

to avoid rendering decisions that will likely bring the Court into conflict with the President, the Congress, the states or the people. On the contrary, to do so would be to compromise away in advance the one contribution it can best make to government: the integrity of its judgments. The actual "final" constitutional resolution of an issue will be determined by the extent to which the executive, the Congress, the states and the people agree or disagree with the Court's interpretation and translate that constitutional judgment into limitations on or refinements of the Court's ruling. But that resolution is a matter properly out of the Court's control and, strictly speaking, should be none of its concern. The Justices should—indeed, because of their oaths, *must*—state what they believe is a proper interpretation of the law, irrespective of political consequences, public perceptions or concern for their own power.

*The Constitution in Conflict* implicitly rejects such a view of the Court's role in favor of a more self-consciously political role. That Professor Burt has taken this position is not of enormous moment. That the Supreme Court has made considerations of power and politics the centerpiece of its new jurisprudence of "reasoned judgment" is of far greater cause for concern.

**THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS.** By James W. Ely, Jr.<sup>1</sup> New York: Oxford University Press. 1992. Pp. x, 193. Cloth, \$32.50; paper \$10.95.

*Carol M. Rose*<sup>2</sup>

In this small volume James Ely puts forth a careful, wide-ranging and blessedly terse survey of the constitutional treatment of property rights over the course of American history. This is not a book of constitutional theory, nor is it a book on the theory of property rights; and although the author makes a number of interesting and informed judgments about the legal events he describes, he does not give the reader many explicit clues about the theoretical stance from which these comments emerge. Extrapolating from the text itself, Ely seems to be working from the perspective of ordinary language or ordinary understanding. That is, he appears to be asking what most people mean by "property," and then describing the

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ways that our various governmental institutions treat the relevant subjects.

This common-sense procedure results in a book that challenges some conventional presentations of constitutional property law. For example, Ely is interested not only in the federal courts, but in the whole range of governmental decisionmaking, including state judicial decisions and legislation, along with congressional acts and regulatory policies. He also moves beyond the conventional focus on land as the quintessence of property, and takes up a variety of other subjects affecting economic entitlements—taxation, intellectual property, property in slaves (from a time happily now past), the regulation of utilities and railroads, the effects of social policies concerning labor relations and discrimination, among others.

A book so brief necessarily slights some aspects of American property history. Readers interested in environmental history may look in vain for many issues relating to the management of public resources—notably the Federal public lands, so very important in the settlement of the West—or the property impacts of various subsidy programs, such as water reclamation projects, agricultural price supports, or the highway programs. Similarly, family law enthusiasts will not find much about the changing (and sometimes not-so-changing)<sup>3</sup> organization of entitlements within the family. Moreover, brevity appears to have dictated that Ely lapse into a more conventional presentation in the later pages of the book, where the issues often appear as the usual pingpong game between the United States Supreme Court and the various governmental actors that have attempted to regulate property.

All the same, the book is a very useful survey of past and present property rights, and of the political and doctrinal lenses through which American law has envisioned property. Those lenses have changed over time, and in Ely's book, one sees the gradual resittings of constitutional property foci: the odd mix of republicanism and mercantilism in the colonial period; the preoccupation with the "obligation of contracts" clause in the early republic; the shift to the commerce clause with all its ambiguities; the laissez-faire and substantive due process approach of the later nineteenth and early twentieth centuries; the switch to permissiveness about economic regulation in the New Deal and following decades; and the current obsession with the "takings" clause, perhaps as a redress to the double standard ushered in by the famous footnote 4 in *Carolene*

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3. For an argument that the widow's share has survived all kinds of changes in estate law, see Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers"*, 10 J.L. & Ineq. 137 (1991).

*Products*—a double standard that has treated property rights as lower in status than other constitutional rights.

Ely dispatches this huge history with admirable calm, only infrequently taking sides in the great debates represented by these massive doctrinal moves. On the most current of these debates—whether property rights should be restored to a rank of equal status with other rights—Ely once again seems to take a kind of ordinary language approach. That is, if people call property a “right,” he seems to find no obvious reason to distinguish this right from others, or to treat property rights as particularly subject to regulatory whim. Ely thinks that the Constitution’s Framers saw property as equal in status with other rights, and although he thinks there might be modern reasons for greater property regulation than once was the case, he still appears to think that a right is a right is a right—even if it is a property right.

What is perhaps more intriguing is the much more radical viewpoint implied in the title of Ely’s book, and explicitly stated by Arthur Lee of Virginia in 1775: that property is “the guardian of every other right.” This view implies that the *Carolene Products* footnote got the matter exactly backwards: that property is not just *equal* in status with other rights, but *takes precedence* over all others. This is not a view that Ely explores at great length, evidently taking the more moderate position of parity over preferment. Nevertheless, it is a view that Arthur Lee’s contemporaries appeared to share, and one that has cropped up in various guises throughout our jurisprudential history.

So, *is* property the guardian of all the others, and of liberty more generally? Why might anyone think so? Here, in no particular order, are some answers, all of which have a newer version as well as a perhaps more provocative older version.

Answer 1. *Property protects all other rights, because property enables citizens to be independent and hence capable of self-government.*

In its older form, this view could be encapsulated under the rubric of “republican property”: property, and especially agricultural property, gives the citizen a safe haven, and this in turn enables him to form independent judgments and to debate and defend his views with courage and vigor in the political forum. The republican property owner is his own man, dependent on no one, and hence fit to exercise the franchise and generally take part in the polity—and if you are not such a property owner, you should be excluded from politics, since you might turn into a potentially dan-

gerous sycophant.<sup>4</sup> I say “own man” advisedly, because it was quite consistent with republican property that women, being excluded in large part from property ownership, were also excluded from the franchise.

The modern form of this argument is quite different, and Ely’s book touches on it: Property, it is said, does indeed form an essential basis for the projection of one’s own “personhood.”<sup>5</sup> But what follows is not exclusion of the propertyless from politics, but rather the view that all citizens should be furnished the necessary modicum of property, so that they too can be sturdy, self-governing citizens.<sup>6</sup>

A few observations may be in order here. For one thing, the modern version does not unambiguously protect property rights, since the citizenship-enhancing property that gets distributed to the poor will necessarily come from the taxes (and hence assets) of those who are better off. For a second thing, the older republican property was also not unambiguously pro-property: republican property had a certain tolerance of redistribution, since vast disparities of wealth were thought to disrupt the republican polity, and since commercial property (which entailed dependence on other trading folk) was never thought to be so significant for independence anyway, and hence was thought to be more regulable.<sup>7</sup> For a third thing, property has no exclusive lock on political independence. It has often been rather nervously opined, for example, that destitution might make people even more strong-minded and “independent,” since the destitute have no reason for giving a damn. One might even think that their unpropertied willingness to revolt takes the place of property: it is the guardian of all their other rights.

All the same, no one should think that the “independence” argument about property is simply a tired antiquity. One might observe its resurgence in the presidential candidacy of Ross Perot, where a number of people seemed to think that the man’s great wealth made him more sturdy and courageous than other politicians. The idea was that he could speak his mind fearlessly, precisely because his property made him independent—and hence an

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4. For a description of this position, see Carol M. Rose, *Property as Wealth, Property as Propriety*, 33 *Nomos* 223, 235-37 (1991) and authorities cited therein.

5. Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982).

6. Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 785-86 (1964); see also Akhil Reed Amar, *Republicanism and Minimal Entitlements: Of Safety Valves and the Safety Net*, 11 *Geo. Mason U. L. Rev.* 47 (Winter 1988).

7. See Rose, *Property as Wealth, Property as Propriety*, 33 *Nomos* 223 (cited in note 4).

appropriate man for political office. This is the idea of republican property rejuvenated.

*Answer 2. Property protects all other rights, because property diffuses political power.*

This argument is heard rather often. Ely cites William Van Alstyne on the matter, but he might just as well have quoted Milton Friedman<sup>8</sup> or Friedrich Hayek.<sup>9</sup> The basic idea, putting it very crudely, is that property is a source of power, and if everyone can acquire and hold property, no single institution or set of institutional leaders can gather all the power to itself. Hence private property is not only economically decentralizing; it is politically decentralizing as well, and prevents the monopolization of power in the hands of some central Leviathan.

The older version of this argument is in a way more interesting, since it emerged against a now almost-forgotten set of background beliefs, according to which hierarchical control was assumed to be necessary for both economic and political life. This was because human beings were thought to be so unruly as to require the subordination of the (many) worse to the (few) better. The eighteenth century property theorists challenged this set of beliefs, describing the market as a self-regulating natural mechanism that effectively dispensed with the need for an imposed political discipline.<sup>10</sup> Indeed, if "the market" could adjust the unregulated participation of huge numbers of human transactions, why did human beings need authoritarian ordering at all, economic or political? Hence private property, and the interactions of the market, gave the original model to the decentralization of political authority.

Again a caution is in order: Joyce Appleby, an historian whose work has thoroughly explored the eighteenth-century political hopes for capitalist private property, evidently believes that the time for this hope has come and gone.<sup>11</sup> Moreover, one has to wonder how thoroughly property can diffuse political power when a property regime itself depends on a set of political choices; we might want to recall, for example, that many of the early capitalist efforts were most actively promoted by monarchs.<sup>12</sup> On the other hand, recent political events have once again shown the power of this set

8. Milton Friedman, *Capitalism and Freedom* 15-16 (U. of Chi. Press, 1962).

9. Friedrich A. Hayek, *The Road to Serfdom* 103-04 (U. of Chi. Press, 1944).

10. Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* 7-9, 25-35, 95-97 (N.Y.U. Press, 1984).

11. *Id.* at 105.

12. See Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 *Nw. U. L. Rev.* 74, 80-81, 86-89 (1989), and authorities cited therein.

of ideas; as Ely points out, the move to a free market in the former Soviet-dominated world is not just an economic matter, but also at least in part a political move, aimed at diffusing power.

*Answer 3. Property protects all other rights, because property makes politics boring and unimportant.*

Ely has at least one modern quotation relating to this version of property's primacy: it is from Judge Alex Kozinski, who remarked that rational people, if forced to the choice, might well forego the right to wear obscene slogans on their clothing, in favor of the right to build buildings or operate railways.<sup>13</sup> Given Judge Kozinski's prominence on the libertarian lecture circuit, one might expect that he himself has rather more sophisticated choices on matters of political liberty; but his observation does give the flavor of another political argument for property. That argument is that property is much more interesting than politics, and hence property can entice people away from endless rounds of political battles. Why bother to repress other people's liberties, when one can spend one's time so much more engagingly in business?

Here too there is an older version. According to Martin Diamond, this capitalistic distraction from politics is one of the things that *The Federalist* had in mind. An extended commercial republic would make property available to all, and that prospect would disarm factions, channelling their efforts away from the usual pursuits of murdering each other over honor and religion and the like.<sup>14</sup> Thus free speech and freedom of worship would be protected by a profound indifference to what anyone says about anything—an indifference induced by the frenetic pleasures of property-seeking. Indeed, a few decades later, Tocqueville rather bemusedly reported that the idea was working: Americans lusted after commerce so mightily that they cared for little else, and, incidentally, hardly could speak about religion or ideas at all, except in the most vapid and extreme generalizations.<sup>15</sup>

There are several caveats here, too. One comes from modern public choice theorists, who tell us that the quest for goodies is indeed quite likely to invade the logrolling democratic political pro-

13. At 153, quoting Judge Alex Kozinski, *Foreword: The Judiciary and the Constitution*, in James A. Dorn and Henry G. Manne, eds., *Economic Liberties and the Judiciary*, xvii (Geo. Mason U. Press, 1987)

14. Martin Diamond, *The Federalist*, in Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy* 631, 648-49 (Rand McNally, 2d ed. 1972).

15. Alexis de Tocqueville, 2 *Democracy in America* 154-57 (frantic pursuit of commerce and industry), 71-78 (vast subjects, inflated style of American poetic work), 134 ("religious insanity") (Phillips Bradley ed., Knopf, 1966).

cess—perhaps even more likely than in hierarchic orders.<sup>16</sup> Indeed, the political quest for goodies (or “rent-seeking”) seems rather easier than making an honest buck in business, and hence, on this cheerless account, political rent-seeking tends to displace productive business activities.<sup>17</sup> Another caveat comes again from the news of our day in Eastern Europe, where the lifting of centralized economic regimes seems for the moment to be absorbing some citizens not in the amiable pursuits of money making, but in the much deadlier and destructive fixation on settling old ethnic scores. Property may distract people from politics, but politics can distract people from property, too.

*Answer 4. Property protects all other rights, because property symbolizes all other rights.*

This argument may have animated some of the Founders’ interest in property, and certainly seems to lurk in Madison’s well-known and almost lyrical description of a great string of rights as his “property”—that is, in a “larger and juster meaning” he had “property” in his religious beliefs, his opinions, and so on.<sup>18</sup> The idea here is that property is the symbolic form that human beings use to represent all forms of entitlement: you can’t think about or describe rights of any kind except in metaphors of property, *à la* Madison.

Is there a modern version of this idea? Jennifer Nedelsky, who has studied the Federalist conception of property, thinks that the notion of property-as-symbol may have some merit, although she warns that property is a rather complicated and imperfect stand-in for other kinds of rights.<sup>19</sup> And in a very practical way, perhaps property’s symbolic force animates the incredible touchiness that is still set off by the regulation of landed property—particularly physical invasions of land<sup>20</sup>—even though, as Ely points out, land is considerably less important in modern economic life than once was the case.

Assuming for the moment that property does act as the quin-

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16. See Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harv. U. Press, 1965).

17. See Gordon Tullock, *Rent Seeking as a Negative-Sum Game*, in James M. Buchanan, Robert D. Tollison and Gordon Tullock, eds., *Toward a Theory of the Rent-Seeking Society* 16, 31-36 (Texas A&M U. Press, 1980).

18. James Madison, *Property*, National Gazette, Mar. 27, 1792, reprinted in Robert A. Rutland, et al., eds., 14 *The Papers of James Madison* 266 (U. Press of Va., 1983).

19. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* 207-08, 247-49 (U. of Chi. Press, 1990).

20. For major cases on somewhat minor physical invasions see *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

tessential symbol for all rights and liberties, it would follow, I suppose, that a weakening of the concept of property in turn would weaken the sense of rights altogether. So what? One response might be, so much the better: that is, we Americans are too rights-conscious for our own good, and our entitlement-crazed desire to sue everybody can only clog the machinery of economic growth. Another response might be that even if property is an important symbol of all other rights, why is land the dominating symbol for property itself? Suppose, for example, that the leading metaphor in our symbolism of rights were not property in land, but property in water, in which people do in fact have important entitlements. Would our symbolism of rights then lead us to think about rights in a figuratively more "fluid" way—making us think that rights bring us into contact with other people, and that rights require us to work out joint solutions?

In short, then, maybe property can act as a symbolic stand-in for all kinds of rights, but this symbolic role raises questions, too: What's so hot about rights-consciousness? And do we need rights-consciousness in the sense of fixed boundaries?

All these propositions, then, and no doubt some others as well, may lead us to a somewhat muted cheer for property as the "guardian of every other right." To be sure, some of these notions stray rather far afield from Ely's down-to-earth book. They relate, however, not only to the question whether property is a preeminent right, but also to a question that Ely does talk about more extensively: whether property enjoys even an equal status with other rights.

Here is the way the preeminence issue raises the parity issue: Property may have once been important as the guardian of other rights, but if those other rights have come to have more direct constitutional protections, do we really need property rights so much? That is, if current interpretations of the Bill of Rights and the great Civil War amendments now protect our political and expressive rights directly, might property as an indirect protector now safely recede to a second rank, somewhat in the way that *Carolene Products* suggested?

This question once again goes to the significance of property as a *political* institution rather than as an *economic* one. Clearly there are independent and powerful economic arguments for property, since property rights are widely believed to enhance and encourage wealth-producing activity. But if property is *only* about economic well-being, and if property is no longer needed as the political guardian of other rights as well, then the regulation of property

would seem to involve only issues of the levels and distribution of total wealth, without implicating fundamental issues of political self-rule.

The foregoing comments assume a few things, of course. For example, they assume that the protections of other rights only ratchet up, and not down; if our courts can change their mood about protecting speech and religion and so on, then property once again might become more important as the "guardian of every other right." Another and more fundamental thing that these comments assume is equally problematic: that one can sort out the political from the economic aspects of property. This is a tricky business, as Ely notes: one only need contemplate, for example, the property interest in a newspaper business, a radio station, or even a sound-truck.

The distinction between property rights and other rights is also a tricky business if one thinks that a society's overall economic well-being (or lack thereof) might affect people's willingness to forego liberties. If that is the case, then the status of property, sheerly as a utilitarian "economic" institution, might affect the overall social commitment to political rights. This is an observation that has often been made about Weimar Germany, for example; that is, that economic fears put political liberties on the auction block.<sup>21</sup> More recently, it sets the background for the worry that economic distress might cause the re-emergence of a new authoritarian regime in the former Soviet Union.

Ultimately, then, property's economic role might be thought another reason why property could be the "guardian of every other right": Property rights make societies wealthy, and wealthy societies can enjoy the luxury of liberty.

So, where do we put our bets? On property as an indirect protector of all the other rights? Or on the judges as the direct protectors or those rights? Or do we hedge our bets and go with redundancy—direct protections plus the indirect protections of property rights? Ely of course does not dither much with these questions in this useful book, but his comments do bring them to the surface, and in so doing suggest that property rights still raise vital concerns in our constitutional polity.

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21. See, e.g., A.J. Nicholls, *Weimar and the Rise of Hitler* 151 (Macmillan, 1968).