison's expansive definition of the right to property in which the essential aspects of the right to property involved goods of the soul—most particularly the rights of conscience, but also the "property in opinions and the free communication of them."

#### THE NEW FEUDALISM AND THE ADMINISTRATIVE STATE

The legal fiction of feudal tenures, having been expelled at the founding, seems to have insinuated its way back into our takings jurisprudence—this time with the administrative state serving in the stead of the King. Professor Dennis Coyle, a perceptive critic of modern takings jurisprudence, writes that "[t]he liberal vision of the founders that private property would provide the independence and responsibility on which to anchor democracy has been obscured by the growth of the state during the twentieth century. A more hierar-

<sup>71</sup> Jefferson: *Writings*, p. 119.

<sup>72</sup> *Ibid.*

<sup>73</sup> Jaffa, *A New Birth of Freedom*, p. 25.

<sup>74</sup> Jefferson: *Writings*, p. 119.

<sup>75</sup> Jaffa, *A New Birth of Freedom*, p. 24.



chical perspective, that possession of private property is encumbered by obligations to the state, has gained prominence.... Landowners are becoming ‘stewards’ who hold their property rights at the pleasure of the state.”<sup>76</sup> Professor Coyle has ferreted out some revealing—indeed startling—passages from legal scholars advocating a return to features of the feudal system. “Within the traditions of property law,” one luminary scolded, “there is nothing particularly radical in visualizing land being owned by the sovereign and being channeled out again to persons who would hold it only as long as they performed the requisite duties which went with the land.”<sup>77</sup> Indeed, Coyle argues, “[a]rguments for the feudallike encumbrance of private property have been heard throughout this century.” He quotes a legal scholar who wrote in 1938 that “in [the] case of feudalism it is regrettable that there could not have been preserved the idea that all property was held subject to the performance of duties—not a few of them public.”<sup>78</sup> These remarks were penned at a time when the advocates of the administrative state were confident that they would prevail in the refounding of the American system of politics—transforming the regime from one that protected individual rights and liberties to one in which the public welfare and the redistribution of property was the primary object of government. This same scholar expressed surprise that the principles of the Founding have been so robust: “The perdurance of assumptions of natural rights has been extremely striking.” “[T]he Constitution’s guarantees of both property and liberty began,” he correctly asserts, “with individualism and natural law as a background.” This background forced the framers to accept the negative idea of “the state as a policeman. That is the general background of the asserted rights to ‘life,

liberty, and the pursuit of happiness.’ More positive conceptions of liberty enriched by state action,” this scholar concluded, “belong to recent, non-individualistic times. They could not have occurred or appealed to our self-reliant ancestors.”<sup>79</sup>

Justice Thomas in his *Kelo* dissent noted evidence that the majority decision was animated by what might be called a version of the “new feudalism.” “[I]t is most implausible,” Justice Thomas wrote, “that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among the express provisions of the Bill of Rights.”<sup>80</sup> Typically, issues involving fundamental rights trigger heightened scrutiny, but the *Kelo* majority was adamant in rejecting any “heightened form of review”; in matters involving the determination of what constitutes a “public purpose” the Court will instead indulge the greatest possible deference to legislative bodies. “Still worse,” Justice Thomas wrote, “it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits [citing *Goldberg v. Kelly* (1970)], while deferring to the legislature’s determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals’ traditional rights in real property.... Something has gone seriously awry with this Court’s interpretation of the Constitution.” Justice Thomas’ conclusion is irresistible: “Once one accepts, as the Court at least nominally does,...that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.”<sup>81</sup>

<sup>79</sup> Philbrick, “Changing Conceptions of Property in Law,” p. 716.

<sup>80</sup> *Kelo*, 517–518.

<sup>81</sup> *Ibid.*, 518. *Goldberg v. Kelly*, 397 U.S. 254 (1970) held that the Fourteenth Amendment’s due process clause requires that welfare recipients “be afforded an evidentiary hearing *before* the termination of benefits” (260). Justice William Brennan, writing for the majority, argued that “[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them.... The constitutional challenge cannot be answered by an argument that public assistance benefits are a ‘privilege’ and not a ‘right’” (262). In a footnote, Justice Brennan helpfully explained that “[i]t may be realistic today to

<sup>76</sup> Coyle, *Property Rights and the Constitution*, pp. 213–214.

<sup>77</sup> E.F. Roberts, “The Demise of Property Law,” *Cornell Law Review*, Vol. 57 (1971), p. 43, quoted in Coyle, *Property Rights and the Constitution*, p. 213.

<sup>78</sup> Francis S. Philbrick, “Changing Conceptions of Property in Law,” *University of Pennsylvania Law Review*, Vol. 86 (1938), p. 710, quoted in Coyle, *Property Rights and the Constitution*, p. 217.

Clearly, the different standards of deference accorded welfare rights—those rights that form the core of the administrative state—and the rights of real property indicate that property rights are no longer understood as essentially private rights. If the administrative state is primarily an agent for the redistribution of property, then the conclusion is inevitable: that ultimately all property—at least *in potentia*—belongs to government. The redistribution takes place on terms and conditions

set by government itself. The right to property has therefore become merely a conditional right—property is held in public trust. In short, government has become, once again, the universal landlord.

—Edward J. Erler, Ph.D., is a Professor of Political Science at California State University, San Bernardino.

*This essay was published October 19, 2007.*

---

regard welfare entitlements as more like ‘property’ than a ‘gratuity’” (262 n. 8). Thus, Brennan concludes “important governmental interests”—the standard of heightened scrutiny—are served by a constitutional requirement of “a pre-termination evidentiary hearing.” What are the “important governmental interests?” Brennan is effusive: “Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity” (265). Justice Hugo Black, in dis-

---

sent, noted the majority’s untenable assumptions about the right to property: “The Court...in effect says that failure of the government to pay a promised charitable installment to an individual deprives that individual of *his own property*, in violation of the Due Process Clause of the Fourteenth Amendment. It somewhat strains credulity to say that the government’s promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment” (275 [emphasis in original]). Black suggests that the majority had created a property right in the redistribution of wealth—that is, a right to property in the property of others.