

Property Rights as a Fundamental Underpinning of Liberty

James L. Morrison

© Oklahoma Institute for Civic Studies

April 2016

Government is instituted to protect property of every sort ... This being the end of government, that alone, is a just government which impartially secures to every man whatever is his own. James Madison¹

Introduction

Former President John Adams, in *A Defense of the American Constitutions*, wrote a number of letters to extol the virtues of a Constitutional Republic and record his thoughts regarding property:

The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If *Thou shalt not covet* and *Thou shalt not steal* were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free.²

The thesis of this paper is the assertion, that in the United States, property rights are fundamentally integral to the liberty of the individual. The author will first briefly explore the history and context of the issues of property rights and liberty guaranteed by the Constitution's due process clause. Finally the author will defend the thesis by presenting additional information and research that supports and informs my conclusions.

History and Context

The Takings and Due Process Clause of the U. S. Constitution

The Fifth Amendment of the U.S. Constitution, after dealing with trials and punishment, provides what is considered to be the Takings Clause “nor, be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation”³ though it first explicitly deals with due process. The Fourteenth Amendment

¹ JAMES MADISON, PROPERTY Volume 1, Chapter 16, Document 23, Papers 14:266-68 (1792). Retrieved 2/9/16 from <http://press-pubs.uchicago.edu/founders/documents.v1ch16s23.html>

² John Adams, edited by Will Butts, *A defense of the Constitutions of Government of the United State of America*, Vol 1. (2015).

³ UNITED STATES CONSTITUTION retrieved from usconstitution.net/const.txt on 3-17-16.

Section One contains what is known as the Due Process Clause “nor shall any State deprive any person of life, liberty, or property, without due process of law,” almost word for word with the substantive difference being this amendment explicitly applies the language to the State.⁴ It is interesting to note the “Privileges and Immunities Clause” protects citizens, while the Due Process clause protects all persons. It may seem in many cases that current Constitutional law places the three rights not up for deprivation, in a hierarchy in accordance with the order in the clauses rather than equal in all aspects of protection under the law. Ronald Krotoszynski Assistant Professor of Law at Indiana University notes “The Supreme Court's modern substantive due process jurisprudence, which protects "fundamental" liberty interests from governmental abridgment absent a "compelling" governmental interest, has never been formally extended to encompass "fundamental" property rights.”⁵ One must be careful when reviewing the conversation on property to note the use of interests versus rights when discussing property. Rights seems to refer to land and tangible assets, interests seems to be used in conjunction with intangibles (e.g. a property interest in employment or reputation), though both are identified as property. Krotoszynski seems to touch on this is a discussion of substantive due process claims (versus procedural due process)

Despite the seeming clarity of *Ewing* and *Martin*, the lower federal courts have had great difficulty creating and applying an analytical framework for evaluating substantive due process claims involving property rights. The federal courts of appeals have split on the basic question whether substantive due process protects *property rights* at all; some have held that it protects only fundamental *property rights*, while others have permitted plaintiffs to bring substantive due process claims regardless of the nature of the *property interest* at issue.⁶ [Emphasis added]

Case law thus seems to protect to a lesser extent the liberty of the individual when it comes to property, and also seems to have established different levels of protection for property rights versus property interests. Adding to the confusion some courts have determined that the Takings Clause is the appropriate clause for adjudication of property rights.⁷ Perhaps this stance is the result of what Akhil Amar contends is language that does not infer that Congress “enjoyed a general power of eminent domain. Rather, eminent-domain power, like all other powers had to be deduced from the Constitution’s earlier enumerations of governmental authority.”⁸

⁴ *Id.*

⁵ RONALD J. KROTOSZYNSKI, JR., FUNDAMENTAL PROPERTY RIGHTS, 85 Geo. L.J. 555, 555 (1997).

⁶ *Id.* at 568.

⁷ *Id.* at 581-582.

⁸ AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY, 327 (2006).

Application of Due Process Clause and Takings Clause to property rights

Leonard Ratner, Professor at Law, University of Southern California indicates the due process clause is perhaps the “most ambiguous statement in the Constitution” especially since its scope includes “all human activity... all governmentally enforced community values... and “due process” suggests inchoate restrictions of methods of enforcement.⁹ He proceeds to argue that the clause has been used in broad terms to limit regulation and enforcement of state and national government. Ratner further suggests the Supreme Court has failed to bring order to the chaos of understandings of the clause choosing instead to take advantage of the ambiguities in historical decisions to balance “social benefits of regulation.”¹⁰

The greatest barrier faced by those who are involved in bringing actions under the Takings Clause is meeting the Federal Court standard of “ripeness. In order to do so one must demonstrate the final decisions have been made after exhausting all avenue of administrative appeal. This barriers height may not be fully appreciated until one has taken on the bureaucracy and the administrative process and delaying tactics available to it. Years of litigation in state courts and the concomitant costs may be lost even a couple of levels up by the courts definition of “ripeness.” Gregory Overstreet asserts though “a taking claim alleges a serious constitutional violation... federal courts seem to consider land use cases simply unimportant.”¹¹

One case decided by the Supreme Court that demonstrates the application of the Takings Clause to property and some of the disagreement even on the Supreme Court is *Lucas v. South Carolina Coastal*¹² opinion written by Justice Scalia. In this case a developer purchased beachfront property intending to build two houses on the property. There were no restrictions on residential building attached to the property at the time of the purchase. After the purchase the state legislated boundaries such that Lucas was precluded from building on the two properties. Lucas sued on the basis that the legislation passed after the purchase rendered the property without value and that this was taking under the Fifth and Fourteenth Amendment. The State Trial Court found in favor of Lucas, the state legislation had rendered the property valueless, the State Supreme Court reversed the Trial Court and the U.S. Supreme court reversed the State Supreme Court and remanded back to the lower court to determine the amount to be paid to

⁹ LEONARD G. RATNER, THE FUNCTION OF THE DUE PROCESS CLAUSE, 116 U. Penn. Law Rev. 1048, 1049 (1968).

¹⁰ *Id.*

¹¹ GREGORY OVERSTREET, THE RIPENESS DOCTRINE OF THE TAKING CLAUSE: A SURVEY OF DECISIONS SHOWING JUST HOW FAR FEDERAL COURTS WILL GO TO AVOID ADJUDICATING LAND USE CASES, 10 J. Land Use & Envtl. L. 91, 92 (1994).

¹² *Lucas v. South Carolina Coastal*, 505 U.S. 1003 (1992).

Lucas. There were actually Justices dissenting and arguing the property was not valueless even though the purpose of the purchase had been abrogated by the legislation, others suggested that this ruling was a new rule out of line with others in the past. And the beat goes on and the beat goes on.

Definition of property and property rights

D. Benjamin Barros suggests property can be defined as “a human-created legal institution that places resources in private hands and, generally speaking, leaves issue of use and disposition of those resources to their owners.”¹³ Property might be defined more often as a “bundle of rights” with the “most important sticks in the bundle [being] (1) the right to exclude, (2) the right to transfer, (3) to right to possess and use and (4) the right to destroy”¹⁴ this bundle of rights would also include the right to transfer sub-divided interests and to restrict transfers with time frames. It should be noted the property interests extend to intellectual property, reputation, and other elements of a person’s life. There have been some that argue employment in a particular job with a particular company or pursuit of higher education has created a property interest.

Definition of liberty

Though one might argue that freedom and liberty are not identical, for the purposes of this paper they will be considered essentially as substitutes. Freedom (liberty) is defined by D. Benjamin Barros, Associate Professor at Law for Widener University School of Law as “an individual’s ability to make basic life choices for herself.”¹⁵ Barros strongly asserts that “T[t]he institution of private property is vital to individual freedom.”¹⁶ He continues “it is difficult to see how other freedoms to[of] speech, religion, or association could be secure in society without the institution of private property.”¹⁷ Liberty, specifically in respect to property, suggests one has the right to choose whom to exclude; to whom, in what manner, and when, to transfer those rights; how to possess, enjoy, and use the property; and whether to destroy or preserve a particular property. Liberty has a positive and a negative connotation, “the freedom to act as well as

¹³ D. BENJAMIN BARROS, PROPERTY AND FREEDOM, 36 NYU J.L. & Liberty, 36, 46 (2009).

¹⁴ JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 3RD ED., 5, (2012).

¹⁵ BARROS, *supra* note 13.

¹⁶ *Id.* at 69.

¹⁷ *Id.*

freedom from interference”¹⁸ Freyfogle asserts that the essence of property entitlement—is the right of quiet enjoyment, the legal ability—not just the physical might—to keep others from interfering with one’s acts.”¹⁹ Perhaps one could argue that essence of liberty is the same right of quiet enjoyment of the right to life.

Argument

Philosophical approaches to property and liberty

Barros addresses the relationship between property and freedom, through three concepts; 1) that property creates a place of individual autonomy and privacy, 2) that property enables the dispersing of power, and 3) that property provides an individual access to resources needed for freedom.²⁰

Zone of Autonomy and Privacy

The core idea advanced by Barros is that property provides a “place,” some interject the idea of a “sacred space” that becomes relatively free from outside influences and interferences. That space provides autonomy within the confines of the laws that govern the public good. Freedom becomes constrained by the removal of that decision making autonomy through regulation or law. The dichotomy is, if the above is true, then persons with no private property cannot enjoy liberty in its fullest sense unless there is public property that provides this same autonomy and privacy. Eminent-domain seems to serve this purpose as a method to create public use spaces, without infringing upon property rights and interests by extending this method to allowing eminent-domain for public purposes.

Dispersal of power

Barros also presents the idea that “property promotes freedom through dispersing of power.”²¹ This concept relies on the argument that private property separates economic and political power and enables one to balance the other. If one were to define freedom as the absence of coercion then private property enables one to access resources in spite of the political power another might wield. The Constitution is designed to be a check on that political power

¹⁸ ERIC T, FREYFOGLE, PROPERTY AND LIBERTY, 34 Harv. Envtl. L. Rev. 75 (2010).

¹⁹ *Id.* at 81.

²⁰ BARROS, *supra* note 13, at 47-51.

²¹ *Id.* at 50.

through its due process provisions. It seems the power wielded by Home Owners Associations, City Councils, County Commissioners, and State regulators is nearly unchecked today, without consideration of the Federal Government power to impact one's property rights.

Access to resources to secure liberty

Barros then makes the argument that “property gives people access to the resources to be free.”²² The argument is made through a counterfactual “in the absence of private property... who gets to decide how to distribute food, housing, transportation, education and other goods and resources.”²³ It is appropriate to remind ourselves at this point that property encompasses much more than land, but also includes tangibles such as tools and vehicles and intangibles such as intellectual products and reputation. This particular relationship between property and freedom is one place where communal property advocates appropriately argue that the indigent and lower socio-economic classes are at severe disadvantages.

Additional linkages between property and liberty

Freyfogle concludes that the governing principle of property and liberty linkage is the law should protect property when the liberty to use that property promotes the common good,²⁴ and goes on to say “liberty does not define property, to the contrary, property defines liberty,” both words attempt to convey abstract ideas. Ron Paul asserts the “Privacy is the essence of liberty. Without it, individual rights cannot exist. Privacy and property are interlocked. If both were protected, little would need to be said about the other liberties.”²⁵ Regardless of ideology it seems to be agreed that life, liberty and property are fundamentally interrelated and perhaps even inseparable.

Balance between Individual liberty and that of the surrounding society

It may be the case that “recognizing a basic liberty in productive property is based on the necessity of property to secure other basic liberties.”²⁶ This requires a system, or property regime that effectively recognizes the need and appropriately facilitates private property rights and interests in such a manner that is most productive for society in general.

Amar has an interesting perspective when he notes the lack of the references to private property in the Constitution itself was intentional and demonstrated the founders “clear

²² *Id.* at 51.

²³ *Id.*

²⁴ FREYFOGLE, *supra* note 18, at 117.

²⁵ RON PAUL, PRIVATE PROPERTY IS THE ESSENCE OF LIBERTY, Mises Institute, 1, retrieved from <https://mises.org> on 3/3/16.

²⁶ BARROS, *supra* note 13, at 64.

commitment to people over property shone through.”²⁷ He surmises the reason for this was the founders desire to set aside private property qualifications for voting and especially for the vote in the ratification conventions. Perhaps this lack of direct constitutional address to the issue of property rights and interests left the opening needed for case law and regulation to set the standards and the balances.

Practical Approaches –

C. Edwin Baker, Professor of Law, University of Pennsylvania, defines property as “an aspect of relations among people” and further expounds on the concept as “A specific property right amounts to decision-making authority of the holder of that right.”²⁸ Sprankling substantiates this view of property with the assertion that “property consists of a package of legally-recognized rights held by one person in relationship to others with respect to some thing or other object.”²⁹ This approach is integral to an understanding of how property is a foundation of an individual’s liberty. The construct of *property functions*, undergirds this view of property as foundation of constitutionally protected liberty. Property, Baker argues has the following functions: 1) it provides liberty through provision of self-realization and self-determination through the choices of the use of the property; 2) it secures “claims on resources” for the provision of life needed survival resources; 3) it serves to define persons and their personhood “in terms of their activities”; 4) it serves to protect the individual from “certain forms of exploitation” by the more powerful.³⁰ Thus property is an integral part of an individual’s liberty and any deprivation of the rights and interests serves to lessen that individual’s liberty.

The court’s current reading and application of the Constitution reduces the individual’s property rights and interests. Perhaps the case with the most publicity in the last several years was that of *Kelo v. City of New London*³¹ in which the majority of the Supreme Court found 5-4 the taking of private property for “public use” was appropriate though the taking was for the purpose of building a privately owned research facility. Justice O’Connor argued in her dissent, joined by Justice Thomas, “that court had replaced the “Public Use Clause with a “Public

²⁷ AMAR, *supra* note 8, at 17

²⁸ C. EDWARD BAKER, PROPERTY AND ITS RELATION TO CONSTITUTIONALLY PROTECTED LIBERTY. 134 U. Pa. L. Rev. 741 742-743 (1986).

²⁹ SPRANKLING, *supra* note 14, at 2.

³⁰ BAKER, *supra* note 28, at 744-748.

³¹ *Kelo v. City of New London*, 545 U.S. 469 (2005).

Purpose Clause”.”³² This finding by the court is a classic example of case law restricting the right of a citizen to make the decision regarding best use of their property interests and rights and thus suffering an abridgement of their liberty. Justice Thomas added a solo dissent in defense of the minorities and the lower economic classes in general and contended strongly for revisiting the concept of public use and returning to the original meaning of the clause. This meaning, he observed, was “the government may take property on if it actually uses or gives the public the legal right to use the property.”³³

I would also submit the resulting complexity from voluminous regulations and the sheer scope and number of court decisions has reduced the individual’s right to decide how they might enjoy their property. John Sprankling makes a convincing argument regarding the laws complexity in just one area of property law, that of public nuisance “as one authority observed, “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance’.”³⁴ Of course public nuisance is the term most often applied when one is trying to obtain an injunction against another’s property use, justified or not. I would suggest there is more than one area of property that could well be termed impenetrable jungle, e.g. the rule against perpetuities, creating a restraint on liberty.

Conclusions

The issues involving property rights and interests are convoluted as well as complex. There are valid arguments on all sides of the issues, there are varying amounts of costs (psychic, financial, and social) associated with decisions made regarding conflicts. Decisions that are just may not be fair to all. A reasonable conclusion is; infringements upon or abridgements of an individual’s property rights, some justified and some not, some major and some micro, do impact an individual’s liberty in varying degrees. A consideration of balance is also important to note, as Baker reiterates, “all laws limit some people’s formal liberty while increasing the formal liberty of others.”³⁵ One must recognize though that the balance of power is the side of local, state, and national governments by virtue of statutory law, case law, and perhaps the lack of enforcement of Constitutional law. The law should stringently protect property rights and interests, though in

³² JUSTICE O’CONNOR IN RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION. 135 (2014).

³³ *Id.* at 136.

³⁴ SPRANKLING, *supra* note 14, at 484.

³⁵ BAKER, *supra* note 28, at 776.

many cases, the law must also find a balance of the individual's rights and interests against another's rights and interests or societal needs as a whole, in an ever increasing brisk paced yet delicate power dance. Perhaps Frederic Bastiat writing in the 1840's and 1850's during the French Revolutions said it best "*The law is justice... its mission is to protect the people, and to secure to them the possession of their property. The law cannot avoid acting upon our persons and property, if it does not secure them, then it violates them if it touches them.*"³⁶

³⁶ FREDERIC BASTIATE, THE LAW, LUDWIG VON MISES INSTITUTE 50 (2013).