

CHAPTER FIVE

Will Property Rights Be Preserved?

Let the people have property and they will have power—a power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges.

Noah Webster,
The Founder's Constitution

OUR EXAMPLES featuring children at the beginning of each chapter illustrate the importance of rules to civil play. For board games, written rules become a type of constitution that governs play. When children are inventing a game as they play it, they hammer out new rules as disputes arise. They have to work together to decide what rules are fair, and they may ultimately have to appeal to the “supreme court,” in the form of parents. When children cannot agree on the rules, their play may break down completely, in which case they disband and lose the value of play. Such negative-sum results give children an incentive to find ways to cooperate. Ultimately, even if rules are written and clear, co-

operation depends on a shared set of values about what is right and what is fair.

So it is with the future of property rights in a civil society. No matter how well specified the property rights, anarchy may prevail if people do not share a belief in the property rights system. As we will see, constitutions, federalism, and common law all contribute to the sanctity of property rights, but ultimately, adherence to the rules requires that the populace believes in limited government and respects the rights of others.

From Defense to Erosion

In each of the two freedom indexes mentioned in chapter 2, the United States ranks high, although not at the top. The United States is currently ranked number four in the Heritage Foundation's 2002 index and three in the Gwartney and Lawson 2002 index. The United States enjoys considerable security of property rights, especially when compared with other countries around the world. But compared with the sanctity of property rights at the time of the nation's founding, erosion has undoubtedly occurred.

The Founding Fathers took seriously their business of preserving liberty through the protection of property rights (see Anderson and Hill 1980 for a more complete discussion of what follows). As Irving Kristol (1975, 39) put it, the political activity unleashed by the Revolution "took the form of constitution-making, above all." In their debates over ratification of the Constitution, the Federalists recognized that "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." They were clear in the Fifth Amendment of the Bill of Rights that no person should "be deprived of life, liberty, or property without due process of law."

With the Constitution ratified, the next step was implementation and interpretation, which again reflected the founders' belief that protecting property rights was paramount to the success of their experiment. No other justice of the Supreme Court has been more forceful in protecting property rights than Chief Justice John Marshall. Using the contract clause, the commerce clause, and the Fifth Amendment, he continually fortified barriers against takings. In his dissent in *Ogden v. Saunders* 25 U.S. 213 (1827), the only case in which he was in the minority, Marshall revealed his Lockean values and defended the right to contract on the grounds that it "results from the right which every man retains, to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought to it." The Constitution's protection of property rights for the seventy-five years after ratification led historian James Willard Hurst to characterize the period as a "release of energy."

By the last quarter of the nineteenth century, however, the barriers erected by the Founding Fathers in the Constitution and Bill of Rights were beginning to break down. Much of the erosion came in the form of regulations found to be constitutional as long as they were "reasonable" and in the "public interest"—two vague terms that gave regulators substantial latitude. In a dissenting opinion in one of the most famous regulation cases, *Munn v. Illinois* 94 U.S. 113 (1877), Associate Justice Stephen Field said, "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of the majority of its legislature." Historian John W. Burgess (1923) concluded that until the end of the nineteenth century, constitutional interpretations "had been an almost unbroken march in the direction of more and more perfect individ-

ual liberty and immunity against the powers of government, and a more and more complete and efficient organization and operation of sovereignty back of both government and defining and guaranteeing individual liberty.” Thereafter, however, he believed that the movement had been “in the contrary direction, until now there remains hardly an individual immunity against governmental power which may not be set aside by government, at its own will and discretion, with or without reason, as government itself may determine.”

Modern Breakdown

One area in which the breakdown of property rights has accelerated over the past fifty years is environmental regulations. The Endangered Species Act (ESA) of 1973, for example, specifically precluded the taking of a listed species, meaning intentionally shooting, trapping, or harming an endangered animal or harvesting an endangered plant. Because ownership of wild animals in the United States has always resided with federal and state governments, few questioned these regulations in the beginning. The word *harm*, however, was interpreted by the U.S. Fish and Wildlife Service to include habitat modification on private and public lands, and through court rulings, harm was defined more and more broadly. Eventually, habitat modification that did not harm a specific animal or plant but had the potential to do so was interpreted to constitute a taking of an endangered species and therefore caused the land to be subject to regulation.

Not surprisingly, *habitat* became a word that landowners dreaded hearing. Listed species on private land brought with them the prospect of financial penalties and restrictions on land use. A family in Riverside County, California, for example, was denied the right to plough its land and was threatened with a fine of \$50,000 and a year in prison if it did so because the area was

habitat for the endangered kangaroo rat. In another case, landowner Ben Cone was prevented from harvesting old growth pine on his property because it was home to the red-cockaded woodpeckers. As a result of the regulation, Cone began harvesting trees at forty years of age rather than eighty in order to preclude the trees from growing old enough to provide woodpecker habitat. Because landowners consider regulations under the Endangered Species Act to be takings, such regulations create perverse incentives that pit landowners against species. As the landowner in the Riverside County example put it, the regulations “have placed ourselves and the species and habitats in adversarial roles” (Bethell 1998, 305).

Wetlands legislation serves as another example of an environmental measure that sparked a nationwide movement to protest against government encroachments on private uses of property. The Clean Water Act of 1972 was stretched to cover mudflats, prairie potholes, and large puddles. Eventually, lands could be classified as wetlands even if they were dry for 365 days of the year. Federal jurisdiction, according to Bethell, “was claimed in ways that could have been written by the satirist of *Saturday Night Live*. Prairie potholes could affect interstate commerce, it was argued, because geese flying from one state to another could glance down and spot a waterhole—the ‘glancing geese’ test” (Bethell 1998, 306). Law-abiding citizens could be sent to jail for filling in ditches on their own land.

An additional area where regulation went wild was in urban renewal projects. Throughout the 1950s and 1960s, federal financing provided the means to condemn hundreds of “slum” neighborhoods across the country, then resell the land at bargain prices to private developers. Those who were being forced out of their neighborhoods were to be relocated to “safe and sanitary housing.” The regulation ended up destroying five times as many low-income housing units as it created, and in the end the blight

was far worse than what had originally existed. *Time* magazine acknowledged in 1987 that urban renewal was a “well-intended and wrong-headed federal mission” that had the effect of tearing down “densely interwoven neighborhoods of nineteenth- and early-twentieth-century low-rise buildings and putting up expensive, charmless clots of high-rises. Or even worse, leaving empty tracts” (quoted in Bethell 1998, 300). Urban renewal regulation replaced property rights with political control. What the regulators didn’t realize was that all along it was property rights that protected poor neighborhoods through the direct incentive of private property owners to ensure that their properties are well maintained for potential buyers. Private owners will always have the motivation to manage property better than a room full of urban planners. The unsuccessful program was discontinued in 1973. The most important consequence of these regulatory contrivances has been a new push to rebuild the barriers to property rights.

Rebuilding the Barriers

From the Magna Carta to the present, people have struggled to create governments that are strong enough to protect property rights, but that are prevented from taking property rights without due process and just compensation. The challenge we continue to face is little different from that of the Founding Fathers—namely, how can property rights be protected from taking by individuals and by government? To rebuild the barriers against property rights takings, we must resurrect constitutional limitations, encourage federalism that devolves governmental authority to lower levels that are more accountable, and rely more on common law than on regulations for resolving property rights questions.

Resurrecting Constitutional Barriers

Prior to ratification of the U.S. Constitution, many states frequently violated citizens' property rights by authorizing such projects as the building of roads across private property without compensating the owner (Siegan 2001). In order to protect liberties, specific restraints on federal and state powers were created in the Constitution. The value of property rights was well understood by the framers, who viewed property rights as undeniable rights of human beings that are critical to maintaining life, liberty, and the pursuit of happiness. Consequently, they created the Fifth Amendment as the primary barrier for the protection of property rights.

Bruce Yandle (1995, xii) has described the Fifth Amendment to the U.S. Constitution as America's chief property rights wall. This wall preserves resources and allows government and liberty to coexist while enabling a society to prosper and flourish. In order to keep this wall from crumbling, however, new mortar must be applied when cracks appear. Property rights advocates often look to the courts to act as the mortar. In many ways, according to Yandle, "property rights advocates are calling for a modern-day Magna Carta." Once again, ordinary people are seeking to contain government. But instead of having to settle differences with picks and swords, the struggle resides in the courts and legislative bodies (Yandle 1995, xi).

The primary protection of property rights in the United States rests on the interpretation of the Constitution by the courts. Heavy regulations throughout the 1970s, such as the ESA, sparked a nationwide movement of protest against government encroachment on private uses of land, which included a shift by the Supreme Court toward greater protection of property rights. Consider two landmark cases, *Lucas v. South Carolina Coastal Council*

505 U.S. 1003 (1992) and *Dolan v. City of Tigard* 512 U.S. 687 (1994). Petitioner Lucas bought two residential lots on a South Carolina barrier island for nearly \$1 million, intending to build homes similar to those on the adjacent parcels of land. Two years after Lucas purchased the lots, the state legislature enacted the Beachfront Management Act, which barred Lucas from building on his parcels. He filed suit, contending that the ban on construction deprived him of all “economically viable use” of his property and therefore effected a taking under the Fifth and Fourteenth Amendments. The Supreme Court decided in favor of Lucas, and the Coastal Council eventually paid Lucas \$1.5 million for his property.

The Dolan case involved the owner of a plumbing supply business in Oregon. City authorities refused to allow the owner to enlarge her store unless she set aside 10 percent of her land for use as a bicycle path and a greenway. The Supreme Court ruled that the town should have purchased the land rather than held it hostage. Both of these cases helped reverse a trend developing since the 1930s of approving various government infringements on the rights of individuals in the name of the public interest. In these cases, the Supreme Court helped place property rights back on the same level with the individual rights protected by the First Amendment (Pipes 1999, 252).

Fortifying Federalism

Court decisions are not the only way to protect property rights and keep government from roaming too far from its Constitutional borders; government can be reined in by reinforcing the concept of federalism. President Reagan (Executive Order 12612, 1987) defined federalism by saying it “is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.” As Bruce Yandle (2001b)

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explains, “Federalism and property go hand in hand” because federalism delegates authority for producing public goods to the most efficient level of government. For example, if noise levels from one person adversely affect the peace and quiet of another, the conflict can be dealt with by local government to the extent that the noise in question does not spill over to residents of other governmental jurisdictions. Hence, noise ordinances are typically implemented by city councils. However, because the noise from jet aircraft taking off and landing is not confined to the airport and its immediate vicinity, noise standards may be dealt with at a higher level of government, such as county or state.

Economist David Haddock (1997, 16–17) summarizes how we can think about the optimal level of federalism. There are benefits to centralizing governmental functions. These include taking advantage of scale economies, enforcing property rights against other citizens and noncitizens, and bringing all third-party effects (for example, air, water, and noise pollution) under a single regulatory unit. But “pointing to the benefits while ignoring concurrent costs is inappropriate, for ideal regulation would maximize net rather than gross benefits.” In other words, we should consider how large the scale economies are and how widespread the third-party effects are. It is entirely possible that capturing the benefits of either of these will be exhausted before regulation becomes national. Moreover, there are the costs of monitoring regulatory performance, which grow, perhaps exponentially, as we move from local to state to national regulation. Haddock concludes that “Many of the gross benefits could be preserved through properly devolved regulations, while substantial costs could be avoided.”

Efficiency in governmental action promoted by accountability is another benefit of federalism. With administrative actions delegated to the lowest political denominator, a connection between

benefits and costs of governmental procedures is more transparent. This in turn helps limit the size and scope of government.

Consider the decision of a governmental body to obtain land for a public park. The taking power of the government allows it to condemn the property and pay just compensation, but is this worth doing? If the benefits from the public park accrue to the local community and if payment for the property must come from local taxes, decision makers will have more incentive to carefully weigh the benefits and costs of providing the park. Suppose, however, that the local park is provided by a higher level of government that can diffuse the costs of paying for the land over a wider group of citizens, many of whom get no benefits from the park. In this scenario, local interest groups have an incentive to lobby for more parks than they otherwise would because they do not bear all the cost. Moreover, if the costs are sufficiently diffused, the taxpayer will likely be poorly informed about the costs and benefits. If so, it is more likely that the government will convert private to public property when the benefits of doing so may not warrant it (see Epstein 2003).

When made at the local level, governmental decisions to acquire property rights are further constrained by the ability of people to “vote with their feet” (see Fischel 2003). If a community takes property without compensation or even raises taxes to pay for acquiring property that is not worth the costs, citizens can move to communities that more carefully weigh benefits and costs. If the acquisition (with or without compensation) is done at higher levels of government, however, the citizen who believes that the government is not being fiscally responsible has few options. In other words, as the potential for voting with one’s feet declines, the potential for taking and for inefficient acquisitions increases. Communist countries surrounded by fences during the Cold War provide an example of what can happen when federalism is dis-

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allowed and migration is restricted. In this setting the potential for taking property and freedom is virtually without limit.

Relying More on Common Law

In chapter 3, we discussed the evolution of property rights, noting that people facing the tragedy of the commons have an incentive to escape the tragedy by defining and enforcing property rights. Hence, cattlemen formed associations to limit grazing on the open range, miners and farmers established water rights to allocate the precious resources in the arid West, and lobster fishers used local associations to limit entry into the fishery. In each of these cases, the potential for an efficient evolution of property rights was driven by the the players' having a stake in finding a workable solution to the commons problem.

Though examples of these types of private definition and enforcement efforts are less prevalent today, common law provides a way for property rights to evolve from the bottom up. Common law is judge-made law, which exists and applies to a group on the basis of historical legal precedents developed over hundreds of years. Common law resolves disputes between competing users of a resource who bring their contested uses before a court. For example, if one person dumps her effluent into a stream from which another person takes his domestic and livestock water, there is a conflict over which party has the right to use the stream for his or her respective purpose. Either the two parties must bargain out of court to resolve their differences or go to court for resolution. In court, each party will try to make the case that it has the right to use the stream for its particular use and that the violation of rights caused it harm. Whenever possible, the court will rely on precedent to give continuity to the evolution process and in reaching a decision will establish further precedent for who has what right.

Consider the case in New York of *Whalen v. Union Bag & Paper Co.* 208 NY 1 (Ct.App., NY 1913). A new pulp mill that created hundreds of jobs polluted a creek used by Whalen, a downstream farmer. The court awarded damages to Whalen and granted an injunction against Union Bag to stop the damage-causing pollution within a year. In its ruling, the court emphasized that Whalen had property rights that could not be violated and that there was precedent for enforcing his rights. In its decision, the court found that

The fact that the appellant has expended a large sum of money in the construction of its plant, and that it conducts its business in a careful manner and without malice, can make no difference in its rights to the stream. Before locating the plant, the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion, or corruption

Such rulings were typical of common law courts resolving property rights disputes and provided precedent upon which future users of streams could decide whether they could conduct their business “without injury to their neighbors.” Karol Ceplo and Bruce Yandle (1997, 246) conclude that resolving property rights disputes in this way “meant there was no excuse for uninvited pollution that significantly reduced water quality. To avoid water rights litigation, polluters could have contracted with riparian rights from downstream landowners or bought all the land along the stream. This was, in fact, common practice.”

Because litigation is a negative-sum game in which one party’s loss is the other party’s gain and both parties to the dispute will bear costs in the fight, each has an incentive to minimize the cost of settlement (see Haddock 2003). For this reason, a majority of disputes are settled out of court. When disputes do go to court, it

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is because the rights are so unclear that both parties believe they have a strong case that their rights were violated.

The common law process has several benefits with regard to protecting property rights, as Yandle notes:

[T]he common law emerges on a case-by-case basis from real controversies adjudicated by common law judges. Common law evolves in a small-numbers setting. Through judges' traditional use of precedents in deciding cases, the law is generalized to a large number. . . . The common law process is continuous; an opportunity for modification and the introduction of new knowledge is afforded each time a common law judge writes an opinion. (2001b, 11)

In short, the common law approach to the evolution of property rights provides continuity, precedent, stability, and efficiency.

Contrast the common law approach to resolving conflicts over property rights with the statutory or regulatory approach. The statutory approach has two types of costs. First, regulations seldom promote efficiency because neither the costs nor the benefits are borne directly by the parties contesting resource use. Return to the zoning example. If one individual or group can down-zone another individual's property and if the down-zoned property owner has no recourse (either compensation or voting with his feet), there is little reason to expect that the reduced value of the down-zoned property is offset by the increased value of the other property. In other words, zoning regulations offer the potential of a free lunch for some at the expense of others, and if people can get free lunches, they have no incentive to ask whether the meal is worth the cost.

Second, regulations cause rent seeking. Recall that rent seeking refers to the time and money that individuals or groups invest in the political process to prevent their property from being taken or to get someone else's property redistributed to the rent seeker. Because the regulatory approach puts property rights up for grabs,

it encourages the same type of race that resulted from homesteading. As we saw in the case of the homestead acts, there was more effort expended in wasteful rent seeking when the process of defining and enforcing property rights process was dictated from the top down. People who fear that their property rights will be taken through regulations will invest in protecting their rights, and people who think they can get those rights will invest in trying to influence the regulations in their favor.

Decisions about the use of public lands illustrate the rent-seeking costs inherent in the regulatory process. Traditionally, federal lands have been used for commodity production such as logging, grazing, and mining. As the demand for amenity values has risen since the 1970s, however, environmental groups have lobbied to get federal lands managed for their purposes. In many instances, this has resulted in a management gridlock (Anderson 1997). Environmental regulations generally, including endangered species, clean air, clean water, and land use policy, illustrate how pervasive regulatory rent seeking can be (Anderson 2000). As Jonathan Adler (2000, 25) states, “As long as environmental decisions made in Washington have the potential to reallocate billions of dollars from one set of interests to another, those interests will be sure that they have their say.” To make matters worse, the billions of dollars are continually put up for grabs, in each legislative session, adding to the rent-seeking cost and making property rights all the less secure.

Beyond Formal Barriers

Although institutional barriers such as constitutions, federalism, and common law are the bulwark of property rights protection, these formal institutions have little effect if people do not believe in limited government and the sanctity of property rights. All of the written rules that one can imagine will not thwart powerful

leaders and their followers from usurping legitimate rights. Indeed, property rights institutions were generally cast aside during the hundred-year experiment with communism. And President Mugabe's tyrannical reign in Zimbabwe, as noted previously, provides a classic case of a leader supposedly elected in a democratic vote and constrained by a constitution that explicitly protects property rights riding roughshod over private property owners. Explicit rules protecting property rights may be a necessary condition for preserving their sanctity, but such rules are not sufficient in and of themselves.

Ultimately, protecting property rights requires a populace that understands the importance of this institution, that recognizes that limited government is a necessary condition for protecting private ownership, and that is willing to elect political agents who are willing to defend property rights. This understanding has waxed and waned since the drafting of the Constitution.

One indication that an appreciation of property rights is currently on the rise is the number of states enacting laws to protect private property rights. In 2001, twenty-three states had passed laws requiring their governments to assess whether governmental actions constituted a taking of property rights and to compensate when this was the case. Even at the national level, Congress has considered various bills that would require assessments and compensation similar to state laws. None of the national bills have passed, but the fact that they are being considered is evidence of a heightened awareness of the current fragility of property rights.

Some developing countries are also showing signs of implementing the lessons of property rights. Examples include: the creation of land titles for farmers in Thailand, which has led to reduced forest destruction; the assignment of property titles to slum-dwellers in Indonesia, which has tripled investment in sanitation facilities; and the establishment of a security of tenure for farmers in Kenya, which has dramatically reduced soil erosion.

Furthermore, a plethora of recent cases has illustrated the point that local institutions will have a greater sense of responsibility for stewardship. Decentralization of management responsibilities to local groups or private parties, such as the forest user groups in Nepal, has resulted in rehabilitation of degraded lands, planting of new forests, and improved forest management efforts. Effective and lasting methods are being devised all over the world to maintain sustainable resource flows. The mechanisms share the critical features of clear ownership rights and responsibilities, which introduce the economic incentives for stakeholders to create and implement solutions that are sustainable over the long term.

Conclusion

Many of the most important conflicts among today's political systems are over property. How much property can the state tax or take away? Should individuals be able to accumulate wealth without limit, or should estate taxes control the amount that can be accumulated and passed on? What counts as intellectual property? These types of questions provoke important philosophic, legal, and political debate, on which we have touched. We have presented some of the basic intellectual foundations regarding what property rights are, how they work, how they evolve, and how they can be protected.

In the end, the sanctity of property rights depends on a populace committed to a limited, decentralized government and to respecting the rights of others. We have made great progress over the past fifty years in guaranteeing civil rights, but we have failed to make the connection between civil rights and property rights. The former can only exist if the latter are secure. As the court declared in *Lynch v. Household Finance Corp.* 405 U.S. 538 (1972): "Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right

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to liberty, and the personal right in property. Neither could have meaning without the other.” Property rights are civil rights. Only through vigorous protection of property rights can we maintain a truly free and just society.

John Adams (*A Defense of the American Constitutions*, 1787) claimed that “[t]he moment that 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. Property must be sacred or liberty cannot exist.” The rise in the number of laws explicitly requiring government to assess the impacts of its regulations on private property and to compensate is a good sign. But explicit laws will only be effective if we have the will to defend property rights. With that will also come freedom and prosperity.