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Contemporary Challenges to Constitutional Order and the Role of the State

by

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Introduction

The single most significant public policy shift away from the “original intent” of the Founders involves the way private property and associated rights are viewed. The Founders viewed private property as the foundation of freedom as well as a means of creating wealth. The benefits, value, and even the meaning of property ownership has shifted over time, and we are moving toward an era of shared resources where fewer people own a greater percentage of wealth and production capital. Intrusive regulations often verging on regulatory takings creates a disincentive of ownership because liabilities often outweigh potential benefits of ownership. Especially during a declared national emergency, the government can persuade, threaten, and then commandeer entire industries. Emphasis on the collective good over the rights of the individual means that private property is perpetually at risk of regulatory and legislative attack. In response, a mutually beneficial *détente* develops among the legislators, regulators, and top industrialists, all of whom benefit from consolidation of capital into fewer hands. Nowhere is this situation on full display more than in the critical infrastructure sector, where the line between “public” and “private” continues to further blur. This paper will demonstrate that “critical infrastructure” needs to be better defined in order best apply existing property laws.

Summary

The economic development and social wellbeing of society are dependent on critical infrastructure components such as energy, telecommunications, and transportation. Its effective performance instills and reinforces national identity and purpose. Conversely, destruction or degradation of critical infrastructure has a debilitating effect on a nation, its economy, and public health (Zhang, 2015). Today, more than a half century after President Truman’s attempted

nationalization of the steel industry, nearly all the pieces are in place that would facilitate a government takeover of private interests during a triggering event.

The Department of Defense defines “critical infrastructure” as: “Systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters” (Kahl, 2021). Although today an entire cottage industry has grown up around it, the term did not exist prior to the 1990s. The definition of what constitutes critical infrastructure has expanded to sixteen¹ sectors, and it is difficult to identify portions of the national economy which would *not* be considered critical. Most national assets (an estimated 80%) are in private hands, further complicating the matter. Even the federal government and private sector owners themselves are unsure of their respective roles and responsibilities when it comes to critical infrastructure protection (CIP) (Lewis, 2006)

According to a Department of Homeland Security strategy document: “The first objective ... is to identify and assure the protection of those assets, systems, and functions that we deem most ‘critical’ in terms of national-level public health and safety, governance, economic and national security, and public confidence. We must develop a comprehensive, prioritized assessment of facilities, systems, and functions of national-level criticality and monitor their preparedness across infrastructure sectors” (Bush, 2003).

¹ The 16 critical infrastructure sectors are: Chemical; Commercial Facilities; Communications; Critical Manufacturing; Dams; Defense Industrial Base; Emergency Services; Energy; Financial Services; Food and Agriculture; Government Facilities; Healthcare and Public Sector; Information Technology; Nuclear Reactors, Materials, and Waste; Transportation; Water and Wastewater. (Source: <https://www.cisa.gov/critical-infrastructure-sectors>)

Because the definition is so broad, it has become a game of ping pong as to what industries and companies fall within the definition. When “free” money is involved in the form of grants or expert manpower, companies fight to be included. On the other hand, when unfunded mandates are involved, companies seek exclusion or exemption. When most people think of critical infrastructure, they think of aircraft manufacturing, shipbuilding, railroads, and bombs and bullets. However, the scope of critical infrastructure is expanding as more “assets” become digital rather than physical. It is envisioned that the next major war will be a cyber war as opposed to a kinetic one. This worrisome possibility has been referred to as a “cyber Pearl Harbor” that would disable command and control and our intelligence apparatus (Hurwitz, 2013). This paper will discuss the view of traditional private property rights during the Colonial period, how the view has shifted over the generations, and the relationship between virtual “property rights” and the government’s potential response during a time of crisis.

History and Legal Theory

The Constitution protects property rights in part via the Fifth Amendment Takings Clause: “[N]or shall private property be taken for public use without just compensation.” Notably, the Takings Clause does not expressly address regulation of property. The reason the Framers did not address land use regulation in the Takings Clause is because they did not regard such action as a taking (Hart). Section 1 of the Fourteenth Amendment states, in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²

Political theorists conceive of a property right not just as a single right but as a bundle of rights and duties that people hold. Property can be owned by individuals or owned publicly by the government. Real property (land) can be treated as a “commons” for everyone to use but no one to own (Widerquist, 2021). The inevitable problem with this scenario is that because no one owns the land, no one has an incentive to maintain or improve it. Many people view cyberspace in the same way. We are able to get on the internet and buy and sell and to establish a residence, as it were. There are virtual worlds with virtual properties for which people pay real money. Internet service providers have a monetary incentive to keep the infrastructure going, but is it their responsibility to protect all aspects of cyberspace from sophisticated foreign enemies? If the Chinese were to drop a conventional bomb on Boeing’s headquarters, the government response would be swift and severe because, in order to cause any physical damage, U.S. airspace was violated and many lives were placed at risk. The same cannot be said for most cyberattacks, although the financial consequences can be worse than conventional attacks. While the use of force scenarios are myriad and beyond the scope of this paper, it will be interesting to see how the federal government responds. Will they take over the internet? Conduct a retaliatory cyberattack? A kinetic attack? The law is still developing but, assuming every aspect of the internet is owned by someone, there is a good chance that private property rights will be infringed upon during a major cyberattack.

² From the Constitution Annotated. Available at <https://constitution.congress.gov/browse/amendment-14/section-1/>.

There are two lawful ways in which the government can take private property: 1) condemnation followed by a taking of the title (often in the context of land and nuisance); or 2) regulatory taking, usually without just compensation (Pilon, 2017). The modern doctrine of regulatory takings treats most cases of land use regulation as takings because they go “too far”³. However, the government may not deprive an individual of his property without a fair procedural opportunity⁴, often in the form of a hearing and appeals process. It is also widely agreed that the Constitution forbids arbitrary deprivation that would serve no legitimate government interest or is viciously motivated.⁵ The government in many cases has legitimate interest in private property, does attempt to regulate its use, and derives revenue from privately held lands. The notion that real property rights are sacrosanct has diminished. In *Berman v. Parker*, Justice William Douglas and the Court ruled that the Fifth Amendment does not limit the ability of Congress to seize private property to any specific purpose. In *Berman*, Justice Douglas famously declared: “The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”⁶

Police power is founded in the right and duty of the government to secure the health and prosperity of the state and ensure domestic order. Public safety is at its core, implicating protection of life, limb, and security of property (Fuller, 1904). The *Pennsylvania Coal* case was a watershed moment for police-powers and demonstrated the threat of direct property right deprivation. The court held that a regulation that severely diminishes private property values is

³ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁴ See U.S. CONST. amends. V, XIV.

⁵ See, e.g., *Flemming v. Nestor*, 363 U.S. 603, 611, 617 (1960).

⁶ *Berman v. Parker*, 348 U.S. 26, 33 (1954).

equal to a taking and requires compensation, although cases should be individually evaluated and deference to the legislature is required. In *Pennsylvania Coal*, Justice Holmes accurately identified the problem: “As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.”⁷ A further erosion of property rights, in the *Kelo* case, the Supreme Court ruled that the Fifth Amendment public use requirement was met and that cities could take private property and grant it to other private developers as long as the new development would provide the city greater benefits and revenues⁸.

View of Property During the Colonial Period

English law protected the inheritance of estates across generations in recognition that the practice was critical to the stability of the economic, political, and social order of the time (Park, 2016). In what was to become the United States, colonial legislators believed that promotion of the public good by restricting the right of private landowners was a legitimate exercise of government power. Lawmakers often regulated usage of private landowners to prevent harm to health and safety and to ensure public benefits, even going so far as to ensure the benefit of other private landholders. State legislatures often attempted to influence land development for purposes thought to be in the public good, even compelling owners of undeveloped land to develop it beyond the requirement of the original grant. The British monarch reviewed colonial legislation, often encouraging broad regulation regarding land usage (Hart, 1996). The nation eventually rebelled against this perceived overreach and micromanagement of private affairs, but some parts of British realty law survived. Even shortly after the national government was

⁷ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁸ *Kelo v. City of New London*, 545 U.S. 469 (2005).

formed, state legislatures in the late 1770s and '80s turned to legal shortcuts in many aspects of law that included summary administrative proceedings, which they attempted to constitutionally cure after the fact (Hamburger, 2015).

A Shifting View of Property Rights

Property is divided into two categories: real property (land) and chattel (movable objects). Real property is easy to track and tax for the very fact that it is fixed. Digital assets like cryptocurrency, movies, songs, and web content were all created by and are owned by someone. Digital assets are still considered private property and require protection. For example, the Global Innovation Policy Center estimated that online piracy costs the U.S. economy between \$30 -\$71 billion annually in lost revenue (Whitten, 2021).

DOD and DHS are, for all practical purposes, co-leads when it comes to protecting the nation's critical infrastructure. One question looming large in the minds of many practitioners is whether DHS will eventually become a regulator of critical infrastructure-related businesses or will simply recommend standards and practices⁹. There is another even larger question of who will be paying for increased imposed security measures intended to reduce any future threats and resolve outstanding uncertainties (Lewis, 2006). Federal funding generally comes with strings attached, and the agreements that agencies put in place are usually not publicly releasable.

It is easier to consolidate power by advocating for collective rights over individual rights. Anyone who rebuffs government collectivist efforts can be quickly labeled a greedy capitalist with a hard heart indeed. Representative Alexandria Ocasio-Cortez (D-N.Y.) has called

⁹ For example, Office of Management and Budget (OMB) or National Institute of Standards and Technology (NIST) guidance.

capitalism “irredeemable,” noting that the goal of corporations is to maximize profits. She has also stated: “Just as there’s all this fearmongering that government is going to take over every corporation and government is going to take over every business or every form of production, we should be scared right now because corporations have taken over our government” (Burke, 2019). Precisely because corporate America must remain profitable in order to survive regardless of any potential threats, it is often more practical and less expensive to purchase insurance than to increase spending on expensive investments that may never be needed (Lewis, 2006). The proliferation of cyber and ransomware insurance, for example, is an indicator that risks are widely recognized and have been deemed merely a cost of doing business. AOC is right that corporations have a responsibility to shareholders, but they also must survive while battling cyberthreats and adhering to the millions of pages of regulation promulgated by federal agencies in an effort to remain “good citizens” and not draw the ire of ambitious politicians.

Due to the growth of modern government, the rights of people to acquire, use, and dispose of property freely have been severely compromised. Unfortunately, the highest court in the land has yet to develop a principled comprehensive theory for remedying such violations (Pilon, 2017). It will take effort at all levels to ensure the rights that our forefathers fought and died for are maintained. Sometime over the history of our nation we have lost many of the aspirations we once had. The Protestant work ethic once drove us to work hard, if not for ourselves for our posterity and for the glory of God. Now that individuals have abrogated their societal responsibilities of tithing and caring for others, it is easier to sit back and let those taxes automatically flow out of the paycheck so that someone else can collect their government check. In other words, one of the primary functions of government today is wealth redistribution. Rather than focusing on inherently governmental functions explicitly outlined in the Constitution, the

government is busy going about its business hoping that the money can get out the door before the next Inspector General or government watchdog report is released.

Critical Infrastructure and the Digital World

In order to reduce ambiguity, nation states could establish acceptable rules of the road or redlines in cyberspace. There is not yet broad consensus regarding what constitutes “use of force,” that would constitute a violation of international law¹⁰, or even what would be considered an “armed attack”¹¹ (Hurwitz, 2013). There is also a notable paradox related to critical infrastructure preparation. The more development that takes place, the more people adapt their life around reliable and convenient infrastructure services, hence becoming more vulnerable to shocks when supply is suddenly interrupted. (Feteke, 2020).

Summary and Critique

Regarding private property, it is sad to reflect and realize that a basic tenet and one of the cornerstones of freedom and individual wealth has been chipped away to the point that, according to the Federal Reserve Board of Governors, today in the U.S. the top 1% control 27% of the wealth.¹² Regulation favors larger industries because they have the resources to hire teams of compliance officers, while smaller firms are driven out of the market or bought out by their larger competitors. Big Business is usually happy to oblige the enforcement of government mandates because they either helped draft the regulation to benefit themselves, are exempt from the diktats, or are only negligibly affected by them.

¹⁰ United Nations Charter Article 2(4).

¹¹ United Nations Charter Article 51.

¹² Manually calculated using the assets by wealth percentile group and the Distributional Financial Accounts (DFA). (Source: <https://www.federalreserve.gov>)

Emergencies are the perfect time to accomplish goals not otherwise possible in “normal” times because the majority are willing to trade security for freedom, although the two concepts are not mutually exclusive. As Higgs notes, emergency conditions do not excuse the denial of constitutional rights. Indeed, the Constitution was written to protect private rights under these very conditions. Devotion to a strong but limited government secured property rights to the point that, even into the late nineteenth century, most activities to include virtually all purely economic decisions were considered *not* the proper business of the federal government (Higgs, 2012).

There are many troubling aspects related to a potential federal takeover of critical infrastructure, but one point in particular should bother even those who wholeheartedly buy into the paternalistic concept. Section 2(a) of Executive Order 13800 states: “It is the policy of the executive branch to use its authorities and capabilities to support the cybersecurity risk management efforts of the owners and operators of the Nation’s critical infrastructure¹³ ... as appropriate” (Trump, 2017). During a national emergency, the executive branch will be determining what is “appropriate.” As de Tocqueville noted, the president is granted extensive powers because the Founders regarded the creation of a vigorous executive as crucial to a free republic. They viewed it as essential for protection of property against foreign attacks and anarchy (Danoff, 2011). While executive orders only apply to agencies and departments under the control of the executive, most people will do what they are told and are not in a position to quickly determine whether a request or demand is applicable or legal. There are many agreements in place with state, local, tribal, and territorial (SLTT) entities—most of which have funding attached— and most funded entities will fall into line, although the orders technically do not even apply to them.

¹³ As defined in 42 USC 5195c(e).

There is not only ambiguity regarding the classification and extent of what could be considered critical infrastructure, the tools, means, plans, and strategies are classified. This is perhaps for good reason, because the enemy does not need to know in advance how the U.S. will respond to any potential cyber apocalypse. The downside is that we as citizens and taxpayers also do not know how our government will respond. We will simply wake up, will not be able to access the internet, and the banks will be closed.

Theological Support and Personal Reflection

The Bible has much to teach us about property and associated rights. Leviticus 25:23 says: “The land shall not be sold for ever: for the land is mine, for ye are strangers and sojourners with me” (KJV). “For every beast of the forest is mine, and the cattle upon a thousand hills” (Psalm 50:10, KJV). In other words, everything belongs to God the Creator, and we are transients just lucky enough to be able to enjoy His bounty for our relatively short stay on the planet. Proverbs 19:14 advises: “Houses and riches are the inheritance of fathers: and a prudent wife is from the Lord” (KJV). Our focus should not be on “things” but rather “people.” Far too often, Americans get caught up in the rat race of making money and neglect those people about whom they should be most concerned. Psalm 37:11 reminds us that “[T]he meek shall inherit the earth; and shall delight themselves in the abundance of peace” (KJV). Accumulating wealth on earth should not be our ultimate goal, although following Biblical principles will many times bring about this result. Finally, Exodus 20:15 warns: “Thou shalt not steal” (KJV). Applied to the public sector, this reinforces the notion that compensation is required in all types of takings.

Conclusion

Major attacks on critical infrastructure would have a national impact, and critical infrastructure protection will remain a national problem requiring a whole-of-government response (Lewis, 2006). The scope of critical infrastructure has grown to encompass most of the economy and nearly all aspects of society to include the water we drink and the food we eat. This is a clear indication that focus has been lost because, when everything is a priority, *nothing* is a priority. One can easily envision a scenario where cyberspace—considered by many legal scholars to now be a legitimate warfighting domain—will be viciously attacked, resulting in people’s inability to access funds, turn on their lights, etc. Big Business, posing as patriots and what is today referred to as the defense industrial base, began colluding in earnest with the federal government just prior to America’s entry into World War I. A century later, private property rights are now significantly diminished to the point that a federal takeover of nearly everything under the guise of critical infrastructure protection is all but inevitable. Americans must legally and lawfully fight back and demand additional safeguards and transparency mechanisms be established and enforced.

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