

DEBATE:
LIABILITY—THE NEW “NEW PROPERTY”

**INTRODUCTION: OF PROFLIGACY,
PIRACY, AND PRIVATE PROPERTY**

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The life of a circuit judge can sometimes be a little mundane, so I am always looking for strange and exotic stories to spruce up my day. Recently, one of my law clerks came up with just such a story involving constitutional law. It seems that my clerk had a friend back at school. I am not allowed to mention the school, except to tell you that it is a well-known Eastern law school the name of which vaguely rhymes with “wayward.” This friend—I will call him “Bob”—was an honors student and editor of the law review, with the usual panoply of honors and accolades, but he had one tragic flaw. When it came to a legal issue in which he had strong policy views, he could not apply his usual skills of legal reasoning and became extremely result-oriented. Nevertheless, he knew that success meant appealing to commonly accepted norms of legal thought, so he struggled to reconcile his political agenda with the text and history of the Constitution.

If there was one thing Bob hated more than anything else, it was the Takings Clause¹ of the Fifth Amendment. The words “private property” caused his blood to boil; he knew that he had to destroy this anachronism once and for all. One day, just as he was about to abandon all hope of reconstructing the Takings Clause, he was hit with a burst of inspiration. He had the solution! His program for ridding the Constitution of this useless bit of Lockean baggage consisted of three separate theories, three reasons that the Constitution, interpreted in accordance with its original intent, does not require protection of private property.

Bob first posited what he called his “chronology theory.” He pointed out that the Constitution protects life, liberty, and property, in that exact order. The Framers were not dumb. Ob-

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1. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

viously they knew that things mentioned first were the most important. Bob, therefore, surmised that the Framers of the Fifth Amendment listed these three rights in a particular order on purpose. Property was listed only to show that it was last, and therefore the least important.

But wait! He had a second theory, which he called the “capitalization theory.” He looked carefully at the Constitution and noticed a little-known, yet important historical fact. In the original Constitution, the “L’s” in life and liberty were capitalized, while the “p” in property was lower case. Now the Framers were men of letters, and if they had wanted to place property on the same high pedestal as life and liberty, they would have taken the important first step. They would have capitalized the “p”! This could be no mere oversight. Putting property in but leaving it uncapitalized was surely meant to show the Framers’ contempt of property.

And, there was one final theory, perhaps the most powerful of all. Bob called this the “penmanship theory.” Intent on removing this albatross from around the Constitution’s neck, Bob travelled to the archives in Washington, D.C. and gazed upon the original document for hours. Finally he noticed that the original draft of the Constitution is quite sloppy. The ink was not what it is today, and the penmanship of the recording secretary left something to be desired. When he looked carefully at the famous phrase from the Fifth Amendment, he saw that the word “property” was hopelessly smudged. He was left confused about what it really said. Naturally he concluded that it could have said anything, anything at all, and not necessarily “property.” For example, it could have read “life, liberty, and poverty,” thus guaranteeing to each American the right to be poor. Crazy maybe, but, after all, America is the land of opportunity and who can benefit most from that opportunity than those who are poor? On the other hand, it might have read “life, liberty, and profligacy.” America is the land of wealth and riches, and perhaps the Framers wanted to codify the tradition of excess in the Fifth Amendment. Perhaps, again, the Framers caved into a particularly effective lobbying effort by a single-issue constituency by guaranteeing the right to “life, liberty, and piracy.” Bob, creative soul that he was, spun out dozens of equally plausible permutations of this hopelessly illegible word,

concluding finally that, because it could mean anything, it in fact meant nothing at all.

Armed with these deep insights, this future constitutional scholar set out to give original meaning back to the Takings Clause. He is well on his way. He recently finished his clerkship with one of my colleagues on the Ninth Circuit and moved on to a professorship at a west coast law school, the name of which I also am not allowed to mention, except to tell you that it rhymes with “bumblebee.”

Despite Bob’s skepticism, we know that property was, in fact, something that was considered important by the Founding Fathers. It is certainly an important aspect of personal autonomy in our capitalist society and probably in any society involving human beings as we know them.

But what is property? That is not an easy question to answer. I remember sitting in my first-year property course on the first day of class when the professor, Jim Krier, who now teaches at Michigan Law School, asked the fundamental question: What are property rights? I was excited. I had just spent four years as an economics major at UCLA—the University of Chicago at Los Angeles—and no one, but no one, in the class knew more about property than I. I threw up my hand and without even waiting to be called on I shouted out, “Property rights define the relationship between people and their property.”

Professor Krier stopped dead in his tracks, spun around, and gave me a long look. Finally he said: “That’s very peculiar, Mr. Kozinski. Have you always had relations with inanimate objects? Most people I know have relations with other people.”

That was certainly not the last time I said something really dumb in class, but the lesson was not lost on me. Property rights are, of course, a species of relationships between people. At the minimum, they define the degree to which individuals may exclude other individuals from the use and enjoyment of their goods and services—yet property goes well beyond things physical. It includes rights to intangibles, such as patents, trademarks, and copyrights. It may also include rights to certain types of governmental benefits, as well as rights to parts of one’s body or to one’s reputation.

Tonight we explore a particularly interesting aspect of property: the rights created through our tort liability system. Once a court enters a judgment in a tort case, the judgment unques-

tionably has the attributes of property. But at what point before judgment does the right become property? At the time the lawsuit is filed? At the time of injury? How about at some earlier point in time? Can, or should, people be able to alienate rights to damages before the injury has occurred? What effect will different rules of law have on the efficient and equitable allocation of resources?

To debate these and related questions, we have two distinguished panelists. Peter Huber started out his career as an engineer. He received a Ph.D. in mechanical engineering from the Massachusetts Institute of Technology (MIT) in 1976, and then taught mechanical engineering there, rising to the rank of associate professor. While still teaching at MIT, Dr. Huber attended Harvard Law School, where in 1982 he graduated *summa cum laude*, a very rare accomplishment indeed. After law school, he clerked for Judge Ruth Bader Ginsburg on the United States Court of Appeals for the District of Columbia, and then for Justice Sandra Day O'Connor.

In 1985 Dr. Huber served as a consultant to the Antitrust Division of the Department of Justice, where he prepared a report on competition in the telephone industry.² He has written a number of other reports and articles, both for professional and popular journals. Most recently he published his first book, entitled *Liability: The Legal Revolution and Its Consequences*.³ He is now working on his second book, which addresses deregulation in the telecommunications industry, under the auspices of the Manhattan Institute, where he is a senior fellow.

Taking issue with Dr. Huber's position will be Professor Joseph A. Page from Georgetown University Law Center. Professor Page received all of his degrees from Harvard, an A.B. in classics in 1955, an LL.B. in 1958, and an LL.M. in 1964. He started his teaching career in 1964 at the University of Denver College of Law. He has been at Georgetown since 1968, where he teaches torts, products liability, food and drug law, lawyering in the public interest, and government regulation of hazardous waste products, among other subjects. He is a free-

2. P. HUBER, *THE GEODESIC NETWORK: 1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY* (1987).

3. P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); see *Torts Are No Piece of Cake* (Book Review), *Wall St. J.*, Oct. 6, 1988, at 16, col. 5.

lance journalist, a director of *Public Citizen*, and a public-interest advocate.

Professor Page has written numerous articles on products liability and is the author of a handbook, *The Law of Premises Liability*.⁴ In 1973 he coauthored *Bitter Wages: Ralph Nader's Study Group Report on Disease and Injury on the Job*.⁵

Professor Page has also written extensively on non-legal subjects, particularly concerning South America. He has written a book, *The Revolution that Never Was: Northeast Brazil, 1955-1964*,⁶ and a biography of Juan Peron.⁷ He is currently under contract with Random House to write a book titled *The Brazilians*. His wife, Martha Gil-Montero, is the author of a recently released book, *Brazilian Bombshell: The Biography of Carmen Miranda*.⁸ Professor Page is also a director of the Carmen Miranda Samba School, which, I understand, means that he, his wife, and their friends dress up in samba costumes and dance the samba in the Washington, D.C. cherry blossom parade.

Now, on with the debate.

4. J. PAGE, *THE LAW OF PREMISES LIABILITY* (2d ed. 1988).

5. J. PAGE & M. O'BRIEN, *BITTER WAGES: RALPH NADER'S STUDY GROUP REPORT ON DISEASE AND INJURY ON THE JOB* (1973).

6. J. PAGE, *THE REVOLUTION THAT NEVER WAS: NORTHEAST BRAZIL, 1955-64* (1972).

7. J. PAGE, *PERON: A BIOGRAPHY* (1983).

8. M. GIL-MONTERO, *BRAZILIAN BOMBHELL: THE BIOGRAPHY OF CARMEN MIRANDA* (1988).