

PROPERTY AS A HUMAN RIGHT

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In 1976, on the Bicentennial anniversary of our founding document, the Declaration of Independence, which celebrated life, liberty, and the pursuit of happiness, the Supreme Court decided the case of *New Orleans v. Dukes*.¹ One might think that liberty and the pursuit of happiness include one's right to a livelihood, but no such right exists under the Constitution, according to *Dukes*. The Constitution does not mention a right to livelihood, but it does not mention a great many other rights that the Court has been ingenious enough to discover: a right to abortion; a right to pornography; a right to travel; a right to privacy; a right to association; a right to free counsel for indigents; a right to spread hatred; and a right of free speech for corporations. A Court that is so imaginative should be able to find the right to pursue a livelihood in the same Constitution. That right seems fundamental to liberty, and it should be accepted as a protected property right, too.

Consider the facts in *Dukes*. They involved a woman who sold hot dogs from a pushcart in the French Quarter. If Nancy Dukes had been a nude dancer in one of the strip joints in the French Quarter and the City Council had put her out of business, she might have pleaded freedom of expression under the first amendment.² Nude dancing can be symbolic free speech, but selling hot dogs is just commerce, and therefore subject to little constitutional respect, even if it involves one's livelihood.

Dukes had operated a licensed pushcart in the French Quarter for two years when the City Council banned all pushcarts except those operated by their owners for at least eight years. This ordinance put only Dukes out of business but allowed two others to operate. The Fifth Circuit thought that the exclusion of Dukes denied her the equal protection of the laws but the Supreme Court unanimously reversed. In an unsigned opinion the Court said that

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1. 427 U.S. 297 (1976).

2. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); see also *Young v. America Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976).

the ordinance was "solely an economic regulation" designed for safeguarding the tourist charm of the French Quarter and thereby aiding the city's economy. The Court did not explain why a third pushcart would offend tourists or hurt the city's economy, but the point of its decision was that no such explanation is required when a mere economic right is at stake. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations."³ The government regulation need only have some rational basis as a means of achieving some police power end. If an economic right is involved, the Court never questions the reasonableness of the government's means. Economic rights, especially those of individuals, are inferior rights.

By contrast, if some regulation seems to threaten first amendment rights or any of the rights of the criminally accused, or any of the rights that the Court has invented, like the right to an abortion or to travel, the Court subjects the regulation to strict scrutiny, reverses the presumption of constitutionality, and places upon the defender of the regulation the obligation of proving its constitutionality. In *Dukes*, however, the Court said that it will "not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." Only once in the past half century had the Court held unconstitutional an economic regulation as a denial of equal protection,⁴ and in *Dukes* the Court overruled that precedent as a needlessly intrusive judicial infringement on the state's economic powers. In the same half century, not one state or local act of economic regulation was held unconstitutional based on a violation of due process of law. Like the corpse of John Randolph's mackerel, shining and stinking in the moonlight, economic due process of law, the old substantive due process, is dead even as to personal rights in property. The Court has abdicated the responsibility of judicial review in such cases, although it has not in any other Bill of Rights cases.⁵

3. *Dukes*, 427 U.S. at 303.

4. *Morey v. Doud*, 354 U.S. 457 (1957).

5. Another little case in the festive year of 1976 again illustrates. By a 7-1 vote the Court held that a state statute compelling the retirement of uniformed police officers at the age of fifty did not deny the equal protection of the law. The officer who sued to be reinstated to active duty had just passed a rigorous physical examination, and the doctors had pronounced him to be in excellent physical and mental health. The Court, believing that fact to be irrelevant, held that its test of strictly scrutinizing a regulation applied only if a fundamental right was violated or if a suspect class was disadvantaged. The Court did not regard the right to work as a fundamental right, certainly not for a fifty-year-old cop if a legislature

The rational basis test, used only when property rights are concerned and never for other rights, is inadequate. After all, the text of the Constitution explicitly protects property rights, not only by the fifth and fourteenth amendments but also through the fourth and seventh amendments, as well as with the contract clause and other provisions of article I, section ten. Yet the states can impose regulations on the entry of citizens into all sorts of jobs, requiring licenses from those who wish to be barbers, plumbers, masons, morticians, beekeepers, lawyers, bartenders, taxidermists, doctors, to name a few. Those who judge their qualifications are members of the guild or occupation, who prefer to keep competition down as well as standards up. About the only people who are unlicensed in California are clergymen and university professors, apparently because no one takes them seriously.⁶

At one time, the Court did respect occupational rights. In 1914, the Court held unconstitutional a statute that prohibited anyone who had not been a brakeman from serving as a freight-train conductor. The act put many experienced conductors out of jobs. The ground of decision was the liberty of contract doctrine from the fourteenth amendment, a judicial invention derived from substantive due process. Denial of equal protection also bothered the Court. It observed that depriving a man of his "*right to labor*" lessened "his capacity to earn wages and acquire property." Liberty, the Court said, means that "the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." All men are "entitled to the equal protection of the law in their *right to work* for the support of themselves and their families."⁷ In a 1923 case the Court expansively declared that the liberty protected by the fourteenth amendment denoted "the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge [the right to an education?], to marry, to worship God according to the dictates of his own conscience, and generally to enjoy the privileges long recognized . . . as essential to the pursuit of happiness by free men."⁸ That recalls a concurring opinion in the second *Slaughter-house* case, when Justice Joseph Bradley said that the right "to follow any of the common occupations is an inalienable right; it was formulated as such under the phrase 'pursuit

thought otherwise, regardless of individual differences. And that ended it. Justice Thurgood Marshall, dissenting, thought that the right to work ought not to be looked at in the same way that the Court looks at a mere economic regulation. *Massachusetts Retirement Board v. Murgia*, 427 U.S. 307 (1976).

6. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6,6 n.2 (1976).

7. *Smith v. Texas*, 233 U.S. 630, 636, 641 (1914) (emphasis added).

8. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

of happiness,' in the Declaration of Independence This right is a large ingredient in the civil liberty of the citizen."⁹ That is what the constitutional law of the matter should be. Bradley spoke of the rights of people, not corporations.

The Declaration of Independence is a starting point for measuring the legacy that we inherited from the founders. Some scholars argue that Jefferson and the Continental Congress discarded the Lockean trinity when they spoke instead of life, liberty, and the pursuit of happiness as unalienable rights—"the pursuit of happiness, mind you, not property or estate," said Harry Jaffa, that preeminent scholar of the Declaration.¹⁰ But Jefferson did not break with Locke. Jefferson knew Locke's ponderous *Essay on Human Understanding*, which used the exact phrase "pursuit of happiness." In a chapter on the 'Idea of Power,' which is really about freedom, Locke used the phrase no less than four times and also used close equivalents several times. Locke wrote:¹¹

Thus, how much soever men are in earnest and constant *pursuit of happiness*, yet they may have a clear view of good, great and confessed good, without being concerned for it, or moved by it, if they think they can make up their happiness without it. . . .

A constant determination to a *pursuit of happiness*, no abridgement of liberty

As therefore the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness; so the care of ourselves, that we mistake not imaginary for real happiness, is the necessary foundation of our liberty. The stronger ties we have to an unalterable *pursuit of happiness* in general, which is our greatest good . . . we are, by the necessity of preferring and pursuing true happiness as our greatest good, obliged to suspend the satisfaction of our desire in particular cases.

But as soon as any new uneasiness comes in, this happiness is disturbed, and we are set afresh on work in the *pursuit of happiness*.

The pursuit of happiness was the linchpin in Locke's political ethics.

The phrase, as a matter of fact, was not uncommon in England before 1776. An anonymous author used it in 1703 in a book entitled *Civil Polity*. William Wollaston, a rationalist writer, used it, and so did Francis Hutcheson the Scottish jurist, Oliver Goldsmith the novelist, Richard Price the nonconformist Whig, and even the anti-American Tory, Dr. Samuel Johnson, who used it at least three

9. *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884). See also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 109 (1873) (per Field, for four dissenters).

10. *Another Look at the Declaration*, NAT'L REV., July 11, 1980, at 840.

11. 1 J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, 342, 345, 348, 355 (A. Fraser ed. 1894) (emphasis added); see also 2 *id.* at ch. XXI. Equivalents include "pursuit of our happiness," "pursuing happiness," "pursuit of true happiness," and "pursue happiness."

times. David Hume expressed a similar thought.¹² William Blackstone used a close equivalent of "pursuit of happiness" in his *Commentaries* in 1765, when he said that God interwove the laws of eternal justice with the happiness of each individual and reduced the rule of obedience to one precept, "that man should pursue his own happiness. This is the foundation of what we call ethics, or natural law."¹³

Closer to home, Richard Bland of Virginia, whom Jefferson knew and all patriot leaders read, cited Wollaston's use of "pursuit of happiness" in his 1766 *Inquiry Into the Rights of the British Colonies*.¹⁴ Jefferson owned a copy of Wollaston. James Wilson in his influential essay of 1774, which Jefferson admired, wrote that "[a]ll men are, by nature, equal and free. No one has a right to any authority over another without his consent Such consent was given with a view to increase the happiness of the governed The consequence is, that the happiness of the society is the first law of every government."¹⁵ In the same year Josiah Quincy wrote that the purpose of government was to promote "the greatest happiness of the greatest number,"¹⁶ a thought expressed also by John Adams in 1776.¹⁷ The most significant precedent besides Locke was the Virginia Declaration of Rights, written by George Mason a month before the Declaration of Independence and stating "[t]hat all men are created equally free and independent, and have certain inherent natural rights of which they cannot, by any compact, deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing *property*, and pursuing and *obtaining* happiness and safety."¹⁸ That formulation is in many state constitutions, including California's. It was, in exact words, the first amendment proposed by James Madison in 1789 for a national Bill of Rights.¹⁹ Some scholars, including Henry Steele Commager, are so eager to show that Jefferson broke with

12. For the principal research tracing the pre-1776 uses of "pursuit of happiness," see Gantner, *Jefferson's 'Pursuit of Happiness' and Some Forgotten Men*, 16 WM. & MARY Q. 558 (2d ser. 1936)."

13. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 40-41 (1765).

14. R. BLAND, INQUIRY INTO THE RIGHTS OF THE BRITISH COLONIES 8-9 (E. Swem rev. ed. 1922).

15. Wilson, *Considerations on the Nature and Extent of the Legislative Authority of Parliament*, in 2 THE WORKS OF JAMES WILSON 723 (R. McCloskey ed. 1967).

16. J. QUINCY, MEMOIR OF THE LIFE OF JOSIAH QUINCY, JR. 323 (1874) (quoting OBSERVATIONS ON THE ACT OF PARLIAMENT (1774)).

17. Adams, *Thoughts on Government*, in 4 WORKS 193 (C. Adams ed. 1850-59).

18. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHAPTERS, AND OTHER ORGANIC LAWS 3812 (F. Thorpe ed. 1909).

19. 1 THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 433 (June 8, 1789) (J. Gales & W. Seaton eds. 1834).

Locke that when they quote Mason's Declaration, they omit the property clause by using ellipsis marks.²⁰

Jefferson's phrasing was more concise and felicitous than Mason's, but Jefferson followed, rather than broke with, Locke in the "pursuit of happiness" phrasing. John Adams wrote that "there is not an idea" in the Declaration of Independence "but what had been hackneyed in Congress for two years before,"²¹ and Jefferson himself conceded that he had not intended to "invent new ideas"²² "but to place before mankind the common sense of the subject . . . it was intended to be an expression of the American mind."²³ And so it was, including the familiar expression, "pursuit of happiness." If it meant an abandonment of the rights of property, Congress would not have accepted it. But it derived from Locke, whom Jefferson followed faithfully.

Harry Jaffa says that life and liberty were valuable natural rights "because they culminated in the enjoyment and possession of property."²⁴ That seems mistaken for two reasons. First, the proposition seems backwards: property, in the sense that Professor Jaffa uses it, was a means of enjoying life and liberty. But one cannot push the point because liberty and property were viewed as so interdependent that there is no knowing which was seen as a precondition of the other. As a writer in the *Boston Gazette* said in 1768, "Liberty and Property are not only joined in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without the other."²⁵ And second, Locke did not mean property in the conventional way that Professor Jaffa does, namely, as one's estate or possessions with a market value. By property Locke also meant what Jefferson called the "pursuit of happiness." Locke was not consistent: he sometimes did mean the ownership of material things, but other times he meant by property a right to *anything*, not just a right to *things*; he meant a right to rights. In his *Second Treatise*, when he wrote that the chief reason that men made compacts for governance "is the preservation of

20. Commager, *The Pursuit of Happiness*, 49 *DIOGENES*, 40, 53 (Spring 1965); Schaar, . . . *And the Pursuit of Happiness*, 46 *V.A. Q. REV.* 1, 5 (1970).

21. Letter from John Adams to Timothy Pickering (August 22, 1822), reprinted in 2 *WORKS*, *supra* note 17, at 512.

22. Letter from Thomas Jefferson to James Madison (August 30, 1823), reprinted in 15 *THE WRITINGS OF THOMAS JEFFERSON* 461-62 (A. Bergh ed. 1907) [hereinafter *WRITINGS OF JEFFERSON*].

23. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), reprinted in 16 *WRITINGS OF JEFFERSON*, *supra* note 22, at 118-19.

24. H. JAFFA, *HOW TO THINK ABOUT THE AMERICAN REVOLUTION* 44 (1978).

25. *Boston Gazette*, Feb. 2, 1768, quoted in C. ROSSITER, *SEEDTIME OF THE REPUBLIC* 379 (1953).

their property”—a remark some conservative scholars quote out of context²⁶—Locke did not mean assets with a cash value. He said that men “united for the general preservation of their lives, liberties, and estates, which I call by the general name—property.” And, he added, “by property I must be understood here as in other places to mean that property which men have in their persons as well as goods.”²⁷

At least four times in his *Second Treatise*, Locke used the word “property” to mean all that belongs to a person, especially the rights that he wished to preserve.²⁸ Americans of the founding generation understood property in this broad Lockean sense, which we have regrettably lost. They regarded property as a basic human right, essential to one’s existence, to one’s independence, to one’s dignity as a person. Without property, real and personal, one could not enjoy life or liberty, and could not be free and independent. Only the property holder could make independent decisions and choices because he was not beholden to anyone; he had no need to be subservient. Americans cared about property not because they were materialistic but because they cared about political freedom and personal independence. They cherished property rights as prerequisites for the pursuit of happiness, and property opened up a world of intangible values—human dignity, self-regard, self-expression, and personal fulfillment.

Political democracy cannot function without job-holding, property-owning, masterless citizens. Every time that a bank forecloses on a family farm, every time that an honest, hardworking shopkeeper goes into bankruptcy, and every time that some aspiring, able person loses his or her livelihood because some state-approved occupational board denies a license, political democracy dies a little. Private property owned by individuals, not corporations, is the bulwark of a free society.

Why then did the Declaration of Independence not say “life, liberty and property”? Why substitute “pursuit of happiness” for “property”? Aside from Jefferson’s sense of style, he had two substantive reasons. First, he meant property in its broadest sense and he wanted to avoid ambiguity. Second, he was listing “unalienable” rights, and he did not believe in the unalienability of possessions, or property as estate. It was a natural right; it was indispensable; but it was not unalienable. Locke was no more a spokesman for corpo-

26. Charles R. Kessler, in H. JAFFA, *AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING* 7 (1984); L. STRAUSS, *NATURAL RIGHT AND HISTORY* 234, 245 (1935).

27. J. LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 123, 173 (P. Laslett rev. ed. 1963) (3d ed. 1698); see also *id.* at § 87 ll.5-6 and accompanying notes.

28. *Id.* at §§ 27, 87, 123, 173.

rate capitalism than he was for collectivism. He believed, and Jefferson agreed, that property had limits. When he spoke of a person gathering acorns or apples, and by his labor earning an entitlement to property, he was speaking of the state of nature, not of civil society.

Locke had little to say about property in civil society. When he concluded his chapter on property by referring to the emergence of money in civil society and to the legitimacy of heaping up money, he stated that communities regulated private property in civil society. "For in Governments," he wrote, "the Laws regulate the right to property, and the possession of land is determined by positive constitutions."²⁹ In a state of nature, property could not be bequeathed. The point is that property is a creature of civil society. Leo Strauss rejected that point, yet he acknowledged Locke's belief that "once civil society is formed, if not before, the natural law regarding property ceases to be valid; what we may call 'conventional' or 'civil' property—the property which is owned within civil society—is based on positive law alone."³⁰ But to acknowledge that Locke endorsed the right to accumulate as much property as possible in any way "permitted by the positive law" is to acknowledge that property is alienable.³¹ Even in a state of nature, property rights had limits: a man had no right to own more than he could cultivate and consume, certainly not at the expense of others.

Whether or not Locke believed that property was alienable in civil society, Jefferson surely believed that property was the product of civil society and was alienable. In his *Tract on Property*, Lord Kames thought so, and Jefferson approvingly copied Kames in his *Common-Place Book*. Thomas Paine thought property was a civil right that could be regulated for the common good, and Jefferson agreed.³² As he once said, ownership "is the gift of social law, and is given late in the progress of society," a reminder that we should not take literally Locke's social compact theory.³³ Jefferson did not believe in the theory that ownership derives from natural law and that government could not create and regulate it. Witness his successful assault on primogeniture and entail.

This view of property as a human right is the theme of a remarkable paper by the father of the Constitution and of the Bill of

29. J. LOCKE, *supra* note 27, at § 50.

30. L. STRAUSS, *supra* note 26, at 235.

31. *Id.* at 241.

32. G. CHINARD, *THE COMMON-PLACE BOOK OF THOMAS JEFFERSON* 107 (1926); G. CHINARD, *THOMAS JEFFERSON: APOSTLE OF AMERICANISM* 80-83 (2d ed. 1939).

33. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *reprinted in* 13 *WRITINGS OF JEFFERSON*, *supra* note 22, at 333.

Rights, James Madison. In 1792 he wrote his essay on *Property*. In Lockean terms he described what he called the "larger and juster meaning" of the term "property." It "embraces," he said, "every thing to which a man may attach a value and have a right." In the narrow sense, it meant one's land, merchandise, or money; in the broader sense "a man has property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practices dictated by them. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."³⁴

When agrarian capitalism predominated, the United States could easily celebrate property as Jefferson and Madison understood the term because most people were or meant to become independent freehold farmers who thought that they controlled their destiny. When industrial and financial capitalism became the governing institutions and the corporation became their major form, the meaning of "property" reverted to its cash nexus. The narrow, surviving meaning was the one that the Supreme Court adopted from the beginning. In 1795, Justice William Paterson, one of the framers, proclaimed the judicial power to hold unconstitutional any legislative act repugnant to the Constitution. In the case before him, *Van Horne's Lessee v. Dorrance*, he described the right to acquire and hold property, real or personal, as an unalienable as well as a natural right, the primary object of the social compact. He held that the power of government to take property when state necessity requires was "despotic." He censured the government's seizure of the land of one citizen, even for just compensation, to give it to others. It was immaterial to the government, he said, in which of its citizens land was vested; once vested, however, it was inviolable. "The Constitution encircles, and renders it an holy thing . . . It is sacred."³⁵

Within about a century a property-minded judiciary had run amok, inventing judicial doctrines to protect corporate interests from public regulation. Brooks Adams had good reason to say, in a 1913 book, that "[t]he Capitalist . . . regards the constitutional form of government which exists in the United States as a convenient method of obtaining his own way against a majority . . ."³⁶ For a

34. National Gazette (Philadelphia), March 29, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266 (C. Hobson, R. Rutland & W. Rachal eds. 1986).

35. 2 U.S. (2 Dall.) 304, 311 (1795).

36. B. ADAMS, THE THEORY OF SOCIAL REVOLUTION 214 (1914).

time the Court incorporated the contract clause, which was originally a limitation on the states only, into the due process clause of the fifth amendment. As a result, Congress had no constitutional power to require a corporation, to which the United States had lent money, to set aside a fund to repay its debt to the government.³⁷ The Court also incorporated the eminent domain or takings clause of the fifth amendment into the fourteenth, so that state regulatory commissions could not fix rates that significantly reduced corporate profits.³⁸ The Court dictated to administrative tribunals, state and federal, how to fix rates using absurd economic formulae. The Court invented the liberty of contract doctrine as a means of securing capital against state interferences with employer-employee relationships, and it struck down minimum wage and maximum hours laws as unconstitutional.³⁹

By 1936 a conservative Court had created a twilight zone within which government power did not exist; neither states nor federal government could constitutionally enact regulatory measures to combat the Great Depression. Congress could not use the commerce power to regulate labor standards and labor relations because they were local matters falling within state jurisdiction. On the other hand, the states could not regulate those matters without violating the Court's liberty of contract doctrine.⁴⁰ The Court shaped constitutional law so that employers were free to exploit workers in accord with so-called laws of supply and demand and free competition, laws that never prevailed if they hobbled entrepreneurial profits.

The Court had discredited itself by its excesses and biases. Franklin Roosevelt blundered by attempting to pack the Court by statute, but his assault on the Court prompted the scales to drop from the eyes of Justice Owen Roberts. He simply changed his mind—the switch in time that saved nine. As a result, without a single change on the membership of the Court, a constitutional revolution was underway, and the rational basis test emerged as the dominating feature of constitutional law in any case involving eco-

37. *In re Sinking Fund Cases*, 99 U.S. 700, 718-19 (1878); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 623-24 (1869).

38. *Chicago, Burlington, and Quincy R.R. v. Chicago*, 166 U.S. 226 (1897).

39. S. FINE, *Laissez Faire and the General Welfare State* ch. 5 (1956); R. HALE, *Freedom Through Law: Public Control of Private Governing Power* (1952); C. JACOBS, *Law Writers and the Courts* (1954); A. PAUL, *Conservative Crisis and the Rule of Law* (1960); B. TWISS, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (1942).

40. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Morehead v. New York ex rel. Tidalpo*, 298 U.S. 587 (1936); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

conomic regulation.⁴¹

Judicial irresponsibility had led to judicial abdication. Not even the most conservative Justices on today's Supreme Court question the constitutionality of government control of the economy. There are no longer any limits on the commerce power of Congress.⁴² Whether we have a government-managed economy or even a socialist state is a question of *policy* to be decided by the voters at the polls; it is no longer a question of constitutional limitations. There are none in the economic realm. The government can take apart even the greatest corporations, like Ma Bell; if it does not proceed against General Dynamics or other giants, the reason is to be found in national defense needs and in politics, not in the Constitution. The states are supplicants before the United States government, beneficiaries of its largesse like so many welfare recipients, unable to control their own policies, serving instead as administrative agencies of federal policies.

Those federal policies extend to realms not remotely within the federal power to govern under the Constitution, except for the fact that the spending power, so-called, the power to spend for national defense and general welfare can be exercised through programs of grants-in-aid to states and to over 75,000 substate governmental entities; they take federal tax money and obediently enforce the conditions laid down by Congress and by federal agencies for control of the expenditures. Federalism as we knew it has been replaced by a new federalism that even conservative Republican administrations enforce.⁴³ The government today makes the New Deal look like a backer of Adam Smith's legendary free enterprise and a respecter of John C. Calhoun's state sovereignty.

Even conservative Justices accept the new order of things. Justice William Rehnquist spoke for the Court in *Prune Yard*, and Justice Sandra Day O'Connor spoke in *Hawaii Housing Authority*; the Court was unanimous in both. In the first of these cases, decided in 1980, the Court held that a state may require a shopping center owner to allow solicitation of petition signatures on his premises. Rehnquist saw a reasonable police power regulation of private property and reminded us that the public right to regulate the use of

41. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446 (1951).

42. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973).

43. A. HOWITT, *MANAGING FEDERALISM: STUDIES IN INTERGOVERNMENTAL RELATIONS* (1984); M. REAGAN, *THE NEW FEDERALISM* (2d ed. 1981); D. WALKER, *TOWARD A FUNCTIONING FEDERALISM* (1981). The generalizations are mine; the works cited here supply the facts.

property is as fundamental as the right to property itself.⁴⁴ One might have thought that as a matter of constitutional theory, the property right was fundamental and that the regulatory power was an exception to it that had to be justified. Rehnquist did not explain why the regulation was justifiable or reasonable; under the rational basis test the Court has no obligation to explain anything. It only need believe that the legislature had some reason for its regulation.

In *Hawaiian Housing Authority*, the Court unanimously held that the state could do the very thing that Justice Paterson had said it could not do—take property from one citizen, even at a just compensation, and give it to another at that price.⁴⁵ Land ownership in Hawaii was concentrated in a few people; to break the oligopoly of ownership the state fixed on a scheme whereby it took private property by eminent domain, lent tenants up to 90% of the purchase price, and arranged for transfer of titles. But the Constitution states that property may be taken at a just price only for a public use. Anyone who thinks that means an arsenal, a courthouse, a school, or a fire station is as naive as Justice Paterson.

Justice O'Connor identified a public use with a public purpose, equating the power of eminent domain with the police power. She proclaimed the need for judicial deference to legislatures, because legislatures are better able than courts to assess what public purposes should be promoted by eminent domain. Certainly an appropriation or taking of property for a public use may have a public purpose, like satisfying the need for an airfield or for a public dump, but vesting the title of land in private parties does not constitute a public purpose or a public use. The public use requirement, O'Connor said, is "coterminous with the scope of the sovereign's police powers." This case teaches that wherever an oligopoly exists, whether in the making of automobiles or disposable diapers, the voters can decide to transfer ownership to the workers in the industry by taking the property, selling it to the employees, and financing the loan they need to make the purchase.

On the Court's side is the fact that it made no new law in the 1984 case. The pre-Civil War history of eminent domain shows that the power was used to take property for railroads and other so-called public works or public utilities, which were privately owned.⁴⁶ But those companies were subject to rate regulation and government controls, from which other private property was ex-

44. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

45. *Hawaiian Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

46. Levy, *Chief Justice Shaw and the Formative Period of American Railroad Law* (pts. 1-2), 51 COLUM. L. REV. 327, 852 (1951). Part I of the article deals with eminent domain; Part II deals with railroads as common carriers or public works.

empt. Also on the Court's side is the fact that nothing was new in its equating the police power with the power of eminent domain. That foolishness had been going on since at least 1897. Whenever the Court used its own subjective standards and found that some regulation was excessive, it condemned the regulation as a taking.⁴⁷ In a case that shows how the Court abused its power for the benefit of utilities, it held that a schedule of rates that permitted the company to earn a profit of 6.26 percent was unconstitutional. The Court held that rates returning "7.5 percent, or even 8 percent" would be "necessary to avoid confiscation."⁴⁸ In these old cases, however, the Court held that the rate regulations were unconstitutional, amounting to an excessive use of the police power, rather than a violation of the eminent domain clause, which would have required compensation for confiscation or a taking.

Regulations designed to promote the public health, safety, morals, or interests should not necessarily be regarded as takings even if the regulation is excessive, so long as the government does not appropriate the property or make any use of it, and it remains in the possession of the owner, whose title has not been transferred or damaged. The fact remains, however, that the Court has long regarded excessive regulation as a taking. The striking difference between the early cases and the 1984 one is that the Court had invented its doctrine that an excessive regulation is a taking in order to protect rights of owners, whereas the Court in 1984 used the same doctrine against owners and in favor of the police power.

A Lockean liberal can accept the 1984 decision because it advanced the cause of individual ownership. What puzzles me is the failure of conservatives, on and off the Court, to criticize an opinion that is so hostile to property and that distorts the plain meaning of the constitutional text, which speaks of taking for a public "use," not for a public purpose. After all, conservatives supposedly cherish both the text and a jurisprudence of original intent.

We have arrived at a peculiar constitutional stance after two

47. *Smyth v. Ames*, 169 U.S. 466 (1898); *Chicago, B&Q. R.R. v. Chicago*, 166 U.S. 226, 239 (1897). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Holmes for the Court said, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. See also *Berman v. Parker*, 348 U.S. 26 (1954), a direct precedent for sustaining an act that takes property from *A* and sells it to *B*. On the general subject, see R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Sax, *Takings, Private Property and Public Rights* (pts. 1&2), 74 YALE L.J. 36 (1964), 81 YALE L.J. 149 (1971); Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980).

48. *United Rys. and Elec. Co. v. West*, 280 U.S. 234 (1930).

hundred years. Once we believed with John Dickinson and the founders that a free government is not one which exercises its powers reasonably but one that is so constitutionally checked that it *must* exercise its powers reasonably.⁴⁹

Once, Jefferson and Madison, in connection with the bill to charter the Bank of the United States, had argued that if the power to spend were construed as independent of the enumerated powers, we should have a government of virtually unlimited powers. Hamilton did not argue the point on that occasion but did so later.⁵⁰ In 1935 Justice Owen Roberts for the reactionary majority of the Court, accepted Hamilton's argument on the power to spend, and in 1937 the liberals also embraced Hamilton.⁵¹ There are no constitutional limits on the spending power today, and no power has more radically transformed American federalism.

Property rights have fallen from judicial grace, but not all property rights, because some are more equal than others. Corporate property is more equal than individual property. Purely private property is more equal than property affected by a public interest—a discredited term. Property deriving from fee simple or outright ownership is more equal than property deriving from statutory entitlement. Purely private property is more equal than private property publicly employed. Consider the case of the privately owned, powerful newspaper, the *Miami Herald*, which disparaged a person in print. The paper had a constitutional right to freedom of the press and no obligation to provide free space in its pages to its victim.⁵² But when a small radio station, also privately owned, disparaged a person, its first amendment rights did not prevail and it had no obligation to provide equal time to its victim, apparently because the public owns the airwaves; the public does not own the *Miami Herald*, but neither does it own that radio station.⁵³

Consider too the case of the welfare recipient whose home could be searched without a warrant and without probable cause if an administrative official decided to invade the premises to determine whether a welfare-assisted child was receiving proper care; re-

49. Dickinson, *Letters from a Farmer in Pennsylvania*, in 1 WRITINGS OF JOHN DICKINSON 356 (P. Ford ed. 1895) (1st ed. 1768) (Letter VII in Vol. XIV of *Memoirs of the Historical Society of Pennsylvania*).

50. 3 WRITINGS OF JEFFERSON, *supra* note 22, at 147-48; I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800, at 324 (1950); 10 THE PAPERS OF ALEXANDER HAMILTON 302-04 (H. Syrett ed. 1961).

51. *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 738 (1950); *Helvering v. Davis*, 301 U.S. 619, 640 (1937); *United States v. Butler*, 297 U.S. 1, 65-66 (1936). See *supra* note 43 and accompanying text.

52. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

53. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

fusal to admit a state official results in forfeiture of the entitlement.⁵⁴ The fact that the welfare recipient received government handouts should not make her property any less private than that of a farmer or a business receiving government subsidies. Nothing but a double standard explains the state of our constitutional law. The fourth amendment applied, as it should have, when an agent of the Secretary of Labor attempted to make a warrantless search of the property of a corporation in order to determine whether it was complying with standards of safety required by federal law. The Court held unconstitutional a provision of Congress's Occupational Safety and Health Act insofar as it authorized inspections without a warrant. The Court failed to explain why the welfare recipient's home was not entitled to the same protection against government intrusion as the business enterprise. The cases show that one must own property to enjoy rights, and, it seems, the more property one has, especially in corporate form, the more rights it buys. Constitutional law loves fictions, so it makes believe that the principle of equality has not been offended. For example, we can spend all we want to advertise or promote our views, and so can a corporation; the only difference is that we spend our own money and can reach few people, while the great corporations spend corporate monies in their exercise of their first amendment rights and can reach the nation.⁵⁵

One who owns the right kind of property is freer than one who owns property but not the right kind. One who owns any kind of property is freer than one who owns none or very little. Property today, like 200 years ago, remains necessary for political liberty and individual independence. The Court made a mistake fifty years ago: it should not have employed the rational basis test in cases of economic regulation involving property as a human right. The Court should learn to distinguish the rights of people from the rights of business enterprises. Strict judicial scrutiny is called for when personal rights of property are at issue. Congress, for example, can regulate major league baseball if it wishes, but if it touches the free agency clause, crimping the right of the players to make top dollar, the Court should apply the same standard as it would in a first amendment case. Making a living is fundamental to one's personhood and stake in society. Free speech is of little value to a propertyless person. With the exception of freedom of religion, nothing is more important than work and a chance at a career or a decent living.

54. *Wyman v. James*, 400 U.S. 309 (1971).

55. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

Every now and then we get some little case that shows astonishing perception, even if it is promptly forgotten. *Lynch v. Household Finance Corporation* in 1972 was such a case. A woman's savings account was garnished under state law for alleged nonpayment of a loan. She received no notice, no chance to be heard, obviously a denial of due process. She sued in federal district court but the court dismissed her suit, ruling that only personal rights merited a judicial hearing, not property rights. The Supreme Court, dividing 4-3, reversed the district court. Justice Potter Stewart for the liberal plurality (Douglas, Brennan, and Marshall), made this rare and wise observation:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.⁵⁶

Citing Locke, John Adams, and Blackstone's *Commentaries*, Stewart added: "That rights in property are basic civil rights has long been recognized."⁵⁷ If that were true, we would not have the double standard: strict scrutiny for all rights but property, a rational basis test for property.

No principled reason exists for the Court's refusal to ask whether a statute curtailing personal rights in property is in fact a significant means of achieving a legitimate police power objective, and whether it achieves that objective without unnecessarily burdening private rights. There is no legitimate basis for perfunctory scrutiny in such cases. Property owned by people should be accorded the same constitutional respect that courts give to other civil or human rights so essential to the pursuit of happiness.⁵⁸

56. 405 U.S. 538, 552 (1972).

57. *Id.*

58. In preparing this paper, I found the following works stimulating: B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); G. DIETZE, *IN DEFENSE OF PROPERTY* (1971); R. SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* (1951); B. SIEGAN, *ECONOMIC LIBERTIES AND THE COURT* (1980); McCloskey, *Economic Due Process and the Supreme Court*, 1962 SUP. CT. REV. 34; Monaghan, *Of 'Liberty' and 'Property'*, 62 CORNELL L. REV., 405 (1977); Oakes, *Property Rights in Constitutional Analysis Today*, 56 WASH. L. REV. 583 (1981); Van Alstyne, *Cracks in the 'New Property'*, 62 CORNELL L. REV. 445 (1977), and *The Recrudescence of Property Rights As the Foremost Principle of Court Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS. 66 (1980).