

ARE EMINENT DOMAIN AND CONFISCATION VEHICLES FOR WEALTH REDISTRIBUTION? A SKEPTICAL VIEW

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Wealth redistribution, at least rhetorically, is back in vogue in the United States. A number of scholars have called for a redistribution of economic resources.¹ During the 2016 presidential election campaign, Democratic Party candidates echoed this assault on concentrated wealth. This, of course, was not the first episode of redistributive fervor to appear over the course of American history. Sporadic complaints about wealth distribution in the United States have been a recurring feature of political life. One thinks of the Populist Movement of the 1890s² and the New Deal years of the 1930s. But in fact these outbursts produced little change in wealth patterns. For example, despite talk of soak-the-rich policies, the New Deal 1935 tax law neither significantly altered the distribution of income nor broke up accumulated wealth.³ Whether the present clamor will result in

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1. See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014). But see Michael D. Tanner, *Five Myths about Economic Inequality in America*, CATO INST. POLICY ANALYSIS NO. 797, Sept. 7, 2016 (noting that some scholars have questioned Piketty's methodology and conclusions). See generally GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* (2017) (arguing that income inequality undermines constitutional government); Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Equality*, 94 TEX. L. REV. 1287 (2016).

2. The People's Party platform of 1892 colorfully proclaimed:

The fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind; and the possessors of these, in turn despise the Republic and endanger liberty. From the same prolific womb of governmental injustice we breed the two great classes—tramps and millionaires.

1 NATIONAL PARTY PLATFORMS, 1840–1972, at 89–91 (Donald Bruce Johnson & Kirk Harold Porter eds., 1973).

3. W. ELLIOTT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A HISTORY* 135 (3d ed. 2016) (“Overall, the tax reforms did not redistribute income through taxation to any great extent, but the tax system had become more progressive.”); MARK H. LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933–1939*, 92 (1984) (concluding that “Franklin Roosevelt's fleeting onslaughts against 'economic royalists' produced minimal revenues and

meaningful change remains to be seen, but there is reason to be doubtful. Americans have never demonstrated a sustained national commitment to economic equality.⁴

I. THE ANTI-REDISTRIBUTION PRINCIPLE

Before 1900 much constitutional thought in the United States was concerned with curtailing state redistribution of wealth.⁵ Since the founding era a cardinal tenet in constitutional doctrine questioned the legitimacy of government-mandated alteration of privately owned resources. Consider a revealing incident that arose from the drafting of the Pennsylvania Constitution of 1776. This was the most radically democratic state constitution adopted during the Revolutionary era. In response to concerns that wealth disparities could undermine political liberty, a committee proposed an unusual provision to limit the accumulation of wealth: “An enormous Proportion of Property rested in a few Individuals is dangerous to the Rights, and destructive of the Common Happiness of Mankind; and therefore every free State hath a Right by its Laws to discourage the Possession of such Property.” This wording was entirely deleted from the final document, as the Pennsylvania constitution framers refused to restrict the amount of property that individuals could acquire.⁶ No other state even debated such a striking proposal. On

thus were of negligible assistance in redistributing income to the nation’s poor.”) It bears emphasis that the federal income tax in the 1930s only applied to about five percent of the population. LEFF, *supra*, at 96.

4. J.R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 426, 434 (2d ed. 1993) (asserting that the American understanding of equality “did not imply equality in the distribution of material resources,” and noting that over the course of United States political history “the question of the distribution of wealth seldom figured for long, or for large numbers, as a national problem”).

5. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 10–27 (1992) [hereinafter HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*] (tracing the evolution of the anti-redistribution principle in constitutional doctrine).

6. WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 192 (Expanded Edition, Rita & Robert Kimber trans., 2001); *see also* ELISHA P. DOUGLASS, *REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION* 146 (1955) (concluding “rarely, if ever, did even the most radical question the right of the wealthy to enjoy their possessions undisturbed”); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution*

the contrary, a number of states, including Virginia and Massachusetts, affirmed in their constitutions the rights of individuals to acquire and possess property.

Prominent members of the Constitutional Convention of 1787 made clear their rejection of redistributive policies. Writing in the *Federalist*, James Madison characterized “[a] rage for paper money, for an abolition of debts, for an equal division of property” as “improper or wicked.”⁷ Similarly, Alexander Hamilton, in 1789, assailed attacks on property owners, declaring: “There is no stronger sign of combinations unfriendly to the general good, than when the partisans of those in power raise an indiscriminate cry against men of property. . . . Such a cry is neither just nor wise”⁸ As Jean Yarbrough pointed out, Thomas Jefferson, although a proponent of a wide distribution of property, did not favor involving government “in any radical scheme of redistribution, for this would have violated Jefferson’s principle of limited government, and run contrary to the purposes for which civil society was instituted.” She concluded that Jefferson “was not seriously troubled by the inequality of wealth in republican America.”⁹

As is well-known, the Constitution and Bill of Rights contain numerous provisions designed to protect property owners against governmental redistribution of their property. The Contract Clause, for example, was driven in large part by the sour experience with state legislatures following the Revolution. They in effect attempted to transfer wealth by interfering in contracts in order to aid debtors at the expense of creditors.¹⁰ The Contract Clause protected the

and Its Influence on American Constitutionalism, 62 TEMP. L. REV. 541, 557–58 (1989).

7. THE FEDERALIST NO.10 (James Madison); see also JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 268 (1990) (“[P]art of the purpose of private property for Madison was to make clear that redistribution could never be an acceptable public objective; it could never be part of a coherent vision of the public good. The rights of property defined redistribution as an illegitimate exercise of political power to promote private interests.”).

8. From Alexander Hamilton to the Electors of the State of New York (April 7, 1789), in THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett, ed., 1962).

9. Jean Yarbrough, *Jefferson and Property Rights*, in LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, 71–72 (Ellen Frankel Paul & Howard Dickman, eds., 1989); see also Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. L. AND ECON. 467, 480–81 (1976) (pointing out that Jefferson never endorsed redistributive policies that would impact existing property holdings).

10. U.S. CONST. art I, § 10, cl. 1 provides in part: “No State shall . . . pass any . . . Law

stability of agreements by barring states from abridging such arrangements. The Fifth Amendment, and its state counterparts, curtailed the authority of government to seize private property by eminent domain in two significant respects. Property could only be taken for “a public use” and upon payment of “just compensation.”¹¹ The Fifth Amendment did not prevent governmental acquisition of property but sought to confine any redistributive impact. In theory, assuming payment of a monetary equivalent for the property taken, the owner would suffer no economic loss. Hence the redistributive impact on the property owner would be modest. Moreover, at least in the nineteenth century, a number of courts invoked the “public use” limitation to confine the taking of property to governmental purposes or situations in which the public had a right to use the property.¹²

To be sure, health and safety regulations had some modest and incidental redistributive consequences. Significantly, however, there was no broad consensus during the nineteenth century favoring governmental action to alter the market-driven distribution of wealth.

By the end of the nineteenth century the anti-redistributive principle was increasingly articulated in connection with proposals to use taxation as a vehicle to alter the existing distribution of wealth.¹³

impairing the Obligation of Contracts.” For an analysis of this provision over the course of United States history, see JAMES W. ELY, JR., *THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY* (2016) [hereinafter ELY, JR., *THE CONTRACT CLAUSE*].

11. U.S. CONST. amend. V provides in part: “[N]or shall private property be taken for public use, without just compensation.” The explicit guarantee of just compensation in the Fifth Amendment reflected the long-standing practice in both England and the American colonies of awarding compensation when government acquired property from individual owners. James W. Ely, Jr., “*That due satisfaction may be made: the Fifth Amendment and the Origins of the Compensation Principle*,” 36 *AM. J. LEGAL HIST.* 1, 1–18 (1992); see also SUSAN REYNOLDS, *BEFORE EMINENT DOMAIN: TOWARD A HISTORY OF EXPROPRIATION OF LAND FOR THE COMMON GOOD* 77–83 (2010) (finding widespread acceptance in the American colonies of the norm that property could be taken from individual owners upon payment of compensation); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 *WASH. L. REV.* 533, 579–83 (1972) (pointing out that granting compensation was extensively practiced during the colonial period before the Revolution).

12. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, *supra* note 5, at 11 (“In the eminent domain cases, the public purpose doctrine was explicitly designed to prevent state redistribution of wealth.”); see also ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 43–49 (2015) (concluding that during the nineteenth century most state courts interpreted “public use” to confine the taking of property by government).

13. ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 97 (1987) (“The income tax was seen by proponents and opponents alike as primarily an instrument of redistribution; in the parlance of the time it was ‘class legislation.’”).

John F. Dillon, a leading jurist, forcefully captured this sentiment in 1895:

But when taxes, so-called, are imposed, not as mere revenue measures, but for the real purpose of reaching the accumulated fruits of industry, and are not equal and reasonable, but designed as a forced contribution from the rich for the benefit of the poor, and as a means of distributing the rich man's property among the rest of the community—this is class legislation of the most pronounced and vicious type; is, in a word, confiscation and not taxation.¹⁴

Dillon's rejection of the legitimacy of a progressive income tax found expression in the Supreme Court's decision in *Pollock v. Farmers' Loan and Trust Company* (1895), striking down the 1894 income tax as a "direct tax" not apportioned among the states according to population as required by the Constitution.¹⁵ Justice Stephen J. Field, in a concurring opinion, focused squarely on the redistributive potential of the federal income tax. He darkly warned: "The present assault upon capital is but the beginning. It will be the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich"¹⁶

Notwithstanding this time-honored constitutional tradition of skepticism of redistribution, Progressive legal thought in the early decades of the twentieth century did much to undercut the security of property and contractual rights in order to promote active governmental intervention in the economy. Progressives looked unfavorably upon judicial protection of the rights of property owners.¹⁷ The

14. John F. Dillon, *Property—Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161, 173 (1895).

15. *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895). For a discussion of *Pollock*, see JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910*, 117–23 (1995).

16. *Pollock*, 157 U.S. at 607; see also 8 OWEN M. FISS, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, 77 (1993) (observing that the fundamental question in *Pollock* concerned "the permissibility of using federal power to alter the market distribution of wealth").

17. James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL'Y 255, 264–77, 287 (2012); see also RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 8 (2006) (concluding that Progressives "thought that ever greater inequalities of wealth justified overriding constitutionally protected rights of liberty, property, and contract").

once-potent Contract Clause, for example, was drained of much efficacy.¹⁸ Even more important was a change in tax policy. Anxious to revamp the tax system and place more of the burden on the wealthy, Progressives championed a federal income tax. The adoption of the Sixteenth Amendment in 1913, which authorized Congress to levy an income tax, seemingly reflected a popular willingness to enact redistributive schemes. Under the influence of the Progressive movement, notions of the proper role of government began to shift.

This transformation was brought to fruition following the political triumph of the New Deal in the 1930s. New Deal constitutionalism, which built upon the Progressive initiatives, relegated the rights of property owners to a secondary place in the constitutional order.¹⁹ Consequently, the Constitution was no longer construed to preclude some forms of redistribution. The New Deal Supreme Court eliminated most of the constitutional obstacles to wealth redistribution, and simply punted the matter to the political arena. It bears emphasis that today there are redistributive dimensions to various public policies associated with the welfare state.²⁰ A few examples must suffice. The income tax, largely paid by the more affluent due to its progressive rate structure, in effect compels wealth transfers to fund the modern welfare state.²¹ Rent controls can be characterized as an effort to transfer wealth from landlords to tenants.²² Minimum wage laws have been viewed in the same light.

But my inquiry lies elsewhere—to what extent does the exercise of eminent domain to acquire private property for “public use” or the

18. ELY, JR., *THE CONTRACT CLAUSE*, *supra* note 10, at 192–237.

19. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 134–41 (3d ed. 2008) [hereinafter ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT*].

20. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, 374 (1997) (“Redistributing wealth to provide welfare benefits for some inevitably requires that the state interfere with the putatively vested property rights of others.”).

21. RICHARD PIPES, *PROPERTY AND FREEDOM* 239 (1999) (“The regular direct and progressive tax on income is a by-product of the welfare state: it came into being concurrently and has been justified as necessary to finance the large outlays which social services demand.”); *see also* Tanner, *supra* note 1, at 7 (contending that “the U.S. tax and transfer system is already highly redistributive”).

22. *Pennell v. San Jose*, 485 U.S. 1, 21–24 (1988) (Scalia, J., & O’Connor, J., dissenting in part) (finding tenant hardship provision in local rent control ordinance amounted to a compelled wealth transfer to tenants in violation of the Fifth Amendment); *see also* RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 186–88 (1985) [hereinafter EPSTEIN, *TAKINGS*].

occasional reliance on outright confiscation serve to redistribute wealth?²³ If there is a redistributive effect, who benefits?

II. EMINENT DOMAIN

I will first briefly consider eminent domain. Unquestionably the potential for redistribution of wealth is implicit in the power of eminent domain. Morton J. Horwitz, for instance, has argued that during the antebellum era eminent domain was often employed to assist fledgling enterprises, such as canals and railroads, at the expense of individual owners, usually farmers. Indeed, Horwitz promulgated a controversial subsidy thesis, contending that, in effect, land was taken at low cost and transferred to more powerful economic interests.²⁴ This thesis is arguably overdrawn, but it reminds us that property transfers can and do operate in a manner to concentrate rather than disperse wealth. I suggest that the pattern detected by Horwitz has quite frequently continued until the present.

The tendency to utilize eminent domain to benefit the wealthy and politically influential institutions was facilitated in the twentieth century by two constitutional developments. First, the Supreme Court virtually eviscerated “public use” as a meaningful restraint on eminent domain, at least at the federal level. Since then, pretty much anything goes, as the federal courts broadly defer to legislative determinations of “public use.”²⁵ Those with political clout can readily manipulate eminent domain to serve their ends. Second, it is highly unlikely that those whose property is condemned in fact receive a monetary equivalent for their loss. Indeed, there is vast literature detailing the inadequacy of prevailing compensation norms

23. A word about terminology is in order. The taking of property by government for public use upon payment of compensation is called “eminent domain” in the United States and “compulsory purchase” in the United Kingdom. In the civil law tradition, on the other hand, such a taking of property is termed “expropriation.” Uncompensated seizure of property is characterized as “confiscation.” See REYNOLDS, *supra* note 11, at 1–2, 7–9. Yet, to complicate matters, the term “expropriation” is sometimes employed by scholars in the United States to denote an uncompensated confiscation of property. To minimize confusion, I will use the word “confiscation” rather than “expropriation” to refer to uncompensated seizures.

24. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1869*, 63–67, 259–61 (1977).

25. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT*, *supra* note 19, at 156–57; SOMIN, *supra* note 12, at 55–61.

in eminent domain proceedings.²⁶ The award of only partial compensation encourages excessive use of eminent domain and compounds the redistribution of wealth to commercial enterprises and developers typically at the expense of the middle class and poor.

Recent exercises of eminent domain underscore the conclusion that this power has regularly been employed to promote the interests of the politically connected rather than the downtrodden.²⁷ Beneficiaries of eminent domain have included General Motors,²⁸ Otis Elevator,²⁹ owners of professional sports franchises,³⁰ Best Buy,³¹ and casinos.³² This is hardly a list of the poor. In reverse—Robin Hood style, the effect of taking property in these cases—even assuming that “just compensation” was paid—was to further enrich the already wealthy.

In the same vein, urban renewal projects, ostensibly designed to clear slums and improve housing conditions for the poor, too often in reality displaced the poor in favor of upscale housing and middle-class amenities. As one scholar noted, condemnations of blighted areas “have typically been part of development or redevelopment efforts that remove poor occupants and replace them with wealthier, often less-likely-to-be-minority occupants.”³³

Similarly, the Hawaiian land redistribution scheme at issue in *Hawaii Housing Authority v. Midkiff* failed to achieve its announced goals of encouraging widespread ownership and reducing housing

26. See, e.g., James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110 (2002).

27. *Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting) (“The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.”).

28. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981), *overruled by* *Cty. of Wayne v. Hathcock*, 471 Mich. 445 (2004).

29. *Yonkers Cmty. Development Agency v. Morris*, 37 N.Y.2d 478, 335 N.E.2d 327 (1975).

30. *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008).

31. *Hous. & Redevelopment Auth. v. Walser Auto Sales, Inc.*, 641 N.W.2d 885 (Minn. 2002).

32. *L.V. Downtown Redevelopment Agency v. Pappas*, 119 Nev. 429, 76 P.3d 1 (2003).

33. David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 379 (2007); see also *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) (warning that “extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities”).

costs. At issue was a law that authorized residential tenants under long-term leases to acquire by eminent domain the landlord's title to the land, upon payment of compensation. The Supreme Court upheld this far-reaching exercise of eminent domain, finding that the program satisfied the "public use" requirement although the beneficiaries were private parties.³⁴ The key point for our purpose, however, is that the beneficiaries were wealthy tenants, and the scheme did nothing to reduce the cost of purchasing a home.³⁵ It scarcely amounted to a redistribution in favor of the disadvantaged.³⁶

III. CONFISCATION

I would like to consider in more detail the question of confiscation as a feature of American constitutional history. We do not often think of the outright seizure of property without compensation as part of our past.³⁷ In fact, the Takings Clause of the Fifth Amendment, and its counterparts in state constitutions, have often been pictured as a rejection of naked confiscation as an acceptable policy in the United States.³⁸ Nonetheless, there have been several episodes of property despoliation over the course of American history. I will explore two such events, the confiscation of Loyalist property during the Revolution and the prohibition of alcoholic beverages in

34. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). For an analysis of Justice Sandra Day O'Connor's opinion in *Midkiff*, see James W. Ely, Jr., *Two Cheers for Justice O'Connor*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 149, 169–71 (2012).

35. See, e.g., Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill Their Unique Role"? A Response to Professor Dyal-Chand*, 31 U. HAW. L. REV. 423, 429–33, 456 (2009); Debra Pogrud Stark, *How Do You Solve a Program Like in Kelo?*, 40 J. MARSHALL L. REV. 609, 624–30 (2007).

36. But see Gia L. Cincone, Note, *Land Reform and Corporate Redistribution: The Republican Legacy*, 39 STAN. L. REV. 1229, 1242–46 (1987) (picturing the Hawaii law as a land reform program designed to break up concentrated land ownership, but not addressing the question of compensation or considering the impact in terms of wealth redistribution).

37. But see Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 23–24 (1927) ("Of greatest significance is the fact that in all civilized legal systems there is a great deal of just expropriation or confiscation without any direct compensation."); Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1 (2000) (asserting that "far from being unknown or highly unusual, expropriations have been very much a part of our property law—so much so that we generally do not even notice them as such").

38. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 714 (1985) (observing that the takings clause of the Fifth Amendment "served an educative role. It inculcated the belief that an uncompensated taking was a violation of a fundamental right.").

the late nineteenth century, with attention to their impact on the distribution of wealth.

A. *Loyalist Property*

There was nothing novel about the confiscation laws enacted during the Revolutionary era. Over the course of English history, disloyal persons were executed and their property seized. William Blackstone asserted the “natural justice of forfeiture or confiscation of property, for treason.”³⁹

In 1777 the Continental Congress “earnestly recommended” that the states enact legislation “to confiscate and make sale of all the real and personal estate” of those persons supporting Great Britain.⁴⁰ Each state adopted a confiscation program, often based on bills of attainder. Such legislation declared certain Loyalists to be traitors and directed seizure and sale of their property. There was either no, or a very circumscribed, provision for a trial in court. This confiscation policy was driven by two motives: to punish Loyalists and to raise funds for the Revolutionary War. Redistribution was not a prime rationale. As Richard B. Morris concluded, “In America these confiscations were carried out not to create a peasant freeholding class”⁴¹

Although not all states pursued confiscation aggressively, a large amount of land and personal property was seized pursuant to these statutes.⁴² Typically the confiscated property was vested in state commissioners, who were charged to sell the property at public auction. Clearly some individual Loyalists suffered a substantial loss, but studies of the Revolutionary confiscations demonstrate that there was little redistributive effect. There was no dramatic change

39. 4 WILLIAM BLACKSTONE, COMMENTARIES *383.

40. Continental Congress (Nov. 27, 1777), in 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, 971 (Worthington C. Ford ed., 1907).

41. Richard B. Morris, *Class Struggle and the American Revolution*, 19 WM. & MARY Q. 3, 22 (1962) [hereinafter Morris, *Class Struggle*]; see also Anne M. Ousterhout, *Pennsylvania Land Confiscations during the Revolution*, 102 PA. MAG. OF HIST. & BIOGRAPHY 328, 340 (1978) (“The confiscation of the estates was not intended to help landless individuals acquire property.”).

42. WALLACE BROWN, THE GOOD AMERICANS: THE LOYALISTS IN THE AMERICAN REVOLUTION 129 (1969) [hereinafter BROWN, THE GOOD AMERICANS] (noting variations in the severity of state confiscation policies).

in the pattern of land ownership.⁴³ Indeed, most of the purchasers of confiscated property were already landowners who simply enlarged their estates.⁴⁴ In addition, the confiscation sales did not yield a financial bonanza for the states, as proceeds from the sales were used primarily to pay the creditors of the dispossessed Loyalists.⁴⁵

Why did this potentially radical program produce such modest results? Part of the answer is that the overriding objective of the states was to raise money quickly. Confiscated property was not given away to the destitute. Rather, it was sold to the highest bidder, who was frequently required to complete the purchase in cash or post a bond for future payment. As a practical matter, these conditions precluded anyone not moderately wealthy from acquiring confiscated land.⁴⁶ Moreover, commissioners did not always advertise sales properly or follow statutory procedures. Consequently, there is evidence

43. It is important to keep in mind that confiscations encompassed personal property, such as farm implements, furniture, and animals, as well as land. See Howard Pashman, *The People's Property Law: A Step Toward Building a New Legal Order in Revolutionary New York*, 31 L. & HIST. REV. 587 (2013) (stressing the impact of New York's confiscation laws on personal property).

44. HARRY B. YOSHPE, *THE DISPOSITION OF LOYALIST ESTATES IN THE SOUTHERN DISTRICT OF THE STATE OF NEW YORK 60–61* (1939) ("While it is true that the disposal of the loyalist estates effected a greater diffusion of ownership, it is questionable whether it went far toward a radical redistribution of landed wealth and a new social and economic order. Motivated by the desire for profit and by the feeling that the possession of landed estates was the firmest pillar on which the social distinction of their families could rest, the leaders of the Revolution, powerful politicians, rich merchants, landowners, and speculators, many already possessed of substantial land holdings, contrived to get a large part of the loyalist estates into their own hands."); Richard D. Brown, *The Confiscation and Disposition of Loyalists' Estates in Suffolk County, Massachusetts*, 21 WM. & MARY Q. 534, 547 (1964) [hereinafter Brown, *The Confiscation and Disposition of Loyalists' Estates*] (finding that sales of confiscated land in Massachusetts "represent no actual diffusion of ownership, but rather a division of loyalist property among people who already owned land"); Robert S. Lambert, *The Confiscation of Loyalist Property in Georgia, 1782–1786*, 20 WM. & MARY Q. 80, 92 (1963) ("In any case the confiscation policy does not seem to have resulted in any substantial redistribution of property from wealthy Loyalists to poor landless Whigs . . ."); Morris, *Class Struggle*, *supra* note 41, at 23 ("When estates were broken up they often went to enlarge the holdings of adjacent farmers and led to a concentration rather than a breakup of holdings.").

45. Ousterhout, *supra* note 41, at 333; Lambert, *supra* note 44, at 91 ("Certainly the confiscation of Loyalist estates did not prove to be the fiscal panacea that many had hoped for."); Brown, *Confiscation and Disposition of Loyalists' Estates*, *supra* note 44, at 543 ("Proceeds from sales went primarily to the creditors of the loyalists . . ."); see also BROWN, *THE GOOD AMERICANS*, *supra* note 42, at 128 ("Also the device of trying partially to finance the war with traitors' wealth was naturally very popular, if of limited success.").

46. Ousterhout, *supra* note 41, at 334, 340; Brown, *Confiscation and Disposition of Loyalists' Estates*, *supra* note 44, at 547; Morris, *Class Struggle*, *supra* note 41, at 38.

that confiscation sales were sometimes manipulated to enrich a clique of insiders who obtained land at prices below market value.⁴⁷

It is important to bear in mind that the confiscation of Loyalist property, although undoubtedly popular, aroused opposition. Some were concerned that the expropriation of Loyalist property might portend a broader assault on private property generally.⁴⁸ Others favored a policy of conciliation toward Loyalists, arguing that a continuation of seizures only prolonged bitterness and undercut reconciliation. After the end of the Revolutionary War, prominent political leaders, such as Hamilton and Madison, sought to moderate confiscation policy, worked to repeal the confiscation laws, and represented Loyalists seeking to reclaim their property in judicial proceedings.⁴⁹ Moreover, John Adams, in Paris to negotiate a treaty of independence, grudgingly expressed his support for compensation for confiscated property.⁵⁰

The 1783 Treaty of Paris ended the Revolutionary War and recognized the independence of the United States. It did not, however, offer

47. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 91 (1985) (“Thus, in practice, sales of confiscated property had often been colossal boondoggles, carried out to enrich political insiders.”); Isaac S. Harrell, *North Carolina Loyalists*, 3 N.C. HIST. REV. 575, 583–84 (1926) (noting that confiscation sales were “conducted with flagrant disregard for honesty, justice and public welfare,” and that commissioners often purchased estates themselves); Richard C. Haskett, *Prosecuting the Revolution*, 59 AM. HIST. REV. 578, 585–86 (1954) (finding evidence of improper sales in New Jersey and concluding that favored buyers could obtain confiscated property at bargain prices); Ousterhout, *supra* note 41, at 336–38 (noting allegations of improper sales and evidence that individuals conducting sales bid for themselves).

48. McDONALD, *supra* note 47, at 90–93; Brown, *Confiscation and Disposition of Loyalists’ Estates*, *supra* note 44, at 536.

49. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT*, *supra* note 19, at 36; BROWN, *THE GOOD AMERICANS*, *supra* note 42, at 177–79. For instance, in 1784 Hamilton criticized reliance on bills of attainder to punish Loyalists, stressed that the Treaty of Paris barred further confiscations, and decried a vindictive spirit toward Loyalists. Letter from Phocion to the Considerate Citizens of New York (Jan. 27, 1784), in 3 PAPERS OF ALEXANDER HAMILTON 483–97 (Harold C. Syrett & Jacob E. Cooke eds., 1962). Hamilton also represented Loyalists in a number of legal actions pertaining to their property, most notably *Rutgers v. Waddington* (unreported) (Mayor’s Court of New York City 1784); see Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI-KENT L. REV. 825, 844–48 (2006).

50. Letter from John Adams to Jonathan Jackson (Nov. 17, 1782), in JOHN ADAMS, 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 516 (Charles Francis Adams ed., 1856). (“I would compensate the [w]retches, how little [s]oever they deserve it, nay how much soever they deserve the [c]ontrary.”). This opinion by Adams would appear to be driven more by the desire to reach a treaty with Great Britain than by considerations of justice for Loyalists.

much comfort to Loyalists whose property was seized. The Treaty forbade further confiscations, but some states disregarded this provision. North Carolina continued to sell Loyalist estates until 1790.⁵¹ With respect to already forfeited property, the Treaty only required Congress to recommend that the states make restitution of such property.⁵² There was, as might be expected, no wholesale restitution of property or offer of compensation. Lawsuits by Loyalists to reclaim property also proved fruitless. In 1800 the Supreme Court upheld a Georgia bill of attainder enacted during the Revolutionary War. Justice William Cushing declared: “The right to confiscate and banish, in the case of an offending citizen, must belong to every government.”⁵³ Still, it should be noted that some states granted petitions by individual Loyalists for relief from confiscation, steps which further diluted the redistributive aspect of Revolutionary policy toward the Loyalists.⁵⁴

Quite apart from its meagre impact on wealth distribution, the wave of Loyalist property confiscations left a lasting sour taste. As early as 1780 the new Constitution of Massachusetts prohibited bills of attainder.⁵⁵ This move anticipated developments at the national level. The framers of the Constitution in 1787, as discussed above, included various provisions designed to prevent the state legislatures from redistributing property. Among other restrictions, the Constitution expressly bars both Congress and the states from enacting bills of attainder, the principal vehicle employed to seize Loyalist property.⁵⁶ As a prominent historian has explained, the prohibitions on bills of attainder “were aimed more at protecting property rights (recall the wartime confiscations) than at protecting liberty.”⁵⁷

During the nineteenth century prominent scholars severely criticized reliance on bills of attainder. Justice Joseph Story pictured such legislation in a dark light, declaring:

The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of

51. Harrell, *supra* note 47, at 588.

52. Treaty of Paris, Gr. Brit.-U.S., arts. 5, 6, Sept. 3, 1783.

53. Cooper v. Telfair, 4 U.S. 14, 19 (1800).

54. Lambert, *supra* note 44, at 88–91.

55. MASS. CONST. pt. I, art. XXV (“No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.”).

56. U.S. CONST. art. I, §§ 9, 10.

57. McDONALD, *supra* note 47, at 270.

proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power.⁵⁸

Commenting directly on the treatment of Loyalists, Story added: “During the revolutionary war, bills of attainder, and *ex post facto* acts of confiscation were passed to a wide extent; and the evils resulting therefrom were supposed, in times of more cool reflection, to have far outweighed any imagined good.”⁵⁹ In the same vein, Thomas M. Cooley explained, “the power to repeat such acts under any possible circumstances in which the country could be placed again was felt to be too dangerous to be left in legislative hands.”⁶⁰

B. Confiscation Repudiated: The Civil War Experience

That the Loyalist confiscation experience left its mark became apparent when the United States again considered the confiscation of property during the Civil War. In 1862 Congress passed the Second Confiscation Act. Among other provisions, this measure authorized the federal government to seize all the real and personal property of those persons aiding or abetting the Confederacy. The Confiscation Act, however, differed sharply from the bills of attainder directed against Loyalists during the Revolution. Instead of a legislative declaration of guilt, it required an *in rem* judicial determination that the owner had given support to the Confederacy by a federal court where the property was located.⁶¹ Most of the property liable to confiscation was situated in the South and under Confederate control. Consequently, the property could not be reached and judicial proceedings could not be commenced until the end of hostilities. President Abraham Lincoln doubted both the wisdom and constitutionality of the Act. He insisted that Congress adopt a resolution which provided that no punishment under the Act should be construed “as to work a forfeiture of the real estate of the offender beyond

58. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 485 (1833, reprint 1987).

59. *Id.* at 497.

60. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 262 (1868, reprint 2002).

61. Second Confiscation Act, 12 Stat. 589, §§ 5–8 (1862).

his natural life.”⁶² Although confined to land, the proviso minimized the impact of the law. Neither Lincoln nor his successor, Andrew Johnson, did much to implement confiscation.⁶³ Moreover, in a series of decisions the Supreme Court narrowly construed the power of confiscation. Significantly, following Lincoln’s analysis, it ruled that the United States could confiscate property only for the “life of the person for whose act it had been seized.”⁶⁴ Confiscation, therefore, could only last for the life of the offender and did not bind the offender’s heirs, a conclusion that reduced the value of confiscated property in the marketplace and undercut the efficacy of the confiscation policy. Not surprisingly, relatively little property was in fact seized under the Second Confiscation Act.

During the Reconstruction era, a number of radical Republicans continued to agitate for aggressive land confiscation and redistribution as part of schemes to fundamentally overhaul southern society and destroy the power of large planters. Congressman Thaddeus Stevens, a radical from Pennsylvania, set forth a sweeping land confiscation plan in September of 1865.⁶⁵ He proposed “to confiscate all the estate of every rebel belligerent whose estate was worth \$10,000, or whose land exceeded two hundred acres in quantity.”⁶⁶ Stevens further proposed distributing part of the land in forty-acre lots to each adult male former slave. The remainder would be divided into farms and sold, with the proceeds being used to indemnify losses to loyal citizens and reduce the war debt.⁶⁷ The House of Representatives rejected the Stevens proposal by a decisive vote of 126 to 37.⁶⁸

62. Joint Resolution Explanatory of “An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes,” 12 Stat. 627 (1862).

63. For a discussion of the 1862 Confiscation Act, see DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND CONFEDERACY DURING THE CIVIL WAR* (2007) [hereinafter HAMILTON, *THE LIMITS OF SOVEREIGNTY*].

64. *Bigelow v. Forrest*, 76 U.S. 339, 350 (1870) (Strong, J.).

65. For Stevens’s confiscation plans, see MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869*, 149–50, 258–60 (1974); RALPH KORNGOLD, *THADDEUS STEVENS: A BEING DARKLY WISE AND RUDELY GREAT*, 281–90 (1955); JAMES ALBERT WOODBURN, *THE LIFE OF THADDEUS STEVENS*, 521–35 (1913).

66. Thaddeus Stevens, *Land Confiscation Plan Speech to Pennsylvanians* (Sept. 6, 1865), <http://history.furman.edu/benson/hst41/red/stevens2.htm>.

67. *Id.*

68. CONG. GLOBE, 39th Cong., 1st Sess., 688 (1865).

Undaunted, in March of 1867 Stevens renewed his proposal, calling for the immediate enforcement of the 1862 Confiscation Act and distribution of part of the seized land to former slaves.⁶⁹ Perhaps sensing that his call for confiscation would fall upon deaf ears, Stevens moved to delay consideration of this proposal until December. In the end his plan went nowhere. President Johnson issued a series of amnesty proclamations restoring the property rights of certain ex-Confederates, and effectively barred any future confiscations with his 1868 Christmas general amnesty to all former Confederates.⁷⁰ By the end of the Civil War and Reconstruction, Americans had seemingly closed the door on sweeping confiscations of property as a penalty for disloyalty. The *Hartford Daily Courant* enthusiastically declared that “the savage calls for general confiscation made by a very few have never found even an echo.”⁷¹

It remains to consider why, after a bitter and costly Civil War, calls for the confiscation of Confederate-owned property gained so little traction. In other words, why was northern opinion so hostile to the seizure of land held by wealthy planters in the South? Critics raised a number of objections to confiscation. They repeatedly pictured confiscation as a partisan scheme to attract the vote of newly freed slaves.⁷² Opponents also expressed concern that confiscation would retard the return of economic growth and prosperity in an impoverished South. A confiscation policy, according to the *New York Times*, “introduces a new element of uncertainty into the South, intensifies its industrial paralysis, and heightens the distrust which already deters capitalists from embarking in its enterprises.”⁷³

More telling for our purposes, however, was opposition to governmental redistribution of property in principle, and fear that a radical redistribution would not be confined to the defeated southern states.⁷⁴ Senator Benjamin F. Wade of Ohio fueled this concern. In June of 1867 he assailed the distinctions between capital and labor, and boldly declared: “Property is not equally divided, and a more

69. CONG. GLOBE, 40th Cong., 1st Sess., 203–08 (1867).

70. HAMILTON, *THE LIMITS OF SOVEREIGNTY*, *supra* note 63, at 159–60.

71. HARTFORD DAILY COURANT, Dec. 10, 1867.

72. *The Republican Party and Schemes of Agrarianism*, N.Y. TIMES, June 13, 1867, at 4.

73. Editorial, *Confiscation—The Extremists and Their Threats*, N.Y. TIMES, April 10, 1867, at 4.

74. Cincone, *supra* note 36, at 1239 (“[T]he threat to private property that opponents of the Stevens bill perceived it to be outweighed the republican rhetoric.”).

equal distribution of capital must be wrought out.”⁷⁵ As might be expected, northern opinion was extremely antagonistic to any suggestion of a general redistribution of property. The *Times* reacted to Wade’s speech in a fiery blast.

It seemed scarcely credible that any man occupying his position would arraign the inequality of wealth as a wrong to be remedied by legislation. We were not willing to believe that doctrine of dividing property, and adding to the rewards of labor by a legislative inroad upon the hoard of the capitalist, is to be imported into our politics and made the groundwork of future agitation.

The *Times* denounced Wade’s remarks as “destructive, leveling, and utterly anarchical propositions.”⁷⁶ Amplifying this theme, it denounced all “projects of confiscation, extermination and the distribution of property or of profits” as “the work of dreamers or demagogues.” The *Times* bluntly concluded: “Unless the right of holding property is to be abolished, there is no possible way of equalizing its possession.”⁷⁷ Likewise, the *Nation* pictured confiscation proposals as “looking toward special favors for special classes of people,” and denounced them as “simply schemes of robbery.”⁷⁸ Clearly the anti-redistribution principle carried the day with respect to land confiscation in the Civil War Era.⁷⁹

C. Prohibition

This did not mean, however, the legislatures would not attempt to destroy other types of previously lawful property as public sentiment

75. As quoted in ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED BUSINESS, 1863–1877*, 309 (1988); see also William Frank Zornow, “Bluff Ben” Wade in Lawrence, Kansas: *The Issue of Class Conflict*, 66 OHIO HIST. J. 44–52 (1956).

76. Editorial, *Labor and Capital—Mr. Wade’s “Jump Forward,”* N.Y. TIMES, June 20, 1867, at 4 [hereinafter N.Y. TIMES, *Labor and Capital*].

77. Editorial, *The Republican Party and Schemes of Agrarianism*, N.Y. TIMES, June 13, 1867, at 4.

78. Editorial, *True Radicalism*, THE NATION, July 18, 1867.

79. Interestingly, the *Times* expressed confidence that the American people would reject redistribution of property. “Nowhere in the world,” it observed, “is property so universally diffused as in this country, and nowhere, therefore, will the protest against every scheme for violating its rights be uttered with such heartiness and effect.” N.Y. TIMES, *Labor and Capital*, *supra* note 76, at 4; see also Editorial, *Future Political Issues*, THE NATION, June 27, 1867 (“A community in which property is so widely spread as it is in our Northern States cannot be led into any hare-brained plans for its redistribution.”).

shifted. A case in point was the periodic emergence of statutes outlawing the manufacture and sale of alcoholic beverages during the nineteenth century. We tend to think of Prohibition in terms of the Eighteenth Amendment and the 1920s, but my focus will be on earlier episodes which highlighted the clash between prohibition laws and property rights. Maine enacted the first statewide prohibition law in 1851, and a number of other states followed suit in the 1850s.⁸⁰ Prohibitionists maintained that a ban on alcoholic beverages would safeguard public health and discourage crime and pauperism. Unlike eminent domain cases, here there was no transfer of property from one party to another. With prohibition laws the possession and use of property rights in alcoholic beverages was destroyed for the perceived public benefit. The early prohibition cases, then, presented the fundamental issue of whether statutes, although couched in terms of regulation, in actuality served to expropriate a species of hitherto lawful private property. To be sure, courts in the nineteenth century were generally disposed to conclude that a ban on alcoholic beverages was a valid exercise of the police power to safeguard the health and morals of the public.⁸¹ Some endorsed the view that alcoholic beverages, although long considered as a legitimate form of private property, could be defined as a nuisance by the legislature and were thus subject to forfeiture without compensation.⁸²

Still, some jurists and commentators expressed concern that the prohibition laws amounted to an uncompensated destruction of property. At issue in the important case of *Wynehamer v. People* (1856) was a New York statute banning the sale or gift of alcoholic beverages and authorizing the destruction of alcohol as a public nuisance.⁸³ The New York Court of Appeals invalidated the measure with respect

80. IAN R. TYRRELL, *SOBERING UP: FROM TEMPERANCE TO PROHIBITION IN ANTEBELLUM AMERICA, 1800–1860*, 252–82 (1979).

81. HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW; NEOCLASSICAL LEGAL THOUGHT, 1870–1970*, 258–59 (2015); MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 512–14 (1977).

82. *Fisher v. McGirr*, 67 Mass. 1, 41 (1854) (insisting that because liquor “is so noxious and declared to be such by law, the owner’s right of property is divested by the judgement, and he can have no claim to compensation”); see also *The License Cases*, 46 U.S. 504, 589 (1847) (McLean, J.) (“The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Every thing [sic] prejudicial to the health or morals of a city may be removed.”).

83. *Wynehamer v. People*, 13 N.Y. 378 (1856). This decision did much to undermine enforcement of the prohibition law in New York; TYRRELL, *supra* note 80, at 291.

to alcoholic beverages owned when the law was enacted as a deprivation of property without due process.⁸⁴ In the lead opinion, Judge George F. Comstock ruled that alcoholic beverages had long been treated as property and were entitled to the same level of constitutional protection as other forms of property. He framed the fundamental question as to whether the legislature can “confiscate and destroy property lawfully acquired by the citizen in intoxicating liquors.”⁸⁵ Insisting that the right of property ownership encompassed the power of disposition and sale as well as enjoyment, Comstock maintained that a law which eliminated these attributes destroyed the notion of property even if the thing itself was physically untouched. He conceded that it was difficult to draw a precise line between regulation of property and destruction, but he concluded that “the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction.”⁸⁶ Although he was clearly bothered by the statutory provision inviting physical destruction of alcoholic beverages, Comstock’s analysis turned upon the statutory elimination of commerce in alcoholic beverages already owned by individuals when the law took effect. Nevertheless, the court intimated that the legislature could bar the future manufacture or importation of such beverages after the law became effective.

Along the same lines as *Wynehamer*, three members of the Supreme Court in 1873 took the position that a state prohibition law could not interfere with rights to alcoholic beverages existing at the date of passage without payment of compensation.⁸⁷ Justice Stephen J. Field proclaimed:

I have no doubt of the power of the State to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the

84. *Wynehamer*, 13 N.Y. at 384–98. For a discussion of *Wynehamer* as a milestone in the evolution of the due process guarantee, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315, 338–41 (1999).

85. *Wynehamer*, 13 N.Y. at 384.

86. *Id.* at 399.

87. *Bartemeyer v. Iowa*, 85 U.S. 129, 135–41 (1873) (Bradley, J., Swayne, J., and Field, J., concurring).

owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law.⁸⁸

More complex questions concerned the impact of prohibitory liquor laws on the value of property employed to manufacture alcoholic beverages. Cooley raised this point in 1868:

Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and, by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand.⁸⁹

This issue was squarely presented when Kansas adopted a constitutional provision in 1880 barring the manufacture and sale of “intoxicating liquors” except for medical and scientific purposes. A year later the legislature enacted a statute to carry out this mandate.⁹⁰ Peter Mugler had opened a brewery before the prohibition amendment was adopted and continued to sell beer in violation of the law. In a criminal proceeding to enforce the law, Mugler alleged that his property was worth ten thousand dollars as a brewery but only twenty-five hundred dollars for any other purpose. He asserted that this reduction in value amounted to an unconstitutional deprivation of his property without due process of law.⁹¹ Brushing aside this contention, the Supreme Court of Kansas in 1883 nonetheless observed: “The legislature has probably gone a long way in destroying the values of such kinds of property as the defendant owned, and has possibly gone to the utmost verge of constitutional authority.”⁹² The court emphasized that Mugler had not been deprived of

88. *Id.* at 137.

89. COOLEY, *supra* note 60, at 583–84.

90. For a treatment of the adoption of the 1881 law, see ROBERT SMITH BADER, *PROHIBITION IN KANSAS: A HISTORY* 63–71 (1986).

91. *State v. Mugler*, 29 Kan. 252 (1883).

92. *Id.* at 269.

his brewery or any tangible property, only his ability to use the property to manufacture and sell beer. Concurring, David J. Brewer, later appointed to the Supreme Court, cut to the heart of the matter, asking: “Is this not taking private property for public use without any compensation? If the public good requires the destruction of the value of this property, is not prior compensation indispensable?”⁹³

Brewer amplified his reasoning in an 1886 federal circuit court opinion. The facts were similar to those in the *Mugler* case. The defendant had invested fifty thousand dollars for land, buildings, and fixtures for the purpose of producing beer at a time when selling beer was lawful in Kansas. He charged that the prohibition law reduced the value of his property to five thousand dollars, and that this loss constituted an unconstitutional deprivation of property. Brewer agreed, ruling that a prohibition law could not interfere with already existing property rights without payment of compensation. He acknowledged that a state could ban the future manufacture and sale of alcoholic beverages, but drew the line at retrospective application of the law to property in existence when the measure was enacted.⁹⁴

Brewer’s efforts to secure some compensation for the owners of shut breweries ultimately came to naught. In *Mugler v. Kansas* (1887) the Supreme Court invoked the police power to protect the health and morals of the community, firmly closing the door on claims for compensation by breweries operating at the time the prohibition law was enacted and thereby suffering a material diminishment in value. Justice John Marshall Harlan, speaking for the Court, observed:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community cannot in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his

93. *Id.* at 274.

94. *State v. Walruff*, 26 F. 178 (C.C.D. Kan. 1886). In an 1891 address Brewer reiterated his belief that the law outlawing the manufacture and sale of intoxicating liquors in Kansas should have provided compensation to the owners of breweries. He stated that “it was fitting for the majority not to destroy without compensation; and to share with the few the burden of that change in public sentiment”). David J. Brewer, *Protection to Private Property from Public Attack*, 55 *NEW ENGLANDER & YALE REV.* 97, 104 (1891).

right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.⁹⁵

Commentators recognized the confiscatory dimension of prohibition legislation. Surveying such laws in 1904, Ernst Freund pointed out that prohibition could “destroy the entire value of breweries” and that “it can hardly be denied that for every practical purpose the owner is deprived of his property.”⁹⁶ Two decades later Morris R. Cohen, speaking of the Eighteenth Amendment, revealingly stated: “In our own day, we have seen the confiscation of many millions of dollars’ worth of property through prohibition. Were the distillers and brewers entitled to compensation for their losses?”⁹⁷

There was no change in patterns of wealth ownership as a result of the state prohibition laws in the nineteenth century. To be sure, as Cohen correctly noted, many small breweries and distilleries were wiped out, but neither the purpose nor the effect of prohibition was redistributive. The owners simply suffered their losses.

CONCLUSION

Contrary to the image of the United States as a property-protective nation, there have been drastic interferences with property rights in times of crisis or in response to public clamor. One might also include the abolition of slave property in this category.⁹⁸ But if confiscation cannot be banished from American constitutional history, neither should its presence or impact be exaggerated. The redistributive effect of the two episodes considered here—Loyalist property

95. *Mugler v. Kansas*, 123 U.S. 623, 688 (1887); see EPSTEIN, *TAKINGS*, *supra* note 22, at 130–31 (pointing out that the Court’s opinion failed to link the police power justification of controlling poverty and crime to a ban on the production of alcoholic beverages, and concluding that if the state “must justify its undisputed taking of property, then the decision seems wrong”).

96. ERNST FREUND, *THE POLICE POWER; PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 568 (1904).

97. Cohen, *supra* note 37, at 25; see also HERMAN FELDMAN, *PROHIBITION: ITS ECONOMIC AND INDUSTRIAL ASPECTS* 306–29 (1930) (commenting that “no law passed in this country since the abolition of slavery affected so vast an investment of tangible property as did the Volstead Act,” and pointing out that unused brewery and distillery property usually depreciated sharply in value and was often dismantled or sold at bargain prices to other industries).

98. Rose, *supra* note 37, at 24–25 (“A third extraordinary disruption was the emancipation of the slaves in the aftermath of the Civil War in the 1860s. . . . But with the Civil War and the post-War amendments to the Constitution, slavery was simply abolished, and all the capital invested in slaves wiped out.”).

confiscation during the Revolutionary era and prohibition of alcoholic beverages in the nineteenth century—was limited at best. Moreover, as the Civil War experience demonstrated, Americans have generally been reluctant to employ wholesale confiscation to compel redistribution of wealth. This perhaps reflects an unarticulated understanding that government-forced wealth redistributions undermine the right of private property, which in turn weakens the historic significance of property as a bulwark of personal and political freedom.⁹⁹ Moreover, it is questionable that a fixation on inequality is the best approach to eliminate poverty.¹⁰⁰ For the most part, Americans have preferred economic growth over redistributive policies. There is a close link between guarantees of private property and national prosperity.¹⁰¹ As John Marshall pointed out, rendering property insecure destroys inducements to industry. “Marshall,” Charles Hobson has explained, was convinced “that strong protection for property and investment capital would promote national prosperity.”¹⁰² Marshall’s vision has generally held sway over the course of United States history.

In short, the record indicates that neither eminent domain nor outright expropriation have proven to be meaningful vehicles for the transfer of wealth from the affluent to the poor in the United States.¹⁰³ Indeed, as noted above, eminent domain has often been employed to benefit established and politically connected enterprises. To the extent that wealth inequality is perceived as a problem, one must seek elsewhere for a solution.

99. PIPES, *supra* note 21, at xiii (asserting that “there is an intimate connection between public guarantees of ownership and individual liberty: that while property in some form is possible without liberty, the contrary is inconceivable”).

100. Deirdre N. McCloskey, *Growth, Not Forced Equality, Saves the Poor*, N.Y. TIMES, Dec. 25, 2016, at BU6 (maintaining that redistributive policies are less effective than economic growth in improving conditions for the poor).

101. DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME NATIONS ARE SO RICH AND SOME SO POOR* 217–18 (1998) (concluding that a society “best suited to pursue material progress” would have standards which, among other things, “[s]ecure rights of private property, the better to encourage savings and investment” and “[e]nforce rights of contract, explicit and implicit”).

102. CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 74 (1996); see also James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1026–27 (2000).

103. *But compare* Jessica A. Clark, Note, *Eminent Domain and Expropriation: Comparison Between Fifth Amendment Precedent and Latin American Land Redistribution*, 28 REGENT UNIV. L. REV. 319, 329–49 (2016) (noting that expropriation as part of land reform programs in certain Latin American nations expressly sought to redistribute land to the rural poor).

