

THE GUARDIAN OF EVERY OTHER RIGHT

A Constitutional History of Property Rights

THIRD EDITION



JAMES W. ELY, JR.

The Guardian of
Every Other Right

BICENTENNIAL ESSAYS
ON THE BILL OF RIGHTS

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OXFORD
UNIVERSITY PRESS

2008

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UNIVERSITY PRESS

Oxford University Press, Inc., publishes works that further
Oxford University's objective of excellence
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Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
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Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

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Library of Congress Cataloging-in-Publication Data

Ely, James W., 1938–

The guardian of every other right : a constitutional history of property
rights / James W. Ely, Jr.—3rd ed.

p. cm. — (Bicentennial essays on the Bill of Rights)

Includes bibliographical references and index.

ISBN 978-0-19-532332-0; 978-0-19-532333-7 (pbk)

1. Right of property—United States—History. I. Title.

KF562.E54 2007

323.4'60973—dc22 2007009648

1 3 5 7 9 8 6 4 2

Printed in the United States of America
on acid-free paper

For Mickey

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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 amendments to the U.S. 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 also 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

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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 that 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 book 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 U.S. constitutional history, and provide a historical perspective on the contemporary debate about economic liberty.

Since publication of the first edition of this volume, interest in the constitutional rights of property owners has mushroomed. This renewed concern has found expression in important judicial decisions, notable legislation, and an outpouring of scholarly literature. Accordingly, I have revised this work, tinkering with some parts and substantially rewriting

others. My purpose has been to incorporate both new historical scholarship and the most recent developments in the continuing debate over the place of private property in the American constitutional order.

Numerous individuals made significant contributions toward the completion of the three editions of this book. I owe a tremendous debt to the late Kermit L. Hall, the general editor of the OAH Bicentennial Essays. Kermit provided constant encouragement and sage advice for every edition of this work. Michal R. Belknap, Harold M. Hyman, David J. Bodenhamer, Jon W. Bruce, R. Kent Newmyer, David F. Partlett, and Nicholas S. Zeppos offered insightful comments on the various editions of this work. I benefited, too, from the specialized knowledge of Jason S. Johnston, Robert K. Rasmussen, and Christopher Yoo.

Institutional support was also important. I am deeply grateful to Janet Hirt, Stephen Jordan, Howard A. Hood, and Peter Garland of the Vanderbilt University law library for their skill and patience in locating materials. I thank Dorothy Kuchinski for her cheerful and highly effective services in the preparation of the manuscript for the third edition.

James Cook and the editorial staff at Oxford University Press were consistently supportive and helpful in the revision of this work.

As before, this book is dedicated to my wife, Mickey, in deep appreciation for many years of love, friendship, and support.

The Guardian of
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Introduction

For decades following the New Deal, the protection afforded to property and economic rights under the U.S. Constitution was 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 owners 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 being agricultural to industrial? 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 deeply 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 use. 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 subsequent commentators. "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 or sought to impose a strict *laissez-faire* regime. 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 tenets 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; 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 shippers 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 early twenty-first 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 soon represent the most significant wealth. 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, courts have 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 frequently 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 clause of the Fourteenth Amendment and takings clause 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 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 new 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 consigning property to a secondary status with only minimal constitutional protection, a development that allowed a wide sway for economic regulation. By the start of the twenty-first century there has been a modest revival of judicial solicitude for the rights of property owners, but courts in fact rarely void regulations of private property or business enterprise.

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. For example,

there has been a large degree of overlap between legal arguments based on the takings clause and the due process clause of the Fourteenth Amendment. Furthermore, different constitutional doctrines, such as the concept of economic due process, have loomed large at various periods in America's past. It follows that the history of property rights has not proceeded in a neat and orderly manner. Rather, the story is one of contradiction and ambiguity, in which constitutional policy has been pulled in divergent directions by economic and political forces. This volume examines the constitutional history of economic and property rights from the settlement of America to the present. It proceeds on the assumption that constitutional law is shaped in a broad political and intellectual context. Thus, the book probes the origins of protection for property, examining the English common law tradition, the colonial experience, and the revolutionary struggle. It considers the impact of major political events, including the Jacksonian movement, the Civil War, and the New Deal. Moreover, the work emphasizes the role of ideology in shaping the constitutional status of property.

This book proposes an analytical framework to guide historical investigation; it does not attempt to resolve long-standing disagreements over the breadth of constitutional protection for property. The study suggests three working principles. First, the framers of the Constitution and the Bill of Rights envisioned some degree of federal judicial review of the substance of economic legislation. What criteria should be employed in making this review and which situations justify judicial intervention were and remain topics of intense controversy.

Second, given the framers' concern with protecting property as well as the nearly 150 years of Supreme Court activity in this field, the relegation of property rights to a lesser constitutional status is not historically warranted. The framers did not separate property and personal rights. Significantly, the language of the Fifth Amendment unites safeguards for both liberty and property.

Third, the Constitution seeks to protect several fundamental values, including economic interests, but property is not entitled to preferential treatment. Few constitutional rights are unlimited. Hence, the constitutional protection of private ownership does not imply unrestrained liberty to enjoy the maximum economic advantages of property under all circumstances. The crucial issues are how these competing interests are to be reconciled and which branch of government should strike the balance.

1

The Origins of Property Rights: The Colonial Period

From the very beginning, the settlement of North America was closely linked with economic rights. To Europeans, the North American continent represented a boundless opportunity for speculation and development; indeed, the prospect of new land was the main economic inducement for colonization. To exploit these favorable circumstances, the (British) Crown granted charters conveying vast tracts of land to trading companies and individual proprietors, such as William Penn. Both Virginia and Massachusetts, for instance, were founded by business ventures seeking a profit from colonization. The investors in the Virginia Company of London and the Massachusetts Bay Company were keenly interested in commercial gain. They anticipated revenue derived from annual rents imposed on land grants and from trade with the colonies. Thus, the initial colonies were products of early capitalism in England.

The settlers themselves were also influenced by economic considerations. Without discounting the importance of religious concerns, many colonists hoped to improve their economic position by migration. For instance, John Winthrop, later the governor of Massachusetts, was impelled to leave England by both religious zeal and the hope of financial reward. The availability of land lured settlers to face the hardships of life in the wilderness. As Willi Paul Adams observed, the “acquisition and cultivation of land was the very *raison d’être* for the colonies.”¹

English common law provided the legal foundation for property ownership in the colonies. Common law was customary law, deriving its authority from long-established usage. Royal courts in England fash-

ioned the common law into a body of rules that defined and protected property rights. The colonists then selectively adopted English common law as the basis of their jurisprudence. Common law principles, therefore, controlled the use and transfer of land and governed contractual agreements.

The high value attached to landownership by the colonists is best understood in terms of the English experience. In England, as in western Europe generally, land was the principal source of wealth and social status. Yet landownership was tightly concentrated in relatively few hands, and most individuals had no realistic prospect of owning land. Moreover, in theory no person owned land absolutely: All land was held under a tenurial relationship with the Crown. Although there was a bewildering variety of tenure arrangements, property ownership was conditional and involved continuing obligations to a superior. By the seventeenth century, these obligations took the form of "quitrents," annual payments to the king or overlord. Feudal in origin, the quitrent was regarded as a type of taxation.

Conditions in North America, however, were radically different from those in England, and traditional assumptions about landownership were ill suited to the colonies. Because land was abundant, the trading companies and proprietors attracted settlers by granting land on generous terms. Most colonies outside New England adopted the "headright" system as a means of distributing land. By this device an amount of land was awarded to each person emigrating to the colony. For many years Virginia granted a headright of 50 acres to all settlers. In 1689 the Carolina proprietors promised 150 acres to encourage immigration. Several colonies even offered headright land to indentured servants once their period of service expired. Until the late seventeenth century, the headright system was the principal basis of land distribution. Although headrighting was gradually eliminated, individuals could still purchase land for a modest payment. As a further inducement, colonial governments granted land titles in fee simple, the most extensive freehold estate recognized by English common law.

Influenced by religious values and a strong sense of community, the Puritan colonies in New England developed distinct patterns of landownership. To encourage social cohesion, land was granted to groups of settlers through townships and church congregations. The townships then distributed the land as they thought proper. Some New England towns in