

# **The Unalienable Right of Property: Examining the Fourth and Fifth Amendments**

GERALD R. THOMPSON



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## **INTRODUCTION**

The major difficulty with discussing the unalienable right of property today is that many people do not believe property rights are truly unalienable. There are several reasons for this belief. First, neither the Declaration of Independence nor the unamended Constitution explicitly refer to property rights. Consequently, there is some doubt whether the Founding Fathers believed in the unalienable right of property. Second, even though the fifth amendment makes two references to property, both uses seem to suggest that property rights are qualified, not absolute. In other words, many people assert that private property must yield to public necessity.

Third, property rights are disparaged because they are often perceived to be selfish rather than egalitarian. Such a view considers property to be man-made, rather than God-given, and rooted in materialism, making it the fruit of greed and gain which are antithetical to true justice. Furthermore, the notions of property embraced in the United States today are primarily progressive and socialistic, adopted as part of a larger agenda to rid our nation of any truly private property.

For these and other related reasons, property is highly regulated today. The use of land, whether for agriculture, construction or other purposes, is regulated at the state and federal levels. Virtually every municipality has a zoning ordinance which includes aesthetic regulations. Where land use is not regulated, it is subsidized. Furthermore, huge tracts of land are owned by civil governments for environmental and recreational purposes. Inner city property is routinely condemned and sold to other private persons under the banner of "urban renewal." Homes and businesses are demolished for new highways. The private ownership of property of all kinds, whether real, personal or intangible, is taxed. Even in the United States, property is effectively taken from one person and given to another for the purpose of redistributing wealth.

I submit that such laws betray an intentional lack of adherence to and disregard for the laws of nature and of nature's God. Specifically, such laws reject the ideas that the Creator has authorized private property and individuals own it as a gift of God. The people who passed these laws have adopted the precept that all property is ultimately owned by civil government, which merely permits individuals to possess property as long as it serves the public interest, convenience or necessity. In other words, current thinking rejects the idea that property rights are unalienable.

However, I propose to demonstrate the bankruptcy of current thinking, to rediscover the true nature of property, and to reaffirm that property rights are unalienable. I will do this by presenting evidence in support of three propositions. First, property rights are regarded as unalienable rights in the Declaration of Independence. Second, property is God's gift to the family; therefore, it is consistent with God's true justice, it is private in nature, and it is an unalienable right. Third, private property is recognized as an unalienable right in the Constitution, particularly as it is secured in the fourth and fifth amendments.

## **THE HISTORICAL UNDERSTANDING**

The recognition and promise that property rights are unalienable is found in the Declaration of

Independence, particularly in the phrase "pursuit of Happiness." It must first be noted that "pursuit of Happiness" is listed among things acknowledged to be unalienable rights.<sup>1</sup> Accordingly, to the extent that property rights are included within the meaning of this phrase, they must likewise be regarded as unalienable rights.

Nonetheless, even if property rights are not within the scope of pursuing happiness, the list of unalienable rights in the Declaration is not exhaustive. Of all the rights which are unalienable, only certain ones are mentioned in the document, but others also exist. These other rights, being part of the law of nature, are also incorporated into the law of our nation. To determine whether property rights are truly unalienable merely requires a study of the law of nature.

However, the "pursuit of Happiness" does refer to private property because the phrase includes the rights of economic liberty, that is, property and contract. It is no accident that the language of the Declaration mirrors the language of the Virginia Bill of Rights, drafted less than one month earlier, providing, "That all men . . . have certain inherent rights . . .; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."<sup>2</sup> Far from expressing a different meaning, the Declaration's enumeration of "Life, Liberty, and the pursuit of Happiness"<sup>3</sup> was intended to convey the same meaning as the Virginia Bill of Rights, but in a more shorthand way.

Thus, the phrase "pursuit of Happiness" was used in the Declaration instead of "property . . . happiness and safety" because it said more in fewer words. Not only property rights, but also the rights of contract, inheritance and choice of occupation were included within its meaning. To interpret the Declaration as renouncing the unalienability of property rights is to interpret the document beyond the scope of its historical context.

Indeed, much evidence contemporaneous with the Declaration regards the rights of property as unalienable. The First Continental Congress declared in 1774 that Americans, "by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS: . . . That they are entitled to life, liberty and property."<sup>4</sup> Early state constitutions expressed similar convictions. The Massachusetts Constitution of 1780, for example, provided that "[a]ll men . . . have certain natural, essential, and unalienable rights; among which may be reckoned the right of . . . acquiring, possessing, and protecting property."<sup>5</sup>

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1. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. VA. CONST. art. 1, §1.

3. DECLARATION, *supra* note 1.

4. Declaration and Resolves of the First Continental Congress (1774), *reprinted in* SOURCES OF OUR LIBERTIES 286, 287 (R. Perry ed. rev. ed. 1978).

5. THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1889 (F. Thorpe ed. 1809 & photo. reprint 1977).

Although the Declaration of Independence recognized that property rights are unalienable, the historical record before and after our nation's founding is inconsistent on this matter. For example, John Locke wrote in his *SECOND TREATISE OF GOVERNMENT* that God gave the world to all men in common and that no man has a natural right to exercise a private dominion exclusive of the rest of mankind over any specific property. Yet, Locke wrote that "there must of necessity be a means" to reckon something as belonging to one man, but not another, in order to make the best use of the earth's resources.<sup>6</sup> For him the solution was a theory of property based on individual labor.

Though the Earth and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person; This no Body has any Right to but himself. The Labour of his body, and the Work of his Hands, we may say, are properly his. . . .

[T]is the taking any part of what is common, and removing it out of the state Nature leaves it in, which begins the Property.<sup>7</sup>

Sir William Blackstone, the jurist whose *COMMENTARIES ON THE LAWS OF ENGLAND* were widely read by the American founders, viewed property similarly. He believed that in ancient times men held all things in common, "and that every one took from the public stock to his own use such things as his immediate necessities required."<sup>8</sup> It was only more recently, he reasoned, that "it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used."<sup>9</sup> Consequently, Blackstone concluded, property "was no natural, but merely a civil, right."<sup>10</sup>

The views of Locke and Blackstone were not universally accepted. Henry St. George Tucker, commenting on Blackstone in 1803, wrote as follows: "I cannot agree with the learned commentator, that the permanent right of property . . . is not a natural, but merely a civil right. . . . [T]he notion of property is universal, and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinements."<sup>11</sup>

Similarly, Chancellor James Kent, commenting on American law in 1824, said,

To suppose a state of man prior to the existence of any notions of separate property, when all things were in common . . . is a mere dream of the imagination. The sense of property is inherent in the human breast . . . . Man was fitted and intended by the

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6. J. Locke, *TWO TREATISES OF GOVERNMENT* 328 (P. Laslett rev. ed. 1963) (3d ed. 1698).

7. *Id.* at 328-30.

8. 2 W. Blackstone, *COMMENTARIES* \*3.

9. *Id.* at 4.

10. *Id.* at 11.

11. 3 Blackstone's *COMMENTARIES* 10 n.\* (St. George Tucker ed. 1803 & photo. reprint 1969).

Author of his being . . . for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature. . . .<sup>12</sup>

Yet the views of Locke and Blackstone prevailed. Even though both men looked to the Bible as the source of their understanding, once the concept of necessity was accepted as the sole basis for private property, property rights became subservient to every perceived change in the necessity of the moment. By the Civil War, the right of inheritance was regarded as a civil privilege which could be regulated, taxed or denied at any time. Property taxes in general proliferated. Regulatory zoning was introduced in the early twentieth century. In 1924 a federal gift tax was imposed for the first time. In the wake of the New Deal, large scale land-use regulation and subsidies were championed. Now, private dominion has been curtailed whenever it interferes with historical landmarks, aesthetic beauty or notions of a clean environment.

Thus, the promise of the Declaration that the "pursuit of Happiness," including the right of private property, is an unalienable right, has yet to be fully realized. Instead of securing the liberty of the people to own, use, possess and transfer property as they might choose, our modern laws have secured the power of the "have-nots" to rule over the "haves." This all follows from the legacy left by legal commentators who regarded property as created by man rather than God, the fruit of necessity rather than law, a public convenience rather than a private mandate, and a conditional privilege rather than an unalienable right.

In the final analysis, however, the historical legacy of property law is not controlling. Legal precedent may explain why property rights are viewed a certain way today, but mere precedent can never authorize or justify a wrong view of property rights. Neither can precedent, by itself, establish the standard by which the truth of any given view of property is measured. Whether property rights are unalienable does not depend upon the "weight" of human authorities.

As President Andrew Jackson stated, "Mere precedent is a dangerous source of authority . . ."<sup>13</sup> Precedent, to be valid, must be consistent with objective reality, that is, the law of nature. Just as Andrew Jackson refused to allow Congress or the Supreme Court to be his interpreter of the Constitution, so we must not allow other legal scholars to be our interpreter of the law of nature. The Virginia Bill of Rights of 1776 reminds us that the blessings of liberty can be preserved only "by frequent recurrence to fundamental principles."<sup>14</sup> Therefore, we must examine the law of nature for ourselves.

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12. 2 J. Kent, COMMENTARIES \*317-18.

13. Veto message of Andrew Jackson (July 10, 1832) (vetoing the bill to continue the incorporation of Bank of the United States), *reprinted in* 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144 (J. Richardson ed. 1897).

14. VA. CONST. art. 1 §15. The Virginia Bill of Rights was adopted on June 12, 1776, and has since remained relatively unchanged.

## THE NATURE OF PROPERTY

The key to the restoration of unalienability of property rights today is to recognize that property is a creation of divine law, not human politics. This divine law was incorporated into the law of the United States through the Declaration of Independence, which was expressly predicated on the "Laws of Nature and of Nature's God."<sup>15</sup> This means our nation was founded upon the legal principles embodied in the physical universe and the Bible. There is only one acknowledged source of these principles, namely, the law of God. Of course, this legal context preexists and is binding upon the Constitution and the Bill of Rights.

The Bible informs, and a study of Creation confirms, that God is the Creator of all things. Thus, God is the sole rightful owner of the earth and its inhabitants. As the uncreated Creator, God has the limitless authority to determine how and by whom His Creation is acquired, possessed, transferred and used. Exercising the authority of an owner, God delegated dominion authority over the earth to man by commanding him: "Be fruitful and multiply, and fill the earth, and subdue it; and rule over . . . every living thing that moves on the earth."<sup>16</sup>

The root of the law of the nature of property is expressed in this verse. Property is the subject of man's domination, that is, the thing over which man has dominion. By implication, dominion includes possessing, using, controlling and disposing of all things on the earth capable of being dominated, such as the surface of the ground, the plants and the animals. Property does not include the atmosphere or human beings, because the dominion mandate granted men no authority to rule over them.

However, the grant of dominion authority did not vest mankind in general with communal rights over all property. Man received in the dominion mandate the authority to own property, but not a conveyance of title. More importantly, as both Locke and Blackstone failed to understand, it was the gift of God which vested individuals with title to specific property, not labor or possession justified by necessity.

Genesis records that no title to any property was conveyed until God put Adam into the Garden of Eden "to work it and take care of it."<sup>17</sup> God later took the title to Eden away from Adam and Eve when they sinned. The title to Eden was not determined on the basis of labor, possession, necessity or dominion authority.

This pattern of property conveyance and title is confirmed throughout the Bible in the accounts of Abraham, Isaac and the nation of Israel. The consistent witness of God's Word is that no man earns any title to any property, real or personal. Rather it is a gift of God. Thus, God, not men, created property rights. Men neither invented the law of dominion nor vested themselves with title.

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15. DECLARATION, *supra* note 1, at para. 1.

16. *Genesis* 1:28.

17. *Genesis* 2:15.

Furthermore, God's actions toward men were based on His mercy and His law, not necessity.

Locke and Blackstone also failed to realize that man's dominion was institutionally specific. In other words, God gave dominion authority to the family unit and its members, not to the church or the state. This is clear by the context of the Dominion Mandate, which authorizes man to have children and own property. Yet, as later scriptures confirm, only a husband and wife were authorized to have children. By linking together the command to have children with the grant of dominion, God made families, not nations, the primary agents of dominating the world. Consequently, all property rights are within the original jurisdiction of the family, independent of societal consent or civil laws.

It follows that since God originally granted authority over property to families, then property rights are inherently private, not public. This conclusion follows not only because dominion was granted to the family institution by its terms, but also because dominion authority was given prior to the institution of any civil government. The first grant of civil authority, capital punishment, was made many generations later as part of God's covenant with Noah.<sup>18</sup> Hence, dominion authority is private in nature, because it is not derived from civil government, but rather precedes civil government in time and in right.

Secondly, since man is an agent of dominion, he is also a steward before God for his exercise of dominion. Man's dominion is not simply exercised pursuant to a divine privilege, but according to a divine duty, because man is held accountable for the fulfillment of his dominion responsibility. As James Madison indicated in his *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS*,<sup>19</sup> a duty towards the Creator is a right towards men. Further, duties owed to God are superior to any social duty and cannot be waived by the institution of any civil society.

Therefore, private property, as revealed by the laws of nature and of nature's God, is not merely a privilege as between men, but a right. Since dominion authority and the title to specific property are both the gifts of God, the right of property is unalienable. Since the right vests in families and their individual members, the unalienable right is private. Since the law of nature binds all men, man's law must conform to God's will and protect the unalienable right of private property against all encroachments.

In addition, as men have received property from God, so men should be free to transfer property among themselves. As God leads individuals to use property in accordance with some divine purpose, so men should be free to follow that leading without interference from other men. As man holds property as a steward of God, so he should be free from restrictions on his holdings. The ownership, disposition and use of property are inseparable parts of exercising dominion, which no man has the authority to restrict.

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18. *Genesis* 9:1-17.

19. J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* R. Cord, *SEPARATION OF CHURCH AND STATE* 244-49 (1982).

## SOME IMPLICATIONS

This perspective of property rights has certain necessary implications, some of which are far-reaching. All land use regulation, to the extent it exceeds the provision of remedies for common law theft, nuisance and trespass, is presumably in violation of the unalienable right of private property. All aesthetic zoning and historical landmark designations, to the extent they prohibit private owners from choosing an otherwise lawful use of their property, are contrary to the law of nature. Many other land-use regulations, land subsidies funded by tax revenues, and environmental laws are partially or wholly improper.

One of the more basic forms of civil law in violation of the unalienable right of property is the property tax. The authority to own property has been delegated to the family unit, which owes its stewardship duty exclusively to God under the law of dominion. The authority has not been delegated to any civil ruler to superintend the family's exercise of dominion. Therefore, the imposition of a tax on the mere ownership of property unavoidably impairs the family's duty to God for the care of its property because every property tax presumes that the authority of civil government over property takes priority over the family's authority.

All private property is the gift of God, yet property taxation necessarily implies that a person can never truly own what God gave him. After all, taxable property can never be freed from the civil claims upon it; that is, the tax on that property can never be fully satisfied. Property which is taxed is merely rented in perpetuity. This is particularly true whenever specific property is subject to forfeiture when the tax levied on it remains unpaid. When property forfeiture for unpaid taxes vests title in the civil ruler, it is equivalent to an assertion that the only ultimate and true property owner is the civil ruler. Accordingly, property taxation is generally anti-private property.

We should remember the words of Chief Justice Marshall, written in *McCulloch v. Maryland*:

All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. . . .

The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission. . . .<sup>20</sup>

Although this quotation was in the context of examining a state's power to tax a federal bank, it states a principle of broader scope. The principle is that a civil government cannot tax that which exists prior to, or apart from, civil society. It would be difficult to deny, therefore, that property

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20. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819); *but see, id.* at 428, where Marshall states: "It is admitted that the power of taxing the people and their property is essential to the very existence of government . . ." However, all taxation involves the payment of wealth, or property. Thus, Marshall's statement does not necessarily refer to a property tax *per se*.



taxation is anything other than the claim that private property is the creature of civil government put into practice.

## SEARCH AND SEIZURE

Having laid a foundation for recognizing the right of property as an unalienable right, I now wish to examine how this right has been treated in the United States Constitution, particularly in the Bill of Rights. I will examine primarily the fourth and fifth amendments to the Constitution for this purpose. This discussion is not an attempt to examine the full scope of either amendment in detail but is merely intended to provide a framework of analysis within which the property aspects of each provision may be understood consistently with the law of nature.

The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>21</sup>

The first hurdle to overcome in the minds of most people, of course, is that the fourth amendment concerns a property right. Lawyers, in particular, have been trained to think of this provision as relating solely to personal liberty interests. Modern jurisprudence categorizes the protection against unreasonable searches and seizures as an aspect of the right of privacy, not the right of property.

However, both the text of the amendment and its early understanding indicate otherwise. The text, for example, secures four things from unreasonable searches and seizures: persons, houses, papers, and effects. The last three of these, certainly, are in the nature of property. They are items which a man may own, possess, use and dispose. Thus, the amendment unquestionably protects people from the unlawful confiscation of their property. Even persons, according to Locke, have a property in themselves, so that the security against unreasonable searches and seizures of persons has been regarded as protecting a property right by some people. However, even if Locke was wrong on this point, the terms of the amendment clearly secure property rights, in addition to personal liberty.

This is certainly the historical understanding of the fourth amendment. In *Boyd v. United States*,<sup>22</sup> the Supreme Court ruled that the evil in an unreasonable search and seizure was not so much found in the fact that it disturbs a man's privacy, but in the fact that it is an "invasion of his indefeasible right of personal security, personal liberty and private property, where that right has

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21. U.S. CONST. amend. IV.

22. 116 U.S. 616 (1886).

never been forfeited by his conviction of some public offence."<sup>23</sup> In the Court's opinion, personal security, personal liberty and private property each constituted an indefeasible, or unalienable, right protected by the Constitution.

According to the Court, the legitimate scope of searches and seizures was limited to retrieving the "fruit of criminal activity," such as stolen property, property used as an instrumentality of a crime, and contraband, which in its best sense refers only to property used for an illegal purpose. In other words, the only property which could be searched or seized was that which its alleged owner had no legitimate right to possess.

Personal papers, clothing and other articles of property in which a person has a legitimate claim of ownership, but were not directly involved in a crime, can never be searched or seized. This rule applies no matter how incriminating or useful the property may be for the purpose of criminal prosecution. This right was recognized as indefeasible, meaning it could not be balanced away by any purported state interest. As understood by the Court, the civil magistrate had no interest in property which was privately owned.

In discussing the issues in *Boyd*, the Court placed great reliance on the English case of *Entick v. Carrington*<sup>24</sup> to advance what was understood to be the historically accepted view of searches and seizures. In that case, the judge held that:

The great end for which men entered into society, was to secure their property. . . .  
By the laws of England, every invasion of private property, be it ever so minute, is a trespass....

Papers are the owner's goods and chattels: they are his dearest property; and we are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet, where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none. . . .<sup>25</sup>

Modern analysis, beginning with Justice Brennan's decision in *Warden v. Hayden*<sup>26</sup> has abandoned this view of searches and seizures as embodied in the fourth amendment. Central to the modern approach is a rejection of the view that property rights are unalienable. According to Brennan:

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23. *Id.* at 630 (emphasis added).

24. 10 How.St.Tr. 1029 (1765).

25. *Entick*, 10 How.St.Tr. 1029, *quoted in Boyd*, 116 U.S. at 627-28.

26. 387 U.S. 294 (1967).

The premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.<sup>27</sup>

The sole basis for this opinion was Brennan's conviction that the prior decisions upholding property rights were the product of the political thought of the times, and that the present "felt need" for flexibility in rulemaking warranted a change.<sup>28</sup> He therefore concluded that "there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband."<sup>29</sup>

Since the decision in *Warden v. Hayden*, the exclusionary rule has been obfuscated in a morass of procedural technicalities dealing with "stop and frisk," "hot pursuit" and other similar concepts.<sup>30</sup> As a result, everyone has suffered. Police officers are hampered in the execution of their powers because now they are subjected to the application of a reasonableness standard which is more like civil tort law than criminal law. The people have had their property rights balanced away by a Court which knows no absolutes, no fixed rules, no immutable principles and no unalienable rights.

The key to restoring the protection and security of the fourth amendment is to return to a correct view of property rights as God-given, private, ruled by fixed and immutable principles of law, and unalienable. I would suggest to you that a correct understanding of the exclusionary rule under the fourth amendment, consistent with its language, its historical interpretation, and the law of nature, is simply this: The only property which can be used against a man as evidence is that which the civil magistrate has a lawful right to possess, as against all other persons. All other property held by the civil magistrate must be returned to the defendant or any other person who is the lawful owner of the property upon demand and excluded from use as evidence.

## **EMINENT DOMAIN**

The fifth amendment, however, poses a more complex interpretational problem. The fourth amendment, by protecting houses, papers and effects from unreasonable searches and seizures, at least looks like it is protecting property interests. In contrast, the last clause of the fifth amendment provides that, "nor shall private property be taken for public use, without just compensation."<sup>31</sup> This language seems to indicate that property rights are not absolute.

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27. *Id.* at 304.

28. *Id.* at 305.

29. *Id.* at 310.

30. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968); *Adams v. Williams*, 407 U.S. 143 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

31. U.S. CONST. amend. V.

The best way to understand the taking power is to understand it as one aspect of the taxing power. Thus, it is necessary to examine the nature of the power of taxation. Romans 13, after describing the nature of civil authority as the power to wield the sword against wrongdoers and to praise those who do right, contains the following statement: "For because of this you also pay taxes, for rulers are servants of God, devoting themselves to this very thing. Render to all what is due them: tax to whom tax is due; custom to whom custom; fear to whom fear; honor to whom honor."<sup>32</sup>

In other words, civil functions are unique to civil institutions. For example, it would be unlawful for a family or church to punish criminals. However, civil government is not authorized by the dominion mandate to engage in business to raise revenue. Consequently, it must exact revenue from its citizens to pay for the costs of providing the services it has a duty to perform (such as punishing criminals). The exaction of revenues is called "taxation." Without taxation, no civil ruler could afford to perform his duties, and civil order would collapse. This is the law of the nature of taxation.

Even though taxation exacts, that is, compels, payment of property by individuals and families to the civil ruler, it is not by its nature inconsistent with the unalienable right of property. When I say that property rights are unalienable, I do not mean that property rights are without limitation. All delegations of human authority have limitations. The Dominion Mandate, which is the root of all property rights, is no exception.

As mentioned earlier, man's dominion authority over the earth's atmosphere is limited. People can use the atmosphere, but it is hardly capable of subdivision and possession like the earth. Similarly, the open seas have never been recognized as capable of being privately owned. Neither can people be owned or sold as property under the law of nature, because the dominion of one man over another is not within the scope of the Dominion Mandate.

There are other limitations as well. A man has no right to own property which is obtained pursuant to an illegal contract, such as a wagering profits, even though it is capable of being owned. A man has no right to his property which defeats his obligation to provide for the welfare of his family and legal dependents. In the same way, a man has no right to his property which defeats his obligation to provide for national defense and the essential functions of his civil government. After all, the support of lawful civil government is a means of protecting the safety and happiness of the family, which every man is obligated to protect anyway. Thus, property rights are unalienable, but not absolute. Another way to say this is that property rights are limited to man's delegation of authority from God, but are plenary to that extent.

There are generally two categories of limits on the power of taxation which ensure that property rights are not violated. The first is a limitation of purposes. In other words, civil government cannot tax people for the purpose of teaching truth, engaging in dominion or preaching the gospel, because these matters have been delegated to individual, family and church institutions. In our nation's federal structure, furthermore, some legitimate civil functions under the law of nature have been

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32. *Romans* 13:6, 7.

allocated to the national government, while others have been reserved to the states. For example, the Constitution reserves the enforcement of common law crimes to the states. Therefore, it would be unlawful to raise federal taxes for the purpose of enforcing common law crimes.

The other limitation on taxation is a restriction of means. The great example of a restriction on the means of taxation in the Constitution is the general division between direct taxes and the so-called indirect taxes, comprised of duties, imposts and excises. Virtually all federal taxes are indirect. The imposition of indirect taxes is limited to means which are geographically uniform; that is, indirect taxes must apply to the citizens in each state the same way.

Direct taxes, unlike indirect taxes, must be apportioned among the states according to population. This is essentially a restriction on the means by which such taxes can be assessed. It requires the Congress to fix the amount of tax in advance and prorate it among the states, usually resulting in an unequal treatment of taxpayers in different states. Consequently, direct taxes have been unpopular historically. There have been only four such levies since 1789, and the last such tax was levied during the Civil War.

Property taxes and capitation taxes are the only two tax forms regarded as direct taxation. Earlier I stated that property taxes are contrary to the law of nature. It is curious that although property taxes are permitted under the Constitution, they are greatly disadvantaged politically, almost to the point of certain failure except in time of war. I suggest that this result was intended by the Framers of the Constitution, because the Framers intended to secure, not encroach upon, the unalienable right of property. Although the law of direct taxation does not explicitly affirm the unalienable right of property, it does evidence an attempt to secure property from improper taxation by a political device.

The taking power under the fifth amendment must be understood in this light, that is, the law of the nature of taxation and of the limits of taxation. Taking property for public use is merely another form of taxation: instead of collecting small increments of revenue from a large number of sources, the government collects the whole revenue from a single source.

Most often, the power of taxation is utilized because the civil government needs money for general expenditures. However, other times it needs specific property, without which it could not carry out its proper functions. An example would be real estate in a militarily strategic location, without which national defense would be hampered. The taking of this property under the taking power is justified by the law of the nature of taxation, because the specific property is something without which the government could not continue to exist or provide its necessary services.

As with the power of taxation, the taking power is limited both as to purpose and means. The requirement that private property can be taken only when it is for some "public use" is a purpose limitation on the taking power. Not every use for which property may be taken is legitimate. Under the fifth amendment, only those uses which serve a constitutionally authorized federal purpose justify the taking of private property. All uses not essential to government functions, such as urban renewal and national parks, are immediately suspect.

Similarly, the requirement that all takings of private property be justly compensated is a restriction on the means of the exercise of the taking power. In fact, it is a restriction that underscores the nature of all takings as an exercise of the taxing power. A tax, as mentioned earlier, takes only small increments of property from many taxpayers. An uncompensated taking, however, would violate this principle. Compensating the property owner instead returns him to the position of all other taxpayers, more or less, by exacting from him only his incremental share of the tax base. Of course, he is also deprived of the enjoyment of his possession, but this is not compensated, because he has not been wronged. The taking of specific property is a legitimate exercise of the taxing power.

This perspective of the taking clause of the fifth amendment is in stark contrast to the modern concept of eminent domain. In fact, I do not refer to the taking power under the fifth amendment as the power of eminent domain, as is common. The legal doctrine of eminent domain holds that civil government may take specific private property for virtually any purpose it deems in furtherance of the public interest, convenience or necessity, as long as the owner is compensated.

This perversion of law acknowledges no legal limitations on the purposes for taking property, so long as a legislature simply pretends that a public use is involved. It allows for such miscarriages of justice as the wholesale redistribution of real estate from lessors to lessees merely for the purpose of reducing the concentration of property ownership in a state, as approved by the Supreme Court in *Hawaii Housing Authority v. Midkiff*.<sup>33</sup>

Justice O'Connor, speaking for the Court in *Midkiff*, repeatedly stressed that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose,"<sup>34</sup> takings are authorized by the fifth amendment. In her opinion, this does not prohibit a legislature from taking property belonging to one person and giving it to another, so long as the legislature rationally believed it had power to do so.<sup>35</sup> So much for the judicial protection of individual rights! In essence, the Court reached this conclusion only because it rejected the idea that property rights are unalienable.

In contrast to the Supreme Court, I submit to you that there is no such thing as the power of eminent domain consistent with the law of nature and, therefore, the laws of the United States. The very term "eminent domain" suggests that it is literally defined as "a superior dominion." Indeed, it is employed in this way. When the civil magistrate claims to have an interest in even private property superior to that of individuals, it of necessity rejects the pre-eminent dominion authority of families. In other words, the doctrine of eminent domain is diametrically opposed to the law of God -- the law of nature -- and embodies the very antithesis of the unalienable right of private property.

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33. 467 U.S. 229 (1984).

34. *Id.* at 241.

35. *Id.* at 242.

Again, the key to restoring the protection and security of the fifth amendment is to return to a correct view of property rights as God-given, private, and unalienable.

## **CONCLUSION**

Even though the fourth and fifth amendments deal with many aspects of the liberties of free men, the full purpose of these provisions can never be accomplished without first reclaiming the unalienable right of property. Unreasonable searches and seizures, property taxes and eminent domain must all be recognized as the actions of a tyrannical and despotic government. I must conclude from the existence of these perversions of law that our civil officers have rejected the unalienable right of property based on the laws of nature and of nature's God for the rule of expediency based on political fiat.

The defect in present circumstances is not to be found in the Constitution. That instrument, in its original form and as amended, embodies a correct understanding of the immutable rules of law and provides adequate safeguards against tyranny. Rather, the problem lies in the hearts and minds of men who have rejected the world view of the men who framed the Constitution - a world view based on the laws of nature and of nature's God. Therefore, the solution is to return to that framework. Let us work toward a revival in our nation, that the present condition will not long continue.

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