

Richard Theodore Ely

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Richard Theodore Ely, "that excellent German professor in an American skin" (Schumpeter 1954: 874), was born to a devout Presbyterian family in Ripley, New York on April 13, 1854. Awarded a fellowship to study philosophy in Germany following his graduation from Columbia College in 1876, he turned instead to political economy, earning a Ph.D. at Heidelberg under Karl Knies in 1878. In 1881, Ely became the first lecturer in his field at Johns Hopkins, where he combined the historical inductivism of his German teachers with his own commitment to Christian Socialism to produce a normatively charged, interdisciplinary economics that strongly challenged the deductive methods and laissez-faire prescriptions of English classicism. Ely left his intellectual mark on a distinguished group of students at Hopkins, among them Frederick Jackson Turner, John R. Commons, E. A. Ross, Albion Small, Newton D. Baker and Woodrow Wilson, before leaving in 1892 to direct the new School of Economics, Political Science and History at the University of Wisconsin. There, after a notorious trial before the university's regents in 1894 at which he was exonerated of charges that he had advocated socialism and encouraged strikes, he maintained his faith in social legislation but gradually became more conservative as the nation adopted the progressive politics of his youth, a shift reflected in Theodore Roosevelt's remark that Ely "first introduced me to radicalism in economics and then made me sane in my radicalism" (Taylor 1944: 135). Ely left Wisconsin in 1925, first for Northwestern University and then for New York, where he led a small research institute and completed an autobiography (1938) before his death, in his ninetieth year, on October 4, 1943.

Ely is best remembered not for his economics, but for his central role in the creation of the American Economic Association in 1885 and as the mentor of a host of scholars and men of affairs more accomplished than he, and it is hard to dispute the conventional view that "his original contribution to economic theory is negligible" (Coats 1987: 129). But Ely's economics was always more prescriptive than analytic. Though his positions on matters of distribution and institutional organization changed over time, the positive theory that motivated the questions he asked and the normative principle that governed the answers he gave remained constant throughout his life. The theory was that of his German teachers, that institutions circumscribe economic life and determine distribution, that law and custom, always in flux, determine institutions, and thus, as the founding principles of the AEA put it, that the "progressive development of economic conditions . . . must be met by a corresponding development of legislative policy" (Ely 1938: 140). The normative principle, expressed first as a commitment to the ideal of brotherhood (Ely 1889: 67-68), was a consistent subordination of individual interest to the welfare of society that Ely called "utilitarianism in the highest sense" (Ely 1914: 504). The unity of economics and law this implied was manifest in Ely's own writing and has animated work at their interface to this day, a development that would not have surprised Ely, who was comfortable with legal sources and saw the two disciplines as "different approaches to the same territory" (Ely 1938: 188). During Ely's own lifetime, Commons (1924) sharpened and extended Ely's vague positive analysis of the effects of legal institutions on economic outcomes, a perspective revived years later in the seminal works of the "new law and economics" (Coase 1960; Calabresi and Melamed 1972). And despite his own chagrin late in life at some of its practical manifestations, Ely's view that all policy, and thus all law, should promote social welfare ultimately found expression in both the progressive labor and antitrust economics of the New Deal

and postwar eras and the conservative, wealth-maximizing social ethic of Richard Posner (1981: 48-115).

All these themes are apparent in *Property and Contract in Their Relation to the Distribution of Wealth* (1914), a treatise twenty years in the making that Ely (1938: 270) called "my most important work." For Ely, who subsumed contractual rights in the larger category of property, the relation implied by the title was fundamental. Distribution is determined neither by the character or behaviour of men, nor by any natural endowment of personal rights society is bound to respect, but by the way society, acting in its own interest through the state, chooses to define the rights that individuals may exercise over things. Property thus has a social as well as an individual side, and as societies mature, the social side grows in importance, as changing conditions increasingly require that prerogatives once enjoyed by individuals be transferred by positive law to the public. American law presents two ancient mechanisms to accomplish this transfer, eminent domain, which requires compensation of these individuals, and the police power, which does not. Though neither Ely nor any of his successors have ever managed to elucidate the distinction between them authoritatively, the extended discussion of these powers in *Property and Contract* anticipates many of the questions that have vexed courts and commentators alike in the years since 1914.

Ely saw the continuous delineation and refinement of the state's police power as the means by which courts maintained the shifting balance between the social and individual sides of property. In deciding the validity of legislation that adversely affected private interests against a claim that a compensable taking of property had occurred, courts fixed the "metes and bounds" of private property and gave it "a content at each particular period in our development which fits it to serve the general welfare" (1914: 206-207). There could thus be no question of

compensation where such a statute was upheld; because the court's decision *defined* the property right at stake, it was held from the moment of its creation by the state, so the individual had not been deprived of anything he had owned before. But Ely maintained that once a right *had* been vested in an individual by a court or legislature, the state could only effect the transfer by eminent domain and compensate the owner for its full value. In 1914, this was not the law; compensation for value in land lost through regulation was required only when title actually passed to the state. But in 1922, speaking in *Pennsylvania Coal Co. v. Mahon* through Justice Holmes, who had sympathetically read *Property and Contract* in manuscript, the Supreme Court adopted Ely's broader view and held that if state action deprived the owner of a vested right in land of its entire economic value, compensation was required even though title remained in the owner. As courts redraw the shifting line between the two powers in this way, Ely believed, they make property "flexible, adapted to the actual situation," and protect the public against both the tyranny of a robber-state and the "excessive development of vested rights" (1914: 209-210).

A central point of this analysis is that the actual determination of this line is the province of the courts. But Ely did not hesitate to offer his own views, and in the course of his long treatise, perhaps in reflection of his drift to the right over the period of its composition, he seemed to contradict himself. Always solicitous of society's needs, he believed that both the police and eminent domain powers ought to be exercised freely, though, like Michelman (1967) decades later, his utilitarianism was sensitive both to the administrative costs of achieving compensation and the demoralization that might attend a failure to compensate that disappointed the expectations of investors (1914: 209, 497-505). Early in the work, he criticized the Court's controversial 1905 decision in *Lochner v. New York* that a statute regulating working hours must yield to the right of free

contract, arguing generally that judges' lack of training in the social sciences inclined them to give too little scope to the police power (1914: 212-226). But later (1914: 755-791), and in his autobiography (1938: 269-274), he supported a broad expansion of compensable vested rights to protect not just the owners of traditional property against the state but the interests of workers in their trades against the advance of technology; if, he argued, such reallocations truly are beneficial to society, the payment of compensation entails no loss and serves as a middle ground between pursuit of social change regardless of its costs and resistance to any change at all. Though Ely derided the ideas of natural rights and social contract, this later position resembles the explicit Lockeanism of Epstein (1985), itself a reaction to Michelman's utilitarian approach to the compensation problem.

Contemporary reviews of *Property and Contract* were mixed. Learned Hand found it "always moderate, never pungent, seldom novel," while Roscoe Pound could see "nothing else on the subject worth talking about" (Rader 1966: 197, 199), evaluations not necessarily in contradiction. But if Ely's contribution to economic theory as such is in fact negligible, this work alone demonstrates his ability to range across disciplines and penetrate to the heart of difficult problems of political economy, and to identify questions that his successors would have to address.

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