



Pei Ketron, Private Property, 23 May 2009, flickr.

Taking Back the Constitution - Part 16 – What property rights?

Donald N. Anderson
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What is private property?

Property is all that a man possesses; his exclusive domain. Man has the right to acquire property and dispose of property. He has the right to control his property, exclude others, to prevent trespass, and the right of quiet enjoyment. He also has the right to the active use of his property provided that his use does not violate the right of others to the quiet enjoyment of their property.¹ Property need not be tangible, but can be ideas to which he has established exclusive claim.

Many countries in the world maintain that *rights* are created by legislation, however, our founders insisted that *man is born with rights*. Those rights may be regulated, but exist independent of and prior to any legislation. Democratically legislated rules can assist in the maintenance of one's property, but only in extreme situations can those rules permit forfeiture of property without the owner's consent. "Rights" provided by democratically enacted legislation make them into what Abraham Lincoln called "the wolf's understanding of liberty: that those with power—whether they be a democratic majority or a legislature or a regulatory

agency—have a basic the right to do as they please with other people and the product of their labor.”ⁱⁱ Our founders did everything possible to protect our rights from the will of the majority.

The right to property far predates our Constitution and was well developed under the common law. The laws of each colony recognized the right to property, and our founders made no change except to give the new government the right to take property for public use provided just compensation was made.ⁱⁱⁱ

Private property is the fundamental right!

The right to own property has always been the critical attribute of a free man. The following quotes are a small sample of the many folks who appreciate this fact:

“The right of property is the guardian of every other right, and to deprive people of this is in fact to deprive them of their liberty.” – Arthur Lee, a colonist in Virginia^{iv}

“The moment the idea is admitted into society that property is not as sacred as the laws of god ... anarchy and tyranny commence. Property must be secured or liberty cannot exist.” – John Adams^v

“Government is instituted to protect property of every sort This being the end of government, that is NOT a just government,... nor is property secure under it, where the property which a man has ... is violated by arbitrary seizures of one class of citizens for the service of the rest.” - James Madison^{vi}

“One great object of government is personal protection and security of property.” – Alexander Hamilton^{vii}

“Property is the foundation of every right we have, including the right to be free. Every legal claim, after all, is a claim to something—either a defensive claim to keep what one is holding or an offensive claim to something someone else is holding.” – Roger Pilon^{viii}

The word “property” was used only once in the original Constitution and that concerned only the property of the new government. The 5th Amendment provides briefly for the compensation of property owners when their property is taken for public purposes. The 14th Amendment reiterates the 5ths prohibition against taking property without due process of law, but applying it specifically to the states. In spite of the scant use of the word “property” in the Constitution, a great number of its provisions protected property.^{ix} The list would have been even longer if our founders had designed the federal government to have any significant power over property. They left the states as the primary protectors and regulators of property.

Takings

The process of condemning private property for purchase or regulating it in such a way that it losses legitimate value is called a taking.

The Supreme Court in the 20th century has separated two types of takings.

The first are condemnations. They have permitted government to take over property often below fair market value. In extreme cases the ultimate beneficiary has not been directly the public (as specified in the Constitution) but some redevelopment or “urban renewal” scheme. In the case of *Kelo v. City of New London*,^x the City was permitted to condemn Susette Kelo’s property only to transfer it to another private party they thought would use it in a way they approved. The Constitution’s “public use” restraint was bent into “of benefit to other taxpayers.” This case caused such an outcry that 40 states enacted legislation to prevent such an outrage. It is doubtful that the Supreme Court will repeat this highly questionable interpretation.

Regulatory takings are an even more obnoxious denial of individual property rights. In most cases the Supreme court has permitted significant reduction in the value of a person’s property before they will permit recovery from the government of the value taken.

Two other types of takings are not compensated and have often become so excessive that they significantly reduce the value of the owners property; to the point of outright theft.

These are property/inventory taxes and required permits. You truly do not own property if you have to pay rent to the government in order to retain ownership. Unfortunately most local governments depend on property taxes to fund their government and schools. These taxes have been with us since colonial times, and in most cases the proposed replacements are equally obnoxious. In this column, I propose making this slow confiscation constitutional.

Permits are a two-sided coin. Many just allow the government to dictate how you use your property. These permits protect no one’s property and represent the essence of bureaucratic theft of property. Other permits prevent actions that will damage the property of others and although preemptive do offer some value when severe damage would be beyond the resources of the active property owner to redress.

Protecting property

Our property may be our most important right, but it is also one of the most difficult to protect. There are constant attempts by others who want to control property without paying for it

The US Supreme Court has made it unnecessarily difficult to bring property rights cases into federal court by requiring owners to use every possible avenue for recovery before turning to the courts. This prevents all but the exceptionally well-healed from recovering property taken by government. Many give up and permit various levels of government to confiscate their property or much of its value. Most people, rather than having a true right to the property they own, are able to use their property only at the forbearance of the government.

This is a travesty. Common law courts were protecting owner’s property rights well before there was a United States. If you have the use of the property you own only with the permission of the government you are not a free man.

To help protect property owners from the very agency set up to protect their property rights, this amendment below sets up a special court, gives it the tools, and tasks it with protecting each individual's property.

An amendment to protect property rights

Amendment Number _____

The owner of any property has the unquestioned right of control, can exclude others, can prevent trespass and have the quiet enjoyment of his property. He also may actively use his property, provided such use does not infringe on the rights of others to the quiet enjoyment of their property.

The Property Rights Review Court shall provide prompt adjunction of citizen's claims against government that assert reduction in value of their property through condemnation, excessive regulation, onerous permit requirements, or excessive taxation. Excessive regulation and onerous permit requirements are those not required to prevent damage to other people's property. Excessive taxation consists of tax rates that, if continued for 100 years, would confiscate the entire value of the property. The court shall have the power to issue injunctions to stop condemnation, prevent regulatory forfeitures, issue permits, and withhold taxes. If there is delay by several months by the government, or the government's claims are not well justified, the case shall be resolved in favor of the property owner. Decisions and damage claims awarded by this court can only be appealed to the U.S. Supreme Court. Congress shall determine the number of this court's justices and their dispersion across the United States.

ⁱ Roger Pilon writing in the "Cato Handbook for Policymakers, 34. Property Rights and the Constitution, 7th Edition" (www.cato.org/pubs/handbook/hb111/hb111-34.pdf) provides a clear description of property rights, their weakening under both our state and federal governments and steps needed to return a level of honesty to our government's treatment of their citizens property.

ⁱⁱ Quoted from chapter 1 of Timothy Sandefur's *The Conscience of the Constitution*.

ⁱⁱⁱ Amendment V ends, "nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The last clause is often called the power of eminent domain.

^{iv} From Coalition for Property Rights presentation:

<http://proprights.com/wp-content/uploads/2012/04/CPR-Presentation.pdf>

^v Mentioned in "Private Property Rights: A basic Premise Of America's Constitution", <http://www.nccs.net/private-property-rights.php>

^{vi} *ibid*.

^{vii} see footnote iii.

^{viii} Roger Pilon, *op. cit*.

^{ix} Rob Natanson, *The Constitution and Property Rights*, [Http://tenthamentcenter.com](http://tenthamentcenter.com)

^x This case decided by the US Supreme Court in 2005 is summarized at http://en.wikipedia.org/wiki/Kelo_v._City_of_New_London