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# PROPERTY RIGHTS—ARE THERE ANY?

CHARLES J. BLOCH\*

The Constitution of the United States was, to me, like a cathedral. In it and by it property rights and personal rights were defined and protected. Now, it is being torn down.

New, so-called rights are being "written-in." Those which were included in it are being destroyed. Developments have been such that the question is seriously propounded:

"Property Rights: Are There Any?"

## I. THE LAW PRIOR TO THE CONSTITUTION

There were. Individuals had rights as to their property just as they had as to their lives and liberty. The Magna Carta provided that no freeman should be imprisoned, dispossessed, banished or destroyed "excepting by the legal judgment of his peers or by the laws of the land."<sup>1</sup> In 1354, Parliament declared that no man should be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.<sup>2</sup> These were the English concepts of rights—those of property and those of person on a parity.

English precedent played an essential part in the early history of American constitutional development. The Magna Carta especially came to be regarded by the colonists, the great majority of whom came from England, as a generic term for all documents of constitutional significance. The Virginia Charter of 1606 established the principle that the American colonists were entitled to the rights of Englishmen.<sup>3</sup> The Charter of Massachusetts Bay<sup>4</sup> so pro-

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<sup>1</sup> MAGNA CARTA ch. 39 (1215).

<sup>2</sup> Statute of Westminster of the Liberties of London, 1354, 28 Edw. 3, c. 3.

<sup>3</sup> VA. CHAR. (1606). The Charter provided in part that: "Also we do . . . DECLARE . . . that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within thus our Realm of *England*, or any other of our said Dominions."

<sup>4</sup> MASS. BAY CHAR. (1629). The Charter provided in part "that all and every the Subjects of Vs . . . which shall goe to and inhabite within the saide Landes and Premisses hereby mencōed to be graunted . . . shall have

vided. So did that of Maryland.<sup>5</sup> The Massachusetts Body of Liberties<sup>6</sup> in the first section thereof protected life, liberty and estate. Expressed in the words of that day, "no mans goods or estate shall be taken away from him, nor any way indamaged under coulour of law or Countenance of Authoritie, unless it be by vertue or equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published . . . ."<sup>7</sup>

When the First Continental Congress met it relied also on English history, declaring:

[T]hat the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS: Resolved, N.C.D. 1. That they are entitled to life, liberty and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.<sup>8</sup>

Following the Declaration of Independence the first Constitution of Pennsylvania provided:

That every member of society hath a right to be protected in the enjoyment of life, liberty and property . . . . But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent . . . .<sup>9</sup>

There were similar provisions in the Delaware Declaration of Rights,<sup>10</sup> Constitution of Maryland,<sup>11</sup> of North Carolina,<sup>12</sup> of Vermont,<sup>13</sup> Massachusetts,<sup>14</sup> and New Hampshire.<sup>15</sup>

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and enjoy all liberties and Immunities of free and naturall Subiects within any of the Domynions of Vs . . . as yf they and everie of them were borne within the Realme of England."

<sup>5</sup> MD. CHAR. (1632). The Charter provided in part that "all Privileges, Franchises and Liberties of this our Kingdom of England, freely, quietly, and peaceable to have and possess, and the same may use and enjoy in the same manner as our Leige-Men born, or to be born, within our said Kingdom of England . . . ."

<sup>6</sup> MASS. BODY OF LIBERTIES (1641).

<sup>7</sup> MASS. BODY OF LIBERTIES art. I (1641).

<sup>8</sup> FIRST CONTINENTAL CONGRESS, DECLARATIONS AND RESOLVES art. I (1774).

<sup>9</sup> Pa. Const. art. VIII (1776).

<sup>10</sup> DEL. DECLARATION OF RIGHTS § 10 (1776).

<sup>11</sup> MD. CONST. art. XXI (1776).

<sup>12</sup> N.C. CONST. art. XII (1776).

<sup>13</sup> VT. CONST. art. IX (1777).

<sup>14</sup> MASS. CONST. art. X (1780).

<sup>15</sup> N.H. CONST. art. XII (1784).

Thus, by 1789 when the Convention which adopted the Constitution assembled, a fundamental principle of law as recognized for five centuries by the English speaking people who colonized this country, freed it from the tyranny of the British King, and established governments for their protection had been firmly established. *Life, liberty, and property* had been and were *equally* entitled to the protection of an established government. If the public good demanded it, after trial by jury, man forfeited his life, or was shorn of his liberty. Again, if the public good demanded it, after proper trial and just compensation, a man could be shorn of his property or his property rights. But *no one* of the three cardinal rights *was subordinate to the other*.

## II. THE CONSTITUTION

The framers of the Constitution had great respect for property and the rights of owners of property. Although the preamble makes no specific reference as such, the Constitution itself abounds with provisions respecting property and the rights attaching to it.<sup>16</sup>

The first ten amendments—the Bill of Rights—sought again to protect property rights as well as personal rights. The third amendment protects the houses of people.<sup>17</sup> The fourth amendment protects the people as to their houses, papers and effects as well as their persons.<sup>18</sup> The fifth amendment protects life, liberty and property,

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<sup>16</sup> The framers knew, for instance, when they prescribed the qualifications for those who were to choose the members of the House of Representatives that at least one of the states had among its qualifications the payment of taxes, or the ownership of property. GA. CONST. art. IX (1777). They were careful to provide for uniformity as to taxation (U.S. CONST. art. II, § 9), duties (U.S. CONST. art. I, § 8), imports (U.S. CONST. art. I, § 8), and excises (U.S. CONST. art. I, § 8). They recognized slaves as property (U.S. CONST. art. I §§ 1, 9; U.S. CONST. art. IV, § 2). They guarded rights in commerce among the ports of the several states (U.S. CONST. art. I, § 9). They sought to protect withdrawals of money from the Treasury of the United States (U.S. CONST. art. I, § 9). They sought soundness in the financial structure by providing that no state should make anything but gold and silver coin a tender in payment of debts (U.S. CONST. art. I, § 10), but it seemed not to have occurred to them to make a similar provision as to the United States. Lastly they sought to protect the sanctity of contracts by forbidding the States to impair them (U.S. CONST. art. I, § 10).

<sup>17</sup> "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

<sup>18</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

and specifically forbids the taking of private property for public use without just compensation.<sup>19</sup> The seventh amendment protects the right of trial by jury in cases involving property just as the sixth does in cases involving life or liberty.<sup>20</sup>

With the adoption of the thirteenth amendment, property rights began to be jeopardized.<sup>21</sup> Property was taken without due process of law. The jeopardy was entirely sectional, so no one outside of the South was greatly concerned.

So far as the supreme law of the land, as written, was concerned, property rights were on a parity with personal rights. Due process protected property as well as person. Neither property nor person could be subjected to unlawful seizure.<sup>22</sup> Where property was involved, a litigant was just as much entitled to a trial by jury as when his life or liberty was involved.<sup>23</sup>

### III. PROPERTY

What is "property"? In its strict legal sense, "property" signifies that dominion or indefinite right of user, control and disposition which one may lawfully exercise over particular things or objects. As so used, the word signifies the sum of all the rights and powers incident to ownership.<sup>24</sup>

So defined, property is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of the

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affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>19</sup> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>20</sup> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

<sup>21</sup> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

<sup>22</sup> U.S. CONST. amend. IV.

<sup>23</sup> U.S. CONST. amend. VII.

<sup>24</sup> *Nashville, C. & St. L.R.R. v. Wallace*, 288 U.S. 249 (1933).

particular subject of property.<sup>25</sup> Owners of real estate have the right under the Constitution to use, lease and dispose of it for lawful purposes.<sup>26</sup> The right of free and untrammelled use for legitimate purposes is fundamental and within the protection of the Federal Constitution. Whatever physical interference annuls this right takes "property." The right or element of user necessarily includes the right and power of excluding others from using the subject of property.<sup>27</sup>

### A. Effect of Taxation

The South may have thought that it was getting even for the passage of the thirteenth amendment when fifty or so years later it sponsored the adoption of the sixteenth amendment and its provision for unlimited taxation of incomes.<sup>28</sup> The statesmen of that day utterly failed to realize that they were sounding not only the death knell of the rights reserved to the states by the tenth amendment but were also laying the foundation for the complete destruction of all property rights. The effect of this amendment is shown in *Pollock v. Farmers' Loan & Trust Co.*<sup>29</sup> where the Supreme Court of the United States stated that: "A tax upon one's whole income is a tax upon the annual receipts from his property, and as such falls within the same class as a tax upon that property . . . ."<sup>30</sup>

There can be no quarrel with the right to tax incomes under the Constitution as now amended. There can be serious quarrel though, when the government extracts money from some citizens for the benefit of others, *domestic and foreign*, without any right given to test the validity of the use by the United States of the funds so

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<sup>25</sup> 42 AM. JUR. *Property* § 4 (1942).

<sup>26</sup> *Terrace v. Thompson*, 263 U.S. 197 (1923).

<sup>27</sup> *Chicago & W.I.R.R. v. Englewood Connecting R.R.*, 115 Ill. 375, 4 N.E. 246 (1886); *Vanderlip v. Grand Rapids*, 73 Mich. 522, 41 N.W. 677 (1889); *St. Louis v. Hill*, 116 Mo. 527, 22 S.W. 861 (1893); *Appeal of Perrin*, 305 Pa. 42, 156 Atl. 305 (1931); *Bryson v. McShane*, 48 W. Va. 126, 35 S.E. 848 (1900).

<sup>28</sup> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

<sup>29</sup> 158 U.S. 601 (1895). This case was decided prior to the passage of the sixteenth amendment and held that an income tax, passed by Lincoln to finance war, was a direct tax under the Constitution, and therefore unconstitutional.

<sup>30</sup> *Id.* at 625.

extracted. Exemplifying this problem is the case of *Massachusetts v. Mellon*.<sup>31</sup>

One of the first of the social security acts was the Federal Act of November 23, 1921.<sup>32</sup> Commonly called the Maternity Act it sought to provide funds to reduce maternal and infant mortality and protect the health of mothers and infants. The Commonwealth of Massachusetts and Harriet A. Frothingham brought separate actions against Andrew W. Mellon, Secretary of the Treasury to restrain the Secretary from enforcing the act. The Supreme Court of the United States held that Massachusetts had no standing to sue. It also held that the taxpayer could not sue to enjoin the execution of the act on the ground that it was invalid and would result in taxation for illegal purposes. Thus the Social Security program of the New Deal in the 1930's was practically immunized from legal attack. Now, Federal statutes further immunize.<sup>33</sup>

### *B. Effect of Legislative Enactments*

Since the adoption of the Constitution many statutory encroachments on property rights have been in two general areas. One area is that in which the owner has devoted his property to a use in which the public has an interest. The other lacks the feature of public interest. Sometimes the areas overlap. Sometimes the line of demarcation is dimmed by judicial construction.

In 1876, it was held in an opinion by Chief Justice Waite that when private property is devoted to public use it becomes subject to public regulation.<sup>34</sup> Thus, in the instant case, the state legislature was authorized to fix by law the maximum charges for the storage of grain in warehouses. It should be noted also that during this same year the court held that railway companies were subject to legislative control as to their rates of fare and freight.<sup>35</sup>

The doctrine expanded with age. Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, were found to be consistent with the due process clause of the fifth and

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<sup>31</sup> 262 U.S. 447 (1923).

<sup>32</sup> Maternity Act ch. 135, 42 Stat. 224.

<sup>33</sup> *E.g.*, INT. REV. CODE OF 1954, § 7421.

<sup>34</sup> *Munn v. Illinois*, 94 U.S. 113 (1876).

<sup>35</sup> *Chicago B. & Q.R.R. v. Iowa*, 94 U.S. 155 (1876).

fourteenth amendments.<sup>36</sup> In *Nebbia v. New York*<sup>37</sup> (which upheld a New York milk control law) the Supreme Court said:

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.<sup>38</sup>

So, in this—our government of laws—the only criterion as to public interest is the judgment and opinion of whomsoever composes the court. It is only a weak hope that another statement of Justice Roberts speaking for the majority in *Nebbia* remains the “law of the land.” Said he: “The guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and *that the means selected shall have a real and substantial relation to the object sought to be attained.*”<sup>39</sup>

“The day is gone” when the Supreme Court “uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”<sup>40</sup> It isn’t the utility owners alone, it isn’t alone the owners of businesses deemed to be affected with a public interest, it isn’t those whose professions or businesses are subject to the police power of the states or the general welfare of the people who have been shorn of property rights.

The Fair Labor Standards Act of 1938<sup>41</sup> requiring employers to conform to the wage and hour requirements with respect to employees engaged in the production of goods which were thereafter to be shipped in interstate commerce was held to be applicable to a Georgia sawmill owner, and valid.<sup>42</sup> To do this it was necessary to overrule a decision of the court rendered twenty-three years before.<sup>43</sup>

That same year Congress enacted the Agricultural Adjustment

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<sup>36</sup> For a list of these cases as of 1934 see 89 A.L.R. 1477-78 (1934).

<sup>37</sup> 291 U.S. 502 (1934).

<sup>38</sup> *Id.* at 536.

<sup>39</sup> *Id.* at 525. (Emphasis added.)

<sup>40</sup> *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

<sup>41</sup> 52 Stat. 1060 (1938), 29 U.S.C. § 201 (1956).

<sup>42</sup> *United States v. Darby*, 312 U.S. 100 (1941).

<sup>43</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918).



Act of 1938.<sup>44</sup> The general scheme of it as related to wheat was to control the volume moving in commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. This piece of legislation gave rise to the famous case of *Wickard v. Filburn*.<sup>45</sup>

Roscoe C. Filburn owned and operated a small farm in Montgomery County, Ohio. He had a herd of dairy cattle, sold milk, raised and sold poultry and eggs. He customarily raised a small acreage of winter wheat, sold a portion of it, fed part of it to his poultry and livestock on the farm, used some in making flour for home consumption, and kept the rest for the following seeding. He did not expressly state what he expected to do with his 1941 crop. The government established for that crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat to the acre. Although he was given notice of this allotment, he sowed 23 acres, and harvested from his excess 11.9 acres 239 bushels. For the misdeed, the government penalized him \$117.11 which he refused to pay. After prolonged litigation the Supreme Court of the United States held the penalty valid since "Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."<sup>46</sup> Therefore the penalty under the act constituted a valid exercise of the power of Congress to regulate commerce.

It is clear from the cases, only a few of which have been considered in this article, that when a state legislature or the Congress enacts a law infringing or curtailing rights of property, a property owner may expect no help from the courts. He holds his property, and may use it, only as the legislatures may permit him so to do. The fundamental rule that regulation of the use or enjoyment of property rights can only be justified by the presence of public interest seems now to be archaic. This is an ultra-modern development of the law.

As previously pointed out the Constitution of the United States was designed to protect property rights as well as personal rights. The founding fathers knew that without property protected by the

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<sup>44</sup> 52 Stat. 31 (1938), 7 U.S.C. § 1281 (1952).

<sup>45</sup> 317 U.S. 111 (1942).

<sup>46</sup> *Id.* at 128-29.

law there would not long be any personal rights to be enjoyed. One of the earliest adjudicated cases<sup>47</sup> which is the foundation for establishing this principle is cited for holding that:

The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government.<sup>48</sup>

The supreme court of my state has said: "The right of private property is very sacred in the eye of the law. It stands on the same foundation as the coordinate rights of personal liberty and personal security."<sup>49</sup>

There is of course a great deal of difference between the right of the states to regulate property and its use under their police power, and the assumed right of the federal government under any of the powers delegated to it by the states. The Supreme Court realized and applied the "limitations" of the federal power in *United States v. Butler*<sup>50</sup> when considering the Agriculture Adjustment Act of 1933.<sup>51</sup> In the opinion nullifying the 1933 act, the following words were in the opinion of Justice Roberts, in which Chief Justice Hughes, and Justices Van Devanter, McReynolds, Sutherland and Butler concurred:

A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired

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<sup>47</sup> *Vanhorne v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795).

<sup>48</sup> 11 AM. JUR. *Constitutional Law* § 335 (1937). (Emphasis added.)

<sup>49</sup> *Alabama Great So. R.R. v. Gilbert*, 71 Ga. 591, 593 (1883).

<sup>50</sup> 297 U.S. 1 (1936).

<sup>51</sup> Ch. 25, 48 Stat. 31.

end. To do this would be to shut our eyes to what all others than we can see and understand.<sup>52</sup>

In the same opinion it was categorically stated that no power "to regulate agricultural production is given" by the Constitution—

and therefore legislation by Congress for that purpose is forbidden. It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted . . . . The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.<sup>53</sup>

We are told that we should obey "established principles" of law. Those "established principles" were not even mentioned by the Supreme Court when, six years later, *Wickard v. Filburn* was decided. Of course, then the Court was differently constituted.<sup>54</sup> The mere composition of the Court, though, ought not to have made any difference in the "established principle"—because ours is a government of laws, not of men.

Despite the "established principle" of the *Butler* case, grants to states for old-age assistance,<sup>55</sup> and other forms of "social security"<sup>56</sup> were in 1937 held constitutional—sometimes by Courts sharply divided. Zoning laws which hardly measured up to the rule that such regulations, to be valid, must bear substantial relation to public health, safety, morals or general welfare have been upheld.<sup>57</sup>

The fifth amendment provides in part: "nor shall private property be taken for public use, without just compensation." It was an established principle of constitutional law that even the right of eminent domain did not authorize the taking of private property for private use. It was an established principle, too, that the courts

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<sup>52</sup> 297 U.S. at 61.

<sup>53</sup> 297 U.S. at 68-69.

<sup>54</sup> Chief Justice Hughes, and Justices Van Devanter, McReynolds, Sutherland and Butler were no longer a part of the Court. Justices Black, Reed, Frankfurter, Douglas, Murphey and Jackson were. Justice Reed had been Solicitor General when *Butler* was decided.

<sup>55</sup> *Helvering v. Davis*, 301 U.S. 619, 672 (1937); *Allen v. Shelton*, 96 F.2d 102 (5th Cir.), *cert. denied*, 305 U.S. 630 (1938).

<sup>56</sup> See *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

<sup>57</sup> *E.g.*, *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

have the power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use.<sup>58</sup>

In 1946, the Court, speaking through Mr. Justice Black, practically destroyed that principle.<sup>59</sup> It established the rule that "when Congress has spoken on this subject, 'its decision is entitled to deference until it is shown to involve an impossibility.'"<sup>60</sup> Now, it is held that the amendment does not prohibit Congressional legislation to make the nation's capital beautiful as well as sanitary.<sup>61</sup> This case, too, is said to authorize the "taking from one businessman for the benefit of another businessman."

It is today not an exaggeration to say that whatever law may be enacted by a state under its police power which affects property rights will be upheld.

Without much fear of exaggeration it could be asserted, too, that under one guise or another the Supreme Court is building a federal police power.

Maybe that federal power had commenced earlier than February 18, 1935. But it can safely be said that a decision of the Supreme Court on that date formed the basis for an unlimited growth of that power. The decision of the majority that day in the case of *Norman v. Baltimore & O.R.R.*<sup>62</sup> prompted Justice McReynolds to commence a dissent with these words: "[I]f given effect, the enactments here challenged will bring about confiscation of property rights and repudiation of national obligations."<sup>63</sup> Concluding, he stated that: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling."<sup>64</sup>

The enactments there challenged invalidated the so-called gold clauses contained in bonds and other non-federal obligations. In the "gold clauses," the promisor had promised to pay in "United States gold coin of the present standard of value," or "of or equal to the present standard of weight and fineness." Congress had by the Joint Resolution of June 5, 1933,<sup>65</sup> invalidated these gold clauses,

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<sup>58</sup> *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930); *Shoemaker v. United States*, 147 U.S. 282, 298 (1893).

<sup>59</sup> *United States ex rel. TVA v. Welch*, 327 U.S. 546 (1946).

<sup>60</sup> *Id.* at 552.

<sup>61</sup> *Berman v. Parker*, 348 U.S. 26, 33 (1954).

<sup>62</sup> 294 U.S. 240 (1935).

<sup>63</sup> *Id.* at 361.

<sup>64</sup> *Id.* at 381.

<sup>65</sup> 48 Stat. 113 (1933), 31 U.S.C. § 463 (1954).

and permitted the discharge of the obligations upon payment in any coin or currency which at the time of payment is legal tender for public and private debts.

By a vote of 5 to 4, the power of Congress so to do was upheld.<sup>66</sup> The principal basis of the power asserted by Congress was held to be that contained in article I, section 8,—“To coin money, regulate the value thereof, and of foreign coin.”

The minority thought that this power could not be “so enlarged as to authorize arbitrary action, whose immediate purpose and necessary effect is destruction of individual rights.”<sup>67</sup> In vain they cited Chief Justice Marshall’s words in *Fletcher v. Peck*.<sup>68</sup> “It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?”<sup>69</sup>

Up to that day, we had thought, as Justice McReynolds cogently stated: “The Fifth Amendment limits all governmental powers.”<sup>70</sup> If it does not, what limitation is there on the powers of Congress? It may not bother many people today, if Congress under its power, for example, “to establish post-offices and post-roads,”<sup>71</sup> may take the property of its citizens without due process of law, and without just compensation. If Congress, in exercising its power under article I, section 8, as it did in the joint resolution nullifying the gold clauses, can ignore the fifth amendment, why can it not ignore the amendment in exercising all of the eighteen powers delegated to it by the states in article I, section 8?

If Congress can ignore the fifth amendment as it respects property rights, perhaps many more people will be concerned today if it follows therefrom that Congress can in exercising its delegated powers also ignore the fifth amendment as it respects life and liberty.

If Congress under its power to coin money and regulate the value thereof can ignore the fifth amendment, why can it not in regulating commerce ignore not only the fifth amendment as to life and liberty,

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<sup>66</sup> *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935).

<sup>67</sup> *Id.* at 372.

<sup>68</sup> 10 U.S. (6 Cranch) 87 (1810).

<sup>69</sup> *Id.* at 135.

<sup>70</sup> *Norman v. Baltimore & O.R.R.*, 294 U.S. 240, 372 (1935) (dissenting opinion).

<sup>71</sup> U.S. CONST. art. 1, § 8.

but also every other provision of every one of those amendments which constitute the Bill of Rights?

Property owners do have some chance in those areas of statutory enactments, for at least a law, a statute, must be enacted. Property owners do have the opportunity to endeavor to convince their elected representatives in their state legislatures or the Congress to honor their rights.

### *C. Effect of Judicial Decisions*

Serious as the destruction of property rights by statutes, state and federal, and judicial construction thereof is, there is an area in which the destruction is even more serious. That area is the one in which the federal courts, in the absence of a statute, construe the Constitution so as to authorize or forbid acts of individuals which affect the rights of other citizens. A glaring example of the use of the judicial power in that area was the decision of the Supreme Court with respect to covenants restricting the sale of real estate.

In 1921, a group of white people in the city of Washington owning residences on "S" Street between 18th Street and New Hampshire Avenue executed an agreement in which they covenanted with one another that no part of this property should be used by, or sold or leased to any person of the Negro race. Among the contracting parties were Buckley and Corrigan. In 1922, Corrigan, knowing one Curtis to be a Negro, agreed to sell her part of the property. Buckley sought to enjoin the conveyance. Corrigan moved to dismiss the bill alleging the contract or covenant was violative of the Constitution. The motion was overruled. The Supreme Court affirmed because the individuals in so agreeing deprived no one of any constitutional right.<sup>72</sup>

Time marched on. Someone conceived the idea that while there might be no constitutional invalidity in the contracts per se; while they might be perfectly legal and within the rights of the property owners, when and if a state court sought to enforce them, there arose state action which was forbidden by the fourteenth amendment. Chief Justice Vinson, and Justices Black, Frankfurter, Douglas, Murphey and Burton so held.<sup>73</sup>

Of what value, of what reality is a valid property right if the citizen cannot call upon the courts of his state to protect it? Does

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<sup>72</sup> *Corrigan v. Buckley*, 271 U.S. 323 (1926).

<sup>73</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

a citizen really have a property right he must enforce and protect personally without the right of resort to the courts?

It has been thought amongst English speaking people for many, many centuries that a man's home was his castle. A man has a right to say that he wants no one of a certain race or religion to come into his home. Suppose one of that race or religion persists in coming into his home, and he asks for police protection. If the police come, and lead the intruder away, is the fourteenth amendment violated? If so, there are no rights of property in what was once a "castle."

The hypothesis is not far fetched.

The Town of Irvington, New Jersey, enacted an ordinance requiring persons intending to canvass, solicit, distribute circulars or call from house to house to receive a written permit from the Chief of Police. The Supreme Court held that ordinance to be unconstitutional as abridging freedom of speech and the press as applied to a member of a Bible and tract society certified to be one of Jehovah's Witnesses distributing booklets from house to house and soliciting contributions.<sup>74</sup>

Those who prepared and adopted the first and fifth amendments would probably be shocked if they, like Rip Van Winkle, could return and learn what construction had done to their handiwork. I daresay they would wonder what had become of the right of privacy, the right of a man and his family to be secure in their own home from door-knockers and bell-ringers and other intruders. In the case just cited the person who attacked the ordinance "called from house to house in the town at all hours of the day and night and showed to the occupants a so-called testimony and identification card signed by the society."<sup>75</sup> If she had the right to disturb a family in its abode at any hour of the day and night, why has not a member of the NAACP or the Ku Klux Klan the same right, or the Anti-Defamation League, or the Knights of Columbus or the WCTU or the American Civil Liberties Union, or any one of the myriads of "societies" which thrive today? And if each of them have that right, and exercise it when they choose, what has become of a property owner's right to be let alone—to enjoy the peace, comfort and security of his home, protected therein by the law?

In 1937, the Supreme Court upheld what to me is another in-

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<sup>74</sup> *Schneider v. State*, 308 U.S. 147 (1939).

<sup>75</sup> *Id.* at 158.

vasion of property rights.<sup>76</sup> A statute of Wisconsin provided that "peaceful picketing" or patrolling, whether engaged in singly or in numbers, should be legal. Prior to this time when ex-President Taft was Chief Justice of the United States, he had written for the majority in *Truax v. Corrigan*,<sup>77</sup> stating: "Plaintiff's business is a property right . . . and free access for employees, owner and customers to his place of business is incident to such right."<sup>78</sup> When the Wisconsin statute came to be considered by the Supreme Court, that established legal principle was "distinguished." In a 5 to 4 decision, the Court held substantially that annoyance to a property owner as a result of peaceful picketing and truthful publicity carried on was not an invasion of the rights of the property owner.

Thus the wind was sowed. And the whirlwind has been reaped, because if there can be any such thing as peaceful picketing, it will not long remain peaceful. For all picketing is coercive in its nature. If an aim is legal, if a person has a right he has a remedy, and that remedy is in the courts of the land. If a citizen has a legal right to induce another citizen to perform a certain act, the courts will command the performance. If the citizen has not the legal right to induce another to perform an act, he should not be permitted to force the performance by any character of coercive act, whether it be denominated "peaceful," or "non-violent," or what not. Picketing or demonstrating which aims to compel the performance of an act which those picketing or demonstrating have no legal right to compel is an invasion of the rights of the property owner.

Justice Brandeis in the case just cited considered the phrase "peaceful picketing" to imply not only absence of violence, but absence of any unlawful act. Said he: "It precludes the intimidation of customers. It precludes any form of physical obstruction or interference with the plaintiff's business."<sup>79</sup>

Justice Brandeis would be shocked, too, if he could return and learn what is being done today under the guise of "peaceful picketing." He would be shocked if he could see the wind he sowed converted into the whirlwind of "sit-ins," "wade-ins," "pray-ins," and "chain-ins" being practiced today.<sup>80</sup>

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<sup>76</sup> *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937).

<sup>77</sup> 257 U.S. 312 (1921).

<sup>78</sup> *Id.* at 327.

<sup>79</sup> *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 479 (1937).

<sup>80</sup> When "sit-downs" were first practiced, the Supreme Court said: "Nor is it questioned that the seizure and retention of respondent's property were



## IV. THE PRESENT

People of the North, East and West are beginning to learn what we of the South have long known: "Tradition and the habits of a community count for more than logic."<sup>81</sup> Persons operating a hotel, a motel, a restaurant, a barber shop, a hairdressing establishment, any other business rendering personal services in the South, know that the traditions and habits of the community are such that customers of the two races cannot be served indiscriminately in them. When integration commences, disintegration does likewise. The right of a property owner voluntarily to operate his business in accordance with the traditions and habits of a community is a right of property. There is nothing in the fourteenth amendment which deprives the property owner of that right. Yet case after case decided during the period 1961-1963 reveal a tendency on the part of the court to compel the property owner to ignore the traditions and customs of the community.<sup>82</sup>

Not yet has the court questioned the long established rule that the fourteenth amendment reaches only state action. To this fact, Mr. Justice Harlan alluded in his concurring and dissenting opinions of May 20, 1963.<sup>83</sup> Then he uttered words which give hope to those of us who believe that some rights of private property are, too, within the protection of the Constitution. Said he:

And it [the Court] does not suggest that such action, denying equal protection, may be found in the mere enforcement of trespass laws in relation to private business establishments from which the management, of its own free will, has chosen to exclude persons of the Negro race. Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been "state action of a particular character" . . . whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.

This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protec-

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unlawful. It was a high-handed proceeding without shadow of legal right." *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939).

<sup>81</sup> *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358, 366 (1910).

<sup>82</sup> *E.g.*, *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Shuttlesworth v. Birmingham*, 373 U.S. 262 (1963); *Peterson v. Greenville*, 373 U.S. 244 (1963); *Garner v. Louisiana*, 368 U.S. 157 (1961).

<sup>83</sup> *Peterson v. City of Greenville*, 373 U.S. 244, 249 (1963).

tion by ostensibly private action is a clash of competing constitutional claims of a higher order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, *to use and dispose of his property as he sees fit*, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. *This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction.* Also inherent in the concept of state action are values of federalism, *a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.*"<sup>84</sup>

In the area of sit-ins and other like trespasses there is hope for property rights if the caveat of Mr. Justice Harlan is heeded.

### V. CONCLUSION

Without making any accusations against any one, I place the happenings of the last thirty years in the area of property rights by the side of one of the few legal definitions of "Communism" which I have found:

"Communism," [is defined as] . . . . "A system of social organization in which goods are held in common; the *opposite of the system of private property* . . . Communalism . . . . Any theory or system of social organization involving common ownership of the agents of production, and some approach to equal distribution of the products of industry . . . ." "A theory of government and social order according to which *property* and the instruments of production are held as a common trust and the profits arising from all labor devoted to the general good: . . . . '[T]he theory which teaches that the labor and the income of society should be distributed equally among all its members by some constituted authority.' . . . A doctrine or practise calling for the complete *abolition of all private property of every description, and the absolute control by the community in all matters pertaining to labor, religion, social relations, etc.* . . ."<sup>85</sup>

In March, 1895, there was argued before the Supreme Court of the United States, *Pollock v. Farmers' Loan and Trust Co.*,<sup>86</sup> in-

<sup>84</sup> *Id.* at 249-50. (Emphasis added in part.)

<sup>85</sup> *United States v. Hautau*, 43 F. Supp. 507, 509 (D.C.N.J. 1942). (Emphasis added.)

<sup>86</sup> 157 U.S. 429 (1895).

volving the constitutionality of an act of Congress passed August 15, 1894,<sup>87</sup> imposing an income tax. Among counsel for those attacking the act was Mr. Joseph H. Choate. In his argument he said:

I believe there are private rights of property here to be protected; that we have a right to come to this court and ask for their protection, and that this court has a right, without asking leave of the Attorney General or of any counsel, to hear our plea. The act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world.<sup>88</sup>

Mr. Choate's plea was prophetic.

Those who scoff at "property rights" might well bear in mind the admonition of the late President Abraham Lincoln:

Property is the fruit of labor; property is desirable; it is a positive good in the world. That some should be rich shows that others may become rich, and hence is just encouragement to industry and enterprise. Let not him who is houseless pull down the house of another, but let him work diligently, and build one for himself, thus by example assuring that his own shall be safe from violence when built.<sup>89</sup>

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<sup>87</sup> Ch. 349, 28 Stat. 509.

<sup>88</sup> 157 U.S. at 522.

<sup>89</sup> 7 BASLER, COLLECTED WORKS OF ABRAHAM LINCOLN 259-60 (1953).