

PRIVATE PROPERTY AND PUBLIC OFFICE

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I will discuss what property is not. I think that a correct understanding of the Constitution depends very crucially on an understanding of what cannot or should not be property. To appreciate this point, I think you might consider one of the great legal texts to which the Framers of the Constitution were constantly turning, Blackstone's *Commentaries*.¹ Blackstone defines property as "that despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."²

I want to call to your attention the word "despotic." Blackstone, in another place says that the authority of Parliament is "despotic."³ He used that term because he wanted to convey the idea that when you are able to exercise despotic power, you are not answerable to anyone else. Your control is complete, and it is entirely independent. The owner of property does not have to seek someone else's permission, approval, or endorsement for what he does with his property. The property's use is entirely his. That is also what Blackstone meant about Parliament. In the British system, there is no higher authority than Parliament; therefore, Parliament does not have to seek approval or endorsement from anyone else. Blackstone realized that this absolute authority is somewhat troublesome. He did not want political authority to be despotic, and he argued that, fortunately for the British, this despotic authority is internally checked and balanced by the structure of Parliament: the House of Commons, the House of Lords, and the king keep each other in check, such that what was a despotic authority in a legal sense was not one in practice.⁴

It is not surprising that Blackstone uses this term "despotic," both in relation to ownership and in relation to governance, because there is a common Latin root word that was used in medieval legal writings: *dominium*. *Dominium* means both owner-

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1. W. BLACKSTONE, *COMMENTARIES*.

2. 2 *id.* at *2.

3. *Id.*

4. See 1 *id.* at *154-55.

ship and rulership. You were the lord of your property, as well as lord of the persons you ruled. The term contains an ambiguity between property and persons because in the Middle Ages there was that sort of equivocation in real life. Feudal lords owned land, and as part of that ownership they also ruled over the people on their land. If you were a vassal and received land from a higher lord, you owed him not rent but political allegiance. Primarily for economic reasons, this system did not last for too long in medieval England. The system, however, did retain certain aspects of the inheritance of office or rulership along with property. For example, men continued to inherit their places in the House of Lords. The most notable example is the monarchy. The monarchy is in a certain sense the king's property, which he inherits like property.

This is a long digression to come back to the main point I wanted to make, which is that the American Constitution rejects this notion of property. The American Revolution was in some sense a revolution against a monarchy that was clinging to the last vestiges of feudalism. Thomas Jefferson thought it was essential to free the fledgling nation from these last vestiges of feudal law.⁵ The public rhetoric of the Revolution was very much aimed at restoring a sense of republican authority. Republican authority means rule is in public hands. Ruling is not something that can be inherited and traded like property.

Not only is our Constitution republican in the literal sense that we do not have a monarch, but the Framers went to the trouble of specifying in the Constitution that neither Congress nor the state legislatures could issue titles of nobility.⁶ What is the objection to titles of nobility? They create a station between government office and private ownership. Although a title of nobility did not have to be inherited, there was always the threat that it would be. In any case, it is a public honor that belongs to the owner while he lives. Consequently, there would be a caste of citizens who were not simply holding accountable public offices, nor lords of their own, purely private property. They would be left in a disturbingly ambiguous position.

5. For a discussion of Thomas Jefferson's involvement in the reform of land law in Virginia see Jefferson, *Autobiography*, in *WRITINGS OF THOMAS JEFFERSON* 3, 38, 39 (M. Peterson ed. 1984); Jefferson, *A Summary View of the Rights of the British America*, in *id.* at 105, 118-19; Jefferson, *Notes on the State of Virginia*, in *id.* at 125, 263.

6. See U.S. CONST. art. I, § 9, cl. 8.

The Framers were in general opposed to titled nobility,⁷ and their idea of republican government was that to have political authority, one must be a public officer. A public officer is accountable to the public. The office cannot in any sense be understood as property. On the other side, the Framers did like the Blackstonian conception of property. They agreed with the idea that in the private station as an owner of property, one can be despotic. The property really belongs to the owner, and the owner has no dependence on anybody else in choosing how to use his property. You can talk that way in a republican regime only because you are talking about mere property ownership. It has no political implications. It is not anyone else's business what you do with it. There cannot be a system of ownership in that sense unless there is a sphere of exclusive control, which by definition and acceptance is understood to be something that is entirely private, so that the owner can make his own decisions without having to get approval or permission from others.

I do not have to belabor the point that property in many spheres today does not have that kind of despotic character. Property owners, indeed, do have to seek permission, endorsement, and curry favor with rent boards, zoning boards, wage boards, environmental agencies, and safety agencies.⁸ As a result of this interference, property owners are no longer despots. Property owners now have to worry about what other people will say. Property has been politicized. Many defenders of public controls on private property openly profess that property is troublesome because it is too private; it allows the owners to be too selfish. They argue that we need to impose public control, which has been done through a number of regulatory modes that involve not a clear law, but a greater degree of dependence on some public administrative authority.

Rather than further discuss that point, I want to discuss a reverse point that we do not usually think of when we think of property and the Constitution. This is the extent to which we have been degrading public office and public authority by allowing it to be exercised by private persons. We have entangled public office in a certain sense with the despotic character

7. See generally THE FEDERALIST No. 47 (J. Madison).

8. See, e.g., CAL. GOV'T CODE § 65100 (West 1983); N.Y. AGRIC. CONSERV. & ADJ. LAW § 12 (McKinney 1937).

of private ownership. We now have private people who exercise the power of public office. They are performing acts that are supposed to be reserved for public officers, but the actors are not publicly accountable officers—that is, they are not accountable to the electorate nor to any official who is accountable to the electorate. The most obvious example is the independent counsel. The Supreme Court in *Morrison v. Olson* decided that the independent counsel is not an officer of the United States in the sense that the term is used in the Constitution.⁹ The Constitution frequently refers to officers, primarily because the Framers were very concerned about establishing their status. An independent counsel, however, is not an officer but is merely someone exercising claims under the law on behalf of the public on a one-time basis. He is not an officer, but rather he is a one-time despot. Judge Silberman and Justice Scalia make the point that what seems despotic about this is that he is not really a public officer.¹⁰ He is not in any sense accountable to the public. He is simply empowered to go into court and stamp his foot and make a demand as if he were an owner. He owns a claim that is supposed to be public, but he can exercise it without public accountability.

Now, you may try to say, as Chief Justice Rehnquist suggests in *Morrison*, that the independent counsel is one small exception.¹¹ The independent counsel really is not just an exception, however. There are many other examples of unaccountable despots in contemporary public policymaking. One such example is the phenomenon of agriculture marketing boards.¹² Your status as a property owner, as a farmer, is dependent on these marketing boards. If you own a farm that could be producing various commodities, you are entitled to vote in a special election that is not a public election. The results bind all producers of the commodity, but the election itself entails no public accountability. The election will set the price of the commodity and within certain limits determine how much can be marketed. We are allowing the farmers to exercise a public office by virtue

9. 108 S. Ct. 2597, 2602 (1988): More precisely, the dispositive question was whether the independent counsel was an "officer" or an "inferior officer" as those terms are used in the Constitution.

10. See *In Re Sealed Case*, 838 F.2d 476, 500 (D.C. Cir. 1988); *Morrison*, 108 S. Ct. at 2639 (Scalia, J., dissenting).

11. See *Morrison*, 108 S. Ct. at 2597.

12. See, e.g., CAL. FOOD & AGRIC. CODE §§ 59,501-76,384 (West 1986).

of their status as private owners. It is a little version of feudalism worked into our contemporary constitutional scheme.

You see this in settings that seem very far removed from feudalism, and in some sense they certainly are. They are, however, equally very far removed from republican government. For example, we allow citizen suits against polluters, and we even allow citizen suits against regulatory agencies. The defenders of the process argue that we should not worry because the citizens who bring the suits are not really owners, and the rights they exercise are not really rights of ownership that they can exercise despotically. If they tried to coerce the agency or the polluter through an injunction in a way that is excessive or harmful to the public, the judge would guard the public interest. We have allowed ourselves to be reassured because we have become accustomed to the idea that judges are not going to allow people to stamp their foot and be despots. The judges, we tell ourselves, will constantly be balancing and weighing and considering public implications. But I think we ought to be rather more uneasy about relying so much on judges; our reliance indicates that because private property no longer has the status that it used to have or that it is supposed to have, it is now acceptable to share it more broadly. Private property has been rendered so "safe" that it can be given to those who are not exercising private roles.

In other situations we allow people to exercise the power of public office when it seems entirely a matter of private ownership claims being extended. Here is my final example. Under the Clean Water Act,¹³ a private citizen can bring a suit for punitive damages against a polluter, and then negotiate to have the damages sent not to the Treasury but rather to the citizen's favorite environmental organization.¹⁴ The citizen is exercising on behalf of the public a kind of property claim. The claim not only entails a certain kind of foot-stamping and despotic control of a sort that should not be accorded a public officer; it even entails the right to use and dispose of the claim, as if it were ordinary private property. It is as if someone could sell his public office and use the proceeds for something else.

13. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended in scattered sections of 33 U.S.C.).

14. See Clean Water Act of 1977, 33 U.S.C. § 1319 (1983 & Supp. IV 1987); Greve, *Environmentalism and Bounty Hunting*, 97 PUB. INTEREST 15 (1989).

If you think about property and the Constitution, you should think as much about what property cannot be in a republican constitution as about what it must be. We might have an easier time insisting on what it must be if we thought as clearly as I think the Framers did about what it cannot be in a republican constitution.