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PROPERTY LAW AND THE NEW ECONOMIC ORDER: A BETRAYAL OF MIDDLE AMERICANS AND THE POOR

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*The New Property*¹ was an early attempt to warn against the coming of a new economic order that would threaten the security, the livelihood, and even the citizenship of the vast majority of working Americans in the name of economic efficiency. Only a partial view of this new order was possible in 1964. Traditional forms of wealth were being replaced by new forms that received greatly reduced legal protection. Individuals were losing ownership of their own labor to giant corporations, resulting in dependency and insecurity. In the face of narrowing economic opportunity, a revised social contract or “new deal” promised government protection against the extremes of economic dislocation. But the promise was not kept.

Under the New Deal increased constitutional powers were assumed by the government in return for societal responsibility to the individuals who gave up their economic independence in recognition of the greater efficiency of large organizations. *The New Property* argued that, if the new social contract was to be respected, welfare state protections and benefits for the middle class and the poor must be treated as *entitlements*—a substitute for old forms of property. Today we are seeing the wholesale repudiation of that contract by a Congress and president who seem to have forgotten what the contract actually stood for and why it was adopted.

At the time of the Founding, Americans enjoyed two kinds of citizenship: political citizenship and economic citizenship. The former was spelled out in the Constitution and the Bill of Rights. The latter consisted of property rights in one’s own labor, plus freedom of contract, freedom of opportunity to enter the occupations and professions, and a share in a vast national endowment that included land available for homesteading and agriculture, plus resources for the taking, including timber, water, minerals, and wild animals.

By the time of the Great Depression, this situation had drastically changed. Political citizenship remained, but economic citizenship had

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1. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

been steadily undermined—by the growth of corporations which gained monopolistic control of employment and hence of livelihood, by the rise of occupational and professional licensing which restricted entry, and by the disappearance of the endowment of public land and resources that was once open to all. When the economy failed in the 1930s, millions of Americans found themselves excluded from any opportunity to make a living. Denied participation and membership in the productive activity of the society, they had lost their economic citizenship to the emerging new economic order. Sheldon S. Wolin writes:

To be a member or citizen in the political economy is to be employed. To be unemployed is to be in the political economy but not of it; it is to be denied participation in the central civic activity.

Thus, membership in the political economy is constantly in jeopardy. Technological innovation is continually rendering large numbers of citizens obsolescent and superfluous—noncitizens, in effect. Further, recurrent cycles of recession, depression and recovery introduce an uncertainty into the notion of citizenship that was unknown to the contractualist. By the contractualist's terms, "once a citizen, always a citizen"; but in the political economy, full citizenship is a temporary state of affairs because the economy is in the business of periodically producing and reproducing noncitizens.²

With so many working Americans forced into the ranks of the economically dispossessed, the nation's leadership was called upon to save the System from what President Franklin D. Roosevelt called a "rising tide of misery" that could "engulf us all."³ The rights of labor were protected. Where necessary, jobs were provided directly by the government. In place of the lost endowment of free land and natural resources, a social safety net was created, including social security, aid to dependent children, unemployment and health insurance, and welfare for those otherwise unable to earn a living. At the same time, corporations were subjected to increased regulation in the public interest. A new phase of economic citizenship commenced.

The law was called upon to play a crucial role in making this "deal" a reality. Only if the new benefits and the new endowment received the status of legally protected rights would this "new property" prove to be a genuine substitute for the old property which most individuals could no longer rely on. Only if the new forms of wealth were protected by both substantive and procedural due process would

2. SHELDON S. WOLIN, *THE PRESENCE OF THE PAST* 44 (1989).

3. Franklin D. Roosevelt, Campaign Address on "Progressive Government" at the Commonwealth Club, San Francisco, CA (Sept. 23, 1932).

the New Deal prove to be not merely a one-way transfer of power to the state, but a two-way bargain, with the people receiving a quid pro quo of economic rights in return.

In 1964, when *The New Property* was published, it was still an open question whether the law would give adequate protection to the new forms of wealth. Thirty years later, it is clear that the law has failed to protect the economic citizenship of individuals. After a few important but tentative steps, including *Goldberg v. Kelly*,⁴ the law has turned against the whole concept of individual economic rights. The concept of “new property” for the great mass of working Americans has been rejected, and with it the promise of secure economic citizenship.

At the same time that property law has failed to protect the interests of individuals, it has been utilized by large corporations to transform their ownership of wealth into a form of economic government that is rapidly replacing democratic public government as the true source of power in America. “Ownership” has allowed corporations to become empires, sometimes under the control of a single individual, where many thousands of workers are denied the rights of ordinary citizens, and where decisions affecting the entire economy are made without any control by the political process.

Property law has been turned upside down. The Framers expected that private property would support the independence of citizens in a democratic republic. Not only has property lost this function; it has instead become the basis for subjecting individuals to the rule of corporations whose only claim to being “private” is that they escape both constitutional and democratic limits. Seldom has the course of the law had such a vast impact upon both personal lives and the future of democratic society. It is indeed tragic that the law has betrayed so totally the American vision.

In 1964, only a portion of this new economic order was visible. The most obvious development was the rise of new forms of wealth that had their source in government: contracts, subsidies, occupational credentials and licenses, and the components of the welfare state such as insurance, pensions, benefits, and public employment. The emergence of these forms of wealth originating in public government was paralleled by the growth of similar organizationally-derived forms of wealth produced by the “private” or corporate sector. The issue presented by this changeover was clear: would individuals or or-

4. 397 U.S. 254 (1970).

ganizations, including government, control or "own" the new forms of wealth being substituted for traditional property? The answer to this question would determine the future balance of power between individuals and the organized sector of society.

A whole series of important public issues were raised by the emergence of new forms of wealth. There was the status of welfare: Should it be protected by due process procedural guarantees and be deemed an entitlement rather than a gratuity? Drivers licenses, professional licenses, and other economically valuable credentials regulated by government raised a similar issue: should they be deemed "rights" worthy of procedural and substantive protection, or "privileges" subject to whatever conditions the state might impose—even conditions at odds with constitutional guarantees? Then there was the question of the rights of public and private employees, including job security, procedural fairness, and free speech. Closely related were the procedural and substantive rights of students, as schools and colleges became vital to economic status in the meritocracy rather than mere institutions of learning. The allocation of public resources such as the national forests, television and radio channels, oil, minerals, and grazing lands, presented similar questions.

By 1964, after the loyalty investigations of the 1950s, it was all too apparent that unprotected new forms of wealth afforded a ready device for using economic retaliation as an extra-constitutional means of punishment. *The New Property* described, for example, how the licensing of lawyers and physicians became devices for McCarthyite persecution of people in the legal and medical professions. License denials and suspensions were politicized and used as weapons against nonconforming individuals. As *The New Property* pointed out, this practice could give rise to a new feudalism where loyalty to government or corporate employer would be made the price of a place in the economy.

Thirty years later we have a more complete picture of the new economic order, and the concerns of 1964 seem not only justified but also understated. Several major developments have taken place, each made possible by the refusal to treat new forms of wealth as deserving the protection of property. The first of these developments is the aggressive use by private employers of their power over individual livelihoods to force cutbacks in pay and benefits, weaken the labor movement, curtail the right to strike, and compel employees to accept greatly reduced job security. This has been possible because jobs and work have been accorded no legal protection, while the employer's

“property right” to hire and fire at will has been exalted to the point where a massive transfer of wealth from workers to top managers and investors has taken place. The measure of how rapidly this transfer has occurred is that it now requires two family members to earn what one could earn in 1964—with devastating consequences for the family as a social institution. During the same period, the standard of living for working families has been forced steadily downward.

A second development has been the depletion of the public services, resources, and functions constituting the endowment held in common for the benefit of all Americans. It has been allowed to shrink, or to be turned over to corporate interests in a process called “privatization.” Schools, parks, wilderness, hospitals, public housing, and the entire urban habitat have all been devastated. As a result, the individual’s share in the commonwealth has been greatly reduced. This loss comes on top of the loss of individual livelihood protections.

A third development is the decision of corporate employers to lay off more and more employees in the name of economic efficiency, thereby creating a growing class of the excluded—people forced into poverty and denied economic citizenship by being pushed out of the economic system. In 1964, corporations appeared to have a greater sense of social responsibility and a greater willingness to share their prosperity with working Americans. But the absence of economic rights for workers meant that this partnership was based upon trust, not legal power. The last thirty years have amply demonstrated the hollowness of trust when one side does not have enforceable legal claims to a fair share of national wealth.

A fourth development has been the readiness of the state, in alliance with corporate America, to break the New Deal social contract altogether by repudiating the idea that welfare for the excluded is a matter of right and entitlement. The formerly accepted fact that economic exclusion results from centralized managerial decisions beyond the control of individuals has been replaced by the carefully designed and crafted myth that individuals are to blame for their own exclusion and resulting poverty.

Although failure to honor the revised social contract resulted from the combined action of all branches of government plus the corporate sector, it is the courts, and particularly the Supreme Court of the United States, which must bear the most serious responsibility for the betrayal of working Americans. This is because the emergence of new property as a substitute for old property presented a series of

issues that were difficult or impossible for lay people to understand, easy for politicians and ideologues to misrepresent and distort, and therefore particularly the province of those whose specialized knowledge and presumed wisdom gives them the task of interpreting the Constitution and the Bill of Rights. A Constitution is merely words—subject to changes in meaning and context over time. As Lawrence Lessig has argued convincingly, fidelity to the true meaning of the Constitution often requires an exercise in *translation*, the purpose of which is to bring the document's provisions forward to the changed context of today. Lessig writes: "We all know that fidelity to an original meaning sometimes requires doing something different, and that, in these cases, doing the same thing done before would be to change the meaning of what was done before."⁵

The interpretive problem presented by new property is that the word "property," as found in the Constitution, if taken literally, extends protection only to those forms of wealth which were regarded as property in the eighteenth century, such as land and other traditional valuables like money and livestock. Under an "originalist" approach to property, there could be no constitutional protection for forms of wealth created in the twentieth century, such as social security, unemployment compensation, or welfare benefits. But fidelity to the purposes of the Constitution is not served by failure to recognize and include the new forms of wealth, which are the only wealth many individuals possess. The real test of the Supreme Court's fidelity to the Constitution is whether it has preserved the grand design of the Framers—to establish an economic basis for individual independence and citizenship.

In *Lyng v. Automobile Workers*,⁶ the Court upheld the constitutionality of a statute providing that families could not become eligible for food stamps if their need resulted from any member of the family being on strike. This decision, along with others of similar import, approved the transformation of benefits intended to keep families from starving into instruments of social control. This form of control, applying only to the needy, greatly strengthened the hand of management and weakened the bargaining power of workers at a time when the discrepancy of power between the two was already very great. The right to strike was singled out for economic punishment. The

5. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1170 (1993).

6. 485 U.S. 360 (1988).

Court allowed government assistance to become government tyranny. The New Deal social contract was thereby breached.

The Supreme Court's failure to protect the new forms of wealth has had an even larger significance. It has altered fundamentally the nature of American society in the following ways:

1. Under the new economic order, the vast majority of working Americans are becoming a propertyless people. They may "own" a home, a condo, a vehicle, or a bank account. But none of these are wealth-producing assets, and all may be lost easily if the owner loses his or her job. Such "ownership" provides no genuine security or independence. Working Americans have lost the only form of ownership that really matters—ownership of their own labor and livelihood.

2. As a result of the denial of true ownership to individuals, corporations, along with a small group of very rich individuals, have become the principal owners of the nation's wealth. This has produced an economy that might be described as "corporate socialism"—a system that combines the worst features of socialism and capitalism. Wealth is held by bureaucratic managers, as in the ill-starred economics of Eastern Europe. But corporate managers do not even have the public responsibilities of socialist managers. Corporations possess the planning and allocation powers of socialist bureaucracies, but these powers are exercised only on behalf of the corporations themselves.

3. As they have been dispossessed of ownership, workers have lost bargaining power, and the value of their labor has fallen in consequence. A general decline of living standards for the majority of Americans has been the result, accompanied by growing disparities of wealth. The public endowment of the American people has also declined. Government services, benefits, support of recreation, the arts, and other aspects of the human habitat have suffered a precipitous decline.

4. Passivity and docility have replaced the vigorous assertion of sovereign citizenship by individuals. Constitutional rights are undermined by the state's ability to use economic pressure to induce the "voluntary" relinquishment of rights, as *Lyng v. Automobile Workers* demonstrates with respect to the right to strike for better wages and working conditions. Without economic independence, political and civil rights are weakened fatally.

The New Economic Order is producing a society of insecure and dependent individuals unable to resist organized power. Neither democracy nor the Bill of Rights is safe from this undermining of individual will. While there is still time, we should act to guarantee economic rights, which are essential to preserve both prosperity and the American vision.

