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Everyone's right to property

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All men are by nature free and independent, and have certain inherent rights... namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Constitution of the State of Virginia (1776).

Happiness and property

We are accustomed to think that the American conception of human rights is based on the right to *life, liberty and the pursuit of happiness*. So it is written in the Declaration of Independence (1776), drafted mainly by Thomas Jefferson. But in the constitutions of certain states we can find a rather different expression of the American ideal. The Virginian constitution of the same year, drafted by George Mason, puts property ownership in the place of happiness, which is tacked on at the tail-end.

Indeed, the declaration of the First Continental Congress (1774) asserted simply the right to *life, liberty and property*. And the Declaration of Independence itself would have resembled the Virginian text, had not Jefferson demanded the omission of the phrase about property; apparently because, though he was strongly in favour of widely-spread property ownership, he did not believe that property rights were absolute.¹

Belief in the importance of individual property ownership has been a dominant factor in America's political culture, from the Republic's very beginnings. And so it remains to this day, explaining the sometimes paranoiac American hatred of anything that smells even faintly of socialism.

Jefferson's dream

Jefferson had a dream: of a society modelled on the old English way of life of the 'yeoman', the countryman farming his own land. He was convinced that *to lack economic resources was to lack freedom*;² so he believed that ownership of land should be widely spread. He worked successfully to achieve, in his own state of Virginia, abolition of the laws of entail and primogeniture; these were inheritance laws designed to keep a family estate in the family; they inhibited wider distribution. And Jefferson wanted states to award fifty acres of land to 'every person of full age' who did not already possess it; an idea that foreshadowed modern experiments such as the British 'child trust fund'³ or the Alaskan 'permanent fund dividend'.⁴

Though Jefferson's vision of 'fifty acres for all' was never realised, America did in fact achieve 'forty acres for many', thanks to a remarkable process that has been called 'the greatest land sale in history'. *The US insisted on its right of pre-emption to Indian lands; no cession of land [by Indians] was valid unless the sale was to the federal government under public treaty*.⁵ The Land Ordinance of 1785 provided for a continuing survey of all this public land as it was acquired. The surveyors began their work on the banks of the Ohio River, under the direction of Thomas Hutchins, first Geographer of the United States, on 30th September 1785.⁶

They created a grid, covering most of the USA, of almost a million squares, called 'townships', each measuring six miles by six; these townships became the basic constituencies of local government. Townships were divided, each into 36 'sections' of one square mile, which in turn were split up, each into 16 forty-acre squares, called 'forties'. A forty measures 20 x 20 chains; the traditional English 'chain', the length of a surveyor's measuring-chain, is 22 yards, like a cricket pitch.

The great land sale

Thus the great survey enabled public land to be sold off in small parcels to individual buyers, often for as little as \$1.25 per acre. Indeed, some parcels were given away free to army veterans, while many others were acquired gratis under the Homesteaders' Act of 1862: a settler who had lived on and improved up to 160 acres for five years, and built himself a cabin thereon, could acquire title to the land without payment.

Thus, since 1785...out of 2.3 billion acres, the total landmass of the United States, some 1.8 billion spread across 32 states have been at one time in the public domain. More than a billion acres [more than 25 million forties] have been transferred to individual owners. In economic terms alone, it has represented the greatest orderly transfer of public resources to the private sector in history.⁷

Independent landowners

Jefferson's concern to create a landowning democracy reflected the view, widespread in eighteenth-century America, that employment was a kind of slavery: *working for wages was widely regarded as disreputable...many years would pass before the idea that wage labour was compatible with genuine freedom gained broad public acceptance.*⁸ So the free citizen, unless he was a rich landowner with enough income from rents to live without working, had to be self-employed.⁹ In the pre-industrial age, this generally meant owning a piece of land on which one could plant crops, raise livestock or (with luck) extract minerals.

But ownership of freehold land also made it possible to borrow money on security of the land, and thus to set oneself up as a self-employed businessman. Land became a source of capital. Thus the creation of what was originally a democracy of landowning farmers was the basis of the modern American culture of entrepreneurship.

A law of few words

The *Fifth Amendment* (1791) to the US Constitution is a striking example of how much can be said in very few words. This famous document contains only 108 words, most of which concern criminal proceedings. The clauses (not even a separate sentence) relating to property have only 25 words:

nor [shall any person] be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Yet those 25 words have vast implications and have provoked endless discussion and litigation. They are understood to authorise the state, in certain circumstances, to oblige private property owners to sell out to the state. But the last three words also oblige the state to pay adequate compensation.

This power, known in America as *eminent domain* and in Britain as *compulsory purchase*, exists in varying degrees in most jurisdictions; but in some countries, such as Japan, it is heavily restricted.

Strange as it may seem, in America, where the rights of private property are widely held to be near-sacred, in the early days state governments could claim private property without compensation. This was tolerated, where government claimed undeveloped land for road-building or other public projects, partly because land was so abundant and cheap, that what was lost could easily be replaced.

Pre-Republican republicanism

But there was a deeper reason. *The failure to establish a safeguard for property rights was consistent with the central tenets of republicanism, the reigning ideology of 1776. At the centre of republican thought lay a belief in a common good and a conception of society as an organic whole...as one historian has noted, « the sacrifice of individual interests to the greater good of the whole formed the essence of republicanism ».*¹⁰

That old-style republicanism was different indeed from that which we know today, with a capital R. Since those early days, America has moved a long way from the 'common good' mentality of the Founders, towards a heavier emphasis on private and individual rights.

The Fifth Amendment recognises the power of eminent domain, while restricting it in two ways. First, the state (the federal government or any of the 50 state governments) can take property only *for public use*, and there have been plenty of arguments over what exactly that means. Second, the power of eminent domain is limited by the state's ability and willingness to pay compensation.

At first, 'taking' property simply meant physically appropriating it, as when the state acquires land to build a road. Gradually it has come to have a much wider meaning. Regulations on the use of private property can diminish its value. So it is argued, not always with success, that such regulations take value away from the property owner, and therefore require compensation.

The Grand Central Station case

In the late 1970s, the Penn Central railroad company wished to construct a 53-storey building above its imposing Manhattan terminus, Grand Central Station. But New York City, wishing to preserve that historic landmark, refused permission. Penn Central objected that this refusal amounted to a 'taking of private property', since it diminished the value of the site; so New York would have to pay the railroad a hefty 'just compensation'. The Supreme Court¹¹ threw out Penn Central's case, arguing that New York City's preservation order would have significant public benefits and would not unduly penalise Penn Central.

This decision reinforced the view that governments can, in some circumstances, restrict or regulate property use in the public interest, without having to compensate the owners. It was a step back towards the philosophy of the early republicans.

The pig in the parlour

A famous earlier case *endorsed a new form of urban planning that would revolutionise the American landscape*.¹² A developer, Ambler Realty, bought a tract of land in the Village of Euclid (near Cleveland, Ohio) for industrial development. Some time later, before any development had started, the village adopted an ordinance dividing its territory into six zones; and much of Ambler's land was in a zone for residential use (detached and semi-detached houses). Not even apartment buildings were permitted; in those days, they had a bad reputation; *when imagining an apartment house...Americans pictured a Lower East Side tenement, not...the elegant buildings of Paris's boulevards*.¹³ For Ambler, this was a totally unexpected shock, since such zoning was rare in the early 1920s. Parts of Ambler's land were said to have lost 75% of their value.

So Ambler went to the local court, demanding an injunction to declare the ordinance an unconstitutional infringement on property rights, and therefore void. The court obliged; but it was overruled on appeal by the Supreme Court,¹⁴ which approved the zoning plan and awarded Ambler no compensation. Thus *modern zoning was constitutionally born*.¹⁵

Justice Sutherland, writing for the Court, explained that *with the great increase and concentration of population, problems have developed...which require, and will continue to require, additional restrictions on land use in urban areas*. He remarked that, in certain locations, industrial development would be a nuisance *like a pig in the parlour instead of in the barnyard*.

From yeomanry to suburbia

By the early twentieth century, city-dwellers were a majority of the American population, and there was no more land to be settled beyond the Western frontier. Jefferson's dream of a nation of 'yeomen' was no longer realistic. But the Supreme Court's endorsement of residential zoning meant that a small parcel of land for everyone was still feasible in principle. Zoning protects certain tracts of land from being intensively developed. The Court *shifted the emphasis of property rights – at least in the residential sector – from dynamic development to tranquil security*.¹⁶ The way was open for the development of the quiet leafy suburb; *the yeoman morphed into the suburbanite*.¹⁷

Free-market ideology supports the idea that owners of real estate should be free to do whatever they like with it, regardless of the interests of society. Just as owners of businesses should (according to the ideologues) be free to run them as they please, without regard to the welfare of their employees, to the interests of the surrounding community, or to the health of the environment.

But our two landmark cases have set precedents, affirming that real estate belongs in part to everyone; its owners are not entitled to use it simply for their own greatest advantage. The Supreme Court has made it clear that society has inherent rights to control, up to a point, the use of private property; it does not have to pay the owners for those rights.

An age-old tradition of sound government

This doctrine stands in a long tradition which we can trace back to Aristotle: *it is clearly better that property should be private, but the use of it common, and the special business of the legislator is to create in man that benevolent disposition*.¹⁸ Thus, government has the right, indeed the duty, to regulate the use of property with a view to the general interest.

Historically, the US government has exercised this right by first 'nationalising' American land and then selling or giving it, in small lots, to individual colonists. Today, local government designates city zones for the construction of family houses. Without these regulations, it is very probable that far more of the land would have fallen into the hands of corporations or wealthy individuals, frustrating the creation of a property-owning democracy.

Was Jefferson right in arguing that a little property for everyone paves the way to freedom? If he was, then it follows that, in order to be free, we need certain regulations.

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¹ William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment* in *Yale Law Journal*, vol. 94 (1985), page 700.

² Eric Foner, *The Story of American Freedom* (Norton, New York, 1999), chap. 1.

³ The 'child trust fund' scheme was introduced by Tony Blair's government in 2005 and closed down by David Cameron's government in 2010. Under this scheme, the government paid into a trust fund £250 for each child at birth, with the intention of making further payments at later ages. Parents, relatives and friends could contribute to the fund. The idea was to build up a capital sum for each child, available at the age of majority (18 years).

⁴ The Alaska Permanent Fund, established in 1976, is a state-managed investment fund that pays an annual dividend to Alaska residents. Dividends in recent years have been in the region of \$1000 per head per annum.

⁵ Francis P Prucha, *Indian Relations* in vol. II of *Encyclopedia of American Political History* (Scribner's Sons, New York, 1984).

⁶ Andro Linklater, *Life, liberty, property in Prospect* (London), August 2002.

⁷ Andro Linklater, *Measuring America* (Walker, New York, 2002), page 234.

⁸ Eric Foner, *The Story of American Freedom* (Norton, New York, 1999), chap. 1.

⁹ In recent decades we have seen a resurgence of this attitude among economists and business consultants, who glorify self-employment and seem to want to see normal employment wither away.

¹⁰ William M. Treanor, loc. cit. supra, page 699. The historian quoted is Gordon S Wood, *The Creation of the American Republic* (University of North Carolina Press, Chapel Woods, 1969), page 53.

¹¹ In *Penn Central Transportation Co. et al. v. New York City et al.* (1978).

¹² Nadav Shoked, *The Reinvention of Ownership* in *Yale Journal on Regulation*, vol. 28 (2011), page 95.

¹³ Ibid., page 126.

¹⁴ In *Village of Euclid v. Ambler Realty Co.* (1926).

¹⁵ Shoked, loc. cit. supra, page 95.

¹⁶ Ibid., page 99.

¹⁷ Ibid., page 91.

¹⁸ Aristotle, *Politics* (trans. Benjamin Jowett), 1263b.