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CHANGING CONCEPTIONS OF PROPERTY IN LAW *

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A layman thinks of property as a man's belongings, or as the things that a man owns. A lawyer commonly speaks similarly; but when speaking with care he defines the word as including the *rights* that a man has in or over things with which the law deals. However, of such technical concepts as thing and right and ownership I do not propose to speak, but rather of matters where lawyers and historians stand on common ground. The forces that change the law in other than trivial ways lie outside it. It is to other things than law, therefore, that your attention must primarily be called.

It is self-evident that neither the things recognized as the objects of property rights nor the nature of these rights themselves could possibly be the same under a land economy of 1700 and our industrial economy of today. Property, in the layman's sense of things, has varied infinitely in character and content from century to century and from place to place. Of course, land and its produce have always been with us. So, too, have a more or less limited number of tangible chattels, such as household utensils and cattle; but the enormous variation of things used by men in different societies is revealed in any anthropological or cultural museum. Our own law of crimes once protected only such animals as were edible. Our civil law once protected only such trees as were "timber"; and as late as 1600 only oak, ash and elm were so classified in English law. And, it may be added, the aesthetic value of an alley of magnificent ancient oaks has never been protected by the non-equity law, but only in equity, which is the more just and civilized portion

* This paper was read before a section meeting of the American Historical Association on Dec. 31, 1937, and will be included in a forthcoming volume to be published under the auspices of the Association by the Columbia University Press. Its preparation for non-lawyers explains the inclusion of much that may, to lawyers, seem elementary information.

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of our legal system. A fact whose influence upon our fundamental property concepts has been enormous is its generous recognition, from medieval times down, of incorporeal things. Such recognition is characteristic even of the law of primitive peoples: songs, myths, dances, the right to use certain incantations or make use of particular sacred vessels, and other rights of similar character are recognized among them as objects of property.¹ It is but a misguided jurisprudence, breaking with the past of centuries, that has very recently excluded incorporeal things from the property law of Germany. In our own law intellectual property—which should have been recognized as property long ago, on Locke-ian principles, since it is the product of labor (and of genius)—is, of course, a very recent newcomer among things treated by society as property. Nor need intelligent laymen be reminded of things such as trade-marks, copyrights, and designs of commercial products. As a matter of fact, the total value under our law today of proprietary rights which have no material object is probably enormously greater than the value of such rights in all land and tangible chattels. This modern incorporeal property includes, particularly, promissory notes, bills of exchange, patent rights, and shares of corporate stock.

Property in the lawyer's sense has undergone even vaster changes through the centuries. Each recognition of a new thing as the object of legal rights has opened a new chapter in the law, often one of vast complexity. But even as regards things recognized for seven centuries as property, the rights in them recognized by law have been forever changing. Of inconceivable importance has been the slow development, in relation to different types of property, of the qualities of transferability by deed or will; and the development of varying modes of alienation as times and public policy have varied. Instances of new rights thus recognized, and of old rights that have decayed or totally disappeared, might be given in great numbers. To a single instance special reference may properly be made, because of its relation to matters later discussed.

Contrary to the idea which was generally entertained a generation or two ago, present-day scholars are agreed that primitive society exhibits no instances of pure communism. Wherever man is found, we find both individual ownership and ownership by family groups, large or small, and other associations; with rarer instances of what appears to be true community ownership of particular things.² But the concept of ownership does not have that sharp distinctness which characterizes our legal conception of today. It

1. R. H. LOWIE, *AN INTRODUCTION TO CULTURAL ANTHROPOLOGY* (1934) 153, 197, 281-282, 286; *Incorporeal Property in Primitive Society* (1928) 37 *YALE L. J.* 551; *PRIMITIVE SOCIETY* (1920) 235-43; A. A. GOLDENWEISER, *EARLY CIVILIZATION: AN INTRODUCTION TO ANTHROPOLOGY* (1922) 137, 138.

2. LOWIE, *PRIMITIVE SOCIETY* (1920) 205-06, 214-15, 231, 233; *AN INTRODUCTION TO CULTURAL ANTHROPOLOGY* (1934) 257, 264, 276, 278, 280, 283; GOLDENWEISER, *op. cit. supra* note 1, at 137; J. BRISSAUD, *HISTORY OF FRENCH PRIVATE LAW* (Howell's trans. 1912) §§ 33-61; R. HUEBNER, *HISTORY OF GERMANIC PRIVATE LAW* (Philbrick's trans. 1918) 227, 115.

is difficult to distinguish common ownership from that free allowance of use which is dictated by customs of hospitality as respects necessities of life, or by considerations of convenience as respects a common use of major agricultural implements.³ Moreover, even after the thorough establishment of individual property the claims of family groups, or of other associations of neighbors or kindred, or even of the entire community, continued to be felt as respected pastures or other things of general social utility.⁴ The most important matter regarding this whole chapter of history, and one upon which early records necessarily throw practically no light, is the attitude of the community toward private rights. Nowhere today apparently, among peoples of advanced civilization, are there examples, such as those just referred to among primitives, of private ownership coupled with common use—which, as will later be noticed, was the ideal of Plato and Aristotle. Private title is with us too powerful and arrogant, too sacred. The individual's desire, the claims of labor or discovery, are evidently one root of individual property; but, as was long ago pointed out by Cliff Leslie,⁵ what needs clarification are the reasons why society permitted—perhaps favored—the development of private ownership. Regarding these reasons, almost certainly economic, one can only speculate. We can only see, for our own day, the reasons which recently have led to a reassertion by society of an increasing control over individual ownership.

Nor has property the same meaning at any one time in different places. It has not, for example, the same meaning in this country with respect to any particular thing as one passes from state to state. If one owns land in different states, one's enjoyment thereof is restricted by varying policies of public control under the state police power; under municipal ordinances respecting public nuisances (such as fire risks or keeping of hogs), or respecting the utilization of land under zoning ordinances; under state statutes regulating rural drainage and school districts; and so on. The non-statutory law respecting nuisances similarly varies. The owner's status is not precisely the same in any two states as mortgagor or mortgagee, or as respects the rights of creditors against the land under judgments or equitable liens or executions. In case of the owner's death intestate, the rules of the states vary with respect to what persons other than children shall be statutory heirs; and may well come to vary greatly—as English law varies today from American—as regards the degree of relationship to the decedent within which persons sharing the land as heirs must fall. Similarly, if one buys an automobile in one state and drives it into another, the sum total of rights that constitute his title may differ very considerably from one state to the other; for example, with reference to the regulation of transfers of title, driving

3. LOWIE, AN INTRODUCTION TO CULTURAL ANTHROPOLOGY (1934) 153, 263, 277.

4. BRISAUD, *op. cit. supra* note 2, §§ 45-55, 57-61; HUEBNER, *op. cit. supra* note 2, § 37.

5. Introduction to É. DE LAVELEYE, PRIMITIVE PROPERTY (Marriott's trans. 1878) xi.

with a foreign operator's license, liability for injuries to passengers taken in as guests, attachment of liens, penalties for mechanical defects, the number of passengers that may be carried. And yet, the owner of the land or of the automobile is spoken of as the owner, and as having the title, in all our states.

Finally, what is property may depend upon the action that is dependent upon the answer. Anything recognized as property has, indeed, existence as such in the eye of the law, but for different purposes existence is rather freely conceded or denied. Things may be assets for creditors in equity that are not property for such legal purposes as taxation. Expectancies are for most purposes not treated as property, yet some may be provable claims against a bankrupt. Goods unlawfully manufactured or owned—such as narcotics, gambling instrumentalities, or intoxicating liquor during the recent prohibition era—may be property for the purpose of taxation, yet may not be treated as such if taken by one who would, if he similarly took normal property, be a thief. Because Lord Eldon once unfortunately declared that equity protects only property (whereas present-day courts of equity in fact freely protect political rights, sentimental interests in dead bodies and letters, rights of privacy and of reputation, and family relationships) courts have often *called* such interests property merely in order to make their protection seem conventional. They have acted similarly in protecting various business interests that are not property by traditional legal standards: such as a manufacturer's expectancy that an adequate labor supply will flow to his factory if unimpeded by strikers. And we shall later see that the Supreme Court of the United States, in order to bring certain interests within the protection of the due process clause of the Constitution (which forbids a state to take "property" without due process of law) has labeled as property a laborer's right to make contracts, with the momentous result that the states could not, for a time at least, adequately regulate wages, nor therefore control labor conditions.⁶

If one asks, wherefore such instability and change, the answer is subject to no doubt. Social needs are the essential life that give vitality to all legal institutes. In the oft-quoted words of Justice Holmes, "the life of the law has not been logic; it has been experience."⁷ To remind you of but one

6. *Infra* pp. 720 *et seq.*

7. O. W. HOLMES, *THE COMMON LAW* (1887) 1. Jhering had said the same thing, in substance, long before at the end of his *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* (3d ed. 1877); and as Holmes preached the idea incidentally throughout life and sought to apply it judicially, so Jhering's lifework as teacher and writer was equally dedicated to its establishment and dissemination. "Law is no natural plant"—i. e. nurtured by sources outside of man—"but a piece of human thought and feeling" (III. 1 *id.* at 306) shaped "by considerations of utility or other influences" (III. 1 *id.* at 308) whose fundamental concepts and principles necessarily change as time passes, "for they are no mere logical categories, but the embodiment of actual human relations" (*Concentrationsform materieller Rechtsätze*) (III. 1 *id.* at 305); whose rules cannot be given and do not need a logical, but only "a historical, practical, or ethical justification" (III. 1 *id.* at 308). To the systematic development of these ideas he devoted the best years of his life in writing his *DER*

illustration, present-day knowledge tends to confirm Morgan's thesis that the appearance of every type of family or inheritance found in primitive societies was dictated by economic considerations.⁸ Yet that is but one side of the relation. To every student of history, government, economics, or sociology it is a commonplace that law—not merely through its reformatory manifestations or basic refashionings, such as the statutes of a New Deal or a French Revolution or the Reception of the *Corpus Juris*, but by the steady restraints of its abiding forms—molds, while it fixes and preserves, society. Students of primitive societies report the manifest interaction of law and social milieu.⁹ As for the property law, to say that social life creates it is a very great understatement of the intimacy of their relation. A biological mutualism, indeed an intimacy greater than that term strictly connotes, exists between them. Each gives form and life to the other. General establishment of individual ownership of land signed the death warrant of the larger family groups that included kindred outside the household circle.¹⁰ Property rights, rather than blood ties, very probably played the predominant part (along with geographical unity and common *mores*) in the origination of formal government, and emergence of the concept of the state.¹¹ That the English land law—of primogeniture, entailed estates and strict settlements only in especial degree¹²—has most profoundly affected the economic development

ZWECK IM RECHT (2 vols. 1887, 1883), sacrificing the completion of the GEIST to what he regarded as a more important task. Cf. *infra* note 42.

8. E. R. A. SELIGMAN, *THE ECONOMIC INTERPRETATION OF HISTORY* (1903) 70-81. LOWIE, *PRIMITIVE SOCIETY* (1920) 70-74, 78, 157-62. It is not meant that the family types followed in fixed order or that all appeared in each society. See Mead, *s. v. Family* (1931) 6 ENCYC. SOC. SCI. 65.

9. "Property is movable, real [immovable], or incorporeal. It may be private or communal; it may or may not be inherited; and if so, according to different principles; and these possibilities are interwoven with social, political, and moral ideas." LOWIE, *op. cit. supra* note 3, at 276, cf. 283; *PRIMITIVE SOCIETY* (1920) 205.

10. A. LORIA, *THE ECONOMIC FOUNDATION OF SOCIETY* (Keasbey's trans. 1907) 89-90; M. M. BIGELOW, *PAPERS ON THE LEGAL HISTORY OF GOVERNMENT* (1920) 62. "There can be no doubt that the economic significance of the gentile organization had a decisive influence on its political effects. A clansman enjoyed *political* rights through his clanship just because it was through his clanship that he enjoyed rights of property. . . . As early as the regal period, however, the gentile system in Rome was deprived of its economic importance. . . . The decisive factor in this process was the extension of the notion of separate ownership from movables to land." R. SOHM, *THE INSTITUTES* (Ledlie's trans. 1907) 36-37.

11. R. H. LOWIE, *ORIGIN OF THE STATE* (1927) c. 4 and "Conclusion".

12. "We owe the fact that the great English nation is tenant at will to a few thousand landowners to that device of evil times, a strict settlement." 1 J. E. T. ROGERS, *HISTORY OF AGRICULTURE AND PRICES IN ENGLAND* (7 vols. 1866-1902) 693. The great landowners "are protected against their own errors, vices, misfortunes, by the device of an estate for life, with remainder intail." ROGERS, *THE ECONOMIC INTERPRETATION OF HISTORY* (1888) 358. Cf. F. POLLOCK, *THE LAND LAWS* (3d ed. 1896) 9-10; J. KAY, *FREE TRADE IN LAND* (2d ed. 1879) 19-22; T. E. SCRUTTON, *LAND IN FETTERS* (1886) cc. 8, 11. The literature of "free land" in the second half of the nineteenth century is full of this subject. The influence of primogeniture was not felt much in earlier centuries because it controlled only the descent of land, personality going to all the children equally or being subject to testation, and as late as the fourteenth century "the stock of a farm was worth at least three times that of the fee simple." ROGERS, *THE ECONOMIC INTERPRETATION OF HISTORY* (1888) 63. Maitland remarked that England's "whole constitutional law seems at times to be but an appendix to the law of real property." F. W. MAITLAND, *CONSTITUTIONAL HISTORY* (1908) 538. "The history of the English Land Law is a history of intentions of Parliament frustrated by the ingenuity of law-

and class stratification of English society, and has exerted great influence on the political transformations of that country are facts so trite that one hesitates even to mention them. That free land has been a similarly powerful influence in the history of our own country is equally certain. A volume would be required to deal adequately with the interrelations in England between social conditions and the law of real property since Glanvill. One small detail of the law of landlord and tenant, regarding the removability of agricultural fixtures, when imposed upon Ireland regardless of contradictory traditional practices in that island, caused such suffering as to become an important factor in the Irish problem.¹³

In short, the concept of property never has been, is not, and never can be of definite content. The paradigm of a Sanskrit verb of a thousand forms could not approach in diversities the phases of that concept in any single time and place. No scholar has ever dealt in more than a rudimentary way with its mutations from age to age.¹⁴ Even a tyro in knowledge must exhaust the vocabulary of change in describing them. Changing culture causes the law to speak with new imperatives, invigorates some concepts, devitalizes and brings to obsolescence others.

So much by way of introductory generalities. The remainder of this discussion will be devoted to the history of the general concept of property, with somewhat particular attention to the distinction which modern economists have emphasized between property for use and property for power. There is no novelty in the facts to which I shall refer.¹⁵ Some novel emphasis

yers . . . in the interest of a class." SCRUTTON, *op. cit. supra*, at 1; to the same effect see ROGERS, *THE ECONOMIC INTERPRETATION OF HISTORY* (1888) 163. On primogeniture and entails see E. CECIL, *PRIMOGENITURE: ITS DEVELOPMENT IN VARIOUS COUNTRIES AND ITS PRACTICAL EFFECTS* (1895); J. R. McCULLOCH, *TREATISE ON SUCCESSION TO PROPERTY VACANT BY DEATH* (1848). C. D. FIELD, *LANDHOLDING AND THE RELATION OF LANDLORD AND TENANT IN VARIOUS COUNTRIES* (2d ed. 1885) 23, n. 3, expressed the opinion that to that day the degraded condition of the English agricultural laborer savored strongly of his origin—i. e., villeinage. Comparing the United States, see general statement in J. F. DILLON, *LAW AND JURISPRUDENCE OF ENGLAND AND AMERICA* (1895) 355-57.

13. The law denied to agricultural tenants the right to remove fixtures. In England improvements were commonly made by the landlord (hence the law worked no injustice there); in Ireland, by the tenants. See FIELD, *op. cit. supra* note 12, at 294, n. 1, and 296, n. 3. Compare this with his remarks on the temporary introduction of the French Code Civil into Carniola, *id.* at 114, and remarks on the introduction into the Bukowina of the family law of the Austrian Code, in E. EHRLICH, *SOZIOLOGIE UND JURISPRUDENZ* (1906) 4-6.

14. The only ambitious attempt known to the writer is that of L. FELIX, *DIE ENTWICKLUNGSGESCHICHTE DES EIGENTHUMS UNTER CULTURGESCHICHTLICHEN UND WIRTSCHAFTLICHEN GESICHTSPUNKTEN*, in six volumes; *NATUR* (1883), *SITTEN UND GEBRÄUCHE* (1886), *RELIGION* (1889), *RECHT UND STAAT* (3 volumes: the first, 1896, dealing with primitive times and classical antiquity; the second, 1899, dealing with the middle ages; the third, 1903, dealing with modern times through the French Revolution). Historical studies of specific doctrines or special fields of our law have been almost purely legalistic. Exceptional are those of J. Bryce, *The Influence of National Character and Historical Environment on the Development of the Common Law* (1897) A. B. A. REP. 444-62; and *The Relations of Law and Religion* in 2 *STUDIES IN HISTORY AND JURISPRUDENCE* (1901) 638-68. A. V. DICEY, *LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* (1914), deals with legislation only.

15. And the general subject of this paper has been partly covered, particularly in C. GORE (ed.), *PROPERTY: ITS DUTIES AND RIGHTS, HISTORICALLY, PHILOSOPHICALLY,*

may be given to them; possibly some novel associations may be shown to exist between them; at least, important associations generally overlooked will be adequately emphasized. By property for use is meant property held for personal consumption; by property for power, property whose title is available for alienation—and which therefore involves potential control over the services of others whose necessities or desires impel them to an exchange of services for property.¹⁶ In particular, property for power involves control of the means of production.

The conception of property for use men can never by any possibility have overlooked. As many have said, even a dog resents interference with his bone. Directly sprung from that concept are the concepts of mere physical control, of legally protected possession, and of title; which last has never in our law had any other meaning than a right to gain, maintain, or regain possession. Naturally enough, students of primitive civilizations find that "communal property usually extends to things of common use".¹⁷ Naturally, also, they report that "with the rarest exceptions primitive people consider land inalienable".¹⁸ Such conceptions linger long. Vestiges of prehistoric communal ownership lingered in English law until they were abolished ten years ago.

In tracing the further fortunes of the concept this side of the primitives one naturally begins with the Greeks. From Plato the conception of property for use received very little recognition as an element of individual property. The end to which his thought was directed was social solidarity; his means was education in the spirit of unity, but education only of the highest class, which alone was fit to rule. Because unchallenged government was essential to social solidarity, and because the institutions of both private property and the family promoted individual selfishness and would therefore stimulate resistance to the engorging tendencies of the city-state, he attacked both in the *Republic*, proposing common enjoyment of property and wives. In the *Laws*, too, he proclaimed communism as his ideal. Nevertheless, he proposed individual possession of land (without powers of alienation) with communal use, and restriction of offspring so as to safeguard enjoyment.¹⁹ Plato has

AND RELIGIOUSLY CONSIDERED (1913). As the present essay is a generalized sketch, citations are on most points confined to secondary texts in which details are given with references to sources.

16. The distinction is primarily due to Anton Menger. See his sketch in the *Encyclopedia of the Social Sciences*. But it was developed and popularized by Adolf Wagner, to whose exposition of the social function of law see Jhering's tribute in his *LAW AS A MEANS TO AN END* (Husik's trans. 1913) 389, n. 110. It is emphasized by M. COHEN, *LAW AND THE SOCIAL ORDER* (1933) 31, 45-51, 343-45; somewhat by Leonard Hobhouse in GORE, *op. cit.* *supra* note 15, at 7, 9-10, 20-22.

17. GOLDENWEISER, *op. cit. supra* note 1, at 137.

18. LOWIE, *op. cit. supra* note 3, at 153, 280.

19. *THE REPUBLIC* (Jowett's trans., 3d ed. 1888), especially V. 464C and VIII. 543; 1 *THE LAWS* (Loeb Lib. ed. 1926) 355, 377, compared with 363, 389 *et seq.* On his attitude toward private property, see E. BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* (1906) 84-5, 142-43. The discussions in W. FITE, *THE PLATONIC LEGEND* (1934), of Plato

been referred to only as a point of departure. There is no reason to exempt philosophers from the discredit that lies on the great-man theory of history. No importance should be attached to Plato's views unless they reflect the attitude of his time; and this (except so far as his scheme assumed the right of the state to assert unlimited control over the lives of its citizens) they evidently do not do. On the contrary, the assumptions that common use could be reconciled with individual possession, and that their combination was therefore consistent with his main end of social unity, are so manifestly controversial that the omission of any attempt to justify them factually may fairly be taken as a confession of the actually impregnable position of the institution of private property in Plato's day.

With Aristotle the situation is different. He recognized Greek institutions as they were, private property and all-powerful state. Indeed, he exalted private property, defending it against Plato's communal doctrines; and the basis of his defense was the conception of property for use, which he was the first to emphasize. Rejecting Plato's false ideal of unity, he declared as his own ideal a state such as would "enable the inhabitants to live temperately and liberally in the enjoyment of property".²⁰ He urged that its private control tended to develop those qualities of foresight, temperance, and philosophy which, better than any mechanical limitations of wealth or impracticable arrangements of state, would tend to preserve the ideal society just characterized. However, he also pronounced for common use of private property, "by friendly consent".²¹

The conception of property for economic power could not well occur to one who defined property, as did Aristotle, as "a collection of instruments" needed in the management of a household, and then explained that slaves were animate instruments. "Property, even though living beings are included in it", were, he said, no part of the state; that was "not a community of living beings, but a community of equals, aiming at the best life possible".²² The proletariat had no place in such a mind. If the conception occurred to it of property's economic power, it could not have harbored the idea of restraining such power for ends of social justice. Of Plato the same might be said. His "communism" had no reference to the evils of poverty; of such evils he gave no evidence of consciousness. It was limited to the ruling class. As regards that class, his plan had educational, moral, and political ends; but not economic. It is true that in arguing that responsibility for the use and control of property develops individual character, Aristotle may possibly have

the man (§ 20), and of his attitude toward liberty (§ 13) and toward individualism (§ 14) are refreshing.

20. Attack on the Platonic plan: *POLITICS* (Jowett's trans. 1885) II. 5, §§ 4-17; II. 12, § 12. His own ideal: *id.* at II. 5, § 10; II. 6, §§ 8-9; VII. 5, §§ 1 and 15 *et seq.*

21. On moderation instead of mechanical limitations, *id.* at II. 7, §§ 12-23. On common use of individual property, *id.* at VII. 10, § 9; for an example of nomads whose use of grazing lands somewhat approaches Aristotle's idea, see LOWIE, *op. cit. supra* note 3, at 280.

22. *POLITICS* I. 4, § 1; VII. 8, § 4.

had in mind economic power; the thought would be natural, but it is nowhere indicated. It is also true that both Plato and Aristotle denounced money and trade; and Aristotle specifically declared that, although one who gives a shoe in exchange for money or food does "use the shoe as a shoe", this was "not its proper or primary purpose". To use its exchange value thus was an improper use;²³ but still there is no evidence that he thought here of services, or classes, or economic power.

However, Plato and Aristotle did clearly assume in their discussions the *political* power exercised by property. The former attacked private property because its abolishment would prevent the objects of his proposed educational scheme,²⁴ the future guardians of the state, from being "enemies and tyrants instead of allies of the other citizens" (and, obviously, of each other). Aristotle criticized at length the particular proposals of Phaleas of Chalcedon to equalize individual fortunes in order to prevent revolution; but, fully concurring in the view that all civic dissensions arose from inequalities of wealth, suggested the elimination of gifts *inter vivos* and by will and restrictions upon the right of inheritance as means by which an oligarchy might preserve itself.²⁵

Our ideas of today seem very far removed from the ideas of these two Greek philosophers. Yet we are probably nearer to them, and to the relation that actually existed between the Greek city-state and private property, than we are to the property concept of the Roman Law. The *dominium* of Roman Law—that is the *dominium* of the quiritary law (*dominium ex jure Quiritium*) to which that word was almost wholly confined—was an absolute right in private property.²⁶ No holder of temporary rights in land, therefore, whatever their nature, could have *dominium*. Likewise, the Romans never classified under *dominium* mere limited and definite rights of use in the land of another. Of the Roman law as a whole, however, that was only qualifiedly true. There existed in it various forms of what we would call inferior types of ownership, of which merely the most important and most strikingly inconsistent with the concept of ownership in the quiritary law were the bonitary ownership (*in bonis habere*) of the prætorian law and holdings of provincial lands. In the first of these *dominium* was in one man and practical enjoyment in another; and the latter, the bonitary owner, was protected in his

23. *Id.* at I. 8, §§ 4, 13; I. 9, §§ 2-5; I. 10, § 4.

24. REPUBLIC III. 416.

25. POLITICS II. 7, §§ 2-23; II. 9, §§ 14-19; II. 12, § 12.

26. SOHM, *op. cit. supra* note 10, at 204, 209; J. T. F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW (1932) 142-44, 268; W. W. BUCKLAND, MAIN INSTITUTIONS OF ROMAN PRIVATE LAW (1931) §§ 32-35; P. F. GIRARD, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN (6th ed. 1918) 261; K. VON CZYHLARZ, LEHRBUCH DER INSTITUTIONEN DES RÖMISCHEN RECHTS (1919) 80. The main texts are given in C. SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's trans. 1886) 353 (little changed in later German editions). "Rome developed the conception of absolute property . . . while Athens worked out a system of *relative* property rights . . . there is no Greek term corresponding to the *dominium* of the Romans." 2 P. VINOGRADOFF, HISTORICAL JURISPRUDENCE (1920) 198, citing MITTEIS, REICHSRECHT UND VOLKSRECHT (1891) 70.

actual enjoyment against even the quiritary owner. In the second case *dominium* was in the state and full enjoyment in the possessor.²⁷ However, no interests of limited duration were recognized under either quiritary or bonitary title. The *dominium* of the *jus civile* antedated the appearance of these lesser interests of the *jus honorarium*, and therefore took no account of them. And this was technically justifiable since, except in the two cases just mentioned, their holders were not protected against everybody.²⁸ To be so protected was the essence of ownership in Roman law. Various modern scholars agree that the very limited records of Rome's legal development through six centuries contain no consistent doctrine; and Savigny's later attempt to construct one was unsuccessful.

Utterly different was the situation in Germanic law. In the earlier centuries of the medieval period the transfer of land titles was either impossible or so impeded by restrictions as to minimize its value in exchange. Its value lay almost exclusively in its produce. We know that in England the distribution among tenants of lands either privately owned in a strict sense or at least controlled by local potentates goes back to the earliest English occupation of England.²⁹ We know that the giving out of land to persons for life, holding immediate enjoyment, with rights of future enjoyment held by other persons, was well established before 1200 A. D. Leaseholds for years were also then becoming important. This separation of title from unified and complete enjoyment, and consequent distribution of the produce of the land among different persons under tenancies of some form, apparently characterized Germanic land law on the continent from the time individual ownership had permitted the accumulation of landed estates of any considerable extent.³⁰ Inevitably, partial ownership was claimed by those who shared in the use of land; and partial title was conceded to them. Control, actual and protected by law, directed to the use of a thing was "the final and the central idea" in the medieval land law. It existed in degrees infinitely varied, but in essence there was no difference between complete title and a right, definite or indefinite, to use land—even the land of another. Ownership was a rubric covering all instances.³¹

27. BUCKLAND, *op. cit. supra* note 26, at 94, 97, 100; BUCKLAND AND McNAIR, *ROMAN LAW AND COMMON LAW: A COMPARISON* (1936) 59, 61, 62, 63; SOHM, *op. cit. supra* note 10, at 16 and 310-11.

28. On the possessor in good faith see BUCKLAND, *op. cit. supra* note 26, § 33, and J. MUIRHEAD, *HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME* (2d ed. 1899) 254, 267, 337.

29. P. VINOGRADOFF, *GROWTH OF THE MANOR* (3d ed. 1920) 224 *et seq.* According to Thorold Rogers, in the fourteenth century "land was constantly sold at six, eight, and twelve years' purchase." *THE ECONOMIC INTERPRETATION OF HISTORY* (1888) 63. He elsewhere states that "it was constantly sold for ten years' purchase", but "was valued at twenty years' purchase" in the middle of the fifteenth, and in the eighteenth averaged thirty-three and a half. *SIX CENTURIES OF WORK AND WAGES* (1894) 287-88, 405.

30. 2 M. KOWALEWSKI, *DIE ÖKONOMISCHE ENTWICKLUNG EUROPAS* (1902) c. 1.

31. HUEBNER, *op. cit. supra* note 2, at 227-28. "In the Middle Ages"—as compared with Rome, and the reference is to all Germanic western Europe—"ownership is divided, real

Under that law, therefore, all persons sharing in enjoyment held, together, the complete title; and each was owner of his particular interest, be it what it might and according to its nature. Likewise, as respect rights *in re aliena*, which Roman law did not treat as owned by the person enjoying them (nor, therefore, by anyone), but only as incumbrances upon the ownership of the thing in which such rights existed: in Germanic law they were, in Gierke's phrase, "splinters of ownership".³²

And the preceding statements are equally true of our law, which takes its fundamental concepts of possession and ownership directly from the medieval German law; to which it is much nearer, in fact, than the present law of Germany. Enjoyment content, use, is the essence and the basis of all title, of all proprietary rights in our law. This brings it very near to the understanding and expectation of the common man, as it ought to be. Question any man, and he will yield the opinion that the sole reason for owning property is to use or (which is enjoyment in another form) to sell it. He will agree that title is only a shell that covers and protects a kernel of enjoyments. These enjoyments are today mainly economic; although of course they may be æsthetic, and under older conditions they were in part both political and honorific in England, and in this country political. In their economic form, enjoyments of land appear, of course, in a variety of guises. The tenant for years, or even at will, has the liberties of an actual occupant and may consume the produce of the land; but the reversioner, his landlord, collects the rent, and it is waste if the tenant wrongfully so uses the land that the consequences of his acts will outlast the tenancy and, therefore, do damage to the reversioner. Holders of present estates of future possessory enjoyment have no liberties dependent upon occupation; but their present estates may be vested

rights become multiplied; one can be an owner as lord, as vassal, as copyholder; one can be owner during one's life or by right of inheritance; one can be owner in the quality of a pledge creditor, or by right of guardianship." BRISSAUD, *op. cit. supra* note 2, at 305n. See II. 1 O. STOBBE, *HANDBUCH DES DEUTSCHEN PRIVATRECHTS* (3d ed. 1896) §§ 85, 92. 2 O. GIERKE, *DEUTSCHES PRIVATRECHT* [in BINDING, *SYSTEMATISCHES HANDBUCH DER RECHTSWISSENSCHAFT*] (1905) 356 *et seq.* 2 A. HEUSLER, *INSTITUTIONEN DES DEUTSCHEN PRIVATRECHTS* (1886) §§ 82, 86. "The compatibility of divers seisin permits the rapid development of a land law which will give to both letter and hirer, feoffor and feoffee, rights of a very real and intense kind in the land, each protected by its own appropriate action, at a time when the backward and meagre law of personal property can hardly sanction two rights in one thing. . . ." 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1911) 183, *cf.* 541. On the last point, regarding personalty, *cf.* HUEBNER, *op. cit. supra* note 2, at 405-06.

32. HUEBNER, *op. cit. supra* note 2, at 227, 229, 230-32. II. 1 STOBBE, *op. cit. supra* note 31, §§ 88, 94, 96; 2 HEUSLER, *op. cit. supra* note 31, at 87; 2 GIERKE, *op. cit. supra* note 31, at 358-59. For bibliography on the difference between *dominium* and *Eigentum*, see 2 *id.* at 348, n. 2. "What must seem a contradiction in terms to the property notion of Roman or of modern civil law—namely, that there may be two or more property rights (rights of ownership) in the same thing—is evidently the most general rule in the [primitive] institutions governing the tenure of land." C. Brinkmann, *Land Tenure: Introduction* (1933) 9 *ENCYC. SOC. SCI.* 231. For example, among the Maori one family may have the right to dig roots in, and another family the right to hunt rats on, a piece of land; and in New Guinea and West Africa trees may be owned apart from the soil. LOWIE, *op. cit. supra* note 3, at 279. To realize the large development of tenancy at an early date in some quarters see L. M. LARSON, *THE EARLIEST NORWEGIAN LAWS* (1935) 89-107.

rights, indestructible and alienable, and in that form they may share by a sale in the economic values of the title; and if their rights be contingent instead of vested, still they share, albeit in lesser measure. A tenant for years owns his leasehold interest in the land; his reversioner owns, and can convey, no more than a title subject thereto. If the existing estates in the land are those of *A* for twenty years, of *B* for life, and then of *C* in fee simple, only the three together can convey a *complete* title. In the absence of such a conveyance *A*'s right is good against everybody during his term, as thereafter *B*'s and *C*'s rights will successively be good. Thus, as in medieval law, ownership is a rubric covering all instances of apportioned use: one may own any interest, and either literally against the whole world, or only against the world generally with exceptions of one or more persons holding better rights. Even a mere right *in alieno solo* is treated by us in the same manner, as an object of ownership: by the laity, by the Restatement of the Law, by the Supreme Court—by all, in fact, save by those of us who know John Austin without knowing the history of our own law. Such a right is a unit in the fascicle of limited rights (liberties of user, powers of alienation, claims to control against interference by others) which make up the general and complex right of ownership. All this is the root of our fundamental doctrine that title is no more than relatively better right to immediate possession (and so of user)—or, in case of rights *in re aliena*, simply a better right of enjoyment—as between two contestants actually litigating that issue; with possible similar subsequent litigations involving another party (or other parties) simply ignored and postponed. To possess, even without any original title whatever, is to be owner against the world generally; against all save those who have a title higher than such possessory title—perhaps merely an older possession. Our law, save in a few rare situations, has never known more than the relative rights to possession (hence, to use) of *A* and *B*, and then of *B* and *C*, and so on—successive parties to successive litigations.³³

33. "The Common Law never had any adequate process in the case of land, or any process at all in the case of goods, for the vindication of ownership, pure and simple." F. POLLOCK AND R. S. WRIGHT, *POSSESSION IN THE COMMON LAW* (1888) 5. "Every title to land has its roots in seisin; the title which has its root in the oldest seisin is the best title." 2 POLLOCK AND MAITLAND, *op. cit. supra* note 31, at 46, cf. 74-80. Likewise, MAITLAND, *FORMS OF ACTION AT COMMON LAW* (1936) 61; 1 MAITLAND, *COLLECTED PAPERS* (1911) 370, 408; HOLMES, *COMMON LAW* 241-42, 244; LIGHTWOOD, in 24 HALSBURY, *LAW OF ENGLAND* (1912) 328. See correspondence of Ames and Maitland, and Pollock's comment thereon, in *Gossip About Legal History: Unpublished Letters of Maitland and Ames* (1924) 2 CAMB. L. J. 1, 15. 2 FREEMAN, *JUDGMENTS* (5th ed. 1925) §§ 854, 876; *re* ejectment, §§ 860, 864-65; *re* trespass to title, §§ 873-74. Holdsworth's statement that our property law is "a law of possession . . . side by side with the law of ownership"—3 HISTORY OF ENGLISH LAW (3d ed. 1923) 89, and LAND LAW (1927) 182—is supported by only a small number of cases, most of them decisions in ejectment; nor is it supported by all of the cases which he himself cites. The analysis of a complete title given by Blackstone (2 BL. COMM. *197-98) and followed by Kent (4 KENT COMM. *373) is misleading. Blackstone's editor, Hammond, pointed out that nothing in the law of Blackstone's time could have suggested it. It goes back to Coke (CO. LIT. *266a), who wrote when the ancient writs of right were in active use; and only since Maitland's work, has it been fully and generally understood that even those writs did not recognize proof of an absolute title.

The doctrine of divided ownership, based upon apportioned use, sprang from the actual economic conditions of medieval times.³⁴ In it the medieval Germanic law gave us the most fundamental single characteristic of the present Anglo-American law of property. It became such merely because of a particularly logical development in our law of the distinction between general title and immediate enjoyment. It has remained such because it conforms to economic justice and human expectations. Four great doctrines have shaped our law: seisin (possession), tenure, uses, and estates. Of these only the first can even be conceived of apart from the concept of divided ownership. In fact, all four have operated solely through that concept; their creative power has been wholly due to it; practically speaking, all sprang from it. Our unique law of trusts, with title in trustee and use in beneficiary, is only the apotheosis of the medieval distinction. And what is true of land is true, in only lesser degree, of personal property.

Before discussing the relation of feudalism to the Roman and medieval doctrines just referred to, a brief reference is desirable to a detail of those doctrines, not yet emphasized, which was the subject of a vast controversial literature in Germany in the last century—namely, the true nature of possession and ownership; a controversy which was only one phase of a broader one between Romanists and Germanists.

Under no legal system can it be doubted that possession is the normal manifestation of ownership. But possession is visible, ownership a mere concept. Consequently, the elements constitutive of a possession which the law will protect tend inevitably to become the test of ownership.³⁵ Great variations have been proved possible, however, in ascribing to possession, as a factor in the creation of ownership, a rôle relatively subordinate or dominant. Its complete subordination in the Roman *jus civile*, its greater recognition in the *jus honorarium*, and its absolute supremacy in the Germanic system, have already been emphasized. Now, as respects the tests of possession, our own law and the Roman law alike require some sufficiently effective control of a thing, plus a mental element. This *animus* is, in our Germanic law, consistently with its doctrines of divided ownership, merely an intention to maintain control against the world generally; not against, literally, all the world. But in the medieval exegesis of Justinian's texts the mental element was labeled *animus domini*, and was treated as a claim against all the world; that is, as a claim of *dominium* in the strict sense of the Roman

34. Maitland has said that "mediaeval land law is not to be understood apart from mediaeval agriculture . . . and . . . the other half of the truth . . . [is] that we can only get at the economic facts of the middle ages through the medium of legal documents, documents which can only be interpreted by those who have studied the law." And he remarked "how elaborate an analysis of the legal thought of the middle ages is necessary if we are really to understand the commonest economic facts". 2 MAITLAND, COLLECTED PAPERS (1911) 252.

35. GIRARD, *op. cit. supra* note 26, at 273; 1 B. WINDSCHIED, LEHRBUCH DES PANDEKTENRECHTS (7th ed. 1891) 427 and n. 5; 2 GIERKE, *op. cit. supra* note 31, at 189.

quiritary law. This doctrine,³⁶ almost minimal in actual texts of Justinian's *Digest*, almost wholly the creation of commentators,³⁷ was taken over by Savigny,³⁸ and was by him, and even more by some of his followers, developed in the most abstract manner as a principle divorced from history and reality. The adoption of "will", rather than "intent", as the translation of *animus* was doubtless partly responsible for such purely metaphysical treatment of the problem.³⁹ Thus, in effect, *dominium* was again made a unitary and absolute concept because it was regarded as the manifestation of a volition which was treated as unqualifiable. Upon the owner's evolving will depended the creation, transfer, and extinguishment of his title;⁴⁰ and

36. A list of all pertinent texts of the *Corpus Juris*, Gaius, Ulpian, etc., and of modern secondary authorities from c. 1500 onward, will be found in F. C. VON SAVIGNY, *DAS RECHT DES BESITZES* (7th ed. 1865). On his theories, see particularly §§ 9, 10, 21, 32.

37. *Id.* at 603, n. 31. However, it seems to be agreed that an emphasis upon *animus* and *voluntas*, and so a wide allowance of individual freedom, was particularly characteristic of Roman Law. "There never was any other law that conceived the principle of individual independence so clearly and consciously, and carried it out so energetically and in so extensive a manner as the Roman." JHERING, *op. cit. supra* note 16, at 383, citing for details II. 1 GEIST 133-218. Cf. MUNROE SMITH, A GENERAL VIEW OF EUROPEAN LEGAL HISTORY AND OTHER PAPERS (1927) 130-32; and, as regards contract law, R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 270-71.

38. See SMITH, *op. cit. supra* note 37, at 143-50. Despite the extensive literature of earlier centuries cited in Savigny's *BESITZ*, the book was highly analytical, not historical. One naturally wonders how the author of a *GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER* (6 vols. 1815-31), and the founder of the Historical School, could ignore the contrast between Roman and Germanic concepts. The *GESCHICHTE* does not reach the time of the Reception; also, it is an "external" history of the law—i. e., it does not follow the development of individual doctrines or conceptions. Moreover, he approached the *facts* of the Reception with the contradictory *theory* that each nation develops its own law by custom within its own borders; and further obscured the significance of facts by a fiction that the jurists who wrote on the Roman law were the mouthpieces of Germanic custom and the Germanic *Zeitgeist*. And, finally, the *BESITZ*, published in 1803, made Savigny famous overnight when he was only 24, and was presumably far advanced toward its third edition (1818; 2d, 1806) when the first volume of the *GESCHICHTE* appeared. On this last point see C. G. BRUNS, *DAS RECHT DES BESITZES IM MITTELALTER UND IN DER GEGENWART* (1848) 409-11, and cf. Jhering's remarks on Bruns, in his *BESITZWILLE* (1889) 252, 462. The aim of Jhering, in his *GEIST*, was a *real* historical understanding of Roman law—of the social situations and purposes back of its rules. "Jhering undertook the work which the Historical School only proposed; but what he brought forth quickly showed him numerous contradictions of its thesis." A Merkel's appreciation of Jhering reprinted with the latter's *LAW AS A MEANS TO AN END* 436-37.

39. Bekker suggests this with a "perhaps". *DAS RECHT DES BESITZES BEI DEN RÖMERN* (1880) 160, n. 2. But the philosophical temptation seems too clear for doubt; cf. Jhering's references to Hegel in III. 1 GEIST 318, 319, 321, n. 349. See also JHERING, *DER BESITZWILLE* 249, 251, n. 1.

40. On the actual Roman doctrine, see WINDSCHEID, *op. cit. supra* note 35, §§ 37, 47, 69; I JHERING, *GEIST* § 10; *DER BESITZWILLE* c. 15; BEKKER, *op. cit. supra* note 39, especially § 32.

On the doctrine adopted by Savigny (though perhaps not originated by him; see JHERING, *BESITZWILLE* 248-53) see his *BESITZ*, *op. cit. supra* note 36. See also Warnkönig, *Analysis of Savigny's Treatise on the Law of Possession* (1838) 19 AM. JURIST 13-49, 257-91, particularly 20-2, 33-4, 44, 258, 262; JHERING, *BEITRÄGE ZUR LEHRE VOM BESITZ* (1868), especially 27-41; UEBER DEN GRUND DES BESITZESCHUTZES: EINE REVISION DER LEHRE VOM BESITZ (2d ed. 1869), especially 28-42; III. 1 GEIST 318-27; *BESITZWILLE* ix-xiii, c. 12, 14.

The jurists ("more and more after the example of Hegel") made the concepts of right and of volition identical. "The final end of all law is for them the act of willing; capacity to hold rights and volitional capacity are for them, therefore, equivalent; a right appears as a fragment, as it were, of the will. . . . The will is the instrumentality through which man enjoys rights; their enjoyment consists in feeling the joy and dignity of power, in the satis-

to his mere acts (by emphasizing which, as implying volition, conceptual absolutism and abstractness could have been checked) little weight was attributed. But, to quote a German jurist of eighty years ago whose criticisms antedated Jhering's onslaughts upon these doctrines:

"If the legal justification of ownership is to be found in volition, and is the factual realization of volition, then the content and extent of proprietorship are necessarily determined by the owner's own will; and ownership is therefore, as the Romans conceived it, a right of absolute proprietorship over a thing. . . . If, on the other hand, the legal basis of ownership is found in the justification of possession afforded by custom, then the ambit and content of proprietorship are, naturally, likewise defined by the concept of customary title. . . . From these points of view it follows, first, for Roman law, that the variant nature of *things* cannot influence at all the concept of ownership . . .; for Germanic law, on the contrary, that the individual character of particular things exercises an essential influence upon the ambit and content of proprietary rights—in other words, that ownership of things of varying nature is itself variable."⁴¹

It was against these exaggerated abstractions that Jhering devoted the best efforts of his life. He ridiculed their extravagant formalism and benighted reliance upon logic.⁴² He substituted for an abstract volition mere evidence of an intelligent consciousness of the nature of his acts by one who in fact uses a thing as an owner would use it (this is substantially the test thoroughly established in American law), and an *interest* seeking recognition on the basis of social utility. He accepted most of the medieval modifications of Roman doctrine.⁴³ The language of Savigny still to some extent per-

faction of having willed—for example, in having mortgaged property or assigned an action (*Klage cedit*), and thereby proved oneself to be a legal personality." III. 1 JHERING, *GEIST* 319, 320-21. But cf. the preface to his *LAW AS A MEANS TO AN END*.

41. C. A. SCHMIDT, *DER PRINCIPIELLE UNTERSCHIED ZWISCHEN DEM RÖMISCHEN UND GERMANISCHEN RECHTE* (1853) 223-24.

42. JHERING, *BEITRÄGE ZUR LEHRE VOM BESITZ* 136-53; *UEBER DEN GRUND DES BESITZESCHUTZES* 160-79; III. 1 *GEIST* 309-15. He deplored ". . . this idolatrous cult of The Logical . . .". III. 1 *id.* at 310, n. 429. "The intellectual spell cast by the Roman law . . . [issues from] hallucinations of juristic dialectic, which . . . endeavors to vindicate the actual law as reasonable, not by vouching its *historical* or *practical* or *ethical* justifications, but by demonstrating its *logical* necessity. . . . Precisely in our day this tendency has become regrettably extreme; regrettably because such a sham justification, such logical self-delusion, diverts us from the true sources in which alone are to be found the ultimate bases of legal institutions, and so from any true understanding of the law. To judge from many recent evidences one might almost believe that the law is essentially nothing more than a creation of juristic dialectic, for whose understanding practical considerations are totally unnecessary; a tumbling ring for votaries of scholastic sophistry". III. 1 *id.* at 309. "Let us break the spell to which delusion has subjected us. The whole cult of logic, which has attempted to make of jurisprudence an artificial legal mathematics, is an aberration that rests upon a misunderstanding of the nature of law. Concepts exist for life, not life for concepts. It is not that which logic prescribes that happens, but that which life, trade, and a sense of justice require; be the result logically a necessity or an impossibility." III. 1 *id.* at 311-12. Criticism was continued, with biting sarcasm, in his *SCHERZ UND ERNST IN DER JURISPRUDENZ* (1st ed. 1885).

43. On Jhering's theory of possession see *BEITRÄGE ZUR LEHRE VOM BESITZ*, especially 5-6, 44-58, 122-35, 153-68; *UEBER DEN GRUND DES BESITZSCHUTZES*, especially 44-72, 143-60,

sists,⁴⁴ but the spirit is different. The controversy⁴⁵ is of interest as a warning that even the greatest jurists may work ill if they ignore history; whereas courts innocent of juristic theory, as most of our American courts have been, may reach sound results by eliminating refinements, and emphasizing practicalities of human conduct and of evidence. In the passage of the German Civil Code of 1900 from its first to second draft *animus* disappeared.⁴⁶

Returning from juristic theories to the living law, feudalism was the next stage in the evolution of the concept of ownership. The feudal relation, whence our private law took its concepts of tenure and relation, rested on the severance of use (*dominium utile*) from title or over-lordship (*dominium directum*). The mere existence of the former phrase—the recognition of a *dominium* consisting in mere beneficial enjoyment—evidences an immense departure from the original Roman doctrine of its *jus civile*. In this the first and essential step was Justinian's abolishment⁴⁷ of quiritary ownership in favor of bonitary ownership.⁴⁸ This declaration that what had become the only actual ownership (because the praetor controlled the remedies by which law was enforced) should be the only ownership legally recognized, was in truth something more. For bonitary ownership was based merely on possession and use. Its displacement of *dominium*, an ownership in which user formed no essential part, terminated the inevitable exclusion of interests less than absolute from the concept of ownership. This must have facilitated an adjustment of Roman doctrines to Germanic medieval facts.⁴⁹

179-93; BESITZWILLE, especially 6-20, 52-79, 470-510. On rights as legally protested interests recognized as socially useful, see III. I GEIST 327-33, and his LAW AS A MEANS TO AN END, *passim*. On his attitude toward medieval changes in the Roman doctrine, see *infra* note 49.

44. Notably in WINDSCHEID, *op. cit.* note 35, §§ 148, 149, 163.

45. *Id.* §§ 9-10; W. W. BUCKLAND, TEXT BOOK OF ROMAN LAW (1921) 199-201, and BUCKLAND, *op. cit.* *supra* note 26, at 105-07; SMITH, *Four German Jurists*, in *op. cit.* *supra* note 37, at 112.

46. In the first draft, § 797 required actual control of a thing (Innehabung) "together with the will of the controller to hold the thing as his own" (Besitzwille). ENTWURF EINES BÜRGERLICHEN GESETZBUCHES . . . AMTLICHE AUSGABE (1888). In the second draft the above section (now § 777) became simply: "Possession of a thing is acquired by gaining actual power [Gewalt] over it." REATZ (ed.), DIE ZWEITE LESUNG DES ENTWURFS EINES BÜRGERLICHEN GESETZBUCHES . . . UNTER GEGENÜBERSTELLUNG DER ERSTEN LESUNG (1894). This was retained in the final draft as § 854. See also MOTIVE ZU DEM ENTWURFE EINES BÜRGERLICHEN GESETZBUCHES . . . AMTLICHE AUSGABE (1896) III. 80 under § 797. Jhering has a criticism of the first draft in his BESITZWILLE, c. 19. According to SMITH, *op. cit.* *supra* note 37, at 201-03, Jhering's criticisms had much to do with the change.

47. No writer (apparently) suggests any connection between this action and the principle of Greek law referred to *supra* note 26.

48. SOHM, *op. cit.* *supra* note 10, at 311; JOLOWICZ, *op. cit.* *supra* note 26, at 514; MUIRHEAD, *op. cit.* *supra* note 28, at 392.

49. BRUNS, *op. cit.* *supra* note 38, §§ 14, 30, 34, 35, 39, pp. 338, 383, 406-07; B. DELBRÜCK, DIE DINGLICHE KLAGE DES DEUTSCHEN RECHTS (1857) 80-91; A. HEUSLER, DIE GEWERE (1872) §§ 24, 32; JHERING, BESITZWILLE 457-62; BIERMANN, TRADITIO FICTA . . . AUF GESCHICHTLICHER GRUNDLAGE (1891) 68, 143-46, 217-19, 290; 2 GIERKE, *op. cit.* *supra* note 31, at 247 *et seq.*

Now, feudalism was a political system; but also an agrarian system "superimposed upon private ownership and collective ownership".⁵⁰ As the latter, it was but an aspect, or an application, of the Germanic doctrine of divided ownership. And its predial character was primary; its political, derivative. The latter sprang from the social status of the over-lord, and the economic dominance of land; but its institutional development was made possible by the complete substitution of the Germanic concept of control for the original Roman concept of *dominium* in the use of that word. Its meaning came, apparently, to rest upon the idea of control just as does the meaning of our word dominion. And thus *dominium* came to imply a relationship—in the land law, of general owner to limited owner; in public law, of lord to man or sovereign to subject. This union of concepts of public and private law had momentous consequences. Private law deals with the assertion of one individual's rights and powers against others. Public law deals with duties of individuals to the state; some negative, some affirmative. One is characteristically the field of individualism; and the fact that private law in its origins was predominantly property law must certainly have greatly stimulated absolutistic thinking about private rights. Public law, on the contrary, is the first of social duties.⁵¹ Writing of the political aspect of the union of these ideas in feudalism, Dr. McIlwain has pointed out the influence upon English theories of government of feudalism's "mingling . . . of the ideas of proprietary right and governmental authority . . . and the corresponding fusion of public and private law".⁵² Its influence upon private law was perhaps greater. Ancient proprietary rights of familial and other associations in the land (above referred to) acquired under feudalism a partially political character; and consequently, as individual rights in land became stronger they, too, did not become merely proprietary, but became the basis of personal status in private and public law.⁵³ So it was in Germany. And something of the same character will probably sometime be established for England; for it would apparently explain why in our law all sorts of duties and rights are attached by law, without reference to volition, to various personal relationships—those of husband and wife, bailor and bailee, debtor and surety, partners, and others. This idea of relation, probably introduced

50. HUEBNER, *op. cit. supra* note 2, at 230. BRISSAUD, *op. cit. supra* note 2, § 60. Of course everybody knows this, but its significance is here emphasized. Mr. McIlwain, for example, speaks of "the feudal conception of the proprietary character of all rights" in *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* (1932) 384; and of course an application of this was a basis of feudalism, but it was not an original concept "of" feudalism.

51. SOHM, *op. cit. supra* note 10, at 24; cf. Digest of Ulpian: D. I. 1, l. 1, § 2. The remarks by Merkel, *supra* note 38, at 440-41, seem to raise an unnecessary difficulty.

52. McILWAIN, *op. cit. supra* note 50, at 177, 182, 355; citing Gierke, *Grundzüge des deutschen Privatrechts* in 1 F. v. HOLTZENDORFF, *ENCYKLOPÄDIE DER RECHTSWISSENSCHAFT* (6th ed. 1904) 488-90. See also, 3 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1923) 255; W. A. DUNNING, *HISTORY OF POLITICAL THEORIES, ANCIENT AND MEDIAEVAL* (1902) 260-61; H. Rehm, *Geschichte der Staatsrechtswissenschaft* in M. V. SEYDEL, *HANDBUCH DES ÖFFENTLICHEN RECHTS* (1896) 170-71, 181 n. 5, 200 n. 9.

53. HUEBNER, *op. cit. supra* note 2, at 230; BRISSAUD, *op. cit. supra* note 2, § 61.

into our law *through* rather than from feudalism, Dean Pound regards as almost the most fundamental and fertile in its development.⁵⁴

In all medieval principles of divided ownership and feudalism there is implicit a deduction—or perhaps an assumption—whose consequences, had it been logically, and above all had it been consciously, developed in our law, would have been of immeasurable importance to society. This assumption or deduction is (I quote again from the German scholar above referred to) that ownership should be “merely the right, and the duty, to control and to use a thing in accordance with socially approved [*sittliche*] purposes”.⁵⁵ The origins of our basic conceptions of property, and very much of its development (almost wholly judicial), are entirely consistent with that principle. We shall see that its increased assertion is one of the most striking aspects of legal development in the period of industrial expansion and social turmoil that followed the Civil War. What was it, then, which diverted the law from a development in harmony with the principle above expressed, and made necessary the reactive assertion of social control which has been so characteristic an aspect of legislation, alike in this country and in other countries, during the last half-century or more? The answer is found in the decay and abolishment of feudalism and in the several doctrines of economic and political individualism that came to power in Europe in the late decades of the eighteenth century, reinforced in this country by conditions of life in an open continent.

As feudalism decayed, the way was opened for its statutory abolishment by the gradual establishment of a general belief that feudalism was essentially irreconcilable with individual ownership. It was not essentially so. On the contrary, it involved *originally* the most extreme expression, the very exaltation, of private property;⁵⁶ and nowhere else an expression so extreme as in England.⁵⁷ But, as remarked before, the user of land—the tenant—

54. R. POUND, *SPIRIT OF THE COMMON LAW* (1921) c. 1; Pound, *The End of Law as Developed in Juristic Thought* (1917) 30 HARV. L. REV. 201, 212-219.

55. SCHMIDT, *op. cit. supra* note 41, at 225.

56. “On a dit, et on va répétant, que la féodalité était la négation de la propriété individuelle. C’est une erreur: elle en était peut-être la plus haute affirmation. Elle en était l’exagération. Elle était, en effet, le pouvoir, pour le propriétaire d’une terre, de l’aliéner partiellement, de la transmettre, en retenant à toujours sur elle un droit, un domaine éminent.” This of course disappeared in England in 1290. “Si vous ajoutez à cela que la substitution était permise, et lui donnait la faculté de rendre sa terre inaliénable, d’en régler la transmission pour plusieurs générations, si vous considérez qu’il avait un choix presque infini dans les droits réels qu’il désirait concéder, à raison de la variété prodigieuse des démembrements de la propriété au moyen âge (fiefs, censives, rentes foncières, locataires perpétuelles, servitudes, emphytéose, etc., sans parler des démembrements spéciaux à telle ou telle province, le bourgage, la calonge, l’échévinage, etc., etc.); si, dis-je, vous envisagez toutes ces facilités, tous ces pouvoirs reconnus au propriétaire d’une terre, vous avouerez que la propriété féodale était”—or at least permitted—“une puissante affirmation du droit individuelle.” B. Terrat, *Du Régime de la Propriété dans les Code Civil* in *LE CODE CIVIL 1804-1904: LIVRE DU CEN- TENAIRE* (1904) 329, 333-34.

57. Because all the above was possible (until 1290) in England, and much more in creating “future interests”—present rights of future enjoyment—than was possible under the French system of “substitutions” (which were abolished by the Code Civil). Brissaud, refer-

who inevitably felt himself owner, readily forgot the lord's *dominium directum* as feudalism decayed; and here again, thanks to the very early abolition in England of subinfeudation, the process of forgetfulness was easier than anywhere else. When men lost consciousness of the property relationship, the lord's claim of suzerainty persisted. But that, too, lost all reality except as an economic burden often grossly abused. Apparently men ceased to *see* (and in England we know why they did not and could not see, for the evidence of subinfeudations was lost)⁵⁸ what originally was plain on every hand: land which was not leasehold, which was held as in fee, yet whose true title was nevertheless separated from its direct and actual enjoyment. Thus, the tenants came to regard themselves as proprietors, unjustly burdened with services and dues. In one country after another their view was accepted,⁵⁹ and the system abolished. The ultimate results were much greater in England's continental neighbors than in England; for there the early abolishment of feudal tenures only very slightly affected the all-pervading medievalism (much of it feudalism) of the law.⁶⁰ There was nothing comparable to the legislation of Stein and Hardenberg in Prussia.

Now, all this meant, of course, that the Germanic doctrine of complete or partial, absolute or limited, ownerships was losing ground; that the Roman conception of *dominium* was gaining ground. In short, the abolishment of feudalism supplied a legal basis for the aggrandizement of individual ownership.

ring to the unique system of estates in our law, the copyhold system, and that of uses, remarks that "the English jurists based everything upon the idea that no one can have an absolute right of ownership over an immovable". BRISSAUD, *op. cit. supra* note 2, at 411 n. More properly, no owner *need* have absolute, undivided, unincumbered ownership. It is the extreme expression of the Germanic system of multiple ownership; equally, the extreme expression of the powers of the individual owner.

58. A very convenient guide to dozens of English non-military tenures—trifling, ludicrous indecent, honorary, or lucrative—included in W. BLOUNT, *TENURES OF LAND AND CUSTOMS OF MANORS* (Hazlitt's ed. 1874) will be found in FIELD, *op. cit. supra* note 12, at 11 n. 7, 12 n. 9, 14 n. 1, 20 n. 7. The evidence of very many of these tenures was doubtless not intended to be preserved; of others, it could not long have been.

59. See the evidence of this in the statements by POTHIER, *Traité du Droit de Domaine de Propriété* in 9 *OEUVRES* (Bugnet's ed. 1861) 102-03. FIELD, *op. cit. supra* note 12 (particularly §§ 12-13, 17-22, 27, 30, 35, 54) and the Cobden Club's *SYSTEMS OF LAND TENURE IN VARIOUS COUNTRIES* (2d ed. 1870) serve usefully as guides to the essential legislation. Field's remarks on this country (§ 189) contain the same error referred to in the following note.

60. Wholly overlooking this, Field repeats the common idea that "on the Continent the Feudal System continued to exist for a century and a half after its abolition in England." FIELD, *op. cit. supra* note 12, at 44. As Pollock points out, "the main body of the technical expressions [rather, *concepts*] of the law [of land], and of the technical habit of thought which they preserve, is derived from feudalism." POLLOCK, *op. cit. supra* note 12, at 2. Cf. SCRUTTON, *op. cit. supra* note 12, in c. 11. There is much to be said in support of this statement by Mr. Morier, in an essay in the Cobden Club's volume, *op. cit. supra* note 59, at 329: "Three great countries—England, France and Germany—began their political life from a similar agricultural basis. In each of them the great conflict between *immunity* and *community*, between *demesne* land and *tenant* land, between the *manor* and the *peasant*, has had to be fought out.

"In England the manor won; the peasant lost. In France the peasant won; the manor lost. In Germany the game has been drawn, and the stakes have been divided."

The disappearance of any long established social system must involve some losses. And so, in the case of feudalism it is regrettable that there could not have been preserved the idea that all property was held subject to the performance of duties—not a few of them public.⁶¹ In medieval juristic literature, however, although most rights were regarded as creatures of the positive law and at the mercy of the state, a higher origin in the law of nature was attributed to both property and the binding force of contracts.⁶² It was the latter conception that was destined to become dominant in the centuries of our colonial life, and leave with us the problem, still a most formidable one in the twentieth century, of establishing in popular consciousness the doctrine that property rights are not unilateral liberties outside the law, but creatures of the law and subject to the state. In a way, of course, the idea did survive as eminent domain; but that is an inert conception, of too narrow content, limited as it is to *takings* for a public purpose, to be socially important. Modern necessities have compelled us to create a more active and powerful instrument, the police power, with which the state has increasingly met the obstinate individualism of private property in the last three-quarters of a century. Today, everybody concedes that property rights are, to some extent, subject to regulation by the state—in this country, of course, primarily by the forty-eight states, subject to their constitutions and to the due process clause of the fourteenth amendment of the Federal Constitution. But the extraordinary strength among us of doctrines of political and economic individualism has tended to restrict regulation within narrow limits and to make it correspondingly ineffective.

These doctrines became practicalities of politics only in the nineteenth century, although their origins go back to much earlier times. While the bitter convictions of feudal tenants were gathering strength to force the destruction of feudal restraints upon individual proprietorship, these other doctrines were preparing a public opinion certain to invigorate and magnify mightily that concept at the instant of its liberation. The first of these was the doctrine of natural law as developed by medieval jurists and carried forward both by non-legal philosophers and in the modern juristic literature, chiefly German, of *Naturrecht*. The second was the doctrine of economic freedom which the physiocrats and the founders of the English classic school

61. Possibly Laveye first expressed this view. See LAVEYE, *op. cit. supra* note 5, xxxiv-xxxv. Many others have done so since.

62. On contract and property as based upon natural law, see GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* (Maitland's trans. 1900) 80-1, *cf.* 74 *et seq.* On the ideas of the medieval church writers see McILWAIN, *op. cit. supra* note 50, at 161; A. J. Carlyle in GORE, *op. cit. supra* note 15, at 125-28. The statement by Huebner that one effect of the acceptance of the Roman *dominium*, a concept of private law, was to facilitate the separation of the concepts of public and private law (see *op. cit. supra* note 2, at 231) must be read as modified by *supra* notes 49 and 52. The recognition of *dominium* involved an attempted denial of ownership to holders of rights in *alieno solo* (see *supra* note 27); and this, but for the resistant remnants of the native Germanic doctrine, would have wholly deprived the lower rural population of all proprietary rights. See HUEBNER, *op. cit. supra* note 2, at 232, *cf.* 319, 461.

of political economy held in common, and which was only one aspect of the liberalism that spread as an intellectual revolution over western Europe in the eighteenth century, setting up as ideals of government the recognition and protection of personal independence in religion, education, publication, and scientific study. The third was the inflammatory doctrine of Benthamite utilitarianism, which was constructed out of a theretofore torpid principle of utility descended from Locke, and two principles which were common English thought in the second half of the eighteenth century—namely, the identity of individual and social interests and the ability of every man to comprehend and pursue them.⁶³

All the physiocrats were fervent champions of individual ownership. They recognized property as a natural right; to some it was the purest of natural rights, exclusive and absolute. For that reason, they strove for the destruction of feudal privileges and of the myriad of mercantilistic restrictions that hampered trade. With Adam Smith the principle of economic freedom did not operate through the doctrine that property is natural and inviolable; doubtless because he was too much of a realist. He saw that labor (subject then to many restrictions regarding residence and employment) was in fact a creature of law—and he, like the physiocrats, classified the right to labor under property. But he did believe in an inherently desirable economic equality of men. "Two conceptions," wrote Arnold Toynbee, "are woven into every argument of the *Wealth of Nations*—the belief in the supreme value of individual liberty, and the conviction that Man's self-love is God's providence, that the individual in pursuing his own interest is promoting the welfare of all."⁶⁴ For that reason he accepted the principle of *laissez faire*. Bentham, also, did not rely upon natural rights; he repudiated that along with all other phrases used to evade the necessity of proof. But he did make happiness primarily dependent upon wealth; he adopted *laissez faire* as the best means of securing the greatest total of community happiness; and he,

63. On the utility principle, see 2 LESLIE STEPHEN, *ENGLISH THOUGHT IN THE EIGHTEENTH CENTURY* (2d ed. 1881) 80 *et seq.* That the other ideas were of the time, see A. TOYNBEE, *LECTURES ON THE INDUSTRIAL REVOLUTION* (1913) 149, 158-59. So Blackstone wrote that God had so arranged "that we should want no other prompter to . . . pursue the rule of right, but only our own self-love, that universal principle of action . . . He has so inseparably interwoven the laws of eternal justice with the happiness of each individual; that the latter cannot be attained but by observing the former." Introduction to 1 BL. COMM. *40. The same ideas were basic with the physiocrats and even their precursors. See C. GIDE AND C. RIST, *HISTOIRE DES DOCTRINES ÉCONOMIQUES* (5th ed. 1926) 52.

64. TOYNBEE, *op. cit. supra* note 63, at 148. With respect to the physiocrats, see W. A. DUNNING, *POLITICAL THEORIES FROM ROUSSEAU TO SPENCER* (1920) 59; GIDE AND RIST, *op. cit. supra* note 63, c. 1; ADAM SMITH 1776-1926: *LECTURES TO COMMEMORATE "THE WEALTH OF NATIONS"* (1928) 63-4, 198-202. Their name signified a government by natural law. Gide describes them as almost wholly men of official position or the higher classes, "épris avant tout de civilisation, de bon ordre, . . . de propriété surtout". *Op. cit. supra*, at 8. As one of them wrote: "Propriété, sûreté, liberté, voilà donc l'ordre social tout entier". On Smith see 3 SMITH, *WORKS* (D. Stewart's ed. 1811) 319; 2 *id.* (T. Rogers' 2d ed. 1880) 118 (bk. 4, c. 5 at end); also ADAM SMITH 1776-1926, *supra*, at 65, 161-72; TOYNBEE, *op. cit. supra* note 63, at 152-155; 2 STEPHEN, *op. cit. supra* note 63, at 319-23.

also, assumed the concurrence of individual and social interests.⁶⁵ They were therefore equally exalters of private initiative and—Bentham more directly—of private property.

Natural law was old; it seemed, when the eighteenth century opened, to be obsolescent. The new liberalism of the century's end gave it a powerful stimulus, yet its protagonists, like their medieval predecessors, could do no more than list a few vague rights as requiring for their validity no intervening act of state: liberty, security and self-defense, equality, property. These could have no authoritative and practical character without the solemn acts of peoples. Such solemn recognition was given them in the Declaration of Independence and the Declaration of the Rights of Man. The former really claimed only the rights of Englishmen under English law. If, in an address to the world, it seemed well to give them greater dignity and plausibility by putting them in the guise of rights under natural law, that is significant of the doctrine's strength; if Jefferson and his collaborators really thought that way—and we know well that they did⁶⁶—the fact is even more significant. Very important indeed is the fact that they were claimed, not as *mere* natural rights, but as rights already *acquired* under English law. Soon they were embodied as guaranteed rights in constitutions;⁶⁷ and thus our constitutions took the place, for us, above the ordinary law, of the medieval law of nature.

One may fairly say that it was natural law (with the doctrines of liberalism that adopted its name) and the excesses of the French Revolution that exalted individual interests in property above those of society. In the Declaration of 1789 property rights were asserted broadly, but as subject to the law. In the constitutions that followed, their guaranty against the law was definite and extreme.⁶⁸ In the eighteenth century French doctrines of social

65. On the happiness principle see J. H. BURTON (ed.), *BENTHAMIANA: OR SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM* (1843) 349, 352, 354, 356; 9 BENTHAM, *WORKS* (Bowring's ed. 1843) introduction to the Constitutional Code; 4 *id.* at 537 *et seq.*; 1 *id.* (Burton's introd.) 17b, 21b, 22a, 24b. Particularly on property as connected with security and happiness, see BENTHAM, *THE THEORY OF LEGISLATION* (Ogden's ed. 1931) 98, 102-11, 118-19; 1 BENTHAM, *WORKS* (Burton's introd.) 33a-34; Burton, *op. cit. supra*, at 360. On *laissez-faire* and identity of self-interest and social interest, see 1 BENTHAM, *WORKS* 313a, 321a-b; BENTHAM, *THEORY OF LEGISLATION* 123, 144-45; BURTON, *op. cit. supra*, at 356-57, 399, or his introduction to BENTHAM, *WORKS* 29a.

66. CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1922) 25, 27, 76-79.

67. The contrast between mere natural rights and "acquired" (erworbene) rights is fully developed by J. W. Jones, *Acquired and Guaranteed Rights* in *CAMBRIDGE LEGAL ESSAYS: PRESENTED TO DOCTOR BOND, PROFESSOR BUCKLAND, AND PROFESSOR KENNY* (1926) 223-42.

68. The Declaration of 1789 read, "Property is the right that each citizen has to the enjoyment of that portion of goods guaranteed him by the state." Mirabeau declared to the Constituent Assembly: "private property is goods acquired by virtue of the laws. The law alone constitutes property." But the constitution of 1793 read: "No one shall be deprived of the least portion of his property without his consent, except when public necessity, legally proven, evidently demands it, and then only on condition of just compensation previously made." This guaranty (in several respects stronger than that in our Federal Constitution) was preserved in all later constitutions. 1 *LE CODE CIVIL, 1804-1904: LIVRE DU CENTENAIRE* (1904) 336-37; L. Faucher, *Property* in 3 J. J. LALOR (ed.), *CYC. POL. SCI.* (1884); 4 *CODE*

reform had a large history. Proposals to curb private property in the public interest were repeatedly presented in the debates of the Revolutionary period, but they left no trace in the Constitution of 1791 or its successors, nor in the Code Civil and the 18th century codes of Prussia and Austria.

In this country no philosophical doctrines were needed to invigorate policies of personal liberty, individual enterprise, and absolute individual ownership; all the circumstances of this continent had dedicated us from the beginning to those ends. But of course men vouched the philosophers to justify their instincts. So it was with Locke's libertarian doctrines, political and economic, and his pronouncement that "government has no other end but the preservation of property". However, he made property include "life, liberty, and estate".⁶⁹ Similarly, the physiocrats had made it include rights of one's person; and it was noted above that our equity courts are still calling rights of personality property. Likewise, the physiocrats made property include, as a part of one's rights in one's person, the right to labor; and if this means the right freely to contract to labor, then this view, we shall see, has been and is likely to remain the view of the Supreme Court of the United States.⁷⁰ It was also inevitable that in this virgin continent, to which Locke had cannily confined it, the old theory that property can rightfully originate solely in labor⁷¹ should have exerted influence—thin and jejune as it was, and inconsistently as he applied it. Adam Smith had combined the two doctrines regarding labor. "The property," he wrote, "which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the 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 neighbor, is a plain violation of this most sacred property."⁷²

It has been said, probably often, that the Constitution's framers understood liberty as having to do primarily with property rights. Possibly this is true. At all events, the two were closely linked in men's minds and speech, and had long been so linked in the past literature of English political strug-

NAPOLÉON, SUIVIE DE L'EXPOSÉ DES MOTIFS . . . DES RAPPORTS . . . OPINIONS . . . DES DISCOURS (1808) 25 *et seq.*; I MOTIFS ET DISCOURS PRONONCÉS LORS DE LA PUBLICATION DU CODE CIVIL (1838) 286 *et seq.*

69. D. G. Ritchie, *Locke's Theory of Property* in DARWIN AND HEGEL WITH OTHER PHILOSOPHICAL STUDIES (1893) 178-95; McILWAIN, *op. cit. supra* note 50, at 199 n. 1; Hobhouse and Rashdall in GORE, *op. cit. supra* note 15, at 26-7 and 38-47; P. LARKIN, PROPERTY IN THE EIGHTEENTH CENTURY WITH SPECIAL REFERENCE TO ENGLAND AND LOCKE (1930). The essentials of Locke are reprinted from his *Two Treatises on Government* in the Assoc. of Amer. Law School's volume, RATIONAL BASIS OF LEGAL INSTITUTIONS (Mod. Legal Philos. Series, 1923) 195-200.

70. See *supra* note 64; *infra* p. 720.

71. It appeared in the Medieval Church writers, GORE, *op. cit. supra* note 15, at 38-40. Some of Locke's inconsistencies are there pointed out at 26-7, 45-6. Among primitive peoples, "as a rule women own what they produce". LOWIE, *op. cit. supra* note 3, at 247, 278.

72. WEALTH OF NATIONS, in 2 SMITH, WORKS (D. Stewart's ed. 1812) 188, bk. I, c. 10, pt. 2.

gles.⁷³ John Hancock defined the end of government as "security to the persons and properties of the governed"; John Adams, in vague language, as "the security of right and property". These ideas were apparently prevalent.⁷⁴ The Pennsylvania Constitution of 1776 (the constitutions of several other states were very similar) enumerated, among "certain natural, inherent, and unalienable rights" held by all men, those of "enjoying and defending life and liberty, acquiring, possessing, and protecting property". Such phrases continue, necessarily, the old vagueness that accompanied for centuries lists of natural rights.⁷⁵ Only their practical application could give them definite meaning; and the clarification, for us, of some of them has only begun by interpretations of constitutional provisions, state and federal.

The Fifth and Fourteenth Amendments of the Federal Constitution respectively forbid the federal and state governments to take any person's "life, liberty, or property" without "due process" of law. No discussion of cases in which the Supreme Court has invalidated tax laws, statutes regulating public utilities, and statutes allegedly exercising the state police power as so taking liberty or property falls within the subject of this paper, except so far as a succinct statement of their results is essential to an understanding of later references to the present general position of property in our constitutional system. On the other hand, some discussion of such distinction between liberty and property as has been established as one result of the cases referred to is clearly proper. The interpretation of both clauses by the federal courts, and interpretations by state courts of the same clauses and of due-process clauses in state constitutions, have manifested an extraordinary persistence of natural law concepts, at least a temporary overlapping of the concepts of liberty and property in respect to freedom of contract which had momentous consequences in the invalidation of state social legislation, and a vast expansion, later, of the liberty concept beyond its common law meaning. The last can barely be referred to. Somewhat less brief attention to the other two phenomena is permissible.

An understanding of what the courts have done will be promoted by first considering the general meanings of liberty and property. Of the latter

73. In *Co. Litt.* *124b, we find, "Three things be favoured in law; life, liberty and dower". This is manifestly an example of Coke's humor. Almost surely there lay back of it and gave point to it some well-known phrase, which must have been equivalent to "life, liberty and property". Although GARDINER, *CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION* (1899), may not contain that phrase, it does yield various combinations near to "liberty and property" (65, 137, 181, 191, 215). Walton Hamilton cites similar related phrases from W. STUBBS, *SELECT CHARTERS* (8th ed. 1895); apparently Locke was the first to prefix "life", using it repeatedly along with the older phrase. Hamilton, *Property—According to Locke* (1932) 41 *YALE L. J.* 864, 868 n. 6.

74. C. E. MERRIAM, *HISTORY OF AMERICAN POLITICAL THEORIES* (1903) 62.

75. The longest list known to Jones (17 rights), *supra* note 67, at 228, was that in CHRISTIAN WOLFF, *INSTITUTIONES*. He refers to various American instances, at 229-30. To these should be added for comparison the statement of Justice Washington quoted by Bradley, J., in *Slaughter-House Cases*, 16 Wall. 36, 117 (U. S. 1873). And cf. DUNNING, *op. cit. supra* note 64, at 94-6.

much has already been said. With regard to liberty, that signifies in jurisprudence freedom of action, and ends where the constraint of law begins. A man may (though this liberty has been threatened by recent legislation) cultivate his land or enjoy its unquiet wildness, do almost anything with or upon it, or make to another man an offer to sell it. He may use his chattel in any way, or destroy it, or abandon it. All these are, in themselves, liberties. Similarly, he may labor or not labor, or offer his labor to another for a price. The offeree is similarly free (or at liberty, or has the liberty) to accept or reject the offer. If he accepts, a binding contract results. The contract rights may be assignable, and it may therefore have commercial value; also, once the contract exists, the law will treat it as an independent thing and protect it against interference by third persons as it will protect one's rights in land. For these two reasons it must be recognized as property. But until acceptance of an offer, all is freedom. As indicated before, our right to be protected in the possession of property really exists for the protection of a complex of liberties and powers that together constitute the means of enjoying property. These portions of ownership have not themselves, traditionally, been spoken of as property. But there is no reason why, in our law, they might not properly be so designated. The bearing of these explanations will soon be apparent.

If we turn from jurisprudence to legal history, we find that in the common law liberty had the narrow meaning of freedom from restraint of one's body. It had no reference to an individual's civil rights. It has been contended that liberty was used with this common-law meaning in the first state constitutions of the time of the Fifth Amendment, and in that Amendment itself; no broader meaning having, in fact, ever been given to it judicially, save in one case, until it received such in interpretations of the Fourteenth Amendment.⁷⁶ It would be truly extraordinary, however, if a word of such familiar and extensive meaning in the controversies which both preceded and followed the formulation of the English Bill of Rights should have been intended to bear in any later framework of government the narrow meaning of "power of loco-motion . . . without imprisonment or restraint, unless by due course of law".⁷⁷ It seems, rather, that the interpretation of the

76. Reeder, *The Due Process Clauses and "The Substance of Individual Rights"* (1910) 58 U. OF PA. L. REV. 191, 213-17; Warren, *The New "Liberty" under the Fourteenth Amendment* (1926) 39 HARV. L. REV. 431, 440, 443. Both Reeder and Warren follow Shattuck, *The True Meaning of the Term "Liberty" in Constitutions which Protect "Life, Liberty, and Property"* (1891) 4 HARV. L. REV. 365, which is not convincing. Essentially, Mr. Shattuck's argument has two bases. The first (with inadequate attention to the distinction between political and legal literature) is some use in ancient documents of liberty in the common-law sense. The second is the assumption that because the phrase "liberty and property" was old, "and when used could not have included" liberty of speech, press, and religion, "because they did not exist at all, or were not deemed important" (*Id.* at 379-80), therefore the aspirations displayed in past political struggles to give a fuller meaning to the word in fact could not have been a part of its meaning in a political document.

77. The words quoted are Blackstone's definition of "personal" liberty, 1 BL. COMM. *134; but on page *6, he defines "political or civil" liberty as "the power of doing whatever

Fourteenth Amendment has been a reaffirmation (for which before its adoption there was little occasion) of long-held constitutional—hence political, not narrowly legal—views.

In the history of government liberty has likewise been traditionally understood as freedom from governmental interference, which was its meaning to Mill.⁷⁸ Nor is liberty so conceived—if *in fact* including freedom to express and communicate opinions, and to act as one will in social and economic and political spheres—any contemptible “abstraction”. Still, it is true, as many have said, that a supposititious savage unrestrained by laws and customs might be more constrained by dangerous environment and hunger than (as Jevons put it) a modern citizen by all the rules of the Revised Statutes and local ordinances. The field of uncontrolled activity may present small or great opportunities. By the positive intervention of government they may be vastly increased; the purely negative conception is relatively inanimate. Yet, if one asks what meaning liberty had to the framers of the Constitution, the writings of their and earlier times indicate that their conception of the relations between liberty and government must have been, substantially, Spencer’s conception of the state as a policeman.⁷⁹ That is the general background of the asserted rights to “life, liberty, and the pursuit of happiness”. More positive conceptions of liberty enriched by state action belong to recent, non-individualistic times. They could have not have occurred or appealed to our self-reliant ancestors.

Judicial consideration of the Constitution’s guarantees of both property and liberty began, then, necessarily, with individualism and natural law as a background. The perdurance of assumptions of natural rights has been extremely striking. At first statutes were invalidated avowedly for mere

the laws permit”. Similarly Bentham distinguished “personal” liberty, or security of the person, from “political” liberty, which he defined as “security against . . . government”; and (*nota bene*) the reason he did not discuss the latter in his *Principles of the Civil Code* was that it belonged in constitutional law. THEORY OF LEGISLATION 15, 97. One has only to turn the pages of GARDINER, *op. cit. supra* note 73, to see how constantly the word was used and with what varied applications. The view expressed by the writer in the text accords with that of Mr. Prentice, *Congress and the Regulation of Corporations* (1905) 19 HARV. L. REV. 168, 185-86, 187.

78. Mill defined it as “the absence of restraint”, and pronounced all restraint, as such, evil. LIBERTY (People’s ed. 1921) c. 5. And so Bentham: “It is impossible to create rights, to impose obligations, to protect the person, life, reputation, property, subsistence, liberty itself, except at the expense of liberty”. THEORY OF LEGISLATION 94. And so Justice Holmes: “Pretty much all law consists in forbidding men to do some things they want to do . . .” *Adkins v. Children’s Hospital*, 261 U. S. 525, 568 (1923). These statements by Bentham and Holmes might evidently be cited equally well in reference to liberty in any one of the three senses mentioned.

79. MERRIAM, *op. cit. supra* note 74, at 312. Morris Ernst says that Jefferson, in the Declaration, “deftly twisted Locke’s philosophy for the protection of property into protection of liberty.” ERNST, *THE ULTIMATE POWER* (1937) 50. This seems to mean nothing. The Supreme Court has said, “Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations. . . .” *Chicago B. & Q. R. R. v. McGuire*, 219 U. S. 549, 567 (1911). This is only an argument to soften the impact of judicial power. To be sure, Mill said much the same thing, but Jhering rightly pointed out its evasive nature. *Op. cit. supra* note 16, at 404-09, with which compare the rest of Jhering’s § 13.

violations of natural rights, absent any constitutional prohibition covering the case; and the contrary view made its way with great difficulty in both state and federal courts.⁸⁰ Of course the appeal was not usually made to "natural rights", particularly in later years, in those words; but references to "vital principles of our free republican governments", rights "fundamental in American jurisprudence" or "founded in natural justice", "great principles of personal liberty and of property", and the like, meant much the same. The traditional has always meant to men the natural: as Pascal said, "nature is itself only a first custom, as custom is a second nature".⁸¹ Moreover, even when the principle had become established that invalidation of a statute must rest on a constitutional provision, the change was perhaps mainly one of form; for as Justice Harlan once stated, the courts have always been able to "find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property".⁸²

The Fourteenth Amendment first received notable attention in the *Slaughter-House Cases* of 1873.⁸³ A Louisiana statute, ostensibly to protect public health, created a slaughterhouse monopoly and deprived many butchers of the liberty of contracting for their services. Did this deprive them of property or liberty without due process? It certainly deprived them of liberty in the jurisprudential sense, and it certainly did not deprive them of property unless continuance of such liberty, as a business, was also property. The majority held, as regarded "property", that no precedents supported that view;⁸⁴ and as regarded "liberty", they held that, although the word was popularly used to mean "civil liberty", including the "right to buy or sell", the liberty protected by the Fourteenth Amendment was freedom from the slavery or personal servitude abolished by the Thirteenth.⁸⁵ Anyway, they held the statute a valid exercise of the police power, then supposed to be uncontrolled by the due process requirement. The future lay with the dissenting Justices, Field and Bradley. Justice Field insisted that the purpose of the Amendment was "to give practical effect to the declaration of 1776 of inalienable rights . . . which the law does not confer, but only recognizes",⁸⁶ "to place the common rights of American citizens under the

80. Grant, *The Natural Law Background of Due Process* (1931) 31 COL. L. REV. 56, 57-8, 60 n. 28, 70-1. On the general perdurance of natural law reasoning, see chapter 2 of BECKER, *op. cit. supra* note 66; also C. G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930); Corwin, *The "Higher Law" Background of American Constitutional Law* (1928) 42 HARV. L. REV. 149.

81. This quotation from Pascal is prefixed by Becker to his book just cited.

82. *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195 (1909), quoted by Grant, *supra* note 80, at 58.

83. 16 Wall. 36 (U. S. 1873).

84. *Id.* at 80-81.

85. *Id.* at 71-80.

86. *Id.* at 105.

protection of the National government.”⁸⁷ Justice Bradley thought that “Rights to life, liberty and the pursuit of happiness are equivalent to the rights of life, liberty, and property”⁸⁸—which, as noted above, was Bentham’s view; put the right to choose one’s calling under “liberty”; and declared that a calling, when chosen, is “property.”⁸⁹ In a later case Mr. Justice Field declared that the right to pursue happiness meant to pursue lawful business;⁹⁰—and, as earlier noted, equity courts, protecting business, have often called it property.

The *Slaughter-House Cases* were argued under the privileges and immunities clause, but by the end of the century that had become unavailable for the federal protection of civil rights derived from the states.⁹¹ Under the due process clause, however, Justice Field’s thesis was completely established before the end of the century. The police power became subject to the control of due process in 1884;⁹² the exercise of eminent domain by the states—the taking to be for a public purpose, and with compensation—in 1896-97,⁹³ thus embodying doctrines of natural rights promulgated by state courts early in the century; and liberty—with a content already large, but since then greatly expanded—was definitely placed under the same protection in 1897.⁹⁴ In this manner the whole field of social legislation, with respect to both property (for as regards that there was, of course, never any question) and civil

87. *Id.* at 93.

88. *Id.* at 116.

89. *Id.* at 122. Mr. Warren points out that the dissenters made “the right to pursue any lawful business” both a “privilege and immunity” of federal citizens and a “liberty”, although the states are absolutely forbidden to abridge the former, whereas abridgment of the latter is subject merely to the requirement of due process. See *supra* note 76, at 447.

90. *Butchers Union Co. v. Crescent City Co.*, 111 U. S. 746, 757 (1884). With these loose statements compare the use of “contract” to include conveyances (deeds) in *infra* note 99, and the remarks on the liberty to make a contract as being in itself property at *infra* pp. 720 *et seq.* And Ex-Justice Campbell, in arguing the *Slaughter-House Cases* before the Supreme Court, declared, in language much wider than Adam Smith’s: “The right to labor, the right to one’s self physically and intellectually, and to the product of one’s own faculties, is past doubt property, and property of a sacred kind.” 16 Wall. 36, 56 (1873). It should be pointed out to laymen that all this is *not* non-constitutional law. But it may be quite proper argument as to the desirable interpretation of a constitution, *supra* p. 713. Also, the expansive tendencies of the property concept justify the expectation that more and more economically valuable interests will be legally thrown under that heading. In the philosophy of law, too, the wide usage is natural. Thus, Dean Pound comes near to accepting the Supreme Court’s theory of liberty of contract as property. POUND, *op. cit. supra* note 37, at 191, 193. But he does not explicitly do so (in either c. 5 at 191-235, or c. 6 at 236-84). John A. Hobson makes property include the whole “private sphere of activity”, “the *proprium* of each person—that domain in which he may freely express himself”. HOBSON, *THE SOCIAL PROBLEM* (1902) 96-7.

91. See discussion by Warren, *supra* note 76, at 437-39; also Jennings, *Freedom of Contract—Inquiries and Speculations* (1934) 22 CALIF. L. REV. 636, 643-44.

92. *Butchers’ Union Co. v. Crescent City Co.*, 111 U. S. 746 (1884).

93. *Missouri Pac. Ry. v. Nebraska*, 164 U. S. 403 (1896); *Chicago B. & Q. R. R. v. Chicago*, 166 U. S. 226 (1897). Although compensation is not required by any constitutional provision when property is taken under the *police power*, it is very often given; evidently, then, on principles of natural or manifest justice. But the emancipation of the slaves and the recent confiscation of gold values in terminating property rights in gold coin may be cited as illustrations of a great variety of cases in which no compensation has been given.

94. *Allgeyer v. Louisiana*, 165 U. S. 578 (1897).

rights, became subject to review by the Supreme Court under the due process clause.

The later fortunes of liberty can be covered by the statement that for its meaning at common law there has already been substituted an important fraction of its jurisprudential and political meaning—of freedom to act except as restrained by law; and whether any attempted restraint by the police power or otherwise is law, the Supreme Court decides. The jurisprudential and political meaning of liberty has become legal; natural rights have become “acquired”; and they are guaranteed by the Constitution. The whole development has of course been at the expense of state sovereignty. On the other hand, it can hardly be denied that the liberties thus guaranteed⁹⁵ are such as tend, with few exceptions, to promote greater opportunities for an individualistic and democratic life. No language of the framers, no literature of the Revolutionary era, nothing of the long struggle for the English Bill of Rights was cited in the opinions in the *Slaughter-House Cases*; although Judge Campbell (formerly a member of the Court), of counsel for the butchers, did in his brief urge at length doctrines of natural law taken from Thiers, Buckle, and other recent writers. Justice Field cited nothing except the passage of Adam Smith quoted above. He did not even cite the many state and federal cases in which natural law doctrines had been declared.⁹⁶ At first impression the approach seems the simplicity of innocence; in fact it was a discreet reticence. As the primary creative cause in the whole development one finds simply the extreme individualism and persistence of Justices Field and Harlan.

95. For the course of decisions, Warren, *supra* note 76, is the best guide to its date. Broad judicial dicta on the meaning of liberty are quoted in the article at 448, 450, 452, 454, compare 446 n. 39.

Of course the whole problem of interpretation is one of provisional judgments and compromises. See Holmes, J., in *Adkins v. Children's Hospital*, 261 U. S. 525, 568-69. Hence inconsistencies; see *O'Gorman and Young v. Hartford Ins. Co.*, 282 U. S. 251 (1931) and *Near v. Minnesota*, 283 U. S. 697 (1931), and discussion thereof by Shulman in Note (1931) 41 YALE L. J. 262. Despite liberty of speech, liberty to teach pacifism exists only subject to regulation by the police power. *Gilbert v. Minnesota*, 254 U. S. 325 (1920). And so of other liberties. See *infra* note 135.

The following pronouncement by J. Allen Smith is an example of the vague and inaccurate ideas to be found in books of influence: “We are still keeping alive in our legal and constitutional literature the eighteenth century notion of liberty. Our future lawyers and judges are still trained in the old conception of government—that the chief purpose of a constitution is to limit the power of the majority.” SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* (1907) 301.

96. The Reporter's summary of Campbell's brief, after a quotation from THIERS, *DE LA PROPRIÉTÉ*, is: “Quoting further from Turgot, De Tocqueville, Buckle, Dalloz, Lieber [Lieber], Sir G. C. Lewis, and others” relating to oppression of laborers and peasants, monopolies, etc. 16 Wall. 36, 45 (U. S. 1873). Adam Smith is cited *id.* at 100. Mr. Lewis, reviewing all the state and federal cases, finds as the dominant influences the opinions of Field, Judge Cooley's *CONSTITUTIONAL LIMITATIONS*, the oral argument of Roscoe Conkling in *San Mateo County v. Southern Pac. R. R.*, 116 U. S. 138 (1885) (extracts printed by Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* (1914) 62 COL. UNIV. STUDIES IN HIST., ECON. AND PUB. LAW 28 *et seq.*), and the Court's taste for power. E. R. LEWIS, *A HISTORY OF AMERICAN POLITICAL THOUGHT FROM THE CIVIL WAR TO THE WORLD WAR* (1937) 88-9.

The relation between liberty and property can be more briefly dismissed. Freedom to labor, to pursue an occupation or a business, and to make contracts incidentally thereto, were the liberties on whose behalf the contention was first made (in the *Slaughter-House Cases*) that civil rights should be protected against the states. The purpose of those liberties is the acquisition of property. The importance of the connection lies in the fact that most of the state statutes invalidated as encroachments upon individual liberty would be generally regarded as calculated, in purpose and general effect, to enlarge the actual opportunities of the laboring classes for a completer economic and social freedom. Liberty of contract was early mentioned as a natural right, and had been frequently mentioned as such in decisions of state courts before the adoption of the Fourteenth Amendment⁹⁷—no doubt, primarily, because of the influence of the doctrines of Adam Smith and his contemporaries.⁹⁸ Following the *Slaughter-House Cases*, both property and liberty were repeatedly emphasized in labor cases in state and federal courts. Frequently no definite distinction between them is indicated.⁹⁹ Finally, in *Coppage v. Kansas*,¹⁰⁰ the Supreme Court declared that the "right to make contracts for the acquisition of property" was both a "right of personal liberty" and property; and therefore voided a state enactment forbidding employers to exact of employees a promise not to join a union. In a later case it pronounced freedom of contract "part of the rights of personal liberty and private property".¹⁰¹

97. Mentioned by Grotius as such. Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454, 455. For its early appearances in the United States Supreme Court, see Jennings, *supra* note 91, at 642-43. Dean Pound cites various opinions by state courts which assumed that the liberty to make contracts was a natural right, qualified solely by physical or mental disabilities. Pound, *supra*, at 466. As late as 1891 the Massachusetts court held that the right "of acquiring, possessing, and protecting property", in which it included the right to make contracts, is a natural and indefeasible right, for infringement of which a statute may be voided even in the absence of a constitutional prohibition. *Commonwealth v. Perry*, 155 Mass. 117, 121, 28 N. E. 1126, 1127 (1891).

98. Pound, *supra* note 97, at 456-57.

99. "As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired . . . [and] as property can only be legally acquired as between living persons by contract"—as to which see remarks *supra* note 90—"a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid." *Holden v. Hardy*, 169 U. S. 366, 391 (1898).

100. 236 U. S. 1, 14 (1914).

101. *Prudential Insurance Co. v. Cheek*, 259 U. S. 530, 536 (1922). "In the annals of the law property is still a vestigial expression of personality and owes its current constitutional position to its former association with liberty." Hamilton, *supra* note 73, at 867, 878. Mr. Hamilton's view reminds one of Aristotle's ideal, *supra* note 21; and as to early law, cf. SOHM, *op. cit. supra* note 10, 24-25; and also *op. cit. supra* note 3, at 286 (on the Yuroks). Of course, it is proper to argue that property is worthless without liberty to enjoy it (and in the text it is pointed out that such liberties—and powers—of enjoyment constitute, in legal fact, the essence of ownership, *supra*, pp. 701-02. Taken in this sense, Algernon Sidney not improperly pronounced property "an appendage to liberty"—quoted in Prentice, *supra* note 77, at 185. But this view does not seem to be Mr. Hamilton's. The latter seems to be inconsistent with fact, at least this side of the origins of property; it is inconsistent with the necessity of *argument* by Locke and others that every man has property in his body and the products of his labor. The truth of Blackstone's remark that "there is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of prop-

Of course, this position of the Supreme Court is a jurisprudential anomaly, known, as Dean Pound has said, to the law of no other civilized country.¹⁰² None the less, the view that liberty to dispose of one's labor is property because, generally, the latter has value (a test suggested in 1872 by Mr. Justice Field, and ultimately accepted by the Court¹⁰³) is in itself not unreasonable. Moreover, raising the question under property rather than under liberty, whose constitutional protection was as indefinite in 1876 as its meaning was doubtful, has probably hastened a solution. The ultimate total result will doubtless be one acceptable to liberals. This has become evident since Justice Holmes, dissenting in the *Coppage* case, objected that there cannot be freedom of contract when there is no equality of position. An amazingly belated argument, surely—well recognized for more than a century in England;¹⁰⁴ but the belatedness is characteristic of American backwardness in social reform. But the point: if a court of growing liberalism refuses on the basis of Holmes' objection to invalidate industrial legislation, the improvement in laboring conditions may justify us in forgetting anomalous jurisprudence, particularly because the anomaly will apparently soon disappear and because the error, as just suggested, will have expedited the ultimate gain. There would be nothing unusual in thus giving special protection where it is needed. The common law and equity are full of

erty, . . ." (2 BL. COMM. *2) has been manifested in all stages of civilization by the willingness of men to *sacrifice* much of the liberty that enters into personality for the liberty of enjoying property; and so of a present-day laborer's bargaining for wages. Moreover, as regards law today, Morris Cohen has remarked that ". . . the identification of private property with liberty or personality generally presupposes that property consists of goods that are objects of purely individual or personal enjoyment." COHEN, *op. cit. supra* note 16, at 343. The identification is hardly possible today.

Very different from Mr. Hamilton's dictum is Dean Pound's, that for the "historical jurists" of the nineteenth century "individual private property was a corollary of liberty". POUND, *op. cit. supra* note 37, at 229. But that, also, seems questionable.

102. Pound, *supra* note 97, at 482. But here he speaks of positive law, not of legal philosophy. Of course many accept the view, e. g., Warren, *supra* note 76, at 449, 454 n. 68. John R. Commons reviews the subject in his *LEGAL FOUNDATIONS OF CAPITALISM* (1924) 11-36. But his discussion assumes throughout that the liberty to contract *is*, and so from the beginning *was*, property. Thus, the question in each case becomes: Will the court protect the property for power (but is it property for power, or for use?) here involved? The creative role of the court is concealed, and broader problems of "liberty" disregarded.

103. This is implicit in the cases as a group; it has, apparently, not been explicitly asserted. It is, of course, a very natural and for most purposes satisfactory test (though some property interests, recognized for centuries as such, have not been alienable, and therefore could not have exchange value). Even an actual contract right is not an asset if without commercial value. *In re Baker*, 13 F. (2d) 707 (C. C. A. 6th, 1926). The same must be true of a right to make a contract. The fact that such right, held by a penniless man, might *theoretically* constitute a valuable liberty (property) is rendered unimportant by practical considerations which compel one to concede the general helplessness of the individual wage earner. Cf. G. L. DICKINSON, *JUSTICE AND LIBERTY* (1908) 127 *et seq.* and the following note.

104. TOYNBEE, *op. cit. supra* note 63, assumes that it was recognized by Adam Smith; and certainly it must have been clear to intelligent Englishmen from the time the first Factory Act was passed in 1802. Cf. B. L. HUTCHINS AND A. HARRISON, *HISTORY OF FACTORY LEGISLATION* (2d ed. 1911) vii-ix, 12-16, 27, 33. Indeed, as early as 1762, Lord Northampton had said judicially: ". . . necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms the crafty may impose on them." *Vernon v. Bethell*, 2 Eden 110, 113 (1762).

institutions created in the interest of particular classes—infants, married women, spendthrifts; the credulous, inexperienced, and careless; debtors (bankruptcy statutes) and creditors (liens and other security devices); and manufacturers (tariffs). This would still be at the cost of diminished contracting power, but without loss of true *freedom* of contract. Awaiting such a transformation, Justice Field's opinion in *Butchers' Union Co. v. Crescent City Co.* remains the primary source of the many decisions¹⁰⁵ that frustrated efforts to develop an enriched individual liberty. It may be added that since due process was definitely held to protect "liberty", that word has been increasingly, and "property"—as its equivalent in this field—has been decreasingly, prominent in the opinions of the Court.

Evidence can be found in the decisions of the Court to support an expectation of the ultimate development above referred to as possible.¹⁰⁶ The situation is already such as utterly belies, with respect to both present fact and plain tendencies, Maine's picture of society as developing from

105. Pound sketches the development, *supra* note 97, at 470-81. "Two courts, in passing on statutes abridging the power of free contract, have noted the frequency of such legislation in recent times but have said it was not necessary to consider the reasons for it. Another court has asked what right the legislature has to 'assume that one class has the need of protection against another.' Another has said that the remedy for the company store evil 'is in the hands of the employee', since he is not compelled to buy from the employer, forgetting that there may be a compulsion in fact where there is none in law. Another says that 'theoretically there is among our citizens no inferior class', and of course no facts can avail against that theory. Another tells us that man and woman have the same rights, and hence a woman must be allowed to contract to work as many hours a day as a man may. . . . Legislation designed to give laborers some measure of practical independence, which, if allowed to operate, would put them in a position of reasonable equality with their masters, is said by courts, because it infringes on a theoretical equality, to be insulting to their manhood and degrading, to put them under guardianship, to create a class of statutory laborers, and to stamp them as imbeciles." *Id.* at 463 (citing ten state cases from Nebraska, Wisconsin, Kansas, West Virginia, Illinois, Pennsylvania, and in New York in support of the foregoing ten assertions). Cf. six cases (three of the above and three others) cited *id.* at 466 *re* natural or "fundamental" rights as an independent basis for invalidation of legislation such as above referred to. "The United States Supreme Court, with the help of the phrase '*freedom of contract*', declared invalid state statutes which did such things as regulate the weight of loaves of bread, prohibit the use of shoddy in manufacture, and fix the fees to be charged by employment agencies; and invoked the word 'property' to establish judicial review of the findings of administrative committees in matters relating to the rates, valuation, and even the charges for depreciation, of public utilities." Hamilton, *supra* note 73, at 874.

106. Cf. Jennings, *supra* note 91, at 636 n. 2, and 637, who points out the recent striking decline of liberty of contract as a constitutional doctrine. Mr. Hamilton reminds us that the Fourteenth Amendment was first invoked to protect a manual calling (butchering), and was first actually used to safeguard personal opportunity in *Yick Wo v. Hopkins*, 118 U. S. 356 (1886) (laundrying); Hamilton, *supra* note 73, at 877. The tendency is clearly revealed if one compares *Lochner v. People of New York*, 198 U. S. 45 (1905) with *Muller v. Oregon*, 208 U. S. 412 (1908); *Adair v. United States*, 208 U. S. 161 (1908) and *Coppage v. Kansas*, 236 U. S. 1 (1915) with *Texas & N. O. R. R. v. Brotherhood of Ry. and Steamship Clerks*, 281 U. S. 548 (1930); *Adkins v. Children's Hospital*, 261 U. S. 525 (1923) with *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937). In *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251 (1931), the Court explicitly declared (by no means for the first time) that legislation alleged to violate individual liberty of contract should enjoy a presumption of validity; and this was again repeated in *Nebbia v. New York*, 291 U. S. 502, 503 (1938). But see *supra* note 97. And compare earlier statements for the court by McKenna, J., in *Erie R. R. v. New York*, 233 U. S. 671, 699 (1914); Clarke, J., in *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530-31 (1917); Sutherland, J., in *Radice v. New York*, 264 U. S. 292, 294 (1924).

status to contract.¹⁰⁷ In place of complete freedom of individual contract "we do seem to be developing a relationally organized society".¹⁰⁸

Let us return to property. The practical end and performance of the Constitution's framers is clear. There is little disposition today to question the theses of Mr. Beard that the Constitution was primarily originated and carried through by propertied groups that desired security, and that, so far as it is an economic document, it was based upon the concept that property rights should be beyond the reach of popular majorities.¹⁰⁹ Nor can anyone well deny that the last end has, to some extent, been attained through judicial construction of state and federal constitutions. To indicate, however, to what extent that purpose has been made effective, and with reference to what forms of property, and against which forms of governmental action, would require consideration of enormous chapters of public law that lie quite beyond a mere discussion of the concept of property. In a word, it may, perhaps, safely be said that great inroads have been made upon the absolutistic conception of ownership as respects the *use* of mere private property; and that much less has been accomplished in curbing industrial property as respects economic power.

That this country, as compared with the countries of western Europe, was, during the first century of its existence, distinctly one in which property received extreme protection under the law cannot be questioned. Our urban concentration was slight. Free lands and loose economic conditions generally made independence easy. An interest in reforms of any kind is, under such conditions, impossible; but we were conscious of no social problems. Cheap land had as one of its consequences that of stimulating and universalizing acquisitive instincts and respect for property rights. Simultaneously, however, with the aggrandizement of political and economic individualism by the modes of thought above referred to, and by the continuance of the frontier mode of life, there arose in the last century an economic society whose problems inevitably demanded restrictions upon individual ownership. It became very evident that inviolability of private property would not work.¹¹⁰ The close integration of modern society, particularly its urban

107. Dean Pound has repeatedly emphasized this. "It shows the course of evolution of Roman law. On the other hand it has no basis in Anglo-American legal history, and the whole course of English and American law is belying it." POUND, *op. cit. supra* note 54, at 28. See also POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 54-60; also *supra* note 54 and next note; N. Isaacs, *The Standardizing of Contracts* (1917) 27 *YALE L. J.* 34, 38 n. 17; 3 HOLDSWORTH, *op. cit. supra* note 52, at 457-58, 532-33; 1 POLLOCK AND MAITLAND, *op. cit. supra* note 31, at 541; 2 *id.* at 233.

108. Pound, *The New Feudalism* (1930) 16 *A. B. A. J.* 553, 558. See *supra* note 54.

109. C. A. BEARD, *ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1923) 324 and c. 6; *THE SUPREME COURT AND THE CONSTITUTION* (1916) 88-95, 102-12. Cf. the more extreme statements of J. ALLEN SMITH, *op. cit. supra* note 95, at 294, 298.

110. "The principle of the inviolability of property means the delivery of society into the hands of ignorance, obstinacy, and spite." JHERING, *op. cit. supra* note 16, at 389. And cf. *id.* at 396-97. "There is no absolute property—property, that is, independent of considera-

portion, made it impossible to leave unchecked land's individual use. Hence, the great modern development of the law of nuisances, public and private; and the enormous expansion, almost wholly a creation of the period since the Civil War, of the police power, by virtue of which the use of property is regulated, or the property may even be destroyed, for the furtherance of public order, safety, health, morality, and well-being generally.¹¹¹ The details in which user is thus controlled are very great in number and of extraordinary variety. Again, the use of land by one owner for the sole purpose of lessening a neighbor's similar enjoyment of his land, or for the sole purpose of causing damage to the latter—as by erecting spite-fences or digging spite-wells—has been restrained by statute in various states, and in others by courts without the aid of legislation.¹¹² Attempts to restrain other anti-social uses of property—for example, the waste of natural resources by allowing natural gas to escape from an uncapped well—have met with less success.¹¹³ It is habitually assumed that one thing which government cannot do is to take one man's property and give it to another, with or without compensation. Yet courts of equity, in "balancing conveniences", have often made the private necessities or the social conveniences of one man's business the measure of another's rights, permitting the former to "take" the latter's land by practically destroying its enjoyment content. This has been done particularly in favor of a dominant business interest (as mining in Pennsylvania and early California, lumbering in various states), and constitutes in effect a subsidy thereof.¹¹⁴ Equity courts, too, have sometimes offered com-

tion of the interests of the community; and history has taken care to engrave this truth upon the minds of all peoples." I JHERING, *GEIST* 7.

111. E. FREUND, *THE POLICE POWER* (1904).

112. J. B. AMES, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor* in *LECTURES ON LEGAL HISTORY* (1913) 399; Walton, *Motive as an Element in Torts in the Common and in the Civil Law* (1909) 12 HARV. L. REV. 501. See also Guttridge, *Abuse of Rights* (1933) 5 CAMB. L. J. 22.

113. *Hague v. Wheeler*, 157 Pa. 324, 27 Atl. 714 (1893); *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71, 77 S. W. 368 (1903); *Townsend v. State*, 147 Ind. 624, 47 N. E. 18 (1897); *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809 (1898); *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 461, 59 N. E. 169 (1901); *Ohio Oil Co. v. Indiana*, 177 U. S. 190 (1900); *Walls v. Midland Carbon Co.*, 254 U. S. 300 (1920); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U. S. 210 (1932); *Bruce, The Oil Cases and the Public Interest* (1933) 19 A. B. A. J. 168; Ford, *Controlling the Production of Oil* (1932) 30 MICH. L. REV. 1170.

114. Although in equity every piece of land is unique (and damages for breach of a contract to convey therefore inadequate) for the purpose of granting specific performance of such a contract, nevertheless, once the land is secured, equity is very much less firm in enjoining any taking of its substance, or unreasonable and permanent interference with its enjoyment. In the former situation an old tradition is followed; a tradition established when ownership of land was no mere economic value, but conferred social standing and political rights. In the latter situation litigation is on the economic battlefield, and the line of tradition is often abandoned. Abandonment is still a minority doctrine, but a growing one. Scores of cases are involved, even in courts of last resort; doubtless hundreds in lower courts whose decisions are unprinted. Preventive equitable relief has often been refused against conceded wrongdoers taking the land's substance (timber, stone, building materials) or rendering its enjoyment permanently impossible (by building upon it, flooding it, burying it under mining debris), either because damages at law for the consummated wrong would (allegedly) be adequate relief, or because the damage done would be slight in a pecuniary sense. For many

plainants the alternative of going remediless or selling their land to an encroaching wrongdoer.¹¹⁵

In all these cases the courts disregard the absolutistic concept of individual ownership in cases of ordinary property and relations between natural (i. e. non-corporate) persons; and, from a social point of view, it must be admitted that very generally their action seems justifiable. It is interesting to note, moreover, that the judges who have so acted have hardly ever even referred in their opinions to the imponderable interest—the centuries-old tradition of inviolable property—which they thus repudiate. Against the value of complainant's land and comfort they ordinarily weigh merely the defendant's capital investment; except when the defendant is a large employer of labor (and in that case almost always a corporation) in whose favor there are such items to consider as the taxes which it pays and their use in maintaining local roads and schools, its weekly pay-roll, and the advantages accruing from local expenditure of wages. Imponderables receive no, or scant, attention. All this certainly reveals a growing forgetfulness of natural rights.

Finally,—returning to cases in which, as in exercises of the police power, a social interest is directly involved—a very little has even been done recently in zoning ordinances¹¹⁶ to break down the tradition that has characterized our law from medieval times of leaving the protection of vital social interests to private contract, or to purely private litigation.¹¹⁷ These zoning ordinances give stability and consistency to land values, tend to conserve large aggregates of social wealth, protect health and public comfort, and give recognition (new in the law) to æsthetic ends.

cases, see J. B. AMES, *CASES IN EQUITY JURISDICTION* (1904) 511n., 517n., 521n.; CHAFEE, *EQUITABLE RELIEF AGAINST TORTS* (1924) 165n., 288n. Even plainer departures from tradition and proclaimed principles are the cases where relief is refused because the economic loss caused to the wrongdoer by an injunction would (it is held in such cases) outweigh (a) the loss caused to the plaintiff by its refusal, and (b)—an item rarely even mentioned by the courts—the value to society of maintaining his conceded legal right. See for such cases, AMES, *op. cit. supra*, at 642n.; CHAFEE, *op. cit. supra*, at 299n., the latter citing various large collections of cases. On dominant interests compare Smith, *Reasonable Use as a Defense* (1917) 17 COL. L. REV. 383, 402 n. 90 (mining); North Carolina cases cited in AMES, *op. cit. supra*, at 511n. (timber); Bohlen, *The Rule in Rylands v Fletcher* (1911) 59 U. OF PA. L. REV. 423, 431-33, 444-46.

115. Building cases: AMES, *op. cit. supra* note 114, at 529, 530n.; CHAFEE, *op. cit. supra* note 114, at 285, 287n.; W. W. COOK, *CASES ON EQUITY* (2d ed. 1932) 457, 463n., 467; E. N. DUFFEE, *CASES ON EQUITY* (1928) 489n. Flooding and debris cases: CHAFEE, *op. cit. supra* note 114, at 304n., 393; COOK, *op. cit. supra*, at 477n. These two classes of cases are selected merely as particularly striking. Other situations reveal similar developments. See, for example, comments on a case in which the owner of coal deposits was allowed to strip and destroy the surface land (owned by another) in order to mine the coal, in (1923) 23 COL. L. REV. 684; (1924) 9 CORN. L. Q. 63; (1924) 33 YALE L. J. 205. The exaggeration of title in boundary disputes is, of course, to be found in all countries; see B. JOUBERT, *ESSAI SUR LA REVISION DU CODE CIVIL* (1873) 69-74.

116. Lloyd, *Some Modern Contacts between Courts of Equity and Government Policy* (1930) 14 MINN. L. REV. 205.

117. See POUND, *op. cit. supra* note 54, at 13-15.

It is not, however, the *use* of ordinary property, nor the property of ordinary or "natural" persons, that presents today serious problems of adjusting law to new social conditions. Those problems arise in connection with property for *power*, and therefore primarily in connection with industrial property. "The whole American political and social system"—to quote a conservative and an economist, President Hadley—"is based on industrial property right, far more completely than has ever been the case in any European country."¹¹⁸ Guarantees for ordinary property were provided in the Constitution; circumstances have made them applicable to industrial property. Their enforcement by the courts have made these, in effect, "arbiters between the legislature and the property owner".¹¹⁹ The conception of property for power, scarcely recognized in earlier centuries, acquired great importance as the industrial system developed in the last century. In this country attention has been called to it by the transmission of vast fortunes, by will or inheritance, to persons who perform no service in its creation and by the recent stupendous concentration of wealth in corporations. There are few among us who still adhere to the belief that the distribution of power through the distribution of property is in accord with divine law as understood by President Baer of anthracite coal fame;¹²⁰ or with inevitable economic laws;¹²¹ or with natural law, unless in the sense of the survival of the fittest,¹²² whose fitness, outside of an industrial jungle, is generally denied. Hence the cry for the abolishment of inheritance;¹²³ and the protests against taxes which to some degree are doing that. Hence the demand for a redistribution of property; and some efforts of the New Deal in that direction. Hence the appeal (to some) of communism, which, among modern theories of social reform, makes the most definite demand that individual interests in property shall be reduced to a mere privilege of use.

Despite the facts that until 1540 no Englishman could dispose of his realty by will (as distinguished from dispositions "craftily made to secret uses" before that date), and then only to a limited degree until much later;

118. A. T. HADLEY, *UNDER CURRENTS OF AMERICAN POLITICS* (1915) 33.

119. *Id.* at 42.

120. Who was reported to have written in a letter in 1902 that, "The rights and interests of the laboring man will be protected by the Christian men to whom God in His infinite wisdom has given the property interests of the country." HENRY GEORGE, JR., *THE MENACE OF PRIVILEGE* (1905) 14. See also GORE, *op. cit. supra* note 15, at 76, for a similar opinion.

121. J. B. Clark, in his *THE DISTRIBUTION OF WEALTH* (1899), attempted to establish a natural law controlling the distribution of social income, which, operating "without friction" through wage bargains "freely made between individual men would give to every agent of production the amount of wealth which that agent creates." See his preface. This would remove the strongest arguments against Locke's labor theory of property, *supra* note 71.

122. Andrew Carnegie's idea in his *GOSPEL OF WEALTH*; GEORGE, *op. cit. supra* note 120, at 14.

123. H. E. READ, *THE ABOLITION OF INHERITANCE* (1918). Cf. McMurray, *Liberty of Testation and Some Modern Limitations Thereon* (1919) 14 ILL. L. REV. 96; various essays in *RATIONAL BASIS OF LEGAL INSTITUTIONS*, *op. cit. supra* note 69, at 411-64; Jenks, *English Civil Law* (1916) 30 HARV. L. REV. 97, 119-20; G. C. BRODERICK, *ENGLISH LAND AND LANDLORDS* (1881) 336-37.

that only a very small proportion of our population is sufficiently propertied to make wills; and that any well informed person would be likely to concur in the opinion that our legislative rules for the descent and distribution of intestate property are decidedly more desirable from a social point of view than the personal preferences and vagaries of the average testator—at least one state court has attempted to make the power of testation a natural right beyond the law's control. This includes, of course, the liberty of disinheriting children or other usually preferred objects of a testator's bounty. But the view is very generally accepted that testation is wholly a creature of law; though certainly not a privilege likely to be abolished. Inheritance taxes are rapidly educating the public to the idea that inheritance, also, is dependent upon the will of the state.

The vast increase in the number and wealth of corporations had begun to attract serious attention fifty years ago.¹²⁴ The amazing conditions which now exist in the industrial field were strikingly emphasized a few years ago by Mr. Ripley in his book on *Main Street and Wall Street*, and have more recently been revealed in detail by the exhaustive research of Mr. Berle and Mr. Means. The data compiled by them indicate that two hundred non-banking corporations control "nearly half of all the corporate wealth", and "very much more than half" of the industry of the country.¹²⁵ One hundred such corporations as the American Telegraph and Telephone Company would control as much wealth as the total present wealth of the country, and would employ as many persons as all who are now gainfully employed.¹²⁶ What is more important, this vast corporate wealth is not controlled by the owners of the corporations—their stockholders; but by managerial groups which very generally, and most particularly those of the large corporations, hold but a small or insignificant amount of stock.¹²⁷ And so here again "there has resulted the dissolution of the old atom of ownership" (a dissolution not

124. Thos. G. Shearman estimated in 1889 that 250,000 persons "practically owned" the country, and that 50,000 would "substantially" own it by 1929 if taxing systems remained unaltered. See Shearman, *Henry George's Mistakes and The Owners of the United States* (1889) 8 THE FORUM 40, 262, 271-73. He made no attempt, however, to show to what extent they owned it through corporations. Mr. Justice Field of the Supreme Court expressed an opinion in 1890 that four-fifths of the wealth of the country was owned by corporations, 134 U. S. 742 (1890) (app.); an estimate that was certainly much exaggerated. No source, apparently, shows to what extent this enormous concentration of wealth, necessarily property for power, took place after the Civil War. Mr. Justice Brewer remarked of litigation in 1904 that "formerly there were but two parties: the individual and the Government. Now there are three: the individual, the corporation and the Government". GEORGE, *op. cit. supra* note 120, at 263.

See also F. J. STIMSON, *POPULAR LAW MAKING* (1910) 201, 202; DILLON, *op. cit. supra* note 12, at 376.

125. A. A. BERLE AND G. C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) 19, 28, 32, 33.

126. *Id.* at 3.

127. W. Z. RIPLEY, *MAIN STREET AND WALL STREET* (1927); BERLE AND MEANS, *op. cit. supra* note 125, at 4, 47 *et seq.* In 1925, for example, a report of the Federal Trade Commission showed that only 1.4% of the stock of the railroads was held in 1922 by their managers; and in 4,367 corporations selected as representative, an average of only 16.5% of their stock was owned by the managerial groups. *Id.* at 50-52.

at all novel, as we have seen) "into its component parts, control and beneficial ownership."¹²⁸ The managers are not themselves controlled by self-interest, as stockholders, to protect with jealousy the interests of the stockholders generally. They cannot be controlled by the latter because of various corporate devices that are available to thwart these; and because great numbers of scattered stockholders cannot unite, the more numerous and scattered they are the greater their helplessness. And they are little controlled by statute, despite the immense mass of legislation regarding corporations now in our statute books. In short, no public duties, direct or indirect, rest upon the managers.

Past history has suggested that corporations may become too strong. At least the quasi-trust relationship so often said to exist between directors and stockholders (and which doubtless did exist in smaller corporations, particularly in earlier times) must be made a complete reality. In no other legal system should such an adjustment be easier; for in no other has the separation of beneficial interest and title—alike of land and chattels—been for centuries a fundamental principle of daily application. Indeed, its familiarity has made us inattentive to its possible dangers. In our ordinary trusts, it is true, the trustee owns the property which the beneficiary enjoys; but he is made trustee because he controls the title; that he controls it because he is the owner (legal or equitable) is a secondary matter. Surely it will be novel if we make the stockholders, who own the property, beneficiaries; and make those who control, but do not own, trustees. But, substantially, and under some name, that must be done. The necessary clarification of concepts in the field of trusts and of our general concept of individual property must be made; but essentially it is a clarification that is required, and nothing more.

Manifestly we need a modernized philosophy of property. No mere philosophy of words or aspirations, however. In that respect the contrast between Mill and Comte—one looking to individualism to save society, the other to society to save the individual¹²⁹—is precisely the same as that which

128. *Id.* at 8; also 2, 7, 345 *et seq.* The instrumentalities by which the economic organization of society is effected are generally thought of as ownership, contract (in its broad sense as in *supra* note 100), and inheritance—e. g. EUGEN EHRlich, *SOZIOLOGIE UND JURISPRUDENZ* (1906) 9, and I R. T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* (1914) 70-93; 2 *id.* at 576-85, and *passim*. Berle and Means would add the corporation, as "both a method of property tenure and a means of organizing economic life." BERLE AND MEANS, *op. cit. supra* note 125, at 1. "The surrender of control over their wealth [by stockholders] has effectively broken the old property relationships. . . ." *Id.* at 2. The managers hold a new power, a power to take from the profits and the underlying corporate assets "by means of purely private processes, without any test of public welfare or necessity. . . . It is entirely possible . . . that the corporate profit stream in reality no longer is private property. . . ." *Id.* at 247.

129. "Comte's ideal is social organization; Mill's ideal is individual development Comte looked to the elevation of the person through the reaction of society; Mill looked to the progress of society through the improvement of the individual, and the improvement of the individual through freedom and self-help." FREDERIC HARRISON, *ON SOCIETY* (1918) 205, *cf.* 254.

existed between Aristotle and Plato. The first tenet of an adequate philosophy must be that property is the creature and dependent of law,¹³⁰ including, of course, our constitutions—surely no radical doctrine! On one hand, private property, though admitting that it can only exist by virtue of public protection, pleads payment of taxes as the whole price of that protection, and beyond that claims immunity from all social obligations. On the other hand, the thought of the world for two generations has been tending toward collective Utopias. The individualism of Adam Smith's *Wealth of Nations* and of Mill's *Liberty* is an inadequate defense against them. The basis for a social philosophy that may be made an adequate bulwark against them, however, was laid long ago by Marx (I refer to him, of course, solely as an institutional historian¹³¹) and Jhering. Such has been the influence of Darwin upon modern thought that nearly everyone accepts as a commonplace Marx's idea—revolutionary in his day—that every social institution is the product of development (here some would stop, but Marx went on) whose causes are to be found (here again most of us put in some qualification, such as "partly" or "primarily") in changing material or economic conditions. Many examples of change in property concepts have already been given, and it is not necessary to remark that when a *property* concept changes it is because of economic circumstances. Jhering's contribution will also seem slight to you, so all pervading is it in our "climate of opinion". It was simply this: that all legal rights and rules represent the protection of interests favored by the law. In place of the evolving will, which even Savigny made the basis of property, Jhering put interests deliberately chosen.¹³²

130. "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." BENTHAM, *THEORY OF LEGISLATION* 113.

131. That is, as the first who, in a general and systematic manner, showed that the social process can only be discovered (if at all) by studying interacting social forces; who made history institutional, and, as respects every institution, evolutionary. His exaggeration of the economic element, and his espousal of communism as a cure for the social conditions and tendencies which he believed to exist, are not here involved. See SELIGMAN, *op. cit.* note 8, at 27, 142-44 (quotations from Marx and Engels); *id.* at 7, 22-24, 39, 50-52, 162-64.

132. His general ideas are developed in the *GEIST*. "The basic concept of law is that of a legalized security of enjoyment: rights are legally protected interests." III. 1 *id.* at 327 "Interests are the end of law, which presupposes them." III. 1 *id.* at 333. "Rights protect nothing that is useless: utility, not volition, is the substance of a right." III. 1 *id.* at 327; *cf.* 321. "Every right of the private law exists for the purpose of assuring to men some advantage, of satisfying their needs, protecting their interests, promoting their purposes." III. 1 *id.* at 328. "Every legal transaction into which the owner of property enters is an act through which he enjoys. . . . Freedom of disposition is, accordingly, merely freedom in the choice of modes of enjoyment, and a restriction of the former is a limitation upon the latter." III. 1 *id.* at 337. "Enjoyment is the essential end of a right; the assertion of the latter is but a means to an end. . . . About this conception revolves the whole life and being of the law; on this even the will must be dependent if it is to contribute to the law's general end." III. 1 *id.* at 338. Hence, as pointed out *supra* note 7, the preparation of his *ZWECK*, in which he developed at great length the above ideas. *Cf. supra* note 43. It is evident that this makes law a changing social product, dependent upon whatever creates society's states of thought regarding its more important interests. He was thus the "founder of modern legal realism, and the progenitor on the juristic side, as Comte is the ancestor on the philosophical side, of the Sociological School of Jurisprudence." Kocourek, *Introduction* in JHERING, *STRUGGLE FOR LAW* (Lalor's trans. 2d ed. 1915) xxvii.

Approach the institution of property under the guidance of these two ideas and it becomes manifest that the justification of property can be rested on no apriorism. It is a creature of law, only justifiable (like all law) by utilitarian considerations. It follows equally, from our two principles, that social interests must control our choices; the individual interests only so far as they advance the general interest.¹³³ Examples have already been given to show that in fact we have, for two generations past, been notably emphasizing the social interests behind legal rules.

Actual dealing by the courts with the problem is necessarily piecemeal. But principles need not be fractionalized. In all private property there is some public interest, or individual rights therein would not be protected. Yet, since the public interest is most evident in particular cases, we have dealt with these separately under the labels of nuisances, malice torts, the police power, "public utilities", property "affected with a public interest".¹³⁴ None of these is a "closed class or category". We need a more unified view, general principles, and less of rubrics. Such a view has manifestly been rapidly developing. It recently found expression in the remark in the *Nebbia* case of 1933 that "upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects. . . .";¹³⁵ and doubtless property in any of its incidents. Or, as Chief Justice Hughes has recently said of liberty—and the same is manifestly true of property: although subject to the restraints of due process, "regulation which is reasonable in relation to the subject and is adopted in the interests of the community is due process."¹³⁶ If adhered to, this must lead to the conclusion that the rule of

133. Cf. *supra* note 110.

134. Robinson, *The Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277; McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 *id.* 759; Hamilton, *Affectionation with Public Interest* (1930) 39 YALE L. J. 1089. Brandeis, J., dissenting in *New State Ice Co. v. Liebman*, 295 U. S. 262 (1932) said: ". . . the conception of a public utility is not static." *Id.* at 284. ". . . the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern. Whether it is, or is not, depends upon the conditions in the community affected." *Id.* at 301. ". . . so far as concerns the power to regulate, there is no difference in essence, between a business called private and one called a public utility or said to be 'affected with a public interest'. . . . The source is the police power. The limitation is that set by the due process clause. . . ." *Id.* at 302.

135. *Nebbia v. New York*, 291 U. S. 502, 537 (1934). See the summary of restrictions already approved as imposed in proper exercise of the police power, *id.* at 525-26; likewise, the list of established restrictions upon liberty of contract in *Chicago B. & Q. R. R. v. McGuire*, 219 U. S. 549, 567-69. Cf. *supra* note 96.

136. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 391 (1937). Judges appeal to precedents or analogies in legal decisions—which is legal tradition; but they also appeal to "the force of justice, morals, and social welfare, the *mores* of the day"—which is essentially an appeal to prevailing opinion. Thus, in both respects, as Justice Cardozo has said, "the power of precedent, when analyzed, is the power of the beaten track." B. N. CARDOZO, *THE GROWTH OF THE LAW* (1924) 62. And the latter basis of the law is very like natural law in a new guise. As a higher law *outside* of and *controlling* positive law, natural law is gone. But natural law was only tradition; originally appealed to in Roman lands to check the Roman doctrine that made the ruler's will supreme. Today we recognize that popular will, which is traditional, and therefore permanent, *makes* the positive law. Under some name that goes back to Jhering's interests—social interest, collectivism, public utility, the weighing

reason is to rest upon the people's will; that popular will, sufficiently manifest, is openly and avowedly to displace the doctrine of natural law and natural rights.

"There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."¹³⁷ With a decreasing emphasis upon divisions of law, all underlain by the idea of the dominance of social interests; with a common test of "reasonableness" in judging these; with a clearly lessening exaggeration of inherent absolutism in the concepts of property and contract;—it would seem that reasonable ends should be attainable. Inconsistent decisions will remain inevitable; "liberty", as the Court recently declared (and so of property), "in each of its phases has its history and connotation".¹³⁸ The Court will not treat all alike.

All men today admit that even our constitutions, state and national, are only instrumentalities of social welfare; yet it cannot be admitted that such instrumentalities are no different from and no better than other means to that end. If constitutions *must* be so construed as to bar changes that necessities demand in the legal sub-structure, then they must themselves be changed. That does not mean that they should be changed lightly. And such a situation is, as our history proves, very rare. We need not, as Francis Lieber put it, "seeing the perversion of principles, follow the besetting fallacy of men and seek salvation from one evil in its opposite, as if the means of escaping death by fire were freezing to death."¹³⁹ That was what Marx did, in turning from exaggerated individualism to communism as a cure for accumulated social maladjustments. Law teaches us much of man's fundamental purposes. It is the embodiment of society's deliberately preferred interests; in many cases its most precious interests. The appointed conservator of those interests, it is the duty of *law* to be conservative. Undue importance should not be given to the impatience of the votaries of upstart amorphous sciences, who regard these recorded and guarded social choices as inconvenient obstacles to the immediate realization of their own transient personal impressions and impulses.

But, after all, it is the duty of *judges* to be intelligent. To solve judicially the legal problems arising in the field of industry requires statesmanship, not legal formalism. If to be a lawyer is to be a precisian, a formalist, an obscurantist, then truly we must declare that no constitution, state or national, shall be a mere lawyers' document. Certainly those qualities are not essential characteristics of the judiciary; yet it is equally certain that judicial work tends to encourage them if not controlled by constant

of "individual" interests (with social predilections in one pan of the scales)—we really have natural law in a new and more powerful form.

137. Brandeis, J., dissenting in *New State Ice Co. v. Liebman*, 285 U. S. 262, 311 (1932).

138. Hughes, C. J., in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 391 (1937).

139. F. LIEBER, ON CIVIL LIBERTY AND GOVERNMENT (3d ed. 1911) 19.

attention to actual conditions in society. In this respect the record of the Federal Supreme Court on freedom of contract (though generally conceded to have been better than that of the state courts)¹⁴⁰ was deplorable. Against the steady protests of a minority it displayed an obstinate indifference to the causes and ends of social legislation that came before it, and put a fatal emphasis upon mere technical logic; a logic, moreover, displayed in the application of a concept of doubtful substance and of doubtful origin, the Court's unique product. This was legal formalism at its worst.¹⁴¹ However, the Brandeis brief in the *Muller* case¹⁴² marked the beginning of the end of the spirit that created that abnormal development. With that eliminated (even aside from recent events calculated to affect the Court's policy) one can expect a socially responsive policy in the further development of the concepts—now desirably separated—of liberty and property.

140. This opinion seems to be justified by Dean Pound's summary of decisions to 1918, *supra* note 97, at 481-82, 485-87; and is explicitly expressed by Professor Powell, *The Judicialeity of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545, 555; although on the single (relatively modern) point there dealt with, his analysis of judicial votes shows a heavy contrary balance. *Id.* at 545-50. Likewise by LEWIS, *op. cit. supra* note 96, at 101. It is, apparently, also the opinion of Charles Beard and Walton Hamilton. See Hamilton, *supra* note 73, at 864, 875 n. 32.

141. "The earlier decisions . . . went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty." Holmes, J., in *Adkins v. Children's Hospital*, 261 U. S. 525, 568. See Pound, *supra* note 97, at 482-84.

142. An analysis of this document, devoted almost wholly to non-legal facts and opinions, is given by Herman, *Economic Predilection and the Law* (1937) 31 AM. POL. SCI. REV. 821, 822 n. 5; in the following pages the author illustrates its influence.