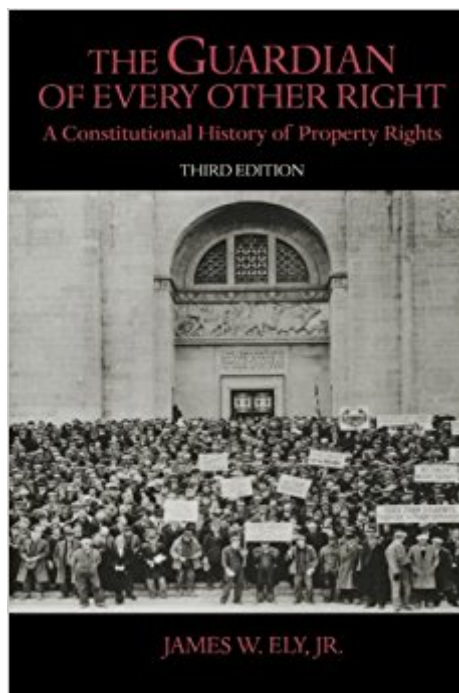


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The Guardian Of Every Other Right: A Constitutional History Of Property Rights (Bicentennial Essays On The Bill Of Rights)



Synopsis

The Guardian of Every Other Right chronicles the pivotal role of property rights in fashioning the American constitutional order from the colonial era to the current controversies over eminent domain and land use controls. The book emphasizes the interplay of law, ideology, politics, and economic change in shaping constitutional thought and provides a historical perspective on the contemporary debate about property rights. Since publication of the original edition of this work, both academic and popular interest in the constitutional rights of property owners has markedly increased. Now in its third edition, this text has been revised to incorporate a full treatment of important judicial decisions, notable legislation, and scholarship since the second edition appeared in 1997. In particular, Ely provides helpful background and context for understanding the controversial Kelo decision relating to the exercise of eminent domain power for "public use." Covering the entire history of property rights in the United States, this new edition continues to fill a major gap in the literature of constitutional history and is an ideal text for students of legal and constitutional history.

Book Information

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Customer Reviews

Acclaim for previous editions "An informative and balanced account of the history of property rights protections under the Constitution."--The American Journal of Legal History
Acclaim for previous editions "This slender volume should serve well on reading lists both in introductory American history courses and in upper-division legal history or constitutional law courses."--The American Historical Review
Acclaim for previous editions "Greatly clarifies the pivotal place of private property in the

American system. Through a sophisticated historical analysis, Ely illuminates two recurring issues of great importance: the constitutional limits on government regulation of property and the complex relationship between property ownership and individual liberty."--Norman Dorsen, New York University School of Law
Acclaim for previous editions
"A wonderfully compact odyssey through the history of constitutional protection for property rights in this country. Tracing the winding evolution of Supreme Court decisions that affected the uses and enjoyment of property, as well as the government's attempts to regulate the same, Ely constructs a comprehensive, yet surprisingly readable examination of the issues."--The Journal of Southern History

"An impressively concise treatment of a complex topic. Ely manages to focus admirably, making this an excellent supplementary text for a course in constitutional law."--Dan O'Bryan, Sierra Nevada College
Praise for the previous edition
"An informative and balanced account of the history of property rights protections under the Constitution."--The American Journal of Legal History
"Greatly clarifies the pivotal place of private property in the American system. Through a sophisticated historical analysis, Ely illuminates two recurring issues of great importance: the constitutional limits on government regulation of property and the complex relationship between property ownership and individual liberty."--Norman Dorsen, New York University School of Law
"A fine overview of property rights in the courts, which makes a good foundation for the study of present day land use planning and land use controls."--Irving Schiffman, California State University, Chico
--This text refers to an out of print or unavailable edition of this title.

Great read. Recommended reading!

It looks great and arrived on time!

James W. Ely, Jr., wrote a gem of a history of the Constitution that focuses almost exclusively on the treatment of property rights, from colonial times to the present, *The Guardian of Every Other Right: A Constitutional History of Property Rights*. It is one of the handiest and briefest digests of the history of property rights vis-à-vis federal and state courts and legislative acts I've come upon, written in clear, succinct language. For anyone imbued with the ambition to tackle *The Federalist*, the Constitutional Convention debates, and the papers of Founders such as Thomas Jefferson, James Madison, and Alexander Hamilton, Ely's book can serve as a nonpareil introduction to the subject of property rights in a political context.

The published reviews present a fairly accurate picture of the book. First, it is concise, always appreciated in a dry subject. Second, it is historical, not only in its order of presentation but also in the mode of analysis. It starts in the right place, America in the colonial period, and marches up to the 2006-07 Supreme Court term. It is blissfully, and I mean blissfully if you have read other works on this subject, free of lengthy disquisitions on the superiority or bankruptcy, depending on your point of view, of particular economic theories; and likewise blissfully free of cant, quack social science and meta-theoretical discussion that focus on academics' views far more than on actual events. Last, it is fairly balanced, and certainly the most balanced treatment I can find out there. The other reviewer says that the author "wears his conservative heart on his sleeve" and I respectfully disagree. The author delivers his story very much in a "on the one hand, on the other hand" fashion. There are many, especially in the not for profit world, who would like to impose a Hegelian narrative on the subject laying out a teleological progress toward the elimination of any "reification" or "privileging" of private property rights in favor of a "redistributive constitutional regime" that has been interrupted by evil reactionaries who would return us to the era of 16 hour workdays and child labor. There are others who would have you believe that intelligent life peaked when Adam Smith wrote *The Wealth of Nations* and all economic regulation is foam from the mouth of raving Marxists. This author paints a much more factual and balanced picture, which is summed up in three sentences (page 9): "First, the framers ... envisioned some degree of federal judicial review of the substance of economic legislation." "Second ... the relegation of property rights to a lesser Constitutional status is not historically warranted." "Third, the Constitution seeks to protect several fundamental values, including economic interests, but property is not entitled to preferential treatment." That sort of analysis may not be intellectually satisfying, as it tells you absolutely nothing about how to reconcile conflicts among various claims grounded in the text of the Constitution, but is a fairer synthesis of the history of the subject than either ideological extreme can fashion. The history of the application of the Constitution to property rights by all three branches of the federal government and by state governments as well is plainly incoherent and it is wishful thinking in service of ideological ends to believe otherwise. There is nothing to connect the application of the Constitution to property rights prior to "the switch in time that saved nine" to how it was applied afterwards that can produce a single coherent intellectual framework. But that is history and what we are stuck with intellectually today.

This is a very well conceived survey of the history of property rights in the United States. Ely seems

to see American constitutional history as having four great periods. The first period is the colonial and early national period up to the ratification of the Constitution. The second period runs from that first Washington administration up to the adoption of the Reconstruction Amendments after the Civil War. The third period runs from then until the so-called "revolution of 1937" when the Supreme Court did a turn around from its resistance to New Deal programs. From 1937 to the present time constitutes the final period of Ely's history. Obviously, from this perspective, the three great moments in U.S. constitutional history were 1. the original ratification of the Constitution, 2. the ratification of the 14th Amendment and 3. F.D.R.'s successful campaign to change the approach of the Supreme Court in 1937. To this history, Ely applies the following three analytical principles: 1. The framers of the Constitution and the Bill of Rights "envisioned some degree of federal judicial review of the substance of economic legislation" (Ely, p.9). 2. The framers did not regard personal and property rights as separable. "Indeed, the framers saw property ownership as a buffer protecting individuals from governmental coercion." (p. 43) 3. However, property is not constitutionally entitled to preferential treatment. Constitutional rights are not unlimited. In many cases, there are competing interests that must be balanced. Ely's survey of the colonial and revolutionary period serves to remind us that there has never been a period of time when property rights were granted unfettered priority. English common law had long established that there were certain public or community rights or needs that took precedence over individual property rights. This common law tradition was fortified by the developing republican ideology which saw the common good as paramount over the good of an individual. Of course, other influential political theorists like Locke placed a much higher emphasis on property rights. And early theorists of capitalism like Adam Smith were beginning to be influential. Certainly by almost any modern standard, the communal or governmental regulation of property was very minimal. The ratification of the Constitution changed quite a bit. For the most part, the Constitution relies on "institutional and political safeguards" for property. There was one clause, however, that would turn out to be essential to property rights in this country. Article 1, Section 10 states that "No State shall...pass any... Law impairing the Obligation of Contracts". Part of section 8 of Article 1 gave Congress the power to "regulate Commerce with foreign Nations, and among the several States...". This too would generate a long history of jurisprudence. The Fifth Amendment would add two other clauses that are essential to Ely's history. The first became known as the due process clause and states that no person "shall be...deprived of life, liberty or property, without due process of law". The so-called 'takings' clause immediately followed stating "nor shall private property be taken for public use, without just compensation." Which of these clauses were emphasized during a particular period would change as would the understanding of what those

clauses meant. For example, the original understanding of federalism left most regulation of the economy at the state level. The main issues of early period of our national history would focus on issues like the limits of the police power by the states, to define what was considered a contract (for example, did a corporate charter constitute a contract between a state and the corporation) and the definition of commerce. Early on, the contract clause would be the one that would be used the most by the Supreme Court to protect the rights of property against the various State governments. Everything changed with the Fourteenth Amendment. The first Section of this Amendment states that no State can "deprive any person of life, liberty and property, without due process of law...". This became known as the due process clause that would be used by the Court late in the nineteenth century and early in the twentieth as the basis for rejecting most attempts at economic regulation by the states or the national government. All in all, Ely's history is well-organized, useful and somewhat convincing. I have two problems with him as a historian. The first is that I think it is really misconceived to try to relate this history as divorced from the social and political history of the country as much as Ely has. When he does condescend into explaining how the larger history of the country effected the way the Supreme Court treated property rights he is at his most unconvincing. His basic explanation of the revolution of 1937 is that it became apparent to the Justices of the Court that their recent anti-New Deal rulings were extremely unpopular and likely to lead to a confrontation with the President. "Prudence" dictated that they retreat to a more popular way of reading the Constitution (p.127). That is about the lamest historical explanation I have ever read. At the very least, it is simply possible that the Justices changed their minds based on a rational rethinking of the consequences of their own judicial philosophies. To determine what the cause of the revolution was would require at the minimum an examination of the letters and papers of the Justices involved. Ely gives absolutely no indication of having done so. His explanation of how the Court came to read the due process clause of the 14th Amendment as implying substantive due process rights for property or how corporations came to be regarded as persons with all the rights of person are equally inadequate. In fact, he barely deals with the latter decision at all. The other quality of Ely's that I would like to remark on is the way he wears his conservative heart on his sleeve. For the most part I am okay with that. Everyone who writes history does so from a personal POV. The problem is that sometimes Ely is driven by his POV to critique a decision by the Court by whatever convenient means lies close at hand. He gets all irate about the New Deal era Court eventually deciding that property rights were secondary to personal rights. Ely is right that the Founders would have been appalled at this idea. But they would have been equally appalled at the distinction that the 19th century court made between commerce and manufacturing.

If you are going to be an originalist, you should try to be a consistent one. All in all, this is a very worthy book. It should be seen as part of most any course of reading about Constitutional history by the lover of American history. Ely may not have done the job perfectly but he does it well enough that reader can take it from there. We are Americans after all- we started out questioning authority and for my part, I see no reason to discontinue the tradition.

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