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## **“A FREQUENT RECURRENCE TO FUNDAMENTAL PRINCIPLES”: A TRIBUTE TO JIM ELY**

John V. Orth\*

As I sat in my office preparing these remarks, my eyes wandered around the bookcases where I saw no fewer than six books with Jim Ely’s name on the spine. And when I looked in my file of reprints, I found no fewer than nineteen reprints of Jim’s articles and book reviews. (A look at Jim’s list of publications revealed that my collection, although extensive, was not complete.) A survey of this literature, particularly the reprints, revealed one overriding theme: there is no textual or historical basis for preferring life and liberty over property in the protections accorded by the Due Process Clauses of the Fifth and Fourteenth Amendments.

Without diminishing in the least the breadth and depth of Jim’s scholarship, I don’t think Jim discovered this fact. It’s obvious. The constitutional texts place life, liberty, and property—what Sir William Blackstone had then only recently labeled the “absolute rights of every Englishman”<sup>1</sup>—all on the same plane. “No person shall . . . be deprived of life, liberty, or property, without due process of law” is the language of the Fifth Amendment,<sup>2</sup> binding, as we know from caselaw, only on the federal government.<sup>3</sup> And the Fourteenth Amendment, expressly binding on the states, is like it: “nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>4</sup>

Only the barest familiarity with eighteenth-century English legal thought, particularly the theoretical underpinnings of the Glorious Revolution and the ensuing constitutional settlement, so important to colonial American opinion, shows that property was held no less deserving of protection than other rights—indeed, it was “the guardian of every other right.”<sup>5</sup> That Jim has had to say this over and over again is what’s interesting—and commendable.<sup>6</sup> It’s interesting because our understanding of constitutional law is so filtered through the cases that we can

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<sup>1</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES \*123–36. By “absolute rights,” Blackstone meant rights of persons “in a state of nature, and which every man is intitled [sic] to enjoy whether out of society or in it.” *Id.* at \*119.

<sup>2</sup> U.S. CONST. amend. V.

<sup>3</sup> *See, e.g.,* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

<sup>4</sup> U.S. CONST. amend. XIV, § 1.

<sup>5</sup> JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (2d ed. 1998).

<sup>6</sup> *See, e.g., id.* (providing an example of Ely’s discussion of property rights).

actually forget that—to take John Marshall’s famous dictum out of context—“it is a constitution we are expounding,”<sup>7</sup> not a series of Supreme Court cases. Jim’s persistence in repeating this message is commendable because we need to be summoned over and over again to return to the sources, *ad fontes!* “A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty” is what the North Carolina Declaration of Rights said in 1776.<sup>8</sup> It still does.<sup>9</sup>

Whatever we may think about the Supreme Court decisions that assigned relative values to fundamental rights, I often wonder if the academic lawyers and treatise writers didn’t do us a disservice by coining the phrase “preferred position,” even “preferred freedoms”—just as, in my opinion, they did us a disservice by popularizing a couple of other nonconstitutional phrases, “substantive due process” and “unenumerated rights.”<sup>10</sup> The common law grows from case to case, but when commentators reduce it to black letter, it acquires a rigidity that can subsequently shape reality—and results.

Before saying something about Jim’s emphasis on property, I would like to venture a few thoughts about another constitutional word that Jim has written about: “contract.” Although it didn’t make it onto Blackstone’s short list of absolute rights or, at least expressly, into the Due Process Clauses, it was given some constitutional protection in the original, unamended Federal Constitution, at least against state interference: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .”<sup>11</sup> In the celebrated *Dartmouth College* case, Chief Justice John Marshall held that this meant that no state could alter the terms of a corporate charter.<sup>12</sup> I say “corporate charter” advisedly; in fact, the large majority of corporations before the nineteenth century were municipal, religious, or (like the *Dartmouth College* charter) educational,<sup>13</sup> but the decision was of most importance to for-profit business corporations. The North Carolina Constitution of 1868, in successive articles, covered Municipal Corporations<sup>14</sup> and Corporations

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<sup>7</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>8</sup> N.C. CONST. of 1776, Decl. Rts., § 21; see JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* 76 (1993).

<sup>9</sup> See N.C. CONST. art. I, § 35.

<sup>10</sup> John V. Orth, *The Enumeration of Rights: “Let Me Count the Ways,”* 9 U. PA. J. CONST. L. 281, 289 (2006); see also JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 33–50 (2003).

<sup>11</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>12</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). In his concurring opinion, Justice Joseph Story noted the possibility of the state reserving a power to amend or alter. *Id.* at 712 (Story, J., concurring).

<sup>13</sup> See, e.g., Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 AM. U. L. REV. 81, 92 (1999).

<sup>14</sup> N.C. CONST. of 1868, art. VII; see ORTH, *supra* note 8, at 140–43.

Other Than Municipal.<sup>15</sup> In 1971 they were relabeled, in conformity with modern usage, Local Government and Corporations respectively.<sup>16</sup> If comparable provisions had been in the 1776 Constitution, they would probably have been called simply Corporations and Joint-Stock Companies.

In response to a barrage of criticism of Marshall's reasoning in *Dartmouth College*, Jim has made a spirited defense of the Chief Justice's equation of charters with contracts.<sup>17</sup> And I am glad to rally to the good cause, although I would do so in slightly different terms. It is generally accepted that what prompted the delegates at the Constitutional Convention in Philadelphia in 1787 to add the Contracts Clause was concern that state legislators would come to the aid of impecunious debtors among their constituents.<sup>18</sup> To that extent, contracts were on their minds. But only briefly. "Contracts" and "corporations" were certainly words in the delegates' vocabulary, but the concepts behind these words had not yet attained their familiar modern form. Aside from contracts of indebtedness, these subjects were simply not among the pressing issues at the time.

It is a commonplace among legal historians that Blackstone had little to say about contracts when he composed his monumental *Commentaries on the Laws of England* only a few years earlier.<sup>19</sup> In fact, he said more about what is today the anomalous "contract of marriage" than about all the commercial contracts put together.<sup>20</sup> It is highly suggestive that when Thomas Cooley prepared his edition of Blackstone's *Commentaries* a century later, he expanded the list of absolute rights, which he relabeled "natural rights," to include "the right to make contracts," as well as (of particular interest in these days of agitation concerning same-sex marriage) "the right to form the family relation."<sup>21</sup>

"Contract," like "corporation," remained an ill-defined term by modern standards until well into the nineteenth century. It is unsettling to the modern property teacher to hear so canny a lawyer as Alexander Hamilton say that "[e]very grant . . . is virtually a contract that the grantee shall hold and enjoy the thing

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<sup>15</sup> N.C. CONST. of 1868, art. VIII; *see id.* § 1 (reserving power to alter or amend corporate charters); ORTH, *supra* note 8, at 142–43.

<sup>16</sup> N.C. CONST. of 1868, art. VII–VIII; *see* ORTH, *supra* note 8, at 140–41.

<sup>17</sup> James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023 (2000).

<sup>18</sup> *See* Steven R. Boyd, *The Contract Clause and the Evolution of American Federalism, 1789–1815*, 44 WM. & MARY. Q. 529 (1987).

<sup>19</sup> A. W. Brian Simpson, *Introduction to Book II of WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND* iii, xiii–xiv (Univ. of Chicago Press 1979) (1766).

<sup>20</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES \*421–28.

<sup>21</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 122 n.4 (Thomas M. Cooley ed., Lawbook Exchange 2003) (3d ed. 1884). On the natural right "to form the family relation," *see* John V. Orth, *Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage*, 3 NEV. L.J. 560 (2003).

granted against the grantor.”<sup>22</sup> This is to ignore the well-known distinction between property, a right in rem, “good against all the world” (including the grantor) and contract, a right in personam, good against the person of the promisor.<sup>23</sup> A grant transfers a property interest from grantor to grantee. It may be delivered in the execution of a contract, but it creates a status, the status of owner. Any promises by the grantor, such as warranties of title, or by the grantee, such as covenants concerning use, are strictly adventitious. And the modern contract teacher must find Marshall’s search for consideration in the charter to Dartmouth College rather embarrassing.

I once defended the great Chief Justice by asserting that he was like the Virginia planter described by Samuel Eliot Morison, who “knew little of business and less of finance.”<sup>24</sup> So, I said, the Virginian needed a Yankee like Joseph Story to bring him up to date. Having learned more about Marshall’s law practice in Richmond,<sup>25</sup> I now realize how condescending that argument was. Marshall drew his clients from among the entrepreneurial element in Virginia society and was far more sophisticated about commercial practices than I gave him credit for.<sup>26</sup> But that is not to say that Marshall thought about contracts the way modern, law school-educated lawyers do.

Already by the late nineteenth century, leading commentators and jurists were skeptical of the claim that the Contracts Clause afforded protection to corporate charters, because by then they were approaching the modern understanding of contract.<sup>27</sup> Cooley limited the application of the Contracts Clause to “the repudiation of debts and just contracts” and thought it didn’t cover corporate charters at all.<sup>28</sup> What I would argue is that before the treatises of Story, both *père et fils*, Parsons, and Langdell—not to mention the formidable Restatement of the Law—contract was flexible enough to include grants, and Marshall was well within traditional usage when he held a charter a contract.

Like contracts, corporations were not dealt with effectively by the Framers of the Federal Constitution and for the same reason. Modern corporations, like modern

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<sup>22</sup> Ely, *supra* note 17, at 1033.

<sup>23</sup> BLACK’S LAW DICTIONARY 807, 809 (8th ed. 2004).

<sup>24</sup> See SAMUEL ELIOT MORISON ET AL., 1 THE GROWTH OF THE AMERICAN REPUBLIC 292 (7th ed. 1980).

<sup>25</sup> See John V. Orth, *John Marshall and the Rule of Law*, 49 S.C.L. REV. 633, 638 (1998) (book review).

<sup>26</sup> *Id.*

<sup>27</sup> Harvard Law School Dean C.C. Langdell did not include corporate charters in his path-breaking casebook on contracts. See C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880).

<sup>28</sup> James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J.L. & LIBERTY 370, 398 (2005) (quoting THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES 280 n.2 (2d ed. 1871)).

contracts, had simply not yet emerged. In consequence, the Marshall Court had to resort to the most obvious sort of legal fiction and raise a presumption—an irrebuttable presumption—that all of the stockholders in a corporation are citizens of its state of incorporation so that it could resolve the question of corporate citizenship for purposes of diversity jurisdiction.<sup>29</sup>

Nor did the Constitution reflect any awareness of manufacturing. Indeed, “[t]hroughout the eighteenth century the word ‘manufacturer,’ true to its Latin roots, meant a person who” made things by hand, manually.<sup>30</sup> Only in the nineteenth century did it finally cross the divide between capital and labor and become the common name of one who employed hand workers.<sup>31</sup> Drafted in light of the Commercial, not the Industrial Revolution, the U.S. Constitution was comprehensively concerned with commerce, that is, the exchange of goods, mostly raw materials and agricultural products: commerce with foreign nations, commerce among the several states, commerce with the Indian tribes.<sup>32</sup>

While I fully agree with Jim’s description of Chief Justice Fuller’s opinion in *United States v. E.C. Knight Co.*,<sup>33</sup> limiting the scope of congressional power, as genuinely concerned with issues of federalism, I would argue that the Framers had not consciously left the regulation of manufacturing to the states. Writing in the days when industry was in its infancy even in England, the birthplace of the Industrial Revolution, they just hadn’t thought much about it. Fuller was not being silly (as he is so often portrayed in constitutional law classes today) when he said that manufacturing is not commerce.<sup>34</sup> It’s not. Of course, there may be a good reason why the national legislature should be able to legislate about manufacturing—just as there is a good reason why the Constitution should protect corporate charters and why federal courts should have jurisdiction over suits by and against business corporations. But the legendary Framers, for all their prescience, hadn’t foreseen the development of corporate capitalism and the modern industrial economy. They couldn’t even agree on the social value of a commercial economy, let alone an industrial one, although all agreed on the political and diplomatic need for central control of commerce to avoid disunion and foreign complications.<sup>35</sup>

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<sup>29</sup> See JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 34–35 (Roland Gray ed, 2d ed. 1921) (describing this fiction as “remarkable for the late date of its origin and for its absurd results”); see also *id.* at 183–86.

<sup>30</sup> JOHN V. ORTH, *COMBINATION AND CONSPIRACY: A LEGAL HISTORY OF TRADE UNIONISM, 1721–1906*, at 45 n.10, 87 n.122 (1991); see 9 *OXFORD ENGLISH DICTIONARY* 341–42 (2d ed. 1989).

<sup>31</sup> ORTH, *supra* note 30, at 45 n.10, 87 n.122.

<sup>32</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>33</sup> 156 U.S. 1 (1895); see JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910*, at 129–30 (1995).

<sup>34</sup> *E.C. Knight Co.*, 156 U.S. at 12 (“Commerce succeeds to manufacture, and is not a part of it.”).

<sup>35</sup> *THE FEDERALIST* NO. 22 (Alexander Hamilton), NO. 42 (James Madison).

Accommodating manufacturing and corporations in the constitutional scheme proved relatively easy. Protecting contract was more problematic. It must have seemed like an oversight to the judges in the late nineteenth century, as it did to Cooley, that the drafters of the Due Process Clauses had omitted contract from their select list of rights.<sup>36</sup> Of course, contract could be shoehorned into liberty or, maybe, property,<sup>37</sup> and it enjoyed a now notorious period of judicial solicitude in the late nineteenth and early twentieth centuries. It is a tale often told that that form of judicial protection of contract met its Waterloo in the “constitutional revolution of 1937,”<sup>38</sup> but in the meantime contract-thinking was seeping into the legal understanding of property.

I have elsewhere argued that property, the central paradigm in the common law scheme of things, has now been displaced by contract.<sup>39</sup> The lease of land is now “like any other contract.”<sup>40</sup> Deeds of residential property are increasingly found to include implied warranties of habitability.<sup>41</sup> Of more consequence, particularly in the present circumstance, is the extension of “contract-talk” to the constitutional conception of property. I’m thinking of that curious phrase in Justice Brennan’s decision in the *Penn Central* case, “investment-backed expectations,” which has become a regular feature of subsequent decisions concerning the Takings Clause.<sup>42</sup> Surely this cannot be taken to mean that property acquired by gift, devise, or descent—the principal means of inter-generational transfers of property—is entitled to less protection than property acquired in a bargained-for exchange.

Rather than continue to discuss the troubled constitutional jurisprudence concerning possessory estates, which Jim has canvassed so well, I want now to turn to yet another area of Jim’s expertise, the non-possessory property interest known as the easement. I have been alarmed recently by the diminishing judicial protection accorded easement rights.<sup>43</sup> My concern is best exemplified by a recent decision of

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<sup>36</sup> See U.S. CONST. amend. V; *id.* amend. XIV, § 1.

<sup>37</sup> See ORTH, *supra* note 10, at 61–62.

<sup>38</sup> The “constitutional revolution of 1937” refers to the Supreme Court’s change of direction in 1937–1938, abandoning economic substantive due process. See, e.g., Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1, 3 n.7 (1997). See generally EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941) (discussing the Supreme Court’s change of direction in 1937).

<sup>39</sup> John V. Orth, *Contract and the Common Law*, in *THE STATE AND FREEDOM OF CONTRACT* 44 (Harry N. Scheiber ed., 1998).

<sup>40</sup> E.g., *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); see also *Brown v. Southall Realty Co.*, 237 A.2d 834, 837 (D.C. 1968); *Wright v. Baumann*, 398 P.2d 119 (Or. 1965).

<sup>41</sup> See, e.g., John V. Orth, *Sale of Defective Houses: Cicero & the Moral Choice*, 6 GREEN BAG 2D 163 (2003).

<sup>42</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

<sup>43</sup> See John V. Orth, *Relocating Easements: A Response to Professor French*, 38 REAL

the Massachusetts Supreme Judicial Court, *M.P.M. Builders, LLC v. Dwyer*.<sup>44</sup> Defendant had purchased a parcel of land and an appurtenant right-of-way easement over an adjacent parcel in 1941.<sup>45</sup> The deed described the location of the easement and contained no mention of possible relocation by either the easement owner or the burdened landowner.<sup>46</sup> Had the parties cared to investigate at the time, they would have found that the common law rule, prohibiting relocation without permission, was in effect in Massachusetts.<sup>47</sup>

In 2002, the plaintiff builder, who had recently acquired the burdened land, proposed to relocate the easement to accommodate planned construction.<sup>48</sup> The relocated easement would permit the defendant access “in the same general areas” as the deeded easement, but the defendant refused permission, “preferring to maintain [his] right of way in the same place that it has been and has been used by [him] for the past 62 years.”<sup>49</sup> Plaintiff then sought a declaratory judgment that it could relocate the easement without the owner’s permission,<sup>50</sup> and the Massachusetts Supreme Judicial Court, abandoning the majority common law rule and applying instead the minority rule adopted in the latest Restatement of the Law of Servitudes, allowed the move.<sup>51</sup>

In defense of the Restatement’s new position, it is said that relocation is allowed only in cases in which it does not “significantly lessen the utility of the easement.”<sup>52</sup> The key question, of course, is who gets to determine utility: the easement owner, the burdened landowner, or the courts? In its own small way, this is the same question

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PROP. PROB. & TR. J. 643 (2004) [hereinafter Orth, *Relocating Easements*]; see also John V. Orth, *The Burden of an Easement*, 40 REAL PROP. PROB. & TR. J. 639 (2006).

<sup>44</sup> 809 N.E.2d 1053 (Mass. 2004).

<sup>45</sup> *Id.* at 1055.

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 1056.

<sup>48</sup> *Id.* at 1055.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1055–56.

<sup>51</sup> *Id.* at 1057. The Restatement states:

Unless expressly denied by the terms of an easement . . . , the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner’s expense, to permit normal use or development of the servient estate, but only if the changes do not

- (a) significantly lessen the utility of the easement,
- (b) increase the burdens on the owner of the easement in its use and enjoyment, or
- (c) frustrate the purpose for which the easement was created.

RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4-8.3 (2000). Although the Supreme Judicial Court adopted the rule in the Restatement, it added the significant qualification that prior judicial approval of the relocation is required. *M.P.M. Builders*, 809 N.E.2d at 1059.

<sup>52</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4-8(3)(a) (2000).



asked in the takings cases that Jim has so effectively criticized, particularly when, as here, the easement is rerouted not for a public purpose but for the convenience of a private developer.<sup>53</sup> Did anyone ask whether, when the land subject to the easement was sold to the developer, the price reflected the obvious existence of the easement along its described route? Or whether the price the defendant originally paid for the deeded easement reflected his preference for that route? And is it rude to ask why the defendant's continued use along the defined route is not an "investment-backed expectation," entitled to constitutional protection?

It would be graceless indeed at this conference where Jim Ely will follow Frank Michelman and Richard Epstein in receiving the Brigham-Kanner Prize to suggest that Jim could do more for the cause of property rights. But I would ask him if *Bruce and Ely on Easements* couldn't be more full-throated in its rejection of the Restatement position on unilateral relocation. Saying that the Restatement "inadvisably discards" the long-standing rule and that some courts have "prudently" decided to retain it is true but pale and passionless.<sup>54</sup> I invite Jim to join me in robustly declaring it—as I have already done in print—"radical" and "unfair."<sup>55</sup>

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<sup>53</sup> *M.P.M. Builders*, 809 N.E.2d at 1055.

<sup>54</sup> See JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 7:16.1 (Supp. 2007).

<sup>55</sup> Orth, *Relocating Easements*, *supra* note 43, at 644 n.6, 653.