Property Law as the Infrastructure of Democracy

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THE TOWER OF LONDON SITS NEAR THE BANK of the River Thames. It is a fortress, complete with a moat and an outer wall and an inner wall and several buildings inside. In the very center of the Tower of London sits an ancient stone structure called the White Tower. The White Tower was constructed by William the Conqueror shortly after he invaded England and was crowned King on Christmas day of the year 1066. The first building was a wooden structure; William replaced it with the current stone building in the year 1078. The White Tower was William the Conqueror's house, and it was the base from which he conquered the rest of England.

A Norman monk named Orderic Vitalis lived through those times. He tells us that William returned briefly to Normandy after his initial invasion of England in 1066. When William returned to England the following year, Orderic reports that William 'gave away every man's land" to his own family and friends. Although William sometimes protected the property rights of the English, for the most part he took their lands away from them. William seized control over the country and divided it up among his trusted men. By 1086, William directly controlled seventeen percent of England while twenty-six percent was controlled by church officials and fifty-four percent by lay lords. Historian Edmund King explains: "It was a small group of people, who held real power. Twenty laymen and twelve churchmen between them held forty per cent of England. Not one on this list was of English descent."[1] William had conquered the English, seized their property and transferred it to his Norman knights, and made himself their lord and king.

William established a feudal society in England. Feudalism was both a political system and a property system. The King was the supreme ruler but he also owned all the land in the kingdom. He allowed lords to possess property in exchange for personal obligations to him. The great lords did not own their lands in any modern sense. They held their lands "of the King" and in return for those lands owed the King specific obligations — generally the duty to provide the King with knights to defend the realm or religious services to protect the King's soul. Those lords, in turn, granted rights to use portions of their land to vassals in return for services from those vassals. The vassals, in turn could "sub-infeudate" and create lord-tenant relations of their own. At the bottom of the feudal ladder were those who lived on the land and worked it. Some of these tenants were free men who owed specific duties to their lords. Many of them were what historians euphemistically call "unfree." Also called "villeins," they were (for the most part) subject to the lord's whim; villeinage was a form of slavery and the lords literally held their tenants' lives in their hands.

The result was an immense feudal hierarchy in which each person had a place, both physical and political. Access to land was tied to personal obligations to a lord. Failure to comply with those obligations would lead to forfeiture of the land. The obligations inherent in

[1] Edmund King, Medieval England from Hastings to Bosworth 11 (Great Britain: The History Press 2009 ed.)(in association with the British Library).

the lord-tenant relationship were personal. The tenants had no power to renounce their feudal ties without the lord's consent and the lords were obligated to respect the tenants' rights. Yet at first, little restrained the lords in their treatment of their tenants other than their need for the services the tenants provided and the potential of rebellion. The lords were both owners and rulers. As proprietors of the land, they had rights not only to allow others to use the land but to act as the local government, holding court and making laws for the manor.

The King, of course, was the ultimate owner/ruler and he used that power to control both his lords and the kingdom. As the ultimate owner of all the land in the realm, the King's word was law. When you live in my house, you follow my rules. But of course, there were always the threats of rebellion and excommunication to limit the King's power; he was, after all, surrounded by men with swords, men who had been trained since birth to use those swords, men who (if they wished) could imprison the King and put someone else in his place. Nor were the Kings wholly indifferent to the state of their souls; the possibility of excommunication and punishment by God worked wonders in certain cases to curtail royal excess. Both to avoid those threats and to maintain good order, the King held court and appointed judges to oversee royal affairs. Over time, the lords formed an advisory council that eventually became Parliament. The King also had a role to play in appointing church officials, including the Archbishop of Canterbury, and used that power to exercise some measure of control over the vast lands held by the Church. The Lord Chancellor was the keeper of the King's seal, the royal chaplain and the King's spiritual advisor. Together, the King, the Chancellor, the lords, and the judges made law for the land. The King also appointed sherriffs to enforce royal laws locally. But the lords generally did as they wished on their own manors.

Democracy versus feudalism

The feudal system was complex. It varied throughout England and varied significantly over time. But several features distinguish it fundamentally from our own modern political and legal system in the United States in the twenty-first century. We are, or hope to be, a free and democratic society. As President Abraham Lincoln so eloquently explained, democracies promote "government of the people, by the people, [and] for the people." We do not all agree on what this means. But part of what it does mean is that we are *not* a feudal society. We have rejected feudalism as a political system, as a way of life, and as a way of organizing access to property. Nor is the American rejection of feudalism an abstract thing. Legal and political disputes in colonial times and in the history of the early American Republic explicitly addressed the question of whether feudalism had any place in the New World. After a period of struggle, we firmly rejected the feudal system. It is important to understand what the American rejection of feudalism entails. What features of feudal societies have we discarded? Why kinds of social and political arrangements are unacceptable to democracies? What property arrangements have we ruled out of bounds?

Strangely enough, the answer is in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The key to understanding what it means to reject feudalism is our commitment to equality. Democracies are premised on the idea that we must show equal concern and respect for every person. For that reason, we reject distinctions of status. We do not have nobles, commoners, serfs; we have citizens. We do not have racial castes; we have persons. We do not have masters and slaves; we have human beings. We do not have masters and servants; we have employers and employees. We no longer require wives to "obey" their husbands; by law, we have equal spouses. We no longer require property to descend to the eldest son, leaving younger siblings at the mercy of their elders. The feudal system was premised on distinctions among persons. This was not a case of some people being "more equal" than others; the feudal system placed people

in ranks and it was a fundamental principle that you were defined by your status. It was also a fundamental principle that some men were not free.

Democracies reject the practice of ascribing unequal status to persons. We do not divide people into different castes, constrain the liberty of the lower castes and subject them to the rule of their betters. From the standpoint of a property law professor, our constitutional law professors neglect to teach one of the most important provisions in the United States Constitution — in some sense, I would argue the most important provision in the Constitution. That provision appears in Article I, Section 9, clause 8. It reads: "*No title of nobility shall be granted by the United States...*"[2] Much as we like to watch British television shows about the monarchy, we have fundamentally rejected the idea of creating formal distinctions of class.

American property law was born at a time when great changes were happening in the world. Prime among them was the American rejection of feudalism as a way of life. Movie stars and sports players aside, we want no lords here. Lords in England had power over those they allowed to live on their land. Ownership was hierarchical rather than dispersed among equal persons. The vassals were living in the lord's house and the lords were living in the King's house. No one was an "owner" in the modern sense. Because the lords had the right to exclude others from their lands, they had the power to control the terms on which others were allowed access to the lords' lands. But the lords were bound by the terms of their agreements with their tenants and they had feudal obligations to their own lords.

Today we still have landlords but their powers over their tenants are limited. Landlords do not have the power to tell the tenants what to do; they cannot imprison their tenants for lack of loyalty. Landlords do not require their tenants to attend church; nor do lords control who their tenants marry. Landlords do not become guardians of their tenants' children should they become orphans. Property rights are defined by law and in a free and democratic society, we do not give owners the power of life and death over their tenants. As the Supreme Court of New Jersey explained in the famous case of *State v. Shack*: "Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises."[3] In contrast, the feudal system did give lords a large measure of "dominion" over the lives of those the lord allowed to live on the manor.

Feudalism originally created a relatively rigid, static society. It tied people to the land and to personal obligations to a lord. A tenant could not simply choose to move to another place or take another job. You were the lord's man; you were a servant in the lord's house. Originally, you could not sell or give up your land without the consent of the lord. You could not avoid the services you owed the lord by getting someone else to do them for you. You could not easily change the course of your life or how you lived. If the lord gave you rights in the land in exchange for farming it, you could not choose to change from agricultural uses to commercial ones. Nor could you sell the land to someone who would take your place without the lord's consent.

In the feudal system, people had not only had statuses but *places*. You belonged in a certain place and you belonged to a lord. You were not free to leave or to live your life on your own terms. You had a *status*. You were a nobleman or you were a commoner or you were a serf or you were a monk or you were a wife or daughter. You knew your place both figuratively and literally.

Feudalism was based on the idea of lordship with the Sovereign as the ultimate lord of the land. This system was premised on inequality, personal loyalty, and landed aristocracy. The lower classes needed the protection of the mighty and in return submitted to their rule. One's chances in life were determined by one's birth. This was true even within families. To avoid the disintegration of estates, manors were inherited by the first-born son under the system of

[2] U.S. Const. art. I, §9, cl. 8.

[3] State v. Shack, 277 A.2d 369 (N.J. 1971).

"primogeniture." Birth order was destiny. So was sex; women were in the hands of men, whether their fathers, brothers, or husbands. Women did not control who they married or even whether they married; nor did women control where they lived. And at the bottom of the feudal hierarchy were the unfree peasants who lived at the lord's beck and call.

The American struggle against feudalism

Lest we think that these problems of feudalism were limited to England, consider the history of the British colonies in America. On March 12, 1664, King Charles II gave all the land between the Delaware and Connecticut rivers to his brother James, Duke of York. Two months later, the Duke of York sent his friend Richard Nicolls to seize this territory from the Dutch. Nicolls beat the Dutch and then gave several groups of settlers deeds to two tracts of land in New Jersey. One of those groups settled in what became the city of Elizabeth; the other group settled in Monmouth County, the land at the shore where modern day Asbury Park is located. Unfortunately, Nicolls may not have had the legal authority to grant titles to these lands. In fact, the Duke of York subsequently granted all of New Jersey to two men, Lord John Berkeley and Sir George Carteret. They hoped to establish feudalism and become the lords of New Jersey; they would live off the rents paid to them by their loyal tenants. They sent Carteret's cousin Philippe to New Jersey as the new governor. Philippe Carteret arrived in New Jersey and told the residents they had to listen to him and that they owed allegiance and rents to their new lords.

The settlers said it was nice to meet Carteret but they did not need a governor and they certainly had no need of a lord. The explained to Philippe Carteret that they owned their land. They had been given titles first and the Duke of York had no right to grant them property and take it back—first in time, first in right. They adamantly refused to acknowledge Berkeley and Carteret as their feudal lords. They also were early proponents of the ideals later popularized by John Locke; they argued that they were free men and that they had labored on the lands to build their homes. As such they held "freehold" title to their lands and owed no tribute to any lord. In addition, they also had made arrangements with the local Indian nations to acquire their lands. So they had three independent sources of title—deeds from the agent of the Duke of York, purchases from the prior Indian owners, and rights based on their own labor enclosing and improving the land. In addition, they had moved to New Jersey because they were escaping religious persecution up in Massachusetts and Long Island. They believed they had a personal relationship with God, that each man was equal before the Lord, and that each one should equally participate in governing the town. They had no need of a lord to govern them and no reason to give up their land.

Confident in their claims, the settlers asserted that they had no duty to pay feudal dues to the new lords of New Jersey. They acknowledged that their deeds from Nicolls contained promises that they would make such payments. But they argued that they had full freehold title to their lands and that free men have no lords; they further argued that ownership of land was incompatible with any reserved rental rights in the grantor. Later generations of lawyers would argue that any duty to pay feudal rents would be “repugnant to the fee.”

The freeholders’ refusal to pay quitrents started a low-level civil war that raged in New Jersey for more than a hundred years, from the 1660s to the 1770s.[4] The successors to the lords were called the “proprietors” and they kept trying to get the freeholders to pay them quitrents. But the freeholders just as stubbornly resisted, and, in the end, the freeholders prevailed. I grew up in Monmouth County. The county seat in Monmouth County is called Freehold. The county government is called the Board of County Freeholders. Bruce Springsteen went to high school

[4] Brendan McConville, Those Daring Disturbers Of The Public Peace: The Struggle For Property And Power In Early New Jersey (Univ. of Penn. Press 1999).

in the town of Freehold—a major claim to fame. But Freehold is also one of the places where American democracy was invented.[5]

This contest between the "proprietors" and the "freeholders" in the state of New Jersey was partly a contest over the legitimate source of title to land, but it was more fundamentally a contest over a way of life. The question was whether New Jersey would become a feudal demesne with two lords and many tenants bound to them by personal and inheritable obligations and governors chosen by the lords, or a property-owning democracy with many owners and a government chosen with the consent of the governed.

After a long struggle, New Jersey outlawed feudalism. That means that government action was required to ban contractual and property relationships that would have established feudal ties. We are not free to create any property arrangements we like; some arrangements are out of bounds. Some contracts with respect to both persons and lands are prohibited. These property institutions violate public policy because they are incompatible with the framework of a free and democratic society. By regulating the market for property rights, the law decentralized power, taking prerogatives away from would-be lords and giving those powers to ordinary people. Regulations prohibiting feudalism promoted freedom. There are many owners of land in the state of New Jersey and we are not subject to the control of any lord. We are the lords of our own castles. We have freedom and independence precisely because we enacted laws that ban feudal arrangements. John Locke wrote: "where there is no law, there is no freedom."[6] He was right. We limited freedom so that we could have liberty.

Property rights and human values

The abolition of feudalism may seem so far in the past as to have little relation to our current problems. What importance could it have to contemporary legal or political issues? Consider the case of *State v. Shack.*[7] In 1971, the Supreme Court of New Jersey ruled that a farm owner could not keep a doctor and lawyer off his farm when they were entering to provide medical and legal services to migrant farmworkers who were living and working there.

The farm owner argued that they were trespassing by entering the land of another without the owner's consent. He argued that he was the owner of the farm and that one of the central rights of ownership is the right to exclude nonowners from one's land and to condition rights of entry on terms chosen by the owner. The workers' employment and housing contracts did not give them the right to receive such visitors. Since the owner had not waived his right to exclude by agreement either with his workers or the service providers, they had no legal right to enter his property against his will.

But the court ruled against the farm owner, accepting the argument of the doctor and lawyer that real property owners are not entitled to prevent service workers funded by the federal government from getting access to workers living on the owner's land. The right to exclude is limited by public policy; ownership rights (even exclusionary rights) are not absolute. For example, owners cannot exclude police who enter property to save someone's life or to respond to an ongoing crime.

Similarly, tenants have a right to receive visitors in their apartments, regardless of what the lease contract may say. This right is so well accepted that few legal precedents establish it. It is

[5] It is an uncomfortable paradox that we had to ignore the vested property rights of the lords of New Jersey to end up with a private property system that had many owners who were free of feudal obligations to aristocratic families. See Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (land reform act to redistribute title from landlords to tenants satisfies "public use" requirement of the Takings Clause). An even more painful truth is that the freehold titles we cherish were created by denying freehold title to Indian nations and forcibly occupying their land or coercing them to enter treaties with the United States by which they relinquished their land.

[6] John Locke, The Second Treatise of Government ¶57, at 32-33 (Thomas P. Peardon ed. 1952 (original 1690).

[7] 277 A.2d 369 (N.J. 1971).

a right we take for granted. When the landlord transfers possessory rights to the tenant, this means that the tenant now has a space to create a home. It is a necessary part of that right to form human relationships with friends and neighbors and to receive family members as guests. According to the New Jersey Supreme Court, migrant farmworkers housed in barracks have the same rights—regardless of what the contract says. The farmer may be the owner of the land but by entering a contract that allows his workers to live on his land, he parts with some of his ownership rights, and it is the workers, not the farmer, who have the right to receive or turn away guests.

Landlords have no right to stop tenants from receiving visitors; American property law does not give landlords such powers. In a democracy, where we do not have titles of nobility, farmworkers have the same right to free association as their employer. While the employer does have interests in excluding others from his land and running his business as he sees fit, the workers have the right to what the New Jersey Supreme Court called "associations customary among our citizens."[8] For that reason, the court found that the farm owner had no right to exclude the doctor or the lawyer from visiting the workers in the privacy of their homes at a time that did not interfere with the business operations.

The court acknowledged that the farmer owns the land, but he has opened his land to others. In such a case, Chief Justice Weintraub explained, "we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being."[9] Farmworkers have a right to be treated with "dignity."[10] They are human beings not serfs. The abolition of feudalism means that we police property and contract relations by law to ensure that each person is treated with dignity and has the freedom to live and to enjoy "associations customary among our citizens."

Ownership in a democracy

The United States rejected feudalism and adopted a democratic form of government. This meant not only the idea of having the people choose their leaders and adopt their own constitutions but embracing a way of life premised on the equality and liberty of the individual. A necessary consequence of our commitment to a democratic way of life is that some kinds of property arrangements and some contractual terms must be outlawed and placed out of bounds.

In their eloquent moments, libertarians deplore government regulations as inherently oppressive. They adopt John Locke's idea that we started in a state of nature with no centralized authority and that individuals went into the wilderness to settle land. To give themselves protection from having their property invaded or seized by others, they created a social compact giving government the power to enforce property rights and to prevent individuals from harming others. Libertarians believe that laws that go beyond preventing force, theft, and fraud wrongly take our natural liberty and go beyond government's proper role. Property rights that are originally established in a just manner and freely transferred from hand to hand must be respected by a just government rather than redistributed.

Robert Nozick styled this theory of property rights a "historical" theory because it based property rights on the historical event of original acquisition and subsequent voluntary transfers. He distinguished this historical version of property rights from a "patterned" theory that looks at the present time to see if there is sufficient equality of ownership today regardless of its origins or the history of title transfers over time. Nozick was worried that liberal concerns with equality would result in forced seizures of property from some for redistribution to others. Such an egalitarian system would threaten systematic interferences with property rights. As the

[8] Shack, 277 A.2d at 374.
[9] Id.
[10] Id.

distribution of property changes over time, we would need constant redistribution and that would involve coercive government interference with the free market system and systematic deprivation of the rights of owners. Nozick argued that we would all have more freedom if we let private arrangements govern the use and ownership of property. In such a libertarian world, freedom of contract would allow the people to reach the arrangements that suit them.

But Nozick's theory of a "historical" basis of property rights is fundamentally flawed. If we look at *actual* history — rather than a made-up "state of nature" — we find an entirely different historical message. In the real world, our property system did not originate in the settlement of an empty land. Property law in England and the United States starts with conquest. William took over England and the British, French, and Spanish invaded America and took lands from Indian nations. Conquest denies the rights of first possessors. We do not have a just origin of title and it is wrong to assume that we do. Nor does American property law begin with settlers establishing full freehold title to lands they occupy. Rather, *American property law starts with the feudal system created by William the Conqueror in 1066*. Our entire history since then, both in Great Britain and the United States, is a slow erosion and final rebellion against feudalism as both a form of government and a form of property ownership.

To prevent the re-emergence of feudalism, our legal system outlaws property arrangements that are likely to lead to renewed concentrations of land ownership or which vest too much power in the hands of a prior owner of the land. For us, land is for the living and powers are to be concentrated in those who are in actual possession of the land. Having no titles of nobility means not only that we do not have a House of Lords and distinctions of rank. It means that we have no lords of the land to which the rest of us must pay homage and obedience.

For this to be possible, many laws needed to be established to outlaw the property arrangements on which feudalism was based. Far from interfering with our fundamental liberties, these regulatory laws banning feudal property arrangements are what created both the modern idea of ownership and the modern idea of freedom. Libertarians who believe in full property rights must also support the intrusive regulatory rules that prohibit contractual arrangements that would create feudal land relationships. The free market that libertarians support would not exist without these regulations.

Democracy and equality

I have already noted that John Locke explained that that "without law, there is no liberty." One way we exercise our liberties is by enacting laws that establish minimum standards for property. *Property law is the infrastructure of democracy.* Democracies require legal regulations that ban forms of property rights that are incompatible with the democratic way of life. The American ban on feudalism is the earliest and, in many ways, the most fundamental of these needed regulations. But it is certainly not the only such limitation.

Over time, as our notions of equality have changed, new laws were needed to ban property arrangements that imposed hierarchical social relationships that limited important individual freedoms. The most obvious example is the abolition of slavery. As with feudalism, we required not only long struggles that eventually led to a Civil War, but formal legal regulations that prohibit slave relationships. Just as the common law and state statutes abolished feudalism, so did state laws and the Thirteenth Amendment abolish slavery. We sometimes take this for granted but the Thirteenth Amendment works by prohibiting the creation of a particular form of property — property in human beings — and does so by prohibiting contracts that would create such property rights. In order to have the freedoms we cherish, we need laws that prohibit the creation of property rights that are incompatible with a way of life that has abolished slavery.

Similarly, in the mid-nineteenth century, the states adopted laws that limited or abolished the power of husbands to control the property owned by their wives. The *Married Women's Property Acts* gave women the right to make enforceable contracts, to sue and be sued, and to

control their own property. This was another step in the development of our modern ideas of democracy and equality. And once again, the empowerment of women required a regulatory law that banned a particular set of property rights.

Recall also that the United States Constitution abolished religious establishment. In a society of free and equal persons with fundamental rights of liberty of conscience, we created a government that was not inexorably tied to a particular religous faith or set of institutions. This has consequences for property rights. We do not limit property ownership to members of an official religion, nor mandate segregation by religious affiliation. We do not make governmental benefits contingent on religion and we do not make access to land contingent on adhering to a particular set of religious commitments. We do not have Catholic towns and Protestant towns.

The abolition of feudalism, religious establishment, slavery, and gender hierarchy were reinforced and expanded in the 1960s with the passage of the next generation of civil rights statutes. Those laws prohibit segregation or discrimination by race, sex, and religion and they ensure access to public accommodations, employment, and housing without regard to such discrimination. Federal law expanded those rights in 1988 and 1990 to persons with disabilities. These changes mean that both state laws and private contracts that limit access to the marketplace in a discriminatory manner are banned.

It is important to recognize the significance of these civil rights laws for our understanding of American property law. We take for granted now that restaurants and hotels and movie theatres cannot exclude or segregate customers on the basis of race. But this practice is a recent innovation. The change occurred because of developments in social values and political organizing but it stuck *because the law made it so.* What was it like before these laws were passed? An African American family traveling in the South needed to plan very carefully, finding places they could stay, eat, and feel safe. An African American buying a shirt in a store might not be allowed to try it on or to return it if it did not fit. She might not be allowed in the store at all. She might be allowed to buy groceries but may have been obligated to let white people step in front of her in line. She could not sit in the front of the bus or drink from the same water fountain or swim in the same pool.

It is true that in the South many of these indignities were imposed by state laws. But some of these indignities were suffered in the absence of laws; they were the result of social custom. A libertarian might conclude that civil rights laws violate the rights of property owners by telling them who they have to allow onto their land. Shortly after winning the Republican primary for Senate in Kentucky, Rand Paul made precisely this argument.[11] Yet, almost immediately Paul felt compelled to retract his statement and affirm wholehearted support for the federal public accommodations law. Why?

The answer is that it is simply not true that property owners are lords of their own castles. *We have no lords in America.* It is true that in feudal times, the lords would rule their manors as they saw fit, subject only to their personal obligations to the King. But in a free and democratic society, we have no titles of nobility. People are free to make their way in the world and that means that access to the marketplace cannot be denied on the basis of race. The Civil Rights Act of 1866 guarantees every person the "same right to make and enforce contracts…as is enjoyed by white citizens"; it guarantees every citizen "the same right … as is enjoyed by white citizens to … purchase [and] hold… real and personal property."[12] The Supreme Court has interpreted these statutes to grant each person the right to enter a store and demand service without regard to her race. The right to contract and to purchase property is empty if no one will sell to you because you are in a lower caste. The right to enter contracts and the right to

[11] Adam Nagourney & Carl Hulse, Tea Party Pick Causes Uproar on Civil Rights, N.Y. Times, May 20, 2010, http://www.nytimes.com/2010/05/21/us/politics/21paul.html?scp=3&sq=rand%20paul%20civil%20rights&st=cse.
[12] 42 U.S.C. §§1981, 1982.

enter property place duties on owners of public accommodations to serve customers without regard to invidious discrimination. And Congress has affirmed this understanding of the Civil Rights Act of 1866 by amending it in 1991 to codify Supreme Court rulings granting every person the right to become an owner without regard to race.

Rand Paul focused on the fact that civil rights laws limit the power of owners to exclude non-owners from their property. He is right; such laws do limit the powers of owners. But they do so to ensure that everyone can become an owner. Homeowners are free to choose their dinner guests and friends on the basis of race if they like but public accommodations may not. Access to public accommodations and to employment and to housing is not contingent on membership in the nobility; in America, it is open to all. We rejected feudalism and slavery and the subjugation of women and we have similarly rejected racial apartheid, whether imposed by law or by businesses providing public accommodations, employment, and housing. It is true that antidiscrimination laws deprive individuals of the freedom to refuse to rent apartments to persons because of their race, but in so doing those laws promote the liberty of living in a society that does not assign economic opportunity on the basis of race.

Similarly, marital property laws were changed in the 1960s to ensure that women share equally in the property accumulated during marriage. Before that, only a few states had "community property" laws that granted married women equal rights to property accumulated during marriage. Law reforms ensured that married women had rights to an equitable share of marital resources if they divorced or survived their husbands. These laws broadly recognized the contributions to the marital community that women made and the enormous value of the unpaid work performed by women in the home. They treat women as equal contributors to the family, to society and to economic life.

Democracies require laws that shape market and social relationships in a manner that is compatible with the democratic way of life. That way of life is committed to the equality and liberty of individuals. For this to be so, many contracts and property arrangements are off-limits; they are incompatible with the social and market framework needed to allow individuals to take control of their own lives and to participate on equal terms in public life, without being hampered by being stuck in a particular caste or class that is excluded from full participation rights. Libertarians value independence. For this reason, they, above all others, should recognize and support laws that ban contracts and property rights which deprive persons of the ability to control their own destinies.

Some might think that we no longer need regulations to prohibit feudalism, slavery, or apartheid. Who would make such contractual or property arrangements today? But whether or not anyone has an inclination to create such arrangements, it is imperative to realize that a commitment to a democratic form of political and social life entails acceptance of regulations that ban relationships incompatible with the legal framework of a free and democratic society. Such regulations do not deprive of us freedom; they are what makes us free.

Nor are these limits on allowable market arrangements limited to big questions like slavery or apartheid. Consider a normal employment contract. Suppose you take a job and promise to work for your employer for a set time period — say a year. Many law students agree to clerk for a judge for a period of a year. Now suppose something happens that requires you to quit. Let's say your sister dies and you want to move to another state to take custody of her children. You ask your employer to let you out of your job even though you have six months left on your contract. In the United States, we do have the freedom to make contracts as we wish (as long as we comply with minimum standards regulations contained in common law and statutes) and the courts will enforce those contracts.

But in this case, the courts will enforce labor contracts only by requiring the breaching party to pay damages. If the judge sues the clerk and asks for the court to issue an injunction ordering the employee to actually continue performing the job duties for the rest of the year, the court will refuse the request. Ordering someone to actually carry out the terms of a contract is

called "specific performance." For the most part, U.S. courts do not order people to do what they promised to do; courts allow breach upon payment of damages. We do not have specific performance of labor contracts for a simple reason; it's called the Thirteenth Amendment. Forced labor is a form of slavery and we do not allow either slavery or indentured servitude in America.

The refusal to specifically enforce service contracts is so well-understood that we sometimes forget that this entails a limitation on contractual freedom. In our system, we are free to make contracts and go to court to enforce them, but we are also generally free to breach contracts upon payment of damages. If the employer can replace the employee so the employer is not financially worse off than if the employee had not quit in the first place, then we reduce the damages to what the employer actually lost. If the employer lost only the cost of finding a replacement, then the damages are low indeed. If that is so, then we place very low penalties on changing your mind. We may be free to make contracts but we are also often legally free to breach them.

We have adopted this policy because we have a strong commitment to the free movement of persons and to the idea that one should be able to control one's own life rather than be held as a servant to a lord or a slave to a master. The democratic way of life requires regulating the terms of contracts and the ways in which they are — or are not — enforced.

Regulation and freedom

Many people wrongly believe that strong protection for property rights means that we must have little government regulation of owners. Yet I have been arguing that nothing could be further from the truth. The property rights that we cherish exist because we had strong governments that used their regulatory powers to abolish feudalism, slavery, racial segregation, and patriarchy. We empower owners by disempowering lords; we ensure the ability to acquire property by rejecting the power to exclude customers because of race. We ensure women the opportunity to acquire property by treating them as equal partners in marital relationships. Beyond all this, strong protection for property requires laws that ensure that the use of property does not harm or destroy the property of one's neighbors. That is why we have nuisance law, zoning law, and environmental law. I cannot enjoy my property if you are free to poison my water and my air, and I cannot enjoy a home in a residential neighborhood unless we use zoning law or enforce restrictive covenants that make it so. Owners do not live alone and we protect the security of owners by limiting the freedom of their neighbors to destroy what they own. The simple principle of noncontradiction means that all owners must be limited in what they can do on their land so that all owners can have quiet enjoyment of their land.

In addition to regulations needed to ensure that property rights are compatible with the values of a free and democratic society, our laws ensure that we get what we pay for when we enter the marketplace. That is why we have consumer protection law; it is why we regulate the sale of property through the statute of frauds and recording statutes and mortgage regulations; it is why we both allow and limit the powers of homeowners associations.

There is no liberty without law. Americans know this and Americans demand law. If you ask Americans if they like government regulation, they say no. But if you ask about specific regulatory laws, they give a different answer. If you look at the statutes that exist in state law books, you find an interesting thing: even the most libertarian states have hundreds of regulations, most of which are designed to protect the public in various ways. Consider the laws of the state of Idaho — not generally thought of as a bastion of liberalism. Idaho regulates building contractors[13] and doctors[14] to ensure that they are competent. It regulates building

[13] See, e.g., Idaho Code §§ 394001 to 394004, 394010 to 394011 (granting the Division of Building Safety broad authority over building construction in Idaho). Among the other areas regulated by the Division of Building Safety are

construction to ensure that our homes are safe.[15] Idaho regulates banks and insurance companies to ensure that they have your money when you need it.[16] Idaho requires corporations to disclose financial and other information so investors can decide whether to buy their stock.[17] Idaho's antitrust laws prevent undue concentration of ownership in particular markets[18] and its consumer protection laws ensure that consumers get what they pay for and are not subject to dangerous or defective products.[19] Idaho regulates marriage; it requires spouses to support each other and their children,[20] and it regulates inheritance and prevents anyone from completely disinheriting a spouse.[21] Idaho regulates the workplace to ensure that workers are safe on the job and can return to their families whole; Idaho protects its people from discrimination and harassment.[22] Idaho forbids discrimination in the housing market based on race, sex, disability and religion.[23] It imposes zoning and environmental regulations to ensure that our homes and businesses can thrive in a healthy environment.[24]

Do these extensive regulations limit our freedom? No. They are what makes us free. Just as we have abolished feudalism, we have used the democratic processes of governance to set minimum standards for social relationships that protect consumers and ensure that the environment in which we live and conduct business is healthy, safe, and fair.

In 2008, the Supreme Judicial Court of the Commonwealth of Massachusetts ruled in the case of *Commonwealth v. Fremont Investment & Loan* that subprime mortgages may violate the state's consumer protection act.[25] That act prohibits "any unfair or deceptive act or practice."[26] A lender that had issued adjustable rate mortgages claimed that its actions were lawful because they did not violate the terms of the state's predatory lending statute. The court found that the consumer protection statute existed side-by-side with the predatory lending statute and might impose restrictions on lending that went beyond those defined in the predatory lending statute. The court also found that a reasonable jury might well conclude that it would be "unfair" to sell an adjustable-rate mortgage to someone who could not afford the payments when the higher rates kicked in when the loan amount is for 100% of the purchase price or the loan is subject to

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electricians, plumbers, heating and air conditioning installers, and loggers. See Idaho Division of Building Safety Home Page, http://dbs.idaho.gov.

[14] See Idaho Code § 541808; see also Idaho Code §§ 391301 to 391310.

[15] See id. §§ 394001 to 394004, 394010 to 394011.

[16] See id. § 411402 ("The purpose of this chapter is to promote the public welfare by regulating insurance rates as herein provided to the end that they shall not be excessive, inadequate, or unfairly discriminatory, and to authorize and regulate cooperative action among insurers in rate making. . . ."); see also § 26601 (2006) (regulating bank reserves).

[17] See id. §§ 3011601 to 3011605, 3011620 to 3011621. These state regulations, as with many other state regulations in this and almost every other area, are in addition to already plentiful federal regulation.

[18] Id. §§ 48101 to 48118 (regulating monopolies and other types of business practices in order to "maintain and promote economic competition in Idaho commerce, to provide the benefits of that competition to consumers and businesses in the state, and to establish efficient and economical procedures to accomplish these purposes and policies."

[19] See, e.g., id. §§ 37123 to 37131. This state regulation supplements extensive federal regulation of consumer products, especially food and drugs.

[20] See, e.g., id. § 321201 (mandating withholding of child support payments based on legislative determination that state's child support regulations were not being followed sufficiently without mandatory employer participation through withholding salary).

[21] See, e.g., id. § 152102 (establishing intestate share of surviving spouse).

[22] See id. § 187301.

[23] See id. § 675909(8).

[24] See, e.g., id. §§ 38101 to 38136 (establishing extensive regulations and a government agency to protect the state's forests); §§ 471501 to 471519 (extending state's detailed regulation of mining to surface mining and detailing the duties and powers of the Board of Land Commissioners).

[25] Commonwealth v. Fremont Investment & Loan, 897 N.E.2d 548 (Mass. 2008).

[26] Mass. Gen. Laws ch. 93A, §11.

a stiff prepayment penalty. Such a loan is "doomed to foreclosure" unless the borrower can refinance the loan.

The court agreed with the findings of the lower court that it is unfair for a lender to issue such a loan given the fluctuations in the price of housing. "To issue a home mortgage loan whose success relies on the hope that the fair market value of the home will increase during the introductory period is as unfair as issuing a home mortgage loan whose success depends on the hope that the borrower's income will increase during that same period."[27] At the time the loans were given, there were already indications that housing prices might be stalling or even going down. Selling subprime mortgages in this setting made it far less likely that the borrower would be able to pay the loan rather than face foreclosure, and the fact that the loan was for 100% of the purchase price meant that it was unlikely the buyer could refinance. The court concluded that if the state Attorney General could prove such loans were highly likely to face foreclsoure because of the borrower's inability to pay, the borrower would be worse off financially than if the borrower had not granted the mortgage to the subprime lender. Such an arrangements strips the borrower of her wealth and a reasonable jury might well find such an arrangement to constitute an unfair business practice.

A libertarian would scoff at this conclusion. If borrowers want to take this chance, why not let them? If we have a willing buyer and a willing seller, who is the state to step in and regulate the transaction? The consumer protection statute provides treble damages as a remedy for engaging in unfair or deceptive business practices. But why should the law tell someone they cannot take a chance they want to take? There is something to this argument; we do not, in fact, want to prevent people from making decisions just because we think they are not wise. Freedom means the ability to make choices about one's life and that includes one's finances.

At the same time, I have argued that every state has a consumer protection statute not because we think consumers are likely to make unwise decisions. Those statutes exist to ensure that people get what they are paying for. Consumer protection laws reject the idea of "caveat emptor" — let the buyer beware. If you buy a car, it should work. Before you buy stock, federal securities laws require the company to tell you if its debts exceeds its assets and it is about to go bankrupt so that you can make an informed decision about whether to buy. And if you borrow money, the lender should not be able to sell you a loan you cannot afford while leading you to believe that you can afford it. Consumer protection laws exist not because people are stupid but because *they have the right to be treated with common decency.* They exist because sellers of products and services have no right to defraud people. Sellers have the right to wax eloquent about their products but they have no right to lie about them.

Mortgage regulations may well be anathema to libertarians. They interfere with freedom of contract by limiting the terms on which one can contract. They regulate property and diminish the rights of owners by making it illegal to create a particular package of property rights. They not only arguably interfere with liberty but decrease social welfare by stopping willing parties from dealing with each other on terms that they prefer. Why then are these regulations so pervasive? *Why then do they exist in every single state?* Don't Americans hate regulation and seek to end "big government"?

Mortgage regulations are pervasive and popular because people demand laws that protect the interests of homeowners who borrow money to purchase homes or who use their homes as collateral for other loans, such as loans to pay for college. Why do people demand these laws? We demand laws that limits our freedom to contact because we live in a free and democratic society that seeks to treat each person with equal concern and respect. Such societies demand that economic and social relationships comport with certain minimum standards. Those minimum standards ensure that we treat each other fairly. They ensure that deals are interpreted

[27] 897 N.E.2d at 554.

in light of the parties' legitimate expectations. They ensure that we do not take undue advantage of each other.

In *The Once and Future King,* T.H. White explained King Arthur's conception of the mission of the knights of the Round Table. "What I meant by civilization when I invented it, was simply that people ought not take advantage of weakness.[28] Mortgage laws exist, not because we are stupid or weak-willed and need to be tied to the mast like Odysseus. They exist because we have the right to be treated with common decency. There are some demands that we cannot make of each other in a free and democratic society. Law exists to set those minimum standards. Regulation of the mortgage market is not an interference with personal liberty; nor is it an inefficient obstruction to social welfare. Mortgage law sets the minimum standards for fair dealing in a society that is premised on respect for each person and the protection of human dignity.

American property law is premised on the idea that all human beings are equal and that each of us has the right to life, liberty, and the pursuit of happiness. It is also premised on the idea that we have an obligation to treat other people with common decency. This places some property arrangements off the table. The core values underlying American property law seek to ensure that we have equal opportunity to participate in social and economic life. They also ensure that consumers get what they pay for and that the environment in which we live is safe and healthy. Of couse, we may not agree on the details; our boisterous political contests leave no doubt on that score. Surprisingly, however, as to the broad picture, we have more agreement than one might think. Property law functions as a private constitutional structure that shapes the contours of economic and social relationships. Property law is the infrastructure of democracy. Its core mission is to define the framework for a free and democratic society that treats each person with equal concern and respect.

[28] T.H. White, The Once and Future King 381 (1939)(Ace ed. 1996).