

Introductory Remarks

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We convene at a pivotal moment in world history. A burst of constitution making is underway, not only in Central Europe and Asia, but on other continents as well. Experience teaches that episodes such as these are brief and rare. How, if at all, can an assembly of scholars assist the far-flung framers?

This panel, the first of the Symposium, focuses on the constitutional dimensions of property. Many constitutional scholars no doubt would be dumbfounded that the Symposium organizers have given primacy to this subject. Because I am a teacher of property law, you will not be startled to learn that I concur in the organizers' decision. In a nutshell, private property both lies at the foundation of a market economy and confers an economic security that emboldens individuals to exercise other constitutional liberties. Having disclosed my perspective, I now content myself with highlighting some basic issues that participants in the various sessions of the Symposium — and especially this one — may wish to address.

First, how confident are we that the substantive provisions of constitutions matter? Legal peripheralists, who doubt that laws shape cultural practices in any significant way, might argue that inserting property clauses into constitutions is futile. In their opinion, erecting constitutional safeguards for private property would be superfluous in a culture that informally respects private property, and unavailing in a culture that does not. What evidence is there that the property clauses have made a difference?

Second, if we assume that constitutional property clauses do matter, should a new democratic nation draft its own or instead borrow shopworn clauses from the constitution of an established democracy? In his opening remarks, Professor Reisman asserted that constitutions do not travel well.¹ This is especially plausible for the portions of constitutions that deal with structural issues such as federalism and the separation of powers. But substantive clauses also may travel poorly. The U.S. Constitution contains a number of provisions that protect private property. The principal ones are the Takings Clause of the Fifth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Thirteenth Amendment's prohibition of slavery, a principle that ensures self-ownership of human capital. U.S. courts

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1. See W. Michael Reisman, *Introductory Remarks*, 19 *YALE J. INT'L L.* 189, 2189 (1994).

have given these provisions much interpretative gloss. Should framers elsewhere mirror a tried approach or start afresh?

Third, might not the term *property* be too small an umbrella for the protection of important private law entitlements? I raise here the issue of the appropriate level of generality, an issue that pervades the business of constitution writing. The organizers of this Symposium declined to convene panels on contracts, torts, and other private law fields. Are some of those entitlements worthy of distinct constitutional protection? Besides its various property clauses, the U.S. Constitution forbids states from "impairing the Obligation of Contracts."² Is it obvious that a takings clause renders a clause of this stripe unnecessary?

Fourth, and conversely, *property* in some constitutional contexts may be too general a term. The Russians, for example, are determining the future of collective farms, high-rise apartment blocks, state-owned enterprises, intellectual property, and so forth. Perhaps Russia's constitution makers should draft separate clauses governing entitlements in each of these resources, instead of, or in addition to, drafting blanket property clauses.

Fifth, how robustly should a constitution protect property owners from legal innovations that diminish the value of their assets? American constitutional scholars hardly speak in one voice on this controversy. At one pole are Richard Epstein and Bernard Siegan, who read the U.S. Constitution as strictly limiting legislative incursions into private property.³ At the other pole are Joseph Sax and Richard Lazarus, who advise against construing property clauses as barriers to doctrinal innovation and majoritarian redistribution.⁴ Should framers indicate where they lie along the spectrum between these poles, or instead relegate this set of decisions entirely to the judges who must eventually lend meaning to open-textured constitutional language?

I conclude by noting that the topics of the ensuing panels all interrelate with property. The next panel focuses on federalism. In the United States, property law is largely a creature of the states, not the national government. The nations newly creating federal systems should weigh the gains and losses arising from *nationwide* rules of property. In Russia, a huge expanse, numerous opportunists are busy seizing state assets without legal authorization. The legality of these seizures eventually must be adjudicated, perhaps according to some analogue of adverse possession law. To what level of its embryonic federal system should Russia allocate the power to legislate on this topic? What protections of property owners, if any, inherently belong in a *national* constitution?

2. U.S. CONST. art. I, §10.

3. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

4. See Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1431-32 (1993); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1454-55 (1993).

The next panel addresses the rule of law, a topic that any observer can readily connect to issues of property rights. Improvers of property require confidence that the state will protect them from expropriations and private seizures. Trustworthy police forces and judiciaries are vital for inducing investment. Many of the nations now engaged in constitution writing lack a rule-of-law tradition. Is it not idle to enact substantive protections for property owners without simultaneously establishing credible institutions to enforce those provisions?

The final panel is on human rights. Commentary on the interaction between property rights and human rights has been schizophrenic. One strand, associated most notably with Karl Marx, identifies private ownership of the means of production as the antithesis of human freedom.⁵ The opposing strand, exemplified by the writings of Thomas Jefferson, Milton Friedman, and Charles Reich, asserts that private property is the bedrock of a liberal democracy.⁶ These writers would contend, for example, that speakers at the mercy of expropriators are unlikely to voice unpopular ideas. Thus property issues lurk in every cranny of a constitution, at least in the eyes of a property teacher.

5. See, e.g., Karl Marx & Friedrich Engels, *The Communist Manifesto*, in KARL MARX: SELECTED WRITINGS 221, 237 (David McLellan ed., 1977).

6. See Stanley N. Katz, *Thomas Jefferson and the Right of Property in Revolutionary America*, 19 J.L. & ECON. 467, 479-81 (1976) (outlining Jefferson's views on property and republicanism); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7-21 (1962); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771-72 (1964).

