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Eminent Domain Law, Riparian Doctrine, and Early American Land Settlement: An Evolutionary History of Vested Property Rights From the Late 18th Through the 19th Century

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INTRODUCTION

This paper is an effort to present a synopsis of the jurisprudence of eminent domain law and riparian doctrine and their place in the history of American property law. Both areas are vast and complicated bodies of law, and both are still undergoing scrutiny and change. We therefore will concentrate on those cases and doctrines that culminated in the eminent domain jurisprudence of the early West. In the context of early American land settlement and development, the paper will define what is known among legal and historical scholars as "takings," expounding on different aspects of that concept. We will examine the confiscation of private property for the "public interest" and the evolution of early American riparian doctrine, closely related to the doctrine of eminent domain. Both issues involve the power of the state or sovereign to disrupt the use of property by private entities through confiscation for what the courts decide is a significant societal benefit. Especially in eminent domain law, courts have authorized takings both by public entities (national or state governments, government agencies, government corporations, and other such organizations) and private entities deemed to serve the public interest. We will look at this phenomenon in an historical perspective.

The paper will consist of a history of American property and eminent domain law and riparian doctrines adopted from English law. This will include a brief discussion of English common law and the state of property law at the time of the drafting of the American Constitution. Riparian law, or the jurisprudence of water use, necessarily will occupy a significant portion of this and other sections of the paper. Water law has historically played an important part in property rights doctrines because of the special problems caused by the ownership of water always considered a "public good" and the privately-owned land it flows through. Discussion of the history of American property law will therefore include both land use and riparian doctrines.

The paper will then continue with the evolution of eminent domain law and riparian doctrine in the Eastern American courts, before the settlement of western lands. By examining both specific caselaw and the legal history of that period, it will analyze the authorization of the takings of land and water rights by Eastern courts, both for public and private use, and thereby establish the conditions that preceded the takings jurisprudence of the American West.

We will continue with an analysis of the Western Courts and their role in American eminent domain law. The United States Government, in striving to settle the western frontier as soon as possible, granted huge portions of land both to private individuals in the form of takings of one individual's land or water rights to be given to another, and to private corporations, especially the railroads. In doing so, the rights of property owners whose property was confiscated in the name of the western frontier were often ignored by the courts of the new western states. We will therefore examine these policies' effect on the land use and riparian rights of property owners. The courts' position on land grants to railroads will receive special attention, as will the conflict between farmers and miners in California over water rights, and the California courts' reaction to that conflict. It is hoped that the reader will gain a sense of the judicial reasoning of this period in relation to property rights and the contingent constitutional evolution that eventually rectified the destruction of those rights.

The paper will conclude with a statement regarding the future of property rights and their place in American constitutional law. Specifically, I will outline a plan for protecting the rights of property holders a course of action that not only sustains the respect given property rights by the federal Constitution, but also remains consistent with the attention given other liberties by contemporary activist courts.

PROPERTY IN ENGLISH AND EARLY COLONIAL AMERICAN LAW

In his outstanding book on the origins of the American Constitution, *Novus Ordo Seclorum*, Forrest McDonald remarked on the role of English law in the development of its American counterpart:

> "... American property law was essentially English property law, and title to every foot of land that was legally held in the United States derived its legitimacy from a grant from the Crown or from the Crown's assignees or successor or successors as sovereign."[1]

It is justifiable, then, that we begin this work with an overview of the rights of British citizens, and later, the rights of American colonists.

The writings of John Locke played a fundamental role in the framing of the American Constitution, and many early American civil libertarians, especially Thomas Jefferson, relied heavily on the reasoning and intellect of Locke to support their own views. The several states, in their state constitutions, invoked Locke in proclaiming an inherent right of men to acquire and possess property.[2]

Locke was also important in the development of the concept of property in England and America. He offered a new and refreshing insight into the natural rights of men. Property, he asserted, was a right of man as natural and fundamental as the more abstract right to personal liberty. A man's labor in taking a product of the natural commons made that product his own property. Thus,

> "Every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath

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1 McDonald, Forrest (1985). *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (University Press of Kansas) p 12.

2 Ibid., pp 152-153.

> provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property."[3]

Lockean theory proved vital in the development of property rights in the eighteenth century. But property law in both English and American judicial schemes was more deeply rooted in the common law tradition that had evolved over several centuries. Fundamental to English law was the supposition that both personal liberty and a right to property were "untouchable" by arbitrary mandates of a monarch except through legitimate law. This basic tenet was confirmed by the Magna Carta and parliamentary confirmations, as early as the thirteenth and fourteenth centuries and as late as 1773.[4] It later proved a critical starting point for American colonial jurisprudence.

Blackstone expounded on the state of property rights and their limitations. Specifically, he said that property rights could be limited by the inherent power of the sovereign to take property for the common interest.[5]

This taking power through regulation was exercised in four ways: general regulation, forfeiture, taxation, and eminent domain. The British Government regularly passed legislation that severely impeded the property rights of citizens of England and the American colonies. These included "offenses against public trade": usury laws, laws prohibiting the forestalling of any market, and sumptuary laws, or the extravagant spending of money on items of personal luxury. The Crown also had a habit of granting monopolies, where exclusive rights were granted to some private charter. In addition, the monarch might at any time simply "reserve" any given domain for what he or she

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3 The Great Books Foundation (1966). *Locke: Of Civil Government, The Second Treatise* (The Great Books Foundation). Chapter V, par. 27; p 16.

4 McDonald, p 12.

5 Ibid., p 13.

deemed the public good, preventing its use or exploitation by private persons or entities. This tradition found its way into early American law, where one-third of all gold, copper, or silver found by virtue of the land act of 1784 or the Northwest Ordinance was reserved for use by Congress, even if such minerals were found on land owned by individuals.[6]

American colonial law relaxed what was a remarkably harsh tradition governing the punishment of some felons through forfeiture laws. For example, Virginia and New Jersey substituted heavy fines for felonies that under English law were punishable by death. However, the colonies, having gained their independence, often enforced severe forfeiture laws that granted sovereign power to confiscate the property of persons convicted of various crimes.[7]

The broadest method of regulating private property, and the one having the greatest impact on the American struggle for independence, was takings through taxation. Unlike other European countries, the British Crown received the bulk of its revenues from voluntary assessment. That is, the people, through the House of Commons, "voluntarily" assigned elected representatives to assess taxes to pay into the royal treasury. The American colonies adopted a similar method of revenue collecting, where the lower house levied taxes collectible by the royal, proprietary, or elected governor.[8]

The final, and for our purposes most important method of property confiscation, was through eminent domain. The English tradition, based entirely on common law, decreed that private property could only be taken by the sovereign for legitimate purposes;

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6 Ibid., pp 13-20.

7 Ibid., p 21.

8 Ibid., p 25.

government could not take one private individual's property and give it to another. The eminent domain principle existed primarily for the construction of highways and public buildings.

The colonies were less careful with their use of eminent domain law. The legislatures granted local officials the authority to plan and construct public roads, and doing so often resulted in rather capricious confiscation of private property. In New England, the governments avoided paying just compensation by allowing landowners to erect gates on roads built through their property. Local authorities maintained that the roads existed for public purposes, but were still the private property of the landowners.[9]

Enjoining the use of one's property had not been an important issue in the earliest days of the colonies. Large, scattered tracts of land made nuisance injunctions and similar legal conflicts over the use of property rare. In regards to an agrarian economy such as that of the new American states, the right to property was considered an absolute dominion over property's use and enjoyment. Blackstone argued that the lawful use of one's private property could be legally enjoined if it impaired in any way with a neighbor's use or enjoyment of his property. However, as the economy grew and new farms and settlements arose, popularly-held legal principles came into conflict. Great efforts were being made to expand and vitalize America's economy through development, and absolute rights to property increasingly opposed the spirit of economic development.[10]

Riparian doctrine of the colonial era tended to be relatively unmuddled and straightforward. However, water law in English common law had only recently undergone drastic

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9 Ibid., p 23.

10 Horwitz, Morton J. (1973). "The Transformation in the Conception of Property in American Law, 1780-1860," *University of Chicago Law Review*, (40) p 248.

changes in appropriation of water rights.[11] Courts had traditionally resolved conflicts over water through a "natural use" doctrine. In cases involving the conflicting claims of two riparian owners, courts gave precedence to prior appropriators and water to be used for agriculture and husbandry. English common law provided that the owner of land through which water flowed had exclusive rights to use the water any way he pleased, so long as that use did not interfere with the natural flow and the equal rights of landowners downstream. Another school of thought, that of prior appropriation, found its way into the English courts, and for a while a dispute ensued over which of the two policies best accounted for the growing crises over water use. Extensive construction of mills and dams in the late eighteenth and early nineteenth centuries, in both the United States and Great Britain, would change the calm associated with water rights, as developers complained loudly against the antidevelopment tendencies of the common law. This search for a coherent water use policy eventually lead to the brilliant views of two great American jurists, Joseph Story and James Kent. Story and Kent would be known as the Blackstones of American riparian doctrine.[12]

The infant United States was thus concerned with the ambiguous and uncertain tradition of property rights in common law. On the one hand, it seemed that common law in the abstract placed property rights in high esteem, subject to violation only through just and legitimate laws of the land. Yet on the other, it seemed that the "laws of the

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11 Lauer, T.E. (1963). "The Common Law Background of The Riparian Doctrine," *Missouri Law Review* (28) pp 60-100.

Horwitz, Morton (1973). "The Transformation in the Conception of Property in American Law, 1780-1860," *The University of Chicago Law Review* (40) pp 248-290.

12 Horwitz, p 251.
Lauer, pp 60-63, 99-107.
McDonald, pp 34-35.

land" tended to be unjust and hardly legitimate, yet still effective in reneging on established common law conceptions of property rights. While Magna Carta and Parliament guaranteed representation of the people's property interests, those same interests tended to be frustratingly reachable by the hand of the sovereign. The several states therefore enacted a great deal of English common law as part of their constitutions, yet searched for more effective measures to supplement those constitutions where common law had proved inept.[13]

The Framers of the Constitution reviewed the long history of property use regulation by the British Crown in context of English and colonial history. It may be rightly said that they were skeptical of the often arbitrary taking power of the sovereign, resenting the unleashed taxation and reserved property policies mandated by royal edict. They viewed sumptuary laws with suspicion except those in the form of agrarian laws limiting the property holding of public officials, and despised Government's power to grant exclusive charters to monopolistic corporations. Their experience with the British had thus taught them that property rights must be held in high regard to keep them out of reach of government. Combining these views with Lockean theory and a more general historical oversight, they drafted an American Constitution complete with a Fifth Amendment forbidding the confiscation of private property without just compensation.

THE EASTERN COURTS

Eminent domain law developed, until the last decade of the nineteenth century, primarily in the state courts.[14] Until the limitations of the Fifth Amendment were

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13 McDonald, pp 152-153.

14 Nichols, Philip Jr. (1949). "The Public Use Limitation on Eminent Domain: An Advance Requiem," *Yale Law Journal*, (**58**) pp 599-614.

applied to the states under the Fourteenth Amendment, takings issues were not reviewed on the federal level.[15]

The courts in eighteenth century eastern America paved the way for developments in western law. Some have claimed that the "law of the West" was innovative and unique from any body of law that preceded it. But those claims have since been proved to be made by those who would romanticize the settlement of western law. The western courts appropriated and expropriated property rights in correlation to the doctrines set forth by eastern judges.[16] It is thus crucial to this examination to include an overview of the eminent domain jurisprudence of early eastern courts, "early" meaning from the early to mid-nineteenth century.

Much of the debate in eminent domain centered around the concept of public use. Initially, the right of the sovereign to expropriate was considered a principle of natural law, and so firmly established in the legal thinking of the time that some state constitutions omitted providing for just compensation in the event of expropriation. A kind of higher justice assumed that eminent domain was justified for the common good. But as government activity expanded, property owners threatened with losing their property rights began insisting that the intended use of their property was not a public use or for the public utility.[17] A legal conflict was brewing. The conflict centered around the definition of public use. In the first half of the nineteenth century, that term was defined broadly and generally referred to the takings needed for roads and flowage easements for mills. The development of natural resources was thus held as a legitimate

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15 Ibid., pp 599-600.

16 Scheiber, Harry & Mccurdy, Charles. "Eminent Domain Law and Western Agriculture, 1849-1900," *Agricultural History*, pp 113-121.

17 Nichols, pp 600-601.

justification for eminent domain. In the mid-1800's, however, eastern courts began narrowing their definition of public use, saying that simple "public benefit" was insufficient as judicial reasoning, and so narrowed the meaning to prevent takings of any property for any reason.[18]

Harry Scheiber, in his essay, "Property Law, Expropriation, and Resource Allocation by Government: the United States, 1789-1910," outlines three expropriating doctrines used to establish a coherent legal policy defining public use. Unfortunately, these same policies held the established property rights of the citizen in low esteem. First, when a state undertook a public project for the public use, the property owner was limited to challenge the action through statutory remedies only. Second, compensation was awarded only when property was physically taken; when it was damaged or lowered in value, courts often simply refused to give the property owner his due. And third, jury trials were not constitutionally guaranteed as long as specific statutes guiding takings proceedings existed.[19] Property owners were thus single-handedly deprived of all their traditional weapons in disputing the confiscation of their land for public benefit, or what the courts said was public benefit.

To understand the courts and their seemingly blatant disregard for property rights, we must first look at this period of time in American history. As mentioned in the preceding section, the nineteenth century was a time of rapid growth and change in America. Industry was beginning to spread and prosper, and with it the need for

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18 Nichols, Philip Jr. (1940). "The Meaning of Public Use in the Law of Eminent Domain," *Boston University Law Review*, (XX) pp 615-641 at 617, and **Chase v. Sutton Mfg. Co.**, 4 Cush. 152.

19 Scheiber, Harry (1973). "Property Law, Expropriation, and Resource Allocation by Government: the United States, 1789-1910," *Journal of Economic History*, (33) pp 232-251. Scheiber notes that the biases of juries in favor of small property owners could probably "be safely assumed."

improved infrastructure and heavy machinery. Roads began meandering in all directions, and the confiscation of private property was often needed to link point A to point B with a navigable road. Large dams were built to provide grist mills for farmers. These mills were largely considered public goods since farmers were producing more grain; the mills were able to grind large amounts of grain in a hurry. The mills proved troublesome to courts who searched for a reliable riparian doctrine to solve difficult cases usually involving mill companies who flooded upstream landowners when they built their dams.[20] There was thus a fundamental tension between the common law tradition inherited from the English and the energetic drive to development the vast array of resources in America.[21]

Meanwhile, an interesting and in the eyes of small property holders, troubling phenomenon began taking place in eminent domain disputes. State governments were devolving eminent domain rights to private corporations whose purpose were found to be in the public interest.[22] Railroad, turnpike, bridge, and canal companies were granted the same power as the state in expropriating land from private landowners.[23] With this authority, companies were able to carry on the damaging precedent set by state expropriations. Scheiber points out that this development was "an artificial and basically

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20 Horwitz, pp 251-259.

21 Ibid., p 253.

22 Scheiber, "Property Law," p 237.

23 Ibid., p 237

extraneous concept conjured up by the Court, thoroughly alien to historic American juridical considerations..."[24]

Railroad companies were the primary beneficiaries.[25] They were usually successful in taking private land for money amounts far less than the actual market value sometimes with as little as one dollar. The companies would obtain appraisers who would hold the value of any benefits accrued as equal to the damages. Thus railroad companies free-wheeled over vested property rights of small landowners, who were totally helpless in the face of courts sympathetic to the developmental claims of the public utility companies.[26] By the 1850's, New York, Vermont, Massachusetts, and other states subsidized railroads through this practice, known as "offsetting."[27] It wasn't until **Railroad Co. v. Iron Works**[28] in 1888 that courts nationwide began seriously reviewing the power granted private entities to take as they please with little or no tendency to compensate fairly.[29] Nor did government support of private companies in expropriating private property end with devolution of eminent domain power. Corporations were allowed to expand or enlarge their projects within the general terms of the state charters, and one Illinois

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24 Scheiber (1971). "The Road to **Munn**: Eminent Domain and the Concept of Public Purpose in the State Courts," from *Perspectives in American History*, (V) p 333. Scheiber's work details the evolution of public purpose and its culmination in **Munn v. Illinois**, 94 U.S. 113 (1877), which he considers a landmark case in the history of eminent domain cases revolving around the question of public purpose.

25 Nichols, "Public Use Limitation," pp 599-600.

26 Scheiber, "Property Law," p 237.

27 Ibid., p 237.

28 31 W.V. 710 at 735, 8 S.E. 453 at 467.

29 Said the court in **Railroad**, "I seems to us, if railroad corporations were permitted *ad libitum* to do what this defendant in error asks to be done, 'no deadlier blow could be dealt the private rights of the citizens'."

court gave a marauding railroad company the power to take what it needed "for its own convenience"![30]

This doctrine was primarily the product of demands for rapid development of American resources. **Beekman v. Saratoga and Sch. Railroad,**[31] drew upon the reasoning in earlier cases to further the contemporary concept of "public purpose," and held that the railroad company in that case qualified as a recipient of the power of eminent domain. A similar case, **Rogers v. Bradshaw,**[32] drove that doctrine home and established it as a legal force that threatened all small property owners who may have been in the way of what courts perceived as "progress."[33]

The stage was set for similar abuses of property rights in western courts, whose concern with economic development and settlement of the western frontier often ignored the property rights of the small property owner. Government subsidization of large industries deemed crucial to land settlement and resource development resulted in a western eminent domain jurisprudence as ignorant and unheeding in dealing with takings law as its eastern counterpart.

Riparian doctrine at this point in American history was deeply intertwined with other eminent domain issues. As mentioned above, mills and dams began putting new strains on existing riparian doctrine, and irrigation and mining caused courts to review eminent domain laws to sort out some sense amidst growing controversy.

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30 **Railroad Co. v. Wilson,** 17 Illinois 123 at 127.
Scheiber, "Property Law," p 238.

31 3 Paige 45 (N.Y. Ch. 1831).

32 20 Johns. R. 735 (N.Y. Ch. 1831).

33 Scheiber, "Road to **Munn,**" pp 365-369.

Riparian doctrine in American law is largely held to have originated shortly after 1825.[34] Joseph Story and James Kent, the two brilliant jurists who are considered the fathers of American riparian law, rejected the common law doctrine of prior use and instigated the "reasonable use" doctrine.[35] Joseph Story first expounded on this unique legal concept in **Tyler v. Wilkinson.**[36] The conflict arose over a diverting mill, and Justice Story claimed that riparian owners have a right to the reasonable use of water. In 1827, James Kent's *Commentaries on American Law*, agreed with the **Tyler** decision. By 1838, the reasonable use doctrine became an established, uniquely American body of law.[37] A long line of cases had emphasized to the legal community that indeed a reliable, theoretically sound doctrine was needed to resolve a plethora of conflicts.[38] The two jurists, along with courts in all the states, found that prior use tended to be dissolute and ambiguous in deciding riparian disputes, while the new doctrine of reasonable use was always consistent in providing justified responses to the range of new questions posed by water use rights.[39] However, Story and Kent did not rely solely on the common law in establishing the new riparian law. In his *Commentaries*, Kent discusses his

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34 Lauer, T.E. (1963). "The Common Law Background of the Riparian Doctrine," *Missouri Law Review* (28) pp 60-107 at 60.

35 Ibid., pp 60-61. The similar "reasonable use" doctrine would later find its way into western courts, especially California, where judges used a test of "reasonableness" to balance the claims of irrigating farmers and the primacy of miners' rights to water.

36 24 Fed. Cas. 472. (1827)

37 Lauer, p 61.

38 Horwitz, pp 251-290. Horwitz's "Transformation of the Conception of Property" gives full account of the caselaw that lead to the discovery of the reasonable use doctrine, and beyond.

39 Horwitz, pp 249-290.
Lauer, pp 60-107.

constant reference to the Code Napoleon in developing the doctrine. The Code Napoleon did not spell out the reasonable use doctrine specifically, but it did provide for deciding riparian disputes on a case-by-case basis with an underlying legal theory as a guide.[40]

Horwitz claims that there were three types of legal controversies over water rights. The first involved disputes where an upstream riparian owner diverted or obstructed the natural flow of the stream; this was the most common and most important type of case. The second type involved the backed-up water of a downstream owner affecting the mill wheel of the upstream owner. And the third type, a result of the mill acts passed by most states, dealt with landowners who sued neighboring mill owners for flooding their land by building a dam.[41] These conflicts arose as mill companies began assuming the form of public utilities, since area farmers used the mills to process their grain. The mills were seen as important tools for economic development and were granted high esteem in the realm of private property expropriations. Soon mills were flooding upstream land owners and riparian users without fear of retribution by the state courts; indeed, the courts proved to be a major ally in this process.

Early in the nineteenth century, judges still struggled with these conflict between development of resources and the archaic common law. States expanded the mill acts in the mid-1830's by devolving to mills the right to expropriate whatever locations they deemed appropriate for their purposes. In **Scudder v. Trenton Del. Falls Co.**,[42] the New Jersey legislature authorized a private corporation to "take" land for the building of

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40 Lauer, pp 62-63.

41 Horwitz, p 252. Horwitz discusses the mill acts at length in this work, citing them as an important example of the legal and economical history of that time in history in relation to property rights.

42 1 N.J. Eq. 694 (1832)

seventy mill sites along a six-mile stretch of the Delaware River.[43] The court upheld the expropriation. By 1870 Massachusetts, Maine, Connecticut, New Hampshire, Wisconsin, Indiana, and Tennessee all had granted private mill corporations the power of eminent domain. As Scheiber states, "The manufacturers had the best of both worlds," meaning that not only did legislatures grant taking powers to the corporations, but they even *encouraged* it to attract investment into their states.[44]

Other issues also frequented the riparian disputes dockets. **People v. Platt**[45] involved protection of private fisheries in the name of public purpose. Private dam owners were forced to alter their dams to conform to the claims of fishery owners who claimed salmon were unable to scale the walls of the dams in their yearly migrations.[46] Though that precedent was later overturned, **Platt** nevertheless exemplified the growing tendency of state courts to recognize many private concerns as *publici juris*, or endeavors affected with a public purpose. Two other important cases, **Crenshaw v. Slate River Co.**[47] and **Charles River Bridge v. Warren Bridge**[48] both widened the view that industries involved with flowing water usually ferries and bridges were *publici juris*, and therefore constitutionally entitled to the powers of eminent domain. While that fact may seem unremarkable, the conditions accompanying those decisions were indeed noteworthy. Riparian industries were, like their land-based counterparts, able to avoid the Fifth

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43 Scheiber, "Property Law," pp 241-242.

44 Ibid., p 240.

45 17 Johns. 195 (NY Sup. Ct. 1819).

46 Scheiber, "Road to **Munn**," pp 337-338.

47 6 Rand. 245 (VA 1828).

48 7 Pick. 344 (1829).

Amendment requirement of just compensation through similar tactics, and government seemed more than happy to see that private riparian concerns had their way.[49] This doctrine of veritable subsidization, and takings of property from one private party to be given to another, applied to all manners of water-based industry: mills, fisheries, navigation companies, bridge construction companies, etc.

The U.S. Supreme Court upheld the states' reasoning in takings of private property with **West River Bridge v. Dix.**[50] A few remarkable cases later, in **Barney v. Keokuk**[51] the federal court held a state's refusal to pay just compensation to a property owner whose property interest (access to the bank of the Mississippi, to which his property extended) was ignored by a municipal grant to several private charters as constitutional. The Court, and most court decisions involving eminent domain previous to **Barney**, relied heavily on the doctrine of *publici juris* as expounded by Lord Chief Justice Hale's *De Portibus Maris*, a lengthy tract discussing property law in the context of eighteenth century English cases.[52] Hale's dissertations, combined with the specific riparian doctrine of Story and Kent, were in fact fundamental in most, if not all, eminent domain cases of the nineteenth and early twentieth centuries.[53]

Frequent and often arbitrary takings in the name of economic development were thus the rule in the eastern court preceding and during the settlement of the west. Small property owners not only were in danger of having their property expropriated by state

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49 Scheiber, "Road to **Munn**," pp 333-344.

50 6 How. 507 (U.S. 1848).

51 94 U.S. 324 (1877).

52 Scheiber, "Road to **Munn**," pp 329-350.

53 Ibid., pp 333-350.

and municipal governments, but also by large public utility companies who usually got what they wanted for unfair prices. Corporations were able to damage and abuse small landowners' property without forethought of any legal consequence. Meanwhile, the situation was mimicked in Rocky Mountain and plains state courts, as efforts were underway to establish a uniform eminent domain code on the western frontier.

THE WESTERN COURTS

The settlers of the frontier, and the people who forged the new local governments, were successful in part due to their impatience for and intolerance of barriers to a quick and efficient settlement of the land, and development of western resources. Unfortunately, one such barrier was the property holdings of owners who stood in the way of the growing infrastructure.

Land was granted in huge tracts to railroads to encourage the transport of people and supplies westward. Telegraph lines were needed to stretch hundreds of miles, and the navigable rivers, often banked by private property, were important modes of transport for myriad purposes. The government, as eager as the settlers themselves to hurry the process, often blatantly violated the rights of small property owners whose land was "needed" for development.

What it seems the courts, both eastern and western, forgot was the long-established rule of law that strictly forbade the taking of one's private property to be given to another.[54] By rationalizing the takings of property for private entities through the public use doctrines, courts were able to authorize takings in the widest possible range of cases, so long as they furthered the cause of economic development. Certainly this was the case in the west where rail companies demanded power to expropriate private

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[54] Nichols, "The Meaning of Public Use," pp 617-624.

property, and more specifically, in California, where disputes over primacy erupted between miners and farmers.[55]

Thick textbooks could be written on the caselaw involving the expropriation rights of the public utilities versus vested property rights of small owners. Many disputes were heard, and in some cases the property owner prevailed. But as a rule, railroads and other utility companies embarked on a veritable rampage that saw property owners throughout the west pleading (unsuccessfully) in courts of law that their constitutional rights be observed.[56]

The period between the 1870's and the early 1900's comprised what Scheiber calls "the heyday of expropriation as an instrument of public policy designed to subsidize private enterprise..."[57] In many instances the "public use" doctrine wasn't even referred to; it was simply a matter of which private enterprise was more likely to promote development of the frontier.[58]

Court adjudication wasn't the only method government employed to effectuate takings for private purposes. Several state constitutions devolved expropriatory powers to private concerns. The Colorado Constitution specifically provided for the taking, through eminent domain, of property for public use to accommodate "private ways of necessity."[59] Other states soon followed suit. In Idaho, the state constitution arbitrated

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55 Scheiber and McCurdy, "Eminent Domain Law and Western Agriculture," pp 121-130.

56 Scheiber, "Property Law," pp 243-245.

57 Ibid., p 243.

58 Ibid., p 243.

59 Colorado Constitution, Article II, section xiv; and Scheiber, "Property Law." pp 243-248.

between disputing claims to eminent domain rights of miners and farmers, much like the situation in California. The Constitution enumerated specific terms under which private concerns could be empowered with eminent domain power. And later, the state legislature enacted in 1887 a statute which listed all undertakings deemed to have public purpose that could be empowered to expropriate private property. The statute was virtually all-encompassing; any concern that even smelled of public purpose was in effect given free rein to take as it pleased. Other state courts--Nevada, Montana, Colorado, Washington, Arizona and New Mexico--soon followed suit with laws that allowed expropriation for irrigation purposes.[60]

One important case, **Dayton Gold and Silver Mining Co. v. Seawell,**[61] made an important distinction between two types of businesses and their eligibility for eminent domain power. The first type, ineligible to expropriate private property, consisted of those ordinary businesses whose purposes did demand specific locations. The second, considered worthy of takings power, were those like mining who by nature of their purpose were limited to specific sites or locations. Other state courts relied heavily on that case to justify decisions supporting the expropriation of property. But, as Scheiber points out in "Property Law." those courts used the broad, general phrases in **Dayton** that expounded on public purpose and other vagaries, rather than the much more important site location doctrine that made **Dayton** unique.[62] Thus, instead of following the **Dayton** precedent of limiting and narrowing the conditions under which a private enterprise might expropriate, other courts used the ruling in **Dayton** to justify further

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60 Scheiber, "Property Law," pp 246-248.

61 11 Nev. 394 (1876).

62 Scheiber, "Property Law," pp 244-246.

takings doctrines. However, in one Montana case, **Butte, A.and P. Railroad Co. v. M.U. Railroad Co.,**[63] the court argued that given the terrain of the west and mineral resource distribution, requirements relating to site and location exigencies demanded that efforts affected with a public purpose be empowered to expropriate private property.[64]

In California, the same offsetting doctrine used in eastern courts accrued similar benefits for the railroads. While California did have stiffer compensation requirements, the courts of that state permitted deductions of alleged benefits to a property owner's remaining land from damages awarded him for property taken. The railroads were thus able to enjoy what amounted to huge involuntary subsidies from landowners and farmers whose land was condemned by the railroads for their use.[65] And while California had initially held that damage to private property by railroads or other undertakings in the name of public interest was not subject to just compensation, pressure both in the form of constitutional revision debates and improving property conditions in other states eventually led California to cease its subsidization of those who enjoyed expropriation rampages.[66] However, as Scheiber and McCurdy emphasize, California judges often construed the terms of stricter compensation doctrines to in effect continue the previous takings practices.

In the mid-nineteenth century, when California was still struggling over issues regarding public use, other western states began rejecting the notion that subsidization of privately-held corporations through taxation was constitutional. It wasn't until the

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63 16 Mont. 504 (1895).

64 Ibid., p 431
Scheiber, "Property Law," pp 245-246.

65 Railroad v. Caldwell, 31 Cal. 368 (1866).

66 Scheiber & McCurdy, pp 127-129.

1871 case of **S. and V. Railroad v. Stockton**[67] that question was reviewed in the California Supreme Court. Discarding the precedents set by other states, the Court found that such subsidization in the form of railroad aid taxation was in fact constitutional.[68]

When western cases finally reached the U.S. Supreme Court, large corporations were happy to learn that the Court was largely in favor of the western state courts takings precedents. In previous cases the Court had tightened just compensation requirements and extended the Fifth Amendment guarantees of just compensation to the states via the Fourteenth Amendment.[69] But the Court upheld the legitimation of devolution of eminent domain power to private concerns in 1896 and then eight years later in the case of **Clark v. Nash.**[70] Here the Supreme Court approved the taking of one individual's property so another could convey water to his own. And in **Hairston v. Danville and W. Railroad Co.,**[71] the Supreme Court extended that reasoning to mining, lumber, and railroad corporations as well, based on what it claimed to be an affirmation of state courts' use of the public use doctrine, whereby any private enterprise thought to have a use beneficial to the larger community could be endowed with the power of eminent domain.[72]

Earlier, in California, competing claims of primacy between miners and farmers began a long conflict between the two interests that the courts in that state could no

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67 41 Cal. 147 (1871).

68 Scheiber & McCurdy, p 129.

69 Scheiber, "Property Law," p 247
Pumpelly v. Green Bay, 13 Wall. 166 (1872).

70 198 U. S. 361 (1904).

71 208 U.S. 598 (1907).

72 Scheiber, "Property Law," pp 247-248.

longer ignore. Mining was widely considered the dominant industry in California, but irrigators were also playing a crucial role in the state's economic development. So while the bias in courts at least initially favored miners, the courts, if not the legislature, of California were anxious to see rapid agricultural development to supplement the revenues generated by mining.[73]

Early in the state's development, the privileges given in view of the primacy of mining was evident. California law had already specifically established the right of miners to exploit the public lands of California in search of minerals. But the 1852 Possessory Act gave miners the right to invade private property, especially farmland, to mine without having to be troubled by the normal barriers of nuisance and trespass laws. And it wasn't until three years later, under the 1855 Indemnification Act, that farmers were able to recover payment for any destruction of their property, via a requirement that bond be posted by invading miners at the outset of their efforts to mine on the private land.[74]

The California Supreme Court was thus forced to formulate a "balancing test," similar to ones used in eastern courts to settle disputes involving the competing claims of small property owners and enterprise affected with a public purpose. The state legislature had already established the rights of miners as superior to all other endeavors, yet the Court recognized the state's interest in promoting agriculture. In this way, the Court became the sometimes lifeguard for property rights of agriculturalists in California. In **Conger v. Weaver,**[75] the Court in effect recognized that property rights

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[73] Scheiber & McCurdy, "Eminent Domain Law and Western Agriculture," pp 118-130.

[74] Ibid., pp 118-119.

[75] 6 Cal. 548 (1856).

are property rights, and that other undertakings, including agriculture and the lumber industry, also played a vital role in the economic development of California. While heeding the legislature's view of mining as paramount to all other undertakings, the Court was nevertheless insistent on the fact that miners were not, in their view, given by virtue of legislation an absolute license to invade and damage private property without providing just compensation.[76]

An example of the Court's limited concern for property rights of landowners was found in the 1860 case of **Smith v. Doe**,[77] where the Court adopted a doctrine of reasonableness to protect homesteaders and other settlers who laid claim to the 160-acre parcels granted by the federal government. As long as the settlers who could provide actual proof of possession, such as planted crops or buildings, the reasonableness doctrine protected landowners from unbridled trespass from miners.[78]

Still, despite the limitations set by the California Supreme Court, the primacy of miners' rights was protected. And Scheiber and McCurdy claim that even in light of the admittedly limited role taken by the Court to protect property rights, miners were virtually unencumbered in their invasions of privately-held land.[79] Small farmers could hardly afford the litigation expense of taking offending miners to court; that fact alone caused many of the landowners to allow their property rights, deemed "vested" by the Court in **Conger**, to be trounced by freewheeling miners who were, needless to say, quite pleased with the arrangement.

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76 Scheiber & McCurdy, "Eminent Domain Law," pp 120-122.

77 15 Cal. 100 (1860).

78 Scheiber & McCurdy, "Eminent Domain Law," p 121.

79 Ibid., pp 120-122.

The conflict between farmers and miners in California necessarily involved a great deal of water rights litigation. Both industries relied heavily on free-flowing streams, and it was inevitable that the same type of disputes over land use rights would soon embroil riparian doctrine as well.

Like the early eastern courts, western courts struggled to find a riparian doctrine that would serve as a uniform basis for solving any dispute that might come to bar. In the leading California case of **Irwin v. Phillips,**[80] the California Supreme Court relied again on a doctrine of "reasonable use," just as it had done in other property disputes.

Earlier, before any litigation arose, water use doctrines in the California territory (and in most of west) held that any prior appropriator of water was considered the owner of the flow of the stream. As there were abundant resources in the west early on, few disputed this doctrine.[81]

When California was granted statehood in 1850, however, law was established by means of both court litigation and legislation that adopted the riparian systems of the early eastern courts and the English common law: the water was considered a public good. This establishment of law, however, did not completely erase the doctrine of prior appropriation, and just as was the case in the east, conflicts arose as to whether the courts should respect the doctrine of prior appropriation or the newer system of riparianism. Wiel explains that here the Court invented the system for resolving disputes known as *disseisin*:

> "The doctrine of disseisin refers to adverse trespassers between themselves upon a third person's outstanding title, according to which the charge of trespass cannot be asserted by either of them until the true owner himself

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80 5 Cal. 140 (1855).

81 Wiel, Samuel C. (1912). "Public Policy in Western Water Decisions," *California Law Review* (1), p 11.

> asserts it; strangers to the true owner will not be heard to raise it. Between themselves alone this doctrine recognized a 'Possessory Right' in the first possessor, subject to the paramount title of the third person. Priority of appropriation was held to be common law under this doctrine, since all the people were disseisors of the United States (it being all Federal domain and the United States taking no action in the matter), and between disseisors the first has a better standing than a second one. The possessory right of the first appropriator was declared to be a right against the whole world 'except the government,' and the term 'possessory right' came into wide use."[82]

Based on this premise, the courts enunciated in **Irwin** and cases immediately following the several circumstances under which water rights were subject to taking and when they were protected or subject to just compensation upon expropriation.[83]

Disseisin, however, was short-lived in California. Massive new mining efforts and the advent of mining technology based on free-flowing streams demanded that a more definitive statement be made on the issue of water rights appropriation and riparianism. Aside from more typical disputes over appropriation and other water use eminent domain conflicts, new hydraulic mining techniques produced tons of debris which washed down the streams and aggravated downstream property owners. In the cases of **St. Helena Water Co. v. Forbes,**[84] **Lux v. Haggin,**[85] and the **Debris** cases,[86] the Court moved forward cases to balance the claims of appropriators and downstream riparian owners. In

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[82] Ibid., pp 12-13.

[83] Scheiber & McCurdy, pp 122-123.

[84] 62 Cal. 182 (1882).

[85] 69 Cal. 255.

[86] Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753, 756, 774 (1884); People v. Gold Run Ditch and Mining Co., 66 Cal. 138, 4 Pac. 1152 (1884).

See Wiel (1936). "Fifty Years of Water Law," *Harvard Law Review* 50 pp 252-304 at 254-259, for an extensive discussion of those cases and of water use and riparian doctrines as they related to the geographical conditions in the west.

St. Helena the Court defended riparian rights against upstream appropriators by holding that the riparian owners were entitled to "enjoy the flow" of streams without fearing the upstream activities of other owners.[87] Two years later, in **Lux**, the Court, while upholding traditional riparian rights, nevertheless had its eye on more instrumental rationales in deciding that case. It held that since irrigation for agriculture was a public use, the legislature had at its disposal section 1238 of the California Code, which dictated the situations under which the state could expropriate private property for various efforts that depended on flowing streams (docks, chutes, ferries, etc.). Thus the court stayed the hand of harmful upstream appropriators, especially miners, and at the same time gave the state the power to take property for agricultural purposes for the "public good." The **Lux** decision is largely seen as giving the legislature broad discretion in formulating standards for defining public use, and, similar to earlier instances in eastern courts, the California legislature required just compensation to prevent what might amount to arbitrariness on the part of expropriators. And in the **Debris** cases, the Court once again stood squarely on the side of vested riparian rights, holding that the huge quantities of debris that often ruined downstream farmland and homes amounted to a taking of property and could be enjoined.[88]

In response to **Lux**, the legislature of 1887 passed the Wright Act, which set up water districts to manage water rights appropriations. The Act gave district officials eminent domain power. While several property owners opposed the Act on the grounds that it granted the officials to expropriate property for private purposes, both state and

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87 Scheiber & McCurdy, p 124.

88 Ibid., pp 124-126
Wiel, "Fifty Years of Water Law," pp 254-257.

federal courts held that the takings that might occur under the Act were done in the public interest.[89]

The U.S. Supreme Court upheld this rationale in **Clark v. Nash,**[90] a 1904 Utah case where one individual sued for the right to effectively "take" his neighbor's property so he could run an irrigation stream across it. The Court validated the individual's claim, holding that the irrigation constituted a public use under accepted eminent domain doctrines of that time. The Court held that it was up to state courts and legislatures to decide whether any given taking might fit into that state's criteria of what constituted a public use.

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89 Scheiber & McCurdy, p 126.

90 Clark v. Nash; see note 66.

SUMMARY

The Framers of the Constitution sought to protect the property rights of citizens from arbitrary takings by government. With the capricious property takings of the British Crown still fresh in their minds, they drafted a Constitution that purported to make such takings a thing of the past. However, later court adjudication and statutory law reneged on those efforts.

In the nineteenth century, enthusiastic efforts were underway in the new eastern states to rapidly and efficiently develop the resources of the American frontier. The advent of such enterprises as mills and railroads, as well as a supportive infrastructure, gave rise to an increasing number of disputes over state takings power and the vested rights of property owners. Soon the dispute centered around the concept of public use, that is, the justifications government or private enterprises who were granted expropriating power used in confiscating private property. Courts began using public use doctrine, both in general eminent domain cases and in riparian disputes, to justify the devolution of eminent domain power to private concerns, especially grist mills and railroads. These undertakings were held to be affected with a purpose that benefitted the community as a whole. Soon courts were authorizing the takings of property without any reasonable requirement for just compensation. Large corporations were able, through a variety of legal or political loopholes, to obtain virtually any land they wanted at a fraction of the property's real market value. The courts not only allowed such practices; in some cases they encouraged it.

Some historians claim that the jurisprudence of the western frontier and new western states was original and different from established American law. However, examination of eminent domain law will reveal that in this area at least, western states legislatures and courts followed the lead set by their eastern counterparts. Against the

backdrop of rapid development of the frontier, especially with regards to mining and agriculture, the law validated property takings similar to those in eastern courts. Railroads were granted expropriations charters, and they and other large corporations (especially mining companies) found the courts ready and willing to grant to private corporations affected with public use a free rein in taking private property, again without strict just compensation requirements. While some later laws in a few states began narrowing eminent domain reasoning, large privately-owned undertakings in general enjoyed liberal court decisions that sent them on a takings rampage that left many small landowners bereft of their rights. In California, disputes between miners and agriculturalists led to intense scrutiny by the California Supreme Court over the claim by that state's legislature of the supremacy of miners' rights. While the Court in some cases established legal doctrine to leash invading miners, in the end, miners' rights to invade farmland and destroy the landowners' property were never in any real danger. In the area of riparian doctrine, courts moved from the doctrine of *disseisin*, closely resembling prior appropriation, to upholding "traditional" riparian rights. However, the courts, in explaining this reasoning, still had their eye on instrumentalist rationales that would further the cause of agricultural development of California. Then, with the passage of the Wright Act of 1887, water districts were formed and district officials were given eminent domain power. The Act was opposed by many California property owners, as they rightly claimed that the officials were licensed to take property for private purposes.

Western takings jurisprudence culminated when the Supreme Court upheld this rationale in the 1904 case of **Clark v. Nash**. Here the Court approved of the public use doctrine and declared that private property could be expropriated for private use if that use was deemed necessary for community benefit by state and municipal officials.

CONCLUSION

While it may be easy for us retrospectively to understand the mindset of the settlers of nineteenth-century America, especially with regards to their desires for economic development, that does no erase the fact that property rights in early America were largely ignored. Locke and other social constructionists saw the right to hold and develop property as a fundamental liberty, equal to other more personal liberties such as religion and expression. Further, the Framers of the Constitution had this in mind when they wrote the Fifth Amendment guarantee of just compensation.

Unfortunately for property owners in the nineteenth century, the courts and legislatures apparently became so engrossed in furthering the cause of settlement and development that those guarantees were shoved aside, ignored. Courts even went so far as to subsidize private enterprises such as railroads by granting them practically limitless powers of eminent domain. Given that any corporation acts in the interest of profit margins, it is remarkable that the Courts did not see or care to see the possible abuses that might take place, or the needless suffering of property owners whose rights were ignored by other, more powerful citizens whose property rights should seem to us to be no greater than the any other's.

What, then, should have been (or should be) the Court's role in fashioning eminent domain doctrines in these disputes? Other liberties, such as that of religion, are given equal protection by the Constitution. Under the Constitution, a Methodist cannot constitutionally receive any better treatment by the law than a Catholic. Why then, should one citizen's property receive preferential treatment over another's?

I would argue that the Supreme Court of the United States should exert as much energy protecting rights of property as it has done protecting rights of personal liberty. A Court that is consistently activist will look out not only for personal rights, but also

for property rights. The blatant arbitrariness of nineteenth-century jurisprudence would then become no more than a well-learned history lesson.

A CASE FOR JUDICIAL ACTIVISM IN PROPERTY RIGHTS CASES

Eminent domain law and riparian doctrines continued to evolve nationwide. Besides the cases mentioned here, there has been endless litigation in American courts as to the conditions under which any entity, public or private, might be empowered to take the private property of a citizen. Indeed the dispute may continue as long as vested property rights are not held in the same light as individual rights.

Every since **Lochner v. New York** and later in **Griswold v. Connecticut**, the Court has come under intense scrutiny for involving itself with "substantive" matters; that is, matters that may be seen by many to not be covered by the Due Process Clause of the Fourteenth Amendment. There are those who claim that a narrow interpretation of the Constitution demands that Due Process refers to "process" only, and that matters of substance are best left to the whims of the majority. A vast and impressive array of books have been written on this subject. Yet my purpose here is to only briefly justify an activist judiciary in favor of individual liberties but not only as they pertain to matters of privacy or personhood. My thesis, at least for purposes of this paper, will be to explain why activist courts, despite successfully defending personal rights, have largely neglected property rights and validated unfettered takings by government and large industry.

When looking at the facts as they pertain to the takings of early American land and especially to the disputes in the early west, many are immediately impressed with the blatant unfairness evident in the various technical and sometimes nonsensical doctrines that approved the destruction of vested property rights. Meanwhile many may agree with

the states in those instances, saying that the need for rapid development during that period justified whatever unfairness may have resulted.

But there is more at stake here than simply circumstances and exigencies relevant to the time frame under question. Even one who wishes to interpret the Constitution narrowly cannot deny that the Framers of that document obviously had arbitrary takings of property in mind when they wrote the Fifth Amendment.[91] In light of the often vague and contradictory nature of the Constitution, it is evident that by clearly enunciating the takings clause of the Fifth Amendment that they intended to make their opposition to arbitrary government action clear.

Contemporary constitutional scholars who embrace the theory of Original Intent claim that the value judgments of the Framers leaned heavily toward democratic theory leaving matters of morality and justice up to the majority. But in doing so, those same scholars are guilty of infusing their own morals and values into the Constitution: precisely what they so vehemently oppose in judicial activism. For the Constitution does not just protect the rights of the majority in the name of democracy. Many Framers, especially Thomas Jefferson and James Madison, knew the tendencies of purely democratic governments to ignore the minority, and therefore became outspoken advocates of individual liberties. Such was the rationale behind the Bill of Rights. We are humans

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91 Of course, the question becomes then whether the Fourteenth Amendment incorporates the Bill of Rights, making them applicable to the states. Raoul Berger gives an impressive and convincing argument (through elaborate documentation of the history drafting of that amendment) to prove that such is not the case in his treatise *Government by Judiciary.* Others maintain that while the Fourteenth Amendment may not apply to the states "jot-for-jot," the underlying fundamental values represented in the Bill of Rights is indeed applicable to the states, thus protecting individual liberties from a majoritarian tyranny. Invoking the Fourteenth Amendment becomes a kind of shorthand for saying that the states must give the same deference to the rights enumerated in the Bill of Rights as the federal government.

before we are Americans, those ten amendments proclaim, and above all, government must respect the human rights and dignities that modern Americans claim in everyday life.

The fallacy of majoritarianism can be seen all around us. When government passes a law that is offensive, or when a police force unfairly and perhaps illegally violates our property and privacy, one question becomes universal to all Americans: "What about my rights?" We may herald the advantages of a democratic system, of popularly-elected representatives, but Americans also hold their *rights*, those privileges necessary for the pursuit of life, liberty, property, and happiness, as more precious than anything else in matters of citizenship in the United States. A moment's reflection will reveal that every American is a minority in some sense. Women, blacks, Jews, non-Mormons in Utah, small businessmen; we could all locate our place in one minority or another, and in light of that fact, one aspect of American life remains constant: we all demand that even in the face of majoritarian opposition, our rights be held in the highest esteem.

Until the advent of what has become known as "Reagan's Justice," the Supreme Court of the United States made substantial headway in providing for human rights. While we may not agree with the reasoning used in **Roe v. Wade** and other controversial cases regarding matters of personhood, we can rejoice in their results. Because the judicial activism prevalent in that jurisprudence gave the individual and his rights the benefit of the doubt. While Original Intent purports to adhere to the value judgments of the Framers, it does so only selectively. There is more to the Constitution than simply representative government. The Framers were careful to draft a Constitution that chartered a very limited government. The Bill of Rights, the writings of Locke and Jefferson: these are ignored by constitutional interpretavists. What's more, we can see through the evolution of human thought and activity that there are more rights to be protected than even Locke and Jefferson imagined. The great influx of immigrants to this

country, the myriad ethnic and religious groups, all serve to make this country the most diverse in the world. We have come to recognize that just because a group or individual is different from ourselves, that does not in any way make him less of a human or American citizen. To protect the diversity of American culture, we must look beyond merely the plan for government established by the Constitution. Because it also, and more importantly, accords respect for individual liberties and justice. This caveat stands deeply at odds with the view that we must only make policy through legislatures, not through the courts. The Supreme Court is the ultimate arbiter of the Constitution, and it is only through unbiased, disinterested adjudication that we can review any legislation as to its constitutionality; that is, as whether or not it gives adequate deference to the individual first.

However, modern judicial activists are also guilty of selective application of their theories. While they abhor the violation of individual liberties such as the right to privacy, they have been largely uninterested in their protection of the equally important right to property. The free pursuit of wealth is a crucial tenet of Lockean theory, and all of the Framers, having escaped from the economic tyranny of the British, were eager businessmen who placed a great deal of importance on the ability to create higher standards of living through a minimum of government interference. Jefferson, himself a large landowner and farmer, was an especially ardent spokesman for laissez-faire economic policy. He and others saw a free and vital economy as the new nation's lifeblood, as that activity which would make America great. And yet, increasingly, government has found itself deeply muddled in economic affairs that are best left to the marketplace.

But most importantly, the Supreme Court, whether largely liberal or conservative, has validated the taking of private property by government or for the "public purpose"

through some of the most innovative ways imaginable. The subsidization of industry, like that which occurred to the benefit of the railroads in the nineteenth century, continues, with hapless property owners unable or unwilling to respond because of huge litigation costs coupled with the knowledge that ultimately, the high court will probably side with the government expropriation. The Court has held in several cases that a person cannot, by order of local zoning ordinance, use his property to make a profit through legitimate enterprise. And while exciting works are being done by a kind of "new breed" of constitutional scholar[92] who argue in favor of property rights, the Court continues to approve takings in various forms. Perhaps it is because the Court fears a backlash similar to that which occurred during the **Lochner** era, or perhaps it is because in its enthusiasm to protect individual rights like privacy, it has simply forgotten that property rights are also fundamental to the American scheme of justice.

Regardless, few constitutional scholars or Supreme Court Justices, liberal or conservative, non-interpretavist or strict constructionist, can claim to have applied consistent standards to the interpretation of the Constitution. To the extent that the judiciary can continuously find new, albeit principled and responsible reasons to uphold the dignity of the citizen in matters of personal rights, so must the Court recognize the

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92 Especially important is Richard Epstein, a professor of law at the University of Chicago, whose book *Takings* is increasingly being recognized as perhaps the most important contribution to the field of property and tort law in the past few years. In his book, Epstein outlines why courts should begin giving greater deference to property rights, and the various ways that the courts have validated the uncompensated takings of private property by government. To a lesser extent, Stephen Macedo's *The New Right V. The Constitution* makes a similar argument. But where Epstein's argument is based on intellectually sound economic and legal theory, Macedo's work is more of a rhetorical tract that lambastes ex-Judge Robert Bork and his contemporaries who carry the banner of Original Intent. Macedo argues adamantly for greater Supreme Court involvement in protecting property rights to the extent it has done so with individual rights.

importance of the right to hold property and create wealth. The key here is consistency. A free America should occur not just in certain areas which the Court deems fundamental. A broader judicial perspective, one that incorporates *all* rights basic to a free and responsible citizenry, will best account for a constantly changing American people.

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