

CHANGING CONCEPTS OF PRIVATE PROPERTY +

By
BERTEL M. SPARKS

*Professor of Law
Duke University*

In the entire history of civilized society there never has been a time when the concept of private property was not undergoing change and it is unlikely that there ever will be such a time. Since the concept of private property is a legal concept, it is appropriate to add that civilized society cannot exist without law and that law cannot exist without property. While some may doubt that last statement, it is believed that such doubts will be removed upon a few moments reflection. For whether the legal topic under consideration is the Code of Hammurabi or the most recent pronouncement from the nearest local court, the rule of law involved is likely to be concerned primarily with the relations of individuals to things. That is to say, it will concern some concrete application of society's attitude toward or understanding of property.

All this leads to the conclusion that any complete story of the changing concepts of private property would include a complete history of civilized society. No such Herculean task is undertaken here. This paper will be limited to a consideration of the multiple nature of property rights and the power of the state to add to or subtract from those rights. Particular emphasis will be focused upon the owner's right to transfer his property interests regardless of how those interests may be defined.

+Reprinted from THE FREEMAN, October 1971, with permission.



As stated earlier, the concept of private property is a legal concept. That fact calls for some preliminary explanation. When the layman uses the word property, he ordinarily thinks of houses and lands, articles of clothing, tools, machinery, and other things capable of being owned. To the lawyer the word property has an entirely different meaning. When the lawyer uses the word property, he is not thinking of a man's possessions or holdings. Instead he is thinking of a man's legal rights with respect to those things. There is the right to use, the right to exclude others, the right to sell, the right to mortgage or pledge, and many others. The legal profession has rarely ever attempted any complete catalogue of these rights. As lawyers they deal with particular rights as they present themselves without too much thought concerning other rights that may exist in the same object. A man's "property" in a given object consists of the total bundle of rights he has in that object. This bundle of rights may be broken up and divided into its component parts in much the same way that a bundle of sticks may be broken into the individual sticks of which the bundle is composed.

The use of the term "private property" necessarily refers to the rights individual

persons have in or to that particular thing. But no analysis of such private rights is complete without some attention being given to the rights of the group. It is the rights of the group, either real or pretended, that often places restrictions upon the rights that may exist in the individual. The expertise of the lawyer must be called upon to provide a working definition of the boundary between the rights of the private owner and the power of the state to regulate the use and enjoyment of those rights. In his efforts to lay out that boundary the lawyer is faced with the fundamental question whether the rights of dominion and control over the wealth of the world should rest in the individual or in the group. If such rights rest ultimately in the group, then we have common ownership which places title to the earth's resources in the state and gives the individual only such rights of user as the state chooses to confer upon him. That theory is antagonistic and foreign to Western traditions, if not in fact to all civilized traditions. Nevertheless, it is a theory which, if not understood, is in danger of being unwittingly accepted.

Almost every American is ready to declare a strong belief in private property but very few Americans can give any intelligible explanation of what they mean by private property. Sir William Blackstone, a famous legal scholar who has had tremendous influence upon Anglo-American institutions, began his definition of property by calling it an "absolute right . . . which consists in the free use, enjoyment, and disposal of all (a person's) acquisitions without any control or diminution . . ." Most Americans who have not given serious thought to the matter would probably be satisfied to end the definition there and to accept it as absolute dogma. But any careful examination of that incomplete definition will convince us that it is insufficient standing alone. We know that that absolute right does not actually exist. The presence of a property tax, however small, places some qualification upon it. But there are other qualifications. Our pious assertion that a man may do as he pleases with that which is his own is always qualified by the equally pious assertion that a man may not use his own in a manner to injure that of another. Blackstone recognized that the right was less than absolute but neither he nor anyone else has ever been able to state

clearly how much less. Blackstone completed his definition by adding a phrase that tends to make his entire statement sound paradoxical. He said property was an "absolute right . . . without any control or diminution, save only by the laws of the land." There is the rub. A man's property in a given object includes absolute dominion over that object except in so far as that dominion is qualified by the laws of the land. To what extent is that dominion qualified by the laws of the land? A more fundamental question could be, to what extent *may* it be so qualified?

These are not hypothetical or purely academic questions. They are questions that are being encountered daily in the market place within the context of concrete cases. And when so encountered they must be answered. The primary responsibility for providing the answers rests upon the legal profession, but at least some of that responsibility must be shared by every responsible citizen. When the state attempts to remove a particular right from that bundle of rights constituting private ownership, it is the lawyer who is called upon to decide whether that right is removable while private property remains, but it is the citizen whose right is being taken who must bear the consequences. If private property is a bundle of rights, the lawyer must search for the source of those rights before he can analyze any possible restriction upon their exercise. He must ask, from whence comes this right of private property anyway? Is it a fundamental, inalienable right or is it a mere privilege granted by the state as a matter of grace? If it is a mere privilege, it may be withdrawn by the state. If it may be withdrawn with impunity, the citizens are little more than slaves.

Numerous state constitutions have sought to give expression to the right of private property as being something that is fundamental and beyond the reach of political power in a free society. One of the strongest of such statements is that found in the Constitution of Arkansas where it is declared that, "The right of property is before and higher than any constitutional sanction."² But that declaration probably does more to intensify than to solve the inquiry into the true source of this right that is "before and higher than any constitutional sanction." John

Locke, whose writings were well known and highly regarded by the founders of the American Republic, found a philosophical basis for private property in man's right to the integrity of his own body. Locke interpreted the Holy Scriptures, which he considered binding upon all men, as granting all wealth of the earth to mankind in common. But Locke regarded every man as having a property in his own person, in his own labor. He then concluded that a man could by his labor remove a thing from its state of nature and place it within his private domain.³ Locke's analysis of this point was accepted by Blackstone⁴ and through him became a part of the thinking of ordinary citizens of this country. The extent to which this approach was diffused among all levels of the citizenry a few generations ago is illustrated by the fact that it was included as part of the grade school reading material provided in one of the most widely used series of texts available during the latter part of the nineteenth and the early part of the twentieth centuries.⁵

But Locke, Blackstone, and the state constitutions all recognize that property ownership is something less than absolute dominion. Reference has already been made to the qualification expressed by Blackstone. When the writers of the Arkansas Constitution declared the right of property to be "before and higher than any constitutional sanction," they hastened to add that "private property shall not be taken . . . without just compensation,"⁶ thus recognizing that there were circumstances under which private property could be taken. And when Locke set forth his doctrine concerning a man's right to assert his private dominion over the earth's resources by joining his labor to those resources, he hastened to add the precaution that this is true, "at least where there is enough and as good left."⁷ Thus there is implicit in every analysis available thus far a recognition of a basic conflict between private ownership and public control. There is an awareness that ownership of a thing does not necessarily mean absolute dominion over that thing.

All this leads to an inquiry into the meaning of ownership. A man's property in a thing has already been described as a bundle of rights with reference to that thing. Each right in the bundle of rights may be described as an in-

cident of ownership. In so far as particular rights may be added to or subtracted from that bundle without destroying the bundle, ownership is an arbitrary term. Its meaning depends upon what incidents of ownership the law recognizes. The law's recognition of these incidents has never been a constant or a static thing. There has been a continuous change and each change has brought with it a change in the meaning of ownership and has thereby caused an alteration in the basic concept of private property.

Even during the early feudal period in England it was said that the man occupying and using a given tract of land owned it, but his ownership was a very limited one. It was a system of land tenure under which, in the strictest sense, land was "held" but not "owned." The occupant or "owner" on the land actually held it under a superior lord to whom he owed certain obligations. The lord in turn usually held under a still higher lord and so on in an ascending pyramid with the crown at the apex as chief lord who, in legal theory, owned all the land in England. In a very real sense the "owner" actually on the land tilling the soil was bound to that land. He could not sell it without the lord's consent.⁸ It was thought that this was necessary to avoid the possibility of having the lord's enemy installed on the land. The right of inheritance was restricted in that when the owner died his heir could not take up the estate until he was of age and then only upon payment of the appropriate fees.

There were other incidents of feudal tenure which tended to restrict the meaning of ownership but it was the restrictions upon the freedom to transfer that held the center of the stage. Even in this tenurial system men occupying the land were called freemen but in fact they were not free. The restrictions upon the individual's right to transfer his holdings literally tied him to the land. His station in life was determined more by his status with reference to the land than by his own efforts and ingenuity. Of course the intermediate lord was under a similar burden so far as his efforts to transfer his own holdings were concerned. But his position was different in that his holdings were larger and of a higher order. He was economically secure and had a comfortable income. It was the fellow who had the least that was under the heaviest

burden for until the man higher up let loose, there was nothing available for the man at the bottom to acquire. And whether a clog on the right to sell is labeled a medieval doctrine of feudal tenure or some civil rights act of the twentieth century, its effect in the market place is the same and the man at the bottom is always the loser.

Political freedom and the whole gamut of civil rights were impossible until there existed the freedom of property which emerged as the burdens of feudal tenure were cast off. While these burdens were not cast off at a single stroke, what is probably the most significant step along the way took place in 1290 when an act of Parliament extended to every free man the right to sell his lands or any part thereof without any interference from any intermediate lord.⁹ Even after this enactment numerous burdensome incidents remained. Prominent among these were the control the lord had over the estates of infant heirs and the obligation of the heir to pay a fee prior to taking up his inheritance. But with the single leap forward taken in 1290 there began a step-by-step process which reached its climax when the last substantial burden imposed by the tenurial system inaugurated by the Normans who conquered England in 1066 was finally abolished in 1660.¹⁰ But it should be remembered that it was truly a step-by-step process and that each step was characterized by a bitter struggle. The legal history of that entire period can be quite accurately described as a struggle for more incidents of ownership in the individual. Burdens and restrictions were being removed and new rights were being acquired by the owner. The bundle of private rights was expanding. But the right to sell, including the right to give away or dissipate according to the owner's own wishes, continued to hold the center of the stage. That right to sell, that economic mobility, or in the jargon of the legal profession that freedom of alienation soon became the chief factor in the development of individual freedom of all kinds. It also stimulated the economic use of property. When the occupant of land became free to sell at a price agreeable to him without seeking the consent of his lord and without paying a fine to his lord for having done so, he began to take on the coloration of a free man in the true sense of that word. Ownership took on new meaning. It included a power to cash

in as well as a power to use. And when that freedom was achieved, men no longer remained serfs, they no longer remained slaves, and the economy no longer remained static. It is no mystery that the real beneficiaries of this political and economic transition were those who possessed the least; it was the "have nots" rather than the "haves." In any society those who are already wealthy, who are already entrenched, who "have it made" are more likely to be interested in preserving their wealth than they are in searching for easier means of transferring it. Those of lesser means are the ones who are in a position to gain from freedom of exchange. And as soon as free economic mobility was achieved, the fellow at the very bottom of the feudal pyramid could exchange his services for a share of what was held by the man near the top.

In this system of free exchange, not only was there no necessity for serfs or slaves, but there ceased to be any place for parasites. Property tended to shift to those who put it to the most economic use. And there emerged the day of plenty which, although it is unique in the history of the world and is to this day confined to a comparatively small part of the earth's surface, is so taken for granted in this country that there is a tendency to forget its source.

But as soon as man became free to transfer his property by either deed or will without interference from the state, other kinds of interference began to appear. There developed a theory of absolute ownership whose very existence tended toward its own destruction. If property ownership meant absolute dominion, it was only logical to assume that it included the power of the owner to dispose or transfer on his own terms. He could create any estate or interest he chose and the fact that the estate or interest chosen tied up the property in an unproductive use long after the transferor had ceased to live appeared to make no difference. Property became tied up in families and became unavailable to future generations. The tying up of property in this manner is an exercise of freedom of the will, a favorite freedom of John Locke, but a fair question to ask is freedom of whose will? It became a freedom of the dead to control the economic affairs of the living.

Both the advantages of freedom and the manner in which that freedom could be used to tie up property in a most unfortunate way can be illustrated by imagining some Sir Galahad emerging from the feudal period and finding himself the owner of a farm. What does that ownership mean? The farm, that is the soil, was there before Sir Galahad came; it will be there after he is gone. Sir Galahad's ownership, his property, does not refer to the soil. It refers to the rights Sir Galahad has in that soil. What are those rights? He has the important right of raising crops of his own choosing. He may erect whatever buildings he is capable of erecting. He may live in and occupy those building. He may exclude others from them. In addition to all these, and still other rights, he has the right to transfer his ownership to another. He may sell it or even give it away if he chooses. He may do either without consulting any overlord or anyone else other than his transferee. He sells his farm and buys another. He sells that one and buys still another. He finds that this freedom of alienation which is now an attribute of ownership is one of his most important freedoms. It gives him mobility. It gives him freedom to change his occupation, to move his home to a new location. He is no longer bound to the land. Sir Galahad is a diligent worker and a shrewd businessman. His farming operations prosper. He invests and reinvests. He buys and sells at a profit until he becomes the wealthiest man in the community.

Sir Galahad acquired his vast holdings through the exercise of his own ingenuity in a free economy. It was the annexation of his own labor and his own skill to the wealth involved that made it his own. It would seem that he should be perfectly free to dispose of it, not only to a person of his own choosing, but upon conditions of his own choosing. Suppose he chooses to dispose of it through a system of complicated contingent and conditional schemes some of which might not become absolute for three or four generations. The motive for such a plan might be nothing more sinister than a desire to keep that which has been earned by the sweat of the brow within the family blood line. But if this is permitted in unlimited measure, the freedom to dispose tends to become a freedom to tie up which in turn becomes a freedom to prevent rather than encourage future development. If the possessory owner has a mere life estate or

some other restricted interest, he will have little interest in making permanent improvements which will endure beyond his period of ownership. And even if he is so inclined, it is unlikely that he will have the ability to do so. He is not in a position to give the kind of mortgage necessary to get a favorable loan. Under these circumstances the freedom enjoyed by Sir Galahad extends beyond his own lifetime and restricts the freedom of future generations.

But a people who had made great personal sacrifice to free themselves of one kind of restriction upon their right to deal with the fruits of their own labor could hardly be expected to remain passive about accepting the same or similar restraints in another form. Having freed themselves from so many stultifying public restraints imposed by a system of feudal tenure, Englishmen were well prepared to resist any effort to impose the same restrictions through private arrangements. The result was a modification of the law of entails and the invention of numerous rules designed to prevent any private interference with economic mobility. It was in this atmosphere that those rules known to lawyers as the destructibility rule and the rules against perpetuities, accumulations, and restraints on alienation came into being. While a substantial body of rather complex law has grown up around the operation of these rules, in their essence they are nothing more than efforts to secure to the living generation control of the world's assets without interfering with the freedom of alienation any more than is absolutely essential to the accomplishing of that purpose.

Thus it was that the freedom of alienation, that is the individual's freedom to buy and sell as he sees fit, became the policy goal that gave birth to numerous rules of property law that persist to this day. In addition to its being the sole justification for the rules referred to above, much of the modern law of conveyancing is law designed to foster the free transferability of property. It is a frequent topic for discussion at bar association meetings and legal institutes. Title standards are adopted and marketable title legislation is enacted for this purpose.

The American Founding Fathers and those

concerned with the framing of state constitutions appear to have been thoroughly convinced that the free institution of property was the cornerstone upon which all other freedoms depend. This fact is demonstrated by the frequency with which provisions were inserted into their statutes, or even their constitutions, declaring that all lands are allodial, that is free, and that feudal tenures of every kind are forever prohibited.¹¹ They looked upon the right to cash in on the product of one's own labor as an essential element of any meaningful concept of a free man. They saw it as the right to elevate the human personality from a position of status where one's social and economic course is predetermined to a position of contract where each one is free to determine his own course. Or as a more recent writer has expressed it, "in organized societies the degree of liberty among human beings is measured by the right to own and manage property, to buy and sell it, to contract."¹²

Experience has shown that where free movement of property has existed the economy has prospered and the wealth, especially the wealth of the least wealthy, has multiplied. This is not a surprising result. It is merely the normal and natural result of giving a man an opportunity to employ his talents in a way most pleasing to him and to enjoy the fruits of his efforts in the manner he selects. If he is denied the right to make his own choice, society is denied the benefit of the productive efforts that choice would demand. The productive capacity of the individual, and hence the productive capacity of society as a whole, will tend to decline. This principle is implicit in the statement of Jeremy Bentham that, "No man can be so good a judge as the man himself, what it is gives him pleasure or displeasure."¹³ The same idea is supported by Ludwig von Mises' declaration that, "The average man is both better informed and less corruptible in the decisions he makes as a consumer than as a voter in political elections."¹⁴

But this long history of the expansion of individual rights to property does not mean that private dominion has now become absolute. It never has been absolute and it is doubtful if anyone will seriously contend that it should be made absolute. The state still does, and it is believed it must, retain some

control. Property taxes are still collected. The right of eminent domain is still exercised. During times of war or other national emergency property has been requisitioned or expropriated when necessary to the state's defense. These acts by the state are necessarily encroachments upon the individual's dominion over the things he acquires. The significant question to ask is how far may these encroachments extend? Fundamentally, it is a problem of defining the point at which the inalienable rights of the private owner end and the inherent power of the state begins. It is not too much to say that that question presents the most challenging problem facing the legal profession, and in fact the entire American society, at the present time. The future course of man's progress toward personal liberty, human dignity, and civil rights depends upon how he answers that question.

In recent years zoning and city planning have become important parts of American law. It is not within the scope of this paper to make any judgment as to whether that development is good or bad. But it is within the scope of this paper to point out that it is a development that constitutes a direct encroachment upon the freedom of the individual to do as he pleases with his own property. Where such schemes are in operation the individual owner is not free to devote his property to the uses most suitable to his needs. An incident of property ownership has been removed. An important right has been taken from the bundle of rights constituting the owner's property in a given tract of land.

Other rights are slipping from the bundle from time to time. It is conceivable that in some instances the loss might be necessary to the well being of society. The distressing thing is that the loss often goes unnoticed. During World War I it was felt necessary to place statutory restrictions upon the amount of rent a man could receive for a given housing unit. After the war most of these regulations were removed. During World War II rent controls were again inaugurated and this time they have been a little slower in their disappearance. Some are still in effect. And in some quarters statutory rent control is now being accepted as a permanent institution. This paper is not an appropriate

place to debate the merits or demerits of this kind of legislation but it is an appropriate place to call attention to its meaning. It was first presented to the public as an emergency war measure but more recently it has been referred to as an instrument for the creation of a new type of tenancy. It has been said that the "statutory tenant," that is a tenant whose rent is determined by a statute rather than by the market, has a new type of estate hitherto unknown to the law. He probably does. But that kind of analysis is incomplete unless it goes further and identifies the kind of estate held by the "statutory landlord." And this second step has rarely ever been taken. If the question is raised at all, the answer is likely to be that the landlord has a fee simple which is defined as the highest estate, that is the highest kind of ownership, known to the law. If that answer is accepted as satisfactory, then it must be admitted that the owner of the highest estate known to the law is denied the privilege of using his holdings in the manner most desirable to him. He is not permitted to rent at a price mutually agreeable to him and his tenant. A substantial incident of ownership has been removed.

In 1948 the Supreme Court of the United States struck at the very heart of private ownership as traditionally understood. Although the decision received wide publicity, very few people gave any indication of being disturbed; or if they were disturbed, it was for reasons other than the court's attack upon private ownership. Prior to 1948 the power to dispose of real property included the power to make certain covenants mutually agreeable to the buyer and seller. Prior to 1948 these covenants were said to run with the land and to be binding upon subsequent owners. The existence of such covenants became a part of the title itself and entered into the calculation of property values. But in 1948, in the case of *Shelley v. Kraemer*,¹⁵ the Supreme Court of the United States was faced with a covenant against sale or lease to members of a particular race. Such covenants had long been inserted in deeds and had become quite common in all sections of the United States. Nevertheless, the Supreme Court chose to ignore the covenant's existence. The fact that property values depended upon the covenant and that mortgage loans might have been extended in reliance upon it made no difference. This

might possibly have been an appropriate time for a judicial determination that covenants of this particular kind were inconsistent with American public policy and therefore without any legal effect. No position is taken here as to whether such a decision would have been wise or unwise. But in any event that route was not taken. Instead the court, in an opinion written by the Chief Justice, displayed a total lack of concern for private property by declaring that the covenant was valid but would not be enforced.

Any effort to rationalize the 1948 decision on the theory of state action is antagonistic to civilized society unless that society is ready to deny recognition of private property altogether and adopt absolute group ownership. A man does not have a property in anything unless he has a right which the state will protect. As soon as the state extends any protection there is clearly a case of state action. If protection is withheld while the right is officially recognized, there is an express invitation to self help where the law of the jungle prevails.

An even more serious inroad on private ownership has appeared in recent years in the so-called "open housing" legislation. When this type of enactment appeared on the local scene in New York City in 1957,¹⁶ it caused very little excitement among the nominal adherents of the free market concept. This in spite of the fact that it almost completely abandoned the theory of freedom of alienation by taking away from the seller the right to choose his own customers. More specifically, it prohibited sellers in certain classifications from discriminating among buyers because of the buyers' race or religion. Freedom of alienation was theoretically preserved, but anyone who has had any experience in buying or selling real estate knows that freedom of alienation has very little meaning if it does not include the freedom to choose one's own customers. The freedom that was preserved by this legislation is remarkably similar to the freedom that prevailed in England prior to 1290 when the property owner was free to sell except that the lord (the king being the supreme lord) had a veto power over the choice of a buyer. Nevertheless, the legislation in varying forms became popular, spread to other states, and found its way into a Federal enactment in 1968.¹⁷ Prior to its

enactment on the Federal level testimony before the Senate Subcommittee on Constitutional Rights pointed out that its effect in the market place would be to reduce the amount of new housing available in coming years and to decrease rather than increase the access of minority groups to that which was available.¹⁸ It would be a mistake to attribute the recent decline (some might prefer to say crisis) in the housing industry to that cause alone but it would also be a mistake to ignore the possibility that it might have been a contributing factor.

The concept of private property appears to be moving in a circle that is almost closed. The feudal ages found "freemen" in virtual serfdom. Private ownership existed but it was a very limited concept. The incidents of ownership were comparatively few and such as existed were substantially restricted by the recognized power of the state. But that period was a period of struggle for more and more freedom and more civil rights in the individual. Men were demanding more control over their own destiny—more of the fruits of their own labor. The result was a steady increase in the incidents of private ownership and a corresponding reduction in the state's power to control. The significant legal developments were centered around efforts of the law to preserve the freedom of movement of private property. This trend continued until very recent times when the individual's freedom both to use and to dispose of the fruits of his own labor seemed virtually secure.

But throughout this period of development there never was any clear line between the conflicting forces, that is to say, between the incidents of ownership sacred to the individual on the one hand and the rights exercised by the state on the other. Eventually the trend toward individual freedom found itself in reverse. The bundle of rights constituting ownership began to shrink. Sticks were withdrawn from the bundle and handed over to the state. The state took a more active part in controlling the use of things still owned by individuals. The owner lost his right to fix the price at which he was willing to rent. He lost the right to dispose of property on terms of his own choosing. He lost the right to select his own customers.

Why is this decline in the importance of the individual together with the corresponding increase in the function of the state taking place? It could be the result of a conscious choice by a society which believes it has gone too far in the direction of private ownership and that a retreat is desirable. It is doubtful if that is the case. It is doubtful that any such conscious choice is being made. What is more likely is that the transition is going more by default than by design. We have concerned ourselves so much with other things that we have almost forgotten that there is a right of property which "is before and higher than any constitutional sanction." We talk about such things as freedom of speech, freedom of the press, freedom of religion, and freedom from false arrest without giving much attention to the foundation upon which all these freedoms rest. We have forgotten that these are but the symbols, the ornaments, and the outward manifestations of a solid structure without which none of them could exist. We have become so interested in the cake's icing that we have ignored the cake. We have become victimized by the often repeated but absolutely false assertion that there is a conflict between property rights and human rights. The truth is that private ownership of property is the greatest instrument of freedom ever designed and it is sheer folly to speak of granting a man freedom while withholding that instrument from him.

It is a long way from the serfdom of the medieval manor to the American statutes and constitutions abolishing feudal tenures. Americans have arrived at an age when freedom of ownership is so taken for granted that there is a danger that we might inadvertently allow it to slip out of our hands. If our freedom is to be taken seriously, we must acquaint ourselves with what is actually happening in the name of social justice, equal protection of the law, and other glittering generalities that are without meaning until they are given meaning in the context of human experience. "Social justice" can become a slogan used to promote both social and personal injustice. "Equal protection of the laws" can be used as a mask for universal oppression through law.

As we move from one age to another there is but one fundamental change in the concept of private property. The rate of the change as

well as the direction of the change may shift from time to time. But the question is always one of deciding what incidents of ownership rest in the individual and what incidents are claimed by the state. If human freedom is to be preserved that question must be faced squarely. Questions concerning zoning, rent control, restrictive covenants, and all the others cannot be intelligently answered until they are placed within the context of that basic issue. When they are placed within that context, it is likely that the most vocal proponents of some of these new schemes will become their most violent critics.

FOOTNOTES

1. 1 *Blackstone, Commentaries* 138 (Sharswood ed. 1874).
2. *Ark. Const.* art. 2, sec. 22.
3. *Locke, Two Treatises on Civil Government* Bk. II, c. V (George Routledge & Sons, 2d ed. 1887).
4. 2 *Blackstone, Commentaries* 1-15 (Sharswood ed. 1874).
5. *McGuffey, Sixth Eclectic Reader* 410-415 (rev. ed. 1879).
6. *Ark. Const.* art. 2, sec. 22.
7. *Locke, Two Treatises on Civil Government* Bk. II, c. V, sec. 27 (George Routledge & Sons, 2d ed. 1887).
8. The exact extent and nature of this restriction upon alienability is a bit uncertain but it is clear that restrictions did exist. In this connection it is interesting to note that in 1256 Henry III issued a writ declaring it an invasion of Royal rights to sell without his consent lands held under him. See 1 *Pollock & Maitland, History of English Law* sec. 9 (2d ed. 1923).
9. *Statute Quia Emptores*, 18 Edw. I cc. 1-3 (1290).
10. *Statute Abolishing the Court of Wards and Liveries*, 12 Car. II c. 24 (1660).
11. E.g., *Minn. Const.* art. 1, sec. 15; *Wis. Const.* art. 1, sec. 14. See generally, 1 *Powell, Real Property* par. 158 (1949).
12. *Garber, Of Men and Not of Law* 34 (1966).
13. *Bentham, Principles of Morals and Legislation* 172 (Oxford at the Clarendon Press 1879).
14. *von Mises, Socialism* 21 (1951).
15. 334 U. S. 1 (1948).
16. *Local Laws, City of N. Y.*, 1957, No. 80.
17. 42 U.S.C.A. secs. 3601-3619 (1970).
18. 112 *Cong. Record* 14715-14717 (1966).