Private Property and Government Under the Constitution

Modern Intellectuals Do Not Take Private Property Seriously

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The economic concept of private property refers to the rights owners have to the exclusive use and disposal of a physical object. Property is not a table, a chair, or an acre of land. It is the bundle of rights which the owner is entitled to employ those objects. The alternative (collectivist) view is that private property consists merely of a legal deed to an object with the use and disposal of the object subject to the whims and mercies of the state. Under this latter view, the state retains ownership and may at any time regulate or even repossess the property it temporarily cedes to individuals.

The Founding Fathers upheld the economic view of property. They believed that private property ownership, as defined under common law, pre-existed government. The state and federal governments were the mere contractual agents of the people, not sovereign lords over them. All rights, not specifically delegated to the government, remained with the people–including the common-law provisions of private property. Consequently, the constitutional rights regarding free speech, freedom of religion, the right of assembly, and private property rights are all claims that individuals may hold and exercise against the government itself. In brief, private property refers to the rights of owners to use their possessions which are enforceable against all nonowners–even the government.

The Economic Concept of Ownership

"We may speak of a person owning land and using it as a factor of production," writes Nobel laureate Ronald Coase in his essay on "The Problem of Social Cost," "but what the owner in fact possesses is the right to perform certain (physical) actions." These "rights to perform physical actions," called private property, constitute the real factors of production and the real articles of trade. Legal title itself means nothing. At best, a title or deed amounts to proof of ownership, not the rights inherent in ownership.

Many people confuse the economic concept of ownership with the mere holding of legal title. Often, title and ownership coincide, but not necessarily. Sometimes businesses lease equipment from manufacturers under circumstances which transfer all of the meaningful rights of ownership to the lessee while title remains with the manufacturer. Here are two examples: if a lease approximates the useful life of the equipment or if the lease itself contains an option to buy the equipment outright for a nominal sum. In both cases the lease transfers ownership in the true economic meaning of rights to employ the equipment without actually changing title. Proper accounting principles, in such cases, require the lessee to record the equipment on its books as an asset and the lease itself

becomes a method of financing the purchase. The manufacturer although still retaining title to the equipment no longer “owns” the property and, accordingly, should not include it as an asset.

In other cases, the “bundle of rights” to use an object may be separated and sold apart from the title. Once again, here are two examples: landowners may lease property for a specified period of time while retaining the residual rights to the land upon termination of the contract or the same landowner may sell only the mineral rights, while retaining title along with most of the “sticks” in the property rights bundle. The validity of these contracts implies that ownership refers to the many legitimate uses and disposal of things, rather than title to the object itself.

The economic view of property consisting of primarily actions, rather than things, is also compatible with intellectual property, such as copyrights and patents. The right to publish a book or construct a machine may be reserved to the author/inventor. These species of private property do not refer to any specific objects at all, but are legitimate articles of property nonetheless.

The Common Law Boundaries of Private Property

The British common law has established the legal limits to property rights through case precedents, reflecting the practical needs of trade long before the North American colonies even existed. The common law provided a clear picture of ownership to the Founding Fathers.

The common law has three pillars: private property, tort liability, and the law of contract. Property and tort liability are inexorably intertwined. No one has a right to infringe upon the legitimate rights of others.

If one uses his possessions to create a health hazard or nuisance to others, he is fully liable for damages. In some instances, an injunction may even prevent an unlawful action before it causes damages to others. The very boundaries of private property are defined by common law liabilities. For

example, if Mr. A erects a six-foot fence at the border of his land and this fence blocks the sunlight to Ms. B's garden, does Ms. B have a common law right to access the sunlight? If so, she would have a claim under tort law. If not, Mr. A may construct the fence and Ms. B either relocates her garden or persuades or compensates Mr. A to move his fence away from the established boundary. The point is that a reasonable and efficient result should occur under either rule. What is important is for the liability limits to property be well-established and clearly defined. After many case precedents the common law courts begin to sharply define the boundaries of private property. Owners may then negotiate, mutually reaching an arrangement, without going to battle in court over a legal ambiguity or seeking a new statute.

The "bundle of rights" we call private property comprise the subject matter for all contracts. Every time goods exchange hands, land is purchased, and an employment contract is signed, "bundles of rights" to resources are exchanged. All commerce, and the prosperity which it generates, depend upon the security and certainty of property rights. If an urban area has a notorious high crime rate, local businesses will tend either to relocate or increase prices. If the courts do not establish consistent liability rules, then litigation costs increase and the basis for agreements is undercut. If the legislature threatens to regulate business, then potential competitors may be frightened away. If the potential uses to which property may be employed are subject to regulation by a governmental body, then the value of property declines. Men like James Madison and Alexander Hamilton understood that prosperity depends upon the security and certainty of property rights and designed the Constitution accordingly.

The common law does evolve slowly to reflect changes in both technology and social mores, but it provides a stable set of rules of conduct. Moreover the common people on juries decide common law cases, not kings, not legislatures. This establishes an important rule-making authority outside of any centralized government.

The English Whigs on Property and Government

Our American forefathers did not develop their political theories in an intellectual vacuum. More than a century before the American Revolution, a Civil War raged in Britain. It pitted the Monarchy against Parliament. Among the opponents of the Monarchy were the seventeenth-century English Whigs. Over the course of a few decades, English Whig intellectuals expounded their theories about property and government. These thinkers, including John Locke, Algernon Sidney, and Thomas Gordon, taught America's founders much about property and government.1

Prior to the rise of the English Whigs, the "divine right of kings" had held that all rights, liberties, and properties actually belonged to the king. The king merely permitted his subjects to use their possessions. The king, however, might regulate the use or even seize these possessions outright at his whim. The people had no claims or rights which could be exercised against the sovereign. Their possessions were at the mercy of the government.

By contrast, the English Whigs believed that the fountainhead for all rights was the sanctity of the individual, not the divinity of the state. John Locke contended that human rights were "natural rights" which pre-existed government. The original owners of the land were the real sovereigns, not the king. Remember the old English saying, "A man's house is his castle and every man is king." Owners, however, might consent to give up a small part of their liberty and property to government in order to institute criminal law and national defense and to perform certain other specifically delegated tasks. Legitimate government is formed by contract and may never acquire more rights than delegated by the property owners who institute it. The authorities must never exceed their narrow constitutionally delegated authority–lest they become despotic.

According to the Whig view, legitimate government is an agent, a servant, a mere convenience charged with certain specific tasks. Moreover, even elected governments tend to become despotic as the British Parliamentary experience illustrated. Most of the descriptions of political

power during colonial times were negative. Thomas Gordon discussed the issues of the day in Cato's Letters. Power was often shown as a "clutching grasping hand" or described as a "cancer that eats away at the body public."

It is also relevant that the Whigs expressed all rights in terms of property. Each man owned his own person and labor. Slaveholders were condemned as man-stealers, the lowest sort of thief who stole the whole person, not merely part of his labor. Whenever the Whigs argued for freedom of religion, the teachers of our forefathers referred to "property in one's conscience." When they opposed Sabbatarian laws, prohibiting certain activities on Sunday, they referred to "property in one's time." The Whig view equated property and liberty, once again reflecting the economic concept that property refers primarily to freedoms to act.

The Founders and Framers on Property and Government

The best way to examine the importance of private property to our forefathers and its place under the law is to study the words of the founders and framers themselves: men like Thomas Jefferson, James Madison, and Alexander Hamilton. In the passage below Jefferson argues that the colonial landholdings had always been held free and clear of the British crown. Throughout American colonial experience, the British crown exacted a small fee called a quit-rent upon all landholders. The quit-rent often went uncollected and never raised much revenue, but it remained on the books as a legal assertion that all land titles were held subject to the crown. In 1774, Jefferson disputed this kingly claim. Jefferson's reasoning gave historical teeth to the Whig view that sovereignty belongs to individuals and that property pre-exists government. Therefore the United States government formed two years later would be established by free men, not serfs. Neither could the new government claim to be the recipient of any superior monarchial rights or claims to private landholdings. According to Jefferson:

> That we shall at this time also take notice of an error in the nature of our landholdings, which crept in at a very early period of our settlement. The introduction of the feudal tenures into the kingdom of England, though ancient, is well enough understood to set this matter in its proper light. In the earlier ages of the Saxon settlement feudal holdings were certainly altogether unknown, and very few, if any, had been introduced at the time of the Norman conquest. Our Saxon ancestors held their lands, as they did their personal property, in absolute dominion, disencumbered with any superior. . . . William the Conqueror first introduced that system [feudalism] generally. The lands which had belonged to those who fell at the battle of Hastings, and in the subsequent insurrections of his reign, formed a considerable proportion of the lands of the whole kingdom. These he granted out, subject to feudal duties, as did he also those of a great number of his new subjects, who by persuasions or threats were induced to surrender then for that purpose. But still much of the land was left in the hands of his Saxon subjects, held of no superior, and not subject to feudal conditions. . . . A general principle indeed was introduced that "all lands in England were held either mediately or immediately of the crown": but thus was borrowed from those holdings which were truly feudal, and applied to others for the purposes of illustration. Feudal holdings were therefore but exceptions out of the Saxon laws of possession, under which all lands were held in absolute right. These therefore still form the basis of the common law, to prevail whenever the exceptions have not taken place. America was not conquered by William the Norman, nor its lands surrendered to him or any of his successors. Possessions are undoubtedly of the [absolute disencumbered] nature. Our ancestors however, were laborers, not lawyers. The fictitious principle that all lands belong originally to the king, that they were early persuaded to believe real, and accordingly took grants of their own lands from the crown. And while the crown continued to grant for small sums and on reasonable rents, there was no inducement to arrest the error.2

In *The Federalist Papers*, James Madison and others argued that the proposed U.S. Constitution would protect the liberty and property of the citizens from usurpations of power from the federal government.

Power in the new government was to be divided into three branches: legislative, executive, and judicial. This would create a system of checks and balances necessary to hinder the unwarranted expansion of political power. The division of power would also make it more difficult for a majority to oppress a political minority and political stability would more likely result. In the following passage James Madison discusses the problems of "mutable policy" (governmental activism). Madison believed that the new Constitution would establish a consistent, stable set of laws necessary to promote prosperity. Otherwise, he warned:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the monied few over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said with some truth that the laws are made for the few, not the many.

In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend upon a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans will be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim of inconsistent government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady stream of national policy.3

Alexander Hamilton contended that the new federal Constitution would protect private property and liberty from abuses arising at the state level. Between the end of the Revolutionary War in 1781 and the ratification of the Constitution in 1788 state governments faced debtor uprisings, such as Shays' Rebellion.

State legislatures sometimes granted debt relief or "stays" on the payments of debts. Hamilton believed the proposed Constitution had "precautions against the repetition of those practices on the part of the State governments which have undermined the foundations of property and credit."4 He referred to Article I section 10 of the Constitution which explicitly protects creditors by forbidding states to pass laws "impairing the obligation of contract" or even devaluing debt obligations by making "any thing but gold and silver a tender in payment of debts."

The "impairment of contract" clause remains effective today. New state laws affecting long-standing agreements may only alter future contracts, not existing ones. This protects interstate commerce, such as insurance and banking, from potential abuses by state and local politicians who may be tempted to rewrite contracts to redistribute income from outsiders to local constituents.

In the body of the Constitution, Article I sections 9 and 10, also expressly forbids both federal and state governments to grant titles of nobility. This prohibits the establishment of a formal, hereditary class in the United States. In England, the titles "Prince," "Duke," and "Earl" consisted of much more than a prefix to a name. Nobility also laid feudal claim to the land held by the common people. Feudal titles, such as Prince of Wales and Duke of York, pretend ownership to the entire realm, subordinating the rights of the landholdings of commoners. America's framers hated the European class system and the feudal pretense to the land that it represented. The United States are forbidden to ever establish feudal land tenures to lands because sovereign landholdings are essential to a free "Republican form of government."

The U.S. Constitution contained a number of flaws, most notably, the official sanctioning of slavery. Nor did the Constitutional framers advocate laissez-faire capitalism. Some of the framers, including Alexander Hamilton, believed that the government should actively encourage economic growth through protective tariffs. Nonetheless, the framers all held private property in high esteem. Indeed, commercial prosperity seems to be the chief end of good government to them. The economic system under the Constitution is capitalism with a very few specific exceptions explicitly delegating limited powers to Congress, i.e., coin money, establish a Post Office, lay customs duties, etc. James Madison summarized, "The powers delegated to the federal government are few and defined."5

The Bill of Rights on Private Property

Many people were fearful that the Constitution still concentrated too much power in the hands of the federal government. The electorate in key states insisted upon a "Bill of Rights" lest they would reject the proposed Constitution.

These amendments soon became incorporated into the new Constitution. Six of these ten amendments pertain either directly or indirectly to private property rights.

The Third Amendment states, “No soldier shall in times of peace be quartered in any house, without consent of the owner, nor in times of war, but in a manner prescribed by law.” This amendment grew out of abuses by the British, who had forced people to allow troops into their homes. The amendment clearly protects the rights of homeowners, but is too specific for wider applications.

The Fourth Amendment includes the clause, “The rights of people to be secure in their persons, houses, and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause . . .” The “search and seizure” clause has been interpreted to pertain primarily to criminal cases, but the stated intent of this statement is to make people secure in their persons and possessions. In civil cases law enforcement officials presently are able to seize property without a warrant and place the burden of proof upon the owner to show that he did not commit a crime. In fact, some local governments now use civil seizures to supplement their budgets.

The Seventh Amendment requires that for civil cases in federal courts, “no fact tried by a jury, shall be otherwise re-examined in any court of the United States than according to common law.” The common law, as we have seen, rests upon three pillars, including private property rights. This indirect recognition of private property only protects individual owners against other private parties. These common law property claims become enforceable against the federal government under the Ninth and Tenth Amendments.

Amendment Nine states, “The enumeration of certain rights, shall not be construed to deny or disparage others retained by the people.” Amendment Ten further stipulates, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states are

reserved to the states and the people." The original intent of the "enumeration" and the "reservation" clauses clearly reaffirm the contract theory of government held by John Locke and James Madison alike. All "powers not delegated to the federal government" includes any and all private property rights described under the common law. Historically, however, U.S. courts have never used the "reservation" clause to decide important cases.

The most explicit recognition of private property comes in the Fifth Amendment which states "Nor shall [anyone] be deprived of life, liberty, or property without due process of law; Nor shall private property be taken for public use without just compensation." The first clause is called the "due process" clause while the second part is referred to as the "takings" clause.

Until the middle of the twentieth century, the "due process" clause was often used to strike down regulations imposed on private property especially if they amounted to confiscation by regulation or if they exceeded the federal government's constitutionally delegated authority. For example, when President Franklin Roosevelt's National Recovery Act required all trades and businesses to form trade associations, restrict entry, and establish minimum wages and prices, the Supreme Court overturned this wholesale reorganization of U.S. industry as a violation of the "due process" clause. This prompted President Roosevelt to threaten to "pack" the Supreme Court. Although Roosevelt failed to gain congressional approval to expand the Supreme Court from nine to fifteen members, the Court no longer overturned New Deal policies. Subsequently, Courts have created an artificial distinction between "property liberties" and "personal liberties." Rarely, do Courts use the "due process" clause to uphold "property liberties" anymore. Current judicial theorists argue that the Constitution does not prescribe a particular economic system (capitalism). Therefore, private property liberties are not protected while "personal liberties" such as First Amendment guarantees of free speech are still upheld under the "due process" clause.

The “takings” clause requires all levels of government to justly compensate owners for property taken for public use. Whenever land is condemned or taken for highway construction, military bases, and so forth, courts must estimate the fair value of the property to be paid to the owners. The “takings” clause also requires governments to compensate owners when confiscatory taxes are imposed or regulatory acts render property worthless.

The “takings” clause was intended to prevent the government from forcing a few property owners to bear the burdens of legislative measures intended to benefit the general public. It reduces the uncertainties of property ownership arising out of the political system, helping to mitigate the problems of “mutable” policy alluded to by Madison. Requiring government to compensate owners for the resources that it takes for public use also enhances proper cost-benefit planning on the part of policymakers; but the primary purpose of this clause is to protect property owners from arbitrary governmental power, not to assist bureaucratic planners–or else the framers would have added a “givings” clause entitling the State to be compensated for the public benefits it claims to generate.

Until the twentieth century, U.S. courts never applied the “takings” clause to regulations falling short of transferring legal title to the government. Courts, however, did respect private property. Owners could find relief under the “due process” clause which could overturn state and federal legislation altogether. Indeed, the failure to apply the “due process” clause in property cases places the “takings” clause as the final barrier to full governmental supremacy over private property rights.

At present, courts are evolving their opinions regarding the “takings” clause. They are willing to allow the regulation of property to some extent, but if the regulation goes too far it may become a taking. The current legal uncertainty results from the clashing views on the nature of private property. Does property constitute the rights of individual owners to actions which enjoy constitutional protections against arbitrary government actions or is the government supreme? In our forefathers’ day,

the latter view was known as “the divine right of kings.” During the middle of the twentieth century, the economic system which allows ownership on paper while the government made all of the important decisions regarding the uses of property was called fascism. Today, in the United States government supremacy over individual property owners means that the government may temporarily permit us to hold title to certain of its possessions and use them in limited ways at its pleasure. So far, the opponents of constitutional property rights have refused to give their system a new name, but it amounts to the same old system called tyranny.

The essence of private property is the bundle of actions which owners may rightfully perform. Logically, any legislation restricting these ownership acts amounts to a regulatory “taking” and the owner ought to be entitled to be compensated for the decline in value of his assets. The Constitution did not establish unlimited majority rule. Even the legislature must be subject to the rule of law.

Nevertheless, many regulations would not involve compensation under the Fifth Amendment because they either do not involve a regulatory “taking” or measurably reduce the fair market value of property. For example, if landowners have a right to be free of pollution under the common law of nuisance and the owners are too disorganized to protect their rights against polluters, a governmental statute may empower the executive to bring the polluters to court under the common law and even impose special statutory penalties upon them. Since the right to pollute did not exist, no “taking” is involved and the government is merely performing its legitimate role in defense of private property. Other regulations, such as Civil Rights public accommodations cases, the regulatory requirement to serve all patrons would not adversely affect the value of the property. Zoning laws often increase land values. No compensation would be required unless the value of the “takings” is measurably reduced.

Under any interpretation, the “takings” clause is a comparatively weak protection of private property. The government may still impose taxes and acquire resources for public use. Courts must still determine “fair” value by making very imprecise approximations. Finally, some government regulations inhibit trade while actually augmenting the value of certain properties. For example, a zoning ordinance which severely restricts the land available for commercial use might increase the value of the property already employed in trade. Although such laws stifle growth and commercial liberty, the “takings” clause offers no relief to prospective businessmen who are unable to enter the market. The broad interpretation of the “takings” clause is no substitute for the judicial protection of “property liberties” under the “due process” clause.

Following the Civil War, the Thirteenth Amendment ended slavery and the Fourteenth Amendment extended the application of the “Bill of Rights.” Section 1 of the Fourteenth Amendment reads, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The application of the “due process” clause to the states gives to individuals and businesses the same Fifth Amendment grounds to challenge state regulations as they already possessed against federal law. The “equal protection” clause extends the basic rights of citizenship to all Americans, regardless of race and sex.

Both clauses were specifically intended to protect the property and liberty of blacks from outrageous actions on the part of southern states. It obviously outlaws the old southern “separate but equal” segregation laws. Thanks to the Fourteenth Amendment, all citizens are joint heirs to the old Saxon and English Whig concepts of liberty and property.

Where Have All Our Property Rights Gone?

The constitutional history discussed above clearly shows that the founders did take private property seriously and designed the Constitution accordingly. In order to limit the potential for tyranny the framers:

> (1) Divided the powers into three separate branches (legislative, executive and judicial).

(2) Further separated the functions of government between federal and state levels, giving the federal level only a few enumerated powers.

(3) Incorporated a "Bill of Rights" which specifically listed some of the most important applications of individual rights for all people to read and the courts to uphold.

The constitutional protections of our liberties have withered over the years. The division of powers within the federal government may have checked the expansion of one part of the federal government into the domain of another, but there is no protection for the people and states against collusions and the conspiracies among the different branches to exceed the delegated powers of federal authority. For example, the Constitution does not grant the federal government jurisdiction over education, housing, agriculture, or energy, but these functions have been elevated to cabinet level status in Washington by Congress, administered by the executive branch and approved by the courts.

Federal regulations have become so extensive that Congress often delegates its rule-making powers to numerous, non-elected agencies, such as the FTC, FDA, OSHA, SEC, and EPA. These agencies combine executive and judicial functions with their rule-making authority– subverting the division of power concept becoming laws unto themselves with feudal-like dominions in command over the private property held by commoners. James Madison condemned "the accumulation of all powers

legislative, executive, and judicial in the same hands, whether of one, few or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny. Were the Constitution chargeable with this accumulation of power or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system."6

Most recently, the federal government's appetite for power exceeds its capacity to raise revenues. Instead of taxation and spending, Congress prefers to subvert the rights of private property owners by imposing unfunded mandates upon them, such as "family leave" and employer mandates or forced "contributions" to proposed health-care legislation. The words of Madison decrying the problems of "mutable" policy have been drowned out amidst a flood of ever wider calls for new government powers.

The usurpation of powers and rights belonging to the states and people by the federal government is partly due to defects in the Constitution itself. The framers, unfortunately, never established an effective check or balance that state governments could invoke against the encroachment of federal power into their proper domains. Ever since the Civil War, the threats by states to secede or nullify laws are not taken seriously, no matter how intrusive federal regulations become. Abuses of federal power may only be addressed in federal courts, hardly an independent or adequate restraint on federal authority.

The unfortunate legacy of slavery also made it more difficult to defend both private property and federalism. The framers granted the same constitutional protections to slave-holding as it accorded to legitimate private property. This has led to the mistaken notions among scholars, including noted Civil War historian James McPherson who called the abolishment of slavery in the Thirteenth Amendment as representing one of "the greatest seizures of property in world history." In fact, no one can ever legitimately own another human being. The English Whigs

understood that the first right was self-ownership. The emancipation of slaves recognized the legitimate claims by southern blacks to self-ownership. The United Stated did not “seize” the slaves as third world governments take over factories. The Thirteenth Amendment set the captives free.

Following the Civil War, the southern states frequently violated the property rights and liberties of black people. The Fourteenth Amendment gave the federal Congress the power to protect their civil rights. This amendment was necessary, but it also established a precedent, “a hook” which the federal government has used to exceed its legitimate powers. Today, federal usurpation of the domain belonging to the states and people goes unchecked. “Liberal” scholars consider private property rights to be government grants of privilege–to be tolerated when convenient to the government, but no longer as a significant human right in itself. The concept of “states’ rights” holds even less respect because it reminds one of past injustices committed by states, rather than as safeguards against the centralization of power.

The “Bill of Rights” provides very explicit words guaranteeing the rights of the common people. Unfortunately, words are not self-enforcing. The constitutional contract between the people and the government must provide incentives, counterforces, etc. to ensure that politicians remain the servants of the people, rather than the other way around. Even the most ingenious constitutional safeguards will wither and die if the public no longer appreciates the importance of liberty and property and if they can be made to believe that the crises of the day invariably requires extra-constitutional remedies.

Modern intellectuals do not take private property seriously, nor do they wish to constrain the makers of public policy. Ever since the “New Deal” of the 1930s, “liberal” scholars have rejected the belief that any economic system is proper for all periods of history. To them, political economy does not reveal any enduring set of legal principles. Political economy instead molds itself to the crises of the moment. The Great Depression, The War on

Poverty, Projected Environmental Disasters, and the Health-Care Crisis, all supposedly require radical reorganization of the economy. Property rights and the rule of law must give way to the reformers.

In truth, no crisis is ever bigger than the Constitution. A solid education in economics would teach that private property and markets normally align the interests of property owners with the public. Most of the attempts by government to eliminate poverty, regulate prices, control macro-economic fluctuations, or otherwise manage the economy have proven very costly and usually counterproductive. It is also probable that many of the recent ecological scares are scientifically unfounded. Real world problems can usually be addressed within the context of private property and market economics.

Infrequently, a government regulation may provide a convenient route in mitigating a particular problem of the day, but the benefits of infringing property rights are small compared to the sheer costs of government and the uncertainties found in the law today. Moreover the Constitution contains an amendment process to handle situations where the need to act is great and normal remedies appear to be inadequate. This amendment process, however, is a slow, deliberate one which enables the people and the experts alike to investigate, study, and analyze the problem and the costs of alternative remedies. Prudent, reasoned solutions require time.

Neither the Constitution, nor the rule of law can long endure the blight of a misinformed public. As friends of liberty, our eternally vigilant task must be an educational one. The people must ever remember the words of the founders, the wisdom of economists, and the lessons of history. Let us endeavor to turn back the regulatory lords in Washington, the twentieth-century pretenders to our property.

1. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967).
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Portable Jefferson, Merrill D. Peterson (editor), pp. 17-18.

3. James Madison, *The Federalist Papers*, no. 62, pp. 381-82 (New York: 1961).
4. Alexander Hamilton, *The Federalist Papers*, no. 85, p.521.
5. James Madison, *The Federalist Papers*, no. 45, p. 292.
6. James Madison, *The Federalist Papers*, no. 47, p. 301.

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