

# The Framers' Understanding of "Property"

*Paul J. Larkin, Jr.*

## KEY TAKEAWAYS

The Framers of the U.S. Constitution put a high value on an individual's right to own property.

They believed that the right to property was both a guarantee of people's legal rights and essential to liberty.

The U.S. Supreme Court has failed to give the right to property the same legal weight in modern times and needs to be reminded of its constitutional significance.

The Framers' understanding of the concept of "property" is an evergreen subject, but it is of particular importance now. For the past few years, some Members of Congress and presidential candidates have lectured us about the alleged virtues of "socialism" or "democratic socialism,"<sup>1</sup> despite the fact that we have a living example in Venezuela of what socialism tends to produce: no power, no food, no water, military rule, and people forced to buy used toilet paper. Perhaps the only redeeming virtue of the lectures that we have received, the ones that have talked about the "garbage" that is our current American economic system,<sup>2</sup> is that the speakers are finally being honest about their intent and their design.

The intent of this *Legal Memorandum* is to add to the ongoing discussion by examining how the Framers of our Constitution viewed the concept of property

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and then assessing where we stand today. Specifically, we need to answer three questions:

- How did the Framers view private property?
- Where are we today?
- Since we are not in the position that the Framers intended, how do we remedy that problem?

## How Did the Framers View Private Property?

How did the colonists view private property?<sup>3</sup> In the 18th century, most Americans owned and lived off their own land.<sup>4</sup> Agriculture was the principal industry. In fact, the opportunity to acquire land and live off of it was the main reason why colonists left England as well as other nations to come to the United States. The land here was ample, and it was available in fee simple, the type of land entitlement that gave the colonists complete and full ownership of the property, unlike what they could have had in England where all the fee simple title was in the crown and they would at best live at the sufferance of the king and, later, parliament. The opportunity to come and live off the land and in vast amounts was a tremendous attraction and a great value to the people who came here.

The best-known forms of property were, not surprisingly, personalty and realty, as well as incorporeal or future interests such as easements, remainders, and reversions.<sup>5</sup> But it was not limited to those sorts of traditional forms that students learn about in the early part of a course on property law in their first year of law school. Some colonists worked as self-employed artisans or shop owners, writers or inventors, and merchants or financiers in a thriving colonial economy.<sup>6</sup> The shortage of hard currency in the colonies, in fact, forced merchants to rely on commercial paper in order to engage in trade. The result was that early Americans understood the value of items such as book credit, promissory notes, bills of exchange, mortgages, securities, loan certificates, maritime insurance, monetized public debt, and the *Lex Moratoria* (or law merchant).<sup>7</sup> Accordingly, the Founders' generation understood that property included the right to possess, use, enjoy, and dispose of land, commodities, currency, or their equivalents.<sup>8</sup>

Our Founding generation also believed that "property" embraced goods earned by the sweat of one's brow. The term included what "men have in their persons," which meant the right to the fruits of one's labors.<sup>9</sup> The

prominent English jurist Sir William Blackstone, whose work was well known by all the Framers of our Constitution,<sup>10</sup> concluded, for example, that “[e]very man might use what trade he pleased.”<sup>11</sup> The English philosopher John Locke, whose works were equally well known and influential, argued that every man had a property right in whatever he acquired or produced through his own labor.<sup>12</sup> Adam Smith, as well as Judge and Lord Edward Coke, believed that the right to pursue a lawful occupation was an essential element of the right to property,<sup>13</sup> which could explain why English law disfavored monopolies.<sup>14</sup>

What is more, the Founders believed in natural law and saw it, as well as the unwritten customs of the people, as the source of law’s legitimacy and a feature of “the shared heritage of the English” people.<sup>15</sup> The result was that, as one contemporary scholar described it, “Liberty itself was property possessed.”<sup>16</sup> Knowledgeable about “William Blackstone’s postulate” that every Englishman had the absolute right to “security, liberty, and property,”<sup>17</sup> which they considered part of their heritage as Englishmen, the Framers’ generation believed that the purpose of the law was to protect those guarantees,<sup>18</sup> which “included the ability to acquire and own property.”<sup>19</sup>

The Founders’ generation saw the protection of property as vital to civil society.<sup>20</sup> For example, the Virginia Declaration of Rights, written by George Mason a month before Thomas Jefferson penned the Declaration of Independence, made that point quite clearly. It provided that:

All men have certain inherent natural rights of which they cannot, by any compact, deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

That belief (among others) explains why the American Revolution was not comparable to the French or Russian Revolutions, ones in which “cake-eaters”<sup>21</sup> or the “proletariat” sought to “jettison a privileged, class-based system in favor of a new legal, social, and economic order.”<sup>22</sup> Nor was the Revolution “a capitalist junta” that “sought to adopt ‘rule by a leisured patriciate.’”<sup>23</sup> Finally, in contrast to the 1989 toppling of the Berlin Wall, “the Revolution did not signify the end of a long period in which the government had denied the public any opportunity to enjoy liberty and private property.”<sup>24</sup> On the contrary, “the Colonists had enjoyed both under English law and believed that English constitutional government was the freest in the world.”<sup>25</sup>

The American Revolution was “an ideological, constitutional, political struggle and not primarily a controversy between social groups undertaken to force changes in the organization of the society or the economy.”<sup>26</sup> As the author has written elsewhere:

There was no economic class warfare in the Colonies. Land was plentiful, and labor, especially in the form of skilled artisans, was scarce, allowing every free adult male an opportunity to succeed financially. Anyone who wanted his own land could find it in the western portions of the Colonies or in the unsettled territories across the Appalachian Mountains. Plus, everyone, whether landowners, merchants, or artisans, recognized the economic and social value, including independence, that property ownership bestowed. Indeed, property was “the one great unifying value” existing throughout the colonies. Finally, the leaders of the Revolution did not impose their own radical economic theories on an unwilling populace. “American political leaders did not develop new ideas about private property. They merely demanded that the concept of property long since canonized by the English Whigs also apply in the colonies.”<sup>27</sup>

Consider what James Madison, the author of our Constitution, thought about property. To him, the term included not only realty and personalty, but also anything of value, including a person’s legal rights.<sup>28</sup> “Conscience is the most sacred of all property,” he wrote, “with other property depending in part on positive law, the exercise of that being a natural and inalienable right.”<sup>29</sup> “That is not a just government, nor is property secure under it,” Madison explained, “where the property which a man has in his personal safety and personal liberty is violated by arbitrary seizures of one class of [persons] for the services of the rest.”<sup>30</sup> Madison also went on to criticize a government that imposed “arbitrary restrictions, exemptions, and monopolies to deny to part of its citizens the free use of their faculties and free choice of their occupations, which not only constitute property in the general sense of the word, but are the means of acquiring property.”<sup>31</sup>

Madison explained in detail his view that property was, in his words, a human right. He made that point in a 1792 essay published by the *National Gazette*:

The term property in its particular application means that dominion which one man claims and exercises over the external things of the world, in the exclusion of every other individual. In its larger and more just meaning, it embraces everything to which a man may attach a value and has a right and which leaves everyone else like advantage. In the former sense, a man’s land or merchandise

or money is called his property. In the latter sense, a man has property in his opinions and free communication of them. He has a property of particular value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ 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>32</sup>

The Founders also believed that liberty and property were “inextricably related” and equally valuable.<sup>33</sup> Property was “the guardian of every other right,” and protection of property was “critical to the enjoyment of individual liberty”<sup>34</sup> and “central to the new American social and political order.”<sup>35</sup> Professor Gordon Wood, perhaps the dean of early American legal history, has put it this way:

Eighteenth-century Whiggism had made no rigid distinction between people and property. Property had been defined not simply as material possessions but, following Locke, as the attributes of a man’s personality that gave him a political character: “that estate or substance which a man has and possesses, exclusive of the right and power of all the world besides.” It had been thought of generally in political terms, as an individual dominion—a dominion possessed by all politically significant men, the “people” of society. Property was not set in opposition to individual rights but was of a piece with them.<sup>36</sup>

As one scholar has noted, “Anyone who studies the revolution must notice at once the attachment of all articulate Americans to property. Liberty and property was their cry, not liberty and democracy.”<sup>37</sup> That point was heard throughout the colonies before the Revolution. The twin theme of threatened liberty and property therefore recurred in hundreds of political statements made between 1764 and 1776, and the cry “liberty and property” became the motto of the revolutionary movement. In the minds of the Framers, property rights were indispensable to the success of the new enterprise, given its close association with liberty, and liberty supplied the means to collect property to obtain the rights, and the property in those rights, and the rights to property that men enjoyed.

John Adams, for example, believed that “[p]roperty must be secured or liberty cannot exist.”<sup>38</sup> Laws that threaten the security of property were, for him, subversive of the end for which men prefer society to the state of nature and so subversive of society itself. James Madison, as noted, was a particularly vocal advocate for the value of private property. Writing in

*The Federalist*, Madison stated, “Government is instituted no less for the protection of property than the persons of individuals.”<sup>39</sup> He reiterated that point at the Constitutional Convention of 1787, saying, “The primary objects of civil society are the security of property and public safety.”<sup>40</sup>

Madison did not stand alone. John Adams and Alexander Hamilton agreed with him.<sup>41</sup> Gouverneur Morris, a member of the Convention of 1787, agreed with Madison, Hamilton, and Adams. As he remarked in Philadelphia, “Life and liberty are generally said to be more valuable than property. An accurate view of the matter, however, would nevertheless prove that property is the main object of society.”<sup>42</sup> St. George Tucker, publisher of the first American analysis of Blackstone’s *Commentaries*, wrote that “[t]he rights of property must be sacred and must be protected. Otherwise, there could be no exertion of either ingenuity or industry, and consequently, nothing but extreme poverty, misery and brutal ignorance.”<sup>43</sup> Prosperity has been possible, he concluded, “only in free states where men could enjoy the fruits of their labor, art and initiative.”<sup>44</sup>

The bottom line is this: The Framers deemed property inherently valuable and critical to civil society and successful government. Stanford University Professor Jack Rakove has summarized the early Americans’ attachment to property as a commonly shared value:

For property was one of the strongest words in the Anglo-American political vocabulary. John Locke had grounded an entire theory of government and the right to resist tyranny on that concept of property, which he did in his second treatise of government. But Locke only gave philosophical rigor to a belief that already permeated Anglo-American law and politics.

For Locke, as for his American readers, the concept of property encompassed not only the objects that a person owned, but also the ability, indeed, the right to acquire them. Just as men had a right to their property, so too they held a property in their rights. Men did not merely claim their rights but also owned them, and their title to liberty was as sound as their title to the land or to the tools with which they earned their livelihood. Furthermore, property was a birthright, a legal entitlement, a material legacy that one industrious generation transmitted to another.<sup>45</sup>

## How Do We View Private Property Today?

Where are we today? The concept of property has grown over time. The concept of property originally embraced real, personal, and financial property as well as the interest that people have in the law. Those

interests are still deemed property today. We have also seen the Supreme Court of the United States add to the list of property such items as welfare benefits, academic tenure, and other items created by positive law that would have been unknown to the Framers.<sup>46</sup> Yet there is a major difference between the Framers' understanding of property and ours. The difference stems from the fact that life, liberty, and property are no longer deemed to have a common origin. The Framers believed that, like life and liberty, property was a natural right that every man possessed, not by virtue of positive law, but as a gift from God. That understanding of property has now vanished.

Today, property is seen as merely a creature of positive law. That positive law, by the way, does not include the Constitution itself, even though that document prominently uses the term "property." As the Supreme Court explained in 1972 in *Board of Regents of State Colleges v. Roth*, "[p]roperty interests, of course, are not created by the Constitution."<sup>47</sup> Perhaps the Court used the phrase "of course" as a way of trying not to explain why property interests—a term that shows up in the Fifth and Fourteenth Amendments (along with intellectual property rights protected by the Copyright and Patent Clause<sup>48</sup>)—do not have a source in the Constitution itself.

What is the result of that? The result is that the state may redefine property interests. Sometimes in the case of the pursuit of honest labor, the government can define that right almost out of existence through occupational licensing laws.<sup>49</sup> Our different contemporary understandings of property and liberty are therefore of considerable importance to public policy because constitutional law now treats them in materially different ways. The government may restrict the exercise of some liberty interests, at least to some extent and at least temporarily, as long as it has a legitimate justification, which it must prove in court.<sup>50</sup> In other cases, the government is quite limited in the regulations it can impose. In those instances, the government may restrict a liberty interest only to serve public goals of the highest order, and even then only to a limited extent and perhaps just for a limited time if at all.<sup>51</sup>

By contrast, since the New Deal, the Supreme Court has permitted the government to regulate private property for reasons and in ways that would have astonished the Framers.

- The government can prohibit individual farmers from growing wheat for their own home personal consumption;

- The government can require a person to have a license to engage in a host of occupations that do not threaten the public health, safety, or welfare; and
- The government can use its eminent domain power to transfer land, including any homes atop that land, from one person to another simply because the new owner might develop the land in a manner that allegedly might more greatly benefit the community.

Because property rights trace their source only to some positive law, the government can regulate and often nullify those interests by a different positive law for almost whatever reason the government sees fit. The result has been to devalue the constitutional status of property and to construe the Due Process Clauses in a quite one-sided, bifurcated manner.<sup>52</sup>

## How Do We Return to the Framers View of Private Property?

How do we remedy this state of affairs? We start by returning to the text of the Constitution. That text hardly compels the current dichotomy between higher-level “liberty” and lower-level “property.” On the contrary, the text places property on a par with liberty and assumes that government officials, including judges, would afford them the same respect.

That text has not changed since 1791. All that has changed is the value that the Supreme Court and the academy have placed on property. Their interpretations, however, have a relatively recent origin. Property did not lose its original understanding until the 20th century, while liberty did not begin its current ascent until the 1960s. Since then, the *haut monde* of American political, legal, and intellectual society have often felt that the Framers’ concern with the protection of property was, to quote American history scholar Edmund Morgan of Yale (who was critical of the notion), “a rather shabby thing” and that the constitutional principles for property discussed from 1776 to 1787 were invented “to hide [property] under a more attractive cloak.”<sup>53</sup>

That belief mistakenly seeks to impose 20th century redistributive economic policies on an 18th century document by denigrating any concern for property as being little more than the desire to constitutionalize protection for greed. The Framers, however, were classically educated men who knew that Western civilization had highly valued property since Roman times.

The Supreme Court should not deem itself free to ignore the Framers' interest in protecting property simply because the economy and society have materially changed over time.<sup>54</sup>

We do not follow that approach elsewhere in the law. We do not abandon the Copyright Clause's protection against plagiarism of the written word<sup>55</sup> just because the clause also protects photographs and films.<sup>56</sup> We do not abandon the Free Speech Clause's concern with prior restraints<sup>57</sup> just because that clause also reaches after-the-fact damages.<sup>58</sup> Nor do we abandon that clause's protection for political speech<sup>59</sup> just because it also includes violent video games.<sup>60</sup> We do not abandon the Fourth Amendment's protection against law enforcement officers rummaging through our homes without justification or restraint<sup>61</sup> just because the amendment now also protects against the government rummaging through our cell phones in the same manner.<sup>62</sup> And we do not abandon the Cruel and Unusual Punishment Clause's protection against hideously painful criminal sanctions<sup>63</sup> just because it also prevents the government from imposing an otherwise lawful penalty on a particular category of offenders, such as juveniles.<sup>64</sup>

In other words, it is difficult to articulate a "neutral principle" of constitutional law<sup>65</sup> that justifies disregarding the original understanding of some constitutional guarantees but not all of them.<sup>66</sup>

## Conclusion

President Donald Trump was absolutely correct when he said that this country has never been socialist and has never been infected with the ills that socialism would bring. Private property is built into the American ethic, into the American dream, into the American DNA, and is an integral component of our national charter. History reveals that the Framers venerated the right to property, both for its own sake and as a means of guaranteeing personal independence. Property was not simply realty or personalty; it was one with liberty and was a guarantee of the protection of the legal rights that people had.

The Supreme Court needs to relearn American history. The Court treats property as "a poor relation"<sup>67</sup> deserving of far less protection than life or liberty currently receive. The Framers did not see it that way. They believed that neither liberty nor property could exist without the other. That belief, moreover, was nothing new to any 18th century English subject, whether he lived in London or in Williamsburg. Anglo-American traditions, customs, and law held that property was an essential ingredient of the liberty that

the Colonists had come to enjoy from Massachusetts through Georgia and must be protected against arbitrary government interference.

The Supreme Court has forgotten the status that property had for the Framers. Reminding the Court may help lift property out of the basement to which it has been relegated by contemporary American constitutional law.

**Paul J. Larkin, Jr.**, is the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation. This *Legal Memorandum* is adapted from a speech delivered by the author on March 19, 2019, as part of a Heritage Foundation series on “Free Markets: The Ethical Economic Choice” and an article written by the author and published in the *Marquette Law Review*.

## Endnotes

1. The latter is how U.S. Senator Bernie Sanders (I-VT) and U.S. Representative Alexandria Ocasio-Cortez (D-NY) describe their philosophy. See, e.g., *That Burning Feeling: What Does Bernie Sanders's Political Revolution Hope to Accomplish?*, ECONOMIST, Feb. 29, 2020, <https://www.economist.com/united-states/2020/02/29/what-does-bernie-sanders-political-revolution-hope-to-accomplish>; *The Bernie Manifesto: How Much of a Socialist Is Sanders?*, ECONOMIST, Feb. 1, 2016, <https://www.economist.com/democracy-in-america/2016/02/01/how-much-of-a-socialist-is-sanders>; Shane Croucher, *Alexandria Ocasio-Cortez Explains Socialism During Instagram Live Stream: "It Does Not Mean Government Owns Everything,"* NEWSWEEK, June 18, 2019, <https://www.newsweek.com/ocasio-cortez-instagram-live-explains-socialism-aoc-1444534>.
2. Representative Ocasio-Cortez used that term during an interview to describe the pre-COVID status of the American economic system. See Briahna Gray, *Alexandria Ocasio Cortez and the New Left*, THE INTERCEPT, Mar. 9, 2019, <https://theintercept.com/2019/03/09/alexandria-ocasio-cortez-aoc-sxsw/>; "I'll never forget this one older woman who came to me and said, 'You know, I always voted Democrat because growing up, my dad told me that Democrats were the people that fight for the working man.' And we stopped. And the working man and woman and people is the majority of this country. So what I think we saw, was now both parties, frankly, abdicated their responsibility and it was just no one was fighting for working people who were struggling.... So when someone is talking about our core, it's like, 'Oh this is radical.' But this isn't radical, this is what we've always been. It's just that now we've strayed so far away from what has really made us powerful and just and good and equitable and productive. And so, I think all of these things sound radical compared to where we are. But where we are is not a good thing. This idea of 10 percent better from garbage shouldn't be what we settle for. It feels like moderate is not a stance, it's just an attitude toward life of like, 'meh.'"
3. See Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1, 4–7, 21–55 (2016).
4. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 16 (3d ed. 2008) ("By 1750 a largely middle-class society had emerged in colonial North America. Most of the colonists owned land, and 80 percent of the population derived their living from agriculture."); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 93 (1985) (the vast majority of Americans held "a comfortable amount of land"); EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763–89*, at 8 (4th ed. 2013) ("This widespread ownership of property is perhaps the most important single fact about the Americans of the Revolutionary period."); SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 236 (1965); EDWIN J. PERKINS, *THE ECONOMY OF COLONIAL AMERICA* 57 (2d ed. 1988) ("The size of the typical colonial farm was generous, often above 100 acres, and families consistently grew and harvested surpluses."); ALAN TAYLOR, *AMERICAN COLONIES* 311 (2001) ("Most colonists lived on farm households that produced most of their own food, fuel, and homespun cloth.").
5. See, e.g., *Wynehamer v. People*, 13 N.Y. 378, 396 (1856) ("Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.") (Opinion of Comstock, J.); 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*20–43; Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 333–34 (1991); Eric T. Freyfogle, Book Review, *Land Use and the Study of Early American History*, 94 YALE L.J. 717, 718–29 (1985) (describing the transition in 16th to 17th century New England from an almost communal understanding of property to an individual-ownership, commodity theory).
6. See, e.g., STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 24–25 (2011) ("Patents and copyrights were established features of the English legal system long before the independence of the United States.... After the Revolution all the states but Delaware enacted general copyright laws protecting all applicants who met certain minimal criteria.... Patents remained discretionary a bit longer.... [S]tate legislatures granted or denied patents on a case-by-case basis, to one applicant at a time."); WILLIAM B. SCOTT, *IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY* 14 (1977) ("[I]n the large seaports most men ran their own shops and owned their own homes.").
7. See, e.g., STUART BANNER, *ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860* (2002); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 41 (3d ed. 2005).
8. See generally FRIEDMAN, *supra* note 7, at 42, 171.
9. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 27, at 15 (3d J.W. Gough ed. 1966) (1689) ("[E]very man has a property in his own person; this nobody has any right to but himself. The labour 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 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."); see PASCHAL LARKIN, *PROPERTY IN THE EIGHTEENTH CENTURY* 1–2 (1930).
10. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999).
11. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*3, \*428; see also JOHN LILBURNE ET AL., *AN AGREEMENT OF THE FREE PEOPLE OF ENGLAND* art. XVIII (1649) ("That it shall not be in their power to continue to make any Laws to abridge or hinder any person or persons, from trading or merchandising into any place beyond the Seas, where any of this Nation are free to Trade.").
12. See *supra* note 9.
13. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* bk. 1, ch. 10, pt. 2 (Modern Library ed. 1937) (1776) ("The patrimony of a... man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity of his hands; and to hinder him

from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour is a plain violation of [his] most sacred property.”); see also 2 CATO’S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 245 (1995) (1720) [hereinafter CATO’S LETTERS] (“By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, as far as by it he hurts not the Society, or any Member of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys. The Fruits of a Man’s honest Industry are the just Rewards of it, ascertained to him by natural and eternal Equity, as is his Title to use them in the manner which he thinks fit: And thus, with the above Limitations, every Man is sole Lord and Arbitrator of his own private Actions and Property.”); LILBURNE ET AL., *supra* note 11, at art. XVIII (“That it shall not be in their power to continue to make any Laws to abridge or hinder any person or persons, from trading or merchandising into any place beyond the Seas, where any of this Nation are free to trade.”).

14. See *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614); *Darcy v. Allen*, 77 Eng. Rep. 1260 (The Case of Monopolies), (K.B. 1603); see also, e.g., *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 761 (1884) (Bradley, J., concurring) (“I hold it to be an incontrovertible proposition of both English and American public law, that all mere monopolies are odious and against common right.”) (emphasis in original); JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* 143–45 (Francis Gregor trans., Robert & Clarke Co. 1874) (1545); 4 EDWARD HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 344 & n.6 (3d ed. 1945); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL’Y 983, 989–1008, 1055 (2013); see Larkin, *supra* note 3, at 21 (“In language foreshadowing the Fifth Amendment’s Due Process Clause, Coke emphasized that a man’s trade is his life, and ‘therefore the monopolist that taketh away a man’s trade, taketh away his life.’ As Coke put it, ‘Generally all monopolies are against this great Charter’—viz., Magna Carta—‘because they are against the liberty and freedom of the Subject, and against the Law of the Land.’”) (quoting Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 608 (2009), which in turn quoted EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES* 181 (Lawbook Exchange 2002) (1644))).
15. Larkin, *supra* note 3, at 22.
16. JOHN PHILIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 72 (1988) (footnote omitted).
17. See 1 BLACKSTONE, *supra* note 11, at \*9, \*11, \*124–26, \*134.
18. See, e.g., BERNARD BAILYN, *FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE* 69 (1990); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 29 (1990); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 3 (1996); Larkin, *supra* note 3, at 23–24.
19. Larkin, *supra* note 3, at 24.
20. See, e.g., Ely, *supra* note 4, at 10–27; RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 17 (1985) (“The classical liberal tradition of the founding generation prized the protection of liberty and private property under a system of limited government.”); ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTES WITH AMERICA* 29 (1775) (“The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.”); SCOTT, *supra* note 6, at 2 (“In time Americans came to believe that all men should own land, and that widespread ownership of land was characteristic of a virtuous society.”); see generally David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL. HIST. 464, 475–77 (1993) (“Property was clearly an important concept in America and was well discussed by many individuals. James Madison described property broadly to include even one’s opinions and beliefs. He argued that property as well as personal rights are an ‘essential object of the laws’ necessary to the promotion of free government. Alexander Hamilton stated that the preservation of private property was essential to liberty and republican government. Thomas Jefferson depicted property as a ‘natural right’ of mankind and linked ownership to public virtue and republican government. John Adams described a proper balance of property in society as important to maintaining republican government and connected property ownership to moral worth. Thomas Paine felt that the state was instituted to protect the natural right of property, and Daniel Webster would later link property to virtue, freedom, and power. Numerous Anti-Federalists described a society as free when it protected property rights or equalized property distributions. For example, Samuel Bryan, in his ‘Letters of Centinel,’ argued that a ‘republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divided.’ Hence, many colonial American readings of Locke’s theory of property also noted the connection between personal political liberty and property ownership, and agreed with Locke that property rights deserved a somewhat absolute protection against government regulation. Additionally, others followed Harrington and articulated the importance of property divisions in preserving state republican governments. Still others cited Blackstone to defend more absolutist conceptions of property. Clearly there were many early Americans who described property as the end of society, as absolute, as linked to other important political rights, or as natural. Conversely, threats to property were considered destructive to freedom and republican government.”) (footnotes omitted).
21. Remember Marie Antoinette’s mistaken belief about the cuisine available to most people in France.
22. Larkin, *supra* note 3, at 23; see BAILYN, *supra* note 18, at 81 (“The American Revolution was not the result of intolerable social or economic conditions. The colonies were prosperous communities whose economic condition, recovering from the dislocations of the Seven Years’ War, improved during the years when the controversy with England rose in intensity. Nor was the Revolution deliberately undertaken to recast the social order, to destroy the last remnants of the *ancient régime* such as they were in America.”); FRIEDMAN, *supra* note 7, at 6 (“[U]nlike the Russian Revolution, or the French Revolution, there was no total social upheaval, at the end of the war.”); MICHAEL P. ZUCKERT, *LAUNCHING LIBERALISM, ON LOCKEAN POLITICAL PHILOSOPHY* 288–89 (2002).
23. Larkin, *supra* note 3, at 23 (quoting BAILYN, *supra* note 18, at xii).

24. *Id.* at 23.
25. *Id.* (citing WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS* 150 (Expanded ed., Rita & Robert Kimber trans., Rowman & Littlefield 2001) (1973)) [hereafter WILLI PAUL ADAMS].
26. *Id.* at 24 (quoting BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 67-68 (enlarged ed. 1992
27. *Id.* at 25 (footnotes omitted).
28. See Laura S. Underkuffler, *On Property: An Essay*, 100 *YALE L.J.* 127, 136 (1990).
29. JAMES MADISON: *WRITINGS* 516 (1999) (quoting *NATIONAL GAZETTE*, Mar. 29, 1792).
30. *Id.*
31. *Id.*
32. MADISON, *supra* note 29, at 515–17 (quoting *NATIONAL GAZETTE*, Mar. 29, 1792); see James A. Dorn, *Judicial Protection of Economic Liberties, in ECONOMIC LIBERTIES AND THE JUDICIARY*, 3–4 (James A. Dorn & Henry G. Manne eds., 1987); see also, e.g., WILLI PAUL ADAMS, *supra* note 25, at 192 (the Founding fathers saw “the acquisition of property” and “the pursuit of happiness” as synonyms); *id.* at 188 (“The twin theme of threatened liberty and property therefore recurred in hundreds of public statements made between 1764 and 1776.”); *id.* at 194 (“The first state constitutions thus clearly emphasized the individual’s claim to legal protection of his property. The self-imposed limits on sovereign power that the constitutions articulated derived from a desire to guarantee not only freedom of expression and of religious exercise but also the freedom to acquire property.”); SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1768) (“property” means, inter alia, “3. Right of possession... 5. Thing possessed.”); LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 252 (1999) (describing Madison’s belief that property is “a human right”); Schultz, *supra* note 20, at 475 (“James Madison described property broadly to include even one’s opinions and beliefs.”).
33. Levy, *supra* note 32, at 251; see also STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* 74–75 (1990) (“In Revolutionary political thought the term ‘property’ denoted a relationship between an individual and some object, not the object itself. That is, X becomes my property—or, I have property in X—only if I alone control the disposal of X. This control over the disposal of X can be called my liberty (or right or power) to dispose of X as I please, and in this sense liberty itself is involved in the definition of property. The right of disposal constitutes the defining condition of property and, indeed, the ‘substance of liberty.’”). See generally Larkin, *supra* note 3, at 36–37.
34. ELY, *supra* note 4, at 26; Lee, *supra* note 20, at 29.
35. WILLI PAUL ADAMS, *supra* note 25, at 215 n.103; see also, e.g., BERNARD H. SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION* 15 (1997); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far”*, 49 *AM. U. L. REV.* 181, 195–98 (1999); Schultz, *supra* note 20, at 475–78 (stating that Madison, John Adams, Jefferson, Alexander Hamilton, and Gouverneur Morris held that view).
36. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 219 (1998).
37. EDMUND S. MORGAN, *THE CHALLENGE OF THE AMERICAN REVOLUTION* 54–55 (1976); see also, e.g., ELY, *supra* note 4, at 25 (“Significantly, the cry ‘Liberty and Property’ became the motto of the revolutionary movement.”); LEVY, *supra* note 32, at 252.
38. 6 JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 280 (Charles Francis Adams ed., 1851); *id.* at 8–9 (“Property is surely a right of mankind as really as liberty... The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”); see WILLI PAUL ADAMS, *supra* note 25, at 154 (referring to the Massachusetts Constitution of 1780: “[i]n the clause that guaranteed an independent judiciary Adams used the classical Lockean triad in the singular version of ‘life, liberty, property.’”).
39. *THE FEDERALIST* No. 54, at 336 (James Madison) (Clinton Rossiter ed., 1961); see *id.* No. 10, at 73 (James Madison) (“The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.”).
40. 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 147 (James Madison) (Max Farrand ed., 1966) [hereinafter 1 FARRAND]; see also Madison, *supra* note 29, at 515 (“Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”) (quoting *NATIONAL GAZETTE*, Mar. 29, 1792) (emphasis in original).
41. See *supra* note 35; 1 FARRAND, *supra* note 40, at 302 (Alexander Hamilton) (“[The] one great obj[ect] of Gov[ernment] is personal protection and the security of Property.”).
42. 1 FARRAND, *supra* note 40, at 533.
43. ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES* 41 (Liberty Fund, Inc. 1999) (1803).
44. *Id.* In that regard, The Heritage Foundation’s annual analysis of economic and political freedom shows that we are continuing on that same path. Where there is economic freedom, there will be political freedom. Where you lack the one, you will see an absence of the other.
45. JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 78–79 (2010).

46. See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9–12 (1978) (ruling that public utility service is property); *Mathews v. Eldridge*, 424 U.S. 319, 333–34 (1976) (same, disability benefits); *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975) (same, public school attendance); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (ruling that a state university professor may have a “property” interest in his job based on “an unwritten ‘common law’ in a particular university that certain employees shall have the equivalent of tenure”); *Bell v. Burson*, 402 U.S. 535 (1971) (same, a state-issued driver’s license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (same, welfare benefits); *Slochower v. Board of Educ.*, 350 U.S. 551 (1956) (same, tenure at a state college). For the seminal argument in favor of treating government benefits as “property,” see Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).
47. 408 U.S. 564, 577 (1972).
48. U.S. CONST. art. I, § 8, cl. 8 (“[The Congress shall have Power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).
49. See Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 *HARV. J.L. & PUB. POL’Y* 209 (2016).
50. Larkin, *supra* note 3, at 11.
51. *Id.* at 11–12.
52. *Id.* at 12–13.
53. MORGAN, *supra* note 37, at 55. See generally Larkin, *supra* note 3, at 13.
54. Larkin, *supra* note 3, at 13–14.
55. See, e.g., the Statute of Anne, 8 Ann. c. 21 (Copyright Act 1709); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657 (1834).
56. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884).
57. See, e.g., *Near v. Minn. ex rel. Olson*, 283 U.S. 697 (1931).
58. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
59. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).
60. See, e.g., *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011).
61. See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886); *Entick v. Carrington*, 19 *Howell St. Tr.* 1029 (1765); *Wilkes v. Wood*, 19 *Howell St. Tr.* 1153, 1167 (1763); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 *MINN. L. REV.* 349, 450–51 & n.168 (1974) (collecting sources discussing the Fourth Amendment’s history).
62. See *Riley v. California*, 134 S. Ct. 2473 (2014).
63. See, e.g., *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878).
64. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005).
65. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).
66. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189, 1244 (1987) (“I know of no constitutional case in which the Supreme Court has held that, although the framers’ intent would require one result, another must be upheld on some other ground.”); Henry P. Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. REV.* 353, 375 n.132 (1981) (“Reliance upon original intent occurs even in opinions whose actual holdings seem wholly at variance with original intent.”). But see Fallon, *supra*, at 1255 n.256 (suggesting that *Reynolds v. Sims*, 377 U.S. 533 (1964), which adopted the “one person, one vote” rule, might be an exception but was unacknowledged as being one by the Supreme Court).
67. *Dolan v. Tigard*, 512 U.S. 374, 392 (1994).