The Reliance Interest in Property Revisited

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Thirty years ago, the U.S. Steel Corporation decided to close a plant in Youngstown, Ohio. The factory was the mainstay of the town and its closing was likely to have a devastating impact on the local economy as well as the lives of all the workers who would be laid off. The union did all it could to keep the factory open, but to no avail. In a final burst of creativity, the union came up with the idea of buying the factory from the company. If they won't run it, maybe we can. But the company adamantly refused to consider selling to the union. It took the inconsistent positions that the factory was unprofitable and that if the union did operate it that the union would be competing with the old employer and illegitimately harming U.S. Steel's business. In the face of this intransigence, the union went to court. Among other things, it asked the court to order the company to sell the factory to the union upon payment of fair market value. In effect, the union claimed that it, or the town, had a right of first refusal in the property.

Trial Judge Lambros was sympathetic. "[I]t seems to me," he said, "that a property right has arisen from this lengthy, long-established relationship between United States Steel, the steel industry as an institution, the community in Youngstown, the people in Mahoning County and the Mahoning Valley in having given and devoted their lives to this industry."[1] Yet when push came to shove, Judge Lambros felt that he could find no precedent in Ohio law for such a property right and that finding was upheld by the Sixth Circuit.[2] Because precedent is far from unchanging and because I shared Judge Lambros' instinct that a long relationship may create property rights when the owner shares access to the property with another, I wrote an article entitled *The Reliance Interest in Property,* in which I argued that Judge Lambros could have interpreted the common law to find such a property right.[3] In addition, I suggested a number of remedies, two of which I want to revisit now. First, I argued that the court could have and should have recognized a right of first refusal in either the union or the town, enforceable by injunctive relief ordering the company to transfer title for fair market value. Second, I argued that the town could exercise its power of eminent domain to take the property from U.S. Steel and transfer it to the union or to another employer who would agree to operate the factory.

I must admit that my argument was more utopian than realistic. If even as sympathetic a judge as Lambros would not find any rights in the union, it was unlikely that others would do so. The courts seemed to frame that argument as a demand that

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[1] Local 1330, United Steel Workers v. U.S. Steel, 631 F.2d 1264, 1280 (6th Cir. 1980).

[2] *Id.*

[3] Joseph William Singer, *The Reliance Interest in Property,* 40 STAN. L. REV. 611 (1988).

plants never close; this argument seemed a non-starter if a plant was unprofitable and the courts felt obligated to defer to corporate judgments about profitability. In addition, they felt that companies are "owned" by the shareholders and that the main purpose of a corporation is to maximize profits. If that depends on shedding workers, so be it. The conventional view is that workers may be stakeholders in corporations but they have no rights other than those they bargained for in their employment contracts.

What struck me as problematic about this way of framing the issue was that it is simply not the case that owners have absolute rights or that the formal terms of contracts are the only obligations attendant to contractual relationships. The rights of owners are limited in many ways and they are especially limited when owners allow non-owners access to their property. Nor are contractual relationships wholly defined by the words in the agreement; both common law and statutory law impose minimum standards on all contractual relationships to ensure that contracting parties do not engage in fraudulent, deceptive, or unfair practices and to ensure that the relationship is subject to minimum standards designed to recognize the dignity and humanity of the parties.[4]

My argument was not wholly without support politically. Congress did partially respond by passing a statute that guaranteed notice before closing factories in circumstances such as this.[5] Notice helps but does not alter the balance of power between employers and employees in these situations. It especially does not require companies to consider the externalities involved in closing factories and laying off workers.

What has changed thirty years later? There is good news and bad news. The good news first. Despite our increasingly conservative Supreme Court, a slim majority of Justices would probably approve statutory or common law remedies granting the union a right of first refusal and the town the right to seize the property by eminent domain. More broadly, the current subprime crisis has made it abundantly clear that the creation of a property right is not a self-regarding act. The banking and mortgage industries created and marketed subprime mortgages which they then securitized and insured with credit default swaps lacking any backing. When the housing bubble burst, these property rights wrecked the world economy. It is apparent to all that regulations of property are needed to prevent and respond to the externalities associated with arrangements that are indifferent to the rights and needs of third parties and to the nation as a whole.

The bad news is the subprime crisis spawned a political movement called the Tea Party whose main preoccupation seems to be the dismantling of "big government." This libertarian view is bolstered by a determined minority of Justices composed of Chief Justice Roberts and Justices Alito, Scalia, and Thomas who have been trying

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[4] Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009); Joseph William Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139 (2008).

[5] Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109; 20 C.F.R. §§ 639.1-639.10.

mightily to expand constitutional protection for property rights. By property rights they mean the rights of the rich and powerful, not those of workers or tenants. These Justices would probably rule that a law granting the union a right of first refusal would constitute a taking of the company's property without just compensation and that a law mandating such a transfer with compensation would violate the public use clause. Moreover, their view has had a substantial impact on state law which is authorized to protect property rights more expansively than the U.S. Constitution requires. At least one state has ruled that a statute granting mobile home owners a right of first refusal when the landlord wants to sell the land under their homes not only constitutes a taking of property but would not satisfy the public use test because the property would be transferred from one private owner to another.[6]

Since the *Kelo* decision,[7] Ohio passed a statute prohibiting takings of property for transfer from one owner to another unless the property is "blighted."[8] It is unlikely that an abandoned factory would constitute "blighted" property unless it were also deemed to be dilapidated or otherwise in a dangerous condition. If that is so, then the state of Ohio and the town of Youngstown would be powerless to mandate a transfer of property from the company to the union or to the town even if it provided just compensation. That means that things have gotten worse, not better, since the Youngstown case was decided.

In the current economic crisis, the focus has been on shoring up the banking system even if this means subsidizing the very institutions that caused the financial crisis in the first place. Efforts to protect homeowners from displacement through foreclosure have been weak or ineffective. And despite rising and painful unemployment, attention to job creation has been almost nil even from the Obama administration, which is sympathetic to the cause. beNow it may be that there are limits to the politically possible and that some things had to be done first before focusing on job creation or protection of displaced home owners. At the same time, it is apparent that Congress has no appetite for large public expenditures designed to promote employment.[9]

What is to be done? We need a new way of framing issues that can bring to center stage the rights and legitimate interests of ordinary people—what we used to call "the common man" — and woman. For too long, we have allowed both politicians and judges to frame issues in a conservative manner, equating government action with oppression and twisting the rhetoric of property rights to justify allowing the powerful to oppress the weak. Our common language has too long lingered in a libertarian direction, excoriating government as oppressive and branding private corporations as persons like you and me. It would behoove us to remember some truths that we may have forgotten.

We live in a free and democratic society and such societies are not characterized by absolute property rights. Indeed, our system comes from rebellion against the absolute property rights of the King in England. Over time, the common law limited the rights

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[6] Manufactured Housing Cmtys. of Wash. v. State, 13 P.3d 183 (Wash. 2000).

[7] Kelo v. City of New London, 545 U.S. 469 (2005).

[8] Ohio Rev. Code §§ 1.08, 163.01-163.22.

[9] Paul Krugman, *Defining Prosperity Down,* N.Y. TIMES, Aug. 12, 2010, at A17.

of the king and of his lords to push power downward to the people who lived on the land. The defining characteristic of American property law is the abolition of feudalism. That means that we regulate property relationships to ensure that each person has freedom, dignity, and access to the means of a comfortable life. We do not abide concentrations of property in the form of company towns, monopolies, or feudal manors. Over hundreds of years, the courts and legislatures have redefined property rights to protect the rights of non-owners. As the Supreme Court of New Jersey famously said in 1982, "[t]itle to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law."[10]

Free and democratic societies believe in the equality of individuals and this does not mean the equal right to starve. It means that resources must be divided and the economy managed so as to give each person a realistic opportunity to live a full and comfortable life. Democracies regulate property rights to ensure that each person has access to property; they do not simply hand out property and then see what happens. The means to do this will vary over time. Globalization and the decrease in unionization are facts we cannot ignore. But what we cannot relinquish is the democratic ideal which recognizes that a people is not free if each person is not treated with dignity. The equal worth of all persons means that our property system — and our employment system — must be structured so as to allow each person to work or otherwise participate in economic life and to do so in a manner that leaves each of us comfortable. Nor does this principle constitute an attack on property rights. Rather, it protects the property rights of all—defined by Jefferson as the rights to life, liberty, and the pursuit of happiness. That is the lesson of the Youngstown case.

[10] State v. Shack, 277 A.2d 369, 371 (N.J. 1971).