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**Abstract:** The article revisits the right to property law of the U.S. Constitution. It is no accident that the Bill of Rights and the 14th Amendment protect against the deprivation of the people's life, liberty, or property without due process of law. Separation of powers is one of the two chief safeguards built into the Constitution against unlimited or despotic government. The other is enumeration. This principle simply means that certain things are delegated to the Federal government to do.

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### **Saving the Ownership Society**

"Our Founders practiced the art of constitutional government, under which government is limited and people have the right to provide for themselves. ... If we lose that, we will find ourselves in a condition of poverty too deep to measure in monetary terms."

BEFORE HURRICANE KATRINA flooded the tear ducts of our politicians and the vaults of our Treasury, Pres. George W. Bush had us talking about America's "ownership society." This is one of the best things he has done. He did it prominently in his reelection campaign. He did it bravely in relation to Social Security, risking the outrage of the media and the votes of older people. If he did it in some ways foolishly, never mind. It showed promise because it had us talking about something central for a change. This question of ownership is at the heart of the U.S. It always has been.

"No taxation without representation" echoed in the hearts and spirits of our Founding Fathers because it called up the ideas they held most dear. If you may not tax me except as my representative, then, for the same reason, you may not govern me except by my consent, If you cannot take my property except by law and with difficulty, then my title to my property is real. It truly is mine. I own it. If James Madison is to be believed, my ownership of my property stands on just the same footing as my entitlement to speak my mind or to say my prayers or to vote my conscience.

It therefore is no accident that the Virginia Declaration of Rights, when it lists our inherent rights, mentions the "means of acquiring and possessing property" alongside life, liberty,

and the pursuit of happiness and safety. This document was adopted on June 12, 1776, less than a month before the Declaration of Independence, and Thomas Jefferson turned to it in the writing of the Declaration. Several people voted for ratification of both documents.

So, it is no accident that the Bill of Rights (in regard to the Federal government) and the 14th Amendment (in regard to the states) protect against the deprivation of our "life, liberty, or property" without due process of law.

It follows that the idea of one man owning another man was condemned by our Founders, some of them slaveholders themselves who were--and who knew they were--condemning themselves. Our right to our property, by their principles, stems from the same source as our right to all things that naturally belong to us, including our bodies, conscience, and relationship with our Maker. One man, said Pres. Abraham Lincoln famously, has no right to eat the bread wrung from the sweat of other men's faces.

If this question of the ownership society is controversial today, it is another among many signs that we are in a time of fundamental dispute. If it has been engulfed for a moment by the Gulf of Mexico, it will come back nonetheless for two reasons: first, because it is engraved upon us by our first coming together, and second, because it is in jeopardy today. This jeopardy is plain in several facts of direct relation to the right to property, and in several indirectly related--through their implications for constitutional government.

Start with the direct. The right to property stands now, after a generation of court rulings and political practices, upon a different footing. This is true at every level of government, from all three branches of the Federal government down to the tiniest tribunal in the smallest hamlet. Which property owner, wishing to build a house or expand a factory, does not fear exactions, delays, and denials that may ensue anywhere and are bound to ensue wherever land is dear?

Right here in southern Michigan, some local officials oppose in principle the "conversion of public land to private," as when a property owner might take control of the unused alley behind his or her house. These officials have forgotten if they ever knew in the first place--that Michigan was part of the Northwest Territory. Almost the whole of that territory was converted en masse to private use, or else we in Michigan would have nowhere to build our homes. The Northwest Ordinance, and the Land Ordinance of 1785 that preceded it, are among the finest pieces of legislation ever passed. They mark a turning away from the use of land and property as a means of control. They part from the practice of the Czar of this and the King of that, that only the Czar and the King may say who owns what and who does what with it. We are the first people to recognize fully that the public interest is best served when private people hold the means of their own existence in their own hands.

In the notorious 2005 *Kelo v. New London* decision, the Supreme Court decreed that the property of one can be taken and given to another so that the other may make more money and pay more taxes with it. The old man in his childhood home and the widow in the dwelling where she raised her children no longer are secure in their abodes. The Fifth Amendment states: "Nor shall private property be taken for public use without just compensation." There is no provision in the document for the taking of private land for other private uses.

In *Lucas v. South Carolina* (1992), several members of the Supreme Court opined that Mr. Lucas could be deprived of the use of his property without compensation, so long as any

small use was left to him. One Justice was of the feeling that Mr. Lucas should be happy so long as he was allowed to picnic and camp upon his parcel. The land in question was on the sea shore, and Mr. Lucas had bought it at great expense. There were houses to the left and right of him. He finally did manage to prevail, al though it took several years and massive expense.

These takings of land upon the least pretext and the heavy regulation of land use at every level of government form a direct assault upon the principle of ownership. The indirect assault is equally dangerous and much more general. Ultimately, it is an attack upon constitutional government itself. To understand this, we must think for just a minute about the foundation of the right to property and our other natural rights.

The key to understanding natural rights lies in the word "nature," which means the essential attribute of anything, whatever makes a thing what it is. It also means, for living things, the process of begetting and growth by which they come to be and thrive.

The Founders were keen students of this subject. They located the nature of man above the beasts and below God. Being imperfect--partaking of the divine but not being divine-- man is capable of good and evil. Free from the government of iron instinct, he must govern himself. Government therefore is necessary, and also natural, to the human being. Yet, in forming governments, we must remember that those who hold the power of government are human, too. They are capable of evil and so, for the same reason that government is necessary, it is necessary that it be limited.

In Federalist 51, Madison writes: "But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." Madison is writing here about the organizing principle of the Constitution: separation of powers. That principle simply means that all the powers of government are not to be united in a single set of hands.

Separation of powers is one of the two chief safeguards built into the Constitution against unlimited or despotic government. The other is enumeration. This principle simply means that certain things are delegated to the Federal government to do. There are many of these things, and they are important. They make--and are meant to make--the government powerful enough to defend our rights against enemies foreign and domestic. However, although it is to be a powerful government, it also is to be a finite one. It may do the things enumerated, not others.

Madison had written earlier, in Federalist 10, that the "first object" of government is to protect the "diversity in the faculties of men," in which property rights originate. Government must, Madison is saying, begin with the job of protecting property. This is the first step toward protecting what he will later define as the "permanent and aggregate interest" of the society.

Only a government whose powers are divided, and only a government that is limited in scope, can be trusted to protect civil and religious freedom effectively, of which the right to property is a key element. Only such a government will leave room for people to tend to their own subsistence by the accumulation of the fruits of their own labor. Great Britain's Winston Churchill, especially when he was protesting against the carelessness of generals with human life and property, liked to say that, in a free society, money must be allowed "to fructify in the pockets of the people."

Make no mistake, then, that the condition of the ownership society, as it was conceived by those who built the first one ever to exist, was a government limited in scope, economical in function, and devoting its powerful, yet finite, authority to the protection of individual rights, correctly conceived.

"Correctly conceived" precisely is the problem today. The ownership society is, as Pres. Bush warns, in jeopardy. It is in jeopardy because government has grown beyond every constitutional bounds. Over the past generation, our government has been transformed to undertake any project, however remote, miniscule, or local. There is no interest, however isolated, parochial, or private, in which it will not meddle. This is unmistakably a change of constitutional proportion, making a huge difference in the very way we live. As it continues, it necessarily will alter not only our relation to the government, but our habits of mind and the disposition of our character.

Like most powerful and sustained movements in American history, this one begins with a variation on our central idea. This variation has a strong appeal, and there is good in it. That accounts for its strength. It is, however, contradictory of our central idea and destructive of the benefits that originally flowed from it.

The variation is explained perfectly in the short message Franklin Roosevelt sent to Congress in 1944 regarding an "Economic Bill of Rights." The theme of this message is plainly revolutionary, even if, on the surface, it pretends only to complete the work done by the American Founders. The rights articulated by the Founders, Roosevelt maintains, are "inadequate," because "necessitous men are not free men." These "economic truths" have become "accepted as self-evident." They require a "new bill of rights." He proceeds to list its components, which is compelling in a way that is evident all about us. Today, we constantly are making new bills of rights: the Victim's Bill of Rights; the Patient's Bill of Rights; the Academic Bill of Rights--on and on it goes.

### [Bill of Rights revised](#)

Roosevelt's list is compelling because it is a list of good--even vital--things. The list includes the right to a job, food, and clothing; medical care; and an education. These things indeed are valuable, and some necessary to life. Yet, they differ from the list of rights in the original Bill of Rights, as Roosevelt concedes. While admitting the difference, he conceals the nature of the difference. The rights protected in the original Bill of Rights do not demand anything of another except their recognition. One may pray all he or she pleases, and others are left free to pray or not--with all of their property intact. Short of slander, libel, or treason, one may say what he or she pleases and do no harm to another. We may come together or, as the Bill of Rights allows, we may "assemble" and, so long as we do not obstruct traffic, others may go freely about their business.

One can see how the right to property, properly conceived, has this same attribute. If my property is the fruit of my labor, and not of yours, then we have no conflict. You may have your property, and I may have mine. What is good for me is good for you. My having my good deprives you of none of yours, and your having your good leaves me secure in mine.

The interesting thing about this understanding of rights is the harmony it breeds in society. My getting the things of which I am entitled takes nothing from you. I may own what is mine, you may own what is yours, and we may be at peace with each other. This harmony--or, to use the political term, this justice--is the reason why our Constitution has lasted so long and our nation has prospered so well. We all can share hope and, in that

hope, we all can build our property to sustain ourselves and our families, and to provide charity for our neighbor in need.

We can see today the effects of the "new self-evident truths" (as if there could be such a thing) and the "new bill of rights." The system of philanthropy, unique to our country, that had prevented people who suffered misfortune from starving, has been replaced by a general system of taxpayer aid that has encouraged the destruction of family life, the essential way to raise children. This is nowhere more evident than in the fact that the illegitimacy--or single parenthood, for the politically correct--rate in the 1950s, before the Federal War on Poverty was launched, was four percent, whereas today it is 35% (68% among black Americans).

Moreover, consider the "right to an education." Education was vital to the people who built our country. In the aforementioned Northwest Ordinance, they wrote: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall ever be encouraged." They then proceeded to provide the most massive subsidy to education that ever has been given in this country. The one exception to the conversion of public land to private was the holding back of 1/36th of the Western land for the provision of education locally and, of course, under the direction of state governments, which had the constitutional power.

Today, by contrast, we have the centralized Department of Education at the Federal level. In providing the "right to an education," it regulates our nation's schools in the closest detail. Since Sept. 11, 2001, defense spending in the U.S. has risen almost 60%; spending on higher education has risen more than 200%.

What do we get for this money? Certainly not learning. College graduates today know little to nothing of the history of our country or its constitutional meaning. If you doubt this, ask a senior a few questions about the Declaration of Independence or the Constitution.

Nor does the money buy political support for the party (Republican) that has voted these massively increased subsidies. It is notorious that the beneficiaries of Federal aid to higher education, namely those who work in colleges, support the other party (Democratic) by embarrassing margins.

Nor do we get patriotism. In fact, a consortium of colleges is suing the Federal government because they object to the requirement that military recruiters be admitted to their campuses as a condition of receiving Federal aid. Already these colleges are abiding thousands of pages of regulation. Yet, they only object to this specific one. Perhaps they have forgotten that Article I, Section 8 of the Constitution--which enumerates the powers of Congress--mentions defense eight times. Education is not mentioned at all.

A good word is due here about many in government today. Pres. Bush introduced the idea of private accounts in Social Security, and it foundered, but the cause has been taken up by a group of young members of Congress. They are proposing variations on the powerful idea, expounded by the American Institute for Full Employment, that the portion of Social Security taken directly from a worker's pay should be placed in a private account. The other half could be used to pay benefits to those now on retirement or soon to retire. This idea would be a massive step back toward the ownership society in its full meaning.

Likewise, one wonders why those who make law today simply would not emulate the Founders in providing education. If you want to subsidize education, why not find a constitutional way? Why not a tax deduction or even a credit? Anything would be better

than the current top-down bureaucratic control of matters that essentially am local, or private, or both.

It was well known to those who built the U.S. that education, food, and medicine are important. This importance has been known to nearly any fool for as long as there has been civil society. The question is only how these things should be provided. Our Founders practiced the art of constitutional government, under which government is limited and people have the right to provide for themselves. Under this system, one gets more food, medicine, and education than under bureaucratic rule. He also gets his liberty.

It was no small achievement to construct the first ownership society known to man. Those who built it thought it fragile. It could be sustained only under the right principles, embodied in and practiced through the right constitutional structure. If we lose that, we will find ourselves in a condition of poverty too deep to measure in monetary terms.

PHOTO (BLACK & WHITE)

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By Larry P. Arnn

Larry P. Arnn, president of Hillsdale (Mich.) College, is author of *Liberty and Learning: The Evolution of American Education*. This article is adapted from a speech he gave at Hillsdale.

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