Chapter 24

The Right to Property

Few rights have been more prominent throughout American history than property rights. The drive to settle North America was above all an attempt to exploit the economic potential of a new world, especially its vast tracts of land. Even individuals who came to escape political or religious persecution hoped for financial reward. But the ownership of property was not an end in itself. It was a right that protected liberty, which is why it appears in the Fifth Amendment as a restraint on governmental power: "No person shall be. . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Colonists considered private ownership of property to be a birthright of Englishmen. They associated it with the time-honored guarantees of the Magna Carta (1215), which secured the rights of owners against seizure of their property without due process of law. As early as 1657, a Massachusetts court recognized as "a fundamental law" the principle that property could not be taken from another person or used "without his owne free consent." John Locke, the seventeenth-century English political philosopher, powerfully reinforced this colonial attachment to property in his Second Treatise on Government. He argued that government was based on a compact between the people and their rulers. Rulers agreed to protect the natural rights of the people in exchange for the authority to govern. One of these natural rights was the ability to own and control property. That right was not absolute, however. Government could regulate the use of private property, especially to prevent it from being used in a way that threatened public health and safety. It could also seize property without the owner's consent if the property was required for a legitimate public use. However, this power, known as eminent domain, required government to offer fair payment to the property owner.

The centrality of property rights to the American conception of liberty can scarcely be exaggerated: "The right of property," Arthur Lee of Virginia wrote in *An Appeal to the Justice and Interests of the People of Great Britain* (1775), "is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." For this reason, the framers of the Constitution provided numerous safeguards for property. They limited the ability of the federal government to tax land and granted Congress the authority to regulate interstate and foreign commerce, as well as to protect intellectual property, such as books and inventions. States were forbidden from enacting any law "impairing the obligations of contracts." But the document did not provide a general right to property, just as it did not list other rights Americans considered essential. The Bill of Rights remedied this problem. The Fifth Amendment contained two important clauses designed to guarantee property rights: no property could be taken without due process of law, and owners must be compensated if property was taken under the government's power of eminent domain. These rights provided a buffer protecting individuals from arbitrary government. Vice President

"As a man is said to have a right in his property, he may equally be said to have a property in his rights."

—James Madison, "Property," *National Gazette,* March 29, 1792

John Adams in an essay, *Discourses on Davila* (1791), summed up the view of a new American creed: "Property must be secured or liberty cannot exist."

The strong connection between liberty and property caused early nineteenthcentury lawmakers to place a premium on the protection of property rights. Some judges went so far as to declare them natural rights—the term they used was "vested rights"—that existed before constitutions and therefore limited all governments. This view justified striking down any limitation a legislature might place on the enjoyment of private property. No one disagreed that government could regulate the use of property to protect the public health and safety, but judges looked skeptically at any law or action that interfered unduly with property rights.

By the 1830s, however, the disadvantage of treating property rights as sacred was apparent to many observers. The issue came to its head when legislators attempted to spur competition in transportation, especially in the building of roads and bridges. During the first decades of nationhood, state and federal governments sought to avoid taxes as much as possible in an effort to limit the power of government. One consequence of this policy was a decision to grant private investors the right to collect tolls (fees) for long periods of time, sometimes for as much as a century, if they would build roads and bridges for public use. As the population grew and demands for new transportation routes increased, legislators offered charters, or grants of authority, to companies who would provide additional roads and bridges. Some of these new routes and structures competed directly with the older toll roads and bridges. The owners of the long-established transportation companies protested that this new competition was destroying the value of their property in violation of their contract.

In 1837, the U.S. Supreme Court ruled on this claim in one of the most important property rights cases of the nineteenth century. Five decades earlier, in 1785, Massachusetts had authorized the Charles River Bridge Company to build a toll bridge over the Charles River between Boston and Charlestown. Before this charter expired, the legislature empowered the Warren Bridge Company to build a second bridge, with the provision that it could collect tolls only until its construction costs were paid. Then, it would become free. Because a toll bridge cannot compete successfully with a free bridge, the Charles River Bridge Company claimed that the state had violated the charter, a legal contract, and destroyed the value of its property. The Supreme Court ruled in *Charles River Bridge v. Warren Bridge* (1837) that, although the Constitution prohibited states from violating contracts, nothing in the Charles River Bridge charter stated that the grant was exclusive.Writing for the Court, Chief Justice Roger B. Taney emphasized that the language of contracts must be interpreted strictly, or precisely. States could regulate property in the public interest unless the language of a charter explicitly prohibited it. Otherwise, he explained, no one would invest in new transportation or new technologies until the old charters ran their course. Economic progress at times required that existing property rights had to be destroyed to make room for innovation and improvement. Such was the price of progress.

The late nineteenth century brought a dramatically different view of this issue. It was an age of industrial monopoly, and the Supreme Court interpreted the due process clause of the Fourteenth Amendment to sharply curtail the authority of states to regulate or control the use of property. In what came to be known as economic due process, the Court decided that legislatures could not pass unrea-

sonable restrictions on property, such as regulating the prices a utility company or railroad could charge. Judges, not elected representatives, would determine what was reasonable. The justices also ruled that courts, not legislatures, would determine fair compensation for any property taken for public use under the state's power of eminent domain. The result was unprecedented protection of property rights—and a decrease in the ability of government to challenge monopolies or regulate businesses for the public good.

The Great Depression of the 1930s changed this approach to the rights of property. With as many as one-third of Americans out of work, the Supreme Court could not resist for long the demand that government had a duty to protect people from economic disaster. The New Deal was President Franklin Roosevelt's plan to stimulate the economy and provide economic support, such as jobs and welfare, to Americans hurt by the depression. It required much greater government involvement in the economy than was traditional. In the early 1930s, the Supreme Court ruled that these programs were unconstitutional; the justices struck down governmental efforts to control prices and set wages, for example, as violations of property rights, especially freedom of contract. By 1938, however, public support for the New Deal—and the retirement of some justices—persuaded the Court to change its stance. Instead of blocking federal laws to reform the economy, the justices adopted a position that Congress could act freely in economic matters under its authority to regulate interstate commerce if it believed good reasons existed to do so. Under this broad standard, property rights virtually disappeared from the Court's agenda. Once considered a right essential to liberty, property rights were now secondary to the desire to promote economic security and restrain too-powerful corporations. A wide array of laws and agencies sharply curtailed the unfettered private use of property in the name of a greater public good. The legal compass had swung almost 180 degrees from the Court's position in the late nineteenth and early twentieth centuries. It was a constitutional revolution of the first order.

In the 1980s and 1990s, the Supreme Court began to trim what had become vast congressional power to control the economy and the use of property. It especially gave more discretion to states to adopt their own standards in this area. It was not long, however, before the rights of property and the power of government came into conflict. The most volatile issues centered on the state's use of eminent domain to condemn property and turn it to private uses that claimed to have a public benefit. A case from Connecticut brought the conflict into stark focus—and resulted in a Supreme Court and a nation equally divided over where to draw the line between the power of government and the rights of property owners.

Susette Kelo, a registered nurse in New London, Connecticut, dreamed of owning an older house near water, so her 1997 purchase of a modest Victorian cottage on the Thames River, near its junction with Long Island Sound, seemed

"In no other country in the world is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned."

—Alexis de Tocqueville, *Democracy in America* (1835)

"Yesterday the active area... was concerned with 'property.' Today it is 'civil liberties.' Tomorrow it may be 'property' again."

—Justice Felix Frankfurter, *Of Law and Men* (1956)

ideal. The ninety-year-old house was in reasonably good condition, and it had a small front yard for her flowers and a place to watch the ever-changing river from her front window. It was in the neighborhood known as Fort Trumbull, an area of older homes and families who had lived there for decades. Down the street from her was a house built in 1895, and a nearby family had been in the neighborhood for generations, dating to the time when William McKinley was President. A number of houses had been owned by the same families for several generations. Susette Kelo's next-door neighbor, for example, lived in the house once owned by his grandmother, who had started a garden the family still maintained. As Kelo and her husband restored their pink house, she realized how special her neighborhood was and how much potential it had for revitalization that would preserve its historic character.

Soon after she moved in, however, Kelo's world started to unravel. New London, Connecticut, once a prosperous city, had recently fallen on hard times. The federal government closed its 1,500-employee Naval Undersea Warfare Center in 1996, and by 1998, the city's unemployment rate was the highest in the state. It also was hemorrhaging population; New London's 24,000 residents was its lowest total since the 1920s. Then salvation arrived, or so it seemed, when a giant pharmaceutical company, Pfizer, began construction of a $300 million research facility on the outskirts of Fort Trumbull. Believing Pfizer's commitment offered an opportunity for a wider economic revival, New London asked its economic development corporation, a private nonprofit organization, to create a plan to revitalize the surrounding area, including the Fort Trumbull neighborhood.

The resulting plan was impressive: it envisioned a resort and conference center, a new state park, an upscale housing development, an office park, and high-end shopping centers. Enthusiastic city and state leaders approved the plan and set out to acquire land in Fort Trumbull. The development corporation offered to purchase the 115 houses in the neighborhood, and all but fifteen residents agreed to sell. For the holdouts, the issue was both personal and a matter of principle: "This is the second time someone from my family may have to move because the government wants to take their home for another private party," one resident said. "If that can happen to us twice, it can happen to anyone, anywhere, not just here in Connecticut. Basically, it's homeowner beware."

Finally, the city tired of negotiating. It assigned its power of eminent domain to the economic development corporation, which moved quickly to condemn the fifteen remaining properties. No one claimed the area was blighted or neglected, typical reasons for the use of eminent domain; the city wanted the land solely because it was in the redevelopment area. Kelo and the other homeowners sued the city, claiming that its use of eminent domain violated the Fifth and Fourteenth Amendments. The planned development, they argued, benefited private interests. In fact, while the case was pending, the redevelopment corporation offered a private company a ninety-nine-year lease on the property for an annual rent of one dollar a year.Where was the public purpose the amendments required?

Kelo v. City of New London was the first major eminent domain case to make it to the Supreme Court since the 1980s. The stakes were high because New London was not alone in its willingness to exercise eminent domain on behalf of private developers. It was an innovative use of government's power; eminent domain traditionally had allowed government to seize land for clearly

public purposes, such as building a highway or a water treatment plant or ridding an area of blight. But many governments, eager to spur economic growth, were now pursuing similar strategies. If the justices sided with Susette Kelo and her fellow plaintiffs, their decision might threaten the economic revitalization of many distressed areas. But if they supported the city, would they not be requiring a few unfortunate property owners to sacrifice their rights for the benefit of wealthy private investors?

In 2005, the justices upheld the city's right to use eminent domain to support its economic development strategy, but the decision revealed a deeply divided court. Five justices agreed that government could not take property from one private party and transfer it to another private entity, even if it paid just compensation, but New London had used the seized property for a public purpose, they concluded. The new jobs and increased tax revenue promised by the developers met the constitutional requirements of public use; the primary benefit of the development would be to the community at large, they found, even though the private investors in the project might profit from it as well. The concept of public welfare is broad and inclusive, the majority ruled, and it was not the Court's job to interfere with the judgment of public officials as to how best to serve public needs.

The four dissenting justices condemned the majority's conclusion. The majority's standard, Justice Sandra Day O'Connor warned, removed any meaningful distinction between public and private and effectively "delete[s] the words 'public use' from. . . the Fifth Amendment." It put all private property at risk: "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded." She dismissed the need to defer to elected officials. If they were the sole judge of what constituted public use, then the Fifth Amendment's restriction would be merely "hortatory fluff." The framers intended the amendment to protect individuals against arbitrary actions of government. Without this protection, "nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." The result of the Court's decision would be to make government a reverse Robin Hood—taking from the poor to give to the rich. "The Founders," O'Connor concluded, "could not have intended such a perverse result."

Susette Kelo and her neighbors lost their battle, but perhaps not the war. Public outrage over the decision forced a moratorium on eviction notices while the Connecticut legislature and governor considered a remedy. "The abuse of eminent domain has become a national plague," wrote the *Boston Globe* in an editorial that reflected national sentiment. Within weeks, state legislatures across the country received pressure to strengthen laws protecting homeowners. By April 2006, twelve states had prohibited the use of eminent domain for private development, and similar proposals were being considered by twenty-seven other states. Only five states that took up the measure failed to pass a restriction. Clearly, *Kelo v. New London* had provoked a response in favor of stronger protections for property rights, a response that resulted from the involvement of citizens in democratic government.

This result, no doubt, would have pleased the founders, who universally accepted both the right to property and citizen participation in government as fundamental to liberty. But it left unanswered a wide array of questions related to the potential conflict between the right of individuals to enjoy their property and

the public desire that government promote economic growth and protect jobs. This latter concern stems from one of the most devastating economic episodes in American history, the Great Depression. More recently, threats to financial security have come from the loss of jobs to lower-cost labor markets and the rise of Asia as an economic powerhouse.We want government to have enough power to act in the public's economic interests yet not enough power to threaten private property rights.Where is the balance point between individual property rights and economic security?

In this desire, we are not as far from the framers of the Constitution as we might imagine. We live in a remarkably different economic world in many ways, yet the fundamental issues are similar. We believe, as did the founding generation, that widespread property ownership encourages economic self-sufficiency and political independence.We affirm, as they did, that protection of private property is a hallmark of a good society. Yet we are also aware of the need to promote the general welfare, the pledge contained in the preamble to the Constitution, and we worry that unbridled economic power or unrestrained competition threatens our liberty as much as concentrated governmental power. The revolutionary generation was most concerned about the restraint of power in any form, although they saw it most gravely threatened by government.We, too, worry about how best to limit power, but we have come to view government as an effective counterbalance to corporate power.

Constitutional protection for the rights of property, we have learned, is necessary for both a healthy democracy and a healthy economy. The ability to buy, sell, and protect property not only constitutes the legal foundation of our free-market economy, but it also helps to secure the financial investments required for economic growth. The recognition of property rights also promotes individual liberty by increasing our economic independence, thus helping us resist interference in our lives from overbearing government or too powerful corporations. With economic independence and security, we are freer to participate fully in a democratic society. We may no longer treat property rights as the guardian of every other right, but we continue to value the economic freedom that enables us to fulfill our duty as citizens more effectively, including our obligation to protect liberty.

The Preservation of Property

John Locke was an English political philosopher whose writings greatly influenced the American revolutionaries. Locke believed that governments had an obligation to protect the individual's right to life, liberty, and property, all of which he viewed as natural rights, or rights that existed in a state of nature that predated societies or government. In his Second Treatise on Government *(1689), he also argued that people in this state of nature voluntarily entered a social compact, in which they agreed to give up some of their individual autonomy to government in exchange for its protection of their rights. In the Declaration of Independence, Thomas Jefferson changed Locke's formula of "life, liberty, and property" to "life, liberty, and the pursuit of happiness," but this modification did not diminish the strong American identification of the right to property as an essential liberty.*

The Supream Power cannot take from any Man any part of his Property without his consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property*, without which they must be suppos'd to lose that by entring into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own. . . .

'Tis true,Governments cannot be supported without great Charge, and 'tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it. But still it must be with his own Consent, i.e. the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them. For if any one shall claim a *Power to lay* and levy *Taxes* on the People, by his own Authority, and without such consent of the People, he thereby invades the *Fundamental Law of Property*, and subverts the end of Government. For what property have I in that which another may by right take, when he pleases to himself?

The Rights of the Community

Charles River Bridge v. Warren Bridge *(1837) was one of the most important property rights cases in American history. In refusing to interpret a previous grant by the Massachusetts legislature as conferring a monopoly to the Charles River Bridge Company, the Court opened the way for competition in building bridges across the Charles River in Boston. Although Chief Justice Roger B.Taney, writing for the 4-to-3 majority, stated that although "the rights of private property must be sacredly guarded, . . . the object and end of all government is to promote the happiness and prosperity of the community." The Court's decision defined property rights as subordinate to the public interest and paved the way for faster incorporation of new technologies into American society.*

But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a state has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, above quoted, "that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the state to abandon it does not appear." The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations. . . . No one will question, that the interests of the great body of the people of the state, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition, for seventy years.While the rights of private property are sacredly guarded, we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation. . . .

And what would be the fruits of this doctrine of implied contracts, on the part of the states, and of property in a line of travel, by a corporation, if it would now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? . . . Let it once be understood, that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of traveling; and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world.

"Common Reason and Legal Interpretation"

Justice Joseph Story, in his dissent in Charles River Bridge v. Warren Bridge *(1837), insisted that the grant to the Charles River Bridge Company was a public contract protected by the Constitution's contract clause in Article 1, Section 10: "No State. . . shall pass any Law impairing the Obligation of Contracts."He disagreed with the majority opinion that property rights were subordinate to the public interest.*

I maintain, that, upon the principles of common reason and legal interpretation, the present grant carries with it a necessary implication, that the legislature shall do no act to destroy or essentially to impair the franchise; that. . . there is an implied agreement that the state will not grant another bridge between Boston and Charlestown, so near as to draw away the custom from the old one; and. . .that there is an implied agreement of the state to grant the undisturbed use of the bridge and its tolls, so far as respects any acts of its own, or of any persons acting under its authority. . . . Where the thing is given, the incidents, without which it cannot be enjoyed, are also given. . . . I maintain, that a different doctrine is utterly repugnant to all the principles of the common law, applicable to all franchises of a like nature; and that we must overturn some of the best securities of the rights of property, before it can be established. I maintain, that the common law is the birthright of every citizen of Massachusetts. . . . I maintain, that under the principles of the common law, there exists no more right in the legislature of Massachusetts, to erect the Warren bridge, to the ruin of the franchise of the Charles River bridge, than exists to transfer the latter to the former, or to authorize the former to demolish the latter. If the legislature does not mean in its grant to give any exclusive rights, let it say so, expressly, directly, and in terms admitting of no misconstruction. The grantees will then take at their peril, and must abide the results of their overweening confidence, indiscretion and zeal.