LIBERTY AND PROPERTY: INDIVISIBLY LINKED?

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In this brief Article, I seek to explore more fully the tie between private property and individual liberty. Since liberty is a capacious subject, I will focus on the exercise of free speech, often considered the paramount individual right. More years ago than I care to remember, I published *The Guardian of Every Other Right* in which I endeavored to recall the traditional view that private property was indivisibly linked to the enjoyment of liberty.[1] Such sentiment was commonplace in eighteenth-century America. "Property must be secured," John Adams succinctly proclaimed in 1790, "or liberty cannot exist."[2] Likewise, Alexander Hamilton asserted in 1795: "Adieu to the security of property adieu to the security of liberty. Nothing is then safe—all our favourite notions of national & constitutional rights vanish."[3] As historian John Phillip Reid aptly noted: "There may have been no eighteenth-century educated American who did not associate defense of liberty with property. Like their British contemporaries, Americans believed that just as private rights in property could not exist without constitutional procedures, liberty could be lost if private rights in property were not protected."[4] Echoing this position, Chief Justice John Roberts recently pointed out: "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom."[5]

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1. JAMES W. ELY. JR, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008).

2. John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS, 280 (Boston, Little, Brown & Co. 1852).

3. Alexander Hamilton, *Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973).

4. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 33 (1986).

5. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).

This central premise that property was fundamental to the enjoyment of liberty persisted throughout the nineteenth century. In 1829 the eminent jurist Joseph Story emphasized:

> That government can scarcely be deemed to be free, where the rights of property left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of liberty and private property should be held sacred.[6]

At the end of the century, Justice Stephen J. Field, the most influential jurist of the Gilded Age, forcefully proclaimed: "It should never be forgotten that protection to property and persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other, and there can be neither prosperity nor progress where either is uncertain."[7]

I. DIVORCE OF PROPERTY AND LIBERTY

Although such expressions linking property and personal liberty occasionally surfaced throughout the twentieth and early twenty-first centuries,[8] there was an attitudinal sea change which had the

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6. Wilkinson v. Leland, 27 U.S. 627, 657 (1829).

7. Stephen J. Field, *The Centenary of the Supreme Court*, 24 AM. L. REV. 351, 367 (1890), *reprinted in* 134 U.S. 729, 745 (1890). In an influential revisionist work, Michael Les Benedict persuasively asserted that the property-conscious jurisprudence of the late nineteenth century was shaped by a desire to protect individual liberty rather than to assist business interests. Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985).

8. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (Stewart J.) ("In fact, a fundamental interdependence exists between 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."); Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017) (Kennedy, J.) ("Property rights are necessary to preserve freedom, for property ownership empowers people to shape and plan their own destiny in a world where governments are always eager to do so for them."); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 734 (2010) (Kennedy, J., concurring) ("The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation, and the right to own and hold property is necessary to the exercise and preservation of freedom."); *see also* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 526 (1999) ("Property rights and in particular rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States.").

effect of splitting property rights from other personal rights. This proceeded in two stages. First, the Progressive movement of the early twentieth century sought a more active role for government and displayed little interest in any claims of individual rights.[9] Daniel T. Rodgers has pointed out that a "striking phenomenon of the late nineteenth and early twentieth centuries was the abandonment of rights talk by Americans who aligned themselves with the progressive movements of the day."[10] In the same vein, David M. Rabban concluded: "But progressives were not sympathetic to other assertions of individual constitutional rights, including claims based on the First Amendment."[11] Progressives took particular aim at constitutional protection of property, which they pictured as an obstacle to their regulatory agenda.[12] Much of this criticism was in fact misplaced, as the Supreme Court generally sustained the legislation associated with the Progressive movement.[13] Indeed, as early as 1914 one observer lamented that private property rights were disappearing.[14] Moreover, leading Progressives were highly dismissive of any constitutional doctrines, such as natural rights theory and the separation of powers, that restrained the authority of government to overhaul private property rights.[15]

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9. James W. Ely Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL'Y 255 (2012); *see also* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM, 40 (2011) ("Leading Progressives were hostile or indifferent to many of the priorities of modern liberals, especially regarding what came to be known as civil liberties and civil rights. Progressives typically did not distinguish among different categories of rights. They instead thought that the very notion of inherent individual rights against the state was a regressive notion with roots in reactionary natural law ideology."). *See generally* RICHARD A. EPSTEIN: HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

10. Daniel T. Rodgers, *Rights Consciousness in American History*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 9, 18 (David J. Bodenhamer & James W. Ely Jr. eds., 3d ed. 2022).

11. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 3 (1997); *see also* MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 78–79 (1991) ("Most prominent early twentieth-century proponents of federal and state economic regulations also supported federal and state speech regulations.").

12. Ely, *supra* note 9, at 271–77.

13. James W. Ely Jr., *The Supreme Court and Property Rights in the Progressive Era*, 44 J. SUP. CT. HIST. 53, 53–70 (2019).

14. Daniel F. Kellogg, *The Disappearing Right of Private Property*, 199 N. AM. REV. 55, 62 (1914) (voicing concern that "the security of property is no longer looked upon, as it once was, as just as essential to the interests of society as the security of human life itself").

15. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 364–66 (2001) (observing that the legal realists "sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state

Second, the political triumph of the New Deal in the 1930s fundamentally altered the constitutional landscape. Building upon the Progressive legacy, New Dealers viewed the federal government as an instrument of social reform. Constitutional provisions that stood in the path of this goal were ignored or downplayed. Thus, structural restraints, such as the separation of powers, federalism, and substantive provisions protective of property, were sharply diluted.[16] A central feature of New Deal constitutionalism was a judicially fashioned dichotomy between the rights of property owners and other personal freedoms deemed fundamental. Property rights were placed in a subordinate category and were to receive virtually meaningless judicial review under a toothless "rational basis" standard.[17] Supine deference to the judgement of legislators regarding economic legislation became the new orthodoxy. In such a climate, little wonder that one commentator concluded that "property rights were essentially confined to a legal dust bin."[18]

Claims grounded in other provisions of the Bill of Rights, however, were to receive more exacting judicial scrutiny.[19] Freedom of speech was now exalted as a check on abusive government to replace the largely discarded structural restraints on government. Accordingly, free speech was reconfigured as an element of democratic governance rather than a private right sheltering individual autonomy from government. By the mid-twentieth century, freedom of speech was elevated to the preeminent position in constitutional

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intervention in regulating and redistributing property"); Michael Zuckert, *On the Separation of Powers: Liberal and Progressive Constitutionalism*, 29 SOC. PHIL. & POL'Y 335 (2012) (examining attack on the separation of powers); James W. Ceaser, *Progressivism and the Doctrine of Natural Rights*, 29 SOC. PHIL. & POL'Y 177, 188–95 (2012) (analyzing Progressive critique of natural rights doctrine).

16. For example, the once potent contract clause was virtually eviscerated at the federal level by the New Deal Supreme Court in order to accommodate far-ranging exercises of governmental power over contracts. JAMES W. ELY JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 216–34 (2016).

17. ELY, *supra* note 1, at 139–41. For the bifurcation between personal and economic rights, see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938) (declaring that constitutionality of economic regulatory legislation would be presumed unless facts preclude the assumption that the legislation "rests upon some rational basis" within the experience of legislators).

18. James L. Oakes, *'Property Rights' in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 608 (1981).

19. KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 346–47 (2d ed. 2009).

thought, as the quintessential preferred freedom.[20] The Supreme Court defended all manner of speech, in sharp contrast to its disinterest in property.[21]It was an article of faith on the political left that freedom of speech served to promote democracy and foster desired political change.[22] Two scholars explained:

> Judicial enforcement of First Amendment rights was once thought to be among the greenest pastures in the land of legal realism—the ideology that came to dominate the American legal academy in the 1960s and that sought to defend both the post-war welfare state and its reform by the Warren Court.[23]

To many of its champions, therefore, robust defense of free expression throughout much of the twentieth century served a particular political agenda.

II. CURRENT CHALLENGES TO PROPERTY AND FREE SPEECH

But time marches on. Many on the political left today have grown disenchanted with free speech and the marketplace of ideas. To them, free speech is not valuable as an individual right but only as a means to achieve certain political goals. They increasingly express alarm that free speech in fact is an obstacle to their vision of social

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20. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 49–59 (1996). This is not to suggest that strengthened protection for free speech was applied evenly to all parties. Consider the question of employer speech in the context of union organizing campaigns. Employer speech urging employees not to join a union was sharply restrained. KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 226–30 (2004). In sharp contrast, union picketing, previously treated as conduct, was deemed constitutionally protected free speech. Thornhill v. Alabama, 303 U.S. 88 (1940) (5–4 decision). The effort to muffle employer speech, largely forgotten today, prefigured current moves to eliminate speech that does not advance a particular political agenda.

21. Richard A. Epstein, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, 31 TULSA L. REV. 543 (1996) (contrasting the activism of the Supreme Court under Chief Justice Earl Warren [1953–1969] on free speech, religious freedom, and criminal procedure with its lack of interest in the protection of property rights).

22. Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's* Democracy and the Problem of Free Speech, 62 U. CHI. L. REV. 423, 427 (1995) (book review) ("Since speech as an agent of change appeared to be the principal beneficiary of the First Amendment, and since change was a byword of the left, vigorous protection of speech and association fit comfortably into the left's agenda for much of the century.").

23. Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1961 (2018).

progress and fret that it may even reinforce the status quo.[24] Accordingly, free speech and inquiry are now seen by many on the left as a problem.[25] Some scholars have criticized First Amendment jurisprudence that treats all speakers alike, arguing that, in their view, such treatment serves to perpetuate the existing imbalance in political power.[26]

Another highly problematic line of attack has been to accuse the Supreme Court of "Lochnerizing" free speech. These critics allege that the Court has turned the First Amendment into a weapon to undermine the regulatory state.[27] A bit of history is in order. The much-maligned decision in *Lochner v. New York* (1905),[28] in which the Court upheld the liberty of contract doctrine as a constitutional right under the due process clause, is the subject of a vast literature which cannot be reviewed here. The Progressive historians fashioned *Lochner* into a laissez-faire bogeyman that somehow blocked their regulatory agenda.[29] But attempts to analogize recent free speech decisions to *Lochner* are wide of the mark. Quite apart from the fact that the *Lochner* case concerned economic regulations, not free speech, the Court rarely invoked the decision and upheld most

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24. Neuborne, *supra* note 22, at 428–29 (observing that "expansive free speech no longer necessarily correlates with change; to the contrary, it may correlate with resistance to change. In such settings, genuine free speech may well aid the relatively affluent majority in opposing reforms designed to benefit the unfortunate minority that has been left behind. . . . [S]uch structural resistance to change has tempted some left-leaning reformers to consider censorship (often cloaked in a republican theory about seeking the common good) as a means of combatting rational, speech-driven attitudes that hinder the left's vision of progress.").

25. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, at xix (1993) (urging "significant changes in our understanding of the free speech guarantee").

26. *See* Suzanne Sherry, *The First Amendment and the Right to Differ*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 31, 39–45 (David J. Bodenhamer & James W. Ely Jr. eds., 3d ed. 2022) (analyzing critique of current First Amendment jurisprudence by "progressives" and warning of risks in allowing government to regulate speech).

27. Sorrell v. IMS Health Inc., 564 U.S. 552, 603 (2011) (Breyer, J., dissenting) (arguing that Court majority in a commercial speech case "reawakens *Lochner*'s pre–New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue").

28. 198 U.S. 45 (1905) (Peckham, J.); *see* James W. Ely Jr., *Rufus W. Peckham and Economic Liberty*, 62 VAND. L. REV. 591, 606–12 (2009) (analyzing Peckham's commitment to the liberty of contract doctrine). *See generally* PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK (1990).

29. BERNSTEIN, *supra* note 9, at 55 ("Just as the story of *Lochner v. New York* itself has been grossly distorted into a tale of struggling workers versus big business supported by the Supreme Court, the received wisdom regarding the broader battle between Progressive lawyers and their 'conservative' opponents amounts to a facile 'government regulation good, Supreme Court intervention bad' interpretation of constitutional history.").

regulations against liberty of contract challenges.[30] Indeed, revisionist scholarship has destroyed the dark myth of *Lochner* fashioned by the Progressive historians.[31] A cartoonish version of *Lochner* is being employed as a foil to criticize robust free speech decisions disliked by scholars on the political left.[32] In short, there is a whiff of attempted guilt by association about the notion of First Amendment Lochnerism.

In this hostile climate, proposals to censor speech abound, and much suppression is being implemented by private platform providers and professional associations. Universities, which once basked in the self-image of open inquiry and commitment to free speech, have increasingly yielded to cancel culture and intolerance of ideas that clash with the prevailing campus orthodoxy.[33] Protestations to the contrary ring hollow. A recent poll indicated that only twenty-eight percent of Americans believe that the United States enjoys true free speech.[34]

Indeed, Mary Anne Franks has launched a full assault on current First Amendment jurisprudence. Lamenting a "fundamentalist" reading of the First Amendment, she charged that free speech doctrine has been transformed "into a tool of the most privileged and powerful members of society."[35] Franks even offered a proposal to revamp the language of the First Amendment in ways that would radically

30. KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 264 (2d ed. 2009) ("The *Lochner* decision was in many ways an aberration with limited impact."); Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 103, 108 (F.H. Buckley ed., 1999) (observing that "even during the period between 1885 and 1930, the supposed height of laissez-faire constitutionalism, the courts, federal and state, did not uniformly sustain the liberty of contract principle").

31. BERNSTEIN, *supra* note 9, at 125–29.

32. WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 123–25 (1988) ("*Lochner* has become in modern times a sort of negative touchstone. . . . We speak of 'lochnerizing' when we wish to imply that judges substitute their policy preferences for those of the legislature."); Benedict, *supra* note 7, at 295 ("Nothing can so damn a decision as to compare it to *Lochner* and its ilk.").

33. KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH (2018) 51–179 (detailing instances of speech obstruction and imposition of ideological boundaries on university campuses, and decrying lack of viewpoint diversity).

34. *Most Americans See Political Correctness as a Threat to Free Speech*, RASMUSSEN REPS. (Aug. 6, 2021), https://www.rasmussenreports.com/public_content/lifestyle/social_issues/most_americans_see_political_correctness_as_a_threat_to_free_speech.

35. MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION: OUR DEADLY DEVOTION TO GUNS AND FREE SPEECH 107 (2019).

diminish the right of free expression "in accordance with the principle of equality and dignity."[36] Such words have no fixed meaning and would open the door to government censorship and speech suppression.

In brief, despite continuing judicial support, respect for freedom of speech in significant segments of the academy and the polity has markedly eroded, and speech rights no longer occupy a preeminent status in much of society. One might well wonder how long courts will continue robust support for free speech if such a right is no longer highly regarded in the political culture.[37]

Private property, although receiving only modest judicial solicitude, has also been recently called into question. Mayor Bill de Blasio's 2017 blast against private property as the root of New York City's income inequality is symptomatic of this trend. "What's been hardest," he asserted, "is the way our legal system is structured to favor private property." He revealingly added:

> I think there's a socialist impulse, which I hear every day, in every kind of community, that they would like things to be planned in accordance to their needs. And I would too. Unfortunately, what stands in the way of that is hundreds of years of history that have elevated property rights and wealth to the point that that's the reality that really calls the tune on a lot of development.[38]

It is tempting to dismiss the mayor's comments, but it is just the visible tip of an iceberg.

Prominent scholars have argued that private property is merely a grant from the state and not really a right.[39] For example, Charles E. Lindblom insisted that "property is itself a form of authority created by government. . . . Property rights are consequently grants of authority made to persons and organizations, both public and

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36. Mary Anne Franks, *Redo the First Two Amendments*, BOS. GLOBE (Dec. 15, 2021), https://apps.bostonglobe.com/ideas/graphics/2021/12/editing-the-constitution/redo-the-first-two-amendments.

37. Greg Lukianoff & Adam Goldstein, *Law Alone Can't Protect Free Speech*, WALL ST. J., Aug. 13, 2020, at A15.

38. Chris Smith, *In Conversation: Bill De Blasio*, N.Y. MAG. (Sept. 4, 2017), https://nymag.com/intelligencer/2017/09/bill-de-blasio-in-conversation.html.

39. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004) (arguing that rights are just grants from the government).

private, and acknowledged by other persons and organizations."[40] One prominent scholar has derided the concept of ownership as a myth.[41] A bloc of self-identified socialists occupies an important place in Congress and calls for massive redistributive measures which would undermine the security of property.

Since property and free speech are both under attack, this seems a propitious time to reconsider the relationship between the two. I propose to examine the historical affinity of property and liberty and ponder its continued viability.

III. SHIFTING STATUS OF PROPERTY AND FREE SPEECH

We should start by stressing that in the eighteenth century, English commentators, expressing Whig thinking, championed the need for constitutional restraints on government in order to safeguard liberty. Moreover, as John O. McGinnis has aptly pointed out, "In the Whig tradition, freedom of speech and property rights were seen simply as different aspects of an indivisible concept of liberty."[42] For example, John Trenchard and Thomas Gordon, important Whig writers in England, closely linked property and speech rights. Speaking of free speech, they declared: "This sacred privilege is so essential to free government, that the security of property; and the freedom of speech always go together."[43] Their arguments were widely reprinted in colonial newspapers and shaped the intellectual framework of the founding era.[44]

This Whiggish doctrine linking liberty and property found expression in constitutional documents. A number of state constitutions of

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40. CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS 26 (1977).

41. JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP (1994).

42. McGinnis, *supra* note 20, at 63.

43. John Trenchard & Thomas Gordon, *Of Freedom of Speech: That the Same Is Inseparable from Public Liberty* (Letter No. 15, Feb. 4, 1720), *in* 1 CATO'S LETTERS, OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS, 96 (3d ed. 1733).

44. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 151 (expanded ed. 2001); *see also* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 57 (1992) (noting that "the colonists shared many ideas" with Trenchard and Gordon); CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 41 (1953); HALL & KARSTEN, *supra* note 30, at 51 (pointing out the importance of Trenchard and Gordon in America after 1750).

the Revolutionary Era accorded equal value to liberty and property rights. The Massachusetts Constitution of 1780, for instance, proclaimed: "All men are born free and equal, and have certain natural, essential unalienable rights, among which may be reckoned rights of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property, in fine, that of seeking and obtaining their safety and happiness."[45] The early state constitutions, according to a leading scholar, manifested "a desire to guarantee not only freedom of expression and religious exercise but also the freedom to acquire property."[46] Similarly, the framers of the Constitution and Bill of Rights did not differentiate between property and other individual rights. Thus, the Fifth Amendment contains important property protections, such as the takings clause, along with procedural guarantees governing criminal proceedings. "Economic rights, property rights, and personal rights," Walter Dellinger cogently remarked," have been joined, appropriately, since the time of the founding."[47]

James Madison, the principal author of the Bill of Rights, amplified his thinking about property and liberty in a 1792 essay.[48] He attributed two meanings to property. The first encompassed the dominion over land, merchandise, and money. The second "embraces every thing to which a man may attach a value and have a right; and *which leaves to every one the like advantage*." "In the latter sense," Madison explained, "a man has a property in his opinions and the free communication of them." He added that "as a man is said to have a right to his property, he may be equally said to have a property in his rights."[49] To modern eyes, this is a curious formulation. It is not common to see freedom of speech defined as an aspect of property. Why would Madison do so? I suggest that Madison calculated that such an understanding would strengthen the protection afforded to free speech. After all, the protection of property rights at common law and in the American colonies was far better settled than the safeguards for free speech, the scope of which was

45. MASS. CONST. of 1780, pt. I, art. I.

46. ADAMS, *supra* note 44, at 192.

47. Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003–2004 CATO SUP. CT. REV. 9, 13.

48. James Madison, *Property* (Mar. 27, 1792), *in* 14 THE PAPERS OF JAMES MADISON 266–68 (Charles F. Hobson & Robert A. Rutland eds., 1983).

49. *Id.* at 266.

contested.[50] Jennifer Nedelsky maintained that "Madison was trying to draw on the accepted importance of property to lend sanctity to individual rights more generally."[51] Whatever the merits of this hypothesis, however, Madison clearly viewed free speech as a sort of property right inherent in the individual.[52]

It bears emphasis that throughout the nineteenth century the prevailing understanding of free speech was that formulated by William Blackstone. He barred prior restraint on speech, but allowed subsequent punishment of expression which threatened public peace and order.[53] In fact, the Supreme Court heard few important speech cases in the nineteenth and early twentieth centuries and narrowly construed expressive rights. There was, for example, no protected right for an individual to speak on public property. In 1897, the Court in a unanimous opinion ruled that the City of Boston could prevent public speeches in municipal parks without a permit from the mayor.[54] As late as 1907, the Court, in an opinion by Justice Oliver Wendell Holmes, concluded that the First Amendment only prevented previous restraint on speech and press, not subsequent punishment, and that the First Amendment did not apply to the states.[55]

To be sure, some commentators and judges urged a more robust reading of free speech guarantees. Thomas M. Cooley, a Michigan Supreme Court judge and the most influential constitutional theorist of the late nineteenth century, rejected the Blackstonian understanding. In his landmark *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States*, first published in

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50. *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

51. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISON FRAMEWORK AND ITS LEGACY 21–22 (1990).

52. McGinnis, *supra* note 20, at 64–67.

53. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151 ("The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.").

54. Davis v. Massachusetts, 167 U.S. 43 (1897) (analogizing public parks to private property and upholding an opinion by Holmes in Commonwealth v. Davis, 39 N.E. 113 (1895)). *Davis* was effectively abrogated by Hague v. Congress of Industrial Organizations, 307 U.S. 495 (1939) (defining streets and parks as public forums for First Amendment purposes). Justice Pierce Butler, dissenting in *Hague*, accurately observed that the majority's opinion was contrary to *Davis*. 307 U.S. at 533.

55. Paterson v. Colorado, 205 U.S. 454, 462 (1907).

1869, Cooley observed: "[I]t is still believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions."[56] Well known for his defense of property rights, Cooley also valued freedom of expression. He characterized the First Amendment as "almost universally regarded as a sacred right, essential to the existence and perpetuity of free government."[57] It is particularly striking, then, that Cooley explicitly equated free speech and property rights. Dissenting in an 1881 libel law case, he maintained that everyone must exercise rights with due regard for the rights of others. "This is as true of the right to free speech," Cooley observed, "as it is of right to free enjoyment of one's property."[58] To his mind, protection of free speech and private property were equally necessary for individual autonomy.

Cooley's opinion was echoed later in the nineteenth century by John W. Burgess, a prominent political scientist. In a treatise on comparative constitutionalism, he explored the essence of those rights constituting liberty. Burgess maintained that "individual liberty consists in freedom of the person, equality before the courts, security of private property, freedom of opinion and its expression, and freedom of conscience."[59] Again, we see private property and free speech linked as essential elements for the enjoyment of liberty. Burgess envisioned that these rights would work in tandem to protect liberty.

Cooley and Burgess were among a host of scholars and jurists who championed both private property and free speech. Mark A. Graber has identified a "conservative libertarian" tradition that maintained that freedom of expression could only exist if government safeguarded property rights. Conservative libertarians, he asserted, "did not separate the system of free expression and the system of private property."[60] Rather, they viewed speech rights as one aspect of personal liberty, and expected courts to defend all aspects of individual freedom.

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56. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 421 (reproduced ed. 2002) (1868).

57. *Id.* at 414.

58. Atkinson v. Detroit Free Press Co., 9 N.W. 501, 520 (Mich. 1881).

59. JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 178 (Boston & London, Ginn & Co. 1890).

60. GRABER, *supra* note 11, at 8.

A generation later, the jurisprudence of George Sutherland similarly exemplified the nexus between property and freedom of expression. Serving on the Supreme Court when some scholars and judges were beginning to embrace the notion that there should be different standards of judicial review for speech and economic regulations, Sutherland stoutly insisted that there should be the same standard of review for all claims of right. Indeed, he equated liberty and property, and regarded both as essential aspects of a free society.[61]

For example, consider Sutherland's opinion for the Supreme Court in *New State Ice Co. v. Liebmann* (1932).[62] At issue was an Oklahoma licensure scheme that had the effect of conferring a de facto monopoly on established ice houses by curtailing competition.[63] Sutherland struck down the law as an infringement of the due process right of others to pursue a lawful trade. During the 1930s, regulatory measures were often justified as experiments in economic planning. Sutherland, however, maintained that government could not brush aside the essentials of liberty in the name of experimentation. He ended his opinion with this telling observation: "[T]he theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection."[64] To Sutherland, the sanctity of speech and economic liberty were equally deserving of constitutional protection. But note the change in emphasis. Instead of the high constitutional status of private property providing a shelter for speech, Sutherland called for economic rights to be treated the same as freedom of expression.

Of course, as discussed above, the affinity between free speech and property rights was shattered with the triumph of New Deal

61. Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249, 323 (2002) ("For Sutherland, freedom of expression and economic liberty comprised complimentary facets of personal liberty, each vulnerable to the ephemeral whims of transient democratic majorities. As such, their protection of all forms of regulation warranted close judicial scrutiny."); *see also* Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 VAND. L. REV. 639, 681–82 (2009).

62. 285 U.S. 262 (1932).

63. *Id.* at 278–79 ("The control here . . . does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.").

64. *Id.* at 279–80.

jurisprudence, and has never been restored. The Supreme Court largely ignored property rights for decades, in marked contrast to its expansive readings of free expression.[65] Indeed, by 1968 Justice Hugo Black felt it necessary to remind his colleagues that "whether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property."[66]

IV. HISTORIC NEXUS BETWEEN PROPERTY AND LIBERTY

Given the dismissive attitude toward the constitutional rights of property owners that prevailed during much of the twentieth century, it seems appropriate to inquire why so many prominent commentators in the eighteenth and nineteenth centuries perceived an intimate tie between private property and individual liberty. What accounts for this long-standing association of property and liberty? I submit that three core beliefs dovetailed to create an intellectual climate favorable to secure property rights.

First, Restraint of Government. Since Magna Carta, a major theme of Anglo-American constitutionalism has been the restraint of government. Secure private property constrains the scope of governmental authority over individuals. In other words, property provides a shelter for liberty because it sets limits on the reach of legitimate government. Widespread ownership tends to diffuse power and resources into many hands. Property held by many individuals functions as an independent source of authority. In such a decentralized society, a variety of personal and political liberties can flourish free of government control. Private property, therefore, serves as a bulwark against state power, a role which assumes ever greater significance in an era of strong centralized government.

Absence of guaranteed property rights, on the other hand, facilitates arbitrary government in which mere privileges, as distinct from rights, are enjoyed at the pleasure of the sovereign. Trenchard and Gordon cogently observed in 1722: "The only despotick Governments now in the World, are those where the whole Property is in the Prince."[67] When they wrote, of course, most people lived under the

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65. Richard A. Epstein, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, 31 TULSA L.J. 643, 644 (1996) ("The question of property rights, their status and protection, was not an issue that much troubled or preoccupied the Warren Court.").

66. Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, 391 U.S. 308, 330 (1968).

67. John Trenchard & Thomas Gordon, *Property the First Principle of Power—The Error*

rule of absolute monarchs and had no claim to secure private property. But these words carry potent meaning into the modern era, where totalitarian regimes invariably either abolish or severely regulate private property. Communist Russia, of course, largely abolished private property in the early twentieth century.[68] As scholars have reminded us, there were significant socialist elements in the Nazi program for Germany, including property confiscation, rigid controls over the economy, and high taxes.[69] "Where the state claims ownership of all productive resources," Richard Pipes emphasized, "individuals or families have no means of asserting their freedom because economically they are entirely dependent on the sovereign power."[70]

Property ownership, on the other hand, serves to limit the sway of the sovereign. As Trenchard and Gordon explained, when the people have "as they think a Right to Property, they will always have some power, and will expect to be considered by their Princes."[71] In words that carry special resonance today, journalist Walter Lippmann warned in 1934: "It has become the fashion to speak of the conflict between human rights and property rights, and from this it has come to be widely believed that the use of private property is tainted with evil and should not be espoused by rational and civilized men." Lippmann insisted, in marked contrast, that such views "should not be allowed to obscure the truth that the only dependable foundation of personal liberty is the personal economic security of private property."[72]

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of Our Princes Who Attended Not to This (Letter No. 84, July 7, 1722), *in* 3 CATO'S LETTERS, OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS, 152 (3d ed. 1733).

68. ANDREW BARNES, OWNING RUSSIA: THE STRUGGLE OVER FACTORIES, FARMS, AND POWER 27–31 (2006) (discussing sweeping nationalization and collectivization of property in Russia during the 1930s, and concluding: "The Stalinist system of ownership and control of property was thus remarkably extensive and coherent").

69. AVRAHAM BARKAI, NAZI ECONOMICS: IDEOLOGY, THEORY, AND POLICY 3 (1990) ("It is quite clear that there was no free market economy in Germany throughout those years, even in comparison with other advanced industrial countries, none of which had operated under conditions of 'pure competition' since the beginning of the century. The scope and depth of state intervention in Nazi Germany had no peacetime precedent or parallel in any capitalist country, Fascist Italy included."); *see also* GOTZ ALY, HITLER'S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE (2005), DAVID SCHOENBAUM, CLASS AND STATUS IN NAZI GERMANY, 1933–1939 (1966) ("But inconsistent as Nazi practice might have been, Nazi theory meanwhile systematically undermined the legal premises of private property.").

70. RICHARD PIPES, PROPERTY AND FREEDOM 117–18 (1999).

71. Trenchard & Gordon, *supra* note 67, at 153.

72. WALTER LIPPMANN, THE METHOD OF FREEDOM 100–01 (1934).

Second. Individual Autonomy. Private property makes people autonomous and thus encourages self-government. Again, Trenchard and Gordon are instructive. They explained in 1721:

> And therefore all Men are animated by the Passion of acquiring and defending Property, because Property is the best Support of that Independency, so passionately desired by all Men. . . . And as Happiness is the Effect of Independency, and Independency the Effect of Property, so certain Property is the Effect of Liberty alone.[73]

According to this thesis, property ownership nurtures the independence necessary for participation in a free society. Persons with a solid base of economic strength are more willing to challenge government or wealthy patrons and less likely to be intimidated into acquiescence. Gordon Wood pointed out that the Revolutionary generation viewed property "as a source of personal authority or independence. It was regarded not merely as a material possession but also as an attribute of a man's personality that defined him and protected him from outside pressure."[74] In the same vein, Lippmann explained that private property was "discovered to limit the authority of the king and to promote the liberties of the subject. Private property was the original source of freedom. It is still its main bulwark."[75] Lindblom, a skeptic about the role of private property in democratic society, acknowledged that property rights were a constraint on authority. He observed:

> Indeed, for good or bad, the law of property is perhaps the most fundamental of all political rules, reserving as it does a set of decisions for each individual and prohibiting interference by others, the ruler included. . . . Property rights carve out for each citizen a domain of free choice that the state does not easily invade.[76]

Consider, on the other hand, a society without property rights. How meaningful would the right to vote or voice one's opinion be in

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73. John Trenchard & Thomas Gordon, *Property and Commerce Secure in a Free Government Only; With the Consuming Miseries Under Simple Monarchies* (Letter No. 68, Mar. 3, 1721), *in* 2 CATO'S LETTERS, OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 319 (3d ed. 1733).

74. WOOD, *supra* note 44, at 178.

75. LIPPMANN, *supra* note 72, at 101 (arguing that lack of property ownership facilitated the rise of absolutist states in Communist Russia, Nazi Germany and Fascist Italy).

76. LINDBLOM, *supra* note 40, at 127.

such a context? Without guaranteed property rights, the enjoyment of other liberties would be empty and largely theoretical.[77] Protection of the rights of owners provides the material basis for other civil liberties. As Richard Epstein forcefully recognized:

> [P]rivate property provides the private wealth necessary to support active participation in public debate. Private property, in a word, nourishes freedom of speech, just as freedom of speech nourishes private property. Can anyone find a society in which freedom of speech flourishes where the institution of private property is not tolerated?[78]

John Dickinson, an influential author and member of the First and Second Continental Congresses, contended in 1768: "[W]e cannot be happy without being free—that we cannot be free without being secure in our property—that we cannot be secure in our property, if, without our consent, others may, as by right, take it away."[79] Indeed, there are few examples, either historical or contemporary, of free societies that do not respect property rights. While a system of private property does not guarantee individual liberty, its absence renders personal and political freedom unlikely.[80]

Amplifying this theme, Justice Antonin Scalia insisted:

> Human liberties of various types are dependent on one another, and it may well be that the most humble of them is indispensable to the others . . . . I know of no society, today or in any era of history, in which high degrees of intellectual and freedom have flourished side by side with a high degree of state control over the relevant citizen's economic life. The free market, which presupposes relatively broad economic freedom, has historically been the cradle of broad political freedom, and in modern times the

77. D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36, 69 (2009) ("It is difficult to see how other freedoms to speech, religion, or association could be secure in a society without the institution of private property.").

78. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 138 (1985).

79. JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES 138–52 (Boston 1768).

80. PIPES, *supra* note 70, at 281 ("The right to property in and of itself does not guarantee civil rights and liberties. But historically speaking, it has been the single most effective device for ensuring both, because it rates an autonomous sphere in which, by mutual consent, neither the state nor society can encroach.").

> demise of economic freedom has been the grave of political freedom as well.[81]

Of course, in a free society inevitably some individuals hold little or no property. This fact has prompted frequent expressions of anti-property attitudes from the eighteenth century to the present.[82] Emphatically rejecting this approach, Chancellor James Kent of New York dismissed "modern theorists, who have considered . . . inequities of property, as the cause of injustice, and the unhappy results of government and artificial institutions."[83] He stressed the advantages of property ownership to the improvement of the human condition. Yet the question remains, how then does a system of private property protect the autonomy of persons without property? It bears emphasis that a system of private property, by dispersing power into many hands and limiting central control, also serves to safeguard the liberty of the propertyless. In 1944, F.A. Hayek insightfully explained:

> What our generation has forgotten is that the system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not. It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us, that we as individuals can decide what to do with ourselves. If all the means of production were vested in a single hand, whether it be nominally that of "society" as a whole or that of a dictator, whoever exercises this control has complete power over us.[84]

Violations of property rights, in other words, serve to solidify the authority of rulers at the expense of individual owners, thereby diminishing the freedom of society as a whole.

Third. Promotes Economic Growth. Stable property rights are a powerful inducement for the creation of wealth and prosperity, prerequisites for successful self-government. As many scholars have

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81. Antonin Scalia, *Economic Affairs as Human Affairs*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 31, 31–32 (James A. Dorn & Henry G. Manne eds.,1987).

82. PIPES, *supra* note 70, at 39–58 (tracing the philosophical assault on private property which originated in eighteenth-century France).

83. 11 JAMES KENT, COMMENTARIES ON AMERICAN LAW 256–57 (1827).

84. F.A. HAYEKS, THE ROAD TO SERFDOM 115 (50th Anniversary ed. 1994).

pointed out, a system of private property and contractual stability encourages savings, investments, and trade.[85] Economic development, in turn, increases the wealth of society as a whole. This is a critical precondition for a climate which fosters individual liberty. The leaders of the founding generation broadly agreed that respect for private property was essential for economic growth. John Marshall, according to a leading scholar, "was convinced that strong protection of property and investment capital would promote national prosperity."[86] Similarly, Kent maintained: "The natural and active sense of property pervades the foundations of social improvement," leading to "the growth of the useful arts" and "the spirit of commerce."[87]

Conversely, the absence of strong protection of contracts and property is a recipe for economic stagnation. After a comprehensive survey of economic success and failure in different cultures over centuries, historian David S. Landes explained that "contingency of ownership stifles enterprise and stunts development, for why should anyone invest capital or labor in the creation or acquisition of wealth that he may not be allowed to keep."[88] Edmund Burke sagely articulated this point when he declared in 1765: "A law against property is a law against industry."[89]

Colonial America provides an instructive example of how prosperity could encourage claims of individual rights. In sharp contrast to England, land was abundant and was widely acquired by colonists. Even individuals without land shared the acquisitive spirit and hoped to obtain such property.[90] Indeed, many came to colonial America for the express purpose of having land of their own.[91] An English visitor

85. DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS 217–18 (1998) (maintaining that to achieve material progress a society should "secure rights of private property, the better to encourage savings and investment, . . . secure rights of personal liberty," and "enforce rights of contract"); *see also* NIALL FERGUSON, CIVILIZATION: THE WEST AND THE REST 12–13 (2011) (attributing the ascendancy of the West to, among other attributes, property rights).

86. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 75 (1996).

87. KENT, *supra* note 83, at 257.

88. LANDES, *supra* note 85, at 32.

89. Edmund Burke, *Tracts Relating to Popery Laws*, *in* 9 THE WRITINGS AND SPEECHES OF EDMUND BURKE 434, 476 (R. B. McDowell ed., 1991).

90. ADAMS, *supra* note 44, at 189 ("The acquisition and cultivation or exploitation of land was the very raison d'etre for the colonies. They were a 'possessive market society,' in which property was the central institution and the one that society was most concerned to protect.").

91. PATRICIA U. BONOMI, A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK 195 (1971).

to New England complained in 1765: "Everybody has property, and everybody knows it."[92] In the same vein, South Carolina Chief Justice William Henry Drayton, in a charge to the Charleston District Grand Jury in October of 1777, observed: "The people of America are a people of property; almost every man is a freeholder."[93] Moreover, labor was scarce, and commanded high wages. This combination nourished a middle-class society and proved a fertile seedbed of rights consciousness and political liberty. "For most white Americans," Gordon Wood aptly pointed out, "there was greater prosperity than anywhere else in the world; in fact, the experience of growing prosperity contributed to the unprecedented eighteenth-century sense that people here and now were capable of ordering their own reality."[94] It followed that any perceived threat to the rights of property owners was quickly translated into a threat to liberty.[95]

V. ROSE CRITIQUE OF ARGUMENTS FOR PROPERTY'S CENTRAL ROLE IN PRESERVING RIGHTS

Carol M. Rose has thoughtfully questioned the efficacy of the time-honored arguments linking the constitutional rights of property owners and individual liberty, including some of the arguments advanced in this Article.[96] She stressed that the institution of property has been persistent over centuries and in difficult cultures, and yet, at the same time, fragile, depending for its existence on recognition by others in the society. Rose agreed that claims for property as a keystone right have been hardy and long-lasting. She observed that "there is at least a plausible case—or rather several plausible cases—that the security of property can set the stage for more thoroughgoing protections of other rights."[97] Indeed, Rose lent support to the contention that protected private property undergirds individual freedom. She forcefully maintained:

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92. Lord Adam Gordon, *Journal of an Officer's Travels in America and the West Indies, 1764–1765*, *in* TRAVELS IN THE AMERICAN COLONIES 367, 404–06 (Newton D. Mereness ed., 1916).

93. S.C. & AM. GEN. GAZETTE, Nov. 6, 1777.

94. WOOD, *supra* note 44, at 169.

95. ELY, *supra* note 1, at 25; WOOD, *supra* note 44, at 169 ("[T]he people were acutely nervous about their prosperity and the liberty that seemed to make it possible.").

96. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996).

97. *Id.* at 362.

> Consider the right to vote, or to speak freely—rights that could easily be cited as the most important among the political rights. How far would they be likely to carry a citizenry whose property is at risk? What boldness, independence and creativity are to be expected without the backdrop of some security of property?[98]

Despite her reservations about the extent of property's protective function regarding other rights, Rose would seemingly agree that property rights continue to occupy a vital place in the constitutional order.

VI. TOWARD THE FUTURE

Any effort to predict the future course of private property and free speech in the United States is hazardous. History rarely proceeds in a linear fashion. It is entirely possible that the current attack on property and speech will be a passing storm. Both private property and free speech have deep roots and will not readily fade away. Americans have rarely shown sustained interest in redistributive measures.[99] But a more pessimistic scenario might prevail. The forces of censorship are powerful and might topple the First Amendment from its constitutional pedestal.[100] Social welfare schemes could further encroach on the rights of owners. They inevitably require the exercise of coercive governmental power to take property from existing owners and give it to others.

In the last days of the Soviet Union, a doctor operating a clinic articulated the values associated with property: "The political fight for power now is the fight for property. If people get property, they

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98. *Id.* at 362–63; *see supra* text accompanying notes 73–84.

99. J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 426, 434 (2d ed. 1993) (maintaining that the American understanding of equality "did not imply equality in the distribution of material resources," and pointing out that in the political history of the United States "the question of the distribution of wealth seldom figured for long or for large numbers, as a national problem"); *see also* CASS SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 135 (2004) (observing that "there can be little doubt that American culture is uneasy with large-scale programs for redistribution, and that uneasiness helps explain the absence of social and economic rights from the American Constitution").

100. *See* DAVID E. BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS (2003) (detailing threats to freedom of expression in the workplace and college campuses).

will have power. If not, they will forever remain hired hands."[101] This doctor recognized that neither democracy nor individual freedom can survive where the people are economically dependent and have little to call their own. The framers of our Constitution and Bill of Rights envisioned a very different society—one grounded on private property as a limit on the reach of government.

101. As quoted in DAVID REMNICK, LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE 445 (1993).