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### "Of Every Sort": Conceptions of Property Rights at the Time of the American Founding

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Claremont McKenna College

“Of Every Sort”: Conceptions of Property Rights at the Time of the American Founding

submitted to  
Emily Pears, Ph. D

by  
Zach Wong

for  
Senior Thesis  
Fall 2018  
December 11, 2018



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## **Preface**

Whether because of my foolish confidence or flawed character, Professor Pears is the only person I asked to provide feedback and guidance while writing my thesis. Thus, it is to her that I am uniquely grateful. Professor Pears, thank you for your comments and feedback which were always cogent and never tiresome. Thank you for your candor in discussing this project and others. Thank you for your support and encouragement. And above all, thanks for letting me sit in your office for way too much time, not only this semester but in semesters prior and, hopefully, after this one.

There are many points about the various subjects in this paper I probably should have included but could not. I intend to correct that mistake, and I am grateful to the Salvatori Center for a grant that will help me continue my research in 2019 and, perhaps, beyond.

## **Abstract**

The most contentious issues of our day often have to do with political and social rights as opposed to economic rights. Through the lens of property rights I investigate whether this dichotomy existed at the time of the American founding. First, I examine the state constitutions and identify three clauses, common to the documents, which protect property rights. I examine their historical basis and reveal their connection to English common law and Locke, primarily. Then, I discuss the personal views of Madison and Jefferson to gain insight into the personal thoughts of two of the most influential Founders. Finally, I examine the actual protections for property rights found in the Constitution and Bill of Rights. Ultimately, I conclude that the Founders saw property rights as deserving no less protection than social and political rights. Our modern political arena thus has a blind spot when it comes to economic rights. Understanding, at the very least, this part of our nation's original history is useful for American policymakers, advocates, and citizens of any political stripe.

## Introduction

Just as New York City has Central Park, Washington, D.C. has the National Mall. Running 1.9 miles along the Potomac River, it is anchored by the Lincoln Memorial at one end and crowned by the Capitol Building at the other. Behind the Capitol, however, sits my favorite building in the city, the Supreme Court of the United States. Classically styled and far less busy than the “currency” buildings across First Street, its broad checkerboard plaza is quiet most days, and the Court only receives the public for business a small number of days per year.

I waited outside the Supreme Court in that quiet (and cold!) at 6:00 AM on November 29, 2017 to hear the oral arguments in *Carpenter v. U.S.* The petitioner, Timothy Carpenter, was arrested and charged with burglary after the government obtained cell phone records from his cell service provider that proved he was in the area of the robberies at the time they occurred. Before the court on November 29th, his attorneys argued that the government’s use of the cell phone records, obtained under the “reasonable suspicion” standard, constituted a warrantless search, which would have required the FBI to provide “probable cause,” a more exacting standard.<sup>1</sup> The case was, in effect, about what government actions were prevented by the Fourth Amendment’s guarantee of “the right of the people to be secure in their persons, houses, papers, and effects,” a political right protecting citizens from being unfairly convicted of a crime.<sup>2</sup>

The Supreme Court was neither quiet nor cold on June 26, 2015, when the justices legalized same sex marriage nationwide via the 5-4 *Obergefell v. Hodges* decision. On the same marble plaza, gay rights advocates and demonstrators celebrated what they viewed as an overdue protection of the social right to marry for all people regardless of sexuality. Justice Anthony

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<sup>1</sup> Orin Kerr, “Supreme Court agrees to hear ‘Carpenter v. United States,’ the Fourth Amendment historical cell-site case,” The Washington Post, June 5, 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/05/supreme-court-agrees-to-hear-carpenter-v-united-states-the-fourth-amendment-historical-cell-site-case/>.

<sup>2</sup> U.S. Const. amend. IV

Kennedy, writing for the majority, cast the case as an issue of personal freedom saying, “No longer may this liberty be denied,” and that the ruling would guarantee for same sex persons “equal dignity in the eyes of the law.”<sup>3</sup>

Today, political and social rights dominate our nation’s public debates. The most important issues of the 21st century - criminal procedure, same sex marriage, campaign finance, affirmative action, abortion - center on the extent of individuals’ rights to act in a certain way, to say a certain thing, or to participate in communal governance in a certain way. Economic rights - those rights which enable a person to improve his or her own economic situation and keep the benefits of his or her labor for personal enjoyment - such as property rights, rights to contract, and labor rights are rarely discussed in popular politics. Even the 2018 case *Janus v. AFSCME*, which asked if a non-union employee could be forced to play union dues, was argued on the basis of 1st Amendment freedom of speech protections - a political right.<sup>4</sup>

This emphasis is present in all branches of government, not just the judicial branch. A Pew survey conducted during the 2016 federal election cycle found that 72% of voters considered gun policy “very important” with 74% saying the same of health care policy.<sup>5</sup> Progressive Bernie Sanders went from a dismissed independent to a serious threat in the Democratic primary in part by recasting access to health care as a human right.<sup>6</sup> After alt-right provocateur Milo Yiannopoulos was prevented from speaking at UC Berkeley, President Donald Trump suggested withholding funding from higher education institutions that did not adequately

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<sup>3</sup> Adam Liptak, “Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide,” The New York Times, June 26, 2015, <https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html>.

<sup>4</sup> Adam Liptak, “Supreme Court Ruling Delivers a Sharp Blow to Labor Unions,” The New York Times, June 27, 2018, <https://www.nytimes.com/2018/06/27/us/politics/supreme-court-unions-organized-labor.html>.

<sup>5</sup> “Top voting issues in 2016 election,” Pew Research Center, July 7, 2016, <http://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/>.

<sup>6</sup> Bernie Sanders, “Bernie Sanders: Why We Need Medicare for All,” The New York Times, Sept. 13, 2017, <https://www.nytimes.com/2017/09/13/opinion/bernie-sanders-medicare-single-payer.html>



protect free speech.<sup>7</sup> In Congress, too, after the nomination of Judge Brett Kavanaugh to the US Supreme Court, the rights of sexual assault survivors and of the accused became the pivotal issues discussed in his Senate confirmation hearings.<sup>8</sup> Even when our political branches talk about issues of economic rights such as taxation policy, the main justifications for policy change are not rights-based. Instead, we are told that our economy will improve or jobs will be created. Was desegregation ever called for on the grounds that it would increase profits for lunch counters?

Was this dichotomy of rights always present in our nation's history? In particular, when our country was founded, what did those great men think about the proper place of economic rights relative to political and social rights? It may have been the case that political and social rights were considered less important (or at least were discussed less frequently), but if it was not, this reveals a blind spot in the American polity today. Uncovering that blind spot and filling in the missing content should be a project important to anyone who thinks about American law and politics. Lawyers, policymakers, commentators, voters, and citizens alike will benefit from understanding the position of economic rights at the time of our founding.

For America's conservatives, reinforcing the principles of the Founders is clearly important. It is conservative orthodoxy that "the Constitution and its principles are grounded in human nature, which is the unchanging ground of our constantly changing experiences,"<sup>9</sup> and it is therefore both useful and right to continue to apply those principles today. Even those who do not believe we should be bound to our country's starting principles find it useful to understand

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<sup>7</sup> Teresa Watanabe, Peter H. King, and Hailey Branson-Potts, "Could Trump really cut funding to UC Berkeley? It would be very difficult," Los Angeles Times, February 2, 2017, <https://www.latimes.com/local/lanow/la-me-trump-berkeley-20170202-story.html>.

<sup>8</sup> Christine Hauser, "The Women Who Have Accused Brett Kavanaugh," The New York Times, Sept. 26, 2018, <https://www.nytimes.com/2018/09/26/us/politics/brett-kavanaugh-accusers-women.html>.

<sup>9</sup> Charles Kesler, "What's Wrong with Conservatism," AEI, June 8, 1998, <http://www.aei.org/publication/whats-wrong-with-conservatism/print/>.

what those principles and our original character were. For instance, Ronald Dworkin proposed that judges engaged in Constitutional interpretation first derive from text and history the “moral principles about political decency and justice” ingrained in the Constitution and then attempt to apply those principles to the specific case in question.<sup>10</sup> This interpretive method can facilitate case results opposite those derived by originalist and likely conservative judges. However, judges and politicians employing Dworkin’s method would still require in the first place a deep understanding of the political principles of our founding. This is the case today: President Barack Obama, applauding the Court for recognizing the previously-undiscovered Constitutional right to same sex marriage in *Obergefell*, began by saying, “Our nation was founded on a bedrock principle that we are all created equal.” For Obama, this principle was rightly recognized in the specific case of marriage equality.<sup>11</sup> Liberals and conservatives both will benefit from a better understanding of our founding principles.

That my discussion of economic rights in our modern political arena has largely centered on court cases should not be taken to imply that I mean for the following analysis to only apply in matters of law. Understanding the Founders’ conception of economic rights is essential to any American wishing to engage in the polity. Forming an understanding of this topic would represent a small step towards answering the two essential questions that our Founders, and their antecedents going back millenia, put forth for us and our posterity: What sort of life is worth living? And, given that, what sort of political regime is worth living under?

My project is far more limited than attempting to answer those questions explicitly.

Indeed, I will not even address how the Founders saw all economic rights. Rather, I will focus

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<sup>10</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996), 2.

<sup>11</sup> Steven T. Dennis, “Obama Transcript: Statement on Same-Sex Marriage Supreme Court Ruling,” Roll Call, June 26, 2015, <https://www.rollcall.com/news/obama-transcript-sex-marriage-statement>.

on the property right as it is the most concrete, ancient, and easily definable of the various economic rights. Over three chapters, I will attempt to uncover to what extent the Founders valued property rights, especially relative to other social and political rights, and how they attempted to protect property rights in our federal Constitution.

In Chapter 1, I will discuss protections for property rights in the various state constitutions that preceded the US Constitution. Antecedent to the federal Constitution and often written by the same men who constructed our nation's incorporating document, the state constitutions served as natural foundations off of which to base the content of the federal Constitution. In examining the state constitutions, I identify three clauses common across many states and trace those clauses' history through British common law and times prior.

In Chapter 2, I will discuss the political thought of two of the most influential Founding Fathers: James Madison and Thomas Jefferson. While none of these great men can stand in for the political thought of all of the Founders, which was not monolithic, it is the case that they were two of the most important Founders and left an identifiable impact on the Constitution.

In Chapter 3, I will turn my attention to the US Constitution itself and discuss alongside its explicit text the Constitutional Convention, ratification period, and Bill of Rights. A work of political theory itself, the creation of the Constitution was informed by the threads I identify in Chapters 1 and 2. It was, and remains, the supreme law of our land and understanding its content and the debates that surrounded its creation and ratification is most important for understanding the Founders' conception of property rights.

## **Chapter 1 - State Constitutions**

230 years after the Founding, it's easy to forget that in the late 18th century, each state was its own very powerful government. The balance of state and federal power then was profoundly different, and state constitutions would have been the most important documents for residents of the 13 states, as the U.S. Constitution is today. Additionally, for a citizen worried about potential government encroachments on his natural rights, it was the state constitutions to which he would turn for protection, not any federal governing document. Thus, it is useful to look at how property is treated in the various state constitutions, which served as the natural predecessors to the federal constitution.

The state constitutions mention property, and they do so in common ways. The first manner in which they are mentioned is that enjoyment and attainment of property is a basic, natural right essential for the pursuit of happiness. The second idea is that government is prevented from taking private property for public use without an owner's consent or that of his legal representative. Third, trial by jury is seen as "sacred" or deserved in cases involving property. Finally, the state shall not engage in limitless searches and seizures of person or property. I will examine each of these clauses in more depth.

### **Property Rights as Natural Rights**

The first discussion of property present in many state constitutions is the idea that property is a basic and natural right possessed by all men. The Bill of Rights of the State of New Hampshire, adopted June 2, 1784, says in its second article, "All men have certain natural, essential, and inherent rights among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining

happiness.” A key question in our investigation is the position of property rights relative to more commonly discussed political and social rights. In New Hampshire, at least, it’s apparent that property rights were on par with other broad rights of “enjoying and defending life and liberty.”

In other important state documents, legislators used similar language to describe property rights. Virginia, the most populous state in 1790, said in its Declaration of Rights, “all men are by nature equally free and independent, and have certain inherent rights... namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” Again, its early inclusion in the Declaration of Rights of the largest state in the nascent union emphasizes the importance of property as a primary natural right.

The Founders established the right to property, among others, amidst a well-documented doctrine of natural rights . Thomas West claims that the genesis of the American natural rights doctrine developed as a way to justify self-rule against the British government. Evidence of a basic theory of natural rights dates back to 1717. Starting in 1725, West says, American publishers printed summaries of John Locke and the natural rights doctrine strengthened. Later, as British rule became increasingly tyrannical, states adopted natural rights as a political tool to push for self-rule as the Massachusetts legislature argued that some of the guarantees of the British constitution were of rights “derived to all men from nature” and thus could not be violated by Parliament.<sup>12</sup>

State constitutions echo this language. . Many states base their guarantee of rights in the notion that the nature of men is “equally free and independent” (Virginia)<sup>13</sup> or that “all men are

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<sup>12</sup> Thomas G. West, *The Political Theory of the American Founding*, (New York: Cambridge University Press, 2017), 21-22.

<sup>13</sup> “Virginia Declaration of Rights,” The Colonial Williamsburg Foundation, Accessed Dec. 11, 2018, <http://www.history.org/almanack/life/politics/varights.cfm>, clause 1.

born free and equal” (Massachusetts).<sup>14</sup> In the Declaration of Independence, Jefferson based his claim of natural rights explicitly in a higher being, famously writing that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights.”<sup>15</sup> All of this language follows in the tradition of John Locke, who used a two-part appeal to “the law of nature,” reason, and God, “one omnipotent, and infinitely wise maker.”<sup>16</sup>

When rights were naturally-derived, Founders believed, they could never be given away. The Declaration of Independence and state constitutions characterize natural rights as “unalienable”<sup>17</sup> and that “when (men) enter into a state of society, they cannot, by any compact, deprive or divest their posterity” of such rights.<sup>18</sup> This implies the highest protection - if a right can never be given away, it can certainly never be justly taken away. By declaring property rights to be natural rights, states also declared them inalienable, eligible and deserving of the strongest protections against any future government encroachment.

The three-part division of natural rights presented by New Hampshire and Virginia - of enjoying liberty, acquiring property, and obtaining happiness - is present in founding documents from Massachusetts,<sup>19</sup> Pennsylvania,<sup>20</sup> and Vermont.<sup>21</sup> In the state constitutions, however, there are differences in how rights are presented, which imply differing views on how these three natural rights interact with one another. In Pennsylvania and Vermont, the state constitutions

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<sup>14</sup> “Massachusetts Constitution,” Commonwealth of Massachusetts, Accessed Dec. 11, 2018, <https://malegislature.gov/Laws/Constitution>, Art. I.

<sup>15</sup> Declaration of Independence

<sup>16</sup> John Locke, *Second Treatise of Government*, edited by C.B. McPherson (Indianapolis: Hackett Publishing Company, 1980), web, <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm>, Sect. 6.

<sup>17</sup> “Massachusetts Constitution,” Art. I.

<sup>18</sup> “Virginia Declaration of Rights,” Clause 3.

<sup>19</sup> “Massachusetts Constitution,” Art. I.

<sup>20</sup> “Pennsylvania Constitution of 1776, Declaration of Rights,” in *The Founders’ Constitution*, edited by Philip B. Kurland and Ralph Lerner, (Chicago: University of Chicago Press, 2000), web, [http://press-pubs.uchicago.edu/founders/documents/bill\\_of\\_rightss5.html](http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss5.html), clause 1.

<sup>21</sup> “Constitution of Vermont - July 8, 1777,” Avalon Project, accessed Dec. 11, 2018, [http://avalon.law.yale.edu/18th\\_century/vt01.asp](http://avalon.law.yale.edu/18th_century/vt01.asp), Ch. 1 Clause 1.

present enjoyment of life and liberty, the acquisition, possession, and protection of property, and the pursuit and obtainment of happiness in a list, one after the other. The natural reading of these documents is that each right listed is an equal right that is deserved by citizens of the state and that there is no distinction between any right.

In New Hampshire and Massachusetts, the last right, to pursue and obtain happiness, is presented as a summation of the first two rights. New Hampshire's constitution reads, "...and, in a word, of seeking and obtaining happiness,"<sup>22</sup> and Massachusetts' constitution says, "...in fine, that of seeking and obtaining their safety and happiness."<sup>23</sup> Under this arrangement, it is certainly the case that a citizen of New Hampshire or Massachusetts would have been entitled to the three natural rights listed above to the same extent as a citizen of Pennsylvania or Vermont. However, the presentation of the right to pursue and obtain happiness makes the claim that the rights to enjoy life and liberty and to acquire, possess, and protect property are constituent rights instrumental to the broadest natural right of pursuing and obtaining happiness. The preface to the final right acts almost as an *id est* postscript, following up on the first two rights to explain that what men are really entitled to is the pursuit and obtainment of happiness.

Delaware eschews the broad proclamations of natural rights endorsed by the other states. Its Declaration of Rights says simply "that every member of society hath a right to be protected in the enjoyment of life, liberty, and property."<sup>24</sup> This is a much briefer protection of the rights listed above and does not include a mention of pursuing or obtaining happiness, as other states do. Delaware's brevity also means its document contains no justification for the natural rights

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<sup>22</sup> "State Constitution - Bill of Rights," New Hampshire, Accessed Dec. 11, 2018, <https://www.nh.gov/glance/bill-of-rights.htm>, Art. 2.

<sup>23</sup> "Massachusetts Constitution," Art. I.

<sup>24</sup> "Delaware Declaration of Rights," in *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner, (Chicago: University of Chicago Press, 2000), web, [http://press-pubs.uchicago.edu/founders/documents/bill\\_of\\_rightss4.html](http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss4.html), sect. 10.

listed as other states do. This omission is interesting in the context of the rest of the Delaware Declaration of Rights, which holds as a primary concern free practice of the Christian religion. Section 2 says that “all men have a natural and unalienable right to worship Almighty God,” and Section 3 guarantees “that all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state,” among other things. That Delaware does not mention God as the source of natural rights may indicate a view on the matter to the contrary or a strong dedication to total state neutrality towards religion.

All of this analysis is presented to demonstrate the varied views on the natural right to property that existed in state constitutions prior to the creation of the US Constitution. In some states, these protections were detailed, including protections for acquisition, possession, and protection of property. They were also based in a doctrine of natural rights which implied that they could never be violated or relinquished to the government. In other states such as Delaware, the protections were shorter, protecting simply “the enjoyment of... property.”<sup>25</sup> However, despite the diversity of opinions about how much protection citizens should have for their property, it was accepted across the nation that protection of property was one of the primary reasons for establishing government and was thus important to protect under a state constitution.

### **Trial by Jury**

The second idea found in every state constitution examined is the requirement for trial by jury in civil and criminal cases. For instance, the Constitution of Pennsylvania, in its Declaration of Rights, states that “in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.”<sup>26</sup> State constitutions

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<sup>25</sup> “Delaware Declaration of Rights,” sect. 2-3.

<sup>26</sup> “Pennsylvania Constitution of 1776,” Clause XI.



required trial by jury for a variety of matters because they realized that the court system could be used to strip citizens of their property, whether through a criminal or a civil trial. Having endured such abuses themselves, they wished to prevent the practice in their own states, and did so through the state constitutions.

Henry G. Connor, a judge on North Carolina's Supreme Court and a federal district court judge in the early 1900s, locates the origins of American insistence on trial by jury in the ancient Magna Carta.<sup>27</sup> Clause 39 of the 13th-century Magna Carta says, "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."<sup>28</sup> Thus, trial by jury has a long legacy as a legal principle stemming from one of the earliest declarations of rights.

Blackstone echoes and expands on this legacy in his *Commentaries*, writing that trial by jury, among other processes, "is as antient as the common law itself."<sup>29</sup> Blackstone, too, credits the Magna Carta as an ancient source calling for trial by jury but also cites the Holy Roman Emperor Conrad who, in the 11th century decreed that "no one shall be deprived of his property but according to the custom of our predecessors, and by the judgment of his peers."<sup>30</sup> Trial by jury is a tradition maintained for almost a millenia. Blackstone says that trial by jury was also employed in feudal systems in Germany, France, and Italy, where juries were composed of other vassals or tenants of the local lord. In those systems, the emphasis was on filling the jury with

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<sup>27</sup> Henry G. Connor, "The Constitutional Right to a Trial by a Jury of the Vicinage," *University of Pennsylvania Law Review* 57, no. 4 (January 1909): 198, accessed December 11, 2018, <https://www.jstor.org/stable/3313928>.

<sup>28</sup> "English translation of Magna Carta," *British Library*, July 28, 2014, <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation#>.

<sup>29</sup> "Blackstone's Commentaries on the Laws of England Book the Fourth - Chapter the Twenty-Third: Of the Several Modes of Prosecution," *Avalon Project*, Accessed December 11, 2018, [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk4ch23.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk4ch23.asp), pg. 305.

<sup>30</sup> "Blackstone's Commentaries on the Laws of England Book the Third - Chapter the Twenty-Third: Of the Trial by Jury," *Avalon Project*, Accessed December 11, 2018, [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk3ch23.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk3ch23.asp), pg. 350.

12 good men of equal status so that when a lord was being tried himself, the jury was filled with 12 other lords of the land.<sup>31</sup> The historical legacy of this practice, which Blackstone argues produces the fairest outcomes for men at trial, would have been important to the Founders. Educated, well-read in the classics and history, it's likely that they would have been appreciative of the impartial outcomes produced by trial by jury, if not aware of the history as Blackstone was.

Blackstone also explains the merits of trial by jury and its importance for protecting property. "The impartial administration of justice, which secures both our persons and our properties," he says, "is the great end of civil society." While the ruling class is well-equipped and well-trained to administer justice, "in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many." Thus, trial by jury of peers is essential to the preservation of a man's liberty, person, and property because of its inclination to impartiality, which cannot at all times be expected from a bench trial.

The protection of trial by jury would have been important to the Founders because, at times, it was endangered when the states were colonies of England. Connor explains that in 1768, Tudor-era treasons created "by a truculent Parliament to gratify the changing ecclesiastical and matrimonial whims of the King" were invoked against the American colonists.<sup>32</sup> To do so would have been a significant breach of the protections afforded by trial by jury. For one, the accused would have been tried in front of "twelve Englishmen, in no true sense of the word his

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<sup>31</sup> "Blackstone - Of the Trial by Jury," pg. 349.

<sup>32</sup> Connor, 205.

peers.”<sup>33</sup> Remember that juries are structured to maximize the potential impartiality of the jurors judging a case. Englishmen, distant and different, would not have fit this description in the trial of an American colonist. Second, “to poor men, as most of them were, transportation to England at best meant ruin.”<sup>34</sup> King Henry VIII originally employed this tactic to punish and control his enemies: “an act was passed empowering (Henry VIII) to appoint commissions for the trial of persons accused of treason at any place in the realm that the King should designate,”<sup>35</sup> explains Connor. This could be used to punish people by stalling their economic activity or to deter people from speaking or acting out with the threat of a faraway trial.

The proposal to charge Americans in this fashion “excited a fierce and legitimate indignation in America, and added a new and very serious item to the long list of colonial grievances.”<sup>36</sup> Americans internalized the danger that a ruler or executive could use the location of the trial to intimidate or punish a man only accused, not convicted. Indeed, the charge was listed as an offence in the Declaration of Independence; independence was justified “for depriving us in many cases, of the benefit of Trial by Jury” and “for transporting us beyond Seas to be tried for pretended offences.”<sup>37</sup> Clearly, the violation of the sacred right to trial by jury, first established in the Holy Roman Empire, guaranteed to the people in the Magna Carta, and venerated by five centuries of English common law, made an impact in the minds of the colonists.

It is against this history, of the protection itself and its violation in the colonial era, that we should read the clauses of the state constitutions. Many of the protective characteristics of trial by jury are guaranteed in the state constitutions, either explicitly or implicitly.

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<sup>33</sup> Connor, 206, quoting Trevelyan’s *American Revolution*.

<sup>34</sup> Connor, 207, quoting Trevelyan’s *American Revolution*.

<sup>35</sup> Connor, 205.

<sup>36</sup> Connor, 208, quoting Lecky.

<sup>37</sup> Declaration of Independence

Pennsylvania, as discussed, guaranteed trial by jury in cases involving property and in civil cases.<sup>38</sup> The substance of the guarantee provided by the State of Virginia is the same, but its framers burnished its clause with the word “ancient,” making clear the long legacy of trial by jury.<sup>39</sup> Delaware does not explicitly guarantee trial by jury in civil cases, saying only that freemen “ought to have remedy by the course of the law of the land... speedily without delay,” but jury trial is implied as the next clause states, “that trial by jury of facts where they arise is one of the greatest securities of the lives, liberties, and estates of the people.”<sup>40</sup> These excerpts indicate that framers of state constitutions had internalized the importance of trial by jury, proven by history and personal experience, and sought to instill it in their states. It is also clear that authors of state constitutions thought it important to protect property and wanted to do so by extending the right to trial by jury to cases explicitly considering property.

An examination of jury trial guarantees in criminal trials further contextualizes Founding-Era views of property. While it may not seem to be the case, the definition of crimes was intimately connected to property. Blackstone writes that, “felony, in the general acceptance of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods.”<sup>41</sup> This would have been most crimes, especially when property forfeiture began to be substituted for capital punishment.<sup>42</sup> In the 17th and 18th centuries, many

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<sup>38</sup> “Pennsylvania Constitution of 1776,” Clause XI.

<sup>39</sup> “Virginia Declaration of Rights,” Clause XI.

<sup>40</sup> “Delaware Declaration of Rights,” Sect. 13.

<sup>41</sup> “Blackstone's Commentaries on the Laws of England Book the Fourth - Chapter the Seventh: Of Felonies, Injurious to the King's Perogative,” *Avalon Project*, accessed December 11, 2018, [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk4ch7.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk4ch7.asp), pg. 94.

<sup>42</sup> “Blackstone - Of Felonies, Injurious to the King’s Perogative,” pg. 95; Actually, Blackstone says that crimes punished by capital punishment are also felonies because in the act of being executed, the convicted “in some degree or other” forfeits his property. Naturally, however, this is a secondary concern; a man’s property interest is diminished, it seems, when he is also at risk of losing his head.

crimes could be punished with death as an extreme deterrent against committing them.<sup>43</sup>

According to Blackstone, even petty larceny could be considered a felony “as they subject the committers of them to forfeitures”<sup>44</sup> when caught.

Additionally, despots in history used conviction for a trumped-up crime to take property from enemies and enrich the state, and it’s natural that the Americans would have sought to prevent a similar practice in their nascent governments. As discussed earlier, the law that would have charged Americans and transported them to England for trial not only “continually harrassed the subject(s)” but also “shamefully inriched the crown,” according to Blackstone.<sup>45</sup> Moreover, Henry VIII was not deploying a new tactic; in Ancient Rome, as well, emperors would use the practice of proscription, declaring specific Romans enemies of the state, to persecute political enemies and fill the state’s coffers.

In the state constitutions, the requirements for trial by jury in criminal cases are more extensive than those for civil disputes. While state constitutions only required the institution of trial by jury and no more in civil cases, most states granted defendants the right to a jury composed of members “of his vicinage” (local to him) who had to agree unanimously in order to render a guilty verdict. Without an understanding of the common law link between crimes and property forfeiture, we may think that this discrepancy implies more concern on the part of state framers over criminal proceedings than over cases specifically to do with property. However, backed with the knowledge of the linkage between the two, it is apparent that jury guarantees in criminal trials were implicitly protections of property rights.

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<sup>43</sup> “How Bloody was the Bloody Code?” The National Archives, Accessed December 11, 2018, <http://www.nationalarchives.gov.uk/education/candp/punishment/g06/g06cs1.htm>.

<sup>44</sup> “Blackstone - Of Felonies, Injurious to the King’s Perogative,” pg. 95.

<sup>45</sup> “Blackstone - Of the Several Modes of Prosecution,” pg. 306.

Again, we see how the natural right to protect property was deeply intertwined with other natural rights to enjoy life and liberty and pursue happiness. It may not have been the case that authors of state constitutions held as a primary concern the protection of property in criminal cases. However, the strenuous requirements for criminal procedure, the magnitude of which was defined by the consequences to the perpetrator's property, indicate how seriously states wanted to protect the innocent from any unjust loss of liberty or property.

The cumulative effect of jury requirement in cases concerning property and criminal trials was to protect defendants from unjust losses of property. Colonial-era legislators were very concerned with ensuring that defendants could request a jury trial, believing that a jury filled with impartial peers was the best way to ensure a fair hearing. The denial to the colonists of that ancient right, guaranteed first to Englishmen in the Magna Carta and developed in common law for centuries, imprinted in their mind the importance of guaranteeing trial by jury. If the colonists agreed with Blackstone that "the impartial administration of justice, which secures both our persons and our properties, is the great end of civil society,"<sup>46</sup> then they believed that one of the most important ways to do this was to guarantee trial by jury.

### **Anti-Takings Clauses**

State constitutions also frequently assert that government may not take private property for public use without the consent of the owner or his legal representative. For instance, Massachusetts' Constitution says, "no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people,"<sup>47</sup> and many other constitutions surveyed say the same. In this section, I

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<sup>46</sup> "Blackstone - Of the Trial by Jury," pg. 379.

<sup>47</sup> "Massachusetts Constitution," Art. X.

explore how state constitution authors likely understood anti-takings provisions and identify the theories of property rights that undergird those provisions. Furthermore, I discuss Blackstone's documentation of similar English provisions, Locke's conception of property, and a republican interpretation of the topic. Finally, I consider the relative lack of compensation-for-takings guarantees in the state constitutions and present two explanations for their absence. While at first the anti-takings clauses in state constitutions appear to be hard prohibitions against nonconsensual takings, the reality is, as always, much more interesting.

Blackstone's *Commentaries*, as the authoritative source on the meaning of English common law, are useful to my analysis because they were no less - perhaps even more - authoritative in the 18th century.<sup>48</sup> In his chapter titled "Of the Absolute Rights of Individuals," he says of private property:

"the third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature...The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."<sup>49</sup>

There are several points to make about this passage. First, Blackstone terms the property right "absolute," according it superior protection to later rights discussed by Blackstone which are "subordinate." The three absolute rights of Englishmen listed, the right to personal security,

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<sup>48</sup> Julius S. Waterman, "Thomas Jefferson and Blackstone's Commentaries," in *Essays in the History of Early American Law*, edited by David H. Flaherty, 451-488, (Chapel Hill: University of North Carolina Press, 1969), Accessed December 11, 2018, [http://www.jstor.org.ccl.idm.oclc.org/stable/10.5149/9780807839898\\_flaherty.22](http://www.jstor.org.ccl.idm.oclc.org/stable/10.5149/9780807839898_flaherty.22), 452-454.

<sup>49</sup> "Blackstone's Commentaries on the Laws of England Book the First - Chapter the First: Of the Absolute Rights of Individuals," *Avalon Project*, accessed December 11, 2018, [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk1ch1.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp), pg. 134-135.

personal liberty, and private property, are “founded on nature and reason, so they are coeval with our form of government; though subject at time to fluctuate and change.”<sup>50</sup> In saying that they are coeval, or contemporaneous, with the establishment of the British government, Blackstone means that they were established in the Magna Carta, “the great charter of liberties, which was obtained, sword in hand, from king John...”<sup>51</sup> These liberties, he wants to make clear, were developed and reaffirmed in common law and statute over hundreds of years and deserve the highest protection.

This treatment of property accords with the American conception of the property right as a fundamental natural right. As discussed, the Americans called the property right “unalienable” and in doing so asserted that it was one of the most basic rights that could be possessed by man.<sup>52</sup> For both Blackstone and

The difference, if it is even significant, can be explained by the parties’ differences in purpose: Jefferson had a political goal whereas Blackstone had a descriptive goal. For example, the Declaration of Independence was intended to justify the American Revolution, and it established political principles the colonists used to justify their actions. The state constitutions built on this foundation, and, in reiterating these principles, ingrained them in their states and future laws. Blackstone was instead focused on describing the traditions of British common law and explaining that the three rights listed held a position of primary importance in the law. Thus, while an “absolute” right is technically different than an “unalienable” right, the difference is immaterial in the question of what both authors wanted to imply; they wanted to imply that property rights were based in an authority higher than man and should be accorded the highest protections.

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<sup>50</sup> “Blackstone - Of the Absolute Rights of Individuals,” pg. 123.

<sup>51</sup> “Blackstone - Of the Absolute Rights of Individuals,” pg. 123.

<sup>52</sup> Declaration of Independence



Second, it is clear that English common law sought to provide the highest protections for the property right. In no instance does the law allow for the state to take property without an owner's consent, even if the public benefit is great. In showing this, Blackstone gives an example of a road, proposed to be built, that would require the land of a private person for its construction. "In vain may it be urged, that the good of the individual ought to yield to that of the community," he says. Such a line of reasoning would run contrary to the very notion of "the public good," he says, which "is in nothing more essentially interested, than in the protection of every individual's private rights."<sup>53</sup> That is, the dichotomy between an individual's interest and the community's interest is a false one; the latter is composed of the former, so the former should always win, and certainly in the case of property.

This is as strict of a conception of an anti-takings prohibition possible - while the state constitutions allowed for takings if an owner's legislature acquiesced, English common law did not. The case of takings is different than even taxation in support of the state or war, which can be imposed by "his representatives in parliament" without explicit, private consent.<sup>54</sup> To reiterate, it is clear that the absolute right of property received the most strenuous protections under English common law.

It's also clear that Blackstone's treatment of property rights is very similar to Locke's discussion of the same topic because both men state that God's provision of the earth to men in common as the basis for property rights. When introducing "the third absolute right" of property, he says it is "probably founded in nature"<sup>55</sup> and later explains that "the only true and solid foundation of man's dominion over external things" is that "the all-bountiful creator gave

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<sup>53</sup> "Blackstone - Of the Absolute Rights of Individuals," pg. 135.

<sup>54</sup> "Blackstone - Of the Absolute Rights of Individuals," pg. 134-135.

<sup>55</sup> "Blackstone - Of the Absolute Rights of Individuals," pg. 134.

to man ‘dominion over all the earth’,” quoting Genesis.<sup>56</sup> Such a phrase will be familiar to any student of Locke who likewise declared “it is very clear, that God... has given the earth to the children of men; given it to mankind in common.”<sup>57</sup> For both authors, the original grant of all the earth from God to all men in common is the basis upon which man can claim any property right. While the authors later diverge in their conception of how property may be transferred,<sup>58,59</sup> they share in common their belief that property rights are derived from God’s actions.

If Blackstone was influenced by Locke, it is likely that the authors of state constitutions were likewise influenced. Indeed, that seems to be the case. The anti-takings protections from state constitutions read almost as summaries of Locke’s political philosophy regarding the origins and purposes of government, in the first place. Libertarian legal scholar Richard Epstein is helpful in explaining this case.

Epstein reads from Locke’s *Second Treatise* a dual justification for the maintenance of law and order. While Locke doesn’t say so explicitly, Epstein identifies “a linguistic switch from the idea of consent (which may be implied in fact, as from a course of conduct) to the idea of being bound because one receives in return the benefit of state protection.”<sup>60</sup> The switch Epstein references occurs in Section 119 when Locke says that what binds a man to obey the laws of government is “tacit consent.” Locke would prefer explicit consent, but that is only present when men leave the state of nature and enter into political compact in the first instance.<sup>61</sup> People would do this because, while free in the state of nature, the enjoyment of such liberty is

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<sup>56</sup> “Blackstone’s Commentaries on the Laws of England Book the Second - Chapter the First: Of Property in General,” *Avalon Project*, accessed December 11, 21018, [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk2ch1.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk2ch1.asp), pgs. 2-3.

<sup>57</sup> Locke, Sect. 25.

<sup>58</sup> “Blackstone - Of Property in General,” pg. 8.

<sup>59</sup> Locke, Sects. 28-33.

<sup>60</sup> Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985), 14.

<sup>61</sup> Locke, Sect. 95.

only ensured under a government.<sup>62</sup> After this initial expression of consent, however, Locke must rely on tacit consent, which is far less powerful.

According to Epstein, Locke establishes a person's tacit consent based on his enjoyment "of any parts of the dominions of any government."<sup>63</sup> This is actually, in Epstein's view, an argument based on benefits received. Because a man avails himself of or, no less persuasive, receives the benefits of state protection and services, he is bound to follow the laws of the government. Epstein labels this system "a theory of restitution for benefits conferred."<sup>64</sup> Because members of a society receive benefits from a government, they develop a corresponding obligation to follow the rules of the government.

Locke offers two reasons as to why men could be bound to follow the laws of a just society. First, they could be bound by giving their own explicit consent, but this is only possible at the onset of society, far removed from us, today, or any of the thinkers discussed. In the American example, explicit consent was reserved for the Founding generation, or in the case of state governments... Members of an existing society give what equates to tacit consent by receiving the benefits of society. Because they benefit, they have an obligation to support the state. In this way, they tacitly consent to laws and are bound by them. In modern times, all American citizens are bound by tacit consent. By driving on roads and enjoying the protection of a national military, we tacitly consent to governance...

Locke's theories of consent and property rights are expressed in the anti-takings clauses of the state constitutions. Reconsider the full anti-takings clause from the constitution of Massachusetts:

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<sup>62</sup> Locke, Sect. 123.

<sup>63</sup> Locke, Sect. 119.

<sup>64</sup> Epstein, 14-15.

“Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent.”<sup>65</sup>

This excerpt is almost a perfect expression of Locke’s political theory. The first sentence gives the primary reason for entering into government: the enjoyment of one’s natural rights. Because the individual receives such benefits, “he is obliged, consequently” to contribute to the society and follow its laws. Next enters the protection against nonconsensual government takings, although it is more lenient than Locke’s absolute clause. The excerpt closes with an explicit requirement of individual consent as given by a citizen’s representative. These similarities make clear that the state constitutions and thus the Founders were influenced by Locke’s political philosophy and his original reasons for the formation of government. Additionally, this thinking was connected intimately to protections of personal property, particularly in ensuring that citizens were protected from nonconsensual government takings.

There are two important points to make. First, it may seem to modern readers that the property protections in Locke and the state constitutions are conflating different things. Whether citizens are required to follow all laws appears to be a more general subject than specific “property” protections in anti-takings clauses. In fact, the two themes are intimately related. Locke himself, when discussing the first goals of political society wrote of society’s “mutual preservation of their lives, liberties and estates, which I call by the general name, property.”<sup>66</sup>

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<sup>65</sup> “Massachusetts Constitution,” Art. X.

<sup>66</sup> Locke, Sect. 123.

Property to Locke (and, as I will show later, to Madison) was a general concept. It included, of course, things that could be traded, valued, and exchanged as in the modern meaning of the word. But the word - and, more importantly, the concept - could be used to describe things more intrinsic to people: their general rights, their safety, their talents, etc.

As such, for Locke, protections for a man's property right were intrinsically connected to protections for other "rights" in our modern conception and therefore to the first reasons for forming political society. Locke would not have argued, for example, that men could establish a political society and simultaneously ignore property rights (indeed, he said so).<sup>67</sup> In the state constitutions, "property" was probably meant to be read in its narrow sense, but the point remains that property protections were fundamentally connected to the purposes of political society generally for Locke and his American successors.

In contrast to Locke, however, the state constitutions do not contain the same absolute prohibition against government takings that Locke prescribed. The states allow for takings with the consent of the legislature. In practice, Locke's prohibition against takings was too strict to be workable. Under Locke's absolute protection, any citizen could impede the function of the state at will based on a claim of individual right. While die-hard liberals may applaud such a protection, the state constitutions did not. They made a compromise between liberal right and the basic functioning of the government, allowing for the government to take individual property with the consent of the legislature.

It may be that the authors of the state constitutions were extending an admission of unworkability that Blackstone himself made. First, recall that individual consent was not a bulwark against taxation in English common law. Perhaps because of their broad application to

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<sup>67</sup> Locke, Sect. 138: "for the preservation of property being the end of government... (this scenario is) too gross an absurdity for any man to own."

all people, instead of the specific, individual nature of eminent domain seizure, taxes were government takings of a different sort and could be imposed by an Englishman's representatives in parliament.<sup>68</sup>

But Blackstone also described a Parliamentary role in eminent domain itself. When Parliament feels there is a public good to be gained by state ownership of a piece of private property, Blackstone says, "the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce." This is not carried out by "absolutely stripping the subject of his property in an arbitrary manner," which would be a violation of absolute right. Blackstone continues, "all that the legislature does is oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution."<sup>69</sup> This mechanism is essentially equivalent to Parliament facilitating a sale of property and pressuring the owner by leveraging the persuasive power of public exigency. Thus, the story told at the beginning of this section is not entirely true; while Blackstone and the state constitutions stressed the importance of property rights and characterized them as deserving the highest protections, they also acknowledged that an absolute prohibition on government takings à la Locke was undesirable.

This apparent rejection of liberalism may lead some to contend, as Dean William Treanor does, that a republican worldview, not a liberal one, influenced the construction of the Constitution's Takings Clause. If he is right, then it was the case that "many of the framers believed that government could - and in the interests of society often should - limit individuals'

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<sup>68</sup> "Blackstone - Of Property in General," pg. 135.

<sup>69</sup> "Blackstone - Of Property in General," pg. 135.

free use of their property.”<sup>70</sup> Treanor’s theory offers an alternative explanation for why there were not absolute prohibitions against takings in state constitutions. Under Treanor’s interpretation of the Founder’s political philosophy, there would be no reason to expect such a prohibition in the first place as the Founders’ primary goal was to cultivate republican virtue instead of implementing liberal protections of natural rights.

Treanor continues, “republicans have a profoundly ambivalent stance toward private property. Believing that the purpose of the state was to promote virtue, they saw sources of corruption in luxury and in commerce” which required, at times, correction by the state.<sup>71</sup> That is not to say that republicans didn’t think property was important - they did. However, they believed that a certain level of property was important insofar as it provided the financial freedom to a citizen to participate fully in public life. They did not believe in the absolute importance of property as Locke did, valuing instead the cultivation of virtue by the state, to which property would need to be at times subservient.

Treanor’s thesis finds little support in the state constitutions, at least. Vermont’s constitution most closely aligns with his argument when it says “that private property ought to be subservient to public uses, when necessity requires it.”<sup>72</sup> This clause points toward an underlying motivation of communitarianism that could feasibly be motivated by republican thought. However, communitarianism is not the same as republicanism; rather, it is actually compatible with Lockean liberalism. Such a clause is a restatement of the benefits received justification for assent to law already discussed. Expressed, again, is the logic that because people receive protection and benefits from the government, they are bound to contribute their

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<sup>70</sup> William Michael Treanor, “The Original Understanding of the Takings Clause and the Political Process,” *Georgetown Law Faculty Publications and Other Works*, Accessed December 11, 2018, <https://scholarship.law.georgetown.edu/facpub/1048>, 783.

<sup>71</sup> Treanor, 821.

<sup>72</sup> “Constitution of Vermont, 1777,” Ch. 1 Clause 2.

share (in property or service). Vermont went further in encouraging communitarianism than other states such as Massachusetts, but it is still hard to roundly say such a clause is republican. As to the current project, then, there is little evidence for Treanor's thesis in the state constitutions.



## **Chapter 2 - Madison and Jefferson**

Analyzing the state constitutions reveals that the states held property in high regard and intended to provide significant protections for citizens' property rights. States declared the property right to be one of the bundle of basic, natural rights to which all men were entitled, consistent with the ideas expressed in the Declaration of Independence. Moreover, they intended to protect property against political abuse. By guaranteeing to citizens trial by jury in civil and criminal cases, states ensured that any forced forfeiture of property would be preceded by a neutral legal process. Additionally, provisions prohibiting nonconsensual government takings of private property were strict and seen as deeply connected with the first reasons for government as provided by Locke's liberalism.

My project in this paper is to understand both how property is protected in the Constitution and what educated people thought about the importance of property rights, especially vis-a-vis political and social rights, far more popular today. To that end, in this chapter I examine the personal writings of James Madison and Thomas Jefferson. While neither of the three can represent the precise views of all Americans, I hope to capture the prevailing sentiments regarding property at the time of the Founding given the two subjects' political influence and, as I will show, diverse ideologies.

### **James Madison**

James Madison is often cast as the strongest defender of property rights on philosophical grounds.<sup>73</sup> Walter Berns is perhaps the author most susceptible to overstating Madison's promotion of strict property rights, saying, "It is almost as if Madison were arguing (in *The*

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<sup>73</sup> E.g. Treanor 708-710 or James W. Ely, Jr. *The Guardian of Every Other Right: A Constitutional History of Property Rights*, (New York: Oxford University Press, 2008), 56.

*Federalist* 10) were arguing that the first object of government is to promote an unequal distribution of wealth.”<sup>74</sup> While it is true that the learned Madison was conscious, like Jefferson and Hamilton, of the philosophical justifications for the right to property, his primary contribution was in creating institutions for the protection of all rights, of which property rights in particular were indistinct. For Madison, property was a right deserving of no more and no less protection than any other right possessed by man. While he recognized that property was a right often threatened by the dangerous mechanisms present in republics - factions, short-sighted passions, and pernicious emotion - the strategies he devised to protect property were no different than the structures meant to protect men generally. This was a product of his own political philosophy which, again, saw property as indistinct from any other right.

Understanding Madison’s conception of property rests on applying faithfully Madison’s own definition of property which he explicated in a 1792 *National Gazette* article. At the head of the article, Madison wrote:

“This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them.

[...]

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.”<sup>75</sup>

Madison’s second, broader definition, which he employs for the rest of the article, means something different than how the word is used today (e.g. when saying “property rights”). It was

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<sup>74</sup> Walter Berns, *Taking the Constitution Seriously*, (New York: Simon and Schuster, 1987), 174.

<sup>75</sup> “James Madison, Property,” in *The Founders’ Constitution*, ed. Philip B. Kurkland and Ralph Lerner, accessed December 11, 2018, <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>

also different from the common use meaning in the Founding Era; Madison's use of the word is particular to his article. In Madison's thinking, the concept of property is general. It encompasses anything in which a man can have an interest. Some other examples of property interests that Madison provides are safety, liberty, free use of faculties, conscience, choice of occupation, and others.

The article, framed by Madison's broader definition of property, reveals the complexity of Madison's thought. First, it shows that Madison saw property (as conceived of today) as no different in character than other rights someone may have. For instance, says Madison, a government which protects its citizens' ownership of things but simultaneously violates the rights of citizens to their "opinions, their religion, their persons, and their faculties" should be condemned.<sup>76</sup> Set in modern terms, a government that protects property rights should protect just as strenuously other economic, social, and political rights. For Madison, too, the converse is also true - a government that protects economic, social, and political rights must also protect property rights. Thus, the property right is no more and no less important than any other right. All are important and should be protected by the state or other means.

Madison's article also intimates that he saw property rights as essentially connected to the person. The subjects of economic, political, and social rights - who to marry, what to say, how to act, when to work, etc. - are qualities and decisions intrinsic to someone. They are, in a twist, *properties* that define who the person is and is not. Physical property appears, to many, to be different. In the common conception, it is seen as something external, only connected to a person by the chance of possession. However, when Madison says that property rights are no different in character than other rights, he implies that the objects being protected are no different, either. Thus, citizens' "free use of their faculties, and free choice of their occupations"

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<sup>76</sup> "James Madison, Property"

should be protected not only because they are property in the general sense but also because “they are the means of acquiring property strictly called.”<sup>77</sup> Property rights, in Madison’s view, protect the fruits of a person’s labor (the things external), but at a more basic level, they the exercise of a person’s natural character - the labor itself.

### **Thomas Jefferson**

For Jefferson, a largely equal distribution of property was most conducive to republican government. Conscious, like Madison, that an unstructured democracy could easily produce poor public policy, creating an equality of interests was essential in Jefferson’s mind. Equality of interests meant roughly equal land holdings and preferably agrarian lots. The aristocracies of Europe would have no place in the new America, and, likewise, the corruption produced by extreme wealth would not exist in the new lands. Finally, Jefferson thought, there was opportunity for every man to own a small farm himself. There was opportunity for every man to own a small farm himself. The seemingly endless abundance of America provided a perfect opportunity to implement an egalitarian society that was impossible to conceive of in Europe.

Jefferson’s aversion to aristocracy was likely developed in part by his time spent as ambassador to France during the Confederation period. While touring his host country in 1785, he encountered in his travels a poor French woman. Destitute, the mother of two children, and without food and employment, he was struck at the extent of inequality in France and the injustice of such a situation. In a letter to James Madison, he expressed his frustration with wealth inequality and gave his thoughts on how legislators might rectify the issue.

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<sup>77</sup> This is because if property rights are no different in character than other rights, then the object being protected cannot be different, either.

The principle problem for Jefferson was the capture of land by the wealthy. This land was left uncultivated and primarily used for hunting. To Jefferson this presented an absurdity: “I asked myself what could be the reason that so many should be permitted to beg who are willing to work, in a country where there is a very considerable proportion of uncultivated lands?” In the first place, it seemed unjust to him that the poor were left without work when there was clearly an opportunity to do so. In the second, it seemed to him foolish, as well. Uncultivated land represented untapped opportunity for “the increase of (the landowners’) revenues by permitting these lands to be laboured.” Finally, and significantly for my investigation, it was an abuse of natural right. “It is clear,” he wrote, “that the laws of property have been so far extended as to violate natural right.”

Jefferson’s last statement is distinctive because it reveals that he believed there to be a limit to the natural right to property. This runs contrary to the line of thinking started by Locke and cultivated by Blackstone’s common law history of the right to property which was termed “absolute” and could never be violated by the state. It’s particularly startling because it appears that Jefferson agrees with Locke’s basic arguments for the development of property. The ideas and phraseology used by Jefferson mimics those of Locke. For instance, Jefferson’s second objection, that the enclosure of fertile land by the rich is foolish, is analogous to Locke’s value theory of property. In the theory, Locke explains that a person who labors on a piece of land deserves a property right over that land because the vast majority of the land’s new value is a product of the person’s labor.<sup>78</sup> Jefferson seems to agree that improving the value of land should be a primary reason for why someone would take ownership of a piece of land. That the wealthy landowners do not care about the potential value of their uncultivated land is an oversight, in Jefferson’s view.

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<sup>78</sup> Locke, Sect. 40-42.

Additionally, the way in which Jefferson talks about land mimics the language of Blackstone and Locke. Recall that both authors believed that property rights originated from God's grant of the earth to all men. Locke, when talking about this process wrote, "God gave the world to men in common... it cannot be supposed he meant it should always remain common and uncultivated."<sup>79</sup> Jefferson, in explaining why it was that the natural right to property has surpassed its original bounds, said, "the earth is given as a common stock for man to labour and live on."<sup>80</sup> The similarities in language indicate that Jefferson is reiterating to Madison the ideas of Locke. Moreover, there is definitive evidence that Jefferson was at least conscious of Locke's writings. In an 1825 letter to Henry Lee, Jefferson explained that the Declaration was intended "not to find out new principles, or new arguments, never before thought of... all it's authority rests then on the harmonising sentiments of the day... Aristotle, Cicero, Locke, Sidney Etc."<sup>81</sup> Jefferson's own acknowledgment, combined with the linguistic and ideological similarities, imply that Jefferson had adopted the basic arguments to do with creation of property first articulated by Locke.

Jefferson appears to break with Locke in his recommendations of the proper legislative response to the unequal divisions of land present in 18th-century France. Saying that "the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property," Jefferson imagined two solutions to the unjust enclosure of land by the French aristocracy: a system of progressive taxation and the elimination of primogeniture.<sup>82</sup> These two state policies, if implemented (and

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<sup>79</sup> Locke, Sect. 34.

<sup>80</sup> "To James Madison from Thomas Jefferson, 28 October 1785," in *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Madison/01-08-02-0202>.

<sup>81</sup> "From Thomas Jefferson to Henry Lee, 8 May 1825," in *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Jefferson/98-01-02-5212>.

<sup>82</sup> "To James Madison from Thomas Jefferson, 28 October 1785".

Jefferson did advocate for the elimination of primogeniture and saw it passed in Virginia<sup>83</sup>), would run contrary to Locke's strong protections for property rights, already discussed in the previous chapter. Stanley Katz remarks that this represented a radical, redistributive line of thinking.<sup>84</sup> Jefferson's policy recommendations are essential in understanding his view of the proper place of property, but, contrary to some scholars, I think that Jefferson's views were entirely compatible with Locke's view of property and that they represent a distinctly republican, but faithful interpretation of Locke's theory of property.

Again, Jefferson's most ambitious claim in his October 1785 letter to James Madison is that, given the situation in France, "it is clear that the laws of property have been so far extended as to violate natural right." As I have shown, Jefferson believed the natural right to be the right of all men to labor upon the earth, which was granted to humanity in common by God. The purpose of this grant is to improve the land and to extract from it the basic sustenance and additional product of industry which each man may derive according to his talents.<sup>85</sup> Thus, the enclosure of the land, left uncultivated solely for the use of sport, by the French aristocracy is not only foolish but unjust - the purpose of enclosure is contrary to the purpose given by God. This is the way in which Jefferson believed natural right to have been violated.

The important point to make is that Jefferson thought his recommendation for state force justified because it was in response to a violation of the proper process of property acquisition. Jefferson believed that there was a defined purpose for which property could be acquired. When this was not followed, it was appropriate for the state to make a correction.

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<sup>83</sup> Ray C. Keim, "Primogeniture and Entail in Colonial Virginia," *The William and Mary Quarterly* 25, no. 4 (1968): 549-550, <https://www.jstor.org/stable/1916798>

<sup>84</sup> Stanley N. Katz, "Thomas Jefferson and the Right to Property in Revolutionary America," *The Journal of Law & Economics* 19, no. 3 (Oct 1976): 479-481, <http://www.jstor.org/stable/725077>.

<sup>85</sup> Locke, 26 & 34.

Additionally, Jefferson's view on this matter was compatible with a view he expressed later in his life and which mirrored again a Lockean idea about property. In an 1816 letter to French expat Pierre Samuel du Pont de Nemours, Jefferson expressed that, in his view, the right to property existed only "without violating the similar rights of other sensible beings; that no one has a right to obstruct another..."<sup>86</sup> This line of thought is a reiteration of one half of Locke's famous proviso that appropriation of God's common grant to man is only allowed "at least where there is enough, and as good, left in common for others."<sup>87</sup> This means that the exercise of one man's right may not prejudice the same right of another. In this case, the proviso enters as another reason for why the French aristocracy's enclosure of land was unjust and exhausted the natural right. In doing so simultaneous with the existence of landless, penniless (more accurately, *sous-less*), unemployed peasants, their enclosure of land was, as Locke would term it, "a prejudice to any other man."<sup>88</sup>

Jefferson's conception of republican land ownership is thus informed by his understanding of the reasons for property acquisition. Recall that Jefferson's ideal was that all citizens own a small amount of land. Property acquired for the narrow purposes prescribed by Locke would only result in small-lot farms. Large holdings, ironically, given Jefferson's own possessions, would be pointless and actually contrary to the initial purposes of property. His views on property acquisition also likely informed his exaltation of rural life and condemnation of urban centers and commerce. Farming and working with physical land was for Jefferson intimately connected with a purpose that descended from God himself.

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<sup>86</sup> "Thomas Jefferson to Pierre Samuel Du Pont de Nemours, 24 April 1816," in *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Jefferson/03-09-02-0471>.

<sup>87</sup> Locke, 27.

<sup>88</sup> Locke, 33.



### **Chapter 3 - The Constitution**

In Chapter 1, I showed how the precursors to the federal constitution, the state constitutions, included protections for property rights, and I also discussed the history and significance such clauses had in the Revolutionary era and prior. In Chapter 2, I discussed the political thought of Madison and Jefferson, two of the most important figures behind the Constitution. However, Madison and Jefferson, while certainly influential at the time, are only two figures amidst the vast array of other thinkers who considered the Constitution when it was written.

This chapter discusses the broader dialogue at the time of the Founding and also identifies areas in which property is protected by our federal Constitution by examining the Constitutional Convention, Bill of Rights<sup>89</sup>, and contemporaneous publications such as *The Federalist*, among other things. I begin by discussing the events of the Revolutionary and Confederation periods, bridging the gap between 1776 and 1789 and showing that the Founding Fathers became increasingly worried over the period that rights, including and especially property rights, were not adequately protected in the Confederation. Next, I identify the broad, structural protections for rights, which the Federalists thought fully protected each citizen's personal rights, including the property right. Finally, I talk about the fate of the three clauses identified in Chapter 1, two of which are included in the Constitution through the Bill of Rights. Ultimately, property rights enjoyed no privileged position in the Constitution or the documents produced discussing property rights. This mimics the Federalist perspective that the property

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<sup>89</sup> It's well-documented that the Constitution was ratified only on the understanding that an explicit protection of rights would follow, so it's reasonable to include the first ten amendments in thinking about "the Constitution." Additionally, the states ratified the Constitution just two years before they ratified the Bill of Rights. This brief time period further justifies viewing the latter as, at the bare minimum, important in understanding the former.

right was no different in character than any other right, and it is contrary to the modern view that economic rights are relatively less important than political and social rights.

### **The Revolutionary and Confederation Periods**

Given the protections for property in state constitutions discussed in Chapter 1, it would be reasonable to assume that property rights were well-respected by the states between 1776 and 1789. Actually, as James Ely writes, “experience soon demonstrated that state safeguards for property were inadequate.”<sup>90</sup> During the Revolutionary War and after, state governments failed to protect property rights, most frequently those of the British and of creditors (and if you were a British creditor, well...).

From the very start of the Revolutionary War, the Continental Congress encouraged states to seize the property of Loyalists for the public benefit. Although justified on the grounds that Loyalists were engaged in treason against the United States and that their possessions were thus subject to forfeiture, the danger to property rights was not lost on the Framers-to-be.<sup>91</sup> After the war, as Brits fought fruitlessly in states to recoup their losses, prominent Founders stepped in to help. Alexander Hamilton defended a British merchant from having to pay restitution for the occupancy of land during the British invasion of New York City, and James Madison helped pass a Virginia law that prevent further confiscation of British property.<sup>92</sup>

The danger the states presented to rights of property was emphasized when the military seized the property of non-Loyalists for use in fighting the War. John Jay wrote to the legislature of New York in 1778 objecting to “the Practice of impressing Horses, Teems, and Carriages by the military, without the intervention of a civil Magistrate, and without any Authority from the

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<sup>90</sup> Ely, 41.

<sup>91</sup> Ely, 34-36

<sup>92</sup> Ely, 36

Law of the Land.”<sup>93</sup> General Washington, too, acknowledged the “many abuses” and ordered that “no horse be impressed by any member of the army, without an order therefor from the Q Mr General...”<sup>94</sup>

Still, it was not only the direct government seizure of property, against which the anti-takings provisions in the states were clearly ineffectual, that concerned prominent Americans. Of particular concern were schemes during the Confederation period to alleviate debtors of their burdens by printing paper money. In Virginia, which had in the 1770s claimed the debts of British creditors then prevented them from filing suit in court, James Madison spoke against a law to print paper money.<sup>95</sup> Paper money had been used in Virginia in the pre-Revolutionary Era, but the notes functioned as small-amount bonds that were paid off by state revenue later.<sup>96</sup> The law that Madison opposed was different. It would have had the effect of relieving debtors of their burden at the expense of the creditors, representing an explicit violation of property rights.<sup>97</sup> In debate, he equated the printing of paper money to “taking away equal value in land” and also pointed out that in so doing the legislature was violating the state’s trial by jury clause which stated, “That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.”<sup>98,99</sup>

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<sup>93</sup> “John Jay, A Freeholder, A Hint to the Legislature of the State of New York,” in *The Founders’ Constitution*, ed. Philip B. Kurkland and Ralph Lerner, accessed December 11, 2018, [http://press-pubs.uchicago.edu/founders/documents/amendV\\_due\\_process12.html](http://press-pubs.uchicago.edu/founders/documents/amendV_due_process12.html).

<sup>94</sup> George Washington, “General Orders,” in *The Writings of George Washington*, ed. John C. Fitzpatrick (Washington, D.C.: US GPO, 1933), 9:420.

<sup>95</sup> Ely, 35-36

<sup>96</sup> “Colonial Paper Money,” Jamestown-Yorktown Foundation, accessed December 11, 2018, <https://www.historyisfun.org/exhibitions/collections-and-exhibitions/yorktown-victory-center-galleries/colonial-paper-money/>.

<sup>97</sup> Ely, 37

<sup>98</sup> “James Madison, Notes for Speech Opposing Paper Money,” in *The Founders’ Constitution*, ed. Philip B. Kurkland and Ralph Lerner, accessed December 11, 2018, [http://press-pubs.uchicago.edu/founders/documents/a1\\_10\\_1s2.html](http://press-pubs.uchicago.edu/founders/documents/a1_10_1s2.html).

<sup>99</sup> “Virginia Declaration of Rights,” clause 11.

The clearest example of the endangerment of property in the Confederation period was Shays' Rebellion. More commonly discussed as the event that revealed the weakness of the federal government under the Articles of Confederation, it was prompted by farmers angry that the Massachusetts Legislature had declined to issue paper money. Led by the revolution's namesake Daniel Shays, armed farmers in western Massachusetts shut down local courthouses, preventing them from enforcing the debts they wanted relieved by the printing of paper money.<sup>100</sup> The rebellion also prompted George Washington to write to Henry Lee "Let us have (a government) by which our lives, liberties, and properties will be secured, or let us know the worst at once."<sup>101</sup> The Constitutional Convention was convened the next summer.

### **Structural Protections**

The first way in which property was protected by the new republic was in the general construction of the government. The Founders were careful to construct a system that would protect citizens' property rights when the state or political process turned against them. This project was driven by an understanding that in a representative democracy, individual rights are endangered by one's fellow citizens, not necessarily the government itself. Abuses by states in the Confederation period confirmed for the Founders the importance of protecting in the essential structure of the new government each citizen's rights.

When people believe their rights to be infringed upon today, they often seek protection by federal power, and many Supreme Court cases enlarging the scope of individual rights have done so by overturning state laws (e.g. *Brown v. Board*, *Roe v. Wade*, *Obergefell v. Hodges*, and others). However, all states, like the nation, have a republican form of government with a

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<sup>100</sup> Ely, 39-40

<sup>101</sup> "From George Washington to Henry Lee, Jr., 31 October 1786," *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Washington/04-04-02-0286>.

written constitution and guarantees of rights. Is there any reason, then, to think that the federal government is more just or that it will protect individual rights better than any state?

Madison put this question to Thomas Jefferson in October of 1788, writing, “(if) a majority when united by a common interest or passion can not be restrained from oppressing the minority, what remedy can be found in a republican Government, where the majority must ultimately decide?”<sup>102</sup> The answer, he said, was “giving such an extent to its sphere, that no common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit.”<sup>103</sup> Inevitably, the citizens of a polity will be different in politically determinative ways. In character, interest, birthright, faculty, industriousness, religion, opinion, and many other things, people will disagree about public issues. In a small republic, these diversities are limited and it is too easy for a majority to form and maintain power. In a large republic, diversities would be more numerous and coalitions would shift more frequently. This mechanism would be enhanced in the representative democracy of the United States as those chosen by “a great number of citizens in the large than in the small republic” would more likely be meritorious people of character instead of people who “practice with success the vicious arts by which elections are too often carried.”<sup>104</sup> It is easier to trick 400 people than 40,000.

Madison’s genius insight was that, in contrast to the monarchical regime from which the colonists had rebelled, the body that threatens the rights of a citizen in a republic is not a despotic ruler but the people themselves. “Acts in which the Government is the mere instrument of the major number of the constituents,” he said, present the greatest danger to an individual’s

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<sup>102</sup> “From James Madison to Thomas Jefferson, 24 October 1787,” *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Madison/01-10-02-0151>.

<sup>103</sup> “From James Madison to Thomas Jefferson, 24 October 1787.”

<sup>104</sup> “The Federalist Papers: No. 10,” *Avalon Project*, Accessed December 11, 2018, [http://avalon.law.yale.edu/18th\\_century/fed10.asp](http://avalon.law.yale.edu/18th_century/fed10.asp).

security, freedom, and fortune, not the despotic decrees of a single sovereign.<sup>105</sup> The very nature of a democratic government is that the majority rules. The Founders recognized this and saw the extended republic of the United States as a superior protection for individual rights than the small republics in the states.

The Founders trusted in the moderating effect of an extended republic, but they also established structural blockades against majoritarian oppression should such a danger arise. These included separating government power into three coequal branches,<sup>106</sup> ensuring judicial independence,<sup>107</sup> and granting to the President the legislative veto,<sup>108</sup> among other things. The purpose of these constructions was to disperse the powers of the federal government across multiple bodies such that different officials and offices could stop unjust laws at any time. These powers are substantial (Publius called the executive veto “constitutional arms” with which to fight back against an intrusive legislature<sup>109</sup>), and they were intended to be. “What is government,” asked Publius, “but the greatest of all reflections on human nature? If men were angels, no government would be necessary.”<sup>110</sup> But men are not angels, and the Founders not only thought it necessary to have government but to have a government resistant to the oppression of popular majorities often exercised through the legislative branch.

Of course, none of these structures ensures the protection of property rights specifically. The Founders did not, in debate or in writing, say of a policy such as checks and balances, “oh wow, we should do this so that property is protected.” However, in the past two chapters, it has

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<sup>105</sup> “From James Madison to Thomas Jefferson, 17 October 1788,” *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Madison/01-11-02-0218>.

<sup>106</sup> “The Federalist Papers: No. 51,” *Avalon Project*, Accessed December 11, 2018, [http://avalon.law.yale.edu/18th\\_century/fed51.asp](http://avalon.law.yale.edu/18th_century/fed51.asp).

<sup>107</sup> “The Federalist Papers: No. 78,” *Avalon Project*, Accessed December 11, 2018, [http://avalon.law.yale.edu/18th\\_century/fed78.asp](http://avalon.law.yale.edu/18th_century/fed78.asp).

<sup>108</sup> “The Federalist Papers: No. 73,” *Avalon Project*, Accessed December 11, 2018, [http://avalon.law.yale.edu/18th\\_century/fed73.asp](http://avalon.law.yale.edu/18th_century/fed73.asp).

<sup>109</sup> “The Federalist: 73”

<sup>110</sup> “The Federalist: 51”

been clear that the Founding Fathers, whether in their capacity as authors and legislators in the states during the Confederation period or exchanging letters on their own, considered property to be a right of the same nature as any other. Therefore, in desiring to protect rights of citizens generally, they were protecting property rights specifically. The violations of property preceding the Constitutional Convention strengthen this argument by suggesting that property violations were on the mind of the men drafting and imagining these governmental structures.

### **The Bill of Rights**

The late Justice Antonin Scalia, testifying in front of the Senate Judiciary Committee, related to the members an exercise in which he liked to engage when giving speeches around the country. “I ask them, ‘What do you think is the reason that America is such a free country?’ ‘What is it in our Constitution that makes us what we are?’,” he said. Their answers often cited protections in the Bill of Rights. This, he contended, was inaccurate: “I tell them, if you think that a bill of rights is what sets us apart, you're crazy. Every banana republic in the world has a bill of rights.... the real key to the distinctiveness of America,” he concluded, “is the structure of our government.”<sup>111</sup>

The Founders, or, at least, the Federalists who shepherded the Constitution through the ratification process, would have agreed. They opposed a Bill of Rights on the grounds that, first, it was unnecessary because rights were already adequately protected by the structure of government established in the Constitution,<sup>112</sup> and, second, it would actually hurt more than help

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<sup>111</sup> Antonin Scalia, *Antonin Scalia - On American Exceptionalism*, video, 7:21, February 19, 2016, [https://www.youtube.com/watch?v=Ggz\\_gd--U00](https://www.youtube.com/watch?v=Ggz_gd--U00)

<sup>112</sup> Robert A. Goldwin, *From Parchment to Power: How James Madison used the Bill of Rights to Save the Constitution*, (Washington, D.C.: AEI Press, 1997), 64-68.

by implying that rights not mentioned explicitly were not protected by the Constitution.<sup>113</sup>

Whether the Federalists were right or wrong can certainly be debated, but in the ratification debates over the Constitution, it was the case that the anti-Federalists called for, and persuaded the states to do so as well, the inclusion of the Bill of Rights in the Constitution, specific enumerations of rights to be protected from government encroachment. It is in these first ten Amendments that the clauses protecting citizens' right to trial by jury and right against uncompensated government takings appear. A clause analogous to the state constitutions' guarantee of natural right was desired by Madison but ultimately excluded from the Bill of Rights.

Trial by jury in civil and criminal cases is protected in three clauses in the Constitution. It is protected, most notably, in Amendments VI and VII which guarantee the right to jury trial in criminal and civil disputes, respectively. However, trial by jury in criminal cases was guaranteed in the Constitution before the Amendments were added in Article III Section 2 Clause 3 which says, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."<sup>114</sup> The jury trial protection in the Sixth Amendment is thus redundant. Madison, when he introduced his proposed Amendments in Congress in 1789, conceived that the protection for jury trial would be specifically limiting the power of the states. "It is proper that every government should be disarmed of powers which trench upon those particular rights."<sup>115</sup>

Madison emerged from the Constitutional Convention uncertain of the efficacy of the Constitution because the Convention had rejected multiple times his proposal, supported by

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<sup>113</sup> "The Federalist Papers: No. 84," *Avalon Project*, Accessed December 11, 2018, [http://avalon.law.yale.edu/18th\\_century/fed84.asp](http://avalon.law.yale.edu/18th_century/fed84.asp).

<sup>114</sup> US Const. Art. III Sect. 2 Clause 3

<sup>115</sup> "Amendments to the Constitution, [8 June] 1789," in *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Madison/01-12-02-0126>.



James Wilson, to grants to Congress a veto on any state law passed. This would have prevented the sorts of paper money laws and government seizure policies that Madison and others abhorred. That the Constitution did not include such a provision was, to Madison, its greatest weakness, and he explained this to Thomas Jefferson in his October letter cited above.<sup>116</sup> His suggestion to Congress that the protection for jury trial (and freedom of conscience and the press) be made specifically against the states represented an extension of this concern. However, Congress again rejected his idea, instead opting for the redundancy of protecting jury trial in criminal cases in two places. Madison would only achieve posthumously his goal of federal oversight of state laws with the addition of the Fourteenth Amendment and the development of the Incorporation Doctrine, which used the Fourteenth Amendment to apply the Bill of Rights to the states.

Protections against government takings were also included in the Bill of Rights via the Fifth Amendment, but they were much weaker than even the state constitutions. With regards to government takings, the Fifth Amendment only says that “nor shall private property be taken for public use, without just compensation.”<sup>117</sup> Obviously, this lacks the consent clause of the state constitutions. Under this system, Congress or the executive could co-opt private property for public use as long as it provides compensation. The consent and rights of the individual, so integral to Locke’s conception of government, is a weaker bulwark against takings under the federal Constitution than it was under the state constitutions. This is a clear shift in thinking from the state constitutions, but, unfortunately, this author was unable to probe how that shift came about. While this is unsatisfying to both the author and reader, there may be an explanation on the face of the question.

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<sup>116</sup> “From James Madison to Thomas Jefferson, 24 October 1787”.

<sup>117</sup> US Const. Amend. V

To reiterate a finding of Chapter 1, the state constitutions' anti-takings clauses represented a recognition of the states that the absolute prohibition on takings was unworkable. There are instance when government seeks a legitimate public policy goal but private holdings stand in its way. Locke, in such a situation, would side entirely with the individual and his or her rights. The state constitutions would generally side with the individual, but allowed a representative legislature to override the individual's rights for the sake of efficiency. The language of the federal Constitution implies that the Framers opted even further for efficiency and saw no place for the bulwark of individual consent.<sup>118</sup>

Finally, the state constitution clauses which so eloquently presented man's natural rights are not found in the Constitution, either. This was proposed by Madison in his speech to Congress, but it was not included. It would have said, preceding the preamble, "That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety."<sup>119</sup> According to Goldwin, "in subsequent debate the proposal to alter the Preamble was denounced, reviled, ridiculed, and rejected,"<sup>120</sup> primarily because of its wordiness.

## Conclusion

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<sup>118</sup> Some may argue that it is unlikely to be the case that the federal government will assume private property lightly. Thus, the compensation clause is an extension of the anti-takings provisions in the state constitutions, which already allowed for legislatures to pass laws taking private property without compensation (the passage of a valid law acting as the consent of the representative body). However, under the Fifth Amendment, the executive branch can take private property without legislative approval. Additionally, the Founders never assumed the good intentions of the government, instead preferring to protect against the worst-case scenario of a potential tyranny holding office.

<sup>119</sup> "Amendments to the Constitution, [8 June] 1789".

<sup>120</sup> Goldwin, 87.

What to make of the Constitution's protections of property rights is unclear. The Anti-Federalists demanded a Bill of Rights because they felt that the protections afforded to individual rights were inadequate. However, they thought this was the case because the federal government had too much power.<sup>121</sup> Madison and the Federalists held the opposite view and thought that the experience of the states during the Confederation period proof that state governments could not adequately defend the rights of individuals. They also believed that by imbuing the structure of the federal government with mechanisms of distributing power, they could protect individual rights. It is well-recognized that the creation of the Constitution was the product of a political compromise, and I think that this is a significant factor explaining why the Constitution doesn't make a distinct claim about property rights or, really, any right.

I think it is also the case that property rights were not prioritized by any party. On the part of the Federalists, they did not believe that property rights had to be protected in ways distinct from how rights were protected generally. The anti-Federalists, on the other hand, were skeptical of property and would not have prioritized property rights if they had been in a position to do so.<sup>122</sup> However, I don't think this diminishes the standing of property rights in the Constitution. It is generally uncontested that the vision expressed in the Constitution is primarily Federalist. The Federalists won ratification without changing the document, and it was James Madison who stewarded the Bill of Rights through Congress. I think that the view that property rights are important, yes, but no more important than other rights predominates the Constitution. This repudiates the widespread modern view of property rights as relatively less important than social and political rights such as freedom of speech and the right to vote, which was certainly not instilled in the Constitution by either side.

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<sup>121</sup> Goldwin, 38-48.

<sup>122</sup> Goldwin, 39.

## Conclusion

I began this paper by observing that the most controversial issues in our modern political discourse are primarily about social and political rights. Issues of economic rights such as property rights, liberty of contract, or labor rights are rarely discussed or are argued on a basis other than economic right. I wondered if this dichotomy existed at our Founding - if economic rights were seen as relatively less important (or were discussed relatively less) than social and political rights. After my investigation in Chapters 1, 2, and 3, it's clear that our modern dichotomy is not an original one. If, for the Founders, some rights were relatively more important than others, it was property rights which were considered more fundamental than political rights such as freedom of speech, not the other way around.

In Chapter 1, I examined the state constitutions, looking for ways in which property was protected. I identified three common clauses in which property was protected. The first is the state constitutions' declarations of natural right. The state constitutions mimicked the language of the Declaration of Independence, which Jefferson drafted in the tradition of John Locke, a pioneer of the natural rights doctrine. The states, in common, declared property - its acquisition, possession, and protection - as a natural right. The second clause common to state constitutions was a guarantee that no man's property could be taken from him, whether in a civil or criminal trial, without trial by jury. Trial by jury, an institution first guaranteed to Englishmen in the Magna Carta, has historically been used as a protection against the tyrannous charges of kings. Indeed, trial in a distant land with judgments passed down by strangers was a tool that King George III sought to use against the colonists, and they listed the offence in the Declaration of Independence. Seeking to prevent the same tactics from being used against Americans, they included the guarantee in the state constitutions. Finally, states constitutions prevented the

government from taking property without an owner's consent or the consent of the legislature. This clause also originated in the thought of Locke and is deeply connected to Locke's first reasons for forming political society. Locke thought that prohibitions on government takings represented an essential part of the compact men join when entering government, and the structure of states' anti-takings clauses, which mirrors Locke's argument, shows the states understood this thought.

In Chapter 2, I examined the thought of James Madison and Thomas Jefferson, two of the most influential men between 1776 and 1791. They represent two different ways of thinking about property. Madison defined property very broadly which was indicative of his view, present in the Constitution, that the property right was no different from any other right. Jefferson, in contrast, believed property to be distinct. Informed by a Lockean conception of property, he saw property as useful because property acquisition through farming was ordained by God. Property overall, then, was important but subordinate to the republican values that farming was supposed to cultivate.

In Chapter 3, I turned to the Constitution itself. I examined the text of the Constitution, the Founders' notes, and contemporaneous publications surrounding the Constitution's ratification. First, it's clear that the events of the Revolutionary and Confederation periods convinced the Founders that property was not adequately protected under the pre-1789 government. It would not be enough to adopt a state's constitution verbatim; new ways of protecting property would need to be created. That's exactly what happened as the Founders combined ideas such as the extended republic, checks and balances, and competing governmental powers in order to secure rights generally, and property rights specifically. The Federalists thought the protections so strong that they pushed back against the anti-Federalists'

calls for a Bill of Rights, thinking it unnecessary and potentially dangerous to the protection of rights. Even so, a Bill of Rights was necessary for the ratification of the whole, and when the first ten Amendments were added to the new Constitution, they included a protection for trial by jury and a prohibition against nonconsensual, uncompensated government takings.

From this modest documentation of the abundance of political thought at the time of the American founding, it's clear that our modern conception of rights is not the same as the Founders' was. While the main issues of our day focus primarily on social and political rights and economic rights are rarely discussed and often seen as less important, the Founders saw the property right as no different in nature from other rights. In fact, at times they even considered the property right as primary, such as when they sought to attach property requirements to suffrage qualifications. Life, liberty and property - those "rights" were not just the things to which people were entitled as a function of being people. They represented to the Founders the very purposes of forming a republic in the first place, and their protection was essential in helping citizens live fulfilling, individual lives in the pursuit of happiness.

### **The Change**

If our modern conception of rights is divorced from the Founding conception, what could have led to such a change? While I doubt there is only one contributing factor, it seems to me that Footnote 4 in *US v. Carolene Products*, which defined for judges when laws should be ruled unconstitutional, clearly defined the dichotomy I have discussed and afforded relatively more judicial protection to political and social rights than to economic rights such as the right to property.

The facts and even the decision of *Carolene Products* (1938) are unremarkable. The Court resolved the case in a 12-page decision by identifying a rational basis on which Congress could have justified the food safety regulation that affected *Carolene Products*.<sup>123</sup> What was remarkable and impactful was Justice Harlan Stone's 4th footnote in his majority decision, which only four of nine judges supported (Justice Hugo Black concurred in the decision but did not support the section on which the footnote commented). In it, he distinguished types of cases in which heightened scrutiny could be (read: would be) required in order for a statute to be held as constitutional. Let me explain.

If a law violates an explicit clause of the US Constitution, it is ruled unconstitutional. For instance, Congress could clearly not make a law preventing the *New York Times* from printing anti-government opinion pieces because of the First Amendment. However, in many cases, including *Carolene Products*, a party will assert that a law is unconstitutional on the much broader, vaguer grounds that a statute violates the "due process" and "equal protection" clauses in Amendments V and XIV.<sup>124</sup> For instance, if Congress made a law that prevented all Claremont McKenna students from going to bed before 10 PM, that is clearly unconstitutional even though there is no explicit clause preventing Congress from passing such a statute. The case would be made on "due process" or "equal protection" grounds. The "rational basis" test was developed over years of judicial precedent to decide such cases.<sup>125</sup>

Under the "rational basis" test, courts ask whether the legislature had a "legitimate state interest" for passing the law in question and whether there is any "rational basis" that connects

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<sup>123</sup> United States v. *Carolene Products Co.*, 304 U.S. 144 (1938).

<sup>124</sup> Thomas B. Nachbar, "The Rationality of Rational Basis Review," *Virginia Law Review* 102, no. 7 (November 2016): 1629, accessed December 11, 2018, [http://www.virginialawreview.org/sites/virginialawreview.org/files/Nachbar\\_Online.pdf](http://www.virginialawreview.org/sites/virginialawreview.org/files/Nachbar_Online.pdf); The Ninth Amendment, which provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" is rarely invoked or relied upon in the courts.

<sup>125</sup> Nachbar, 1627-1631.

the actual statute to the interest. If the answer to both questions is yes, then the law is presumed constitutional, and it is a pretty easy standard to meet.<sup>126</sup> The philosophy underlying the rational basis test is that, in our constitutional order, the courts should defer to the political branches of government and allow the legislative branch wide latitude in carrying out democratic policymaking. A fundamental tension in our federal system, intended but never resolved by the Founders, is to what extent in our representative democracy the judiciary should exercise its anti-democratic power. The rational basis test prefers leniency, overturning acts of the democratically-elected legislature and executive only in blatant cases of illegitimate state action.<sup>127</sup>

Footnote 4 changed this test. Instead of awarding the wide leniency of rational basis review to all statutes, Justice Stone suggested, and the Court subsequently adopted, that the Court be more skeptical of a laws' constitutionality if it either (1) "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or (2) targets "discrete and insular minorities."<sup>128</sup> These two situations imply stronger protection for what I have called political and social rights, and I believe Stone's creation of stronger protection has led to the relatively higher value accorded political and social rights versus economic rights today. Again, let me explain.

Stone's first clause identified political rights as deserving of higher protection. In the footnote, he listed a variety of different restrictions on rights to political participation that had been adjudicated before the Court such as "restrictions upon the right to vote... restraints upon the dissemination of information.... Interferences with political organizations... prohibition of

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<sup>126</sup> Nachbar, 1629.

<sup>127</sup> David Strauss, "Is Carolene Products Obsolete?," *University of Illinois Law Review* 2010, no.4 (2010): 1254-1255, accessed December 11, 2018, [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2988&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2988&context=journal_articles).

<sup>128</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 note 4 (1938)



peaceable assembly.”<sup>129</sup> Additionally, recall that the underlying logic for deferring to the legislature was that doing so permitted the democratic process the greatest latitude. Stone’s footnote extended this logic by asking the courts to watch out for situations where the democratic process lacked integrity, i.e. if certain people could not vote in an election. For Stone, the ordinary political processes could be “relied upon to protect minorities”<sup>130</sup> because, as the Founders thought, the Constitution provided for minorities (in the political, not the demographic, sense) the tools with which to persuade majorities to change their minds. If those tools were corrupted or denied, however, Stone thought that the courts should take notice and intercede. Thus, Stone recommended that courts protect political rights at a higher level than traditional rational basis deference.

Stone’s second clause is also connected to the political process and a corruption of well-functioning, democratic lawmaking, but its rationale points clearly towards protecting the most controversial social rights asserted today. According to Strauss, a “discrete and insular” minority is “‘discrete’ in the sense that they are separate in some way, identifiable as distinct from the rest of society. They are ‘insular’ in the sense that other groups will not form coalitions with them” because of prejudice.<sup>131</sup> Because such minorities are unable to change policy through the legitimate lawmaking process, Stone believes, they deserve further protection. Many of the social issues that are adjudicated in front of the court - same sex marriage, affirmative action, racial discrimination - are clearly derived from this thinking. Those seeking broader protections in public or the courts cite the historic discrimination against a group as reason for expanding protections for social rights which mirrors Stone’s second clause.

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<sup>129</sup> United States v. Carolene Products Co., 304 U.S. 144, 152-153 note 4 (1938)

<sup>130</sup> United States v. Carolene Products Co., 304 U.S. 144, 152-153 note 4 (1938)

<sup>131</sup> Strauss, 1257.

The *Carolene Products* decision also came after a period in the Court's history in which it rejected a significant amount of the New Deal during what has been termed the *Lochner* period of the court.<sup>132</sup> *Lochner* ruled a law restricting work hours unconstitutional on liberty of contract grounds (people should be able to freely enter whatever contract they want such as working more than 60 hours per week) - a case decided on the basis of protecting an economic right. The court during that time valued strongly economic rights such as the liberty of contract and recognized that the prioritization of social and political rights can at times come into conflict with individuals' fair economic rights. After Hugo Black joined the Court and shifted the balance of power, the Court began to place less importance in economic rights. *Carolene Products* is not only representative of this shift, but it is an explicit direction to consider political and social rights as more important than economic rights, and I think that it is a persuasive explanation for our modern conception of the relative importance of economic, political, and social rights which differs from that of the Founding.

While my argument is based on a Supreme Court case and uses judicial history as its primary evidence, I don't think that the explanatory power of my argument is limited to the change's effect on the courts. In our everyday life, what the courts say fundamentally impacts what we think, how our arguments are framed, and what policies are proposed. Is there a state in the Union that would today propose a law segregating schools based on race? No, and there hasn't been such a proposal for years because it has been clearly unconstitutional since *Brown v. Board of Education*. Legal doctrine affects what policies are put forward and how those policies are framed, and society changes in reaction to those policies. I am not saying that all change starts with court decisions, which I think would be a profoundly negative process. I am saying that people should not consider the effect of legal developments as limited in scope to the

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<sup>132</sup> Strauss, 1253-1254.

judiciary. It is my contention that the high value accorded to social and political rights, at times at the expense of economic rights, is in part due to a footnote in an otherwise irrelevant case from the 1930s. The distinction Justice Stone made parallels exactly the dichotomy I identified in my Introduction, and it was a lubricant for the documented pivot the Court made from inhibiting Progressive policy and the New Deal at the beginning of the century to protecting minority social and political rights during the Civil Rights era. The effects of the infamous footnote are still observable today.

### **The Result**

This analysis matters because it reveals a blind spot in our modern political debates. America has long been noted for its unique veneration of the Founding, and for those who believe that the Founding Fathers were great men (despite their admitted and well-documented flaws) who expressed timeless and exceptional political principles worthy of being followed today, this analysis represents a wake-up call that a portion of those principles are not being upheld. Even those who distrust or disagree with the Founders - because of their identity, their protection of slavery, their value judgments, or whatever - can find value in understanding the ideas that motivated this nation's founding, the unique culture of our original people, and the principles on which our institutions are based. When moving houses, one must know first his own address, at least in order to direct the movers where to pick up his favorite possessions. So too should would-be reformers understand the United States' first principles in order to mitigate the possibility that, in their haste to form a more perfect Union, they carelessly discard important national heirlooms.

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