The John Marshall Law Review

Volume 33 | Issue 4 Article 21

Summer 2000

Rebalancing Professor Ely's Reappraisal of the Marshall Court and Property Rights, 33 J. Marshall L. Rev. 1165 (2000)

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REBALANCING PROFESSOR ELY'S REAPPRAISAL OF THE MARSHALL COURT AND PROPERTY RIGHTS

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INTRODUCTION

In his paper, *The Marshall Court and Property Rights: A Reappraisal*,[1] Professor Ely seeks to continue the trend of presenting "a more balanced account of the Marshall Court's concern with economic rights."[2] In this pursuit, he presents a well-crafted argument that the "Marshall Court built upon and expanded the accepted constitutional status of property."[3] Ely's paper is a work of consensus history, consensus history writ especially large since he suggests "a strong continuity between judicial efforts to vindicate private property"[4] from the Marshall to the Taney to the Lochner era Courts.[5]

As someone who believes that the history of the constitutional status of property involves both consensus and controversy,[6] I think Ely's balance requires a bit more balancing. To the extent there was consensus about property rights in the early Republic, Ely's work may require supplementation to convey what that consensus actually entailed. To the extent there was controversy, Ely's work requires retooling to detail that conflict and its meaning.

I present three counter-weights to Ely's balance; three challenges to his reappraisal. I do this not so much to say that Ely is wrong in some regard, but to bring out the remoteness, the

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1. James W. Ely, *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023 (2000).

2. *Id.* at 1025.

3. *Id.* at 1028.

4. *Id.* at 1061.

5. *See generally id.*

6. Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 9-23 (1991) [hereinafter Siegel, *Lochner*]; *see also* Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S.C. L. REV. 1 (1986) [hereinafter Siegel, *Contract*]; Stephen A. Siegel, *Let Us Now Praise Infamous Men*, 73 TEX. L. REV. 661, 657-701 (1995) (book review).

distance of the Marshall Court from ourselves; to emphasize that history frequently explores an unusable past.[7] I also present these counter-weights because I think we would all benefit from Professor Ely's response to them.

I name the challenges to Professor Ely's analysis after the contemporary scholars most associated with their formulation. They are the "Hart/Novak" challenge, the "Treanor/Wood" challenge, and the "Siegel" challenge.

I. THE HART/NOVAK CHALLENGE

To be sure, as Professor Ely says, property was a deeply held, widespread, consensus value in the colonial era, in the early Republic, and throughout the nineteenth century. But there are two substantially conflicting visions of what America's longstanding consensus commitment to property rights entailed. On the one hand, we have scholars, among whom Ely is preeminent, who are quite right to remind us that "the belief that property ownership was essential for self-government and political liberty [has] long been a central premise of Anglo-American constitutionalism."[8] Ely, in today's paper, and in prior books and articles,[9] accurately recounts the high regard in which property was held, and the plethora of judicial decisions elaborating constitutional protections for property.

On the other hand, we have known, since Oscar and Mary Handlin's study of Massachusetts,[10] and Louis Hartz's study of Pennsylvania,[11] both published in the late 1940s, and more recently John Hart's study of the colonial period,[12] and William Novak's study of nineteenth-century America,[13] both published in the past few years, that whatever respect America had for

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7. *See* G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781 (2000).

8. Ely, *supra* note 1, at 1001.

9. *See, e.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 (1995); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENTARY 315 (1999) [hereinafter Ely, *Oxymoron*]; James W. Ely, Jr., *"That Due Satisfaction May be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1 (1992) [hereinafter Ely, *Due Satisfaction*].

10. OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861 (1947).

11. LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860 (1948).

12. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

13. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

property rights did not preclude active and intrusive regulation. The Handlins called it the "commonwealth" concept;[14] Novak calls it "the common law vision of the well-regulated society."[15]

What we have in our scholarship today is a case of scholars looking at the same glass and some discussing the half-full part, and others discussing the half-empty part. I have summed up the doctrines that allow scholars to talk past each other by saying that throughout the nineteenth-century, constitutional law protected vested rights of property, not substantive rights; that constitutional law protected the possession of property, but not its value. Among the illustrations of this perception is that, in the nineteenth century, property was protected from a physical taking without just compensation while, at the same time, there was no concept of a regulatory taking.[16]

Scholars wishing to assert that nineteenth-century America extolled property rights write, as Edward Corwin did, of vested rights protection as the fundamental doctrine of American constitutional law.[17] Yet scholars wishing to assert the supremacy of the "people's welfare" and that as a constitutional doctrine laissez-faire was a myth write, equally truthfully, about the extent of the police power.[18]

The truth is that both were going on at the same time. What we need to understand is how a system of constitutional protections for property that few today would find intellectually respectable or politically desirable seemed to its creators to be eminently satisfying. For a long time, I have been mulling over this puzzle. We need to understand the economic, social, political and jurisprudential context that allowed nineteenth-century jurists to contentedly elaborate a regime of vested rights protection without substantive rights protection. If we can understand this I think we will see the distinct differences, as well as similarities, between the institution of property two hundred years ago and now. Let me give an analogy. Nineteenth-century Americans celebrated their personal freedoms while they lived with a free speech doctrine that most of us today would find thoroughly oppressive.[19]

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14. O. HANDLIN & M. HANDLIN, *supra* note 10, at 28-31. *See also* LEONARD LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 305-15 (1957) (discussing the "commonwealth idea").

15. NOVAK, *supra* note 13, at 19-50.

16. Siegel, *Contract*, *supra* note 6, at 76-81; Siegel, *Lochner*, *supra* note 6, at 6-10.

17. Edward Corwin, *The Fundamental Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

18. *See, e.g.*, NOVAK, *supra* note 13.

19. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 129-176 (1997).

II. THE TREANOR/WOOD CHALLENGE

So far we have been assuming that America's notion of property rights always included protection for vested rights from legislative interference. This is a questionable assumption. Some years ago, there was a scholarly exchange between William Treanor and Ely over the norm that government should pay just compensation whenever it seized property. Treanor argued that the norm was only emergent in the founding era.[20] Ely responded that it was already well-established.[21] I will not review Treanor's and Ely's differences; I note them only as background for saying that just this past year Gordon Wood renewed the challenge in his essay on *The Origins of Vested Rights in the Early Republic*.[22]

Wood's analysis is filled with evidence of a right in flux, a right just germinating. "By the time of the American Revolution," he writes, "most educated Englishmen had become convinced that their rights existed only against the Crown. Against their representative and sovereign Parliament, which was the guardian of these rights, they existed not at all."[23] And, when Alexander Hamilton in 1787, gave voice to the view that the constitutional norm of due process was a judicially enforceable norm limiting legislative power to fashion law, in Wood's view it was "a novel twist."[24] In Ely's view, a view that he also published just this past year, Hamilton's argument was old hat, reflecting a doctrine found in Blackstone and Lord Coke before him that common law due process had substantive content binding even Parliament.[25]

Time prohibits detailing my concerns on both sides of this debate. I only observe that the overall lesson of Jack Rakove's Pulitzer Prize winning study of the Constitution's framing, entitled *Original Meanings*,[26] is that the Framers' provided no clear answer for many fundamental issues which we today still find controversial. Instead there was a range of answers, some of which were only emergent as the process of constitutional drafting, ratification, and implementation proceeded. This understanding of our constitutional origins stands at odds with the typical originalist approach that the founding era provided clear

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20. William Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695-708 (1985).

21. Ely, *Due Satisfaction*, *supra* note 9.

22. Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421 (1999).

23. *Id.* at 1426.

24. *Id.* at 1437.

25. Ely, *Oxymoron*, *supra* note 9 at 320-27. I am aware of only one scholar who previously advocated Ely's position. Robert Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941 (1990).

26. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

answers to most fundamental issues.[27] Of course, just compensation and vested rights protection for property may have been an issue on which, unlike most others, there was a clear social norm that the founding generation intended to protect.[28] But I think there is much to the argument that invites further exploration. For example, by my count, as late as 1800, only three of the original thirteen states had an express just compensation clause in their constitution.[29] Just compensation may have been an established legislative practice, as Ely has argued on another occasion.[30] But as Christine Desan has shown in her studies of colonial and founding era treatment of contract claims against the states: legislative practice and constitutional right are not necessarily equivalent —especially when claims on the public treasury are involved.[31]

III. THE SIEGEL CHALLENGE

The final challenge is my own. I suggest that the Marshall Court's work in developing constitutional protections for property involved controversy as well as consensus.

Ely writes that antebellum America extolled property rights.

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27. For a discussion of Rakove's treatment of the founding and originalism see Stephen A. Siegel, Book Review, 17 LAW AND HIST. REV. 410 (1999) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)).

28. Even Rakove thinks that for some issues the Framers and ratifiers had clear answers. *See* Jack Rakove, *Statement on the Background and History of Impeachment*, 67 GEO. WASH. L. REV. 682, 686-87, 690-91 (1999) (founding generation did not intend that misleading a civil jury was an impeachable offense); *See also* Jack Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1041, 1047 (1997) (founding generation intended judicial review); Jack Rakove, *Reading Today's Bias into "Original Intent,"* L.A. TIMES, May 28, 1995, pt. M., at 2 (founding generation intended to deny states the power to impose term limits on congressional office holding). Rakove teaches us, however, to be deeply suspicious of scholars who always find clear answers to a great variety of questions.

29. This comment is based on a study of the constitutions of the original thirteen states in 1-11 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (William Swindler ed., 1973-88). In 1800, the governing state constitutions with just compensation provisions were DEL. CONST. of 1792, MASS. CONST. of 1780, AND PA. CONST. of 1790. The governing state constitutions without just compensation clauses were CONN. CONST. of 1776, GA. CONST. of 1798, MD. CONST. of 1776, N.H. CONST. of 1784, N.J. CONST. of 1776, N.Y. CONST. of 1777, N.C. CONST. of 1776, R.I. CHARTER of 1663, S.C. CONST. of 1790, and VA. CONST. of 1776. States admitted after 1789 tended to have just compensation clauses, as did the Northwest Ordinance

30. Ely, *Due Satisfaction*, *supra* note 9, at 1.

31. *See* Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1383-91, 1495-1503 (1998); Christine Desan, *Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 LAW AND HIST. REV. 257, 257-64 (1998).

I have written that they extolled property rights but were divided over rights of privilege.[32] Wealth in nineteenth-century America was not a unitary concept. Wealth was divided into property, which denoted valuables whose acquisition was open to all individuals, typically through competition in the free market; and privilege, which signified valuables that only certain individuals could acquire, usually through designation by affirmative governmental act. Property was a consensus value; privilege was controversial. To overstate the point, some Americans thought privilege as sacrosanct as property; others did not. The corporation, usually large-scale enterprise created by specially negotiated charter was the litmus test for where one stood on the issue. I place John Marshall and Joseph Story on the privilege regarding side of my dichotomy. I think the issue split the Marshall Court. I certainly think the stance generally taken by the Marshall Court distinguishes it from the Taney and Waite Courts.

If you accept my property/privilege distinction, I think Marshall most frequently leaned, or tilted in favor of privilege, applying, if not fashioning, doctrines favorably to the claims of privilege. Consider *New Jersey v. Wilson*,[33] the origin of the doctrine that a state may contract away its power to tax, a doctrine that became exceedingly controversial after Marshall passed from the scene.[34]

New Jersey v. Wilson involved a 1758 land transaction between New Jersey and an Indian tribe in which the tribe released its claim to some land and the State, in return, conveyed other land to trustees for the tribe's benefit. The trustees were prohibited from leasing or alienating the land, and the land was exempted from taxation. The Indians occupied the land until in 1801 when they requested the legislature to authorize the trustees to sell the land so that the tribe might move to another locale. Acceding to the request, the legislature empowered the trustees to divide and sell the tribe's land. After the land was sold, the purchasers claimed the benefit of the tax exemption contained in the 1758 statute.[35]

In ruling against the purchasers' claim, the state Supreme Court accepted the notion that a legislature could grant away its taxing power. Nonetheless, the state high court ruled against the purchasers' claim saying (1) that, in legislative contemplation, the exemption was meant to be coupled with Indian possession; (2)

32. The commentary in this paragraph is drawn from Siegel, *Contract*, *supra* note 6, at 57-66.

33. 11 U.S. 164 (1812).

34. *See* Siegel, *Contract*, *supra* note 6, at 46-52.

35. *See Wilson*, 11 U.S. at 165-66; State v. Wilson, 2 N.J.L. 218, 218-19 (1807).

that repealing the statutory bar to sale repealed the tax exemption; and (3) that, in any event, a clear statement was necessary before it would interpret a contract as granting away the state's sovereign power of taxation.[36]

The Marshall Court reversed. It upheld the purchasers' claim by casually construing the tax exemption as a covenant running with the land, rather than as a covenant that was personal to the Indian tribe, in order to create a contract with an obligation that ran to subsequent purchasers of the tribe's land. Marshall's reasoning was that the only value to the covenant came from the tribe's ability to pass it on to subsequent parties.[37] This strikes me as willful blindness on Marshall's part to the state's argument that the purpose of the covenant was to prevent the possibility of the land being seized for nonpayment of taxes while the Indians possessed it.[38]

Dartmouth College v. Woodward[39] supports a similar observation. *Dartmouth College*, which inaugurated Contract Clause protection for corporate charters, is another Marshall Court decision that became extraordinarily controversial later in the century.[40] Yet, in *Dartmouth College*, both the state Supreme Court and the Marshall Court agreed that the Contract Clause should protect the charters of private corporations but not the charters of public corporations.[41] The state Supreme Court felt that Dartmouth College, chartered in the mid-eighteenth century and still the only institution of higher learning in the state, had been set up for great public purposes —as corporations of its time tended to be.[42] The Marshall Court ruled, however, that the corporation was private because it had not been entirely

36. *See Wilson*, 2 N.J.L. at 221-26.

37. *See Wilson*, 11 U.S. at 167.

38. *See Wilson*, 2 N.J.L. at 222. The purpose of the transaction, the state court said, was to give the tribe a permanent homeland and "this salutary provision would have become nugatory in a few years, the Indians turned out of possession, and the humane intentions of the Legislature frustrated, through the improvident and incurable carelessness of these people, had their lands been liable to be seized for taxes." *Id.* The tribe, not being much involved in the cash economy, would have found it difficult to raise the necessary cash for annual real property tax payments.

39. 17 U.S. 517 (1819).

40. *See* Siegel, *Contract*, *supra* note 6, at 32 n.148. For example, Gilded Age legal scholar, Francis Wharton, contended that the *Dartmouth College* was an early challenge to the survival of the Republic. Francis Wharton, *"Patches" on the Constitution*, THE INDEPENDENT, January 10, 1889, *reprinted in* JOHN BASSETT MOORE, A BRIEF SKETCH OF THE LIFE OF FRANCIS WHARTON 17, 19-20, 23 (1891).

41. *Dartmouth College*, 17 U.S. at 629-30; Dartmouth College v. Woodward, 1 N.H. 111, 115-17 (1817).

42. *Dartmouth College*, 1 N.H. at 117-20. In addition, the trustees, who were the parties at bar, had no personal financial stake in the College. *Id.* at 122-23.

constituted by public funds.[43] What was ambiguous, in Marshall's time, was the application of the public/private dichotomy; and the Marshall court ruled in favor of a generous definition of the private.

Finally, consider *Ogden v. Saunders*,[44] in which Marshall wrote his only dissent in a constitutional case. In his dissent, Marshall wrote that bankruptcy laws that discharged debtors "impaired the obligation of contract" even when the law preexisted the contract being discharged.[45] I have argued that Marshall's dissent, which Story and Duvall joined, was a preemptive strike against the validity of the increasingly popular "reserve clauses" that were rapidly becoming the prime legislative means to free states from the limitations imposed by the *Dartmouth College* decision.[46]

CONCLUSION

In conclusion, controversy as well as consensus marks the Marshall Court's Contract Clause jurisprudence.[47] Significantly, controversy in Marshall's day was more subtle than it was later in the century. But even if we set aside the differences that existed among the judges of Marshall's time as too muted, the shifting course of Contract Clause adjudication over the nineteenth century makes it impossible to maintain that the Marshall, Taney,

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43. *Dartmouth College*, 17 U.S. at 629-32.

44. 25 U.S. 213 (1827).

45. *Id.* at 333 (Marshall, C.J., dissenting).

46. *See* Siegel, *Contract*, *supra* note 6, at 14-20. Shortly after the *Dartmouth College* decision, when granting corporate charters, states began to reserve the power to make unilateral amendments. The "reserve" clause doctrine was grounded in the view that contract obligations are whatever the parties agree to, so long as their agreement is not proscribed by standing law. This includes agreements by which one party agrees to abide by all subsequent modifications decided upon by the other party. So clearly was the reserve clause doctrine a part of nineteenth-century contract jurisprudence that it was first broached in *Dartmouth College*, the first decision to extend Contract Clause protection to corporate charters. *See id.* at 33-35.

47. Fletcher v. Peck, 10 U.S. 87 (1810), Marshall's first Contract Clause case, shows another example of subtle differences among the Court's justices, differences in which Marshall supported more extensive protections than some of his colleagues. *Fletcher v. Peck* stands for the proposition that Contract Clause protections extend to contracts to which the state is a party. This was a consensus doctrine that, as Ely argues, was anticipated since the Founding. *See* Ely, *supra* 1009. Yet Justice Johnson dissented in *Fletcher*, objecting to Marshall's extending Contract Clause protections to "executed" as well as "executory" agreements. Johnson's concern was that such an extensive protection would impede the states' exercise of their eminent domain powers. *See* Siegel, *Contract*, *supra* note 6, at 27 & 27 n.128. To this extent, then, applying the Contract Clause to state land grants, which were executed contracts, involved a modest dispute, one in which Marshall, once again, took the more extensive view.

Chase, Waite and Fuller courts all had a uniform approach to constitutional protections of private property.