

CONCLUSION

The absolute nature of private property rights has been attacked throughout history. "Private property" has been the citadel against which the polemists⁹³ of the late nineteenth and early twentieth century social reform movements hurled their sharpest epithets.

The American Constitution and the French Declaration of the Rights of Man⁹⁴ both treated property as one of the fundamental human rights which government existed to protect. Many of the legislative codes founded on the principle of individual private ownership of property as the necessary corollary of individual liberty, developed the social instrumentality of property by endowing the holder of property with a subjective but nevertheless substantive right, absolute in duration and in effect. The property "right" attached to the thing appropriated, and the duty corresponding to this right rested on all persons other than the owner of the property. The continental legislators who followed in the wake of the French Revolution adopted the rigid legal construction of the Roman *dominium*.⁹⁵

4. then offered to prove by a fair preponderance of the substantial, credible, scientific evidence that the proposed government action did, in fact, represent an imminent danger of serious, permanent and irreparable damage;

standing could have been established and the evidence elicited in a trial on the merits might have induced Congress to re-examine the entire project in a manner similar to the President's reconsideration of the Cross-Florida Barge Canal in 1970, shortly after an action was filed by the Florida Defenders of the Environment challenging further construction of the Canal. *Environmental Defense Fund v. Corps of Eng'rs*, 324 F. Supp. 878 (D.D.C. 1971).

I am today ordering a halt to further construction of the Cross-Florida Barge Canal to prevent potentially serious environmental damages. . . . A natural resource treasure is involved in the case of the Barge Canal—the Oklawaha River—a uniquely beautiful, semi-tropical stream, one of a very few of its kind of the United States, which would be destroyed by construction of the Canal. . . .

The step I have taken today will prevent a past mistake from causing permanent damage. But more important, we must assure that in the future we take not only full but also timely account of the environmental impact of such projects—so that instead of merely halting the damage, we prevent it. Address by President Nixon, Jan. 19, 1971, reprinted in *PUBLIC PAPERS OF THE PRESIDENT* 43 (1971).

For the actual "Counter-102" Statement prepared by the Florida Defenders of the Environment which led to the initial reconsideration of the Cross-Florida Barge Canal project, see, Yannacone, *The Cross-Florida Barge Canal Counter-102 Statement, Environmental Systems Science*, PROCEEDINGS OF THE A.B.A. NATIONAL INSTITUTE ON ENVIRONMENTAL LITIGATION, at ch. 10 (1975).

93. See generally, *RATIONAL BASIS OF LEGAL INSTITUTIONS* (1923).

94. "The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are: liberty, property, security, and resistance to oppression." *DECLARATION OF THE RIGHTS OF MAN*, art. 2 (n.p. 1789). Article 17 of the same document begins, "Property being a sacred and inviolable right. . . ."

95. *Dominium* means ownership in the sense of personal possession, while *imperium* means the power of a sovereign to regulate the use of property. In modern law, as a result of the medieval confusion of the power of the sovereign to regulate the use of property (*imperium*) with ownership (*dominium*) and of the idea of the corporate personality of the state, we have made the *res publicae*, *supra* note 73, of the Roman law into property of public corporations, which has required modern systematic writers to distinguish between those things which cannot be owned at all, such as human beings; things which may be owned by public corporations but may not be transferred; and things which are owned by public corporations in full dominion.

The consequences of accepting the concept that property ownership is an absolute and inviolable human right are obvious. The owner, having the absolute right to use, benefit from, and dispose of, the property, has for many of the same philosophical reasons, the right not to use the property, not to derive any benefit from it, and not to dispose of it, as well as the right to abuse or misuse the property, and deny others, even society, the benefit of non-consumptive uses of the property. Accepting the concept of absolute private property rights cedes to the property owner the right to ultimately dispose of property by destroying it.

Critics of private property rights have ranged from advocates of primitive communal living groups⁹⁶ to prosaic and now partially realized proposals to transfer certain kinds of property from private to public ownership, or to limit their exercise by government regulations.

The limited availability of prime agricultural land has led many concerned citizens to consider supporting legislation which would treat productive agricultural land as a public resource with the owners of such land subject to public regulation much the same as public utilities.

The next logical step after converting public resources to public utilities is a legislative declaration that all non-renewable natural resources in critical or short supply are public property and con-

96. During the second quarter of the nineteenth century many reformers experimented with socialist alternatives to the capitalist system. Notable among those who rejected the capitalistic system of wealth and acquisitiveness were, of course, Charles Fourier, Robert Owens, and those who began the Brook Farm experiment, including Elizabeth Peabody, in whose Boston bookstore the Farm was planned. Of it, she said,

the plan of the Community, as an economy, is in brief this: for all who have property to take stock, and receive fixed income thereon; then to keep house or board in commons, as they shall severally desire at the cost of provisions purchased at wholesale or raised on the farm; and for all to labor in the community, and be paid at a certain rate an hour, choosing their own number of hours, and their own kind of work. With the results of this labor and their interest, they are to pay their board, and also purchase whatever else they require at cost, at the warehouses of the Community, which are to be filled by the Community as such. . . .

All labor, whether bodily or intellectual, is to be paid at the same rate of wages; on the principle that as the labor becomes merely bodily, it is a greater sacrifice to the individual laborer to give his time to it; because time is desirable for the cultivation of the intellectual, in exact proportion to ignorance. . . . As a Community it will traffic with the world at large, in the products of agricultural labor; and it will sell education to as many young persons as can be domesticated in the families. . . . In the end it hopes to be enabled to provide not only for the necessaries, but all the elegances desirable for bodily and for spiritual health: books, apparatus, collections for science, works of art, means of beautiful amusement. These things are to be common to all. . . .

E. PEABODY, BROOK FARM, *reprinted in* J. NOYES, HISTORY OF AMERICAN SOCIALISM 114-17 (1870).

Twentieth century reverberations of "share the wealth" plans echoed in Huey Long's plan to give each family a \$5,000 homestead and a guaranteed annual income of \$2,500 with the funds to come from the confiscation of great fortunes. 79 CONG. REC. 8040 (1933).

sumption of such resources by the private sector is subject to regulation by the government "in the public interest." The final step would be to declare all land and natural resources national assets and eliminate any unqualified or absolute private rights in those assets.

However varied in emphasis and method, the general basis for what may conveniently be called the "Social" criticism of private property interests is found in the statement that, "many of the evils of society are primarily due to the unregulated existence of the institution of private property."

There is no surer way to discredit the institution of private property than to seek its justification in eighteenth century economic theory,⁹⁷ and insist that property is indispensable to human development and the attainment of personal liberty and individual freedom because property is but the external form of the inherent and

97. Many of the economists who were spawned in the wake of the Industrial Revolution, first in Europe and then in America, believed that human nature requires the institution of property, arguing that without property there would be no stimulus to labor or saving. Since the land is not of human creation property interest in land must be justified other than on the basis of a right in those who labor to possess the fruits of their labor. For a person to appropriate a mere gift of nature, not made to them in particular, but which belongs as much to all others, is *prima facie* an injustice to all the rest of mankind.

M. Adolph Wagner calls this system the economic theory of nature, and Roscher formulated it thus:

"Just as human labor can only arrive at complete productivity when it is free, so capital does not attain to full productive power except under the system of free private property. Who would care to save and renounce immediate enjoyment if he could not reckon on future enjoyment?"

Roscher, *The Theory of Property*, RATIONAL BASIS OF LEGAL INSTITUTIONS, ch. XIII, at 176 (1923); reprinted from DE LAVELEYE, PRIMITIVE PROPERTY (G. Marriott trans. 1878). The private appropriation of land has been deemed by many philosophers and economists to be beneficial to those who do not, as well as those who do, obtain a share in the land appropriated, because the strongest interest which the community and the human race have in the land is that it should yield the largest amount of food, and other necessary or useful products of the land required by the community. Now, though the land itself is not the work of human beings, its produce is; and to obtain enough of that produce, certain human beings must exert their personal labor. In order to support that labor, which is deemed beneficial to all society, some agency of society must expend a considerable amount of the savings from earlier human labor. The reason usually assigned by generations of philosophers and economists for allowing land to become private property, and which, after all, may actually be the best reason that can be given, is that the majority of mankind will work much harder and make much greater pecuniary sacrifices for themselves and their immediate descendants than for the public. In order, therefore, to give the greatest encouragement to production, it has been thought right that individuals should have an exclusive property interest in the land, so that they have the most to gain by making the land as productive as they can, and may be in no danger of being hindered from doing so by the interference of anyone else. A property interest in the land, however, is not indispensable for its good cultivation. Lands have been well cultivated throughout history by temporary occupants. Private property in the soil, is not, therefore an economic necessity. See the discussion by de Laveleye on the assertion of John Stuart Mill that "Landed property, . . . if legitimate, must rest on some other justification than the right of the laborer to what he has created by his labor." *Id.* at 174.

The increased value of land and natural resources resulting from national activity such as provision of public services, such as highways and other means of transportation and the maintenance of certain national institutions, not the least of which is the legal system which protects "property" interests, should be reserved to the nation and not considered the "property" of those who hold nominal title to the land or resources and reap the harvest of public enterprise in the form of an increase in the market-value of the property.

necessary law of human nature which provides that it is in the free creative expression of the power of human dominion over material objects that individuals achieve their personality and manifest their freedom.⁹⁸

It was noted in the early part of the nineteenth century that at any time in social history when the value of the greater part of the proprietary rights which the society maintains are to be found among active property rights, note 36 *supra*, creative work is encouraged, idleness discouraged and societal interests advanced. While at those times when the greater value of the property rights maintained by society fall into the passive category, the social effects are less salubrious.

The "property" which stampedes many concerned citizens into displaying the ferocity of terrified sheep when the cry is raised that "property rights are being threatened," is not the simple property interest of suburban homeowners in their one family homes or workers in their tools; still less the household goods, automobiles and other domestic amenities of the average citizen. It is rather the "property" represented by fuedal dues which robbed the French peasants of part of their produce until the Revolution abolished them. The question might be raised as to just how the modern income tax levied on each increment of wealth which labor produced differs from the *quintaines*, and just how transfer taxes differ from *lods et ventes*, which were such an onerous burden on the working class that they eventually toppled fuedal society. How do urban ground-rents differ from the payments that were made to English sinecurists before the Reforms Bill of 1832? Both are equally tribute paid by those who work to those who do not work. If the monopoly profits derived from maintaining a company town whose tenants must work in the mine or factory in order to earn the money to buy their food at the company store and pay their rent were an intolerable oppression to the workers of this country prior to the Great Depression, what is the sanctity attached to the monopoly profits of modern industry which is in a position to control both output of goods and the price of goods, while compelling the consumer to buy only what is offered on the pain of not buying at all?

Nevertheless, all of these examples of passive property interests claim absolute and unqualified protection as "property" which may not be taken by the federal government "without due process of law" because of the protection afforded by the fifth amendment in the Bill of Rights, and lately by the fourteenth amendment and its application of the Bill of Rights to all government action in the United States of America.

At the turn of the twentieth century, some philosophers and economists attempted to make a distinction between active and passive ownership. It was noted that in modern industrial society, the great mass of property in terms of value and wealth consists neither of personal acquisitions or other tangible property, nor of stock in trade or tools, but rather in rights of various kinds such as royalties, rents and shares in industrial undertakings which yield an income irrespective of any personal service rendered by their owners. These economists and philosophers lamented the divorce between ownership and use and noted that in modern industrial civilization, property had become attenuated to nothing more than a monetary lien secured by some kind of bond or other legally recognized obligation on the product of an industry which carries with it a right to payment, but which is valued because it relieves the owner from any obligation to perform any positive or constructive function in society. Such property was characterized as passive property or property for acquisition, property for exploitation or property held for the purpose of wielding power, to distinguish it from the property that is actively used by its owner for the conduct of a trade or profession, or the upkeep and maintenance of a household and family. Tawney, *Property as a Function, Not a Right: Another View*, RATIONAL BASIS OF LEGAL INSTITUTIONS ch. XXVI, at 329 (1923); reprinted from THE ACQUISITIVE SOCIETY chs. II, III, IV (1920) [hereinafter cited as *Property as a Function*].

To the lawyer passive property may be as fully property as active property. It is questionable, however, whether passive property is truly property in the absolute economic sense. For over two generations, M. King Hubbert has stated that the real measure of wealth or value in the world today is the extent to which an individual or organization controls the non-renewable, consumable resources necessary to human survival, commerce and industry. M.K. Hubbert, *Energy Resources*, THE ENERGY CRISIS DANGER AND OPPORTUNITY 43-51 (V. Yannacone ed. 1974).

98. Hegel developed the metaphysical theory of property further than Kant by getting rid of the idea of occupation and treating property as a realization of

the idea of liberty. In order to reach the complete freedom involved in the idea of liberty according to Hegel, personal liberty must be externally manifest. Hence a person has a right (which Hegel defines as a reasonable expectation of being allowed) to direct their personal will externally. Any object on which it is so directed becomes personal property. The material object which has become "personal property" is not an end in itself, but acquires rational significance from the exercise of the will of some individual person. Thus when human beings appropriate material objects, in a fundamental sense they manifest the majesty of their individual wills by demonstrating that external objects that have no will are not self-sufficient and are not ends in themselves.

Of course this assumes that the whole question of ownership is between the owner and the property owned, not between the owner and other human beings who do not own the property but might wish to own it.

It follows, adds Hegel, that the demand for equality in the division of the soil and the other forms of wealth is superficial. According to Hegel, differences of wealth are due to accidents of external nature which give to that property which one person impresses their will upon greater value than that property another impresses with theirs, and to the infinite diversity of individual minds and character which lead one person to attach their will to this object and another to that.

Other nineteenth century metaphysical theories of property proceeded to carry out the ideas or develop the method of Hegel, but they all ignored the existence of that property which was not subject to individual ownership or appropriation, the property that the Romans designated *res extra commercium*. One way of meeting the difficulties in applying Hegel's philosophical theory of property is to state that beyond what is needed for personal existence and individual human development, property can only be held in trust for the state. If the philosophy of Hegel were to be accommodated within the American system of government under our Bill of Rights, however, the alternative to expropriation of private property by direct act of the legislative or executive branch of government would be income or property taxation and inheritance taxes graduated to the eventual level of practical confiscation. Application of the philosophy of Hegel leads almost inevitably to a theory of property that can best be described as social utilitarianism in the context of a totalitarian state. (See note 73, *supra*).

At a time when large unoccupied areas were open to settlement and abundant natural resources were waiting to be discovered and developed, a theory of acquisition by discovery and appropriation of property, including land and natural resources that had not been claimed or appropriated by others already, the *res nullius* of the Romans reserving a few things as *res extra commercium*, *supra* note 73, property which could not be the subject of personal appropriation or private ownership, did not involve the kind of serious social concerns it now does in a crowded world facing shortages of essential natural resources including arable soil, the basis for all food and fiber production.

In the United States, the law of mining and of water rights on the public domain developed along the lines of discovery and reduction to possession under the conditions of the American economy in 1849, 1866 and 1872, while more recent legislation proceeded on ideas of conservation and wise use of natural resources. The argument that excludes some property from private ownership seems to apply more and more to land and certain non-renewable natural resources in short supply but subject to heavy demand.

Even Herbert Spencer, the prophet of Social Darwinism and Economic Determinism said, in explaining the extent of "property" in those things which are common to all such as air and water, the *res communes* of the Roman law: "If one individual interferes with the relations of another to the natural media by which the latter's life depends, [that individual] infringes the liberties of others by which his own are measured." (See note 33, *supra*).

Since this has been long held to be true of air, and of light, and of running water, mankind has insisted upon inquiring why it is not true of land, of the articles of land, of the articles of food production, of tools and implements, of capital, and even in the most recent extremes of social welfare legislation, of the luxuries upon which a truly human life depends. If, instead of looking at property from the ideal of maximum individual activity as Spencer did, one looks at it from the ideal of maximum effectiveness of the economic order, a distinction may be drawn, as has been done in many socialist systems, between instruments of production, which it is assumed may be used more efficiently when socialized; and consumer goods, "articles of personal consumption and comfort," destined only to be consumed or used for the individual life, with no potential for productive utilization by the community or larger society.

From the economic theory of the eighteenth and nineteenth centuries comes the belief that the particular forms of property which exist at any moment are sacred and inviolable and an unshakeable conviction that anything, including human beings (directly during the period when slavery was tolerated, and indirectly today as a result of the conditions of involuntary servitude that the modern business and social welfare systems have established as the state in which most citizens must exist) may properly become an object of ownership upon which private property rights may be exercised.⁹⁹

By the end of the nineteenth century, all the advocates of the various private property interests vied with one another in repeating the shibboleth that property is a "natural right," but few of them fully understood the import of those words. The philosophical jurists of Germany, mainly influenced by the philosophers Fichte and Hegel, sought to explain this position.

Fichte reasoned that every man has an inalienable right to live by his labor, and consequently to find the means of employing his hands, and it is in this philosophical principle that we find the origin of the "right to work" movement. Hegel reasoned that everyone ought to be possessed of property, while the poet Schiller rendered the same idea in a two line couplet.

"Etwas muss er sein eigen nennen,

Oder der Mensch wird morden und brennen."

which is to say, that "a man must have something to call his own or else he will burn and kill."

During the late nineteenth century, the metaphysical theory of property was linked with theories derived from considerations of human nature.

Although it purports to be different, the positivist theory of property is essentially the same as that of Hegel. The verification of deductions from some "fundamental law of equal freedom" by observation of other civilizations is not essentially different from the verification of the deductions from the metaphysical fundamentals carried on by the historical school of jurisprudence. The most notable difference among the philosophers is that the metaphysical and the historical jurists rely chiefly upon the primitive possession of ownerless things, while the positivists have been inclined to lay stress upon the creation of new material goods by means of human labor.

The metaphysical jurists reached a principle about property by metaphysical speculation and deduced property as an institution from that principle. The historical jurists verified their deduction that property did and should exist by showing the same principle as the idea realizing itself in the course of legal history. In the hands of the positivists the same principle was reached empirically from observation, the same deduction was made therefrom, and the deduction was verified by finding the institution latent in primitive society and unfolding with the development of civilization.

The method of the historical school of jurisprudence has been to find a doctrine or institution in the Roman law, then trace its development into modern law; first through the German law and to that extent make the historical investigation comparative; then to attempt reconstruction of the primitive law and legal institutions of the Indo-European peoples seeking the roots of modern law therein; finally broadening the scope of inquiry by examining the social institutions of all primitive peoples and laying the foundations of a universal legal history. I POUND, JURISPRUDENCE 124-26. In addition to works on the Roman law in medieval Europe and England by Vinogradoff, *see also* H. MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS REFLECTION ON MODERN SOCIETY (1950), especially ch. VIII, *The Early History of Property*.

99. It was Karl Marx who finally joined the philosophy of materialism and political science in a formal theory of government and economics based on the abolition of private property of all kinds and the absolute sovereignty of the state. The National Socialism of Nazi Germany during the Third Reich and the Communist states of today, which owe their philosophical allegiance to the political science of Lenin and the economics and materialism of Karl Marx, both represent the end result of the abandonment of natural law, misunderstanding of the nature of sovereignty and the failure to recognize that there are some material goods and some natural resources that are not subject to personal individual ownership but are essentially *res extra commercium*: not subject to ownership as private property.

Modern industrial civilization assumed its present shape in the age when one of the earliest political expressions of the property right—that once the right of private property is asserted, the personal title on which it is based is absolute and unconditional—dominated the mainstream of philosophy.

Unfortunately, the idea of social purpose as a necessary corollary of the right to own property seems to have been discredited by the industrial economists of the Robber Barons.¹⁰⁰ Nevertheless, it is not surprising that in the new commercial and industrial societies which arose on the ruins of the *ancien regime*,¹⁰¹ the dominant note should have been insistence upon individual rights irrespective of any social purpose to which their exercise contributed. The natural consequence of the abdication of authority which had stood, however imperfectly, for a common purpose in social institutions, was the gradual disappearance of the idea of social purpose itself. What remained when that keystone in the arch of Society was removed were the pillars of private rights and private interests. The practical result of such ideas was a society ruled by laws, not by the caprice of Governments, but which recognized no moral limitation on the pur-

During his late student days and before he had developed an explicit theory of political communism, Marx attacked Hegel's insistence on private property as the basis for civil society, appealing for abolition of the monarchy and the development of social democracy. The idea of a classless economic society is implicit in Marx' criticism of Hegel's political state.

According to Marx, however, criticism by itself is inadequate. Whether Marx does justice to Hegel may be open to question, but he did oppose Hegel's primacy of the Idea and maintained that the fundamental form of human action is not thought, but manual labor in which man alienates himself in the objective product of his labor, a product which, in society as he saw it constituted, does not belong to the producer. This alienation cannot be overcome by any process of thought in which the idea of private property is regarded as a moment in the dialectical movement to a higher idea, it can be overcome only through a social revolution which abolishes private property and effects the transition to communism. The dialectical movement is not a movement of thought about reality; it is the movement of reality itself, the historical process. Society cannot be changed simply by philosophizing about it. Thought must issue in action, not theory and not philosophy, but social revolution which must be the work of the most oppressed class, which to Marx was the Proletariat.

By consciously and explicitly abolishing private property, the Proletariat would emancipate both itself and the whole of society from the egoism and social injustice which are bound up with the institution of private property.

Although today we consider Marx the prophet of world Communism, it is interesting to note how appropriate his philosophy and theory of property are to the idea of the modern corporate State. Perhaps the time has come in the history of America to seriously consider whether the emerging revolutionary class which Marx, Engels and the modern Communists believed was the Proletariat or workers of the world, might not, in fact, be the corporate oligarchy of today's multinational or more appropriately supranational or transnational corporations.

With the rise of socialism as the form of government in many areas of the world today, one of the most vexing questions in philosophical jurisprudence becomes how to rationally account for the so-called natural right of property while fixing the "natural" limits to that right.

100. See generally, G. MYERS, HISTORY OF THE GREAT AMERICAN FORTUNES (2d ed. 1936).

101. The term *Ancien Regime* was first used to describe retrospectively the social and political structure in France which the Revolution destroyed; that period of French history from 1748 to 1789. It has also been used to refer to other countries at different times, such as Russia at the end of the nineteenth century.

suit of individual economic self-interest—the “Acquisitive Society.”¹⁰²

The economic success of the United States has led to a belief that the strength of society is not to be found in socially useful function which would make the acquisition of wealth and the enjoyment of property contingent upon the performance of services beneficial to the public, but rather that all individuals enter the world cloaked with the absolute and inalienable right to freely dispose of any property they may acquire or appropriate in the pursuit of their personal economic self-interest by any means not specifically prohibited by positive law. The implication of this philosophy is that such property rights are antecedent to, and therefore independent of, any service that a person (particularly the corporate person so dear to the heart of a majority of the Justices of the United States Supreme Court prior to World War II) might render to society or any socially useful work they might perform.

The enjoyment of “property rights” in directing industry, and managing commercial enterprises used to be considered a self-evident prerogative of management, which stood by its own virtue and did not require any social justification. Industrial capitalism was a basic function of civilization, and not to be judged by how well its activities contributed to any overall social purpose. There is little doubt that the foundation of early industrial society in England and America was the dogma that rights in the possession and enjoyment of private property were absolute. Nevertheless, even during that grim period of social injustice which stretched generally unrelieved

102. The motive for establishing the public institutions of America, which directly or indirectly determined the policy of those institutions and colored political thought following the Revolutionary War, was not necessarily to meet the need for public services, but to increase opportunities for individuals to attain a “property interest in the material goods they desired.”

During the 1920's, Roger Henry Tawney aptly named the social organizations that had evolved from this philosophical position the “Acquisitive Society,” preoccupied as it was with promoting the acquisition of personal wealth.

By fixing men's minds, not upon the discharge of social obligations, . . . but upon the exercise of the right to pursue their own self-interest, it offers unlimited scope for the acquisition of riches, and therefore gives free play to one of the most powerful of human instincts. To the strong it promises unfettered freedom for the exercise of their strength; to the weak the hope that they too one day may be strong. Before the eyes of both it suspends a golden prize, which not all can attain, but for which each may strive, the enchanting vision of infinite expansion. It assures men that there are no ends other than their ends, no law other than their desires, no limit other than that which they think advisable. Thus it makes the individual the center of his own universe and dissolves moral principles into a choice of expediences. . . .

Property as a Function, supra note 99, at 332.

A social organization in which the acquisition of wealth is made contingent upon the discharge of social obligations and which sought to proportion remuneration to service and denied it to those who performed no service—a “Functional Society”—is the stated, but still unrealized and probably unrealizable goal of many modern totalitarian states. Such a functional society also seems to be inconsistent with the origins of the American Republic and development of the early American way of life: the immediate concern of which was protection of personal economic rights from governmental interference, and which left economic functions, except in moments of national emergency, to fulfill themselves.

from the Industrial Revolution to the Second World War, some equitable limitations were imposed on the exercise of private property rights in order to meet specific social emergencies.

When laws, whether dealing with property or otherwise, do not have the sanction of the enlightened conscience of the community, they are already in the process of being abrogated by the people. Even the deliverances of the courts interpreting the rubrics of the positive law are of value only insofar as they enjoy the moral sanction of the community. Radicals easily find some justification for their attack upon private property rights in the gap that has arisen between the institution as it actually exists and the demands of the enlightened social conscience of the community as to what it should be. To widen that gap or to refuse to bridge it invites revolution, whether from the barrel of a gun or the pens of the Supreme Court.

When the organizations and institutions established by Society to promote the public interest become so arbitrary that they no longer assure the social relevance of economic activity, and so tyrannical as to thwart the social function of the economic system instead of promoting it, as was the case in most European countries by the middle of the eighteenth century, actions are often taken to emancipate the individual and to enlarge personal rights. In France, Germany and Russia the discontent over the "rights of those with property" culminated in bloody revolutions out of which emerged totalitarian states.

Let those who today hold nominal title to the land and non-renewable natural resources of the world look around.

Black, brown, red, yellow and white consumers are shopping for a better world with a whole new shopping list. They are demanding that the land, landscape and finite natural resources of the world today, particularly those upon which all the people of the world must depend for food, clothing and shelter, be considered a public trust to be used wisely by the people of this generation and conserved as the capital assets of those generations yet unborn.¹⁰³

103. Cerchione, note 85 *supra*.