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INTRODUCTION

In every social system, property stands at the center of the relationship between the individual and the state. Not just the political quality of the regime, but the institutions of its economy and the customs of its people are largely determined by whom the state recognizes as having the authority to control the disposition of objects and ideas, and in whose interests that authority is exercised. This is most obvious in totalitarian systems, where all rights to property lie ultimately in the state, and individuals exert only the control over things that the state, in pursuit of its own interests, chooses to allow them. But it is equally true of market orders based on private property and the individuality of interests. If, as James Madison (1788, p. 356) put it, men were angels, they would see that respecting the property of others is both a guarantee of peace and a means to the advancement of their own purposes, and act accordingly without external compulsion. But real men and women need the power of a state to protect their property and the market that surrounds it, to ensure that they do what they must to preserve the regime of freedom itself.

Without the state, then, there is no property. Yet there are obviously profound differences in the political character of states, and much of this variation can ultimately be traced to the attitude of their governing ideologies toward the nature and origins of property, or more specifically, to the answers they offer to the question of whether property precedes the existence of the state or is itself necessarily a

product of the state. At any moment in time, and more clearly than in any of their other aspects, it is in the way that different regimes address this question that their essential political and moral qualities are revealed. And as even a brief glance at the constitutional history of the United States suggests, the differing answers given to it by a single people over the course of time may leave a deep and lasting imprint on the development of its political culture and institutions.

LOCKE AND BENTHAM

For John Locke (1690), hoping to justify resistance to the sovereignty of a king claiming to govern by divine right, the property of men sprang from the will of God, and government was the instrument men devised to protect it from one another's predations. Much as Luther had argued that man's spiritual relationship to God was direct and personal, unmediated by the established church, Locke maintained that God did not vest political authority in a king whose prerogatives could only be challenged by an act of blasphemy, but had touched every man as an individual, granting him personal sovereignty in the form of natural rights to liberty and property and the authority to punish those who would deprive him of these rights. The state of nature was thus a regime of private property and free exchange, in which only the unreasoning few would deny their fellows the peaceful enjoyment of their rights. But the threat to order and prosperity posed by these few, coupled with the problems of discipline and proportion that would inevitably attend the efforts of wronged individuals to vindicate their rights on their own, made it rational for every person to renounce the state of nature and join in a contract with the others that would establish a political entity endowed with powers sufficient to secure their liberty and property.

The terms of this contract define the nature and the constitutional contours of the state embodied in it. Locke's contractors do not surrender all their rights; to protect their natural rights to liberty and property, they agree to designate some of their number as agents of the state, a government, and vest in them only their personal right to punish transgressors, and this only so long as the agents use these rights to violence for the specific purpose they were given, the protection of the individual's remaining pre-existing rights. The contract is not a covenant between individuals and the state, but an agreement among these individuals themselves to create a government of fallible men authorized to exercise limited powers in the name of the state. Like the intangible conventions that induce men to trade useful or beautiful objects for the otherwise worthless bits of paper they agree to call money, the state is an abstraction, a state of mind representing consent to a monopoly of legitimate force that may be benign and protective, threatening and dangerous, fragile and contested, or all of these at once. And as with any ordinary contract at common law, nonperformance is grounds for rescission; if government proves unable to protect the God-given rights to liberty and property it was

constituted to defend, or if it threatens those rights itself, the people may withdraw their consent to its powers and, in so doing, dissolve the state and deny legitimacy to its agents.

The political implications of this quintessentially liberal vision are crucial. For Locke, the rights and interests of living men and women are not just the starting point of the analysis but, in the end, its only point. Civil society is not, as many American intellectuals would come to understand it two hundred years after the *Second Treatise*, a reified, purposive collective, ontologically distinct from and politically superior to the individuals who comprise it (Tariello 1982, pp. 53-69), nor is the abstract state embodied in the contract the active manifestation of this social being in the world of affairs. Government exists solely to protect the pre-existing rights of its individual creators, and has no warrant to make any person an instrument for the welfare of others, individually or collectively, without his consent. The protection of every person's liberty and property, the *raison d'etre* of government itself, imposes an implicit constitutional constraint on its powers, for in taking one person's property against his will for the benefit of another, the state's agents themselves transgress the law of nature and become the very thieves they were commissioned to punish.

By 1800, the principle that protecting the right to property was a defining duty of government, enforceable by the courts even against the will of the legislature, had become an axiom of American constitutional jurisprudence. "I cannot," wrote Justice Samuel Chase in *Calder v. Bull* (1798, pp. 386, 388), "subscribe to the omnipotence of a state Legislature or that it is absolute and without control." A statute that "takes property from A. and gives it to B." must be void, even if it is not expressly forbidden by the Constitution, since 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." Nor was this early postulation of natural rights an isolated or idiosyncratic assertion of judicial authority. As the nineteenth century unfolded, where it could not appeal to explicit constitutional text to defend personal property against hostile legislation by the states, the Supreme Court repeatedly invoked the "nature of society and government," the "principles of natural justice" and "the fundamental maxims of a free government" to justify its holdings.[1]

As the moral philosophy of John Rawls (1971) and the "constitutional economics" inspired by James Buchanan and Gordon Tullock's *Calculus of Consent* (1962) make clear, the contractarian perspective retains great power even today as a framework for the normative analysis of political relations. But as social science, Locke's theory was dealt a fatal blow by Charles Darwin. Darwin saw human beings not as fully formed, atomistic individuals who had once lived in a presocial state of nature and then purposefully chosen to leave it, but as descendants of the great apes, whose territoriality and group behavior suggested the existence of primitive and culturally heritable forms of property and social organization well before the arrival of *homo sapiens* and made it impossible to argue seriously for

the historical reality of the state of nature or the social contract. And by replacing the teleology of Genesis with the directionlessness of natural selection, Darwin cast the idea of universal, natural human rights itself into grave doubt, making it very hard for modern liberals to argue for their existence to those not already persuaded of it.

But the central tenets of Locke's politics had been challenged well before this. In the midst of the French Revolution, Jeremy Bentham (1791, p. 501) derided the idea of natural rights held independently of the state as "nonsense upon stilts" and dismissed the notion of a social contract designed to protect them. The only meaningful rights men possessed were those the state chose to enforce, he argued, and the state's purpose in creating and allocating these rights should be to maximize the aggregate of individual utilities (Dinwiddy 1989, pp. 25-28, 49-53). The effect of Bentham's insistence that property was the creation of the state was to stand the relationship between the individual and the collective implied by the Lockean contract on its head. Where Locke had seen the state as the lifeless tool of its sovereign creators, politically subordinate to them and constructed to protect their rights, Bentham gave primacy to the interests of the state over those of its individual constituents and assigned it a clear purpose of its own, and if his own characterization of that purpose is at least arguably compatible with the liberal spirit, he nonetheless cleared the way for successors less liberal than he to portray the modern nation-state as an organic, self-interested being and to ascribe other, more collectively defined objectives to it. And where Locke's government had been strictly limited in its powers by the constitutional principle of consent and the natural rights of its citizens, Bentham's legal positivism made the liberty and property of every individual an instrument of the public interest, and freed government from any constraint on its authority not consistent with this broad and malleable collective purpose.

THE TRIUMPH OF THE PUBLIC INTEREST

For 75 years after the Civil War, variants of these contrasting visions vied for supremacy in the American political economy. As the successful movement to liberalize state incorporation laws and new technologies of mass production and distribution combined to transform the nation's economy in the second half of the nineteenth century, property that had once been held by real men and women in the form of sole proprietorships and small partnerships increasingly passed into the metaphorical hands of huge limited liability corporations. Clearly not living souls granted liberty and property by the law of nature, but endowed by the law of man with legal personality distinct from their owners and the rights to own property and enter contracts in their own name, these new corporations were an anomalous presence in the Lockean universe. The vast new material wealth they produced brought with it wrenching economic and social dislocation, and as first

progressive intellectuals and then the public at large gradually came to perceive these changes in terms of their effects on a broadly defined public interest or on the health of the social organism, state legislatures began to experiment with utilitarian measures that redistributed wealth and regulated private property in ways that could not be reconciled with the contractarian ideology of *Calder v. Bull*.[2]

The response of the federal courts was to use the newly ratified fourteenth amendment to resist these initiatives in the name of fundamental rights whose existence preceded that of the state governments and sharply limited their powers. The fifth amendment, ratified in 1791, protected citizens against deprivation of their lives, liberty and property by the federal government "without due process of law," protection now extended by the new amendment to state governments as well. Due process had traditionally been held to require only a fair hearing before an appropriate public body before a person's liberty or property could be taken, but now, led by Justice Stephen Field, the Supreme Court began to add substance to the guarantee of fair procedure by reading into the fourteenth amendment specific limitations on the power of the states to adopt laws that denied or interfered with the individual's fundamental rights and freedoms. But in the new world of Darwin and Bentham, profoundly skeptical of the God-given rights at the core of Locke's system, what was the origin of these inviolable, pregovernmental rights, and how, precisely, were they to be defined?

Field's solution, first proposed in the context of the new amendment's privileges and immunities clause in the *Slaughterhouse Cases* (1873), was to locate them in the common law brought by the colonists from England as part of their "indubitable rights and liberties" to become the basis for the new legal institutions they would construct in America. Field's invocation of the common law brilliantly addressed both of the major objections raised by his contemporaries to the older logic of natural rights. If the state of nature had never really existed, and the contract that emerged from it could no longer be taken seriously as fact, no one could doubt the historical reality of the common law and its ancient sources, or the centuries of tradition and practice prior to the creation of the American states that had legitimized it as a judicial check on the power of kings and parliaments. And if the specific content of Locke's broadly defined natural rights remained contested and uncertain in a complex, modern world, the common law, despite the permanent ambiguity at its margins that propelled its evolution, offered an easily apprehended set of principles from which a closed and relatively fixed list of rights could be derived.

Dissenting in *Slaughterhouse*, Field had unsuccessfully invoked the common law right to ply a lawful trade in support of Louisiana meat packers who claimed that a legislatively enforced monopoly in the local market denied them their fundamental rights. But the Court was soon persuaded of the virtues of reading pre-existing individual rights into the Constitution. By 1887, stressing that "the courts are at liberty—indeed are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has

transcended the limits of its authority," it made clear that it would strike down on due process grounds any state statute it found to be "a palpable invasion of the rights secured by the fundamental law."[3] Ten years later, Field's crusade to establish the sanctity of Lockean rights against the rising tide of Benthamism was crowned with success in *Allgeyer v. Louisiana* (1897), as Justice Rufus Peckham, voiding a statute regulating insurance contracts, expansively defined the liberty protected by the fourteenth amendment against the state's claim of power to legislate in the public interest. That liberty, he wrote,

> 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.

"Has not," he asked, "a citizen of a State...a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him?"[4]

Thus began the era of substantive due process, a period of some 40 years in which the Court struck down dozens of state and federal regulatory statutes intended to advance the public interest on the ground that they unreasonably abridged fundamental liberties protected by the fifth and fourteenth amendments, most often the freedom of contract identified in *Allgeyer*. In this, the Court reflected the ambivalence of the people themselves. On the one hand, the rapid changes in economic relations and the conditions of daily life brought about by industrialization seemed to threaten the well-being of the nation as a whole and fueled the demand for corrective legislation, but on the other, it was clear that the movement for reform had greatly extended the reach of government and resulted in new and sometimes questionable limitations on rights and freedoms to which the majority of Americans had long been accustomed.[5] But the Court's defense of Lockean principle was fatally compromised from the start. Urged on by Stephen Field, the Court held in 1886 that corporations as such were "persons" within the meaning of the fourteenth amendment and thus as entitled to the protection of the due process clause as any living man or woman.[6] For this, there was no justification, either in the logic of natural law or the liberal impulse that motivated legislation to preserve the autonomy and dignity of ordinary people against the corrosive effects of industrialization. By 1920, it was apparent that the principal beneficiaries of substantive due process were not working men and women, as Peckham's rhetoric seemed to imply, but their corporate employers, shielded by the Court from legislation meant to level the playing field in their dealings with workers. Soon, an antimajoritarian doctrine that had always been unpopular was made intolerable by the Depression, and in 1937 the Court abandoned it, reading liberty of contract out of the fourteenth amendment and forswearing interference in the

states' efforts to legislate the greatest good for the greatest number.[7] The triumph of positive law in the public interest seemed complete.

BENTHAM AND LOCKE REDUX

But the Lockean impulse could not be entirely stilled. By 1973, a Court committed to fundamental liberties had once again made the due process clause the vehicle for a challenge to Benthamism, first in its expansion of the procedural rights of criminal defendants in state courts[8] and then in its resurrection of substantive due process, this time in the context of a fundamental right to privacy in matters of contraception and abortion.[9] More recently still, the idea of pregovernmental rights has also been revived in the area of constitutional law that speaks most directly to the concept of property as Locke and Bentham understood it, the problem of "takings."

The Framers themselves provided that private property "shall [not] be taken for public use, without just compensation," thus writing into the fifth amendment both the ancient doctrine of eminent domain, the power of government to take private property for public use against the will of its owner, and its limiting corollary, firmly established in common law by the seventeenth century, that fair payment must be made for the taking.[10] But they also recognized that the same common law that encoded the Lockean principle of compensation also gave government broad, often implicit police powers to promote the health, safety, and welfare of the public through appropriate legislation, with no need to compensate those disadvantaged by the enactment. The Framers saw no contradiction in this. The takings clause was not intended to abrogate the police power, but to ensure that the government's actual taking of title to land or other property would always be accomplished by eminent domain, with just compensation paid to the owner. Because the concept of property itself was closely linked to physical possession or control of tangible objects, the line separating eminent domain from the police power was sharply drawn. Legislatures typically employed the police power to regulate or limit the use of private property rather than to take title to it, so regulatory legislation, even where its effect was to render property whose title remained in the owner all but worthless, was rarely seen to raise the question of compensation under the takings clause. Thus, for example, in *Mugler v. Kansas* (1887) the Court, despite its foreshadowing of substantive due process, denied compensation to owners of breweries for the substantial devaluation of their property in the wake of the state's prohibition of liquor.

By 1900, however, the law's traditional identification of property with possession had largely been supplanted by the more complex idea that property is, as the economist Richard T. Ely (1914, p. 60) put it, a "bundle of rights," with each stick in the bundle representing the legal authority to use or dispose of an object in a particular way. Property in an object was thus not just one right of

possession or control, but a potentially infinite number of rights to specific uses that might be held (or traded) simultaneously by different individuals and the state itself. In *Mugler*, for example, the state could now be said to have taken from its owner only the single right to use his facility as a brewery, leaving him in full possession of the other sticks in the bundle, the rights to use it for all the other purposes not addressed by the prohibition statute. New legislative regulation of private property could thus be interpreted as a seizure of one of the sticks, and thus a compensable taking of property, even where the owner's legal title was not disturbed. Ely himself, decidedly a Benthamite but not always a friend of aggressive government, made just this argument (1914, pp. 200-226), and saw it adopted by the Court in *Pennsylvania Coal Company v. Mahon* (1922), in which owners of subsurface coal were granted compensation for the almost total destruction of the economic value of their property by a statute that forbade mining the coal but left title to it in the owners.

But *Mahon* opened a Pandora's box for the Court. The new principle it announced remained extremely vague; all Justice Holmes could say was that "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (1922, p. 415). The clarity of the earlier distinction between eminent domain and the police power was entirely lost, and every new act of regulation now raised the question of whether compensation must be paid to those adversely affected by it, a question to which Locke and Bentham suggest very different answers. For the Lockean, government's defining role as the guardian of pre-existing rights implies that any regulation of property, no matter how urgent the public's desire for it, must be compensated unless the regulation is intended to eliminate a common law nuisance, that is, to prevent an owner from using his property so as to infringe upon the rights of others. But for the Benthamite, for whom property rights are granted solely by the state in the interests of the public, the essential subordination of individual interests to those of the public presumptively places all legislation within the police power and requires compensation only where the larger public interest would be served by paying it. Cut from the moorings of the earlier rule, the Court since *Mahon* has vacillated for some 80 years between these contrasting philosophies, carried this way and that by the ideological currents of the day, unable to settle upon any clear or durable theory of the takings clause.[11]

In the mid-1960s, Frank Michelman (1967) offered a general solution to the problem, anchored in a Benthamism that, unlike the standard of wealth maximization that had by then come to dominate neoclassical welfare economics, left room in the calculation of social utility for personal, subjective costs and benefits created by such nonmaterial factors as the fairness of the income distribution and the degree of sympathy observers might feel toward those affected by the regulation. Michelman's utilitarianism, itself a reflection of the commitment to active government characteristic of the 1960s, encouraged an expansive view of the

police power and left its mark on the court, which in 1978 denied compensation to owners of structures designated as historic landmarks for the costs imposed by statutory restrictions on their use.[12] But by then, the ideological winds had already begun to shift, and Michelman's analysis was soon countered by the explicit Lockeanism of Richard Epstein (1985), who argued for strict limits on the government's power to regulate without compensation and who, like Stephen Field, drew the fundamental rights and obligations at the base of his system from the English common law.

Epstein's position too found support in the Court, which in 1992 held that compensation must be paid to owners of seafront property adversely affected by environmental regulations.[13] But the tortuous history of the takings problem makes clear that it, like the larger ontological dispute between Locke and Bentham that underlies it, is not a matter to be settled by logic or experiment. As Richard T. Ely recognized long ago, the controversy turns ultimately on the ontological and normative commitments we bring to it, and as these commitments change with time, the line separating the police power from eminent domain will shift along with them. "The police power," he wrote in 1914, "is the power of the courts to interpret the concept property...and to give the concept a content at each particular period in our development which fits it to serve the general welfare" (Ely 1914, pp. 206-207). For good or ill, in a democracy such as ours this may in the end be the most important thing of all to be said about the relationship between government and property.

NOTES

1. Fletcher v. Peck (1810, p. 135); Terrett v. Taylor (1815, p. 52); Wilkinson v. Leland (1829, p. 657). See also Tribe (1988, pp. 560-562).
2. Tariello (1982, pp. 97-114); Wiebe (1967); Fine (1956).
3. Mugler v. Kansas (1887, p. 661).
4. Allgeyer v. Louisiana (1897, pp. 589, 590-591).
5. Compare Fiss (1993, pp. 155-184).
6. Santa Clara County v. Southern Pacific Railroad (1886).
7. West Coast Hotel Company v. Parrish (1937).
8. Through the doctrine of "selective incorporation," the Court found certain of the procedural rights protected by the fourth, fifth and sixth amendments to be "implicit in the concept of ordered liberty" (Palko v. Connecticut, 1937, p. 325) and thus binding upon the states as well as the federal government. See, for example, Mapp v. Ohio (1962); Gideon v. Wainwright (1963); Duncan v. Louisiana (1968); Henkin (1963).
9. Griswold v. Connecticut (1965); Roe v. Wade (1973).
10. Thus, the right to compensation "is not *inherent* in the concept of eminent domain but is *imposed upon* the sovereign government by constitutional and statutory enactments. So universal has the requirement of compensation become, however, that for practical purposes any working definition of eminent domain must now include it" (Netherton 1968, p. 39, emphasis in original). On the historical origins of these principles, see Lenhoff (1942, pp. 596-601); Ely, Jr. (1992, pp. 23-24). The "takings clause" of the fifth amendment was held to bind the states through the fourteenth amendment in Chicago, Burlington & Quincy Railroad v. Chicago (1897).

11. Cf. Michelman (1967, pp. 1183-1202).
12. Penn Central Transportation Company v. New York City (1978).
13. Lucas v. South Carolina Coastal Council (1992).

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