

AMERICAN LAW INSTITUTE CLE EMINENT DOMAIN AND
LAND VALUATION LITIGATION KEYNOTE ADDRESS:
“PROPERTY RIGHTS: FOUNDATION FOR A FREE SOCIETY”

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KEYNOTE ADDRESS SPEAKER

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Friends, let’s think back to September 1787. Our country’s Constitutional Convention was nearing its end in Philadelphia when a formidable woman encountered Benjamin Franklin, a delegate to the Convention.¹ She braced him with this question: “Well[,] Doctor[,] what have we got[,] a republic or a monarchy[?]”² The wise, old, battle-tested Franklin replied simply: “A republic . . . if you can keep it.”³

So, friends, we have a republic if we can keep it. We have a free society if we can keep it.

Just what role do property rights—the freedom to acquire and govern our assets—play in nurturing our republic and our society?

It is the rare American these days who doesn’t feel that our country’s civic life and democratic institutions have gotten pretty ragged, and our political and social fabric dangerously frayed. This feeling runs across the political and cultural spectrum from citizens who find Donald Trump and Fox News the “be all and end all” to those who sit at the feet of Nancy Pelosi or Bernie Sanders, aided and abetted by CNN and MSNBC. Perhaps the citizens most concerned about the sad state of our political and social fabric are those who fall between these two poles, hoping everyone will take a deep breath, cool the invective, and get on with the work at hand.

* Warm thanks to Mason Shefa, William & Mary Law School ’19, for his excellent work on citations to these remarks.

1. See Papers of Dr. James McHenry on the Federal Convention of 1787, 11 AM. HIST. REV. 595, 618 (1906), *reprinted in* U.S. GOV’T PRINTING OFF., DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 952 (1927).

2. *Id.*

3. *Id.*

Now, by no stretch of the imagination is this the first time Americans have been alienated from one another. The Revolutionary War was as much a struggle that pitted colonists against colonists, rebels against loyalists, as it was a conflict with Great Britain. During the presidential election of 1800, the supporters of John Adams and Thomas Jefferson were frenzied, fearing that if the election went against them, the fledgling nation would be strangled in its crib. To press their respective cases, Jefferson's partisans called Adams a "hideous hermaphroditical character, which has neither the force and firmness of a man, nor the gentleness and sensibility of a woman."⁴ Adams' adherents, in turn, termed Jefferson "mean-spirited, . . . an atheist, a libertine, and a coward."⁵

The Civil War, when it came early in the republic's life, again pitted Americans against Americans in a struggle of catastrophic dimensions. The Great Depression of the 1930s, Vietnam, Watergate, and the civil rights movement all led to serious internal disputes and strife. Americans have disagreed over immigration repeatedly since the colonists first set foot in America. Issues rooted in race, religion, gender, sexual orientation, and economics have all taken their toll on our national harmony and unity.

In short, internal strife is nothing new for our country. But that fact makes all the clearer our need for countervailing forces that bring us together and help sustain our republic, time and again. A Holocaust survivor and resistance fighter whom I know likens America to a cat with many lives—in the end, the United States always lands on its feet.

So let's think together about how property rights are vital in enabling our country to keep landing on its feet. Turn the matter of how property rights do this deed over in your own minds as I offer my own ruminations about the matter.

At the threshold, it is always telling for me to remember that one of the first things a totalitarian regime usually does is interfere with property rights.⁶ It seizes the property of people actively opposed to

4. ED WRIGHT, HISTORY'S GREATEST SCANDALS 11 (2006).

5. Kerwin Swint, *Founding Fathers' Dirty Campaign*, CNN (Aug. 22, 2008), <http://www.cnn.com/2008/LIVING/wayoflife/08/22/mf.campaign.slurs.slogans> (last visited March 20, 2019).

6. See, e.g., Vladimir Lenin, Dekret o Zemle [Decree on Land], IZVESTIYA TSENTRAL'NOGO ISPOLNITEL'NOGO KOMITETA SOVETOV RABOCHIKH I KRESTIANSKIKH DEPUTATOV SSSR [IZV.TSIK] [Bulletin of the USSR Central Executive Committee of the Councils of Workers' and Peasants' Deputies] 1917, http://www.hist.msu.ru/ER/Etext/DEKRET/o_zemle.htm. For a full translation,

the regime and the property of groups whom the regime singles out for special persecution (such as Jews under Hitler and Kulaks under Stalin), and it relentlessly grows the role of the state in the general acquisition and disposition of property.⁷ Indeed, if the regime is communist, it quickly eliminates all significant sources of private property,⁸ demonizes those who once owned it, and murders millions of them.⁹ Lenin, Stalin, and Mao intuitively understood that property rights are antithetical to tyrannical government.

To quote a leading lawyer in the first half of the twentieth century, John W. Davis, “History furnishes no instance where the right of man to acquire and hold property has been taken away . . . without the complete destruction of liberty in all its forms.”¹⁰ Past experience does make clear that there is a strong link between the right to possess property and the existence of personal freedom.

It is always invigorating to recall the words of Justices of the United States Supreme Court when what they say strikes kindred chords with us (less invigorating to quote them, of course, when their words rattle our cages). In 1897, Justice Harlan said, “Due protection of the rights of property has been regarded as a vital principle of republican institutions.”¹¹ In 1921, Justice McKenna wrote, “The security of property next to personal security against the exertions of government is the essence of liberty.”¹² In 1972, Justice Stewart declared

that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between

see Report on Land, MARXISTS INTERNET ARCHIVE, <https://www.marxists.org/archive/lenin/works/1917/oct/25-26/26d.htm> (last visited Apr. 10, 2019). See generally Adam J. Macleod, *Strategic and Tactical Totalization in the Totalitarian Epoch*, 5 BRIT. J. AM. LEGAL STUD. 57 (2016) (discussing the legal theories behind interference with property rights by totalitarian regimes abroad).

7. See, e.g., Calvin B. Hoover, *Dictatorship and Property*, 13 VIRGINIA Q. REV. 161 (1937).

8. *Id.* at 163–64.

9. See Stephen W. Carson, *A Property-Rights Theory of Mass Murder*, FOUND. ECON. EDUC. (Sept. 1, 2008), <https://fee.org/articles/a-property-rights-theory-of-mass-murder> (last visited March 22, 2019).

10. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 133 (3d ed. 2008) (quoting WILLIAM H. HARBAUGH, *LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS* 347 (1973)).

11. ELY, *supra* note 10, at 3 (quoting Justice Harlan in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235–36 (1897)).

12. *Block v. Hirsh*, 256 U.S. 135, 165 (1921) (McKenna, J., dissenting).

the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.¹³

A few years earlier, in 1958, a judge of the U.S. Court of Appeals for the Second Circuit, the august Learned Hand, sounded the same theme. Let me quote what James W. Ely, Jr., wrote about the great Judge Hand. Ely said that Judge Hand

questioned whether there was a principled distinction between personal and property rights. He observed that “it would have seemed a strange anomaly” to the framers of the Fifth Amendment “to learn that they constituted severer restrictions as to Liberty than Property.” Hand added that there was “no constitutional basis” for asserting greater judicial supervision over personal freedom than over economic liberty.¹⁴

Now let’s see what the Constitution has to say about the matter. This entails a look at the historical context out of which the property provisions of the Constitution arose and then a look at the intentions of its framers and ratifiers, to the extent those intentions can be divined from very fragmentary records. Next comes the text of the Constitution itself and what it actually says about property. Finally, there is actual practice—how these provisions of the Constitution have been interpreted in real life, no matter what the historical context out of which the Constitution arose, no matter what the intentions of the constitutional fathers, and no matter what the pertinent words of the Constitution say. Days could be spent on these four intertwined inquiries. Let your hearts be at rest, I will be mercifully brief.

First, the historical context. A desire to escape the aristocratic, quasi-feudal ways of property ownership in England and Scotland was one of the motivating forces that led colonists to crowd aboard small, unsafe vessels; take their chances crossing a vast sea; and land, if successful, on a mysterious continent, then largely wilderness.¹⁵ In the mid-1600s in England and Scotland, to quote a distinguished property scholar, “land use was far from free, because it was

13. ELY, *supra* note 10, at 150–51 (quoting Justice Stewart in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)).

14. ELY, *supra* note 10 at 150 (quoting LEARNED HAND, *THE BILL OF RIGHTS* 50–51 (1958)).

15. *Id.* at 12.

always intimately connected with services owed to a higher lord, all the way up to the monarch.”¹⁶ American colonists, however, wanted to be able to acquire property, possess it outright, and use it as they thought best. They sought the personal freedom that is rooted in property rights.¹⁷

As American society grew and prospered, evolving from Jamestown in 1607 and Plymouth Rock in 1620, the colonists became increasingly eager to control their own economic future and make their own laws with minimal interference from the mother country.¹⁸ In the last quarter of the eighteenth century, they became heavily influenced by the thoughts of the philosopher John Locke and the Whig party in Parliament.¹⁹

Jim Ely captured the essence in his seminal book entitled *The Guardian of Every Other Right: A Constitutional History of Property Rights*. Ely wrote:

The colonial attachment to property ownership was powerfully reinforced by intellectual currents in the mother country. For England, the seventeenth century was a time of political and

16. JOSEPH WILLIAM SINGER, PROPERTY § 7.1, at 300 (3d ed. 2010).

17. See, e.g., Samuel Adams, *The Rights of the Colonists, a List of Violations of Rights and a Letter of Correspondence*, 18 BOS. REC. COMMISSIONERS’ REP. 94 (1772), reprinted in 2 THE WRITINGS OF SAMUEL ADAMS, PROJECT GUTENBERG (Harry Alonzo Cushing ed., Project Gutenberg compilation 2000), <http://www.gutenberg.org/cache/epub/2092/pg2092-images.html> [hereinafter THE WRITINGS OF SAMUEL ADAMS] (“Among the Natural Rights of the Colonists are these[.] First. a Right to Life; Secondly to Liberty; thirdly to Property; together with the Right to support and defend them in the best manner they can—Those are evident Branches of, rather than deductions from the Duty of Self Preservation, commonly called the first Law of Nature . . .”).

18. See ELY, *supra* note 10, at 15; THE WRITINGS OF SAMUEL ADAMS, *supra* note 17 (“The natural liberty of Men by entering into society is abridg’d or restrained so far only as is necessary for the Great end of Society the best good of the whole . . .”).

19. See ELY, *supra* note 10, at 16–17; see also David L. Wardle, *Reason to Ratify: The Influence of John Locke’s Religious Beliefs on the Creation and Adoption of the United States Constitution*, 26 SEATTLE U. L. REV. 291, 296–97 (2002) (“Of all of Locke’s works, his *Essay* was by far the most widely distributed in America at the end of the eighteenth century. One study shows that the height of Locke’s popularity, as judged by the percentage of libraries carrying his books, was from 1777 to 1790, a critical period for the Constitution. Locke’s political philosophy was important to these early Americans . . .” (footnotes omitted)); Donald L. Doernberg, “We the People”: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CALIF. L. REV. 52, 57–59 (1985) (“It would be difficult to overstate John Locke’s influence on the American Revolution and the people who created the government that followed it.”); David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L. Q. 131 (1992).

religious upheaval, culminating in the Glorious Revolution of 1688. Seeking to justify these events, English political thinkers analyzed the nature of government. The most significant of these Whig theorists was John Locke, who asserted . . . that legitimate government was based on a compact between the people and their rulers. The people gave allegiance to the government in exchange for protection of their inherent or natural rights. Deviation by the rulers from this fundamental agreement provided grounds for their overthrow.

Of particular importance was the theory of property rights in Locke's political philosophy. According to Locke, private property existed under natural law before the creation of political authority. Indeed, the principal purpose of government was to protect these natural property rights, which Locke fused with liberty. Thus, he asserted that people organized government to preserve "their Lives, Liberties and Estates." Because the ownership of property was a natural right, the powers of government were necessarily limited by its duty to safeguard property. Locke argued that the legislature could not arbitrarily take property and that the levy of taxes without popular consent . . . "subverts the end of Government."²⁰

According to Ely, "It is difficult to overstate the impact of the Lockean concept of property. Strongly influenced by Locke, the eighteenth-century Whig political tradition stressed the rights of property owners as the bulwark of freedom from arbitrary government. Property ownership was identified with the preservation of political liberty."²¹

But eighteenth-century Whig political theory was not the only factor at play. King George III and Parliament fell deeply into debt during The Seven Years' War of 1756 to 1763.²² This was a struggle waged around the world, with Britain and France as the prime combatants. The conflict came to North America as what the British colonists called the French and Indian War.²³ When England's government sought to have the colonists help retire its huge war debt by levying new taxes on Americans and interfering in other ways with their property, smoldering resentment against the mother

20. ELY, *supra* note 10, at 16–17.

21. *Id.* at 17.

22. See JUSTIN DU RIVAGE, *REVOLUTION AGAINST EMPIRE: TAXES, POLITICS, AND THE ORIGINS OF AMERICAN INDEPENDENCE* 77–79, 91–92 (2017).

23. *Id.* at 11.

country for many reasons finally caught fire, and the American Revolution broke out.²⁴ The cry “no taxation without representation” fueled the conflagration.²⁵ American property was not to be trifled with, even by Parliament and King.

After the Revolution, during a dangerous time of feckless national government under the Articles of Confederation, states began to tread on property rights as they sought revenue.²⁶ Concern to stem this trend was an impetus, among many, to the Constitutional Convention;²⁷ it met in secret, behind closed doors and drawn curtains, from May to September 1787,²⁸ often in stifling heat.

The need to safeguard property against arbitrary action by government was very much on the minds of the constitutional fathers. To quote Ely again:

The delegates to the Constitutional Convention were an able and experienced group, most of whom had participated in public affairs during the revolutionary era. Harboring little faith in the people, the framers were not democrats in any modern sense. Indeed, they viewed popular government as a potential threat to property rights. . . .

Despite their differences over particular economic issues, the right to acquire and own property was undoubtedly a paramount value for the framers of the Constitution. Following the Lockean philosophy, John Rutledge of South Carolina advised the Philadelphia convention that “Property was certainly the principal object of Society.” Similarly, Alexander Hamilton declared, “One great obj[ective] of Gov[ernment] is personal protection and the security of Property.” These sentiments were widely shared by other delegates. Consistent with the Whig tradition, the framers did not distinguish between personal and property rights. On the contrary, in their minds, property rights were indispensable because property ownership was closely associated with liberty. “Property must be secured,” John Adams proclaimed in 1790, “or liberty cannot exist.” Indeed, the framers saw property ownership as a buffer protecting individuals from governmental coercion.

24. See ELY, *supra* note 10, at 27.

25. *Id.* Additionally, the cry “Liberty and Property” became “the motto of the revolutionary movement.” *Id.* at 25.

26. See *id.* at 41.

27. See *id.*

28. *Id.* at 42.

Arbitrary redistributions of property destroyed liberty, and thus the framers hoped to restrain attacks on property rights.²⁹

Now, one form of property—the ownership of human beings by other human beings, that is, the institution of slavery—occasioned the most bitter and divisive debates during the constitutional deliberations and came close to wrecking the Convention.³⁰ Compromise was finally reached on slavery in ways that satisfied no one except that the compromise permitted the formation of a viable national government.³¹ This was crucially important if our fledgling nation was to have a chance to survive infancy and to begin to gather strength at a time when Britain, France, Spain, and even Russia still occupied parts of North America and waited expectantly and hungrily for the failure of the new republic and the territorial opportunities this would provide them.

The right to own slaves did emerge, with strong protections, from the drafting and ratifying of the Constitution, though the words “slave” and “slavery” were never used in the document written and ratified in 1787–88.³²

Property rights in other people, however, are flatly inconsistent with another, more basic property right, that of self-ownership—the priceless right to possess ourselves free of anyone else’s claim on our bodies, our time, our talent, and our labor.³³ It took a hideous Civil War and a constitutional amendment to vindicate self-ownership, though in the twenty-first century self-ownership seems the most basic property right of all.³⁴

Now, against the background just sketched, let’s look at the provisions of the Constitution that deal with property. They exist in

29. *Id.* at 42–43 (first quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 534 (Max Farrand, ed., rev. ed. 1937); then quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 302; and then quoting 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams, ed., Boston, Little, Brown & Co. 1851)).

30. See ELY, *supra* note 10, at 46.

31. See *id.* at 46–47.

32. David S. Reynolds, *The Fuse the Founders Lit*, WALL STREET J., Nov. 24–25, 2018, at C7; see U.S. CONST. arts. I–VII.

33. See Reynolds, *supra* note 32 (“[T]he most basic property right was that of self-ownership, a right possessed by every human being.”).

34. See Carole Pateman, *Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts*, 10 J. POL. PHIL. 20, 20 (2002) (describing an increase in scholarly interest in the concept of self-ownership in the 1990s).

great profusion. Why am I going to lay each and every one on you? Two main reasons: First, their cumulative weight speaks eloquently. It tells us something important, and we should take heed. Property was obviously a primal concern of the framers, ratifiers, and later the amenders of the Constitution. Second, I believe Continuing Legal Education credit may be given for this lecture. In my experience, getting enough CLE annually to keep our law licenses often entails a bit of boredom, even some suffering. I proceed in that spirit.

Constitutional provisions pertaining to the legislative branch include Article I, Section 2, Clause 3 (“[D]irect Taxes shall be apportioned among the several States . . . according to their respective Numbers . . .”), Article I, Section 8, Clauses 1–8 (establishing Congress’s power to set taxes, borrow money, regulate commerce, establish uniform bankruptcy laws, coin money, and secure copyright protection for inventors and authors), Article I, Section 9, Clauses 1 (stating that “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited . . . prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed . . . not exceeding ten dollars for each Person [, that is, each slave]”), Article I, Section 9, Clauses 3–8 (prohibiting bills of attainder, a capitation tax other than one in proportion to the census, the preference of the ports of one state over another, and the granting of titles of nobility), and Article I, Section 10, Clauses 1–2 (prohibiting states from printing money, passing bills of attainder, impairing the obligation of contracts, granting nobility, or charging tariffs on imports from other states).³⁵

The property provision relevant to the judicial branch is in Article III, Section 3, Clause 2: “The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”³⁶

A property provision dealing with the relation of states to one another can be found in Article IV, Section 2, Clause 3:

No Person held to Service or Labour in one State, [that is, a slave,], under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from

35. U.S. CONST. art. 1, § 2, cl. 3, § 8, cl. 1–8, § 9, cl. 1, 3–8, § 10, cl. 1–2.

36. *Id.* at art. 3, § 3, cl. 2.

such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.³⁷

And a provision dealing with national debts appears in Article VI, Section 1, Clause 1: “All Debts, contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.”³⁸

Then there are the property provisions of the amendments to the constitutional text. The Third Amendment states: “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”³⁹ The Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”⁴⁰ The Fifth Amendment: “No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”⁴¹ The Thirteenth Amendment: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁴² Finally, the Fourteenth Amendment provides, in relevant part:

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 shall any State deprive 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 validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any

37. *Id.* at art. 4, § 2, cl. 3.

38. *Id.* at art. 6, § 1, cl. 1.

39. U.S. CONST. amend. III.

40. *Id.* amend. IV.

41. *Id.* amend. V.

42. *Id.* amend. XIII.

State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.⁴³

So what should we make of these constitutional metaphysics—the historical context out of which the property provisions of the Constitution arose, the intentions of their framers and ratifiers, and the actual language of these provisions? If we could find someone who is aware of context, intent, and text, but who is wholly innocent of actual practice—how text has been interpreted since the U.S. government began under the Constitution in March, 1789—that innocent being would marvel at how little primacy property rights seem to have enjoyed in the United States in recent generations.

Now some loss of primacy for early property rights was inevitable. When the Constitution took effect 230 years ago, property rights were largely the preserve of white males of means. Even their wives and daughters had extremely limited rights. And ownership of slaves constituted an enormous source of wealth. As was recently written about Thomas Jefferson:

Property in land and property in slaves were the engines that drove Virginia society from its earliest days, giving Jefferson and those in his class wealth, independence, and liberty—their sense of identity. It was the dividing line between those who could participate in republican society by voting and those who could not, between those who were respectable and those who were not.⁴⁴

All this was bound to change as American society changed, with gains in property rights for people who were not privileged, white

43. *Id.* amend. XIV, §§ 1–4. Many more constitutional amendments pertain to property, including the Second Amendment (“[T]he right of the people to keep and bear Arms, shall not be infringed.”), the Eighth Amendment (“Excessive bail shall not be required, nor excessive fines imposed . . .”), the Sixteenth Amendment (“The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”), the Eighteenth and Twenty-first Amendments (prohibiting intoxicating liquors and then repealing Prohibition, respectively), and, finally, the Twenty-fourth Amendment (“The right of citizens of the United States to vote . . . shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.”).

44. See ANNETTE GORDON-REED & PETER S. ONUF, “MOST BLESSED OF THE PATRIARCHS”: THOMAS JEFFERSON AND THE EMPIRE OF THE IMAGINATION 20 (2016).

males and losses for those males—especially when it came to ownership of other people and to control of marital property.

It was also true that, given the evolution of American society toward greater civil rights and greater redistribution of wealth, it was not politically feasible for the federal judiciary to continue giving property rights the same constitutional primacy accorded them during our government's first century and a half. The United States Supreme Court came slowly to this realization when it struck down much of the New Deal legislation on property rights grounds during Franklin Roosevelt's presidency but shifted its stance under the hammer blows of the Great Depression and political furor.⁴⁵

Of course, too, there have *always* been constraints on property rights. These constraints become most pronounced during major wars, but to a lesser degree they are ever present. Today these constraints exist in multitudinous profusion and, at times, seem to breed like rabbits.

Joseph William Singer, a Harvard Law School Professor, wrote an important article entitled *Property as the Law of Democracy* in which he stresses that “[p]roperty is more than the law of things; property is the law of democracy.”⁴⁶ This entails, in Singer's view, a rich flowering of constraints.⁴⁷ “In a free and democratic society,” Singer says,

owners have rights, but they also have obligations. Restaurants and shops cannot exclude patrons on the basis of their race or religion. Nor can public accommodations refuse to make reasonable accommodations to make their services available to persons with disabilities. Owners are not free to ignore longstanding occupation of their property if they want to protect themselves from loss of their property by adverse possession. Owners cannot vote to pass zoning laws that unduly inhibit the ability of religious institutions to operate in their communities. Landlords cannot fail to provide tenants with heat or hot water. Owners are not free to interfere with the quiet enjoyment of neighboring owners, nor are they free to saddle buyers with covenants that unreasonably impede the alienability of land. Owners are not free to sell property without reducing the transaction to writing and recording

45. See ELY, *supra* note 10, at 126.

46. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1291 (2014).

47. See *id.* at 1301.

the documents in the registry of deeds. Nor are they free to build without complying with local building and construction codes. The number of obligations the law imposes on owners is far too numerous to mention. And determining what obligations owners have requires attention to our deepest norms and values.⁴⁸

“Property law is designed,” wrote Singer, “to spread freedom, opportunity, security, and wealth, but it is also designed to prevent owners from inflicting harm on others and from acting in a manner that is incompatible with norms of propriety.”⁴⁹ Singer elaborated:

Property law . . . entails substantive choices about the type and scope of property rights that a free and democratic society can recognize without violating its deepest values. We have, for example, abolished feudalism, slavery, primogeniture, male control of marital property, racial segregation, the fee tail, and debtors’ prisons. We have abolished self-help in landlord–tenant relations; we prohibit landlords from putting the tenant’s belongings on the street if a rent check is a day late. . . . We have abolished strict foreclosure of mortgages. We have abolished racially restrictive covenants. We have enacted zoning and environmental laws and we have protected consumers from unfair and deceptive business practices. The host of regulations we see both in state and federal law establishes minimum standards for social relationships compatible with our choice to live in a democracy and to promote freedom and equality.⁵⁰

Inevitably, there will be conflicts between protecting the ownership and use of property, including enforcing contractual rights, on the one hand, and advancing other interests such as the redistribution of wealth, the allocation of land for public enjoyment, and economic redevelopment, on the other. As ever with constitutional interpretation, hard cases defy easy answers. Conflict is most acute, perhaps, when eminent domain is used to take land and buildings from unwilling private owners so as to transfer it to other private owners for their entrepreneurial projects, purportedly to enhance the larger social good. This is especially the case when the compensation for

48. *Id.* at 1323–24.

49. *Id.* at 1324.

50. *Id.* at 1304.

the seized property seems disproportionately small compared to the harm done to the erstwhile owner.

The reaction, especially at the state level, against the Supreme Court's 2005 decision in *Kelo v. City of New London*⁵¹ suggests a renewed appreciation of the role of property rights in ensuring the health of our republic. The Court in *Kelo* split 5–4.⁵² In dissent, Justice O'Connor was in full cry: "Under the banner of economic development," she wrote, "all private property is now vulnerable to being taken and transferred to another private owner"⁵³ She argued that nothing now prevents states "from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall,"⁵⁴ and she said the Court eliminates "any distinction between private and public use of property—and thereby effectively . . . delete[s] the words 'for public use' from the Takings Clause of the Fifth Amendment."⁵⁵ Justice Thomas, also in dissent, said: "Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not."⁵⁶

States have not warmed to *Kelo*, viewing it more as anathema than panacea.⁵⁷ Both legislatively and judicially, they have limited eminent domain of the sort permitted by the majority opinion in *Kelo*.⁵⁸ President George H. W. Bush pushed back against the opinion, as did many U.S. Senators.⁵⁹ On the whole, the public was appalled by the decision.⁶⁰ It did, however, receive modest editorial support from *The New York Times* and *The Washington Post*.⁶¹

51. 545 U.S. 469 (2005).

52. *Id.*

53. *Id.* at 494 (O'Connor, J., dissenting).

54. *Id.* at 503.

55. *Id.* at 494.

56. *Id.* at 518 (Thomas, J., dissenting).

57. See Ilya Somin, *The Political and Judicial Reaction to Kelo*, WASH. POST (June 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/?utm_term=.ee3e2d7d81f0.

58. *Id.*; Patricia H. Lee, *Eminent Domain: In the Aftermath of Kelo v. New London, a Resurrection in Norwood: One Public Interest Attorney's View*, 29 W. NEW ENG. L. REV. 121, 134–37 (2006).

59. See Lee, *supra* note 58, at 131–34.

60. Adam Liptak, *Case Won on Appeal (to Public)*, N.Y. TIMES (July 30, 2006), <https://www.nytimes.com/2006/07/30/weekinreview/30liptak.html?n=Top%2FReference%2FTimes+Topics%2FSubjects%2FP%2FPublic+Opinion> (last visited March 22, 2019); Somin, *supra* note 57.

61. See Editorial, *The Limits of Property Rights*, N.Y. TIMES (June 24, 2005), <https://www.nytimes.com/2005/06/24/opinion/the-limits-of-property-rights.html> ("The Supreme Court's

In 1955, Justice Felix Frankfurter, when talking about constitutional interpretation, wrote, “Yesterday the active area in this field was concerned with ‘property.’ Today it is ‘civil liberties.’ Tomorrow it may be ‘property’ again.”⁶² If Frankfurter were still above ground—still on this side of the Great Divide—he might well see signs that property rights are coming back into their own as a focus of constitutional understanding, along with civil liberties.

Against this background, let’s ponder for a moment just how property rights do contribute to the strength of our republic.

In my view, tenure for professors and lifetime appointment for federal judges are instructive. Tenure for college and university professors gives them a stake in the success and strength of their colleges and universities. The security of position that’s inherent in tenure also provides them with the freedom to probe and challenge established dogma, to think and create robustly, and to speak freely—all of which are essential to intellectual progress. Without tenured professors’ security of position, their universities would be less likely to be powerful generators of new knowledge for the common good.

By the same token, the lifetime appointment of federal judges gives them a vital stake in the strength and success of the judicial enterprise. Because of their life tenure, they are also freer than they would otherwise be to decide cases based on the facts and the law, resisting political, economic, or social pressure to do otherwise. Because federal judges possess lifetime appointments, they are more able to see to the integrity and legitimacy of the third branch of government.

It seems to me that property rights work for citizens, as a whole, in much the same way that tenure does for professors and life appointments do for federal judges. When people have governmentally protected rights to acquire and to use property in ways conducive to their pursuits of happiness, they become more interested in the strength and success of their government and civil society. They have a stake in the well-being of both. And the possession of property gives them the security and influence to express their views and participate in civic and political life more freely and effectively. In a very fundamental sense, property does precede and undergird liberty.

ruling . . . was a welcome vindication of cities’ ability to act in the public interest.”); Editorial, *Eminent Latitude*, WASH. POST (June 24, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/23/AR2005062301698.html?noredirect=on> (last visited March 22, 2019) (“[T]he court’s decision was correct.”).

62. ELY, *supra* note 10, at 3 (quoting FELIX FRANKFURTER, *OF LAW AND MEN* 19 (1956)).

Property rights also undergird a vibrant market economy. These rights—in an economy governed by the rule of law—enable people to plan, invest, exchange goods and services, take entrepreneurial risks, and generally act in all the ways crucial to creativity, competition, and productivity. A robust national economy has the potential to lift all boats and ensure the stability and effectiveness of government.

Then, too, property rights also undergird people's capacity to be well-educated. Higher education in particular has become quite expensive. It takes property to pay the bills, either through family assets, taxpayer receipts, or funds philanthropically given by others to provide scholarships. To quote a former university president, now head of the Phi Beta Kappa Society, "Higher education increases volunteerism, political knowledge and participation, electoral turnout, and democratic attitudes. . . . Political theorist and Professor Danielle Allen . . . put it well: ' . . . [L]evel of education is an even stronger predictor than income of whether one will vote on Election Day.'"⁶³

And there is the enormous role that property plays in most people's daily lives. Having at least a modest amount of property lifts burdens that would otherwise drain a person's capacity to be an effective citizen. Without sufficient property, transportation can become a huge issue—so can acquiring shelter and lodging, reliably feeding your children and meaningfully educating them, as well as ensuring health care for the family. Without a basic amount of property, people have little capacity to participate in civic life or political activity. Their time and energy must go towards trying desperately to keep a nostril above the waves of daily existence. Without property, people have little capacity to thrive as citizens of our republic.

During the bicentennial of the United States in 1976, much celebratory material appeared. I collected a lot of it at the time. One piece that has survived in my hands is a calendar distributed by Exxon to its travel club members. This 1976 calendar celebrated the principal rights that Americans enjoy and cherish, starting in January with "The Right to Freedom of Religion."⁶⁴ When April 1976 came around, the bicentennial calendar celebrated "The Right to Own Property" with a caption saying:

63. Frederick M. Lawrence, *Preparation for an Engaged Civic Life*, KEY REP. (Dec. 3, 2018), <http://www.keyreporter.org/PbkNews/PbkNews/Details/2614.html> (quoting Danielle Allen, *The Future of Democracy*, 37 HUMAN. 61, 61 (2016)).

64. 1976 Exxon Travel Club Calendar (on file with author).

[T]o the rural American [of a bygone era] his new barn was a source of pride and joy, as well as visible evidence that he was a successful independent farmer. Today, in this Bicentennial era, Americans own more property of various kinds than any people in the history of the world.⁶⁵

On New Year's Day 2019, the newspaper in Richmond, Virginia, where my family lives, laid out eleven principles on which its editorials are based.⁶⁶ Among them was property rights.⁶⁷ The paper said:

We believe in the right to property. Individuals are granted a limited time on Earth, and they spend much of that time in arduous toil. They offer their labor in consensual exchange for money, which they then offer in consensual exchange for goods. To divest them of their money and property without profound justification is to rob them of their labor—and hence a portion of their lives.⁶⁸

I had a torts professor in law school who used to say money isn't everything, but it is everything else. The same can be said for property rights; they are not everything, but they are everything else. Property rights are a condition precedent to a flourishing civil society and a healthy polity for our republic.

Let me end with this thought. For centuries, lawyers in our country have had a special responsibility to nurture the public good. We lawyers are unusually able by dint of our training and experience to bring people together to work out their differences, to seek compromises, and to ensure our country deals with its difficulties and seizes its opportunities. We lawyers are especially charged to protect and nurture the rule of law in America, and the rule of law is flatly essential to our continued national success. So I think lawyers, as a species, are thinking very seriously these days about just what it is that holds our country together and sustains its capacity to flourish. Property rights are surely part of this equation. We lawyers have a special responsibility to see that property rights have their proper place in our country's constitutional understanding of what it takes to preserve a free society.

65. *Id.*

66. *See Our Creed*, RICH. TIMES-DISPATCH, Jan. 1, 2019, at A8.

67. *See id.*

68. *Id.*

“What could be more satisfying than to be engaged in work in which every capacity or talent one may have is needed, every lesson one may have learned is used, every value one cares about is furthered.”⁶⁹ These words from John W. Gardner are compelling. When these words characterize our work as lawyers, we make a serious difference for the better for our country.

It is a delight to be with you.

69. John W. Gardner, U.S. Sec’y of Health, Education, and Welfare, Address at the 13th Annual Career Service Awards Banquet (April 21, 1967), *in* 113 CONG. REC. 10, 610 (1967) (statement of Sen. Carlson).