Chapter 13

THE INSTITUTION OF PRIVATE PROPERTY IN AMERICA

INTRODUCTION

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

JAMES MADISON

The equal right of all men to the use of the land is as clear as their equal right to breathe the air — it is a right proclaimed by the fact of their existence. For we cannot suppose that some men have a right to be in this world, and others no right.

HENRY GEORGE

The reason why I defend the millions of the millionaire is . . . that I know no way in which to get the defense of society for my hundreds, except to give my help, as a member of society, to protect his millions.

WILLIAM GRAHAM SUMNER

PRIVATE PROPERTY has always been one of the basic American institutions. The first colonists and the later ones, the Founding Fathers and their Tory opponents, the men who built a new nation out of a wilderness, the great capitalists and most of the people who worked for them in the later nineteenth century, and we ourselves in the twentieth century have never ceased to maintain that the right to own things is a fundamental one. We have held that governments are instituted among men to protect this right, along with other fundamental rights — to life, to liberty, and to the pursuit of happiness. It is hard to conceive of an America without private property. Indeed it may be asked whether, if private property ceased to exist among us, we would be the same people. We would certainly not have the same ideas and ideals.

However, despite the perennial regard paid to property, it seems undeniable that private property, at least in the traditional sense of the term, is undergoing radical changes. We continue to think of property in the old way; but we act, in significant respects, in a new way. A "quiet revolution" has been going on under our very noses, and many of us are hardly aware of the change as yet; but it is probable that by

the end of the century our public notions of, and our public attitudes toward, private property will have undergone startling revision.

These radical changes in a perennial institution become apparent when the eighteenth-century theory of private property is compared with the modern theory, and especially with our contemporary practices with regard to property. At the same time, other questions come in for consideration. For example, what is the relation between property and citizenship — between the American as voter and the American as property owner? What social obligations, if any, does the owner of private property have, and why and how can the requirements of society override the rights of ownership? What is the difference between the possession of property and the control over its use, and does the distinction help to explain recent changes in the institution? Is there a valid conflict between "human rights" and "property rights"? The conflict was basic to the great question of slavery, but what is its contemporary meaning?

Finally, what will private property become in the America of the future? Are we headed for socialism, a condition of things in which all productive property is owned by the state, and only its benefits — such as they are or might be — are conferred on individuals? Or can we look forward to a time when all Americans — indeed all men — are independent proprietors, perhaps of a new kind, and enjoy the rights as well as the benefits of ownership?

1. THE EIGHTEENTH-CENTURY THEORY OF PRIVATE PROPERTY

For centuries, the Western discussion of the idea of private property was conducted by means of pairs of contrary terms, the most important of which were "natural" and "conventional." According to the view that was prevalent throughout the Middle Ages and much of the Renaissance, all things had originally been held by the human race in common, and private possession was to be justified mainly on the grounds of convention or custom. It was therefore positive law that protected private property, which was natural, as a consequence, only in the sense that positive law itself is natural. Mankind, fallen from its primeval condition of innocence, might "naturally" desire and attempt to protect its property, but the appropriation of common things by individuals was not inevitable and was even, to some extent, undesirable; the Christian in a state of grace would not wish to own property but would, on the contrary (according to the gospel demand), sell all he had and give to the poor. In the ideal or Edenic condition of man, no one would own anything, but all would be able to use what they needed for subsistence.

The eighteenth-century theory of private property met the older view at two main points. The earth had been given to mankind in common, said John Locke, writing at the very end of the seventeenth century, but this was a negative rather than a positive community of ownership; things belonged to no one rather than to everyone, and an individual had a natural right to take what he needed to live. But Locke went further. How had truly private property actually come into existence? What was its original justification? When the individual put *himself,* as it were, into the common, Locke replied, by that very act he made it proper.

"Though the earth and all inferior creatures be common to all men," Locke wrote, "yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labor' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labor with it

Library of Congress

Engraving of an early American farm

and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labor something annexed to it that excludes the common right of other men. For this 'labor' being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

"And thus . . . supposing the world," Locke went on to say, "given as it was to the children of men in common, we see how labor could make men distinct titles to several parcels of it for their private uses, wherein there could be no doubt of right, no room for quarrel."

Labor in the beginning having created the right to acquire private property, the question remained, how should the individual's property be protected from other men? According to Locke, and to most Englishmen and Americans in the eighteenth century, the answer was simple: government. For just governments, at least, derive their powers from the consent of the governed, who are possessed of certain inalienable rights; property is one of these rights, and so governments are instituted among men to protect it. For Locke, "property" and "right" were close to being the same thing.

It is true that Locke distinguished between two meanings of property. In the first general meaning, property and right *are* the same. The natural rights of life and liberty, for example, are proper to a man as a man; he cannot be deprived of either without violating his very nature. Indeed, the word "property" derives from a Latin word ultimately meaning "individual," and one obviously loses one's individuality if he loses his life, and almost as obviously if he loses his liberty. In the second, more specific meaning, property means the things that one owns, or, as Locke put it, one's "estate." Hence Locke, and most of his followers throughout the eighteenth century, tended to fuse the two meanings of the word and to maintain that governments were in-

stituted among men not only to protect the inalienable rights to life and liberty but also the right to estate, or to the possession of those things that were one's own.

According to historian Richard Schlatter, "Before 1690 [the date of publication of Locke's *On Civil Government*] no one understood that a man had a natural right to property created by his labor; after 1690 the idea came to be an axiom of social science." This is an exaggeration, but perhaps a salutary one, for it makes clear the dominance of the Lockean or natural right theory throughout most of the eighteenth century, particularly in America. Three American statements may be cited as exemplary. Samuel Adams wrote in 1768 that it is an "essential, unalterable right in nature, engrafted into the British constitution as a fundamental law, and ever held sacred and irrevocable by the subjects within the Realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent." The Massachusetts Bill of Rights of 1780 declared that "all men are born free and equal, and have certain natural, essential, and inalienable rights; among which may be reckoned the right . . . of acquiring, possessing, and protecting property." And James Madison in 1792 published one of the most precise and perspicuous essays on the subject ever written in America.

The word "property" in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual," Madison declared. But, he added, "in its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and which leaves to everyone else the like advantage. In the former sense," he observed, "a man's land, or merchandise, or money is called his property." But "in the latter sense, a man has property in his opinions and the free communication of them." Thus he has "a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them."

"In a word," Madison concluded, "as a man is said to have a right to his property, he may be equally said to have a property in his rights."

2. PROPERTY RIGHTS, THE CONSTITUTION, AND CITIZENSHIP

The English in the eighteenth century did not completely accept the Lockean theory of property. Historically, the theory had helped to justify the "Glorious Revolution" of 1688, which established the claim of property owners against the Crown; with the revolution won, the natural rights theory was less useful, and indeed could be turned against the great landowners themselves, for the theory seemed to imply that a man had a *natural* right only to so much of the "common" as he could consume himself.

In America the Lockean theory reigned supreme. Indeed, those who objected to taxation without representation based their arguments mainly on this theory. The statement by Adams quoted above was directed against the British tax collectors; the idea was that since the colonists had a natural right to their property, it could not be taken from them in the form of taxation without their consent, that is to say, unless they were represented in the legislative bodies that decided to take it. The American Revolution was fought to a large extent over this issue.

After the war was won, the situation changed, as it had changed a hundred years before in England. Now the idea of the natural right of property meant one thing to

those who had funded, commercial property, based on money contracts, and the like, and another thing to those whose property was based on labor, especially the labor involved in clearing one's own small portion of the wilderness. The supporters of the Constitution — the Federalists — generally belonged to the former class; they expected that this document, and the central authority established by it, would be a bulwark against "radical Democratic" attempts to redistribute property. And those who opposed the new Constitution were generally small landholders and persons with little or no property. To the anti-Federalists, the Constitution appeared to make possible a tyranny of property over the popular will. The dispute flared more than once into actual fighting, notably in Shays's Rebellion in Massachusetts in 1786.

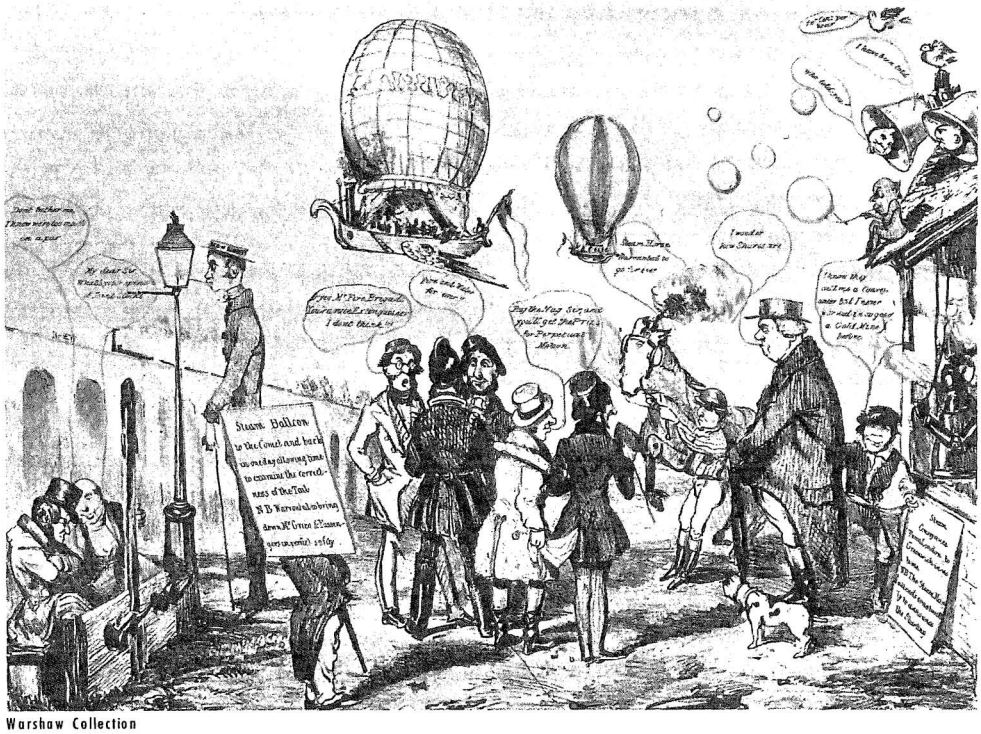
The Constitution itself makes little mention of property and property rights, lacking, as it did at first, a federal Bill of Rights. (Many of the states had bills of rights like that of Massachusetts.) The Federal Convention had dispensed with a bill of rights because they saw no need to require a government of property owners to respect property — the basis, as John Adams asserted, of all liberty. However, the Constitution was not acceptable in this form to many state legislators, who made the inclusion of a bill of rights a condition of ratification. The result was the first ten amendments to the Constitution, the fifth of which states that no person shall be "deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." As Schlatter observed, "the Fifth Amendment enacted into law the *Civil Government* of Mr. John Locke."

Incidentally, as Schlatter and others have pointed out, the heirs of the Federalists can be grateful to the anti-Federalists who forced through the Amendment. For as the nineteenth century wore on, the people — through the wider and wider extension of the suffrage — captured the government that the Federalist fathers had sought to reserve to men of property. Thus the Fifth Amendment, supplemented by the Fourteenth, which prohibited state governments as well as the federal government from depriving citizens of their property "without due process of law," both of them interpreted by a Supreme Court with strong and conservative views on the rights of property, became the chief legal barrier to popular demands for limitations on private ownership. For example, although the Court upheld an Illinois state law fixing maximum rates for grain storage in 1877, it struck down the attempts of various states to regulate railroad rates in 1886 on the grounds that such laws violated the due process clause of the Fourteenth Amendment. The effect was to reinforce corporate property rights, for it was argued successfully that corporations were "persons" in the meaning of the Amendment.

The ratification of the Fifth Amendment did not solve all the problems of property, particularly those raised by the relation of property to citizenship. Some of these problems are reflected in the conflicting, or at least inconsistent, statements of a man such as Thomas Jefferson regarding property rights. When Jefferson was thinking of the kind of tyranny that he felt had been exerted by the Crown over the American colonists, he was prone to speak of the violation of a *natural* right to property; but when he was thinking of the policies of a free, democratic government in which the franchise would be universal or nearly so, he was prone to speak of a *conventional* right to property, which, since it was based on positive law alone, could be amended by legislative action. Such inconsistencies were, in fact, common at the time.

Jefferson seems to have felt that if all men owned property, then the natural right theory would be the best one to uphold;

54



Warshaw Collection

"Joint stocks, railway, steam, mining, and aerial arcana"; British view of American "venture capitalism," 1837

for, in that case, not only would all men be able to vote, and thus participate in their government — for him the most desirable situation — but they would also tend to be solid, virtuous, and independent citizens. But all men, particularly in the old countries of Europe, did not own property, Jefferson realized; nor did those who owned property own equal amounts. Hence legislative action to redistribute property — to spread it more widely and evenly among the population — was desirable.

"I am conscious that an equal division of property is impracticable," he wrote in 1785. "But," he added, "legislators cannot invent too many devices for subdividing property, only taking care to let the subdivisions go hand in hand with the natural affections of the human mind. The descent of property of every kind therefore to all the children, or to all the brothers and sisters, or other relations in equal degree is a politic measure, and a practicable one. Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point and to tax the higher portions of property in geometrical progression as they rise."

These proposals, radical for their time — though some of them have since been adopted — are indicative of Jefferson's attitude and that of many Democrats; for they are based on the notion that the right to equality takes precedence over the right to property, and that a just government, while continuing to protect property, ought to regard equality as the primary end.

According to Jefferson, the franchise ought not to be restricted to property owners; and he answered the views of his opponents with arguments based both on the natural right theory and the conventional right theory of ownership, as it served his purpose. His opponents tended to emphasize the natural right theory alone. For example, the Federalist Tunis Wortman, writing in 1800, declared that "the welfare of society requires every active citizen to be deeply interested in the prosperity of the state: he should feel that he has something valuable at stake. . . . He who possesses a property in the soil may be considered as a

permanent member of society." And he went on to say that "the individual who is possessed of property will act with principle and independence; but the child of poverty is a feather that may be wafted by the lightest breeze." It is obvious that such a person cannot consider himself a "permanent member of society" unless he enjoys permanent possession; and this is only to be assured by his natural right to his property. Similarly, an editorial in the New York *Journal of Commerce* in 1829 warned that "by throwing open the polls to every man that walks, we have placed the power in the hands of those who have neither property, talents, nor influence in other circumstances, and who require in their public officers no higher qualifications than they possess themselves."

The resolution of the problem posed by the conflict between those who felt the franchise should be restricted to property owners and those who felt it should be extended to persons who possessed little or no property was found not in political debate but in the special circumstances of the new country. As Charles Pinckney pointed out as early as 1787, "That vast extent of unpeopled territory which opens to the frugal and industrious a sure road to competency and independence will effectually prevent for a considerable time the increase of the poor or discontented and be the means of preserving that equality of condition which so eminently distinguishes us." The same point had been expanded upon by the Federalist John Adams, who debated it with the Republican Jefferson in a series of letters covering many years.

In a letter written in 1776, not to Jefferson but to another friend, James Sullivan, with whom he also discussed the subject, Adams first conceded that men without property were unworthy — or relatively unworthy — of the franchise. Is it not true, he asked, "that men in general, in every society, who are wholly destitute of property, are also too little acquainted with public affairs to form a right judgment, and too dependent upon other men to have a will of their own? If this is a fact, if you give to every man who has no property, a vote, will you not make a fine encouraging provision for corruption, by your fundamental law?" However, to restrict the franchise too severely, as Adams observed in several later letters to Jefferson, might be to create an "aristocracy" that would be no more responsive to the public good than a "democracy" of men of no property.

The balance of power in a society accompanies the balance of property in land, Adams emphasized in his letter to Sullivan. Therefore, he declared, "the only possible way . . . of preserving the balance of power on the side of equal liberty and public virtue is to make the acquisition of land easy to every member of society; to make a division of the land into small quantities, so that the multitude may be possessed of landed estates. If the multitude is possessed of the balance of real estate, the multitude will have the balance of power, and in that case the multitude will take care of the liberty, virtue, and interest of the multitude, in all acts of government."

The principles here affirmed by Adams were embodied in several important acts of legislation, notably the Northwest Ordinance of 1787 and the Homestead Act of 1862. And even though state legislatures, at least before the 1820s, generally assumed a connection between property and citizenship, in the special circumstances of the country the assumption actually had a democratic effect. In Massachusetts, for example, the new constitution adopted by the state in 1780 increased rather than decreased the property requirements for suffrage and officeholding, but the result was nevertheless that more adult white males exercised the suffrage than in any other society at the time. In Massachusetts about two of every three white males had the vote; and the

same was true, though to a somewhat lesser degree, in Virginia.

The reason, of course, was that almost everyone could be an owner of land in America — the land was there for the taking, and the situation was radically different from that of the old countries of Europe. Hence the franchise could safely be extended to all, or nearly all, of the people. And that is indeed what happened. [For further consideration of some of the matters treated in this section, see Chs. 4: GOVERNMENT BY THE PEOPLE and 9: EQUALITY.]

3. PROPERTY AND POWER

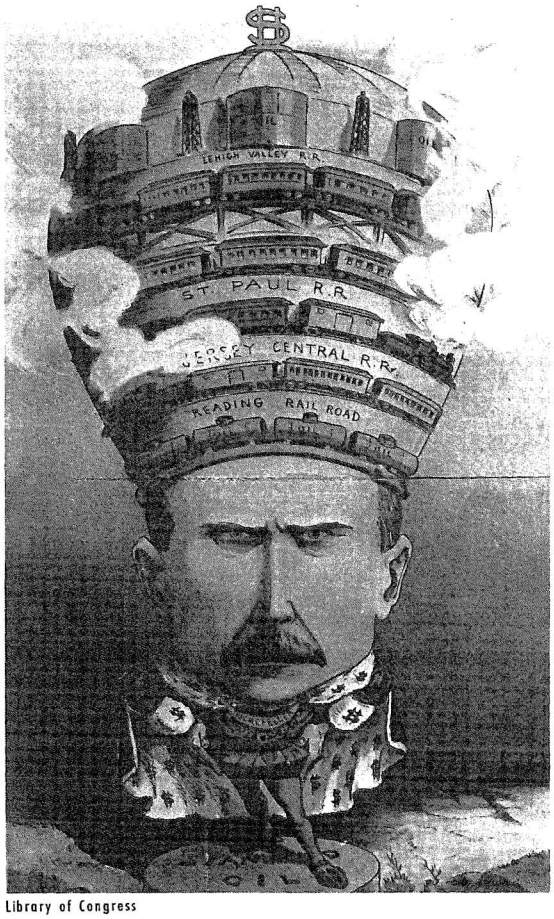
DESPITE THIS PRACTICAL SOLUTION of the problems raised by the relation of property to citizenship, questions remained to trouble Americans for decades. Emerson, writing in 1841, after the Jacksonian democratization of political institutions, observed that "the law may in a mad freak say that all shall have power except the owners of property; they shall have no vote. Nevertheless," he added, "by a higher law, the property will, year after year, write every statute that respects property. The nonproprietor will be the scribe of the proprietor." "He who commands the property of a state," Thomas Skidmore asserted in 1829, at the beginning of the Jacksonian period, "or even an inordinate portion of it, has the liberty and the happiness of its citizens in his own keeping." Indeed Adams had put it even more strongly in his letter to Sullivan of 1776. "Power always follows property. This I believe to be as infallible a maxim in politics as that action and reaction are equal is in mechanics."

This of course was an old point; and it was allied to another equally as old. There is a distinction, men have pointed out for centuries, between the possession of property and the use of it. In earlier times this distinction was often made in a moral context: it was claimed that, while a man could properly own something, he could not properly misuse it to harm his neighbor.

However, possession and use were not really seen as separable by men like Adams, as is evident from their insistence that political power always follows the possession of property. Those who have not only get but also control — simply by virtue of their having. The greatest benefit conferred on a man who owns property thus consists in the political power that he inevitably gains, and this is consequent on the assumed use of his property that necessarily follows from his possession of it.

Once again, however, the peculiar American situation subtly changed older ideas. In Europe, and in America throughout the eighteenth and much of the nineteenth centuries, the commonest and most characteristic item of property was a piece of land, possession of which practically entailed use. Traditionally, ownership of land conferred not only political power but also the social perquisites of property (as they may be called), the most important of which, perhaps, were economic security and independence. Thus in the early years of our national history, the characteristic desire was to own a piece of land and by means of that ownership to obtain the security and independence so eagerly sought by immigrants from European countries, where only the rich were really safe and free.

In America there was much land available, as long as the "natural right" of the first proprietors, the Indians, was ignored; and the Americans appropriated almost all of it within the short space of a century. However, by the 1870s the vast reservoir of "free" land was beginning to run out, even in the West. This fact aroused alarm in several commentators on the American scene, notably Henry George, whose *Progress and Poverty* (1879) warned that European developments might now be expected in the newly settled continent. "The great cause of



Library of Congress

"The King of the Combinations"; "Puck," 1901

inequality is in the natural monopoly which is given by the possession of land," he wrote. "The idea of property, which naturally arises with reference to things of human production, is easily transferred to land, and an institution which when population is sparse merely secures to the improver and user the due reward of his labor, finally, as population becomes dense and rent arises, operates to strip the producer of his wages. . . . A dominant class, who concentrate power in their hands will likewise soon concentrate ownership of the land. . . . And inequality once established, the ownership of land tends to concentrate as development goes on."

An even more subtle danger than the growing monopoly of landholdings threatened the institution of private property at this time. For property was changing its character in a way that was not so evident to most people in America, where there remained, relatively at least, considerable free land, than to people in Europe, where there was little or none. The use of property continued to follow its possession, and political power went with both. But another kind of power, *i.e.*, economic power, began to separate itself from the ownership of land and to follow the ownership of machines — the means or instruments of production in an industrial economy.

As capital grew and the industrial might of the nation expanded toward the end of the nineteenth century, the great capitalists came to possess not only economic power but political power as well. Power *does* follow property, as Adams had said, and as many in the twentieth century were to echo him in saying; the question, however, is not whether it does, but what *kind* of property confers power. The most marked characteristic of the history of the institution of private property in nineteenth-century America was that a new kind of property came to the fore, but most Americans did not realize it. They continued to seek land, which indeed conferred important benefits, including security and independence. But the real power shifted to those who owned machines and manufactures. [For consideration of the matters treated in this section from other points of view, see Chs. 15: Freedom of Enterprise and 16: Corporation.]

4. THE ACQUISITION OF PROPERTY: EMINENT DOMAIN

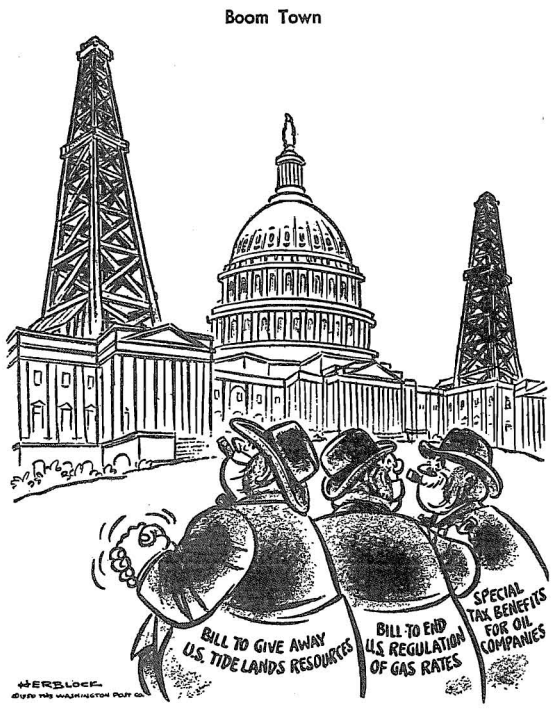
Mention was made in the previous section of three topics that require discussion before we go on to consider the radical changes in the institution of private property in the present century. These are the question of how property, especially land, is acquired, and the allied topic of the right of eminent domain; the question, hinted at by Emerson and Skidmore, of whether there is a basic

conflict between "human rights" and "property rights"; and the question of the relevance of a special kind of property, slaves, to the American history of property.

The traditional basis of property right was occupation ("possession is nine-tenths of the law"); Roman law, for example, tended to hold that ownership follows use, and that he who controls a piece of property can properly be said to possess it. This principle was widely applied in America, with, however, some curious inconsistencies.

In 1800 the whole western two-thirds of the continent lay open before the citizens of the new nation; the question was, who owned that land? According to the traditional principle of occupation, the answer had to be the Indians, who had been there for centuries. But that answer was satisfactory only to romantics; in any event the principle could lead to another conclusion. For although it was conceded that the Indians were *there,* it could be argued that they did not actually possess the land in the sense of using and controlling it. In fact, and sometimes even in law, the American who could drive the Indian from a piece of land, build a house, level the primeval forest, and till the ground was ordinarily held to possess it as his property — to which, by an extension of the Lockean theory, he could even be said to have a natural right, since he had applied his labor to the appropriated acres. And most of the vast, empty — or relatively empty — continent was appropriated in this way.

The too-literal interpretation of the principle of occupation led to difficulties, for if a man occupied a piece of land for a while and then moved to a different piece of land, could he be said to have lost title to the first piece? And could a man hand on property to his sons, who had not appropriated it in the original way? Indeed, as Frank Soulé observed in 1854, writing of the experience of the gold diggers in California in 1849, "One considerable cause of personal



disputes and bloodshed was the uncertainty of legal titles to property, which encouraged squatterism. Owing to recent conflicting decisions by the courts of law it almost appeared that the only, or the best title to real estate was actual possession." And there were also problems about water rights in the parched Western states, where land with water was extremely valuable, while land without it was worthless. Could one man, because a stream went through his property, appropriate all of its flow for his own purposes, and in effect make a desert of the properties downstream? Or was his right to the water limited by the amount of property he owned, and could he take no more than a fair share?

These particular problems were resolved by various court decisions in the late nineteenth and early twentieth centuries, although there are still disputes among the Western states regarding water rights. But a second and closely allied problem came to the fore in the same period, and one not so easily resolved. Did the private owner have a social obligation to use his property in a

way conducive to the common good or to the good of the greatest number? And in what circumstances did the government or society at large have the power to expropriate private holdings for common purposes?

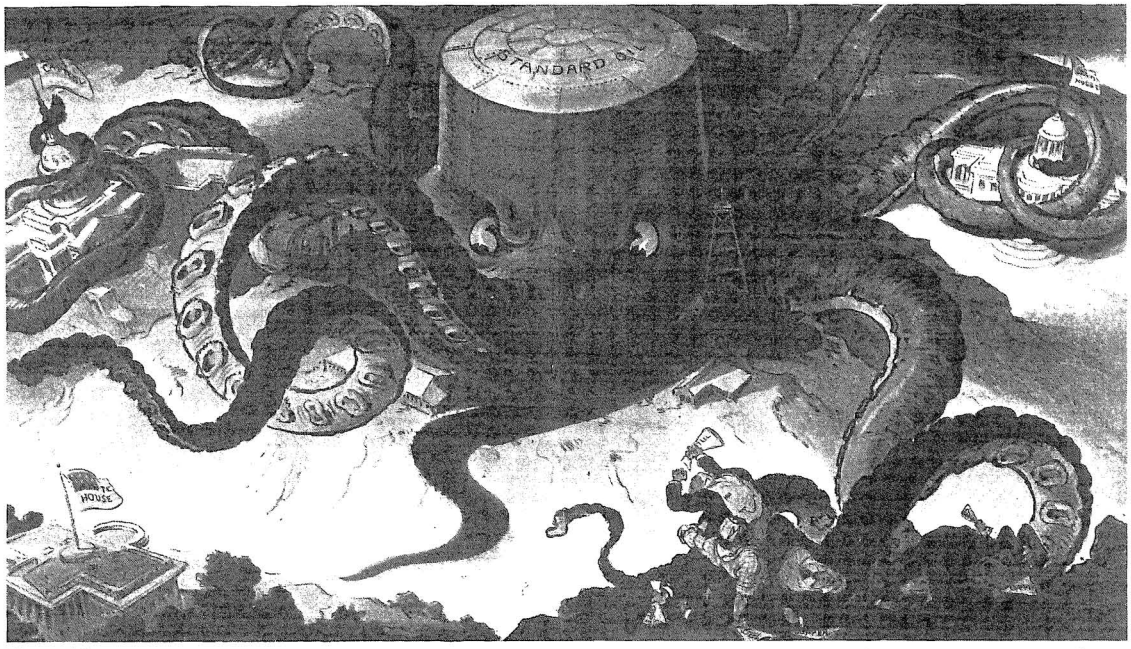
Thus J. W. Hurst, among others, made the point that in the United States, in the nineteenth century, private property rights were not so sacrosanct that they could not be abrogated (by eminent domain and in other ways) upon a proper showing that the economic needs of the community would be jeopardized by the continuation of that right. For example: A man owns a piece of land along a river. His land would make a fine site for a grist mill. He does not want to sell; but the land is nevertheless taken (with some compensation) by eminent domain, on the grounds that the economic needs of the community override the owner's property right. With the coming of the railroads, some states even went as far as to vest with the railroad company the right to condemn property by eminent domain that was needed for the right of way. In this case, an element of state sovereignty was transferred to a private corporation, but for the same reasons for which the state itself could exercise its right of eminent domain — to seize property when not to do so would interfere with the economic "progress" of the community.

The right of eminent domain had been recognized in the Constitution, which also required that public seizures of private property be properly compensated. U.S. courts were at first unwilling to allow such seizures, especially in the open lands of the West. But the situation changed when, as was inevitable, the land began to run out. In the relatively crowded Eastern states this happened early, a fact reflected in documents such as the constitution of Vermont (1777), which declared that "private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." But the problems of eminent domain, and the conflict between public and private interests, did not really become very pressing until the beginning of the twentieth century, by which time the frontier had ceased to be a fact.

In recent times, the issue has revolved around the ownership of what has come to be called "wilderness" — unused and therefore "unspoiled" land that is held to be, in some sense, the inheritance or birthright of all the people and not simply of those who wish to exploit it for their own private gain. Theodore Roosevelt was a leading figure here; his conference of state governors for the purpose of considering the conservation of natural resources in 1908 was one of the first important official events of its kind. The acquisition of the great national parks, like Yosemite, Yellowstone, and Grand Canyon, was also a step toward the fuller recognition of the "wilderness idea." More recently, there have been movements to save the last remaining California redwoods, to preserve the natural beauties of the Grand Canyon area from the inroads of private power companies, and so forth.

How these and other similar disputes will be resolved it is not possible to say. It is probably safe to say that more and more land, if not property of other kinds, will be appropriated for public use in the future. The establishment of the Cape Cod National Seashore in 1961 is a case in point; here a large tract of privately owned land along the Atlantic side of Cape Cod was bought by the federal government and converted into a park. And other such parks also will be created before the end of the present century.

At the same time it must be conceded that some government seizures of private property — for example, property taken for the interstate highway system — have been objected to vociferously by large segments



Library of Congress

"Next!"; lithograph by Joseph Keppler for "Puck"

of the population (both by those intimately concerned and by those with only a peripheral interest in the particular lands involved) on the grounds that the stated community need was not really a need at all but rather an intrusion on the rights of all the people. A highway, for example, is an excellent means of transportation; but it is also a cause of air pollution. A government (state or municipal) sewage plant is required to deal with the rubbish of a city; but it destroys the beaches at which the city's dwellers have been accustomed to swim.

Some of the problems raised at mid-twentieth century by this conflict between public and private rights, and between one public right and another public right, are among the most difficult that we have to face in our time. [For further consideration of some of the topics dealt with in this section, see Ch. 2: FRONTIER.]

5. PROPERTY RIGHTS VS. HUMAN RIGHTS

THE IDEA that there is a conflict between "property rights" and "human rights" is based, to some extent, on a misconception. There are no rights other than human rights; the right to property is no less human than the right to life or liberty.

Nevertheless, the notion that property, somehow or other, has impersonal "rights," and that these are in basic conflict with the rights of the ordinary human being, has a long history in American thought. For example, Theodore Roosevelt declared in *The New Nationalism* (1910) that "we are face to face with new conceptions of the relations of property to human welfare, chiefly because certain advocates of the rights of property as against the rights of men have been pushing their claims too far. The man," Roosevelt went on to say, "who wrongly holds that every human right is secondary to his profit must now give way to the advocate of human welfare, who rightly maintains that every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it."

The idea being put forward here, while it supports the public interest as against the private (in certain circumstances), is different from that involved in the right of eminent domain. The latter justifies actual sei-

zures of property from private owners; Roosevelt's idea was that all private owners have an obligation to the community at large, and that they are limited in their use, if not in their possession, of the things they own.

His views were shared by many, both before and after 1910. "The force of the religious spirit should be bent toward asserting the supremacy of life over property," Walter Rauschenbusch wrote in 1907. "Property exists to maintain and develop life. It is unchristian to regard human life as a mere instrument for the production of wealth." An editorial in *Fortune Magazine* declared in 1951 that "the old concept that the owner has a right to use his property just the way he pleases has evolved into the belief that ownership carries social obligations, and that a manager is a trustee not only for the owner but for the society as a whole." And Benjamin Franklin had made much the same point more than a hundred years before Roosevelt. Private property, Franklin wrote in 1789, "is a creature of society and is subject to the calls of that society, whenever its necessities shall require it, even to its last farthing; its contributions to the public exigencies are not to be considered as conferring a benefit on the public, entitling the contributors to the distinctions of honor and power, but as the return of an obligation previously received, or the payment of a just debt."

On the other hand, many opposed the notion that property entails social obligations. One consequence of that "absurd" belief, according to William Graham Sumner, is the equally absurd belief that all men ought to have property. We indeed ought to guarantee equal rights, he declared in 1883; however, "rights do not pertain to *results,* but only to chances. . . . It cannot be said that each one has a right to have some property, because if one man had such a right some other man or men would be under a corresponding obligation to provide him with some property." Clarence Darrow made a similar point, and one that returns to the subject of an earlier section of this chapter. "Every democracy begins with a great mass of regulations inherited from the autocratic powers that have gone before," he wrote in 1903. No one would dispute that; but Darrow went on to declare that "these laws and customs are originally the same decrees that have gone forth from the absolute rulers of the earth, and every change in forms and institutions is based upon the old notions of property and rights that were made to serve the ruler and enslave the world."

In other words, Darrow was saying that, like it or not, property has rights in that property owners are the real, if not the apparent, rulers of mankind, even in democracies. "Power grows by what it feeds on," he exclaimed; and what it feeds on is property. We might prefer to see "human rights" raised above the "rights" of property; doubtless ideal justice would demand that they be so raised. But the ideal is not often attained. [For more extensive discussion of the positions sketched in this section, see Ch. 5: GENERAL WELFARE.]

6. THE DISPUTE ABOUT SLAVES AS PROPERTY

THROUGHOUT their national existence, Americans have owned, and still own today, many different kinds of property, ranging from land itself to the produce of land, to the rents of land, to the income from the investment of the rents, to machinery, to stocks and bonds in industrial corporations; and, on another side, ranging from the produce of their ingenuity (patents and similar possessions) to the produce of their skill (copyrights, job seniority, and similar items of property). The most controversial of all the things that Americans have owned is other human beings.

Most of the issues considered in earlier sections of this chapter came to a head in the furious debate over slavery that raged from 1800 to the Civil War. Those who desired to justify slavery could not make use of the philosophy of natural rights insofar as it emphasized liberty and equality. Locke's theory of private property would seem to be directly opposed to slavery, as we have seen; for if a man has a natural right to anything, it is to his freedom, to the " 'labor' of his body and 'work' of his hands." Nevertheless, slaveholders were able to use the terminology of the natural rights theory. They did this by making a distinction between two kinds of natural rights.

According to the commonest Southern argument, interference with slavery was interference with property itself, to which men of course had a natural right. "The right to slave property," declared Henry Clay in 1840, "being guaranteed by the Constitution, and recognized as one of the compromises incorporated in that instrument by our ancestors, should be left where the Constitution has placed it, undisturbed." Such a statement, however, seemed to base the right of property in slaves more on convention than on nature, a defect that was remedied, for example, by the Lecompton (slavery) Constitution of Kansas, which, in 1857, declared that "the right of property is before and higher than any constitutional sanction." This was to insist that the natural right of property superseded any conventional right, however construed.

Nevertheless, this did not do the whole job, for it could still be maintained that the natural right to freedom conflicted with, and even superseded, the natural right to property. This position was countered by men such as George Fitzhugh, who based his reasoning on the asserted fact that Negro slaves were naturally inferior, and that their natural rights were therefore defective as compared with those of whites. Furthermore, since Negroes needed to be taken care of like children, slavery was not only natural (for them) but also humane. According to Fitzhugh chattel slavery was more just than the industrial "wage slavery" practised in the North, because Southern Negroes, unlike their Northern counterparts, were the recipients of benevolent and affectionate care.

It is interesting to record that John Wilkes Booth, the assassin of President Lincoln, concurred in this judgment. "Looking upon African slavery from the same standpoint held by the noble framers of our Constitution," he wrote in a letter left with his sister shortly before the assassination, "I have ever considered it one of the greatest blessings (both for themselves and us) that God ever bestowed upon a favorite nation."

The Southern argument, of course, was vigorously opposed, and on precisely the grounds that Fitzhugh tried to meet — namely, that the natural right to freedom should override the natural right to property. "We maintain," wrote Abolitionist William Lloyd Garrison in 1833, "that no compensation should be given to the planters emancipating their slaves, because it would be a surrender of the great fundamental principle that man cannot hold property in man." The reason, Garrison went on to explain, lay in human nature itself. A further point was made by Horace Mann. "Because horses and oxen are *property,* by the common consent of mankind," he wrote in 1850, "it needed no law to make them property. . . . Slaves are not *property*" in this sense — that is, not only is slavery wrong from the point of view of the natural right theory but also from that of the conventional right theory. Many others shared their feeling.

Lincoln agreed with writers like Garrison and Mann, that slaves were not rightful property. Slavery is based on the principle of "You toil and work and earn bread, and I'll eat it," he declared in a speech in 1858. The Negro may not be our equal in all re-

spects, he went on to say, but "in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man." "I never knew a man who wished himself to be a slave," he wrote in an album at a Sanitary Commission Fair in 1864, and added — it is the simplest of all versions of the natural rights argument against slavery — "Consider if you know any *good* thing that no man desires for himself."

Nevertheless, Lincoln urged, as against the Northern "radicals," that the Southern slave owners should be compensated for the loss of their slaves, whether the slaves were rightfully owned or not. His reasons may have been merely practical; he hoped by such compensation to avoid, and later to end, the war. An astute politician, he realized what Machiavelli had realized many years before, that men are often more willing to forget and forgive the loss of their fathers than of their patrimony. When Lincoln failed to persuade Congress to appropriate the vast sum needed to compensate the Southerners for their slaves, and failed, too, to persuade the Southerners to accept it, he issued the Emancipation Proclamation.

7. PROPERTY IN THE TWENTIETH CENTURY

We observed at the beginning of this chapter that the institution of private property in America has undergone radical changes in our time, and that a crisis in its history may well be in the making. Evidence for this statement may be found in many modern economic practices.

Consider, for example, the practice, which became more and more prevalent during the 1960s, of renting automobiles rather than buying them. At an earlier time, only a few of the very rich rented cars, primarily to avoid suits for heavy damages if the car was involved in an accident. In the 1960s, however, many ordinary Americans rented cars. The reason often given was that there were tax advantages in so doing, but there was actually more to it than that.

The real explanation is perhaps that it was not such a great change, after all. In the post-World War II period, cars generally were bought "on time"; the "owner" made a small down payment and "financed" the car, either through a bank or some other lending agency. "Ownership" in this sense entailed responsibilities: the car was registered in the "owner's" name, he had to obtain liability insurance, and he paid for gas, oil, and repairs. But if it ever happened that he fell behind in his payments, he soon discovered that his ownership of the car was more questionable than he had thought. His down payment, he discovered, did not even cover the depreciation in the value of the car brought about by his purchase of it — even if he only drove it around the block it was thereafter a second-hand car — and his monthly payments did not cover the continuing depreciation in value brought about by the introduction of yearly model changes.

Another example is even more familiar. Many Americans in the same period supposed themselves to be the owners of houses — some 55 million all told, a higher proportion of the population than in any country in the world. But let us imagine a far-from-impossible case, that of a man who "owns" a house valued at $25,000, and who has a mortgage of $18,000 on his "property." Who actually owns the house — the mortgagee or the mortgagor? Let us suppose, in addition, that the putative owner has recently had some repairs done and is now disputing the cost of these with his contractor. The "owner" fails to pay the bill; the contractor is able to obtain a contractor's or mechanic's lien on the property, a court order that prohibits the "owner" from selling his property until the claim is

Courtesy, C. D. Batchelor, New York "Daily News"

satisfied. Now who owns the house? Further, let us assume that the title of the *previous* owner of the house is challenged in the courts — once more not an uncommon occurrence. Either the present "owner" has title insurance, in which case the title guarantee company now has a claim of sorts, or he does not, in which case another lien is obtainable, the result of which will be to prohibit him from even giving the house away. But if he cannot even give the house away, and if he owes most of its value to the mortgage holder, does he really own it at all? Once more his claim is dubious.

The kind of "attenuation" of property right that is represented by these examples also applies to other than real property. As is pointed out in Ch. 16: CORPORATION, the "owner" of a share of stock in a large industrial corporation does not possess property in the traditional sense. He does have the right to sell his share; and he also has the right to receive income if he holds onto it. But usually he has no control over the disposition of his "property." Possession of a hundred-dollar share in a billion-dollar company does not confer any kind of jurisdiction over even the tiny part that the hundred dollars represents. The sort of ownership that is implied is far different from that envisioned by the earlier proponents of the natural right of property.

One more example — perhaps the most bizarre of all, from the point of view of the traditional theory — will suffice to make the point. Suppose you have $1,000 that you wish to invest — with which to buy "a piece of America," as the modern phrase has it. You will find that you can buy five shares of this stock, ten shares of that, or fifteen shares of the other — but none of these purchases is particularly inviting, for all involve a risk that the given stock will decrease sharply in value. In order to spread the risk, you therefore decide to invest in a mutual or trust fund, and you give your $1,000 to a trustee, who amalgamates it with the savings of many others and buys stock in a large number of companies. Now who owns the stock? You do not; you merely own the right to receive such income as the mutual or trust fund shall declare and to demand as much of your money as may remain after a stated period. But the mutual fund does not own the stock either, for it has bought it with your money. The companies do not, for they have received due payment for their stock. In fact, all of the shares bought (but not owned) by the mutual company are held "in trust" for you and the other subscribers. From the traditional point of view, nobody owns the stock itself!

As Fr. Paul P. Harbrecht, S.J., put it in 1960, "Today the notion that ownership has been divorced from control of productive property has become commonplace. Though it is not so clearly known, the evidence is now before us that, with the advent of the pension trusts, the mutual funds,

and the large accumulations of corporate stock in the hands of bank-trustees, ownership itself as an operating reality is diminishing. In the process of the evolution of property relationships the concept of ownership has been gradually stripped of the rights and prerogatives that once made ownership desirable. We have reached a stage in the evolution of property — and here we are speaking only of productive property — where the individual is an owner because he possesses a piece of paper which says he is. The sole advantage left to the possessor of the paper, however, is the right, under certain circumstances, to receive income."

In a similar vein, lawyer David Bazelon showed by means of a fable how difficult it has become to define property legally. In a modern law school, he pointed out, "some of the best all-around fun is had in arriving at a definition of property." First off, the basic image of property — land and things — is ridiculed, then the search for a definition is carried through contract rights, choses in action (unrealized rights, including claims in court), and other intangibles. The class then thinks it has the answer: property is rights — called property rights or, in the short form, property. This is the point at which the modern professor enjoys himself the most, and to confound the class completely he pulls out a case in which a property right is recognized and enforced by a court *for the first time.* "A smile settles on the professor's face, and the pot of gold is indicated: Property is a right of use or disposition *which will be enforced by a court."* Such a definition is of course tautological, as Bazelon realized, but it is nevertheless all we have.

The familiar economic practices mentioned above have been noted by many commentators. Generally speaking, they tend to make three observations regarding the changes that have occurred.

First, they point to a progressive separation of the possession from the control of property — a growing distinction between what we have called its possession and its use. Many writers emphasize the increasing control of large corporations by hired managers, men who direct but do not own the vast amounts of capital concentrated in these industrial giants. The managers may indeed own stock in their own and other companies, but they usually do not own anywhere near enough to give them proprietary control in the traditional sense. As stock owners, they are no different from the ordinary citizen who owns a few shares in the corporation. But since there are so many owners, and since each owns such a relatively small part, the managers procure the control and wield the power.

Second, the writers point to the progressive attenuation of property rights, one of the results of the high taxes and other public "expropriations" that obtain in the modern "mixed" economy. As is pointed out in Ch. 14: Taxation, recent tax policies have had either as their explicit or at least as their implicit goal the "redistribution" of wealth by means of progressive income taxes, escalating inheritance and estate taxes, and the like. A man no longer has the unquestioned right to hand on his property intact to his chosen heirs, nor does he have the right to keep, invest, or consume all he can manage to earn. In the view of many, such expropriations do violence to the fundamental idea of private property.

Finally, many observers today point to a fact that might have been astonishing in earlier times. Men without property in modern America can and do live well, by all the signs once applied to men of property; they enjoy, in the world of today, what may be termed the economic equivalents or advantages of property. A. A. Berle described the situation in 1954. "Property, theoretically considered, has two sets of attributes," he declared. "On the one hand, it can be a medium for creation and produc-

tion and development. On the other, it offers possibility for reception, enjoyment, and consumption. An old-fashioned farm or small business property held by a single owner or small group of owners combined both groups of attributes in the same hands. The owner used his property to create, to produce, to improve. In a word, he used it as capital. He also used it to provide for his needs and for his enjoyment — in other words, for his consumption. Life was all in one piece, and the attributes were intertwined."

However, Berle went on to say, the situation has now changed. "The twentieth-century corporation has proved to be the great instrumentality by which these two groups of property attributes have been separated one from the other. The process was inevitable . . . [for] if modern civilization and technical development require enterprises of [a] size to provide the standard of living the American community expects, they require precisely this split of property into its component attributes, assigning the receptive attributes to the group of shareholders, and gathering the creative attributes in a single command."

Other writers point out that it is not only the shareholders who participate in the "receptive attributes" of property in modern America. Partly because of the progressive attenuation of property rights as a result of high taxes and the redistribution of wealth even those without any property at all share to some extent in the economic equivalents of ownership. Theoretically, no American at mid-twentieth century need starve, go unclothed, or be without shelter. He may have to depend on government relief, but he need not suffer the fate of men without property in earlier times. The average workingman is likely to have very little property, but he lives as well as many eighteenth-century landed proprietors, partly because of government assistance and partly because of the fantastic productivity of modern industry. And the middle class, owning, on the average, relatively little property by past standards, enjoys such perquisites of property as a second home in the country, two, or even three, cars, liberal allowances for clothing, travel, and recreation, and opportunities for mental stimulation and growth that were beyond the reach of all but the richest capitalists a bare hundred years ago. [For further discussion of matters treated here, see Ch. *5*: General Welfare.]

8. THE FUTURE OF PRIVATE PROPERTY

The question that seems to be uppermost in the minds of modern students of private property concerns the direction in which the institution is headed. They agree that to some extent we have learned to live without private property, at least in the traditional sense of the term. But they disagree about what the future will bring.

Three possibilities are most often mentioned. They are, first, state capitalism, where the state owns and controls all productive property. In this case there would be no separation of ownership from control of property, although the institution of *private* property might be said to have come to an end. The second is what Father Harbrecht calls the "paraproprietal society." In this case, the split between ownership and control of property is accentuated, at the same time that the attenuation of the right to receive returns from property also increases. The third is a new kind of capitalism that would not put an end to the progressive separation of ownership and control but would decrease the tendency toward attenuation of property rights.

Berle, among many others, has seen the process we have been describing as similar to revolutionary developments in countries like the Soviet Union, where the state owns

the means of production and receives all the benefits, but where hired managers control the productive capacities of the nation. In both the U.S. and the U.S.S.R., he declared in 1960, "an oligarchic group has power and uses it, though the justifying mythologies markedly differ."

The difference is of first importance, Berle was quick to observe. He pointed out that the Soviet Union "is a doctrinaire dictatorship. . . . But the United States is a democracy, capable of changing its opinions, its laws, and its executives and, incidentally, of changing the system by which the directors of AT&T are chosen; and nobody knows this better than this particular group of directors." The implication, of course, was that the managers and trustees of the great U.S. corporations are and must be responsible to the real needs of the community, so that state socialism, even if it actually developed here, would be very different from what it is anywhere else in the world.

Others maintain that socialism, at least in its traditional European form, cannot occur in the United States. The reason, according to writers such as Louis Hartz in *The Liberal Tradition in America* (1955), is, paradoxically, that there is no indigenous American conservatism, to which socialism has been traditionally opposed. We lack "a feudal heritage"; we were "born free." One result is our characteristic restlessness and also our progressive spirit; all Americans are forward-looking, it is claimed, because they have nothing really desirable to look back to. Another result is the lack of ideological differences between parties and political philosophies. Americans, of whatever political stripe — even those of the "conservative" wing of the Republican Party — agree in wanting change and improvement. According to this argument, only if a new class of men develops, a conservative class accepting duties and enjoying inherited privileges, will socialism have a chance in the United States. In that case, the workers will sooner or later follow suit. They too will form themselves into a coherent class grouped around a socialist party as they have in Europe. But Hartz and others do not consider this to be likely.

Father Harbrecht maintained that America is moving toward a paraproprietal society — one that would be, as the term indicates, beyond property. "A man's relationship to things — material wealth — no longer determines his place in society (as it did in a strong proprietary system)," he wrote, "but his place in society now determines his relationship to things. This is the consequence of the separation of control over property from individual ownership."

The point, made by others as well, is that the ownership of property no longer confers social status — the man of great wealth is "rather respected than obeyed" — but, on the contrary, that status is the key to social relationships. The president of a large U.S. corporation, even if he is not a man of wealth (as he would necessarily have been a hundred years ago), wields great influence, both social and economic. He also enjoys political power, but Father Harbrecht observed that his exercise of this kind of power is limited.

"Our great domains differ from those of the feudal age," Father Harbrecht went on to say, "in that the grantors of power are the people themselves. These people may appear to be impotent beneath the powers of the rulers of the domains, but they have powers, economic and political, which can be brought to bear upon their vassals. Another great difference between our society and that of the feudal domains is that our domains exist alongside a well-organized political power centered in a strong government. Juridical power does not lie with the economic rulers. Thus the reserved powers of the new lords, the people, are considerably stronger. Their problem will be to keep

the powers of their two vassals, the economic and political, separate and in balance."

Other writers have disagreed that either socialism or the paraproprietal society needs to be the form of the future. They emphasize the fact that a modern family may have a decent — indeed, more than a decent — standard of living in the total absence of private property in the traditional sense; at the same time, however, these perquisites of property may not include the independence that once accompanied property. And they point to the desirability of retaining independence, at whatever cost.

"Where men have yielded without serious resistance to the tyranny of new dictators," wrote Walter Lippmann, "it is because they lacked property. They dared not resist because resistance meant destitution. . . . What maintains liberty in France, in Scandinavia, and in the English-speaking countries is more than any other thing the great mass of people who are independent because they have, as Aristotle said, 'a moderate and sufficient property.' They resist the absolute state. An official, a teacher, a scholar, a minister, a journalist, all those whose business it is to make articulate and to lead opinion will act the part of free men if they can resign or be discharged without subjecting their wives, their children, and themselves to misery and squalor."

Those words were written in 1934; and they do not seem to take into account the more recent developments that are noted by the other writers considered in this section. Nevertheless, in the view of a few contemporaries, there remains a feasible solution of the problems — economic, political, and social — raised by the attenuation of property rights in the modern age. This is to enable everyone to become a capitalist in the traditional sense. This, these writers maintain, is far from being an impossibility in our day. It could be brought about, for example, by paying workers partly in wages and partly in stock, so that, after a time, they would own an important, if not a controlling, share in the company for which they work.

According to several writers, this conception of everyone as a capitalist is not new at all. It has been said that both the Federalist Alexander Hamilton and the Democrat Andrew Jackson, though for different reasons, misunderstood the fundamental American situation a century and more ago. Hamilton based his conservatism on the false premise that his love for capitalism must make him hate democracy; Jackson made the opposite error of supposing that his love for democracy must make him hate capitalism. Neither of them realized that in the peculiar American circumstances democracy was capitalism's best ally and capitalism democracy's most powerful stimulus. "All commoners, all capitalists" — this Jacksonian slogan, it has been claimed, was the death knell for Federalist hopes but the secret of the American system.

There are doubtless other possibilities as well, besides the three discussed here. The United States may never become a completely socialist state, nor may it ever want, or be able, to make everyone a capitalist. What these further possibilities are we cannot say.

Private property is far from dead. The kinds of things Americans own today are different from the kinds of things they owned a hundred years ago, and the ownership is perhaps more dubious, but there is nevertheless an amazing proliferation of modes of possession. Some commentators, in fact, are predicting a movement back to "property" — property in rights and status, in job seniority, in pension rights, in trading futures, in rights in a job, in such anomalous possessions as a medical or dental practice, or commissions on sales, or the goodwill of a business. The ownership of one's

intellectual productions — a book, an invention — through the devices of copyrights and patents is also a mode of possession that seems in no danger of being attenuated.

This conception of property — as distinguished from real estate or money in the bank — was not entirely new, of course: witness the remarks of Madison quoted earlier in this chapter. He asserted nearly two centuries ago that a man has property in his opinions, in his religious beliefs, in his conscience, in the free use of his faculties (in modern terms, this might be the right to a good education), and in freedom generally. And he insisted that a just government would secure this kind of property, too, as well as property in land and money.

If we look at it from the traditional point of view, however, the institution of private property has become almost unrecognizable. This is an extraordinary fact. As Berle observed in 1958, "In the most violently private-property-minded country in the world, [it] is perhaps one of the most magnificent economic jests the world has seen."