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AMERICAN LAW



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PROPERTY, as conceptualized in American law, consists of rights regarding things that are binding upon others and that are endorsed by the state. The objects of property include tangibles, such as land and automobiles; intangible claims to wealth, such as corporate stock; and inventions and literary works, now termed "intellectual property." The most important property rights are those of use, dominion, and alienation. Use rights permit the owner to employ the resource for economic benefit or personal satisfaction. Dominion rights permit the owner to exclude others. Alienation rights permit transfer of the owner's use and dominion rights by sale, gift, or testamentary disposition. This view, that property consists of a bundle of rights with respect to others, differs sharply from the everyday notion that property consists of things that one owns.

In general, American law treats rights in most valuable resources as property. It presumes that property is held by individuals, as opposed to family or communal groups or the state. Its preference for practical finality over theoretical perfection is manifest in the concept of adverse possession, by

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which a person occupying land without permission for a modest number of years acquires a fresh title that is superior to old claims of ownership. The American legal concept of property has no fixed meaning or clear-cut structure. It has developed from a multitude of European and indigenous sources, the most important being the English *common law. As the notions of utility and *justice that have shaped it continue to evolve, the concept of property evolves as well.

Pre-Colonial Sources. The sources of American property rights include the classical Roman law (c. A.D. 1–250) which recognized ownership (*proprietas*) of tangible things. Roman occupation of Britain (55 B.C.–c. A.D. 410) was terminated by Angles, Saxons, and Jutes, who came from the Danish peninsula and north Germany. Chieftains of these riding bands granted tracts of land to their followers. As the Anglo-Saxon concept of kingship developed, this customary practice was regularized through the issuance of charters granting occupation of land in exchange for payments and services.

Anglo-Saxon rule in turn was overthrown in 1066 by William the Conqueror, whose Norman French invaders had their origins in Norway. While the Normans never adopted Anglo-Saxon landholding practices in a formal sense, these practices formed the basis of immemorial custom that shaped the early common law. William's grants of land differed from previous practice in that they generally were conditioned upon personal oaths of fealty and promises to supply specified numbers of knights for battles. Over the next two centuries, paid armies replaced knights and the economic value of land was increasingly recognized. Correspondingly, feudal obligations of military service were replaced by money rents, and the Statute *Quia Emptores* (1290) permitted landholders to sell their estates. Over time, the cost of royal wars led to continued strife with Parliament, but by the Glorious Revolution of 1688 English law had evolved so even the king was subject to the rule of law.

Property in American Colonial Times. The American concept of property was shaped by economic and political developments during the colonial period (1607–1776). In England, land title ultimately was vested in the crown. Those who held land through royal grants of tenure formed a highly concentrated elite. In America, land was plentiful and colonial proprietors had to lure immigrants with the promise of absolute title. Also, colonists had absorbed the teaching of the English and Scottish Enlightenment that government was

a compact among individuals for the preservation of their liberties. The most influential Enlightenment author was John Locke, whose *Second Treatise of Government* (1688) proclaimed that men had property rights in themselves and in those natural resources fashioned into usable things through their labor.

By and large, the indigenous Indian tribes were hunters and gatherers; they did not build permanent structures or delineate individual landholdings. While such communal use of land was sensible given the lack of towns and intense agricultural development, it was not recognized by Europeans as creating property. Thus, European nations distributed lands without regard for customary American Indian rights (see *NATIVE AMERICANS AND THE LAW: HISTORY*).

The Development of Property from Independence Through the New Deal. When the colonies achieved independence, the English common law of property was received as the law of the new states. The ratification of the United States Constitution in 1787 did not substantially affect the common law basis of property, since the Constitution provided the federal government with only limited powers. Furthermore, the framers regarded the protection of property as a great object of the Constitution and a necessary condition for the preservation of *liberty.

The powers delegated to Congress enhanced the importance of property by establishing a national common market. Among them were the power to coin money; to regulate interstate, foreign, and American Indian commerce; to establish post offices; to grant patents and copyrights; and to regulate *bankruptcy (Article I, Section 8). Similarly, among the few prohibitions imposed upon the states were the coinage of money and the impairment of *contracts (Article I, Section 10). The Fifth Amendment to the Constitution prohibited the taking of private property by the federal government without just compensation and similar provisions were incorporated in all state constitutions. State statutes facilitated the incorporation of businesses and placed on a firmer footing the rights of investors whose tangible property consisted of shares of corporate stock.

During the rapid industrialization that followed the Civil War, states responded to perceived abuses by businesses with legislation regulating railroad and utility rates as well as labor conditions. (In so doing they relied upon the police power, the inherent right of the sovereign to protect the public health, safety, and welfare.) Late in the nineteenth century the Supreme Court held

that such regulations must present a reasonable return on investments in regulated property and, more fundamentally, that the right to contract to enter into a lawful occupation or to acquire property was a liberty interest, protected by the *due process clause of the Fourteenth Amendment. In cases such as **Lochner v. New York* (1905), which came to epitomize the Court's approach, it would ascertain independently whether a regulation was necessitated by the public health, safety, or welfare, or whether it deprived business or employees of their property or contract rights arbitrarily and in violation of their substantive right to due process of law. In the wake of the Great Depression and the New Deal, the Court backed away from this approach. Ever since its decision in *United States v. Carolene Products Co.* (1938), the Supreme Court has permitted the government wide latitude to impose economic and social regulations, shifting its closer scrutiny to such rights as freedom of speech and freedom from racial discrimination.

A problem inherent in the Court's post-New Deal jurisprudence is that the legal concept of property encompasses both dominion rights and use rights. The value of the right to exclude others from land, for instance, may be insignificant without the owner's additional right to use the land. In monetary terms, the value of a thing used in commerce depends upon the anticipated income generated by that use. Therefore, there is an internal inconsistency in the familiar assertion that property (dominion rights) is protected from uncompensated seizure by the Fifth Amendment's *takings clause, while the business activity (use rights) that generates income may be regulated stringently under the police power.

Property in Contemporary America. A marked attribute of contemporary American property law is its growing complexity. At the beginning of the twentieth century, property was conceptualized as real property (land and buildings), personal property (other tangible things), and intangible rights, such as stock, patents, and copyrights. By the end of the century these concepts had changed significantly.

Over a millennium, real property had acquired a unique legal status and claim on popular affections. For many centuries, real property was the basis of family wealth and power. Given its relative permanence, real property ownership had to be tracked over long periods of time. For these reasons, changes in the few permissible variations from complete ownership of land, such as life *estates and leases, came slowly. As a basis of economic self-sufficiency, real property ownership re-

duced the need to remain in favor with the king and thus facilitated the quest for political rights.

Through the early twentieth century, ownership of land used for commercial purposes was embodied in the simple deed of the equity owner, and the simple *mortgage protecting the lender who advanced funds for the land's purchase. These relationships have been transformed by the growth of modern financial institutions, including pension and mutual funds, and the proliferation of distinctions in tax law. Now hundreds of ownership rights might exist in a shopping center or office complex project, each tailored to the time horizon, aversion to risk, and tax status of a particular type of investigator.

The residential lease, which earlier was conceptualized as the transfer of ownership of a land for a term of months or years, has been reconceptualized by the *landlord-tenant revolution of the mid-twentieth century into a contract for the provision of housing services. This change permits courts to read into leases various "implied warranties" by landlords that never were part of traditional property law. In fact, these warranties result from police power regulation rather than contract, since the implied provisions cannot be disclaimed even by tenants' most explicit agreements. As in feudal times, the rights of residential landlord and tenant are determined by their status rather than by their bargain.

Property rights in residences, farms, and other lands occupied by their owners have been reconceptualized as well. In the United States, ownership of land traditionally has been viewed as carrying with it the right to make economically useful improvements. To be sure, owners could not commit acts of nuisance, which deprived neighbors of the right to reasonable enjoyment of their lands. Beyond this, however, owners could not be required to leave land undeveloped simply to provide open space for the community. In many European nations, on the other hand, use rights in land are limited to existing uses. Subsequent development is predicted upon obtaining permission from local planning authorities.

Comprehensive *zoning was approved by the U.S. Supreme Court in *Village of Euclid v. Ambler Realty Co.* (1926). It was adopted rapidly by almost all American cities. Although predicated on the notion of sound planning, zoning has mostly served to segregate residential from industrial and commercial districts and to protect property values and aesthetics in homogenous suburban communities. While the more blatant forms of exclusionary zoning against disfavored socioeconomic

groups have been prohibited in some states, zoning is inherently exclusionary. In recent years, a few states have adopted state-wide or regional growth-management programs, which generally have been upheld by the courts. These typically create urban growth boundaries, beyond which most development is precluded. The goal is to establish sharply defined and densely populated towns surrounded by green belts, reconceptualizing American land use rights along the European model. The recent demand for "smart growth" legislation may hasten this trend.

Many landowners have attempted to coordinate the use of their respective parcels through private agreements. These create easements (nonpossessory rights in the land of another), and equitable servitudes (similar promised binding as a matter of fairness). While the distinctions among these devices are somewhat arcane, owners might choose one device over another to ensure either flexibility or rigidity in the enforcement of their agreements over time. The recent *Restate (Third) of Property, Servitudes* (2000) would collapse these devices into the servitude, which would be enforced by courts in light of reasonableness. For some, this is a welcome change. For others, it represents another reconceptualization of traditional property, which is capable of serving owners with precision if used with care into another domain of public policy, governed by amorphous standards of fairness.

As the legal concept of property becomes increasingly complex and less set apart from other bodies of law, it moves farther from the laypersons' view of property as the tangible thing in which the owner might vest care and affection. The effects of these developments upon the historic links between property and the creation of wealth and property and the preservation of individual liberty remain to be determined.

[See also Patent Law Practice]

• Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*, 1985. Jeremy Waldron, *The Right to Private Property*, 1988. Ellen Frankel Paul and Howard Dickman, eds., *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal*, 1989. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy*, 1990. Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes*, 1991. Margaret Jane Radin, *Reinterpreting Property*, 1993. James W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2d ed., 1998. William B. Stoebuck and Dale A. Whitman, *The Law of Property*, 3d ed., 2000.

—Steven J. Eagle