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MARQUETTE LAW REVIEW

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THE ORIGINAL UNDERSTANDING OF "PROPERTY" IN THE CONSTITUTION

PAUL J. LARKIN, JR.*

Contemporary Supreme Court jurisprudence treats "property" as far less deserving of judicial protection than "life" or "liberty." The Supreme Court, however, has misread American legal history. Anglo-American traditions, customs, and law held that property was an essential ingredient of the liberty that the Colonists had come to enjoy and must be protected against arbitrary governmental interference. The Framers' generation believed that "property" and "liberty" were equally important institutions and that neither one could exist without the other. The Framers venerated property as a means of guaranteeing personal independence because (among other things) the concept of "property" embraced the legal rights to which everyone was entitled, such as the right to governance under "the rule of law." Property was not immune from regulation, but that regulation had to be for the purpose of promoting "the general Welfare," not the interests of specific groups or people. It is time for the Supreme Court to revisit Anglo-American legal history and to re-examine its precedents in light of what that history teaches.

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I. INTRODUCTION: UNDERSTANDING PROPERTY

The Fifth and Fourteenth Amendments both refer to "property."[1] The Due Process Clauses protect "life, liberty, and property" against government action inconsistent with "due process of law," while the Takings Clause bars the expropriation of "private property" without paying the owner "just compensation."[2] Despite the obvious importance of those terms, the constitutional text does not define them, perhaps because their meaning was well known at the time.[3] The result, however, has been to leave the task of definition to the courts, particularly the Supreme Court of the United States.[4]

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1. *See* U.S. CONST. amend. V ("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."); *id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .").

2. The Fifth Amendment directly limits only the power of the federal government, *see* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), but the Fourteenth Amendment limits the power of the states. Over time the Supreme Court has applied most provisions of the Bill of Rights against state and local governments by incorporating them through the Fourteenth Amendment Due Process Clause. *See* McDonald v. Chicago, 561 U.S. 742 (2010).

3. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 10 (1985) (hereinafter MCDONALD, NOVUS ORDO SECLORUM) ("At the time of independence a great many Americans believed . . . that liberty or freedom required no definition."); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 37 (1990) (the meaning of property at that time was "unproblematic"). That does not mean the definitions were simple. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra*, at 13 ("The concepts of liberty and private property carried with them a large body of assumptions, customs, attitudes, regulations both tacit and explicit, and rules of behavior. Thus neither liberty nor property was a right, singular; each was a complex and subtle combination of many rights, powers, and duties, distributed among individuals, society, and the state. Together, these constituted the historical 'rights of Englishmen' of which eighteenth century Americans were so proud—at least until 1776, when they abandoned their right to call themselves Englishmen.").

4. The courts' interpretive role should never be underestimated. *See* William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 467 (1977) ("[W]hoever hath an *absolute Authority* to *interpret* any written *or* spoken Laws, . . . it is He who is truly the *Law-giver*, to all Intents and Purposes, and not the Person who first spoke or wrote them.") (quoting Benjamin Hoadly, Bishop of Bangor, Sermon Preached before

The courts have often found that Anglo-American legal history illuminates the meaning of terms in the constitutional text.[5] For example, the Supreme Court has found that the Due Process Clauses trace their lineage to the Magna Carta[6] and that, in the Framers' view, the terms "life, liberty and property" referred to natural rights that every man possessed, not by positive law, but as a gift from the Almighty.[7]

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the King 12 (1717)).

5. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 949–50 (2012) (discussing the historical meaning of the Fourth Amendment); District of Columbia v. Heller, 554 U.S. 570, 592–98 (2008) (same, the Second Amendment); INS v. Chadha, 462 U.S. 919, 946–47 (1983) (same, the Article I Presentment Clause); Nixon v. Admin. Gen. Serv.'s, 433 U.S. 425, 473–74 (1977) (same, the Bill of Attainder Clause); Gregg v. Georgia, 428 U.S. 153, 169–71 (1976) (lead opinion) (same, the Eighth Amendment Cruel and Unusual Punishments Clause); Williams v. Florida, 399 U.S. 78, 87–90 (1970) (same, the Sixth Amendment Jury Trial Clause); Klopfer v. North Carolina, 386 U.S. 213, 223–25 (1967) (same, the Sixth Amendment Speedy Trial Clause); Myers v. United States, 272 U.S. 52, 109–42 (1926) (same, the Article II Appointments Clause); Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (same, the Article III original Jurisdiction of the Supreme Court and the practice of individual justices "riding circuit"). *See generally Heller*, 554 U.S. at 592 ("We look to this [*viz*., "the historical background to the Second Amendment"] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'").

6. The term "due process of law" stems from Article 39 of Magna Carta of 1215, which provided that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." J.C. HOLT, MAGNA CARTA app. 6, at 461 (2d ed. 1992). The effect of Article 39 was to safeguard life, liberty, and property against arbitrary deprivation by the crown. *See*, *e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.' The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words."); *see also, e.g.*, Davidson v. Cannon, 474 U.S. 344, 347–48 (1986); Daniels v. Williams, 474 U.S. 327, 331 (1986); Hovey v. Elliott, 167 U.S. 409, 415–17 (1897). An act of Parliament later substituted "due process of law" for "law of the land" without changing the term's substantive meaning. *See* Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 411–13 (2015).

7. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *54 [hereinafter 1 BLACKSTONE]; JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (3d ed. 2008) ("According to Locke, private property existed under natural law before the creation of political authority. Indeed, the principal purpose of government was to protect these natural property rights, which Locke fused with liberty."); PASCHAL LARKIN, PROPERTY IN THE EIGHTEENTH CENTURY v (1930) (Preface by Prof. J.L. Stocks) ("Property exists, like marriage and the family, antecedently to government, and belongs to the state of nature on which government is superimposed: it is natural in a sense in which government is not."); *cf.* MICHAEL P.

The Framers' generation also had a clear understanding of what each term meant.[8] Not surprisingly, life meant then what it means today. Indeed, given the fact that people died at home among family rather than in a hospital and the widespread use of capital punishment as the penalty for crime, that generation was quite familiar with issues of life and death.[9] "Liberty" meant freedom from unauthorized government interference in one's movement or locomotion, or, more specifically, freedom from arbitrary arrest by the Crown.[10]

The Framers also knew something about the concept of "property."[11] In the eighteenth century, most Americans owned and lived off their own land—agriculture was the principal industry[12]—so the best-known forms of property were material items such as personalty and realty, as well as incorporeal or

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ZUCKERT, LAUNCHING LIBERALISM, ON LOCKEAN POLITICAL PHILOSOPHY 275–76 (2002) (early state constitutions gave a prominent place to protection of natural rights).

8. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 4.

9. *See, e.g.*, STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 28 (2002) ("Death itself was a common enough sight."); Douglas Hay, *Property, Authority and the Criminal Law*, *in* DOUGLAS HAY ET AL., ALBION'S FATAL TREE: CRIME AND SOCIETY IN 18TH CENTURY ENGLAND 18 (1975) ("[T]he number of capital statutes [in England] grew from about 50 to over 200 between the years 1688 and 1820.").

10. *See* Kerry v. Din, 135 S. Ct. 2128, 2132–33 (2015) (plurality opinion); 1 BLACKSTONE, *supra* note 7, at *125, *130, *134; 2 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 46–48 (1797); Henry Paul Monaghan, *Of Liberty and Property*, 62 CORNELL L. REV. 405, 411–12 (1977) ("Prior to the Civil War, . . . there was little evidence that due process 'liberty' meant anything more than freedom from personal restraint . . . . The Blackstonian conception of liberty is both purely negative—i.e., freedom from governmental interference—and limited. It is not the equivalent of an all encompassing 'right to be let alone'; it is a right to be let alone *only* with respect to one's bodily movement. It is the kind of interest, roughly speaking, that common-law courts protected in habeas corpus and false imprisonment actions.") (footnotes omitted); *see also, e.g.*, Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926); Charles M. Hough, *Due Process of Law—To-Day*, 32 HARV. L. REV. 218, 223–24 (1919); Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property"*, 4 HARV. L. REV. 365, 369 (1891).

11. ELY, *supra* note 7, at 43.

12. *See, e.g.*, ELY, *supra* note 7, at 16 ("By 1750 a largely middle-class society had emerged in colonial North America. Most of the colonists owned land, and 80 percent of the population derived their living from agriculture."); MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 93 (the vast majority of Americans held "a comfortable amount of land"); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763–89, at 8 (4th ed. 2013) [hereinafter MORGAN, BIRTH OF THE REPUBLIC] ("This widespread ownership of property is perhaps the most important single fact about the Americans of the Revolutionary period."); SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 236 (1965); EDWIN J. PERKINS, THE ECONOMY OF COLONIAL AMERICA 57 (2d ed. 1988) ("The size of the typical colonial farm was generous, often above 100 acres, and families consistently grew and harvested surpluses."); ALAN TAYLOR, AMERICAN COLONIES 311 (2001) ("Most colonists lived on farm households that produced most of their own food, fuel, and homespun cloth.").

future interests such as easements, remainders, and reversions.[13] Property that someone owned—say, a farm, a home, a barn—were "vested" rights that the government could not simply give to someone else.[14]

The Framers' understanding of property, however, was not limited to those traditional forms. Some Colonists worked as self-employed artisans or shop owners,[15] writers or inventors,[16] and merchants or financiers[17] in a thriv-

13. *See, e.g.*, Wynehamer v. People, 13 N.Y. 378, 396 (1856) ("Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.") (Opinion of Comstock, J.); 2 WILLIAM BLACKSTONE, COMMENTARIES *20–43 [hereinafter 2 BLACKSTONE]; Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. Rev. 273, 333–34 (1991); Eric T. Freyfogle, Book Review, *Land Use and the Study of Early American History*, 94 YALE L.J. 717, 718–29 (1985) (describing the transition in sixteenth to seventeenth century New England from an almost communal understanding of property to an individual-ownership, commodity theory).

14. *See, e.g.*, *Wynehamer*, 13 N.Y. at 398 ("When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power.") (Opinion of Comstock, J.); Hough, *supra* note 10, at 223.

15. *See* WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 14 (1977) ("[I]n the large seaports most men ran their own shops and owned their own homes.").

16. The Framers' generation knew that value could be intellectual as well as corporeal. *See, e.g.*, STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 24–25 (2011) ("Patents and copyrights were established features of the English legal system long before the independence of the United States . . . . After the Revolution all the states but Delaware enacted general copyright laws protecting all applicants who met certain minimal criteria . . . . Patents remained discretionary a bit longer . . . . [S]tate legislatures granted or denied patents on a case-by-case basis, to one applicant at a time."); ELY, *supra* note 7, at 19 ("As early as 1648 the Massachusetts code permitted a monopoly grant for 'such new inventions that are profitable for the Countrie.'"); *id.* at 32 ("In response to a 1783 recommendation by the Continental Congress, every state enacted legislation granting copyright protection to authors who were [American] citizens."); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 186 (3d ed. 2005) (describing a 1716 South Carolina law granting a patent for the creation of a superior coating for ships). The Framers' desire to protect intellectual property lead to the Patent and Copyright Clause. *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."); *see* RANDOLPH J. MAY & SETH L. COOPER, THE CONSTITUTIONAL FOUNDATIONS OF INTELLECTUAL PROPERTY: A NATURAL RIGHTS PERSPECTIVE (2015).

17. *See, e.g.*, BERNARD BAILYN, THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY (1955); CARL BRIDENBAUGH, CITIES IN REVOLT: URBAN LIFE IN AMERICA, 1743–1776 (1955); CARL BRIDENBAUGH, CITIES IN THE WILDERNESS: THE FIRST CENTURY OF URBAN LIFE IN AMERICA, 1625–1742 (1938); T. H. BREEN, THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE (2004); JOHN J. MCCUSKER & RUSSELL R. MENARD,

ing colonial economy.[18] The shortage of hard currency in the Colonies forced merchants to rely on commercial paper to engage in trade.[19] Early Americans understood the value of "book credit," promissory notes, bills of exchange, mortgages, securities, loan certificates, maritime insurance, monetized public debt, and the *lex mercatoria* or "law merchant."[20] Accordingly, the Founder's generation understood that "property" included the right to possess, use, enjoy, and dispose of whatever land, commodities, and currency (or its equivalent) a man owned.[21]

The meaning of "life, liberty, and property" has grown over time. Today, medicine and state law use the absence of respiration or brain function as the dividing line between life and death.[22] "Liberty" still means freedom from an

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THE ECONOMY OF BRITISH AMERICA, 1607–1789 (1985); GARY B. NASH, THE URBAN CRUCIBLE: THE NORTHERN SEAPORTS AND THE ORIGINS OF THE AMERICAN REVOLUTION (1986); PERKINS, *supra* note 12, at 115.

18. *See* PERKINS, *supra* note 12, at 118 Tbl. 5.1 (listing examples of trades); SCOTT, *supra* note 15, at 1–2 ("By the middle of the eighteenth century British North Americans had already become the richest, freest, and most egalitarian people in the West."). By 1775, America had a population one-third the size of, and an economic output nearly equal to, England's. Although labor was scarce, land was plentiful. The basic economic unit was the family farm, which often exceeded one hundred acres in size. Three-quarters of population depended on agriculture for their livelihood. *See* PERKINS, *supra* note 12, at xi, 2, 11, 43, 57, 85, 91, 213–14. "[T]he real strength of the colonial economy was its prodigious agricultural production for local consumption and urban centers." *Id.* at 43. Moreover, despite the Colonists' claims about being taxed unfairly by the Mother Country, taxes in America were only half of what was levied in England, and no one region in America was unduly burdened. *Id.* at 187, 194.

19. *See* FRIEDMAN, *supra* note 16, at 42; Alexander, *supra* note 13, at 333–34.

20. *See* STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860 (2002); FRIEDMAN, *supra* note 16, at 41; KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 49 (2d ed. 2009); MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 110–19, 122.

21. *See generally* FRIEDMAN, *supra* note 16, at 42, 171.

22. *See, e.g.*, VA. CODE ANN. § 54.1-2972(A) (2014). For certain legal purposes, even a condemned prisoner may have a legally protected "life" interest until his sentence is carried out. In *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), a condemned prisoner challenged the state clemency procedures on the ground that they violated the procedural fairness guaranteed by the Due Process Clause. The Supreme Court noted that the threshold (and either esoteric or macabre, depending on your perspective) question was whether a prisoner lawfully condemned to die by execution has a "life" interest protected by due process until his sentence is carried out. *Id.* at 279. Remarkably, there was no majority on that issue. A plurality of four Justices acknowledged that even a condemned prisoner "maintains a residual life interest, *e.g.,* in not being summarily executed by prison guards," *id.* at 281 (plurality opinion), but ultimately did not resolve whether that residual interest was merely biological or also legal because the plurality found that the state clemency procedures were constitutionally adequate. *Id.* at 279–85 (plurality opinion). The remaining five Justices concluded that "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life." *Id.* at 288 (O'Connor, J., joined by Souter, Ginsberg, and Breyer, JJ., concurring in part and in the judgment); *id.* at 291–92 (Stevens, J., dissenting). But those Justices were on opposite sides of the outcome, so they did not constitute a majority.

arbitrary government seizure,[23] but it now also includes a host of other guarantees, many of which refer to some aspect of sexual autonomy, such as the use of contraceptives or abortion.[24] The concept of "property" originally embraced real, personal, and financial property,[25] and those interests are still deemed property today.[26] The breadth of that term, however, has grown mightily.[27] It now includes some wholly modern-day creations such as driv-

23. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (holding that a person cannot be briefly detained unless there is "reasonable suspicion" to believe that he was involved in, was about to commit, or may know something about a crime).

24. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that there is a constitutionally protected liberty interest in same-sex marriage); Lawrence v. Texas, 539 U.S. 558 (2003) (same, intercourse in the home with a partner of the same sex); Roe v. Wade, 410 U.S. 113 (1973) (same, abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (same, use of contraceptive devices); Morrissey v. Brewer, 408 U.S. 471 (1972) (ruling that release on parole creates a "liberty" interest protected by the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390 (1923) (ruling that a state law prohibiting the teaching of German unconstitutionally interferes with parents' right to instruct their children). Some of the Supreme Court's recent decisions, however, have given due process protection to "liberty" interests that the Framers likely would have taken for granted. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding unconstitutional a municipal regulation prohibiting grandparents from living as a "family" with their children and grandchildren).

25. *See, e.g.*, ELY, *supra* note 7, at 19; *supra* notes 12–13 and accompanying text.

26. *See, e.g.*, Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427–28 (2015) (holding that raisins are "property" for Takings Clause purposes); Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (holding that government-induced temporary flooding of a landowner's property can constitute a "taking" for Takings Clause purposes); Coll. Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999) ("The assets of a business (including its good will) unquestionably are property . . . ."); Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (ruling that interest on a client's funds is property); Connecticut v. Doehr, 501 U.S. 1 (1991) (holding unconstitutional a state law authorizing the prejudgment attachment of real estate without a prior hearing or proof of an emergency); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000–04 (1984) (holding that trade secrets are property); Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 160–65 (1980) (same, principal and interest earned on an interpleader account); Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473–75 (1973) (same, a leasehold); United States v. Va. Elec. & Power Co., 365 U.S. 624, 629 (1961) (same, an easement); Armstrong v. United States, 364 U.S. 40, 44, 46 (1960) (same, a security interest in real property); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 596–602 (1935) (same, real estate lien); Lynch v. United States, 292 U.S. 571, 579 (1934) (same, valid contracts).

27. That does not mean the Supreme Court's jurisprudence on the subject has been clear and consistent. *See* Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 130–31 (1990) ("In modern constitutional jurisprudence, the definition of property has played its most critical role in the context of the due process and takings clauses of the Fifth Amendment. Both clauses have been loci for friction between the individual and government. Both clauses involve, at least ostensibly, the same concept: property. Under both clauses, the existence of a cognizable property interest is the threshold and often determinative question. Various tests—such as the 'ordinary understanding' approach, the 'reasonable expectations' approach, the 'functional' approach, the 'bundle of rights' approach, and others—have been used to determine whether a constitutionally cognizable property interest exists. The resulting incoherence is profound. An easement, conceptually severed from the underlying land, is property and compensable if taken; twenty-seven million tons of coal are not.

er's licenses, public utilities, university tenure, public school attendance, and disability welfare benefits, concepts the Founding generation could not have imagined.[28]

Yet, there are two principal differences between what the Framers understood as "property" and how that term is understood today. The first one is that property now has different meanings for different purposes. Under contemporary constitutional law, "property" can have one or more of three different meanings depending on its relevance to one or more of three different legal doctrines: procedural due process, substantive due process, and takings.[29] A party can raise a *procedural due process* claim by arguing that that the government has mistakenly deprived him of a property interest without first affording him adequate procedural safeguards to ensure that the government's reason for its action is correct.[30] An example would be found if the government sought to terminate welfare benefits on the ground that a recipient is no longer eligible for state assistance.[31] Alternatively, a person could make a *substantive due process* argument by contending that the government cannot take a particular action toward him regardless of the number and quality of the hearings available to him.[32] The Court's decision last term in *Obergefell* fits into that category.[33] The objection there was not that the plaintiff was entitled to a hearing before being denied a marriage license, but was that the government could not deny that license simply because the plaintiffs were gay or lesbian.[34] Finally, an individual can challenge government action as an unlawful *taking* by claiming that the government must pay him just compensa-

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The right to occupy land, or to pass land to one's heirs, is property, compensable if taken; the right to modify a building that one owns, or to prevent physical invasion, is not.") (footnotes omitted).

28. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9–12 (1978) (ruling that public utility service is property); Mathews v. Eldridge, 424 U.S. 319, 333–34 (1976) (same, disability benefits); Goss v. Lopez, 419 U.S. 565, 573–74 (1975) (same, public school attendance); Perry v. Sindermann, 408 U.S. 593, 602 (1972) (ruling that a state university professor may have a "property" interest in his job based on "an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure"); Bell v. Burson, 402 U.S. 535 (1971) (same, a state-issued driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (same, welfare benefits); Slochower v. Board of Educ., 350 U.S. 551 (1956) (same, tenure at a state college). For the seminal argument in favor of treating government benefits as "property," see Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

29. An excellent discussion of the three types of claims can be found at Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 887–89 (2000).

30. *Id.*

31. *See, e.g., Goldberg*, 397 U.S. 254 (1970).

32. Merrill, *supra* note 29, at 887–89; *see Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

33. *See Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting).

34. *See, e.g.*, *id.* at 2604–05.

tion for the property it has expropriated from him, rendered unusable, or prevented his use of it.[35] The differences among the claims are significant because not every protected interest qualifies as "property" for all three purposes. Welfare benefits are "property" for procedural due process purposes, but not for purposes of substantive due process or takings doctrine.[36] Otherwise, the government could never reduce or eliminate statutory entitlements, at least not without compensating the recipient by purchasing an annuity for him. That is clearly not the law. Legislatures are free to adjust or eliminate government welfare programs as they see fit.[37] The need to distinguish among those understanding of "property" did not occur to the Framers, and they did not discuss whether "property" should have one, two, or three different interpretations.

A second difference between the Framers' understanding of property and ours stems from the fact that liberty and property are no longer deemed to have a common origin. The Framers believed that, like life and liberty, property was a natural right that every man possessed not by virtue of positive law but as a gift from God.[38] That understanding of property's origin has now vanished. Property is now merely a creation of positive law.[39] That positive

35. *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (government flooding of private property).

36. *See generally Goldberg*, 397 U.S. 254 (1970).

37. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch.'s, 487 U.S. 450 (1988) (rejecting claimed fundamental right to free public school transportation); Harris v. McRae, 448 U.S. 297 (1980) (ruling that there is no constitutional right to funding for any medical procedure, including an abortion, even though a woman has a right to choose that procedure); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (ruling that there is no a constitutional right to a minimum amount of funding for a public education); Richardson v. Belcher, 404 U.S. 78, 81–84 (1971) (rejecting the argument that Congress cannot modify that Social Security benefits). The same principle would allow the government to withdraw the monopoly or oligopoly status that it has bestowed on certain groups as a matter of law, such as municipal ordinances limiting the number of taxi "medallions" authorized in a community. *See* Illinois Transp. Trade Ass'n v. City of Chicago, No. 16-2009, 2016 WL 5859703, at *1–3 (7th Cir. Oct. 7, 2016).

38. *See, e.g.*, ELY, *supra* note 7, at 17 ("According to Locke, private property existed under natural law before the creation of political authority. Indeed, the principal purpose of government was to protect these natural property rights, which Locke fused with liberty."); LARKIN, *supra* note 7, at vi (Preface by Prof. J.L. Stacks); MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 20; ZUCKERT, *supra* note 7, at 278. Some commentators have continued to posit that there is a natural right to property like the one understood by the Founders. *See* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW (2010). Others have sought to ground the right to property in a notion of physical possession, from whence the legal principle of property arises. *See* Thomas W. Merrill, *Possession as a Natural Right*, 9 N.Y.U. J. L. & LIBERTY 345 (2015). One group or the other may ultimately be proved right. At present, the Supreme Court disagrees.

39. Positive law is defined as "[a] system of law promulgated and implemented within a particular political community by political superiors, as distinct from moral law or law existing in an ideal community or in some nonpolitical community. Positive law typically consists of enacted law—the

law, moreover, does not include the Constitution itself, even though that document prominently uses the term "property." As the Supreme Court explained in *Board of Regents of State Colleges v. Roth*,[40] "[p]roperty interests, of course, are not created by the Constitution."[41] Instead, the Constitution assumes that property rights are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[42] The result is that the state may redefine property interests.[43] By contrast, at least some interests protected under the rubric of "liberty" exist independently of positive law.[44] For example, in *Roe v. Wade*[45] and *Obergefell v. Hodges*[46] the Supreme Court created a constitutional right to abortion and to same-sex marriage, respectively, as aspects of "liberty."[47] *Obergefell*, in fact, created that right despite an admitted lack of support in Anglo-American legal history for any such guaranty.[48]

Those different contemporary understandings of property and liberty are

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codes, statutes, and regulations that are applied and enforced in the courts." *Positive Law*, BLACK'S LAW DICTIONARY (9th ed. 2009).

40. Board of Regents v. Roth, 408 U.S. 564 (1972).

41. *Id.* at 577; *see also*, *e.g.*, Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998) (reiterating that principle); Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980) (same).

42. *Board of Regents*, 408 U.S. at 577; *see also, e.g.*, Frank Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1099–1102 (1981) (identifying four possible non-constitutional sources of property rights: (1) positive law; (2) contemporary lay understandings; (3) the common law; and (4) reliance). For the argument that there are some property rights that the constitutional term "property" itself generates, see *id.* at 1106–07 (discussing Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

43. There is a limit regarding how far a state may redefine the term "property" to exclude traditionally understood features of that concept. *See*, *e.g.*, *Phillips*, 524 U.S. at 167 ("[A]t least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."); *Webb's Fabulous Pharmacies*, 449 U.S. at 164 ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.").

44. *See generally infra* notes 45, 46.

45. 410 U.S. 113 (1973).

46. 135 S. Ct. 2584 (2015).

47. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person."); Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."), *modified by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

48. *Obergefell*, 135 S. Ct. at 2597–605.

of considerable importance to public policy because constitutional law now treats property and liberty in materially different ways. The government may restrict the exercise of some liberty interests, at least to some extent and at least temporarily, as long as the government has a legitimate justification.[49] In other cases, the government is quite limited in the regulations that it can impose. The government may restrict such a liberty interest only to serve goals of the highest order and, even then, only to a limited extent.[50] By contrast, since the New Deal the Supreme Court has permitted the government to regulate private property for reasons and in ways that would have astonished the Framers. The government can prohibit individual farmers from growing wheat for their own home consumption.[51] The government can require a person to have a license to engage in a host of occupations that do not threaten the public safety, health, or welfare.[52] And the government can use its eminent domain power to transfer land, including any home atop it, from one person to another simply because the new owner might develop the land in a manner that allegedly would benefit the community.[53] Because property rights trace their source only to some positive law, the government can regulate, and often nullify, those interests by a different positive law for almost whatever reason the government sees fit.[54] The result has been to devalue the

49. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 307 (1981) ("[T]his Court has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel. The constitutional right of interstate travel is virtually unqualified . . . . By contrast the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right', the Court has held, can be regulated within the bounds of due process.") (citations omitted); *compare*, *e.g.*, Mazurek v. Armstrong, 520 U.S. 968 (1997) (ruling that a state can require that abortions may only be performed by licensed physicians); Connecticut v. Menillo, 423 U.S. 9 (1975) (same).

50. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."); *Roe*, 410 U.S. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted).

51. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

52. *See* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209 (2016).

53. *See* Kelo v. City of New London, 545 U.S. 469 (2005). For discussions of *Kelo*, see*, e.g.*, JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2009); *see also* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN (2015).

54. For a summary of the minimal restraint that the Constitution imposes on the government's regulation of property, see*, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–15 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect

constitutional status of property and to construe the Due Process Clauses in a quite one-sided manner.[55]

The text of the Constitution hardly compels that dichotomy. If anything, the text places "property" on a par with "liberty" and assumes that government officials, including judges, would afford them the same respect.[56] That text has not changed since 1791.[57] All that has changed is the value that Supreme Court and the academy have placed on property. Their interpretations, however, have a relatively recent origin. Property did not lose its original understanding until the New Deal,[58] while liberty did not begin its ascent until the 1960s.[59] Since then, the *haut monde* of American political, legal, and intellectual society have often felt that the Founder's concern with the protection of property was, to quote one American history scholar, "a rather shabby thing" and that the constitutional principles discussed from 1776 to 1787 "were invented to hide it under a more attractive cloak."[60]

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lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.' This standard of review is a paradigm of judicial restraint. 'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.' On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]' Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of '"legislative facts"' explaining the distinction 'on the record' has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'") (citations omitted).

55. *See, e.g.*, BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 207 (1998) ("It has been a perennial problem for left liberal political theorists over the past forty years . . . to explain why the Court is not merely engaged in that most dread of all pursuits, '*Lochnerizing*' . . . when, for example, it overturns state anti-abortion laws or mandates school desegregation.").

56. *See* Wynehamer v. People, 13 N.Y. at 392–93 ("Property is placed by the constitution in the same category with liberty and life.") (Opinion of Comstock, J.).

57. *See generally* U.S. CONST.

58. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934) (upholding milk price regulations); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding a state minimum wage statute); United States v. Carolene Products Co., 304 U.S. 144 (1938) (upholding a ban on the interstate transportation of skim milk).

59. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (ruling that married couples have a constitutional right to use contraceptive devices).

60. EDMUND S. MORGAN, THE CHALLENGE OF THE AMERICAN REVOLUTION 55 (1976) [here-

That belief, however, mistakenly seeks to impose twentieth century redistributive economic policies on an eighteenth century document by denigrating any concern for property as little more than the desire to constitutionalize protection for greed.[61] The Framers were classically educated men who knew that Western Civilization had highly valued property since Roman times.[62]

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inafter MORGAN, CHALLENGE]. For most scholars, the low status of property rights is a given. *See, e.g.*, ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 146 (1990); JOHN HART ELY, DEMOCRACY AND DISTRUST 14 (1980); KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 15 (2009); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 455 (1909); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1 (1992); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003). *See generally* David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 4 n.14 (2003) (collecting contemporary authorities taking that position).

61. Ironically, at the same time that some scholars argued that the Supreme Court has properly belittled the constitutional value of private property rights, some members of the academy claimed that the Constitution required the federal and state governments to guarantee a minimum level of welfare benefits for the poor. The best known advocates for that view were Professors Charles Reich and Frank Michelman. *See*, *e.g.,* Reich, *supra* note 28; Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. CIV. RTS.-CIV. LIB. L. REV. 207 (1970); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659. But they were not alone. *See, e.g.*, John E. Coons *et al*., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 307 (1969); Arthur J. Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205 (1964); Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39 (1967); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969). Not everyone, of course, drank that Kool-Aid. For decidedly skeptical—and ultimately prescient—views on constitutional welfare rights, *see* Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; Philip B. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968); and Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41. The Supreme Court has consistently rejected those claims. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch.'s, 487 U.S. 450 (1988) (rejecting claimed fundamental right to free public school transportation); Harris v. McRae, 448 U.S. 297 (1980) (same, right to public funding of abortion); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (same, right to "adequate" public educational funding); Ortwein v. Schwab, 410 U.S. 656 (1973) (refusing to waive filing fees for indigents seeking to appeal state administrative decisions reducing or terminating public assistance); United States v. Kras, 409 U.S. 434 (1973) (rejecting challenge brought by an indigent party to bankruptcy court filing fees); James v. Valtierra, 402 U.S. 137 (1971) (upholding over an equal protection challenge a state constitutional provisions requiring local voter referendum approval of low income housing); Dandridge v. Williams, 397 U.S. 471, 484–87 (1970) (rejecting claimed constitutional right to public welfare).

62. *See* RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL

The Supreme Court is not free to ignore the Framers' interests in protecting property simply because the economy and society have materially changed over time. We do not follow that approach elsewhere in the law. We do not abandon the Copyright Clause's protection for plagiarism of the written word[63] just because the Clause also protects photographs and films.[64] We do not abandon the Free Speech Clause's concern with prior restraints[65] just because that clause also reaches after-the-fact damages.[66] Nor do we abandon that clause's protection for political speech[67] just because it also includes violent video games.[68] We do not abandon the Fourth Amendment's protection against law enforcement officers rummaging through our homes without justification or restraint[69] just because the Amendment now also protects against the government rummaging through our cell phones in the same manner.[70] And we do not abandon the Cruel and Unusual Punishment Clause's protection against hideously painful criminal sanctions[71] just because it also prevents the government from imposing an otherwise lawful penalty on a particular category of offenders, such as juveniles.[72] In other words, it is difficult to articulate a "neutral principle" of constitutional law[73] that justifies disregard-

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PROTECTION FOR PRIVATE PROPERTY 5–6 (Oxford Univ. Press 2008) ("We know that private property was a central institution of the European civil law tradition that started with the Roman law of Justinian, and of the English common-law tradition that started with the Norman Conquest. We know that the protection of private property from the Crown was a major purpose of the Magna Carta as early as 1215. Centuries later, the key writers who set the intellectual framework for our Constitution—John Locke, David Hume, William Blackstone, Adam Smith, and James Madison—all treated private property as a bulwark of the individual against the arbitrary power of the state."); David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 475 (1993) ("One understanding of property that came to America from Locke, Harrington, and Blackstone was [that] property was an important political concept crucial to the maintenance and defense of individual liberty and limited government.").

63. *See, e.g.*, the Statute of Anne, 8 Ann. c. 21 (Copyright Act 1709); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834).

64. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884).

65. *See, e.g.*, Near v. Minn. *ex rel*. Olson, 283 U.S. 697 (1931).

66. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

67. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010).

68. *See, e.g.*, Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729 (2011).

69. *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886); Entick v. Carrington, 19 Howell St. Tr. 1029 (1765); Wilkes v. Wood, 19 Howell St. Tr. 1153, 1167 (1763); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 450–51 & n.168 (1974) (collecting sources discussing the Fourth Amendment's history).

70. *See* Riley v. California, 134 S. Ct. 2473 (2014).

71. *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878).

72. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005).

73. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

ing the original understanding of some constitutional guarantees, but not all of them.[74]

Contemporary legal scholarship, moreover, is no longer as one-sided as it has been for most of the last eighty years.[75] Over the last three decades in particular, a growing number of scholars have argued that property was undeservedly dropped from the perch that the Framers had envisioned for it and that, even if *Lochner* may have gone too far,[76] property is nonetheless entitled to greater constitutional protection that it has received since the New Deal.[77] Accordingly, the belief that "property" was placed adjacent to "life" and "liberty" in the Due Process Clause to ensure that legislatures could not play Robin Hood is no longer an apostasy in the academy. The debate engendered by those scholars gives rise to the hope that society, and, in particular, the Supreme Court, will reconsider the dichotomy noted above.

This Article attempts to contribute to that debate by analyzing the found-

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74. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244 (1987) ("I know of no constitutional case in which the Supreme Court has held that, although the framers' intent would require one result, another must be upheld on some other ground."); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.132 (1981) ("Reliance upon original intent occurs even in opinions whose actual holdings seem wholly at variance with original intent."). *But see* Fallon, *supra*, at 1255 n.256 (suggesting that *Reynolds v. Sims*, 377 U.S. 533 (1964), which adopted the "one person, one vote" rule, might be an exception, but was unacknowledged as being one by the Supreme Court).

75. *See generally* DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011).

76. The overwhelming majority of legal scholars, from across the political spectrum, have criticized *Lochner* as an illegitimate example of gross judicial overreaching. *See* Bernstein, *supra* note 60, at 2 n.4, 4 n.14, 6 nn.17, 19 & 22 (collecting criticisms). Not everyone, however, views *Lochner* as the Sauron of constitutional law. *See* Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5, 13–15 (1988); Bernstein, *supra* note 60, at 6 n.18 (collecting authorities defending *Lochner*).

77. *See, e.g.*, ELY, *supra* note 7; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter EPSTEIN, TAKINGS]; MAYER, *supra* note 75 at 5–6; MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY (2001); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (2d ed. 2006); Alexandra L. Klein, Note, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE. L. REV. 411 (2016); Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 GEO. L.J. 1075, 1085 (1998) (reviewing JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997)) (labeling as "deplorable" the courts' current attitude toward judicial review of economic legislation); Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397 (1993); Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065 (2013); Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91 (1983); J.R.R. II, Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097 (1973). *See generally* MAYER, *supra* note 75, at 5–6, 121–23 nn.25–32 (collecting authorities).

ing generation's understanding of "property." Section II will summarize the understanding that property had at common law, while Section III will delve into the Framers' understanding of that concept during the period leading up to the Constitutional Convention of 1787.[78] It turns out that, according to the scholars who have analyzed those periods, the Framers treated the concepts of "liberty" and "property" as equally important and inseparable aspects of the freedoms guaranteed Englishmen on either side of the Atlantic before July 4, 1776.[79] Finally, Section IV will address the issue whether the Framers saw property as an "absolute" right that trumped the state's ability to regulate property in "the public interest."

II. THE STATUS OF PROPERTY IN ENGLAND AT COMMON LAW

Critical to the emerging identity of England in the Middle Ages was the proposition that governance should be done according to law, not the diktat of the king.[80] "The rule of law"—*viz*., the principle that the law should govern the conduct of everyone in the kingdom, including the crown—sought to prevent arbitrary government and thereby guarantee liberty.[81] Critical to the success of that principle was the protection of private property. "Long before the era of the revolutionary controversy, the centrality of property to the definition of liberty, to the rule of law, and to constitutionalism had become [bedrock] British legal dogma."[82] Property was valuable because it provided a source of wealth and power.[83]

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78. *See* discussion *infra* Parts II, III.

79. *See* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 7 (2011) [hereinafter GREENE, CONSTITUTIONAL ORIGINS] ("For Englishmen, liberty was . . . not just a condition enforced by law but the very essence of their emerging national identity.").

80. *Id.* at 5–6

81. *See, e.g.*, JOHN PHILLIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES (2004) [hereinafter REID, RULE OF LAW]; A.J. CARLYLE, POLITICAL LIBERTY: A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES 53 (1941) ("[T]he supreme authority in political society was not that of the ruler, but that of the law.").

82. *See, e.g.*, JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 29 (1986) [hereinafter REID, AUTHORITY OF RIGHTS]; *see also* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 23 (5th ed. 1956); Gordon S. Wood, *The History of Rights in Early America*, *in* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 233, 233 (Barry Alan Shain ed., 2007) ("Englishmen valued their rights to their personal liberty and property—rights that were embedded in their medieval common law. The common law had deeply held principles, including, for example, the notion that no one could be a judge in his own cause and that no one, not even the king, could legally take another's property without that person's consent.").

83. *See* FRIEDMAN, *supra* note 16, at 167 ("In medieval England, rights to real property meant more than 'ownership'; such rights conferred jurisdiction. The lord of the manor was a little sover-

Common law protection for property begins at least with the Coronation Charter of Henry I.[84] Issued by Henry II to satisfy a "campaign promise" to the barons for their support in a dispute over the crown, the Charter sought to resurrect English law from the time of Edward the Confessor, in part, to protect the barons' feudal property rights.[85] The Coronation Charter is significant here for several reasons. It was "primarily concerned with the protection of property rights;[86] it "consider[ed] such protection a prerequisite for the rule of law";[87] it demonstrated that "unwritten law periodically stands in need of being transmuted into written norms in order that the image of what is just may become a code of what shall be right,"[88] and it "created awareness among subjects that claims against the Crown were sanctioned by a constitutional document which specifically spelt out their rights."[89]

A similar concern was a cause of the barons' revolt that led to the adoption of Magna Carta.[90] "[W]hether or not the revolt of 1215 was prompted by a long chain of abuses or by the magnitude of John's oppressions, there is not much doubt that in large measure the revolt occurred in defense of property rights."[91] Thirty-eight of the sixty-three articles in the Great Charter protected feudal property rights.[92] Given the "overwhelming number" of articles protecting feudal property rights, one scholar has concluded that "the protection of property is probably the outstanding feature of Magna Carta"[93] and could have been "the *raison d'être* for the establishment of the rule of law in the Great Charter."[94] If so, if "[t]he charter of 'liberties' is thus in large measure a

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eign in his domain, as well as the person who had title to houses, fields, and growing crops. Only people with land or land rights really mattered: the gentry, the nobles, the upper clergy. Land was the source of their wealth and the source and seat of their power. Well into modern times, power and wealth were concentrated in the hands of great landlords. The social system of the kingdom turned on rights in land.").

84. GOTTFRIED DIETZE, MAGNA CARTA AND PROPERTY 12, 14 (1965). For a discussion of that protection, *see* Timothy Sandefur, *The Right to Earn a Living*, 6 CHAPMAN L. REV. 207, 209–17 (2003).

85. DIETZE, *supra* note 84, at 14.

86. *Id.* at 25.

87. *Id.*

88. *Id.* at 12.

89. *Id.* at 25–26.

90. *Id.* at 24.

91. *Id.* at 18; *see id.* at 24 ("John's infringements upon property were the chief reasons for considering his conduct tantamount to a replacement of the rule of law by the arbitrar[iness] . . . of [one] man.").

92. *Id.* at 37.

93. *Id.* at 33; *see also id.* at 33–38.

94. *Id.* at 43.

charter of 'properties,'"[95] it could be argued that "property rights constitute the better part of freedom as an end of the rule of law."[96]

As English law progressed, it maintained the ancient respect for private property. Blackstone deemed the invaluable right to property "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[97] John Locke, whose work greatly influenced early Americans, wrote that the men created civil society to protect "property" along with the closely related concepts of life and liberty.[98] "The seventeenth-century English constitutional maxim making liberty dependent on security in private rights to property may be the most familiar legal doctrine identified by historians of that period."[99] In the "pantheon of British liberty there was no right more changeless and tireless than the right to property."[100]

The term "right" acquired its modern understanding in the seventeenth century.[101] Originally, that term referred only to a valid title of ownership, such as the title to real estate.[102] The terms "liberty" or "privilege" were more commonly used than "right." They referred either to the protections all enjoyed against the arbitrary actions of the Crown or to a benefit bestowed on particular individuals by the king.[103] Yet, the modern-day notion of a "right"

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95. *Id.* at 38.

96. *Id.* at 43–44.

97. 2 BLACKSTONE, *supra* note 13, at *2; *see also* REID, AUTHORITY OF RIGHTS, *supra* note 82, at 33 ("The first and principal cause of making kings . . . was to maintain property and contracts, traffic and commerce among men.") (quoting John Davies, Attorney General of Ireland).

98. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 87, at 43–44 (3d J.W. Gough ed. 1966) (1689); Schultz, *supra* note 62, at 471 ("John Locke's writings were perhaps the most influential upon early America and this influence has been noted by many scholars."); *id*. at 472–73 (summarizing Locke's view of property); SCOTT, *supra* note 15, at 29 ("For [Locke] 'property' did not simply mean possessions. It included life, liberty, and estate. Self-possession or liberty comes close to Locke's use of the term 'property.'").

99. REID, AUTHORITY OF RIGHTS, *supra* note 82, at 31–32.

100. *Id.* at 27; *see id.* at 33 ("The first and principal cause of making kings . . . was to maintain property and contracts, traffic and commerce among men.") (quoting John Davies, Attorney General of Ireland).

101. *See* JACK R. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 19 (1998) [hereinafter RAKOVE, DECLARING RIGHTS].

102. *Id.*

103. "Many liberties and privileges were regarded not as inherent qualities or attributes of individuals but rather as legal powers granted by the crown. The liberty or privilege of doing something did not belong to individuals as a matter of course; it was a specific power allowed or permitted by the state—and as easily revocable by the same authority." *Id.*; *see also, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1396–97 (1992); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1121–22 (2009).

as an enforceable legal guarantee arose during the great religious and political battles between the Crown and Parliament during the seventeenth century.[104] Parliament, for example, opposed the efforts of the Stuart kings to raise revenue without authorization from Parliament by arguing that the king's actions undercut the right of the people to be governed by their elected representatives.[105] Defenders of religious and political dissenters also argued that individuals have a fundamental right of freedom of conscience that disabled the government from coercing them to adopt a particular belief.[106]

The understanding of a "right" therefore changed in two important ways during that period. The first was that the concept of "right" had expanded "to embrace and even subsume the variety of claims and activities formerly classified as 'liberties and privileges.'"[107] The second change was that "the notion of ownership that lay at the core of the original meaning of right now described just what it was that the holders of rights enjoyed."[108] Unlike a liberty or privilege that the state could withdraw, a right was something that its possessor owned, just as he owned land.[109] Moreover, a right owned by Englishmen was not the result of an exchange but was "a *birthright* to which the English people were entitled by virtue of living in a realm where monarchy was limited, not absolute; where Parliament and trial by jury provided effective checks on royal power; and where Protestant traditions of dissent and toleration had supplanted Roman Catholic demands for orthodoxy and uniformity of religious belief."[110]

The "liberty" and "property" so protected included the right to pursue a lawful occupation.[111] Blackstone concluded that, under English law and custom, "every man might use what trade he pleased."[112] Locke argued that eve-

104. RAKOVE, DECLARING RIGHTS, *supra* note 101, at 19.

105. *Id.* at 19–20.

106. *Id.* at 20.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*; J.R. POLE, PATHS TO THE AMERICAN PAST 84 (Oxford Univ. Press 1979) ("It was a standard item of Whig thought that property rights antedated those rights that were given by political society.").

111. *See, e.g.*, Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 948 (1927) (noting the "common law right to carry on a business"); SANDEFUR, *supra* note 38, at 207–18. The Colonists later felt the same way. *See, e.g.*, Samuel Adams, Massachusetts Circular Letter, Feb. 11, 1768, *reprinted in* DOCUMENTS OF AMERICAN HISTORY 66–67 (Henry Steele Commager ed., 1973) (The Massachusetts circular letter of 1768 stated that "what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent.").

112. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *3, *428; *see also*

ry man has a property right, not only in himself, but also in whatever he produced or acquired through his labor.[113] Adam Smith believed that the right to pursue a lawful occupation was an essential element of the right to "property,"[114] a reason why English Law treated monopolies with disdain.[115] Lord Edward Coke, whose opinions were well known by the Framers, was particularly critical of monopolies for the same reason.[116] "Coke did not attack monopolies because of the manner in which they deprived individuals of their right to practice a trade or calling, but rather for the deprivation itself. In language foreshadowing the Fifth Amendment's Due Process Clause, Coke emphasized that a man's trade is his life, and 'therefore the monopolist that

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JOHN LILBURNE ET AL., AN AGREEMENT OF THE FREE PEOPLE OF ENGLAND art. XVIII (1649) ("That it shall not be in their power to continue to make any Laws to abridge or hinder any person or persons, from trading or merchandising into any place beyond the Seas, where any of this Nation are free to Trade.").

113. *See* LOCKE, *supra* note 98, § 27, at 15 ("[E]very man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property."); *see also* LARKIN, *supra* note 7, at 1–2.

114. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. 1, ch. 10, pt. 2 (Modern Library ed. 1937) (1776) ("The patrimony of a . . . man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour is a plain violation of [his] most sacred property."); *see also* 2 CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 245 (1995) (1720) [hereinafter CATO'S LETTERS] ("By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, as far as by it he hurts not the Society, or any Member of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys. The Fruits of a Man's honest Industry are the just Rewards of it, ascertained to him by natural and eternal Equity, as is his Title to use them in the manner which he thinks fit: And thus, with the above Limitations, every Man is sole Lord and Arbiter of his own private Actions and Property."); LILBURNE, *supra* note 112, at art. XVIII ("That it shall not be in their power to continue to make any Laws to abridge or hinder any person or persons, from trading or merchandising into any place beyond the Seas, where any of this Nation are free to trade.").

115. *See* Allen v. Tooley, 80 Eng. Rep. 1055 (K.B. 1614); Darcy v. Allen, 77 Eng. Rep. 1260 (The Case of Monopolies), (K.B. 1603); *see also, e.g.*, Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 761 (1884) (Bradley, J., concurring) ("I hold it to be an incontrovertible proposition of both English and American public law, that all *mere* monopolies are odious and against common right."); JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 143–45 (Francis Gregor trans., Robert & Clarke Co. 1874) (1545); 4 EDWARD HOLDSWORTH, A HISTORY OF ENGLISH LAW 344 & n.6 (3d ed. 1945); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 989–1008 (2013).

116. Calabresi & Leibowitz, *supra* note 115, at 922, 1055; Allen v. Tooley, 80 Eng. Rep. 1055 (K.B. 1614).

taketh away a man's trade, taketh away his life.'"[117] As Coke put it, "'Generally all monopolies are against this great Charter'—*viz*., Magna Carta—'because they are against the liberty and freedome of the Subject, and against the Law of the Land.'"[118]

III. THE STATUS OF PROPERTY IN AMERICA IN THE EIGHTEENTH CENTURY

A. The Colonists' and Framers' Understanding of Property

1. The Role of Property in the American Revolution

The Colonists' decision to break from England was different in character from contemporary revolutions. Seeing English customs and rights as an invaluable benefit, more valuable than even England's military or commercial power,[119] the Colonists brought their legal traditions with them to the New World.[120] One of them was the "rule of law."[121] Americans in the seventeenth and eighteenth centuries believed in the concept of "higher-law constitutionalism," the principle that the Crown and Parliament alike were obligated to follow the "natural and customary rights recognized at common law."[122] Belief that law traced its legitimacy to natural law, as well as to the unwritten customs of the people, along with the expectation that law could protect against

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117. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 608 (2009).

118. *Id.* (quoting EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 181 (Lawbook Exchange 2002) (1644)).

119. GREENE, CONSTITUTIONAL ORIGINS, *supra* note 79, at 8.

120. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 294–95 (1996) [hereinafter RAKOVE, ORIGINAL MEANINGS] (quoting William Penn); Wilcomb E. Washburn, "*Law and Authority in Colonial Virginia*," *in* LAW AND AUTHORITY IN COLONIAL AMERICA 117 (George Athan Billias ed., 1965); Mark DeWolfe Howe, *The Sources and Nature of Law in Colonial Massachusetts*, *in* LAW AND AUTHORITY IN COLONIAL AMERICA 117 (George Athan Billias ed., 1965). Colonial charters guaranteed settlers the benefits of the common law in the new land, *see* GREENE, CONSTITUTIONAL ORIGINS, *supra* note 79, at 8, and the common law served as the default rule until it was revised by statute. Eleven of the thirteen colonies enacted so-called "receiving statutes," which incorporated the English common law as state law; one state—New Jersey—adopted the common law through its state constitution; and the last state—Connecticut—adopted the common law by judicial decision. In 1720, the English Attorney General Richard West concluded that English common law applied in the Colonies. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 6–8 (1977); WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 18–20 (1975).

121. REID, RULE OF LAW, *supra* note 81, at 93.

122. Gedicks, *supra* note 117, at 614, 619; *see, e.g.*, THOMAS PAINE, RIGHTS OF MAN (1984) (1776).

government tyranny, had become part of the shared heritage of the English.[123] Like their countrymen across the Atlantic, the Colonists put their reliance on the law because they believed that only it could shield them from arbitrary government power.[124]

Accordingly, the American Revolution was not an early version of the French or Russian Revolutions, one in which the "proletariat" sought to jettison a privileged, class-based system in favor of a new legal, social, and economic order.[125] Nor was the Revolution "a capitalist junta" that sought to

123. *See* Hurtado v. California, 110 U.S. 516, 530 (1884) ("The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history . . . ."); GREENE, CONSTITUTIONAL ORIGINS, *supra* note 79, at 141, 180–81; REID, RULE OF LAW, *supra* note 81, at 93 ("Rule-of-law belonged to the seventeenth and eighteenth centuries. It was . . . the cornerstone of the jurisprudence of liberty . . . when liberty was struggling to survive."); GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 12 (1970) ("The theory of natural law served, as it were, as the connecting arch between the society the Americans broke away from and the new society, or societies, they formed.").

124. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 77 (enlarged ed. 1992) [hereinafter BAILYN, IDEOLOGICAL ORIGINS] ("Liberty . . . was the capacity to exercise 'natural rights' within limits set not by the mere will or desire of men in power but by non-arbitrary law—law enacted by legislatures containing with them the proper balance of forces."); HORWITZ, *supra* note 120, at 5 ("The persistent appeals to the common law in the constitutional struggles leading up to the American Revolution 'created a regard for its virtues that seems almost mythical.'"); MORISON, *supra* note 12, at 171–72 ("One principle upon which all Englishmen then agreed was the rule of law. When in the late eighteenth century, they spoke of the 'liberties of free-born Englishmen,' the rule of law was in the back of their minds: resistance to Charles I in the name of law, vindication of law against James II. Colonial leaders were familiar with the works of Algernon Sidney, [James] Harington, and [John] Locke, who urged every Englishman to resist every grasp for power; to stand firm on ancient principles of liberty, whether embalmed in acts of Parliament or adumbrated in the 'Law of Nature.'"); NELSON, *supra* note 120, at 13 ("One of the most intense concerns of Americans in the prerevolutionary period was to render individuals secure in their lives, liberties, and properties from abuses of governmental power.").

125. *See* BERNARD BAILYN, FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE 81 (1990) [hereinafter BAILYN, FACES OF REVOLUTION] ("The American Revolution was not the result of intolerable social or economic conditions. The colonies were prosperous communities whose economic condition, recovering from the dislocations of the Seven Years' War, improved during the years when the controversy with England rose in intensity. Nor was the Revolution deliberately undertaken to recast the social order, to destroy the last remnants of the *ancient régime* such as they were in America."); FRIEDMAN, *supra* note 16, at 6 ("[U]nlike the Russian Revolution, or the French Revolution, there was no total social upheaval, at the end of the war."); ZUCKERT, *supra* note 7, at 288–89 ("[The] widely perceived congruence between established practice and the natural standards of right is one factor that made the American Revolution so much more successful than the French Revolution. In the latter case, the new order to be brought in differed so radically from the old order that a massive demolition job had to be performed before anything new could be built. In America this was not the case; although the Americans innovated in many and important ways, they were also free to maintain deep continuities with the precedent order at the level of both political structures and the legal system.").

adopt "rule by a leisured patriciate."[126] And, unlike the fall of the Berlin Wall in 1989, the Revolution did not signify the end of a long period in which the government had denied the public any opportunity to enjoy liberty and private property. The Colonists had enjoyed both under English law and believed that English constitutional government was the freest in the world.[127]

Familiar with William Blackstone's postulate that security, liberty, and property were the three absolute rights of Englishmen,[128] the Framers' generation believed that the most remarkable feature of the unwritten English constitution was its avowed purpose of protecting those guarantees.[129] That concept included the ability to acquire and own property. Indeed, the opportunity to own property was a principal attraction of the New World. Colonists flocked to America because of the promise of finally owning their own land, rather than serving a landlord, or, in the case of artisans who settled in the cities, the hope of bettering their economic condition by becoming their own bosses.[130]

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126. BAILYN, FACES OF REVOLUTION, *supra* note 125, at xii.

127. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS 150 (Expanded ed., Rita & Robert Kimber trans, Rowman & Littlefield 2001) (1973).

128. *See* 1 BLACKSTONE, *supra* note 7, at *9, *11, *124–26, *134; Schultz, *supra* note 62, at 475.

129. *See, e.g.*, BAILYN, FACES OF REVOLUTION, *supra* note 125, at 69 ("[By 1776, English liberties] had been achieved . . . over the centuries, and had been embedded in a constitution whose wonderfully contrived balance between the needs of the state and the rights of the individual was thought throughout the Western world to be one of the finest human achievements. It was obvious too, of course, that something had gone wrong recently. It was generally agreed in the colonies that the famous balance of the constitution, in Britain and America, has been thrown off by a gang of ministers greedy for power, and that their attention had been drawn to the colonies by the misrepresentations of certain colonial officeholders who hoped to find an open route to influence and fortune in the enlargement of Crown power in the colonies."); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 29 (1990) ("Americans took particular pride in being governed under Britain's unwritten constitution, which they considered the most perfect form of government ever invented 'by the wit of man'—a judgment with which, they often added, every major writer on politics agreed.") [hereinafter MAIER, AMERICAN SCRIPTURE]; RAKOVE, ORIGINAL MEANINGS, *supra* note 120, at 3 ("The British constitution was not a fixed document, adopted at a particular moment in time, by special procedures that gave it an authority superior to all ordinary acts of government. It was really the entire set of institutional arrangements, parliamentary statutes, judicial precedents, and political understandings that together shaped the exercise of power. The British constitution could not be found in any one document—not even in Magna Carta or in the parliamentary Declaration of Rights of 1689—but rather in many texts or even none. Moreover, none of those documents could prevent a sovereign parliament from adopting any law it chose, even if that law violated some fundamental right or dearly held tradition. In a sense, the idea of parliamentary sovereignty *was* the ruling principle of the eighteenth-century British constitution.").

130. *See* ADAMS, *supra* note 127, at 189 ("The acquisition and cultivation or exploitation of land was the very raison d'être for the colonies."); CHARLES M. ANDREWS, THE COLONIAL BACKGROUND OF THE AMERICAN REVOLUTION 6–7 (Yale Univ. Press 1961) (1924) (people came to the New World to acquire property, to better their economic status, to obtain religious freedom, to

The Revolution was "an ideological, constitutional, political struggle and not primarily a controversy between social groups undertaken to force changes in the organization of the society or the economy."[131] The Colonists embraced Locke's views of property and sought to transplant it in America.[132]

There was no economic class warfare in the Colonies.[133] Land was plentiful, and labor, especially in the form of skilled artisans, was scarce, allowing every free adult male an opportunity to succeed financially.[134] Anyone who wanted his own land could find it in the western portions of the Colonies or in the unsettled territories across the Appalachian Mountains.[135] Plus, everyone, whether landowners, merchants, or artisans, recognized the economic and social value, including independence, that property ownership bestowed. Indeed, property was "the one great unifying value" existing throughout the colonies.[136] Finally, the leaders of the Revolution did not impose their own radical

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start a new life, or to seek adventure); BERNARD BAILYN, THE PEOPLING OF BRITISH NORTH AMERICA, AN INTRODUCTION 30–32, 36–37, 42–43, 67 (1985) [hereinafter BAILYN, PEOPLING)]; TAYLOR, *supra* note 1012, at 192 ("Coming from a more crowded, competitive, and capitalist land where about half the population lacked sufficient, food, shelter, and clothing, the colonists marveled at the apparent abundance of nature, the vast numbers of fish, birds, trees, and deer."); *id.* at 440–41 ("Compared with Britain, the American colonies offered greater opportunity for free people to become landowning farmers . . . . [C]olonial conditions permitted most adult, free men to own sufficient land to employ themselves and their families, a cherished condition called 'independence,' which starkly contrasted with the dependence of laborers and tenant farmers in Great Britain."). The opportunity to speculate in land was also attractive to immigrants after they became settled. *See* BAILYN, PEOPLING, *supra*, at 67 ("Every farmer with an extra acre of land became a land speculator . . . . Within a single generation of the first settlements, the acquisition of land had taken on a new form; and a new purpose; speculation in land futures was fully launched as a universal business, and it developed quickly."); FRED BOSSELMAN ET AL., THE TAKING ISSUE 53 & n.1 (1973) [hereinafter BOSSELMAN] (noting that Crown owned all land in England and that the nobles merely "held" their property).

131. BAILYN, IDEOLOGICAL ORIGINS, *supra* note 124, at x, 67–68. That is not to say that colonists were not motivated by economic considerations. Some surely were. *See, e.g.*, Marc Egnal & Joseph A. Ernst, *An Economic Interpretation of the American Revolution*, *in* HISTORICAL PERSPECTIVES ON THE AMERICAN ECONOMY 42–68 (Robert Whaples & Dianne C. Betts eds., 1995) (discussing the political and economic causes of the American Revolution).

132. *See* ADAMS, *supra* note 127, at 189.

133. *See id.*

134. *Id.* at 190–91 ("The strongest motive of the middle class, and of the upper and lower classes that shared its guiding values, was the pursuit of property in free competition, property as a guarantee of security and status.").

135. *See* ADAMS, *supra* note 127, at 189; BAILYN, PEOPLING, *supra* note 130, at 38 ("[T]here were millions of open acres east of the Mississippi, and the growing scale of [the American] enterprise, both in commerce and agriculture, and the multiplying and maturing towns created opportunities that had not existed when coastal property had been almost free for the taking.").

136. ADAMS, *supra* note 127, at 191; ELY, *supra* note 7, at 27 ("[T]he defense of property rights was a major force unifying the colonies in their struggle with England.").

economic theories on an unwilling populace.[137] "American political leaders did not develop new ideas about private property. They merely demanded that the concept of property long since canonized by the English Whigs also apply in the colonies."[138]

America sought independence from England because the two polities fundamentally and irreconcilably disagreed over the nature of the "constitution" protecting English citizens in the Mother Country and in the New World.[139] Having suffered under the arbitrary rule of several tyrannical kings, the England people believed that the "mixed constitution" established after the Glorious Revolution of 1688[140]—a state organized with each of the three classes of English society represented by one branch of the government: the Crown for the monarchy, the House of Lords for the nobility, and the House of Commons for the common man—would protect cherished English liberties by ensuring that no one person or entity could threaten English freedoms.[141] By contrast, by the time of the Revolution many Colonists had never directly suffered under royal despotism,[142] but they had lived under what they deemed its Parliamentary version. Americans believed that only the law could protect their freedoms because a legislature could be as tyrannical as a king.[143] Be-

137. *See* ELY, *supra* note 7, at 27.

138. ADAMS, *supra* note 127, at 188; *see* ELY, *supra* note 7, at 17 ("Whig political thought profoundly shaped public attitudes in colonial America . . . .").

139. *See* BAILYN, IDEOLOGICAL ORIGINS, *supra* note 124, at 67–68.

140. *See id.* at 70–71.

141. *See id.* at 70.

142. *See* BAILYN, IDEOLOGICAL ORIGINS, *supra* note 124, at 203 (royal power "touched only the outer fringes of colonial life"); GREENE, CONSTITUTIONAL ORIGINS, *supra* note 80, at 179–80; MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 9 ("For Americans the great thing about this empire, apart from the sheer pride of belonging to it, was that it let you alone. The average colonist might go through the year, might even go through a lifetime, without seeing an officer of the empire.").

143. *See* GREENE, CONSTITUTIONAL ORIGINS, *supra* note 79, at 10–11, 59, 141–42; CHARLES H. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 2–3, 9–11, 16–17 (rev. ed., Cornell Univ. Press 1947); MORGAN, CHALLENGE, *supra* note 60, at 7, 54–56; 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 3–5, 69–72 (1993). The Declaration of Independence used the phrase "life, liberty, and the pursuit of happiness," rather than "property," and Jefferson never explained why he changed Locke's well-known phrase. SCOTT, *supra* note 15, at 41–42. But it is unlikely that he intended to denigrate the importance of property. *See* ADAMS, *supra* note 127, at 192 ("[T]he acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both."); ELY, *supra* note 7, at 29 ("The right to obtain and possess property was at the heart of the pursuit of happiness."); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 276 (1988) [hereinafter LEVY, ORIGINAL INTENT] ("The pursuit of happiness, a phrase used by Locke for a concept that underlay his political ethics, subsumed the great rights of liberty and property, which were inextricably related. . . . The

cause both the Crown and Parliament had come under the rule of "irresponsible and self-seeking adventurers—what the twentieth century would call "political gangsters" who "had gained the power of the British government and were turning first to the colonies"[144]—the Colonists found their freedoms threatened by the English government. The American Revolution, accordingly, was a rebellion fought to *preserve* the rule of law and the freedoms enjoyed by the Framers' generation as Englishmen, not to *obtain* them.[145]

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anti-American Tory, Dr. Samuel Johnson, had used the phrase, and Sir William Blackstone, also a Tory, employed a close equivalent in his *Commentaries* in 1765, when remarking 'that man should pursue his own happiness. This is the foundation of what we call ethics, or natural law.'") (emphasis added); *id.* at 277 ("liberty, property, and the pursuit of happiness [were] deeply linked in the thought of the Framers"); ZUCKERT, *supra* note 7, at 220–24, 281; *cf. infra* text accompanying note 184 (quoting Madison's understanding of "property"). Jefferson may have used "the pursuit of happiness" rather than "property" for several reasons. Natural rights, like "life" and "liberty," were inalienable, where "property" was alienable. Some colonists sought to make a living through a trade, rather than agriculture. *See* MAIER, AMERICAN SCRIPTURE, *supra* note 129, at 134, 270–72 n.79. Some of the Framers were deeply troubled by the inconsistency between their declaration that every man had an inalienable right to "liberty" and the prevalence of Black chattel slavery, principally in the southern colonies. *See* BAILYN, IDEOLOGICAL ORIGINS, *supra* note 124, at 232–46. Perhaps, they feared that using the specific term "property" in America's fundamental statement of its political and moral philosophy could be used to claim that the document endorsed that institution. (State constitutions, by contrast, generally used the term "property.") *See* MAIER, AMERICAN SCRIPTURE, *supra* note 129, at 165–67. Or perhaps Jefferson, who expected the Declaration to be read aloud, just liked the sound of his chosen phrase. ZUCKERT, *supra* note 7, at 223.

144. BAILYN, FACES OF REVOLUTION, *supra* note 125, at xi; *see id.* at 207 ("The colonists—habituated to respond vigorously to acts of arbitrary rule; convinced that the existence of liberty was precarious even in the loosely governed provinces of the British-American world; more uncertain than ever of what the intricate shufflings in the distant corridors of power in England portended; and ever fearful that England's growing corruption would destroy its capacity to resist the aggressions of ruthless power seekers—saw behind the actions of the ministry not merely misgovernment and not merely insensitivity to the reality of life in the British overseas provinces but a deliberate design to destroy the constitutional safeguards of liberty.").

145. *See* FRIEDMAN, *supra* note 16, at 6 ("[I]n some ways, it was a war fought *for* continuity; for the right to trudge along familiar walkways."); POLE, *supra* note 110, at 77 ("The American revolutionaries never claimed to be fighting for new principles. They asserted repeatedly that they were engaged in the defence of ancestral English rights and privileges; and when they fell back on the rights of man, they relied on rights which we must take to have been even older than those of Englishmen."). As Professor Bernard Bailyn has explained: "[T]he primary goal of the American Revolution . . . was not the overthrow or even the alteration of the existing social order but the preservation of political liberty threatened by the apparent corruption of the constitution, and the establishment of the existing condition of liberty. . . . What was essentially involved in the American Revolution was not the disruption of society with all the fear, despair, and hatred that that entails, but the realization, the comprehension and fulfillment, of the inheritance of liberty and of what was taken to be America's destiny in the context of world history." BAILYN, IDEOLOGICAL ORIGINS, *supra* note 124, at 19; *see also, e.g.*, BAILYN, FACES OF REVOLUTION, *supra* note 125, at 69 ("[T]he liberties Americans sought were British in their nature; they had been achieved by Britain over the centuries and had been embedded in a constitution whose wonderfully contrived balance between the needs of the state and the rights of the individual was thought throughout the Western world to be

2. The Relationship Between Property and Liberty

One of those freedoms was the ability to acquire and enjoy the use of private property.[146] The Framers' generation held that "property" was a "natural right," a right that is antecedent to and exists independently of government.[147] Such a right, in Coke's words, was the "*Lex aeterna*, the law of nature . . . written with the finger of God in the heart of man."[148]

That generation saw the protection of property as vital to civil society.[149]

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one of the finest human achievements. It was obvious too, of course, that something had gone wrong recently. It was generally agreed in the colonies that the famous balance of the constitution, in Britain and America, had been thrown off by a gang of ministers greedy for power, and that their attention had been drawn to the colonies by the misrepresentations of certain colonial officeholders who hoped to find an open route to influence and fortune in the enlargement of Crown power in the colonies."); GREENE, CONSTITUTIONAL ORIGINS, *supra* note 79, at 59–66; ANDREW C. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 123–24 (1932) ("[T]he central principle of the American Revolution [was that] rebellion against an unlawful act [was] not rebellion but the maintenance of law. This philosophy gave character to the Revolution."); *id.* at 133 ("The colonists were demanding a constitutionally checked government; they claimed it was already theirs; and in course of time they proceeded not only to fight, but to create governments of exactly that character."); MORISON, *supra* note 12, at 180 ("There was no American nationalism or separatist feeling in the colonies prior to 1775. . . . Americans were not only content but [also] proud to be part of the British imperium. But they did feel very strongly that they were entitled to all constitutional rights that Englishmen possessed in England."); *id.* at 182 ("[T]he Americans were a high-spirited people who claimed all the rights for which Englishmen had fought since Magna Carta, and would settle for nothing less. . . . Make no mistake; the American Revolution was not fought to *obtain* freedom, but to *preserve* the liberties that Americans already had as colonials. Independence was no conscious goal, secretly nurtured in cellar or jungle by bearded conspirators, but a reluctant last resort, to preserve 'life, liberty and the pursuit of happiness.'"); NELSON, *supra* note 120, at 13 ("One of the most intense concerns of Americans in the prerevolutionary period was to render individuals secure in their lives, liberties, and properties from abuses of government power."); Gedicks, *supra* note 117, at 621.

146. See RAKOVE, DECLARING RIGHTS, *supra* note 101, at 20.

147. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 345 (1827) ("[T]he right to contract, and the obligations created by contract, . . . exist anterior to, and independent of society . . . [They] are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation."); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815) (referring in dicta to "the principles of natural justice, [and] the fundamental laws of every free government"); LARKIN, *supra* note 7, at v (Preface by Prof. J.L. Stocks) ("Property exists, like marriage and the family, antecedently to government, and belongs to the state of nature on which government is superimposed: it is natural in a sense in which government is not."); BOSSELMAN, *supra* note 130, at 103 ("Natural law was the prevailing judicial philosophy."); TIMOTHY SANDEFUR & CHRISTINA SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA 54–56 (2016) [hereinafter SANDEFUR & SANDEFUR]; Hadley Arkes, *Who's the Laissez-Fairest of Them All? The Tradition of Natural Rights in American Law*, POLICY REV. 78 (Spring 1992).

148. STOURZH, *supra* note 123, at 12; *see also, e.g.*, 1 BLACKSTONE, *supra* note 7, at *41; BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT (Harvard Univ. Press 2013) (1931); MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC (1996).

149. *See, e.g.*, ELY, *supra* note 7, at 10–27; EPSTEIN, TAKINGS, *supra* note 77, at 17 ("The classical liberal tradition of the founding generation prized the protection of liberty and private property

For example, the Virginia Declaration of Rights, written by George Mason a month before Thomas Jefferson penned the Declaration of Independence,[150] made that point clearly, providing that "all men . . . 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."[151] The founding generation believed that Locke was correct to conclude that the primary purpose of government was to protect the natural rights of man, including the right to property.[152]

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under a system of limited government."); ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTES WITH AMERICA 29 (1775) ("The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty."); SCOTT, *supra* note 15, at 2 ("In time Americans came to believe that all men should own land, and that widespread ownership of land was characteristic of a virtuous society."); *see generally* Schultz, *supra* note 62, at 475–77 ("Property was clearly an important concept in America and was well discussed by many individuals. James Madison described property broadly to include even one's opinions and beliefs. He argued that property as well as personal rights are an 'essential object of the laws' necessary to the promotion of free government. Alexander Hamilton stated that the preservation of private property was essential to liberty and republican government. Thomas Jefferson depicted property as a 'natural right' of mankind and linked ownership to public virtue and republic government. John Adams described a proper balance of property in society as important to maintaining republican government and connected property ownership to moral worth. Thomas Paine felt that the state was instituted to protect the natural right of property, and Daniel Webster would later link property to virtue, freedom, and power. Numerous Anti-Federalists described a society as free when it protected property rights or equalized property distributions. For example, Samuel Bryan, in his 'Letters of Centinel,' argued that a 'republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divided.' Hence, many colonial American readings of Locke's theory of property also noted the connection between personal political liberty and property ownership, and agreed with Locke that property rights deserved a somewhat absolute protection against government regulation. Additionally, others followed Harrington and articulated the importance of property divisions in preserving state Republican governments. Still others cited Blackstone to defend more absolutist conceptions of property. Clearly there were many early Americans who described property as the end of society, as absolute, as linked to other important political rights, or as natural. Conversely, threats to property were considered destructive to freedom and republican government.") (footnotes omitted).

150. *See* ZUCKERT, *supra* note 7, at 220, 275.

151. *See, e.g.*, The Virginia Declaration of Rights, *reprinted at* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3813 (F. Thorpe ed. 1909) ("[A]ll 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.") (emphasis added). George Mason wrote the Virginia Declaration of Rights a month before Thomas Jefferson wrote the Declaration of Independence.

152. *See* LARKIN, *supra* note 7, at vi (Preface by Prof. J.L. Stocks) ("According to Locke's theory, when government is instituted, nature is abrogated only in its defects: for the rest it remains intact, a source of fundamental social rights and obligations. Thus this account of natural property, except so far as it reveals defects in nature's provision, is correctly taken as defining in principle the property which, in Locke's view, it is the primary end of government to preserve.").

One of the Colonists' goals was to acquire their own property. In England, the crown was the ultimate landowner.[153] Since William I, the crown had parceled out land to vassals and subvassals in the feudal system.[154] By the eighteenth century feudalism was a matter of history, but hereditary estates made available land scarce.[155] "The colonies, on the other hand, were short of people, cattle, and hard money, but had land to burn."[156] For example, Virginia adopted the "headright system," in which each new male settler received fifty acres of land to encourage settlement.[157]

Colonists also had the opportunity to own land "free, clear, and absolute"[158]—that is, in fee simple, the broadest property right known to the common law—with none of the remnants of the feudal duties that accompanied a grant of land from the king.[159] Individual feudal property holders owed the king a duty of military service or, as it later developed, an obligation to pay rent, known as "quitrent," a rough form of property tax.[160] The Virginia Company, the corporation chartered to develop that colony, owned the early settlements in Virginia, and the colonists bore the same duty to pay quitrents.[161] But that state of affairs soon changed. The Crown's revocation of the Virginia Company's charter in 1624, the death of King James I the following year, the grant of private property to settlers in Virginia, and the adoption of the common law—those events (along with the Colonists' general refusal

153. *See* BOSSELMAN, *supra* note 130, at 53 & n.1.

154. *See* FRIEDMAN, *supra* note 16, at 24.

155. Under the English law of "primogeniture," all of the deceased's lands descended to his eldest son if the owner died intestate. The law was designed to protect the landed gentry by helping them "keep their property within the bloodline," because political power rested on land ownership. *See* FRIEDMAN, *supra* note 16, at 24, 29–30.

156. *Id.* at 24.

157. 1 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660 18 (2008) [hereinafter 1 NELSON]; PERKINS, *supra* note 12, at 57; ELY, *supra* note 7, at 11.

158. FRIEDMAN, *supra* note 16, at 171 (internal punctuation and citation omitted).

159. BANNER, *supra* note 16, at 5. In England, eighty percent of farm workers were tenants or itinerant workers, but in America a majority of colonial farmers owned their land outright. American farmers who were tenants also remained in that status for only three or four years (for indentured servants, the period was four to seven years), just long enough to purchase their own property. PERKINS, *supra* note 12, at 57–59, 91–92.

160. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470 (1793) (Cushing, J.); BANNER, *supra* note 16, at 5; 1 BLACKSTONE, *supra* note 7, at *44–518; ELY, *supra* note 7, at 11; FRIEDMAN, *supra* note 16, at 24–25; MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 19.

161. *See* ELY, *supra* note 7, at 10–11; 1 NELSON, *supra* note 157, at 13–14; Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 444–47 (1931) (describing land tenure in the seventeenth century in the Plymouth Colony). The duty to pay quitrents was common in the southern colonies (although they were poorly collected), but "novel and provocative" in New England. TAYLOR, *supra* note 12, at 277.

to pay rent, and the royal governors inability to collect it) changed the nature of property ownership in America.[162] Gone were the remnants of the feudal duties that landowners owed the crown. The difference, according to Professor Stuart Banner, was tremendous.[163]

Americans also sought to protect the property they acquired. "If there was one issue on which most of the American Founders agreed, it was the importance of protecting private property rights."[164] Yet, it is important to recognize that the founding generation's desire to safeguard private property was not simply a matter of a materialistic state of mind.[165] During the period before and after 1776 "[t]he revolutionists' coupling of property with life and liberty was not an attempt to lend respectability to property rights, nor was it an attempt to enlist the masses in a struggle for the special privilege of a small

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162. *See* ANDREWS, *supra* note 130, at 3–6, 8; ELY, *supra* note 7, at 12–13; LARKIN, *supra* note 7, at 140 ("[F]eudalism never got a real footing in America. Most of the charters from 1606 to 1732 granted lands in free and common soccage, that is, free tenure without military service."); 1 NELSON, *supra* note 157, at 24–41.

163. BANNER, *supra* note 16, at 5.

164. POLE, *supra* note 110, at 77 ("In all these rights, nothing was more fundamental than the laws of property, in which not only their fortunes but their liberty was at stake."); SOMIN, *supra* note 53, at 36; *see also* Fisher Ames, *Dangerous Power of France, No. III*, in 2 WORKS OF FISHER AMES 309 (S. Ames ed., 1854) ("[T]he great duty of all governments . . . is to protect property."); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 [hereinafter Bruchey] ("Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights."); Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. L. & ECON. 467 (1976) [hereinafter Katz]. It is worth remembering that the criminal law was a useful device, not only for moral instruction and cleansing, but also for protecting private property. *See* FRIEDMAN, *supra* note 16, at 149–50 ("Law and order are themselves a kind of social insurance. The criminal law tries to guard people's property against thieves and robbers."); Hay, *supra* note 9, at 17–18 (explaining that English law made numerous property crime capital offenses because there were no investigative agencies; the criminal law relied instead on the threat of a severe punishment to deter crime). Colonial criminal law, while less bloodthirsty than the English common law, served economic purposes too. *See* FRIEDMAN, *supra* note 16, at 33, 37–38.

165. As Professor John Phillip Reid explained, we use the term "property" differently than the Founders' generation did: "Today we think of [that generation's] emphasis upon property as a defense of the material and tend to forget how much the concept of liberty in the seventeenth and eighteenth centuries depended upon property—upon the right to property and the right to security in property. We no longer think of property in the manner that people did in the revolutionary era, nor do we use the word 'property' as they did, and it is sometimes forgotten that liberty itself was spoken of and thought of as property. Constitutional rights of individuals—the right to trial by jury, for example, or the right to be taxed only by consent—were possessions that English citizens owned, that were vested in them by inheritance from their ancestors." JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX 27 (1987) [hereinafter REID, AUTHORITY TO TAX].

wealthy class."[166] Property was not one of "the special privileges of a small wealthy class" of Americans.[167] Most Colonists owned property and saw "life, liberty, and property" as "the fundamental trinity of inalienable rights," rights that "individuals could never renounce," unlike "rights whose exercise was subject to the regulatory power of the state."[168] As Professor Edmund Morgan of Yale once put it:

> Americans were actually quite shameless about their concern for property and made no effort to hide it, because it did not at all seem shabby to them. The colonial protests against taxation frankly and openly, indeed, passionately, affirm the sanctity of property. And the passion is not the simple and unlovely passion of greed. For eighteenth-century Americans, property and liberty were one and inseparable, because property was the only foundation yet conceived for security of life and liberty: without security for his property, it was thought, no man could live or be free except at the mercy of another. . . . The Americans fought England because Parliament threatened the security of property. They established state constitutions with property qualification for voting and officeholding in order to protect the security of property. And when state governments seemed inadequate to the task, they set up the federal government for the same purpose. The economic motive was present in all these actions but it was present as the friend of universal liberty. Devotion to security of property was not the attitude of a privileged few but the fundamental principle of the many, inseparable from everything that went by the name of freedom and adhered to the more fervently precisely because it did affect most people so intimately.[169]

Harvard Professor Bernard Bailyn agrees:

> The sanctity of private property and the benefits of commercial expansion, within customary boundaries, were simply assumed—the Revolution was fought in part to protect the indi-

166. MORGAN, CHALLENGE, *supra* note 60, at 55.

167. *Id.*

168. RAKOVE, ORIGINAL MEANINGS, *supra* note 120, at 290; *see also* ELY, *supra* note 7, at 16 ("By 1750 a largely middle-class society had emerged in colonial North America. Most of the colonists owned land, and 80 percent of the population derived their living from agriculture.").

169. MORGAN, CHALLENGE, *supra* note 60, at 55–56; *see also* BAILYN, IDEOLOGICAL ORIGINS, *supra* note 124, at 77 ("Liberty . . . was the capacity to exercise 'natural rights' within limits set not by the mere will or desire of men in power but by non-arbitrary law—law enacted by legislatures containing with them the proper balance of forces.").

> vidual's right to private property—nor were acquisitiveness, the preservation of private possessions, and reasonable economic development believed to be in necessary conflict with the civil rectitude that free, republican governments required to survive. Later, generations later, such a conflict might be seen to emerge in complex ways, but for the Revolutionary generation and its immediate successors these were harmonious values, implicit in a configuration of ideas that had evolved through the critical passages of Anglo-American history.[170]

The Founders understood the term "property" to have an expansive meaning, more than mere ownership of land or material goods.[171] It included "property which men have in their persons as well as goods,"[172] which included the right to their fruits of their labors.[173] The right to property even em-

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170. BAILYN, FACES OF REVOLUTION, *supra* note 125, at 206; *see also* MORGAN, CHALLENGE, *supra* note 60, at 56 ("[W]e should totally abandon the assumption that those who showed the greatest concern for property rights were not devoted to human rights."); MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 94 ("The Revolution had begun as a dispute over the security of property, and had fed on the conviction that government existed for the protection of property."); NEDELSKY, *supra* note 3, at 30 ("Madison did not . . . have a simple conception of property as land or even material goods. The 'faculties for acquiring property' emphasized a subtle, nonmaterial dimension of property. And the legislative injustice he feared was not straightforward confiscation, but the more indirect infringements inherent in paper money and debtor relief law.").

171. Contemporary scholars in law and economics treat "property" as more than "things," realty and personalty in particular, but do not go so far as including legal rights under that rubric. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 358 (2001) ("Analysis of the law from an economic standpoint abounds with talk of 'property rights' and 'property rules.' But upon closer inspection, all this property-talk among legal economists is not about any distinctive type of right. To perhaps a greater extent than even the legal scholars, modern economists assume that property consists of an ad hoc collection of rights in resources. Indeed, there is a tendency among economists to use the term property 'to describe virtually every device—public or private, common-law or regulatory, contractual or governmental, formal or informal—by which divergences between private and social costs or benefits are reduced.' [¶] In other times and places, a very different conception of property has prevailed. In this alternative conception, property is a distinctive type of right to a thing, good against the world. This understanding of the in rem character of the right of property is a dominant theme of the civil law's 'law of things.'") (footnotes omitted).

172. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 252 (1999) [hereinafter LEVY, ORIGINS]; *see also* LARKIN, *supra* note 7, at 58–59.

173. *See*, *e.g.*, BREEN, *supra* note 17, at 190–91 ("[T]he Enjoyment of Property is the Aim of all Mankind; and the Foundation of their ent[e]ring into Societies. . . . Every Man has a *natural Right* to enjoy the Fruit of his own Labour, both as to the *Conveniences*, and *Comforts*, as well as the *Necessaries* of life . . . .") (quoting "Rusticus", *The Good of the Community Impartially Considered, in a Letter to a Merchant in Boston* (1754)); *see also* Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIB. 334, 345 (2005) ("There is no doubt that the right to practice one's occupation is so closely tied to entry into commerce, the pursuit of happiness, and the ownership of property that Justices Bradley

braced what Locke deemed as "a right to rights."[174] "[P]roperty, even the concept of property as material accumulation, was not limited to the physical in the eighteenth century. It included constitutional rights that English people counted among the attributes of liberty."[175] The result was that "liberty itself was property possessed."[176]

Consider James Madison's views.[177] As he once explained, the term

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and Peckham may well have been right, and most certainly did not misbehave, when they collapsed their broad conception of occupational liberty into the Privileges or Immunities Clause.").

174. LEVY, ORIGINS, *supra* note 172, at 252; *see also* CASIMIR J. CZAJKOWSKI, THE THEORY OF PRIVATE PROPERTY IN JOHN LOCKE'S POLITICAL PHILOSOPHY 23 n.62 (1941) ("[Property] was generally meant to include the natural rights which appertain to man, the protection of which was the chief object of the State's existence."); LEVY, ORIGINAL INTENT, *supra* note 143, at 276 ("In the eighteenth century property did not mean merely the ownership of material things. Locke himself had not used the word to denote merely a right to things; he meant a right to rights. In his *Second Treatise on Government*, he remarked that people '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.' At least four times in his *Second Treatise*, Locke used the word 'property' to mean all that belongs to a person, especially the rights he wished to preserve. Americans of the founding generation understood property in this general Lockean sense, which we have lost."); Schultz, *supra* note 62, at 472–73 ("Locke argues in both the First and Second Treatises that the protection of property is the goal of civil society. Property is a natural and pre-political institution given to man by God, and a property interest gives the owner a singular and absolute control over something which no one, including the state, could violate. Property ownership of a thing was based upon ownership of one's body and labor such that anything that our labor mixed with became personal property. But property included more than the possessions of individuals. Property referred to one's 'Life, Liberty, and Estate.' 'Property' was a general political term referring to all the personal and political rights of individuals with ownership of one's body and talents premised upon the natural freedom of individuals. These comments, along with the placing of property in a state of nature, indicate that property was meant to affirm the natural political rights and liberties of individuals against the state, and not necessarily be the only tool of economic development.") (footnotes omitted).

175. JOHN PHILIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 72 (1988) (footnote omitted) [hereinafter REID, CONCEPT OF LIBERTY]; *see also* LARKIN, *supra* note 7, at 52–53 ("The same words, 'lives, liberties and estates,' Locke designated 'by the general name' of property, the protection of which was the chief object of the State's existence. Thus the word 'property' or 'propriety' had a rather wide connotation in the seventeenth century. It was frequently applied to constitutional liberties as well as to other matters.") (footnote omitted); LARKIN, *supra* note 7, at 58–59 ("[To Locke, property] includes the right[s] to life and liberty as well as the right to property, as we understand it today."); MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 13, 36–37; Underkuffler, *supra* note 27, at 128–29 ("During the American Founding Era, property included not only external objects and people's relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties.").

176. REID, CONCEPT OF LIBERTY, *supra* note 175, at 72.

177. James Madison's views on the Constitution are particularly important. He was the Founder principally responsible for drafting the Constitution, and his fear of the tyranny of the majority reflected the Federalists' belief that the principal threat to the new government was the tension be-

"property" included more than realty and personalty, reaching anything of value to someone, including legal rights.[178] "Conscience is the most sacred of all property," he wrote, with "other property depending in part on positive law, the exercise of that, being a natural and inalienable right."[179] "That is not a just government, nor is property secure under it," Madison explained, "where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of [persons] for the service of the rest."[180] He criticized a government that used "arbitrary restrictions, exemptions, and monopolies" to "deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called."[181] Madison explained in detail his view that property was "a human right."[182] He made that point in a 1792 essay published by the *National Gazette*.[183] In his words:

> This term [property] in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."
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> In its larger and juster meaning, [it] embraces every thing

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tween political egalitarianism and the economic inequality that would inevitably result from individuals' disparate abilities. The difficulty in creating a new charter for the nation, therefore, was to devise a structure that could promote democracy, perform effectively, and protect liberty and property. *See* Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 347–50 (1982).

178. *See* Underkuffler, *supra* note 27, at 136.

179. JAMES MADISON: WRITINGS 516 (1999) (quoting NATIONAL GAZETTE, Mar. 29, 1792).

180. *Id.*

181. *Id.*

182. LEVY, ORIGINAL INTENT, *supra* note 143, at 276–77.

183. *See* Underkuffler, *supra* note 27, at 136 ("Madison's essay is curious and provocative. He clearly saw property as having two distinct meanings. Although it could, in its narrow sense, mean corporeal or incorporeal objects and our relationships to them, it could also mean more. His broader understanding of property as including rights to freedom of conscience, freedom of expression, physical liberty, and the ability to use one's intelligence and creative powers, is radically different from the ordinary understanding of property today.") (footnote omitted). Other contemporaries of Madison's shared that view. *See* PAUL EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION 257 (1968) (during the founding generation, property "encompass[ed] whatever is proper to oneself, including the enjoyment of one's faculties, one's rights and privileges"); MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 13 (property was a "subtle combination of many rights, powers, and duties, distributed among individuals, society, and the state"); Leonard W. Levy, *Property as a Human Right, in* 5 CONST. COMMENTARY 169, 174–77 (1988) (in the eighteenth century "property" encompassed constitutional rights and liberties); Underkuffler, *supra* note 27, at 136 ("Although few other American Founders explored the idea as extensively as Madison, the existence of a broader understanding of property during the Founding Era has been widely recognized.").

> to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*.
>
> In the former sense, a man's land, or merchandise, or money is called his property.
>
> In the latter 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 practice dictated by them.
>
> He has a property very dear to him in the safety and liberty of his person.
>
> 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.
>
> . . . .
>
> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.[184]

The natural rights[185] and social compact theories[186] familiar to the Framers

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184. MADISON, *supra* note 179, at 515–17 (1999) (quoting NATIONAL GAZETTE, Mar. 29, 1792); *see* James A. Dorn, *Judicial Protection of Economic Liberties*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY, 3–4 (James A. Dorn & Henry G. Manne eds., 1987); *see also, e.g.*, ADAMS, *supra* note 127, at 192 (the Founding fathers saw "the acquisition of property" and "the pursuit of happiness" as synonyms); *id.* at 188 ("The twin theme of threatened liberty and property therefore recurred in hundreds of public statements made between 1764 and 1776."); *id.* at 194 ("The first state constitutions thus clearly emphasized the individual's claim to legal protection of his property. The self-imposed limits on sovereign power that the constitutions articulated derived from a desire to guarantee not only freedom of expression and of religious exercise but also the freedom to acquire property."); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768) ("property" means, inter alia, "3. Right of possession. . . . 5. Thing possessed."), LEVY, ORIGINS, *supra* note 172, at 252 (describing Madison's belief that property is "a human right"); Schultz, *supra* note 62, at 475 ("James Madison described property broadly to include even one's opinions and beliefs.").

185. *See*, *e.g.*, BAILYN, IDEOLOGICAL ORIGINS, *supra* note 124, at 187–88 (discussing the views of Alexander Hamilton, Thomas Jefferson, John Dickinson, and Philip Livingston).

186. *See, e.g.*, THOMAS HOBBES, LEVIATHAN (1651); LOCKE, *supra* note 98; JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Penguin Classics 1968) (1762).

presumed that the right to life, liberty, and property existed independently of positive law. Eighteenth century common law and political theory reflected that assumption.[187] The Founders also believed that liberty and property were "inextricably related"[188] and that each one was as valuable as the other.[189] As Professor Gordon Wood has written:

> Eighteenth-century Whiggism had made no rigid distinction between people and property. Property had been defined not simply as material possessions but, following Locke, as the attributes of a man's personality that gave him a political character: "that estate or substance which a man has and possesses, exclusive of the right and power of all the world besides." It had been thought of generally in political terms, as an individual dominion—a dominion possessed by all politically significant men, the "people" of society. Property was not set in opposition to individual rights but was of a piece with them.[190]

The Founders believed that property was "the guardian of every other right," and that protection of property was both critical to the enjoyment of individual liberty[191] and "central to the new American social and political order."[192] As one scholar has noted, "Anyone who studies the Revolution must notice at once the attachment of all articulate Americans to property. 'Liber-

187. *See* 1 BLACKSTONE, *supra* note 7, at *9, *11; J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT, FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 507 (1975) (discussing the Whig roots of the eighteenth-century civic humanist idea that "personality was founded in property, perfected in citizenship but perpetually threatened by corruption").

188. LEVY, ORIGINS, *supra* note 172, at 251; *see also* STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE, LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 74–75 (1990) ("In Revolutionary political thought the term 'property' denoted a relationship between an individual and some object, not the object itself. That is, X becomes my property—or, I have property in X—only if I alone control the disposal of X. This control over the disposal of X can be called my liberty (or right or power) to dispose of X as I please, and in this sense liberty itself is involved in the definition of property. The right of disposal constitutes the defining condition of property and, indeed, the 'substance of liberty.'"); LEVY, ORIGINAL INTENT, *supra* note 143, at 276; POLE, *supra* note 110, at 78–79.

189. REID, AUTHORITY TO TAX, *supra* note 165, at 27.

190. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 219 (1998).

191. ELY, *supra* note 7, at 26; LEE, *supra* note 149, at 29.

192. ADAMS, *supra* note 127, at 215 n.103; *see also, e.g.*, BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 15 (1997); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 AM. U. L. REV. 181, 195–98 (1999); Schultz, *supra* note 62, at 475–78 (stating that Madison, John Adams, Jefferson, Alexander Hamilton, and Gouverneur Morris held that view).

ty' and 'Property' was their cry, not 'Liberty' and 'Democracy.'"[193] That point was heard throughout the colonies before the Revolution. "The twin theme of threatened liberty and property therefore recurred in hundreds of public statements made between 1764 and 1776,"[194] and "the cry 'Liberty and Property' became the motto of the revolutionary movement."[195] In the minds of the Framers, property rights were "indispensable" to the success of the new enterprise, given its close association with liberty,[196] and liberty supplied the "means" to protect their property.[197]

John Adams believed that "property must be secured or liberty cannot exist."[198] "Laws that threatened the security of property were for him 'subversive of the end for which men prefer society to the state of nature' and 'so subversive of society itself.'"[199] James Madison was a particularly vocal advocate for the value of private property.[200] Writing in *The Federalist*, Madison stated that "[g]overnment is instituted no less for protection of the property than the persons of individuals."[201] At the Constitutional Convention of 1787, Madison said that "[t]he primary objects of civil society are the security of property and public safety."[202] Alexander Hamilton shared that view.[203]

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193. MORGAN, CHALLENGE, *supra* note 60, at 54–55; *see also, e.g.*, ELY, *supra* note 7, at 25 ("Significantly, the cry 'Liberty and Property' became the motto of the revolutionary movement."); LEVY, ORIGINS, *supra* note 172, at 252.

194. ADAMS, *supra* note 127, at 188.

195. ELY, supra note 7, at 25.

196. *Id.* at 43.

197. TAYLOR, *supra* note 12, at 442 ("The free colonists intently defended their property rights because property alone made men truly independent and free. In turn, the free colonists clung to their liberties as the means to protect the property that endowed their self-employed independence. Without property they would become 'slaves,' a state they knew all too well from local observation. Broadly defined, 'slavery' meant to labor for a master without reaping the rewards.").

198. 6 JOHN ADAMS, THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851) [hereinafter THE WORKS OF JOHN ADAMS]; *id.* at 8–9 ("Property is surely a right of mankind as real as liberty . . . . The moment the idea is admitted 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.").

199. PAULINE MAIER, THE OLD REVOLUTIONARIES: POLITICAL LIVES IN THE AGE OF SAMUEL ADAMS 40 (1980) [hereinafter MAIER, OLD REVOLUTIONARIES] (quoting John Adams for the Massachusetts House of Representatives to Dennys DeBerdt (Jan. 12, 1768) and John Adams as "Candidus," BOSTON GAZETTE (Jan. 20, 1772)).

200. *See* NEDELSKY, *supra* note 3, at 18–66.

201. THE FEDERALIST No. 54, at 336 (James Madison) (Clint Rossiter ed., 1961); *see id.* No. 10, at 73 (James Madison) ("The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.").

202. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 147 (James Madison) (Max Farrand ed., 1966) [hereinafter FARRAND I]; *see also* MADISON, *supra* note 179, at 515 (1999) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of

So, too, did Gouverneur Morris. As he remarked during the Constitutional Convention: "Life and liberty [are] generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property [is] the main object of Society."[204] According to St. George Tucker, who published the first American analysis of Blackstone's *Commentaries*, "[t]he rights of property must be sacred, and must be protected; otherwise there could be no exertion of either ingenuity or industry, and consequently nothing but extreme poverty, misery, and brutal ignorance."[205] As John Trenchard and Thomas Gordon argued in the popular *Cato's Letters*, "without liberty commerce and manufacturing atroph[y]," because where the "'perpetual Uncertainties, or rather certain Oppressions' of despotism" exist, 'no Men will embark large Stocks and extensive Talents for Business.'"[206] Rather, "populations grew and cultures developed and prospered only in free states where men could enjoy the fruits of their labor, art, and initiative."[207]

The Federalists believed that property benefitted the individual and society, economically and politically.[208] According to Adam Smith, "freedom and prosperity were linked" and "served the welfare of society."[209] Noah Web-

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individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.") (quoting NATIONAL GAZETTE, Mar. 29, 1792).

203. FARRAND I, *supra* note 202, at 302 (Alexander Hamilton) ("[The] one great obj[ect] of Gov[ernment] is personal protection and the security of Property.").

204. FARRAND I, *supra* note 202, at 533

205. ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 41 (Liberty Fund, Inc. 1999) (1803) [hereinafter TUCKER]; *see also* Renée Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 HARV. J.L. & PUB. POL'Y 37 (2012).

206. MAIER, OLD REVOLUTIONARIES, *supra* note 199, at 98.

207. *Id*.; *see id.* at 100 ("For [Isaac] Sears, for [Alexander] McDougal and [John] Lamb, for their followers, and in all likelihood for the merchants, artisans, and seamen elsewhere who rallied to the American cause, the revolution promised to give far more than it asked, and its rewards would be of a material as well as a spiritual sort. Liberty was good business.").

208. *See* LOCKE, *supra* note 98, § 37, at 20 ("[H]e who appropriates land to himself by his labour does not lessen but increase the common stock of mankind."); *id.* § 40, at 22 ("I think it will be but a very modest computation to say that of the products of the earth useful to the life of man nine-tenths are the effects of labour; nay, if we will rightly estimate things as they come to our use, and cast up the several expenses about them—what in them is purely owing to nature, and what to labour—we shall find in most of them ninety-nine hundredths are wholly to be put on the account of labor."); GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 94 (2002) [hereinafter WOOD, AMERICAN REVOLUTION] ("The individual ownership of property, especially landed property, was essential for a republic, both as a source of independence and as evidence of a permanent attachment to the community."). "Men's almost ubiquitous pursuit of material security and prosperity" was a "strong passion" for them, a driving force in their "pettier quest for material safety and affluence." STOURZH, *supra* note 123, at 82, 83.

209. MAIER, OLD REVOLUTIONARIES, *supra* note 199, at 98.

ster, "one of the federalists' most active publicists,"[210] believed that "*property* is the basis of *power*" and was essential to the survival of a republic.[211] "An equality of property, with a necessity of alienation constantly operating to destroy combinations of powerful families, is the very soul of a republic."[212] Maintain that state and "the people will inevitably possess both power and freedom"; lose it, and "power departs, liberty expires, and a commonwealth will inevitably assume some other form."[213] That is why eighteenth-century Americans, believed, as Yale Professor Morgan observed, that "property and liberty were one and inseparable, because property was the only foundation yet conceived for security of life and liberty: without security for his property, it was thought, no man could live or be free except at the mercy of another."[214] As another scholar, Professor Phillip Reid, put it, "Americans did not have to be told that liberty and property were inseparable . . . . There may have been no eighteenth-century educated American who did not associate defense of liberty with defense of property."[215] "The conviction that private property was essential for self-government and political liberty," Professor James Ely has noted, "was long a central tenet of Anglo-American constitutionalism."[216] Liberty and property were "a unitary concept."[217] "In sum,

210. BAILYN, FACES OF REVOLUTION, *supra* note 125, at 262.

211. *Id.* at 263; STOURZH, *supra* note 123, at 230 nn.104 & 107.

212. STOURZH, *supra* note 123, at 230.

213. BAILYN, FACES OF REVOLUTION, *supra* note 125, at 263.

214. MORGAN, CHALLENGE, *supra* note 60, at 55.

215. REID, AUTHORITY OF RIGHTS, *supra* note 82, at 32–33; *see also, e.g.*, Hon. Loren A. Smith, *Life, Liberty, and Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1056 (1996) ("While the word 'property' does not appear in the Preamble of the Constitution, the Federalist Papers make it very clear that each objective enumerated in the Preamble involved, in part, the protection of the citizen's property rights. In fact, using the Madisonian conception that property includes all of the fundamental aspects of the integrity of the human person, *life, liberty and property*, the whole preamble is about protecting the citizen's rights in property and property in rights.").

216. James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 40; *see also, e.g.*, Bruchey, *supra* note 164, at 1136 ("Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.").

217. Those concerns were still vibrant when the Fourteenth Amendment was adopted. *See, e.g.*, Williams v. Fears, 179 U.S. 270, 274 (1900) ("The liberty, of which the deprivation without due process of law is forbidden, means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned . . . ."); Powell v. Pennsylvania, 127 U.S. 678, 684 (1888) ("The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing

ownership of the land begat independence, independence begat virtue, and virtue begat republican liberty."[218]

Liberty, property, security, and the rule of law—the Framers believed that all those concepts were intertwined[219] because "private property" was "a foundation of personal freedom."[220] "For Englishmen, liberty was . . . not just

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an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 395–98 (1988) ("[I]n 1868, the concept of 'civil rights' of blacks—or, for that matter, of almost anyone—included two elements: (1) the right to equality of treatment in court trials and of access to the agencies of the state; and (2) a set of distinctly *economic* civil rights, namely, the right to make contracts and the right to own property. When the same Congress that drafted the amendment legislated under it, the legislation involved contract and property rights, not the rights of association or privacy or the freedoms of speech or religion. Among the rights not recognized was freedom from racial segregation. Congress did not have segregation in mind when it passed the Civil Rights Act of 1866, when it drafted the fourteenth amendment, or even a decade later when, contemplating the end of Reconstruction, it drafted the Civil Rights Act of 1875, which was subsequently struck down by the Supreme Court. Even Radical Republicans maintained a sharp distinction among 'civil' rights, 'political' rights, and 'social' rights. The fourteenth amendment and the Civil Rights Act of 1866 were designed to protect civil and political rights, but not social rights. And civil rights were fundamentally defined as economic rights. [¶] Thus the fourteenth amendment was economic by design. The freedmen did not need the freedoms of speech or religion or even the fair administration of the criminal process so much as they needed jobs and security . . . . [O]nce the problem of protecting black access to the economic system had been solved, the remaining purpose of the amendment was to enable the courts to define individual economic liberties against the states.") (footnotes omitted).

218. MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 74–75; *see* SCOTT, *supra* note 15, at 13 ("Land ownership provided a freeholder moral purpose, economic security, and individual autonomy."); Schultz, *supra* note 62, at 471–72 ("John Locke's writings were perhaps the most influential upon early America and this influence has been noted by many scholars. Locke's Two Treatises on Government were written in opposition to the abuses of the Crown and in defense of the principles of limited government, the natural rights of men, and the right to revolution. It was in this context the colonists read Locke and with which the early American conceptions of property were situated. The history of Locke's theory of property, then, is primarily political, with the language of property used to defend the political liberty of Englishmen (including the colonies) against the Crown. It is this political linkage of property to personal power that was most influential on America.") (footnotes omitted).

219. "In the eighteenth century the concept of liberty was more than the sum of all its elements—the other sides of licentiousness and slavery, the rule of law, the security of property, and the principles of the constitution." REID, CONCEPT OF LIBERTY, *supra* note 175, at 98.

220. BAILYN, IDEOLOGICAL ORIGINS, *supra* note 124, at 352; *see also* ELY, *supra* note 7, at 17 ("Strongly influenced by Locke, the eighteenth-century Whig political tradition stressed the rights of property owners as the bulwark of freedom from arbitrary government. Property ownership was identified with the preservation of political liberty."); John Trenchard, No. 68, Mar. 3, 1721, *reprinted in* 2 CATO'S LETTERS, *supra* note 114, at 319 ("[A]ll men are animated by the passion of acquiring and defending property, because property is the best support of that independency, so passionately desired by all Men.").

a condition enforced by law but the very essence of their emerging national identity."[221] And property was essential to liberty. "To be free, it was necessary to be secure, but you could not be free without property, and could not have property unless it was secure from arbitrary interference."[222] Private property was "the quintessential instance of individual rights as limits to government power," because it "set bounds between a protected sphere of individual freedom and the legitimate scope of governmental authority."[223]

> The Americans fought England because Parliament threatened the security of property. They established state constitutions with property qualifications for voting and officeholding in order to protect the security of property. And when the state governments seemed inadequate to the task, they set up the federal government for the same purpose. The economic motive was present in all these actions, but it was present as the friend of universal liberty. Devotion to security of property was not the attitude of a privileged few but the fundamental principle of the many, inseparable from everything that went by the name of freedom and adhered to the more fervently precisely because it did affect most people so intimately.[224]

Other members of the Founders' generation also made that point. As John Adams wrote, "[p]roperty must be secured or liberty cannot exist."[225] James Madison emphasized in *The Federalist* that "the first object of government" is "[t]he protection of these faculties—*viz*., the faculties of men, from which the

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221. GREENE, CONSTITUTIONAL ORIGINS, *supra* note 79, at 7.

222. REID, CONCEPT OF LIBERTY, *supra* note 175, at 73; *see also* ADAMS, *supra* note 127, at 192 (the Founding fathers saw "the acquisition of property" and "the pursuit of happiness" as synonyms); *id.* at 188 ("The twin themes of threatened liberty and property therefore recurred in hundreds of public statements made between 1764 and 1776."); *id.* at 194 ("The first state constitutions thus clearly emphasized the individual's claim to legal protection of his property. The self-imposed limits on sovereign power that the constitutions articulated derived from a desire to guarantee not only freedom of expression and of religious exercise but also the freedom to acquire property.") (1980).

223. Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, *in* CONSTITUTIONALISM AND DEMOCRACY 241 (Jon Elster & Rune Slagstad eds., 1988).

224. MORGAN, CHALLENGE, *supra* note 60, at 55–56; *see also* Underkuffler, *supra* note 27, at 129 ("[P]roperty included not only external objects and people's relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being . . . .").

225. 6 THE WORKS OF JOHN ADAMS, supra note 198, at 280; *id.* at 8–9 ("Property is surely a right of mankind as really as liberty. . . . 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."); *see* ADAMS, *supra* note 127, at 154 (referring to the Massachusetts Constitution of 1780: "[i]n the clause that guaranteed an independent judiciary Adams used the classical Lockean triad in the singular version of 'life, liberty, property.'").

rights of property originate . . . ."[226] Given that broad understanding of property, it was entirely logical that the Framers' generation treated economic opportunity—the ability to freely pursue a chosen profession—as a form of "property."[227] Other Founders such as Alexander Hamilton, John Dickinson, Gouverneur Morris, John Rutledge, and Rufus King echoed the opinions of Adams and Madison.[228] As Professor Morgan has explained:

> For the colonists, as for the rest of the English, property was not merely a possession to be hoarded and admired; it was rather the source of life and liberty. If one had property, if one had land, one had one's own source of food and could be independent of all other men, including kings and lords. Where property was concentrated in the hands of a king and aristocracy, only the king and aristocracy would be free, while the rest of the population would be little better than slaves, victims of the eternal efforts of rulers to exploit subjects. Without property, people could be starved into submission. Hence liberty rested on property, and whatever threatened the security of property threatened liberty.[229]

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226. THE FEDERALIST, *supra* note 201, No. 10, at 78 (James Madison).

227. *See, e.g.*, Allen v. Tooley, 80 Eng. Rep. 1055 (K.B. 1614) (Coke, J.) (noting that Magna Carta and the common law protect the right of "any man to use any trade thereby to maintain himself and his family"); LOCKE, *supra* note 98, at 15 ("[E]very man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his."); Letter of Thomas Jefferson to John Adams (Mar. 4, 1801), *in* THE ADAMS-JEFFERSON LETTERS 391 (Lester J. Cappon ed., 1959) ("Here every one may have land to labor for himself if he chuses; or, preferring the exercise of any other industry, may exact for it such compensation as not only to afford a comfortable subsistence, but wherewith to provide for a cessation from labor in old age."); James Madison, *Property*, *in* 14 THE PAPERS OF JAMES MADISON 267 (1983) ("Nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of [the] citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property."); TUCKER, *supra* note 205, at 40 ("[B]y the laws of nature and of equality, every man has a right to use his faculties in an honest way, and the fruits of his [own] labor, thus acquired, are his own."). Closely related is the longstanding American distaste for class-based legislation and monopolies, which the colonists saw as reminiscent of the special privileges that feudalism afforded to the wealthy and powerful. *See, e.g.*, PHILLIPS, *supra* note 77, at 106–14.

228. *See* ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 100, 104 (1965) [hereinafter BROWN, CRITICAL ANALYSIS]; THE FEDERALIST, *supra* note 201, No. 85, at 520 (Alexander Hamilton) (noting that the proposed Constitution would provide "additional security" for "property"); MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 3–4.

229. MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 17; *see also* ADAMS, *supra* note 127, at 156 ("The interdependence of liberty and law was a strong element in Anglo-American constitutionalism that the colonial leaders saw no reason to give up. For several generations liberty had been contrasted with licentiousness in English political debate. In addition, defenders of republican government had frequently defined its essential characteristic as 'the rule of law' or *imperium legum*

The Colonists widely shared the Framers' views.[230] A majority of them were landowners and made their living from the soil.[231] "This widespread ownership of property is perhaps the most important fact about the Americans of the Revolutionary period."[232] As a consequence, most Americans enjoyed economic and political independence—economic independence because property ownership gave a landowner the opportunity to obtain food, clothing, and shelter without the sufferance of the government or landed gentry; political independence because property ownership was a criterion to vote or hold office in the colonies.[233] The desire to protect the freedom that property guaranteed Americans became a leading cause of the Revolution.[234] "The Revolution had begun as a dispute over the security of property, and had fed on the conviction that government existed for the protection of property."[235] The result is this: the nation's earliest "history, legal traditions, and practices,"[236] demonstrate that the critical importance of private property and economic opportunity to the American way of life are interests "deeply rooted"[237] in the American conscience and have been "traditionally protected" by American law.[238]

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non hominum, rather than as the mere absence of a king. In Europe, the phrase had come to be used as a major argument against the arbitrariness of absolutist government; in America it soon was in use as a standard argument against the arbitrariness of the new ruler, the majority of voters.") (footnote omitted); REID, CONCEPT OF LIBERTY, *supra* note 175, at 72 ("[P]roperty, even the concept of property as material accumulation, was not limited to the physical in the eighteenth century. It included constitutional rights that English people counted among the attributes of liberty. In fact, a point that should not be forgotten is that liberty itself was property possessed.").

230. *See* MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 8, 17.

231. *See, e.g.*, BAILYN, FACES OF REVOLUTION, *supra* note 125, at 193; MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 93; MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 7–8, 95; WOOD, AMERICAN REVOLUTION, *supra* note 208, at 94 ("[A]s one Carolinian wrote in 1777, 'the People of America are a people of property; almost every man is a freeholder.'"); GORDON S. WOOD, THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES 265 (2011) ("compared to England, land [in America] was so plentiful and tenantry so rare"). The Colonies regulated certain lines of work, but they did not replicate the medieval guild system because there was no need to create artificial barriers to entry to raise wages. Wages were already high. *See* MORISON, *supra* note 12, at 236; PERKINS, *supra* note 12, at 57.

232. MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 8.

233. *See id.*; *see generally* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 93.

234. MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 8.

235. *Id.* at 94.

236. Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (identifying that focus as the starting point for "all due process cases"). The Supreme Court declined to apply that standard in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), however, without suggesting what the new standard would be or whether there will even be one. *See* Paul J. Larkin, Jr., *A Tale of Two Cases*, 73 WASH. & LEE L. REV. 467 (2016).

237. *Washington*, 521 U.S. at 721.

238. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion); *see also, e.g.*,

The Founders' generation also did not make the distinction between "liberty" and "property" that the Supreme Court drew two hundred years later.[239] Consider this view of an anonymous contributor to the *Boston Gazette*: "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other."[240] Contemporary historians agree that those beliefs were widely held in pre-Revolutionary America. "For eighteenth-century Americans," Professor Morgan observed, "property and liberty were one and inseparable, because property was the only foundation yet conceived for security of life and liberty: without security for his property, it was thought, no man could live or be free except at the mercy of another."[241] As another scholar, Professor Reid, put it, "Americans did not have to be told that liberty and property were inseparable . . . . There may have been no eighteenth-century educated American who did not associate defense of liberty with defense of property."[242] The conviction that private property was essential for self-government and political liberty, Professor James Ely has noted,

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James W. Ely, Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century,* 8 U. PA. J. CONST. L. 917 (2006) (early state constitutions protected property and economic freedom); McCormack, *supra* note 77, at 458–59; Sandefur, *supra* note 84, at 263–77, App. A-D. The Declaration of Independence used the phrase "life, liberty, and the pursuit of happiness" in place of Locke's traditional formulation of "life, liberty, and property." In the eighteenth century, however, that distinction made no difference. *See* ADAMS, *supra* note 127, at 192 ("[T]he acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one sufficed to evoke both."); *id.* (Maryland, Pennsylvania, and Virginia constitutions each listed as an inalienable right and included obtaining happiness in the same sentence); LEVY, ORIGINS, *supra* note 172, at 251–52; REID, CONCEPT OF LIBERTY *supra* note 175, at 119 ("It is simply wrong to think that the framers of the Declaration of Independence, when they altered the familiar common-law trilogy from 'life, liberty, and property' to 'life, liberty, and the pursuit of happiness' were turning American law away from the constitutional principle of security of property. That supposition became constitutionally defensible only after definitions changed and the concept of property, ceasing any longer to embrace liberty or rights, was relegated to the material. The basic premise that we may easily overlook, but which eighteenth-century people never forgot, is that liberty in the eighteenth century was personal property. Indeed, it was the concept of property that bestowed on liberty much of its substance as a constitutional entity and provided one of the enigmas of eighteenth-century constitutional thought—a puzzle for us, not for the eighteenth century. For as everyone then appreciated, liberty existed through security of property and yet . . . liberty itself was the *only security* of property."); SANDEFUR & SANDEFUR, *supra* note 147, at 55.

239. *See* Perry v. Sindermann, 408 U.S. 593, 599 (1972).

240. SANDEFUR & SANDEFUR, *supra* note 147, at 55 (quoting CLINTON ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 175 (1963)).

241. MORGAN, CHALLENGE, *supra* note 60, at 55; see also ELY, *supra* note 7, at 17 ("To the colonial mind, property and liberty were inseparable . . . .").

242. REID, AUTHORITY OF RIGHTS, *supra* note 82, at 32–33.

was long a central tenet of Anglo-American constitutionalism.[243] "Protection of property from arbitrary acts of government has proved to be the material basis for all other civil liberties. Intellectual freedom, experience had shown, presupposed economic independence."[244] Liberty and property, to the Revolutionary mind, were "a unitary concept."[245]

Stanford Professor Jack Rakove has summarized the "attachment" to property as "a value that all Americans shared":

> For *property* was one of the strongest words in the Anglo-American political vocabulary. Its security from unlawful taxation had been a dominant value of their common constitutional culture since the previous century. John Locke had grounded an entire theory of government—and the right to resist tyranny—on the concept of property in his *Second Treatise of Government*. But Locke only gave philosophical rigor to a belief that already permeated Anglo-American law and politics.
>
> For Locke, as for his American readers, the concept of property encompassed not only the objects a person owned but also the ability, indeed the right, to acquire them. Just as men had a right to their property, so they held a property in their rights. Men did not merely *claim* their rights, but also *owned* them, and their title to their liberty was as sound as their title to the land or to the tools with which they earned their livelihood. Furthermore, Americans believed that they truly owned these rights because their ancestors had fairly purchased them through the arduous work of colonization. Just as Locke had grounded his theory of property on the labor through which men expropriate the fruits of nature for their personal use, making the earth more productive and thus fulfilling the divine injunction to preserve mankind, so the colonists looked back to their ancestors' pioneering and saw that it was good—and legal too. Property was a birthright, a legal entitlement and material legacy that one industrious generation transmitted to another. That was as true for the

243. Ely, *supra* note 216, at 43; *see also, e.g.*, Bruchey, *supra* note 164, at 1136 ("Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.").

244. ADAMS, *supra* note 127, at 207.

245. Daniel Hannan, *Magna Carta: Eight Centuries of Liberty*, WALL ST. J., May 29, 2015, http://www.wsj.com/articles/magna-carta-eight-centuries-of-liberty-1432912022 [https://perma.cc/U5K3-445D] ("Liberty and property: how naturally those words tripped, as a unitary concept, from the tongues of America's Founders.").

> small farmers of New England, working their fifty or hundred acres and still fencing their fields with glacier-strewn rocks, as it was for the planters of the south, with their scores and hundreds of bondsmen, and for the merchants and land speculators of Pennsylvania and New York as well. Property, defined in this way, was the vital right that Parliament would infringe upon, even destroy, if it made good its claim to legislate for Americans "in all cases whatsoever."[246]

B. The Protection of Property in the State and Federal Constitutions

In the years following the Declaration of Independence, Americans adopted written state constitutions as their "first-line of defense against tyranny."[247] Americans believed that written charters, like the ones that governed the earli-

246. JACK RAKOVE, REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA 78–79 (2010). The Framers' attitude toward property gives rise to the following irony regarding the Supreme Court's decision in *Obergefell*. In the process of endorsing a constitutional right to same-sex marriage, *Obergefell* abandoned the lessons of history in favor of the Court's own precedents addressing the "liberty" component of the Due Process Clause. Had the Court stuck to the text, it could have pointed to the breadth of the historical meaning of "property" to justify its rulings. As Professor Laura Underkuffler has written, "It is apparent that property, under this historical view, was broadly defined. It was tied to the notion of human beings as masters of themselves; it involved the maintenance of personal integrity in both a physical and nonphysical sense. It was intimately related to the development of the human personality, to the exercise of independent thought and creative powers. It was universal and reciprocal: it was that to which we, as human beings, 'attach a value and have a right, and which leaves everyone else to the like advantage.' . . . The powerful, rhetorical image of property, as that which gives the individual a bulwark of isolated independence from her fellows, has been cited as the central symbol of the antagonism between the individual and collective life." Underkuffler, *supra* note 27, at 138, 147 (footnotes omitted). Perhaps, the Court relied on "liberty" rather than "property" because it was ignorant of the historical meaning of "property." Or perhaps the Court was aware of that history, but chose not to rely on it due to the fear that giving voice to the historical understanding of property would undermine the Court's New Deal precedents and resurrect ghosts that the Court prefers to leave dead and buried.

247. BOSSELMAN, *supra* note 130, at 92–93 (discussing 1777 Vermont and 1780 Massachusetts constitutions); MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 90 ("The most striking thing about these state governments is that they all had their wings clipped by written constitutions in which their powers were strictly limited and defined. In Rhode Island and Connecticut the old colonial charters continued to serve this purpose, but in each of the other states a special document was drafted. The British constitution was unwritten, and in the recent disputes each side had pelted the other with historical precedents. Though the colonists gave as good as they got in this fracas, they had had enough of it and were now unanimous in feeling that their new governments should have something more than tradition to limit and guide them. [¶] A written constitution, [thus], was their first line of defense against tyranny, and it generally contained a bill of rights defining certain liberties of the people which government must not invade under any pretext; general warrants and standing armies were forbidden; freedom of the press, the right to petition, trial by jury, habeas corpus, and other procedures that came to be known as 'due process of law' were guaranteed."); *cf.* PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 20 (1998) (referring to the Massachusetts Laws and Liberties of 1648: "A written code of law also increased the security of property.").

est settlements, were formal and more certain guarantees of liberty than an unwritten constitution because they could clearly define, apportion, and limit governmental power far better than the unwritten version that governed England (then and today).[248] The original states were "the great political laborator[ies]" whose experiences taught the Framers lessons on how to implement the theory of republicanism.[249]

Not all of those experiences were positive, however, and the negative ones were fresh in the minds of the Convention delegates when they gathered in Philadelphia.

The Framers were aware of the general tension between promoting democracy and protecting civil liberties.[250] The delegates also had certain specific fears in mind when they began their task.[251] Although numerous state constitutions contained explicit protections for property rights,[252] some states still followed the practice of expropriating, through bills of attainder or by other means, property owned by Loyalists before or during the war.[253] In addition, state legislatures had enacted laws authorizing paper currency for debt repayment, staying execution of debts, and the like, all of which degraded the value of property holders.[254] Another common fear was that, at some point, a majority of the electorate would not be propertied.[255] Instead, it would either

248. *See generally id.*

249. RAKOVE, ORIGINAL MEANINGS, *supra* note 120, at 31.

250. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 202 (quoting Edmund Randolph of Virginia that "[o]ur chief danger arises from the democratic parts of our constitutions"); *id*. (quoting Elbridge Gerry of Massachusetts that "[t]he evils we experience flow from the excess of democracy").

251. *See id.* at 202.

252. *See* ADAMS, *supra* note 127, at 192 ("The first state constitutions thus clearly emphasized the individual's claim to legal protection of his property. The self-imposed limits on sovereign power that the constitutions articulated derived from a desire to guarantee not only freedom of expression and of religious exercise but also the freedom to acquire property."); MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 152 (seven states explicitly or implicitly declared a Lockean inalienable right to property in their first post-1776 constitutions); RAKOVE, ORIGINAL MEANINGS, *supra* note 120, at 291 ("The 'life, liberty, and the pursuit of happiness' in the Declaration of Independence took a somewhat modified form in the state bills of rights, which preferred a trial of 'enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.'"); James W. Ely, Jr., *'The Sacredness of Private Property:' State Constitutional Law and the Protection of Economic Rights Before the Civil War*, 9 N.Y.U. J.L. & LIBERTY 620, 627 (2015) ("[T]he Northwest Ordinance, taken together with the state constitutions of the Revolutionary period, demonstrate that the security of private property was a keystone of the political and social order in the newly independent United States.").

253. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 90–93, 155–56.

254. *See id.* at 156–57.

255. *See id.* at 93–94.

be employed in manufacturing, trade, or finance, or be impoverished,[256] but would use its numerical dominance to redistribute land.[257] The result, according to Professor McDonald, was that "Americans were not as secure in their property rights between 1776 and 1787 as they had been during the colonial period."[258]

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256. *See id.* at 100–01 ("It was calculated in the late seventeenth century that out of a total English population of five and a half million people, more than a million and a quarter were 'cottagers, paupers, vagrants, gypsies, thieves, beggars'; the country was plagued with an army of rootless workers who in times of depression or famine might, as an early mercantile writer put it, cause 'dangerous uproars.'").

257. *Id.* at 90–91 ("[I]t is true that no proposals for redistribution of the land owned by Patriots had been seriously considered, but what had been done in that direction was enough to inspire uneasiness in the bosom of every substantial landholder. Wholesale wartime expropriation of the holdings of Loyalists and British subjects was still fresh in mind when the 1787 Convention met; indeed, sale of the property was still going on. And though a variety of motives—avarice not least among them—entered into the confiscations and divestments, state after state specifically directed that the larger confiscated estates be sold in small parcels, so as to break up 'dangerous monopolies of land.'"); *see also, e.g.*, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 451–52 (James Madison) (Max Farrand ed., 1966) [hereinafter FARRAND II]; LARKIN, *supra* note 7, at 156–58 (discussing Madison's fear of the "tyranny of the majority"); MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 157 ("These attacks upon property rights were, in the eyes of many, symptomatic of the excesses that were inherent in democracy. For most persons who so believed, that judgment represented a rethinking of attitudes that they had held earlier—specifically, the tendency, shared by most Americans who embraced the revolutionary cause, to confuse popular power with popular liberty."); RAKOVE, ORIGINAL MEANINGS, *supra* note 120, at 41, 314–15, 332, 335; STOURZH, *supra* note 123, at 70–71, 80–81, 83 (same, attributing that view to Alexander Hamilton). Madison was particularly concerned with this prospect. *See* SCOTT, *supra* note 15, at 44–45 ("An expanding population limited to a fixed amount of land inevitably would force Americans to turn to manufacturing. This would necessitate the growth of cities populated by large numbers of unstable, dependent men. Although he agreed with Jefferson that a redistribution of land would alleviate many of the immediate problems of declining landholding, Madison suggested that land redistribution could never include everyone, and that in the long run the United States could not count on land reform to spare it from the trauma of class conflict and aristocratic tyranny which Madison associated with European society. . . . A federal republic promised to solve for Madison the problems which declining landholding threatened—tyranny by the unpropertied masses over the propertied minority or the despotism of the propertied few over the mass of the unpropertied population. Under a federal system the unpropertied would be divided into as many separate groups as there were states so that they would have little opportunity to form themselves into an effective majority. Even if the unpropertied succeeded in gaining control over any one state, their power to violate individuals' rights and to deprive the wealthy of their possessions would be limited by a strengthened federal government which could enforce limitations on the powers of state governments. At the same time, argued Madison, the great diversity of economic interests (such as those of slaveowners, freehold farmers, merchants, financiers) and the country's geographical differences would prevent an elite from acting in concert to impose its will on the unpropertied.").

258. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 154; *see also* Gold, *supra* note 192, at 223 ("Colonial and early state governments showed very limited respect for property rights. Professor McDonald estimated in 1976 that $100 million worth of property was taken without compensation during the Revolutionary Period. During that time, Loyalist property was taken, debts to British subjects were canceled, and worthless bills of credit were issued.") (footnotes omitted).

The Framers approached that problem from a different direction than the states had used. The Framers decided to limit the power of the new national government rather than guarantee specific protection for property.[259] The Framers distributed the government's powers among three branches; they enumerated those powers separately vested in Congress and the President; they split the Congress into a bicameral legislature; they required the Congress and President to cooperate in order to pass a "law"; they limited the terms of office held by federal officials in the legislative and executive branches; they required periodic elections to hold those offices; and they created federal courts to review the work of those branches.[260] All of those steps, the Framers concluded, protected property by limiting the authority of the new national government in a federalist system to which the states were partners and by creating a system of checks and balances that would keep each branch from aggrandizing its power.[261]

The Framers, however, did not stop there. They included within the Constitution numerous provisions that would directly protect private property rights by limiting the powers of the federal and state governments. The Commerce Clause[262] is the best-known protection. It expressly empowers Congress to regulate interstate and foreign commerce, and, as the Supreme Court has construed it, it implicitly forbids the states from discriminating against or burdening interstate commerce.[263] Among the other property-protecting provisions are the Uniformity Clause,[264] the Federal Coinage

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259. *See* ELY, *supra* note 7, at 47–48.

260. U.S. CONST. art. I, II, III.

261. *See* ELY, *supra* note 7, at 47; SCOTT, *supra* note 15, at 44 ("The only hope [to avoid class conflict] lay in organizing government in such a way that even in the absence of widespread land-holding popular control could be retained without endangering personal liberty or property. The time to act, Madison wrote Jefferson, 'is at the first forming of the constitution and in the present state of population when the bulk of the people have a sufficient interest in possession or its prospect to be attached to the rights of property, without being insufficiently attached to the rights of persons.'"). There appears to have been widespread support for this goal. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 15, 83 n.7 (1981); Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 598 (1995) [hereinafter Epstein, *History Lean*] ("[A]s Herbert Storing has pointed out, for all their differences both the Federalists and Antifederalists shared the belief that the protection of private property was at least one of the legitimate ends of government.").

262. *See* U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

263. *See, e.g.*, Or. Waste Sys., Inc. v. Dep't of Env'l Quality of the State of Or., 511 U.S. 93, 99 (1994).

264. *See* U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have the power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all [Taxes,] Duties, Imposts and Excises shall be uniform throughout

Clause,[265] the Direct Tax Clause,[266] the Export Tax Clause,[267] the Port Preference Clause,[268] the State Coinage, Bills of Credit, and Paper Money Clause,[269] the Import-Export Clause,[270] the Contracts Clause,[271] and the Corruption of Blood Clause.[272] Other provisions, such as the Bill of Attainder[273] and Elections Clauses[274] (at least in that day), implicitly accomplished the same result.

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the United States . . . .").

265. *See* U.S. CONST. art. I, § 8, cl. 5 ("Congress shall have power . . . [t]o coin Money, regulate the Value thereof, and of foreign Coin . . . .").

266. *See* U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").

267. *See* U.S. CONST. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State.").

268. *See* U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.").

269. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts . . . ."); *cf.* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 271.

270. *See* U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.").

271. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

272. *See* U.S. CONST. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

273. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder . . . ."); *cf.* MAIER, OLD REVOLUTIONARIES, *supra* note 199.

274. *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id.* amend. XVII (adopting the same criterion for the election of Senators); Arizona v. Inter Tribal Council of Arizona Inc., 133 S. Ct. 2247, 2257–59 (2013) (noting that while Congress has the power to fix the "time, place, and manner" of federal elections, the states have the authority to define the qualifications to vote for federal office). That allocation of authority is important because the colonies required property holding as a qualification for voting. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting) ("Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one. . . . Most of the early Colonies had [property qualifications for voting]; many of the States have had them during much of their histories . . . .") (footnotes omitted); ADAMS, *supra* note 127, at 195–96, 315–31 (discussing and listing property qualifications for the suffrage); BROWN, CRITICAL ANALYSIS, *supra* note 228, at 62–66 (state-by-state discussion of property qualifications for suffrage or holding office); FARRAND II, *supra* note 257, at 203 (James Madison) ("In several of the States a freehold was now the qualification [to vote]. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty."). Property qualifications were defended on several grounds, such as ensuring independence of mind and

Together, those provisions manifest a deep commitment to the protection of private property rights.[275]

The proposed Constitution, however, contained only a few of the rights that the new Americans had enjoyed as Colonists, such as the right to a jury trial and protections against bills of attainder and ex post facto laws.[276] The Anti-Federalists seized on those omissions to oppose ratification, and their absence troubled participants in the state ratifying debates.[277] State constitutions adopted since 1776 strongly protected the right of property,[278] and the lack of any comparable specific protection in the proposed federal Constitution troubled some participants in the state ratifying conventions. The Virginia ratifying convention, as an example, proposed amendments to the Constitution to protect various historic guarantees of English liberty, one of which was a version of what became the protection for "life, liberty, and property" found in the Due Process Clause.[279]

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commitment to the community. *See, e.g.*, ADAMS, *supra* note 127, at 207–15; BROWN, CRITICAL ANALYSIS, *supra* note 228, at 54 (noting that most adult male colonials owned property and could vote); FARRAND II, *supra* note 257, at 203 (James Madison) ("Whether the Constitutional qualification ought to be a freehold, would with him depend much on the probable reception such a change would meet with in States where the right was now exercised by every description of people. In several of the States a freehold was now the qualification. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty.").

275. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 268–70; POLE, *supra* note 110, at 87 ("I think we can regard the Constitution as a *defensive* instrument of government, embodying the protective concept of property that was felt to be under such dangerous attack by legislative majorities.").

276. *See* U.S. CONST. art. I, § 9, cl. 3 (the federal Bill of Attainder and Ex Post Facto Clauses); *id*. § 10, cl. 1 (the state Bill of Attainder and Ex Post Facto Clauses); *id*. art. III, § 2, cl. 3 (the Jury Trial Clause).

277. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 285. The Anti-Federalists believed that a bill of rights was necessary to prevent Congress from eliminating state-law rights under the combined effect of the Necessary-and-Proper and Supremacy Clauses. *See* RAKOVE, ORIGINAL MEANINGS, *supra* note 120, at 323. That omission, however, may not have troubled Madison. Based on his experience seeing a decade of state legislation, he believed that bills of rights were merely "parchment barriers." *Id.* at 316. The Framers also saw the Bill of Rights as being more a reservation of natural rights than a guarantee of civil rights and therefore as less necessary in 1787 than in 1776. *Id.* at 317.

278. *See* ADAMS, *supra* note 127, at 192 ("The first state constitutions thus clearly emphasized the individual's claim to legal protection of his property. The self-imposed limits on sovereign power that the constitutions articulated derived from a desire to guarantee not only freedom of expression and of religious exercise but also the freedom to acquire property."); MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 90; *see* ZUCKERT, *supra* note 7, at 275–76 (early state constitutions gave a prominent place to protection of natural rights).

279. *Additions Proposed by the Virginia Convention: A Proposed Bill of Rights* (June 27, 1788), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 220 (Ralph Ketcham ed., 1986) ("9th. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner

The Framers' response to that concern was that such a list was both unnecessary and hazardous. Unnecessary, because the Constitution authorized the new government to exercise only certain specified powers to prevent the national government from interfering with the liberties won by the Colonists in battle.[280] Hazardous, because no such list could be exhaustive, and the omission of any right could be read as a rejection of its importance.[281] Interestingly, Madison did not believe that the express limitation on the federal government's powers or the inclusion of a list of rights would adequately safeguard property.[282] His experience observing a decade of state legislation

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destroyed or deprived of his . . . property, but by the law of the land."). First on the list was a declaration that would have affirmed "[t]hat there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity[,]" rights that included "the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property . . . .").

280. *See* BROWN, CRITICAL ANALYSIS, *supra* note 228, at 108 ("That the Constitution did not confer on Congress the power to make direct attacks on property is not to be wondered at. . . . Given the America of 1787, in which most men owned property, the reverse would have been the more astonishing. A constitution which permitted an attack on property would not have received a hearing in a country that had fought a revolution for the preservation of life, liberty, and property. One of the colonists' chief complaints against Britain had been that the British, on whom the colonists had no check, were endangering the property rights of colonists. The opponents of the Constitution were not opposed to the protection of property rights. After all, were not the Anti-Federalists responsible for the adoption of the first ten amendments, and did not Articles [*sic*: Amendments] IV, V, and VII provide for additional protection of property rights which these federalists did not think the Constitution provided?").

281. *See* BROWN, CRITICAL ANALYSIS, *supra* note 228, at 107–08; *see* RAKOVE, ORIGINAL MEANINGS, *supra* note 120, at 315.

282. "When rights of property were at stake, Madison feared, neither the enumeration nor the denial of specific legislative powers would provide adequate safeguards. In this sense his solution to the problem of religion—denying government any authority to legislate—could never wholly apply to economic regulation and public finance. His clearest statement on this point appears in *Federalist* 10. He closed his famous passage explaining how the forms of property divided society into different 'interests' by noting that 'The regulation of these various and differing interests form the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government.' But then he denied that acts of economic regulation were solely legislative in character. 'What are so many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators but advocates and parties to the causes they determine?' The examples of regulation that Madison cited reveal that he regarded *all* decisions of economic policy as implicating questions of justice and thus of private rights: laws relating to debtors and creditors, to the protection of foreign manufactures and the restriction of foreign goods, to the apportionment of taxes. Economic rights thus differed from rights of conscience in a fundamental sense. While government could safely abstain from religious matters, it could never avoid regulating the 'various and interfering interests' of a modern society; and any legislative decision would necessarily affect the rights of one class of property holders or another. Nor was this a mere speculative danger. For by 1787 a decade of state legislation enabled Madison to perceive how economic and financial issues could force broad coalitions across society, which could actively manipulate the legislature to secure their desired ends." RAKOVE, ORIGINAL MEANINGS, *supra* note

under the Articles of Confederation had persuaded him that no legal or political restraints could defeat a legislature bent on expanding its powers.[283] Nonetheless, after a sufficient number of states had ratified the Constitution and the First Congress had been convened, Madison drafted, and both houses of Congress approved, the series of amendments today known as the Bill of Rights.[284] The Bill of Rights added three additional safeguards for property, the Third Amendment ban on the quartering of soldiers in homes during peacetime[285] and the Fifth Amendment Due Process[286] and Takings Clauses.[287]

120, at 314–15 (footnote omitted).

283. "This strikingly modern perception of what legislatures could *do* reflected not only discontent with the sheer busyness of American lawmaking but a recognition of 'the impossibility of dividing powers of legislation, in such a manner, as to be free from different constructions, by different interests, or even from ambiguity in the judgment of the impartial.' In the realm of economic legislation, the interests to be regulated were so complex, the ends and means of legislation so intertwined, that no simple formula could defeat the 'infinitude of legislative expedient' that artful lawmakers could always deploy. By its very nature, legislative power was too supple and plastic to be neatly confined. Moreover, the legislature possessed other advantages than the plasticity of its power. Its superiority was political as well as legal, a function of its greater intimacy with, and influence over, its constituents." *Id.* at 315 (footnote omitted).

284. Neither the Constitution nor the Bill of Rights addressed in much detail the federal government's authority to engage in what today is known as land use regulation. The Constitution gave the federal government authority to govern what is now known as the District of Columbia. *See* U.S. CONST. art. I, § 8, cl. 17 (the Seat of Government Clause) ("The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . ."). Otherwise, the Constitution did not empower the national government to seize or regulate the use of land. Perhaps, the Framers assumed that the federal government would govern whatever land ceded by England to the victorious Colonies after the Revolution that was not within the original thirteen states and would purchase whatever other land within a colony that it needed. *See id*. ("The Congress shall have Power . . . to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."); *id*. art. IV, § 3, cls. 1 & 2 ("New States may be admitted by the Congress into this Union[.] . . . The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). The Takings Clause did make sure that the new federal government could not take property from its owners unless they were paid "just compensation" and the property was put to a "public use," however strict or loose a reading that term might receive. *See id*. amend. V. Unfortunately, the Supreme Court has effectively read the Public Use Clause out of the Constitution. *See, e.g.*, EPSTEIN, TAKINGS, *supra* note 77; SOMIN, *supra* note 53.

285. *See* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

286. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

287. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); EPSTEIN, TAKINGS, *supra* note 77, at 29 ("It is very clear that the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the emi-

Those amendments did not limit the states' power to regulate property because they applied only to the federal government.[288] Although the Framers had been concerned with state-law threats to property, and the Constitution did contain some provisions safeguarding it, as noted above, the Framers largely left to the states the responsibility of protecting property rights against state action.[289] The Framers could interfere with the states' lawmaking power only so much, and state law did offer some protections for property. Besides, eighteenth century state constitutions protected property rights;[290] the states could establish the qualifications to hold state office;[291] and they could define the qualifications to vote in state (or federal[292]) elections, which often included property ownership.[293] The Framers may have stopped short of protecting

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nent domain provision in the Bill of Rights.").

288. *See ELY, supra* note 7.

289. *Id.* at 47–48.

290. *See* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795) (Patterson, J.) ("[I]t is evident . . . that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law."); Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 6–7 (2012) (quoting property rights protections in late 18th century constitutions in Massachusetts, New Hampshire, Pennsylvania, and Vermont).

291. The Constitution defines the criteria to hold federal, not state, office. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (ruling that the Constitution establishes the exclusive requirements to hold office as a Representative, a Senator, or a President).

292. *See* Arizona v. Inter Tribal Council of Arizona Inc., 133 S. Ct. 2247, 2257–59 (2013) (noting that while Congress has the power to fix the "time, place, and manner" of federal elections, the states have the authority to define the qualifications to vote for federal office).

293. Property qualifications to vote for members of Parliament had long existed in England, and they were widespread throughout the Colonies. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 153. In 1787, 97 percent of the Colonists lived outside cities, and most of them owned land. *See* BROWN, CRITICAL ANALYSIS, *supra* note 228, at 54, 67. "There had been no significant opposition to property qualifications in the colonies before 1776. If they were not imposed in the form of instructions to the governors, the colonial assemblies had adopted ones of their own accord." ADAMS, *supra* note 127, at 195. Vermont later allowed every adult male to vote; elsewhere, property qualifications for voting were taken for granted. *Id.* at 197. Scholars disagree about the extent to which property qualifications limited the number of voters and therefore could have protected property rights. *Compare, e.g.*, ROBERT E. BROWN, MIDDLE-CLASS DEMOCRACY AND THE REVOLUTION IN MASSACHUSETTS, 1691–1780 (1955) (concluding that Massachusetts was a predominantly middle-class society, that most men owned property, and that most men could vote); MORGAN, BIRTH OF THE REPUBLIC, *supra* note 12, at 8 (noting that the widespread ownership of property gave Americans economic and political independence because property ownership was a requirement to vote or hold office); ADAMS, *supra* note 127, at 195 (noting estimates of one-quarter to one-half of adult males excluded from suffrage). Nonetheless, the Framers did not adopt a property qualification in the Constitution. The Framers did not oppose a standard in principle, but they could not agree on one, given differences among the states. Plus, the Framers knew that some states allowed non-property holders to vote and that the residents in those states would not want to lose the suffrage. *See* BROWN, CRITICAL ANALYSIS, *supra* note 228, at 39, 102–06; SCOTT, *supra* note 15, at

property rights against state invasion because they believed that they were leaving property in relatively good hands, because they decided that they could go no further, or for some other reason.[294] Whatever the reason may have been, the Framers believed that they had protected property rights from expropriation or dilution by the new national government.

C. The Role of History

There are two questions that should be considered at this point. The first is to what extent the historical sources discussed above can be said to accurately describe the status that property enjoyed in the minds of the Framers. In her recently published book Madison's *Hand: Revising the Constitutional Convention*,[295] Professor Mary Sarah Bilder argues that one of the principal sources for the Framers' understanding of the meaning of the Constitution, Madison's *Notes of Debates in the Federal Convention of 1787*, does not reliably describe the content of that discussion.[296] Madison took notes as the Framers thrashed out the Constitution and revised them later in his life, but Madison's *Notes* was not published until four years after his death, 1840, when there were no other surviving members of the Convention.[297] After forensically analyzing Madison's *Notes*, Professor Bilder concludes that he materially revised at least some of the discussion, including his own comments, to bring his views into line with those of Thomas Jefferson—the nation's third President and Madison's personal confidant, who was in Paris during the Convention as the American representative to France—regarding the need for a strong chief executive.[298] Madison also hoped to alter the record and to appear to have been on the right side of history when the nation finally ended slavery.[299] If Professor Bilder is correct, Madison's *Notes* may no longer be able to serve as an accurate recount of what the Convention's members said and did in Philadelphia that summer. The consequence would be not only to weaken the authoritative effect that courts should attribute to Madison's *Notes* for constitutional law purposes, but also to raise some doubts about the weight that should be given to other accounts of what other members of the Framers'

47–48.

294. Such as the inability to eliminate slavery without dissuading the Southern states from endorsing the Constitution. *See* ELY, *supra* note 7, at 47–51.

295. MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) [hereinafter BILDER].

296. *Id.* at 1–2.

297. *Id.* at 1–4.

298. *Id.* at 3–4.

299. *Id.* at 188–89.

generation said.

The second question is whether contemporary historians have overstated the value that the Founding generation placed on private property.[300] Political considerations can lead an elected official to "fudge" the likely adverse effect of a proposed law to see to its passage.[301] That is but one of the reasons why it always is difficult to divine the intent of any collegial body even when a reporter accurately transcribes the discussion.[302] Different decisionmakers may

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300. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 17 (2005) ("Although some modern readers have tried to stress property protection rather than popular sovereignty as the Constitution's bedrock idea, the words 'private property' did not appear in the Preamble, or anywhere in the document for that matter. The word 'property' surfaced only once, and this in an Article IV clause referring to *government* property. Above and beyond the Constitution's plain text, its clear commitment to people over property shone through in its direct act: As we have seen, the Founders generally set aside ordinary property qualifications in administering the special elections for ratification-convention delegates.").

301. *See, e.g.*, Paul F. Larkin, Jr., *Essay: Philemon, Marbury, and the Passive-Aggressive Assertion of Legal Authority*, 29 BYU J. PUB. L. 241, 260–62 (2014) ("Consider the repeated statements that President Obama made before and after passage of the Patient Protection and Affordable Care Act that the law would cause no one to lose insurance coverage. . . . Yet, as insured parties began to lose their health care plans in 2012 and 2013, it became undeniable that the President's assurances, to be polite, were fibs. The public likely shares that conclusion, even if most people believe that it is an impolitic point to make out loud. In fact, after dissembling at first even President Obama eventually admitted—in what was surely the understatement of 2013—that Obamacare has not worked out precisely in the manner that he repeatedly assured the public it would. In President Obama's own words, '[t]here is no doubt that the way I put that forward unequivocally ended up not being accurate.' The response from most of the public likely was, 'Tell me something I don't know.'") (footnotes omitted).

302. The best summary why this inquiry is a hazardous one can be seen in Justice Antonin Scalia's dissenting opinion in Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting):

> [T]he difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. For while it is possible to discern the objective "purpose" of a statute (*i.e.,* the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he

have different interests, motives, and designs, not all of which they may express, some of which can change over time, perhaps considerably, possibly in response to the publicly or privately expressed views of colleagues or constituents.[303] Those interpretive difficulties do not disappear even if a deliberative body endorses a formal document, such as a constitution or judicial opinion, as its statement of shared conclusions.[304] Numerous parties may contribute to

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> may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.
>
> Putting that problem aside, however, where ought we to look for the individual legislator's purpose? We cannot of course assume that every member present (if, as is unlikely, we know who or even how many they were) agreed with the motivation expressed in a particular legislator's pre-enactment floor or committee statement. Quite obviously, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien,* 391 U.S. 367, 384 (1968). Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read—even though we are unwilling to assume that they agreed with the motivation expressed in the very statute that they voted for? Should we consider postenactment floor statements? Or postenactment testimony from legislators, obtained expressly for the lawsuit? Should we consider media reports on the realities of the legislative bargaining? All of these sources, of course, are eminently manipulable. Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and postenactment recollections conveniently distorted. Perhaps most valuable of all would be more objective indications—for example, evidence regarding the individual legislators' religious affiliations. And if that, why not evidence regarding the fervor or tepidity of their beliefs?"

303. Consider what Professor McDonald had to say about the delegates to the Convention of 1787. After surveying the principles and interests of the delegates before they arrived in Philadelphia, he concluded, with respect to their avowed purposes on arrival, that "it is meaningless to say that the Framers intended this or that the Framers intended that: their positions were diverse and, in many particulars, incompatible. Some had firm, well-rounded plans, some had strong convictions on only a few points, some had self-contradictory ideas, some were guided only by vague ideals. Some of their differences were subject to compromise; others were not." MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 224.

304. Consider again Professor McDonald's comments on the Convention of 1787: "Drafting the Constitution, as Madison wrote long afterward, was 'the work of many heads and many hands.' Some delegates, to be sure, were more active and influential than others, and some were engaged in artful backstage manipulations; but no delegate or coalition of like-minded delegates was able to dominate the convention except for brief periods and on specific issues. The diversity of interests and points of view among the delegates made for alignments that shifted with circumstances and necessitated repeated compromises." MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 225 (footnote omitted).

the drafting of a written decision,[305] and factors such as the order in which decisions are made or shifts in voting coalitions may disguise the views of a majority of decisionmakers.[306]

Then, there is the problem of attempting to divine the intent of a body that deliberated more than two centuries ago. Historians have concluded that the Framers attributed a value to property that varies considerably from the one lawyers are familiar with today. The contemporary legal culture does not treat property with the same respect afforded liberty; far from it. Nor does it see the two concepts as interrelated, let alone so enmeshed that each one is necessary for the enjoyment of the other. Twenty-first century constitutional law also does not deem the concept of property as a repository of legal rights beyond freedom from unjust imprisonment. Supreme Court case law treats a discrete and limited number of interests—land, personalty, currency, patents, copyrights, trade secrets, and perhaps a few other comparable matters—as property.[307] The remaining protected interests are treated as aspects of liberty.[308] The change between what is said to have been the view of the founding generation toward property and what is today's generation's view of property is quite stark, so divergent that is possible that contemporary historians (or

305. An example is the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court heard oral argument on November 10, 1975, and delivered an unsigned 100-plus-page per curiam majority decision on January 30, 1976, with five justices also issuing separate opinions. The *Buckley* opinion was a team effort.

306. *See, e.g.*, KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (3d ed. 2012); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982). The classic example could be the Supreme Court's decision in *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). *Tidewater Transfer* involved the constitutionality of an act of Congress authorizing district courts to adjudicate disputes between residents of the District of Columbia and citizens of a state under the diversity jurisdiction of Article III. Three justices concluded that the District of Columbia is not a "State" for Article III purposes, so federal courts lack diversity jurisdiction over lawsuits brought by or against District of Columbia residents, but Congress may, pursuant to Article I, grant Article III courts some jurisdiction not authorized by that provision. *Id.* at 583–604 (plurality opinion of Jackson, J.). Two justices disagreed with the plurality on both points, concluding that Congress cannot add to Article III jurisdiction by relying on Article I, but District residents are residents of a "State" for Article III purposes. *Id.* at 604–26 (Rutledge & Murphy, JJ., concurring in the judgment). Four justices concluded that the plurality and concurring opinions were each half-right. In their view, District residents are not citizens of a "State" for purposes of Article III jurisdiction, and Congress cannot add to the jurisdiction of Article III courts. *Id.* at 626–46 (Vinson, C.J., & Douglas, J., dissenting); *id.* at 646–55 (Frankfurter & Reed, JJ., dissenting). The result was that, according to separate majorities of the Court, District residents are not citizens of a state for purposes of diversity jurisdiction, and, because Congress cannot add to Article III jurisdiction, Congress cannot direct the federal courts to treat District residents as if they are state residents, but Article III courts can adjudicate disputes between residents of the District and a state.

307. *Supra* notes 24 and 26 and accompanying text.

308. *Id.*

contemporary lawyers reviewing their work product[309]) are mistaken.[310]

Those questions are daunting. Most lawyers are not trained historians, and any lawyer discussing the history of any era risks missing nuances that a historian could see or overestimating the importance that a particular event (or train of events), debate, or doctrine had on the development of the law.[311] In fact, even professional historians disagree amongst themselves over the meaning of events and concepts.[312] Accordingly, lawyers should tread lightly when they act as amateur historians.

Yet, in this case there is good reason to be confident that American historians have accurately captured the opinions of the founding generation regarding property. To start with, Professor Bilder does not say that Madison fabricated or revised his views on property, which is the focus of this Article.[313]

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309. There is, of course, the question whether I have misconstrued what historians said about the value of property during that period. That question is for the reader to decide.

310. A related question is whether historians have *understated* the depth of the founding generation's veneration for property. That is, was the Framers' *principal* (if not exclusive) motivation for adopting the Constitution the protection of private property? Early in the twentieth century Charles Beard made just that argument. In 1912, Beard famously argued that the Framers were principally motivated by economic self-interest and that their primary goal in creating the new republic was to safeguard the wealth of the landed, mercantile, and manufacturing classes by creating a republic that protected their property interests, particularly personalty, against encroachment by others. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 65–71, 161, 168 (Dover ed. 2004) (1913). That controversial theory has attracted numerous then-contemporary and modern-day defenders and adversaries. *See, e.g.*, BROWN, CRITICAL ANALYSIS, *supra* note 228; Robert E. Brown, *The Beard Thesis Attacked: A Political Approach*, *in* ESSAYS ON THE MAKING OF THE CONSTITUTION 88 (Leonard Levy ed., 1969) [hereinafter LEVY, ESSAYS]; Forrest McDonald, *The Beard Thesis Attacked, II: A Political-Economic Approach*, *in* LEVY, ESSAYS, *supra*, at 113; Jackson T. Main, *The Beard Thesis Defended*, *in* LEVY, ESSAYS, *supra*, at 144; FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1992); ROBERT A. MCGUIRE, TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION (2003). Supporters described his thesis as "authoritative and scholarly." BROWN, CRITICAL ANALYSIS, *supra* note 228, at 8 (referring to Henry Steele Commager and Samuel Eliot Morrison). Critics (at least the more colorful ones) described his book as "inspired either by Marx or, by inference, the Devil." *Id.* at 8 (referring to former President and Chief Justice William Howard Taft and Edward S. Corwin). Whoever Beard's muse may have been, *An Economic Interpretation of the Constitution of the United States* does not pose a problem today. As explained in the text, no one denies that the protection of property was at least *one* of the Framers' concerns.

311. *See* ELY, *supra* note 60, at 56 ("Now I know lawyers are a cocky lot: the fact that our profession brings us into contact with many disciplines often generates the delusion that we have mastered them all."); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525 (1995) ("[C]onstitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers.").

312. *See, e.g.*, BAILYN, FACES OF REVOLUTION, *supra* note 125, at 188–89.

313. The principle of *falsus in uno, falsus in omnibus* need not apply here. Madison may have reworked his comments regarding slavery to improve his standing throughout history, but neither he nor anyone else at the time envisioned that history would eventually treat property on a par with hu-

Also, esteemed scholars of early American history—Bernard Bailyn, James Ely, Jack Greene, Forrest McDonald, Edmund Morgan, Jennifer Nedelsky, and Jack Rakove among others—have all concluded that the Founding generation believed that private property was indispensable to a free republic.[314] None of them relied exclusively or primarily on Madison's *Notes.* In fact, Locke strongly believed that the purpose of government was to protect the life, liberty, and property of the citizenry, and he wrote his treatise a century before Madison took or revised his *Notes* on the debates in the Convention of 1787.[315] Trenchard and Gordon argued in *Cato's Letters*, also published before the Convention of 1787, that property was important to the success of a government.[316] Numerous Framers other than Madison—such as John Adams, John Dickinson, Alexander Hamilton, and Noah Webster—expressed the same view as Madison regarding the importance of property, as did Thomas Jefferson, who believed that individual landowners were the backbone to the health of the republic.[317] A large number of different historical figures in American legal history therefore supports the conclusion that eighteenth-century Americans believed in the instrumental and inherent importance of property.[318]

As for the question whether American historians have overestimated the Framers' views: We can safely leave that debate to historians. Scholars are unanimous that the English emigrated to America at least in part to obtain land to become economically independent, that the majority of them obtained and lived off their own land, and that the preservation of their local political systems and the way of life that had grown up under them was a cause of the decision to become independent from England. It is not necessary to accept or reject the thesis that protection of private property was the *sole* concern of the Framers to conclude that it was at least *one* of the Framers' goals.[319] The

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man chattel slavery. *See* BILDER, *supra* note 295, at 2.

314. There is a disagreement among scholars whether the Framers believed in natural rights or rights guaranteed by the unwritten English constitution. See ZUCKERT, *supra* note 7, at 276–77 (describing the disagreement). For the purposes of this Article, that difference does not matter.

315. LOCKE, *supra* note 98, at vii (Introduction by J.W. Hough).

316. Trenchard, *supra* note 316, at 245

317. *See* ELY, *supra* note 7, at 29.

318. That history also gives the Framers' concern for property a far longer and more distinguished pedigree than enjoyed by any of the sexual privacy interests that the Court has sheltered since the 1960s.

319. As one of Beard's critics put it: "[I]t seems clear that whatever future research does to clarify the issues surrounding the Constitution and its ratification, we cannot assume, as we have in the past, that the Constitution was adopted undemocratically in an undemocratic society and that it was put over on the people as a sort of *coup d'état* or conspiracy by holders of personal property. For good or bad, America in 1787 was a country in which most men were middle-class property

historians noted above prove that point, and that is all that is necessary. Their work demonstrates that the Framers believed that every man had a natural right to property, that protecting property was critical to nourish the type of political society they sought to adopt in America, and that this protection should be enshrined in the new republic's charter.[320]

We may not always or often be able to know how the Framers would have resolved an issue that could not have arisen in their lifetimes. (Would Madison have thought that reading the contents of a cell phone was a "search"?) But we may be able to narrow down the range of permissible answers by considering how they resolved the questions before them or how much weight they gave to competing values. That is possible here. Whatever may be true in other instances, the then-contemporary treatises, pamphlets, debates, discussions, and the like concerning property are not "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[321] The available evidence reveals a consistent belief in the importance of property for economic and political independence.

IV. THE STATUS OF PROPERTY UNDER AMERICAN GOVERNANCE: THE ROLE FOR REGULATION

We are not yet done. One more critical question remains. Did the Framers' generation deem the natural right to property as absolute, as always and everywhere trumping the government's authority to regulate individuals, their land, and their businesses for the good of society? Between 1750 and the 1770s, the French "physiocrats," the first group to label themselves "economists," coined the term *laissez-faire* and devised the theory that there were

owners, especially the owners of real estate, and because they were property owners, they were also qualified voters. Having fought the Revolution to preserve a society based on the natural rights of life, liberty, and property, it is not at all surprising that they would adopt a Constitution which provided for the protection of property. In fact, had the people suspected that the Constitution would not protect property, I doubt that it would have had the slightest chance of adoption. And certain it is that if the common people had opposed, there would have been no Constitution." Robert E. Brown, *The Beard Thesis Attacked: A Political Approach*, *in* LEVY, ESSAYS, *supra* note 310, at 88, 112; *see also* BROWN, CRITICAL ANALYSIS, *supra* note 228, at 198 ("Naturally the delegates [to the Constitutional Convention of 1787] recognized that the protection of property was important under government, but they also recognized that personal rights were equally important. In fact, persons and property were usually bracketed together as the chief objects of government protection.").

320. *See* ADAMS, *supra* note 127, at 191; BROWN, CRITICAL ANALYSIS, *supra* note 228, at 111 ("To say that the Constitution was designed in part to protect property is true; to say that it was designed only to protect property is false; and to say that it was designed only to protect *personalty* is preposterous.").

321. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J. concurring in the judgment).

natural economic laws that, if followed, would increase the productive capacity and wealth of any society.[322] That theory influenced the work of Bernard Mandeville in *The Fable of the Bees*,[323] which greatly influenced Adam Smith's 1776 magnum opus *An Inquiry into the Nature and Causes of the Wealth of Nations*,[324] which, in turn, was influential in some quarters in the early days of the new republic.[325]

The question therefore is this: Did the Framers value property so highly that they foresaw no circumstances in which representative government could restrain or regulate its use for the public benefit? The Framers' rhetoric would suggest that the value that they attributed to property would have outweighed any benefit that could be accomplished by legislation, rendering property virtually untouchable by the democratic process.[326] If so, we could expect to find proof of that attitude in the absence in the eighteenth century code books of colonial, state, or local regulation of land, its fruits, or commerce. It turns out, however, that there was "a gap between political rhetoric and institutional practice."[327] History, as seen in the practice of government, does not manifest an unquestioning adherence to *laissez-faire* capitalism.[328] The practical and political demands of governance, bolstered by the general historical acceptance of English mercantilism and the theoretical support of jurists like Blackstone, gave rise to widespread local, albeit shallow, forms of regulation of property in the public interest.[329] As explained below, the an-

322. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 106–07.

323. BERNARD MANDEVILLE, THE FABLE OF THE BEES: OR PRIVATE VICES, PUBLICK BENEFITS (Phillip Harth ed., Penguin Books 1989) (1714).

324. SMITH, *supra* note 112.

325. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 128 ("[Adam] Smith, who had already established a great reputation with his *Theory of Moral Sentiments*, created a sensation with the *Wealth of Nations*. Most public men in America acquired at least a passing acquaintance with the work, almost all praised it, and many gave it thorough study. Hamilton worked arguments derived from it into several of his public papers. Madison was said to have quoted from it almost unconsciously, without attribution, in his speeches, and some in his audiences recognized the words.") (footnotes omitted); *see also, e.g.*, *id.* at 108–09, 123–25, 128–31. At the same time, it is unlikely that Smith's *Wealth of Nations* was widely available in early America. The book was published in England in 1776, but was not published in the United States until 1789. FRANK BOURGIN, THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC 23–24, 37 (1989) [hereinafter BOURGIN, GREAT CHALLENGE].

326. Schultz, *supra* note 62, at 476–77 ("Clearly there were many early Americans who described property as the end of society, as absolute, as linked to important political rights, or as natural. Conversely, threats to property were considered destructive to freedom and republican government.") (footnotes omitted).

327. *Id.* at 491.

328. BOURGIN, GREAT CHALLENGE, *supra* note 325, at 22–23.

329. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 40–45 (1989);

swer to the question phrased at the outset of this section quite clearly is "No."

Start with Locke's natural rights theory. The theory rests on a tradeoff between private and government protection of property rights. The theory posits that each person has certain rights, some of which are alienable, some of which are not, to life, liberty, and property.[330] In a theoretical state of nature, individuals are free to join together to create an independent state by agreeing to delegate certain rights to government because, through the combined power of each contracting member, the state can better protect everyone's remaining rights than any one person could alone.[331] No one may alienate certain rights, such as the right not to be subjected to slavery, but each party is free to trade others as he sees fit for his own betterment. People therefore can exchange some of their property rights for the greater protection that the government can provide for the ones that remain.[332]

Move to Blackstone, whose views were very influential.[333] Blackstone believed that the purpose of government was not to protect property, but to

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Schultz, *supra* note 62, at 487–95. Frank Bourgin argues that "[t]he kind of government the Founding Fathers were trying to set up was the opposite of that obtaining under the Articles [of Confederation]. Congress under the Articles was synonymous with laissez-faire, with local popular sovereignty, lackadaisical government lacking in energy. Congress had no real powers, and for its purposes, needed none. But the Constitution involved an altogether different conception: a close-knit Union, endowed with large comprehensive powers that its makers wanted to be used toward promoting national economic development." BOURGIN, GREAT CHALLENGE, *supra* note 325, at 50.

330. *See* ANDREWS, *supra* note 130, at 201–02 ("Whatever 'the law of nature' may mean to us to-day, to the thoughtful colonist of that period it certainly meant justice, equity, and good conscience, or, as Hobbes puts it in the *Leviathan*, 'every man's natural liberty to use his power to his own advantage.'") (citation omitted).

331. *See, e.g.*, Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J. L. & LIB. 1, 13–15 (2010).

332. *See* SCOTT, *supra* note 15, at 29 ("Even as Locke insisted that the right of property derived from God, he always allowed that the liberty to exercise the right derived from social order—an order established and determined by society."); ZUCKERT, *supra* note 7, at 283 ("The securing of natural rights is altogether the end or purpose of legitimate government. . . . The very fact of legitimate government proves that the various rights cannot be 'absolutes.' As Jefferson said in 1802, 'Man . . . has no natural right in opposition to his social duties.' The law can properly limit rights and can intrude into the basic sphere of immunities of the individual, but this may be done only when justified; as a provision of the American Constitution later stated, 'no person may be deprived of life, liberty, or property without due process of law.' Law correctly limits rights not only on behalf of the specific rights of others but also in pursuit of 'the public good.'"). Moreover, the market does not deal well with problems like free riders and externalities, for example, so individuals may grant the state certain powers that they could otherwise exercise on their own to increase the likelihood that they will maximize their welfare at the lowest cost. Some degree of state market governance is effective and efficient and therefore salutary.

333. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 715 (1999); Schick v. United States, 195 U.S. 65, 69 (1904); Schultz, *supra* note 62, at 484.

address "the wants and fears of individuals,"[334] a proposition that lends itself to democratic government. Blackstone believed in Parliamentary supremacy, which legitimized the actions of republican government. He believed in the importance of private property, but nonetheless saw it as subject to "the laws of the land," which in his era, meant the common law of nuisance and the edicts of Parliament.[335] "Blackstone's influence would suggest a legalistic reading of property that would make it subject to numerous regulations and restrictions."[336]

History also supports that conclusion. The English common law and Parliament both regulated the market.[337] At common law, there were three offenses against public trade: *Forestalling*, acquiring goods en route to the market; *regrating*, buying large quantities of a good at market and reselling them at higher price in the same market; and *engrossing*, purchasing large quantities of foodstuffs for resale.[338] The Crown granted monopolies to particular, favored parties and reserved land, including mineral rights, for the sovereign.[339] England had price controls, usury laws, and sumptuary laws—*viz*., provisions forbidding certain types of immoral conduct, such as excessive spending, gambling, and prostitution.[340] England also imposed the mercantile

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334. 1 BLACKSTONE, *supra* note 7, at *47.

335. *See* Schultz, *supra* note 62, at 486 ("Blackstone's Commentaries also had a tremendous influence in how American law depicted property. Blackstone's views on property were known to many Americans and were often cited. Unlike Locke's views which may not have had an immediate impact on property law, Blackstone's were more direct and discernable. Specifically, contra Locke, and despite the fact that at times Blackstone appears to be echoing him, Blackstone argued that the 'only true and natural foundations of society are the wants and fears of individuals,' not the protection of property. While property is noted as an absolute right of Englishman, this right is tempered by 'the laws of the land.' For Blackstone, property was subject to numerous regulations and volume II of the Commentaries noted in detail these restrictions on use and ownership. [¶] In sum, the language of Blackstone was important to the legal discourse in America, especially in regards to property. Blackstone's influence would suggest a legalistic reading of property that would make it subject to numerous regulations and restrictions. If Blackstone and the language of law were more important than Locke's when it came to treating property as an institution, one would see property rights as far from absolute from 1776–1800.") (footnotes omitted); Wood, *supra* note 82, at 248.

336. Schultz, *supra* note 62, at 486; *see* Munn v. Illinois, 94 U.S. 113, 124 (1876) ("When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'").

337. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 13–20.

338. *See, e.g*., 1 BLACKSTONE, *supra* note 7, at *154–59; MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 14 & n.8.

339. MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 17–19.

340. *Id.* at 14–16; LARKIN, *supra* note 7, at 18.

system on the Colonies to benefit the Mother Country.[341] The seventeenth and eighteenth century economies in England could not be described as *laissez-faire*.

Anglo-American legal history accepted the regulation of property.[342] The Glorious Revolution of 1688 established the constitutional principle of Parliamentary supremacy in England;[343] England used that authority to regulate colonial trade; and, prior to 1763, the Colonists accepted Parliament's sovereignty "with a reasonable [degree] of equanimity."[344] England regulated America's macroeconomy through imposition of the mercantile system, and the Colonies did not object to English governance of international trade, even when it affected home grown products, until 1764, when Parliament began to impose direct taxes on items such as sugar and stamps.[345] In fact, some colonies, such as Maryland and Virginia, enacted their own export controls over staples, such as tobacco, to maintain their reputation for quality and to in-

341. *See, e.g.*, 1 BLACKSTONE, *supra* note 7, at *108, *154–59; MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 14 & n.8.

342. *See, e.g.*, Wynehamer v. People, 13 N.Y. 378 at 398–99 (1856) ("However difficult it may be to define, with accuracy and precision, the line of separation, there is a broad and perfectly intelligible distinction between what is plainly regulation on the one side, and what is plainly prohibition on the other. . . . It is certain that the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction. It is equally certain that the legislature can regulate trade in property of all kinds. Neither of these propositions is denied; but they necessarily lead to another—that between regulation and destruction there is somewhere, however difficult to define with precision, a line of separation.") (Opinion of Comstock, J.).

343. *See* CHARLES HOWARD MCILWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION 3, 43 (Cornell Univ. Press 1961) (1923); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 856–57 (1978) ("The ideas of fundamental law, so dominant in 17th-century England, were subtly undermined in that country by the course of political history. The events of the Cromwellian period, the Restoration and the Revolution of 1688, and finally the evolution of the system of ministerial government under the Hanoverian Kings, all tended to create a practical legal supremacy in Parliament. Whig theory and practice made royal authority subordinate to Parliament, and Godden v. Hales [89 Eng. Rep. 1050 (K.B. 1686)] in 1686 represented the court's last imposition of a constitutional limit on parliamentary authority in the name of the royal prerogative. The constitution came to be seen less as a body of principles limiting governmental power, and more as a set of institutions headed by a Parliament that possessed ultimate authority to change customary arrangements by legislation.") (footnotes omitted). There were dissenters to that view, including William Pitt, the greatest English statesman of the age, but they were in the minority. Grey, *supra* at 857–59.

344. ANDREWS, *supra* note 130, at 61.

345. *See id.* at 7–9, 51–53, 61; ELY, *supra* note 7, at 18–19; EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION (1995); PERKINS, *supra* note 12, at 21 (English trade restrictions on the colonies played only a negligible role in American revolutionary sentiments). Some did disagree with English control. *See* Katz, *supra* note 164, at 476 (noting Jefferson's disagreement). Some states imposed their own mercantile system after independence, but exempted the other states. MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 18.

crease the price.[346] Sometimes, they even embargoed foodstuffs to benefit local consumers at the expense of local farmers.[347] Some colonies even regulated or taxed intercolonial trade.[348] Every state adopted some form of mercantilism after winning independence.[349]

Colonial and early state governments also adopted various different policies to regulate markets or promote specific business.[350] "Regulation of busi-

346. *See* FRIEDMAN, *supra* note 16, at 40 ("Colonial government made a constant effort, not always effective, to keep its staple crops under some kind of quality control. . . . Twentieth-century farm schemes were foreshadowed in old Maryland and Virginia: quality control, inspection laws, regulation of the size of containers, subsidies for planting preferred kinds of crop, public warehousing, export controls."); *see also* ELY, *supra* note 7, at 21; FRIEDMAN, *supra* note 16, at 40–41 (describing similar regulatory programs in Connecticut, Georgia, Massachusetts, and Pennsylvania).

347. ELY, *supra* note 7, at 21.

348. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 18.

349. POLE, *supra* note 110, at 77 ("[T]he early American state governments were as mercantilist and as interventionist—in intention if not always in power—as the royal government they had overthrown."). For example, Massachusetts' "mercantilistic program was a complex one, involving bounties on exports, protective duties on imports, inspection laws, and, above all, the promotion of manufactures through a combination of what might be styled state capitalism and a partnership between governmental and private economic endeavor. . . . In New York, which produced a large quantity of wheat and flour as well as manufactured goods for export, the emphasis was placed upon the regulation and inspection of local commodities so as to maintain a reputation for quality products in international markets." MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 102–03; *see also id.* at 103–04 (discussing the inducements offered by legislatures in Virginia and Maryland to construct a fleet for carrying tobacco to England).

350. *See, e.g.*, BOURGIN, GREAT CHALLENGE, *supra* note 325, at 90 ("[Alexander Hamilton] never believed in laissez-faire so far as the promotion of trade and industry [were] concerned. His new official position [as Treasury Secretary] gave him an opportunity to make his views those of the Washington administration."); HALL & KARSTEN, *supra* note 20, at 25 ("Until about the 1740s, the single most important function of the incorporated town was to provide 'the commercial community . . . the service of trade and industry. It established and regulated the marketplace."); *id.* at 41 ("To ensure the success of their markets, town officials oversaw the quality and price of goods and services."); SCOTT, *supra* note 15, at 11; Schultz, *supra* note 62, at 489 ("Bourgin, Schlesinger, and other historians have noted the extensive regulation of the economy and market that occurred not just in early 19th century America but even during the colonial and revolutionary era. State regulation of the economy included the promotion of manufacturing, and the confiscation of property for numerous public projects was common. Price fixing and as well as other forms of property regulation were important. Regulation of monopolies, dormant land, urban land, and other economic policies were also employed. Hamilton's creation of a national bank as well as advocacy to support and regulate commerce are other examples of federal efforts to subordinate individual property interests to secure the public good.") (footnotes omitted); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 788–89 (1995) [hereinafter Treanor] ("Although colonies clearly limited the ways in which individuals could use property, no colonial charter mandated compensation when regulations affected the value of property. Furthermore, courts did not direct compensation for such regulations. Land use was subject to extensive regulations. In colonial Virginia, for example, various statutes barred overplanting of tobacco and required the growing of crops other than tobacco. Boston had zoning regulations governing the location of bakeries, slaughterhouses, stills, and tallowchandlers, and violators were subject to prose-

ness was primitive by modern standards," but "in some ways, it was fairly pervasive."[351] As Professor William Nelson has noted, "Colonial government regulated its subjects' lives in pervasive detail; government in the Age of Mercantilism sought to insure not only the physical and economic, but the moral and social well-being of its subjects as well."[352] Reluctant to trust free markets, colonies supervised public markets and, for example, prohibited forestalling because it would have allowed wholesalers to evade public market regulation.[353] Laws regulated the weight, quality, and price of bread and required bakers to brand their products for identification.[354] The shortage of

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cution. New York City and Charlestown enacted ordinances barring further operation of slaughterhouses within city limits. [¶] Colonial governments regulated not only land use, but also business operations and economic decisionmaking. For example, fee schedules for ferries were imposed, peddlers had to obtain licenses and pay duties, and pork, beef, flour, tar, pitch, and turpentine were subject to inspection for compliance with statutory standards prior to sale or export. Taverns were licensed, based on need and a determination of whether the tavern would impair public morals, and licensing fees were charged. Bread prices were regulated. Various colonies experimented with sumptuary legislation, restricting expenditures on clothing and jewelry. Laws barred speculation in commodities, including such practices as forestalling (purchase of goods while in transit to the market), engrossing (purchase of large quantities of commodities for resale), and regrating (purchase of goods in a market for resale in the same market).") (footnotes omitted); Wood, *supra* note 82, at 253 ("Not only did the state government of New York distribute its largesse to individual businessmen and groups in the form of bounties, subsidies, stock ownership, loans, corporate grants and franchises, but it also assumed direct responsibility for some economic activities, including building the Erie Canal."); *id.* ("Between 1780 and 1814, the Massachusetts legislature . . . enacted a multitude of laws regulating the marketing of a variety of products—everything from lumber, fish, tobacco, and shoes to bread, butter, nails, and firearms."); *see also, e.g.*, CARL BRIDENBAUGH, CITIES IN THE WILDERNESS: THE FIRST CENTURY OF URBAN LIFE IN AMERICA, 1625–1742 (1964); ELY, *supra* note 7, at 17–22; HALL & KARSTEN, *supra* note 20, at 25, 41–50; GEORGE L. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 66–84 (1960); MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 14–21; 2 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660–1730, at 21–23, 56 (2013).

351. FRIEDMAN, *supra* note 16, at 38 ("The settlements depended on roads, ferries, bridges, and gristmills for transport, communication, and the basic food supply. These businesses were privately owned; but the public had a deep interest in how they were run; and there were rules and regulations that expressed colonial policy. . . . Government also regulated markets, road building, and the quality of essential commodities.").

352. William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 903 (1978) [hereinafter Nelson, *Eighteenth-Century*]; *see also, e.g.*, *id.* at 903 n.62 ("Nine of the thirteen colonies established state religions and all the colonies prosecuted immorality in such varying forms as fornication, drunkenness, profanity, and desecration of the Sabbath."); Wood, *supra* note 82, at 253 ("The states never lost their inherited responsibility for the safety, economy, morality, and health of their societies.").

353. ELY, *supra* note 7, at 20; FRIEDMAN, *supra* note 16, at 39 ("From England, the colonies copied laws about public markets. These laws laid down rules about where and when key products could be sold. A scattered market is difficult to control or to regulate. When all sellers of wood, or hay, or grain meet at one place and time, regulation can be cheap and effective.").

354. FRIEDMAN, *supra* note 16, at 39.

manual labor led assemblies to experiment with codes of labor and wage limits.[355] Usury laws fixed a ceiling for interest rates.[356] The Colonies and states also regulated ferries, innkeepers, lawyers, leather merchants, peddlers, and anyone who did business with Indian tribes.[357] Mills were seen as public utilities, with the requirement that everyone be served at a fixed price.[358] Localities licensed taverns, and county courts fixed the price for food, board, and drink, or barred alcohol altogether.[359] Congestion in urban areas not only multiplied sanitation problems, but also posed special problems due to the risk of fires. The result was building ordinances that required brick or stone for construction and prohibited straw roofs, wooden chimneys, and the storage of straw or gunpowder.[360] The government could exercise its "police power"—*viz*., originally, the state's power "to enforce public and private rights against private infringement"; eventually, the general authority to regulate a person's liberty and property in pursuit of communal betterment[361]—not only to prevent common law nuisances,[362] but also to further the public welfare, and

355. *Id.* at 43 ("In the early days of colonial life, it was a common rule, both North and South, that every able-bodied man had a duty to work."); *id.* at 42–49 (describing indentured servitude, slavery, and other economic regulatory efforts).

356. MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 110; ELY, *supra* note 7, at 21.

357. *See, e.g.*, MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 18; FRIEDMAN, *supra* note 16, at 41, 125.

358. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 18; FRIEDMAN, *supra* note 16, at 38.

359. *See, e.g.*, Wynehamer v. People, 13 N.Y. 378, 409–23 (1856).

360. *See* BOSSELMAN, *supra* note 130, at 83; *see generally* FRIEDMAN, supra note 16, at 127.

361. JAMES L. HUFFMAN, PRIVATE PROPERTY AND THE CONSTITUTION: STATE POWERS, PUBLIC RIGHTS, AND ECONOMIC LIBERTIES 7 (2013); *see* William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1074 n.39 (1994) ("The police power entailed the imposition of direct and explicit limitations on private behavior not found in taxation or land policies. Furthermore, police restraints and compulsions operated on conventional and legitimate behavior rather than the 'intrinsically vicious' or evil acts regulated by criminal justice."). The old and modern understandings of the police power are quite different. Originally, it was seen as the state's power to protect public and private rights in the public interest. Today it has become the state's power to redefine public and private rights in the public interest. *See* HUFFMAN, *supra*, at 7–9, 17–19, 116–17, 129–30; *compare* Novak, *supra*, at 1084 ("'Police' [in Europe in the seventeenth and eighteenth centuries] in this sense stood for something much grander than a municipal security force. It referred to the growing sense that the state had an obligation not merely to maintain order and administer justice, but to aggressively foster 'the productive energies of society and provide the appropriate institutional framework for it.'") *with id.* at 1085 ("In America, 'police' stood for new efforts on behalf of a dynamic state to marshal resources and promote a well-ordered community devoted to the public happiness and public good.").

362. *See, e.g.*, Mobile v. Yuille, 3 Ala. 137, 139–40 (Ala. 1841) ("Doubtless, under the form of government, which exists in this and the other States of this Union, the enjoyment of all the rights of property, and the utmost freedom of action which may consist with the public welfare, is guaranteed to every man, and no restraint can be lawfully imposed by the Legislature in relation thereto, which

could do so without compensating a property owner.[363] According to one historian, the period from 1781 to 1801 witnessed "a deluge of state and local legislation regulating economic and social life."[364] The authority to regulate

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the paramount claims of the community do not demand, or which does not operate alike on all. Free government does not imply unrestrained liberty on the part of the citizen, but the privilege of being governed by laws which operate alike on all. It is not therefore, to be supposed, that in any country, however free, individual action cannot be restrained, or the mode, or manner of enjoying property, regulated."); Whitney v. Bartholomew, 21 Conn. 213, 218–19 (1851) ("[T]he erection of a building on one's own land, with a purpose of its being so used that its use will probably result in an injury to others, is, of itself, a wrongful act. And whether such would be the effect, must depend much upon the nature of the business there done, and of its proximity to the residences and property of others. And therefore, it has been uniformly holden, that the placing of a swine-stye, slaughter-house, tannery, tallow-furnace, steam-engine, smith's forge, or other erection, which, in its use, will infect the atmosphere, produce unhealthy vapours, or offensive smells or noises, so near the dwellings of others as to materially affect them, and render them either unhealthy or uncomfortable, as residences, is unlawful and wrong, and constitutes such erections, nuisances, although upon the builder's own land. And from this it results, that of trades which are lawful, some may be nuisances in cities, which are harmless in the country.").

363. *See, e.g.*, Commonwealth v. Alger, 62 Mass. (7 Cush.) 53, 84–85 (1851) ("We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property . . . holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient."); Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55, 57 (1846) ("All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community . . . ."); Treanor, *supra* note 350, at 791–94. Nineteenth-century Supreme Court decisions also recognized that proposition. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 662–63 (1887); *cf.* Legal Tender Cases, 79 U.S. 457, 551 (1870) ("That provision [the Takings Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals."). The distinction between a valid exercise of the police power and a taking of private property survived until Justice Holmes smudged it in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *See* HUFFMAN, *supra* note 361, at 7–9, 17–19, 116–17, 129–30. He agreed that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal*, 260 U.S. at 413. He added, however, that "[t]he 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. The result was to turn a categorical difference into one of degree.

364. Novak, *supra* note 361, at 1076 (emphasis omitted); Wood, *supra* note 82, at 242 ("Indeed, as Madison complained in 1786, the states passed more laws in the decade following [i]ndependence than they had in the entire colonial period. And these laws had less and less to do with private matters—with moral and religious issues—and more and more to do with public mat-

the economy became an accepted part of what was known as a state's "police power."[365]

Those are just examples of economic regulation during the colonial and early history of the nation. Those periods also witnessed various forms of what we now term land use regulation.[366] For instance, as conditions of obtaining or retaining title, the colonies and young states required new landown-

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ters—economic development and commercial convenience.").

Consider New York. "[T]he New York legislature passed special laws regulating lotteries; hawkers and peddlers; the firing of guns; usury; frauds; the buying and selling of offices; beggars and disorderly persons; rents and leases; firing woods; the destruction of deer; stray cattle and sheep; mines; ferries; apprentices and servants; bastards; idiots and lunatics; counselors, attorneys and solicitors; travel, labor, or play on Sunday; cursing and swearing; drunkenness; the exportation of flaxseed; gaming; the inspection of lumber; dogs; the culling of staves and heading; debtors and creditors; the quarantining of ships; sales by public auction; stock jobbing; fisheries; the inspection of flour and meal; the practice of physic and surgery; the packing and inspection of beef and pork; sole leather; strong liquors, inns, and taverns; pot and pearl ashes; poor relief; highways; and quit rents. . . . This regulatory pattern continued well into the nineteenth century." Novak, *supra* note 361, at 1076–77. And was just regulation at the state level. The state legislature granted municipalities, such as Albany, their own police powers. "An 1826 statute haphazardly lumps together some of the regulatory powers of the common council for the 'more effectual suppression of vice and immorality' and 'for preserving peace and good order.' Included are hundreds of regulatable offenses, actions, professions, and economic interests: forestalling; regrating; disorderly and gaming houses; billiard tables; combustible and dangerous materials; the use of lights and candles in livery or other stables; the construction of fireplaces, hearths, chimneys, stoves, and any other apparatus capable of causing fires; the gauging of all casks of liquids and liquors; the place and manner of selling hay, pickled and other fish; the forestalling of poultry, butter, and eggs; the purchase of wheat, corn, every kind of grain, and other articles of country produce, by 'runners'; the running of dogs; weights and measures; buildings; chimneys and chimney sweeps; roads; wharves and docks; the weighing and measuring of hay, fish, iron, cord wood, coal, grain, lime, and salt; markets; cartmen and porters; fires; highways and bridges; roof guards and railings; the selling of cakes and fruit; the paving or flagging of sidewalks; the assize and quality of bread; the running-at-large of horses, cows, or cattle; and vagrants, common mendicants, or street beggars. In addition, the legislature authorized Albany's common council 'to make all rules, by-laws, and regulations for the good order and government of the said city.'" *Id*. at 1078–79 (footnotes omitted). Colonial assemblies also subsidized some industries, such as ironworks, to encourage economic development. Moreover, even the Framers' generation may have subordinated its concerns for property in this world to its desire for a secure homestead in the next one. *See* NELSON, *supra* note 120, at 54 ("[P]roperty law in the 1760s still promoted ethical living in preference to the unrestrained pursuit of wealth."); Wood, *supra* note 82, at 242.

365. *See* Munn v. Illinois, 94 U.S. 113, 125 (1876) ("From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.").

366. *See, e.g.*, John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000) [hereinafter Hart, *Early Republic Land Use*]; John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) [hereinafter Hart, *Colonial Land Use*].

ers to inhabit, clear, cultivate, and improve their land; to fence agricultural land to corral animals; to operate mines; to drain wetlands for agricultural use; to devote riparian properties to use as mills; and so forth.[367] Some land use restrictions, such as ones governing the choice of building materials to prevent the spread of fire,[368] could be described as efforts to prevent harms to neighboring landowners or nuisances.[369] Others, such as regulations governing the siting of residences or the uniform tracting of land,[370] could be said to be early instances of what today is known as urban planning or stewardship.[371] The same type of rules applied in the new territories as well.[372]

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367. Hart, *Early Republic Land Use*, *supra* note 366, at 1107–31; Hart, *Colonial Land Use*, *supra* note 366, at 1273–82.

368. BOSSELMAN, *supra* note 130, at 83, 86; Hart, *Colonial Land Use*, *supra* note 366, at 1273 (discussing New England requirements that landowners destroy all "barberry bushes" on their property to prevent them from spreading a blight to neighboring wheat); *id.* (same, building materials restrictions adopted for fire-preventing purposes).

369. BOSSELMAN, *supra* note 130, at 83 ("Other measures, similar to present zoning ordinances, sought to locate certain noxious uses in such a manner as would render them least offensive to the local citizenry."; offering the example that some localities limited the location of slaughterhouses and denied compensation for property destroyed to prevent the spread of a fire); Hart, *Colonial Land Use*, *supra* note 366, at 1281; *see* Miller v. Schoene, 276 U.S. 272 (1928) (rejecting due process challenge to Virginia statute permitting the uncompensated destruction of red cedar trees to prevent an infectious plant disease from spreading to nearby apple orchards, regardless of whether the disease rendered the cedar trees a common law nuisance); Bowditch v. Boston, 101 U.S. 16, 18–19 (1879) ("At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. . . . In these cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity.").

370. Hart, *Colonial Land Use*, *supra* note 366, at 1275–79.

371. *Id.* at 1281–82; *see also* Hart, *Early Republic Land Use*, *supra* note 366, at 1102 ("The same variety of public welfare objectives is observable for these years [1776–1789] as for the colonial period. Aesthetic regulation of town buildings was common. Riparian land was subordinated to the policy of promoting economic development that would benefit the public. Farmers who owned wetlands were obliged by local majorities of their neighbors to have their lands drained and to contribute to the costs of drainage. Other farmers were obliged to participate in coercive fencing projects. The public interest in the development of mines and metal production was given precedence over the wishes of affected landowners. Some landowners were prohibited from selling their interests in land. And legislatures sometimes enacted statutes declaring that owners of unimproved land must improve or occupy such lands or forfeit their title.") (footnotes omitted).

372. Hart, *Early Republic Land Use*, *supra* note 366, at 1149–50 ("[D]uring that period [from 1776 to 1789] landowners were sometimes required to build urban buildings in accordance with aesthetic requirements, or to allow their land to be used for water power or mining, or to submit to invasive projects of drainage or fencing, or to face the threat of forfeiting unimproved land if they did not occupy it or cultivate it. Thus landowners' use rights were subordinated to a number of different public policies between the founding of the state governments and the adoption of the Bill of Rights. Plainly, the 'police power' at the time of the Constitution was not confined to the 'fundamental principle that every one shall so use his own as not to wrong and injure another.' Madison and his contemporaries, like earlier lawmakers, conceived of the public welfare as including much more than the

To be sure, "we have to remember that nineteenth-century government"—let alone the eighteenth century version—"was certainly in no way a leviathan."[373] The federal government did not regulate local businesses operations—no one imagined the expansion of Congress's Commerce Clause power during the twentieth century or the growth of the post-New Deal federal administrative state[374]—and at least some state or local regulations were merely paper restraints. "Two pillars of the modern state were missing: a strong tax base and a trained civil service,"[375] and the universal guarantee of a trial by jury, which, at that time, could decide both questions of fact and law, ensured that the community could refuse to convict for conduct that the community did not consider against its mores.[376] Atop that, the public was not willing to help the government take its tax dollars or regulate its property, and the Colonies adopted a more "free market" approach to governance beginning in the eighteenth century.[377] The laws regulating economic opportunity and property rights may have been written in local codes, but also may have been only a shadow as far as their implementation is concerned.

The law books indicated that "colonial society often placed the interests of the community above the economic rights of individuals."[378] Sumptuary laws

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supposedly classical concern for public health, safety, and morals.") (footnotes omitted); *id.* at 1143–47

373. FRIEDMAN, *supra* note 16, at 127. Nonetheless, that some instances of regulation are permissible does not prove that the state can always subordinate property to communal needs. *See* Epstein, *History Lean, supra* note 261, at 596 (noting that even an expansive view of the Takings Clause permits the government to regulate monopolies and common carriers).

374. That is not to say that no federal administrative state existed early in our history. One did, just not today's Brobdingnagian version. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

375. FRIEDMAN, *supra* note 16, at 127; *id.* at 128 ("State action, then, was pinched for pennies. It had to find substitutes for the tax dollars it simply did not have. Hence there was heavy use of the fee system. Wherever possible, the costs of state services were shifted to users. . . . There was no trained civil service in the modern sense. Government was not run by experts, even experts in running a government. Politics was a way to make money or use power. . . . In general, then, administration was weak and limited. Regulation tended to be local, self-sustaining—as in the fee system—and conservative in the use of staff."). State and local regulatory programs were even weaker in the Western states and territories. *Id.* at 129; *see* HALL & KARSTEN, *supra* note 20, at 41 ("Colonial economic regulation, although pervasive, was limited by the resources available to enforce compliance. It was most effective at the local level.").

376. *See* SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 48, 59 (1990).

377. *See, e.g.*, *id.* at 39, 120–25; 2 NELSON, *supra* note 350, at 56.

378. ELY, *supra* note 7, at 22; *see* FRIEDMAN, *supra* note 16, at 125–27 (discussing state or local regulations imposed to ensure food quality; to conserve fish and foodstuffs; and to protect the public health through quarantines, nuisance abatements, and fire suppression).

were only one example.[379] Reasonable regulations were permitted before the eighteenth century drew to a close.[380] "In these days, long before anybody had heard of 'free enterprise,' the proprietors, squires, and magistrates of America certainly did not hold to the mantra that the best government was the one that governed least."[381]

The bottom line, as David Schultz has noted, was that "while property was important it was not so important that it could not be regulated."[382] There was a difference between what the Colonists said in defense of their decision to break with England, or what the Framers said when discussing the principles that underlay the new government they sought to charter, and what the Colonists and Framers actually did when their hands were on the wheel. They did not translate in its entirety and without modification their philosophical and rhetorical understanding of property into the legal institution of property governed by the former colonial or new federal political institutions. Whether for reasons of economic or social necessity or practical political reality, late eighteenth-century Americans did not immunize property rights from governance.[383]

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379. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 88–89.

380. *Id.* at 97–142; WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); RAKOVE, ORIGINAL MEANINGS, *supra* note 120, at 291 ("The exercise of rights of property was subject to the supervisory authority of the state, which regulated markets, enacted sumptuary laws, granted monopoly privileges, and imposed various forms of takings through forfeiture, eminent domain, and taxation."); BILDER, *supra* note 298. The courts also upheld reasonable regulations in the nineteenth century and later. *See, e.g.*, Middleton v. Texas Power & Light Co., 249 U.S. 152, 157–63 (1919) (upholding state workers' compensation statute); *id.* at 160–61 (collecting cases to that effect); N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 208 (1917) (upholding a no-fault state workers' compensation law); Second Employers' Liability Cases, 223 U.S. 1, 50–51 (1912) (upholding congressional repeal of the fellow-servant rule); St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 295–96 (1908) (upholding a railroad safety requirement); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding over a due process challenge a state compulsory smallpox vaccination requirement); Booth v. Illinois, 184 U.S. 425, 428–29 (1902) (same, a state ban on futures contracts); Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 523 (1885) ("The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.").

381. FRIEDMAN, *supra* note 16, at 39.

382. Schultz, *supra* note 62, at 479.

383. *Id.* at 490 ("Property rights, then, while important, were not viewed as inviolable and their defense, John Locke's assertion notwithstanding, was not the singular end of government. Property was viewed as a means to an end, despite Lockean rhetoric to the contrary, and property claims were sacrificed to support republican principles and the public good. Concrete experiences of British common law, colonial and early American regulatory policies, and case law all sustained significant limits on property rights that contrasted dramatically with the political rhetoric of property during this era.") (footnote omitted).

Madison is well known for his discussion of competing "factions" in *The Federalist*,[384] but he was not the only person aware of the difficulties posed by contending economic interests. The Framers were savvy individuals, well aware of the economic rivalries present in late eighteenth-century America.[385] Those rivalries took place along various axes: coastal versus interior cities; landed and agricultural versus commercial interests; local manufacturers and artisans versus importers; and, of course, debtors versus creditors.[386] Discussions about how to reconcile the pursuit of individual self-interest with the search for the "common good" were common in the run-up to the Declaration of Independence as well as the adoption and ratification of the Constitution.[387]

Implicit in those discussions was an unavoidable conclusion that Madison himself drew in the period before the Constitutional Convention: Government had the responsibility to protect property rights, but popularly elected republican government could never fully achieve that goal.[388] The reason is twofold: (1) The majority could use its numerical superiority to transfer property from the rich to the poor, and (2) unlike religion, property and its regulation is an unavoidable component of governance in any political community.[389] A state can avoid violating a person's free exercise rights by abandoning the field to self-regulation by the members of individual faiths. That had not been the case in England or the Colonies, where the Anglican Church had been an integral part of the government ever since Henry VIII renounced serving as a vassal of the leader of the Church of Rome and established himself as the titular leader of the Church of England.[390] That combination of religion and governance, and the favoritism and discrimination it inevitably produces, was one of the reasons the English emigrated to the Colonies.[391] America, however, divorced the federal government from religion, eliminating the possibility that the government would be obliged to govern by sectarian principles or to pre-

384. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 165.

385. *See id*. at 187 (the Framers were "hard-nosed and tough-minded . . . practical men of experience and talent").

386. *See* ADAMS, *supra* note 127, at 222–23.

387. *Id.* at 222.

388. *See* RAKOVE, ORIGINAL MEANINGS, *supra* note 120, at 315–16, 332, 335; Katz, *supra* note 164, at 484–85.

389. *See* FARRAND II, *supra* note 257, at 203–04; Katz, *supra* note 164, at 485; *Madison's Observations on Jefferson's Draft of a Constitution for Virginia*, *in* 6 PAPERS OF THOMAS JEFFERSON 308, 310 (Julian P. Boyd ed., Princeton Univ. Press 1952).

390. *See* Katz, *supra* note 164, at 472 (noting that the Anglican Church had been established by law in Virginia and residents were required to attend Anglican services and contribute to the church).

391. *See id.*

fer one group of citizens over another on the basis of their faith.[392] To use a modern term, the new federal government "privatized" religion.

That option was not available to the federal government in the realm of economic policy. It was not possible to leave to debtors and creditors, or to local manufacturers and importers, for example, the responsibility to sort out their own affairs. The refusal to pick sides in that dispute would have had the effect of leaving to each state the responsibility to develop its own bankruptcy and trade laws, a chore that each state would gladly have exercised as long as it could favor its own residents over everyone else. Yet, the state economic wars waged under the Articles of Confederation was one of the major reasons the Articles had failed to consolidate the states into one nation and one of the principal justifications for revising or, as the Framers ultimately decided, abolishing that compact in favor of an new one.[393] The Framers knew that they could not leave those decisions to the states.[394] Responsible governance demanded that the new national government possess the authority to displace the states and regulate for the nation in those fields. Hence, were born the Commerce, Coinage, Bankruptcy, and Supremacy Clauses.[395]

In sum, the Colonists and new Americans certainly believed that property was essential to life, liberty, and the pursuit of happiness, but they did not also assume that property was impervious to regulation. The claim that Americans in the new nation sought to install a *laissez-faire* economy—and the ancillary claim that the Supreme Court sought to do the same early in the twentieth century via the Constitution—cannot be reconciled with seventeenth and eighteenth American history. The Colonies and states saw no inconsistency between the value that should be afforded to property and the need for reasonable regulation. Accordingly, there is no merit to the argument that the young nation treated all forms of regulation as an anathema. The Americans of that era placed a high value on property, and there were instances in which as Justice Oliver Wendell Holmes later put it, "regulation goes too far" and results in a "taking,"[396] even though title remained in the property-owner's

392. The Constitution achieved that goal through three provisions: The Religious Test Clause of Article VI bars use of any religious test as a prerequisite for holding federal office, and the First Amendment Establishment and Free Exercise Clauses forbid the federal government from establishing a national religion or penalizing an individual's choice of faith. *See* U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); *id*. amend I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

393. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979).

394. *Id.*

395. U.S. CONST. art. I, § 8, cls. 3–5; *id.* art. VI.

396. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

hands.[397] Nonetheless, the government could regulate property for the benefit of the public when the community's needs demanded it.[398]

Part of the reason why early Americans could reconcile those principles was their belief that, to be valid, regulation had to be in the public interest.[399] The Framers believed that government officials should manifest the Roman sense of civic virtue when exercising governmental authority.[400] Corruption was a "rotting of positive ideals of civic virtue and public integrity."[401] In their view, any use of government power to advance the ends of a small faction rather than to "promote the general Welfare"[402] was a corrupt exercise of that authority.[403] To them, the law was not a device for rewarding a favored interest group. It was a mechanism for protecting individual rights and for

397. *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003); Gold, *supra* note 192; Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996).

398. *See* Schultz, *supra* note 62, at 494 ("When it comes to studying early American legal history, we need to see the political discourse as creating a climate of opinion, yet the Lockean and Republican rhetoric must be viewed through the perspective of Blackstone and the law. More importantly, the rhetoric of property may even be part of the community concensus that helped define the law. According to Jack Greene, the law during the Founding era was more than simply enactments from a political superior to an inferior: 'On the contrary, in the context of British and American legal traditions, law in the 1760s and 1770s was still thought of as being "as much custom and community consensus as sovereign command.'" . . . What we have in the end then is a view of property in early America that is different depending not simply on whose rhetoric is examined. These differences are rooted in the difference between how property is approached as either a political concept or a legal institution.") (footnote omitted).

399. "The end of government being the *good* of mankind, points out its great duties: It is above all things to provide for the security, the quiet, and happy enjoyment of life, liberty, and property. There is no one act which a government can have a *right* to make that does not tend to the advancement of the security, tranquility, and prosperity of the people." ADAMS, *supra* note 127, at 217 (quoting JAMES OTIS, THE RIGHTS OF THE ENGLISH COLONIES ASSERTED AND PROVED 10–11 (1764)); *see also, e.g.*, Ellis v. Marshall, 2 Mass. 269, 276 (1807) (distinguishing between a "public act, predicated upon a view to the general good" and a "private act, obtained at the solicitation of individuals, for their private emolument, or for the improvement of their estates," with only the former being constitutional); Nelson, *Eighteenth-Century*, *supra* note 352, at 951. That is not to say that the Framers' generation did not realize that there are conflicting interests in any society. They did. They believed that a representative democracy could reconcile conflicting interests for the nation's benefit. ADAMS, *supra* note 127, at 227.

400. *See* SCOTT, *supra* note 15, at 25 (according to James Harrington, a seventeenth-century English political theorist, "a virtuous polity must . . . govern in the interest of [the] entire citizenry. A society that allowed class or personal interest to determine public policy lacked virtue and suffered from corruption."); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 32–38 (2014).

401. TEACHOUT, *supra* note 402, at 39.

402. U.S. CONST. pmbl.

403. *See* TEACHOUT, *supra* note 402, at 38.

enhancing the well-being of the community.[404] "The idea that laws should be general rather than special, and oriented toward public rather than private interests, was central to the eighteenth-century Founders' conception of valid laws as equal laws."[405] That belief undergirded the colonial and early American rules governing economic relations and property rights.[406] Accordingly,

404. *See* WOOD, *supra* note 190, at 53 ("The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution. From this goal flowed all of the Americans' exhortatory literature and all that made their ideology truly revolutionary."); *see* Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334, 334–35 (1982) (noting that "Americans believed that what made republics great or ultimately destroyed them was not the force of arms but the character and spirit of the people," that "[p]ublic virtue, as the essential prerequisite for good government, was all-important," and that "furthering the public good—the exclusive purpose of republican government—required the constant sacrifice of individual interests to the greater needs of the whole, the people"). Of course, people being people, there were exceptions. *See* MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 175 ("[Rhode Islanders] did nothing to enhance their reputation by their unorthodox views toward government, which held that government existed to facilitate (by fraudulent means if necessary) the business activities of its citizens, or by their business ethics, in which the only limits upon trickery, deception, and sharp trading were those required by a regard for future trading. [¶] All these doings earned the state the opprobrious sobriquet of Rogue's Island . . . .") (footnote omitted).

405. Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 HARV. J.L. & PUB. POL'Y 181, 182 (1997). Professor Rosen adds that "Congress and the States have the power to regulate economic liberties in the public interest, but regulations that benefit private interests are *ultra vires* and unconstitutional. This suspicion of economic 'class legislation' was of such pressing concern to the Framers and ratifiers of the original Constitution and the Civil War amendments that it is reflected throughout the text, in power-granting provisions as well as rights-reserving ones, including the Taxation Clause of Article I, Section 8; the Contracts Clause of Article I, Section 10; the Due Process and Just Compensation Clauses of the Fifth Amendment; and the Privileges or Immunities Clause, Due Process Clause, and Equal Protection Clause of the Fourteenth Amendment." *Id.* at 181. For that reason, it was settled law that the government could not take property from *A* for its or the public's use without paying *A* compensation for his loss, *see* Rosen, *supra*, at 184–85, and no government could not take property from *A* and give it *to B* regardless of whether *B* was compensated for the loss, *see, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean . . . . [A] law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."). *See also* 1 JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW 45–47 (5th ed. T. Nugent trans., 1807); 2 HUGO GROTIUS, DE JURE BELLI AC PACIS 385 (Francis W. Kelsey trans., 1925); 2 SAMUEL VON PUFENDORF, ON THE LAWS OF NATURE AND NATIONS 1070 (James Brown Scott ed., Oldfather & Oldfather trans., 1964) (1688); THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 399, 453–54 (2d Amer. ed., 1832); EMER DE VATTEL, THE LAW OF NATIONS 19 (James Brown Scott ed., C. Fenwick trans., 1916) (1758).

406. *See* Hart, *Colonial Land Use*, *supra* note 366, at 1291 ("[T]he colonial experience of land

as Professors Kermit Hall and Peter Karsten have explained:

> Economic development harmonized with a central tenet of republican theory, the idea of the public interest. Antebellum Americans did not embrace "a dogmatic laissez-faire faith. . . ." The idea of mixed economic activity . . . in which government intervenes in the private marketplace to serve the public good, better captures the law's impact on the antebellum economy than does the term "laissez-faire."[407]

To be sure, over time the nation's attitude toward property began to diverge from the one held by the Framers. To them as to Locke, there was a strong theoretical and practical linkage between liberty and property; each one was necessary fully to enjoy the other. Beginning in the eighteenth century, however, property came to be seen simply as a commodity. An important commodity because it still supplied income, but no longer an essential feature of liberty and independence. As Gordon Wood, one of the deans of early American history, has noted, "property as a source of independence and authority gave way to an entrepreneurial idea of property, as a commodity to be exchanged in the marketplace . . . ."[408] It therefore may be that, as Willi Paul Adams has concluded, "[t]he idea that property is a natural right . . . triumphed in the Glorious, the American, and the French bourgeois revolutions," only to lose its "self-evident and unquestioned character in the course of the Revolution" and, certainly, in the decades afterwards.[409]

Perhaps that transition was inevitable. Underneath the Lockean relation-

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use regulation cannot fairly be confined within the imagined boundary of nuisance control. The preferences of landowners were regularly subordinated to a vision of the public good that embraced many objectives beyond protecting health and safety. In regulating land use, the government sought benefits for the public, not just avoidance of harm. The government often acted simply to encourage a publicly preferred use of private land—to rationalize or optimize private land use. The power to regulate private land seems to have been regarded simply as part of civil government's power to legislate for the common welfare.") (footnote omitted).

407. *See* HALL & KARSTEN, *supra* note 20, at 93 (footnote and internal punctuation omitted); *accord* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956) ("not the jealous limitation of the power of the state, but the release of individual creative energy was the dominant value. Where legal regulation or compulsion might promote the greater release of individual or group energies, we had no hesitancy in making affirmative use of the law.").

408. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 330 (2009); *see also* FRIEDMAN, *supra* note 16, at 172; HORWITZ, *supra* note 120, at 31 ("As the spirit of economic development began to take hold of American society in the early years of the nineteenth century, . . . the idea of property underwent a fundamental transformation—from a static agrarian conception entitling an owner to undisturbed enjoyment to a dynamic, instrumental, and more abstract view of property that emphasized the newly paramount virtues of productive use and development."); *see also id.* 31–62.

409. ADAMS, *supra* note 127, at 187.

ship between property and liberty was an undercurrent of tension, a tension that began to emerge during the debates leading up to the Revolution and Ratification, a tension that reflected the need to address and resolve the inevitable conflict between a republic that was perfectly democratic and a nation that afforded private property absolute protection from the government. As a general matter, the Framers, as Montesquieu had warned, were troubled by the prospect that only a small republic could survive the inevitable clashes among factions for different portions of the economic pie, particularly a conflict between the haves and have-nots.[410] Classically educated men, the Framers knew from scholars such as David Hume that past republics had been riven by conflicts among factions.[411] Intensely practical men, the Framers also knew that demagogues—such as George Clinton in New York, John Hancock in Massachusetts, Samuel Chase in Maryland, and Patrick Henry in Virginia—had risen to power in numerous states.[412] The Framers' fear that a numerically superior landless majority would eventually redistribute property fueled the debates over the qualifications for suffrage and office holding and over the possible formulas and factors that could be used for the apportionment of representatives.[413] Madison and the other delegates hoped that three features of the new national government would "minimize the mischiefs" that factions could achieve.[414] The large size of the republic would make it difficult for factions to co-opt the Congress. The Supremacy Clause would help scuttle some unreasonable state laws.[415] And the states could be trusted to regulate the suffrage to prevent expropriation. Nonetheless, despite the view often expressed from the run-up to the Revolution and through Ratification of the Constitution that property rights must be protected, the Framers likely knew that they had not eliminated the tension between property and democracy and had merely kicked that can down the road to the new federal government, the

410. *See id.* at 166.

411. "James Madison and various others focused upon a feature of republics that had always been troublesome, namely, the tendency of men to divide into factions or parties and to put the interests of the parties ahead of those of the public." MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 162; *see also id.* at 162–63.

412. *See id.* at 164.

413. Such as whether that number should reflect the number of taxpayers in a district (or the amount of taxes they contributed) rather than the total population. *See* ADAMS, *supra* note 127, at 158–59.

414. MCDONALD, NOVUS ORDO SECLORUM, *supra* note 3, at 165–66.

415. *See id.* at 165. Madison had hoped to achieve that result by granting Congress a veto power over unwise state legislation, *id.* at 206, but the other delegates were unwilling to grant Congress a power that broad. The compromise result was to adopt the Supremacy Clause of Article VI, which requires the states to comply with federal law and deems invalid state laws that conflict with or frustrate the purposes of federal law. *See id*. at 275–76.

states, and the people.[416]

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Where does that leave us? With this.

History reveals that the Framers venerated property both for its own sake and as a means of guaranteeing personal independence. Property was not simply realty or personalty, but was one with liberty. The Framers' generation was familiar with local, small-scale regulation of markets and goods for the public benefit, and those members accepted the need for such regulation to serve that goal. Later generations gradually attributed far less importance to the acquisition, ownership, and use of property as a legitimate goal for individuals and as the ideal and principal means of promoting social welfare, and far greater importance to the need for regulation to protect the public. Whether property should have fallen as far as it has, however, is a different matter, one that deserves its own separate treatment.

V. CONCLUSION

The Supreme Court treats "property" as "a poor relation,"[417] deserving of far less protection than "life" or "liberty" receive. The Framers, however, did not see it that way. They believed that neither liberty nor property could exist without the other. That belief, moreover, was nothing new to any eighteenth-century English subject, whether he lived in London or Williamsburg. Anglo-American traditions, customs, and law held that property was an essential ingredient of the liberty that the Colonists had come to enjoy from Massachusetts through Georgia and must be protected against arbitrary governmental interference. The Supreme Court has forgotten the status that property had for the Framers. Reminding the Court may help lift property out of the basement to which it has been relegated.

416. *See* ADAMS, *supra* note 127, at 158–59.

417. Dolan v. Tigard, 512 U.S. 374, 392 (1994).