The Unalienable Right of Property: Its Foundation, Erosion and Restoration

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I. The Declaration of Independence Affirms Unalienable Property Rights

A. INTRODUCTION

The purpose of this examination of the foundation of property law in America is similar to the purpose of the Declaration of Independence. "Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject . . . ."[1]

The "common sense of the subject" expressed in the Declaration of Independence was that a national civil government must be based upon the "Laws of Nature and of Nature's God." The laws of nature and of nature's God dictate that all men are equally endowed by their Creator with unalienable rights to "Life, Liberty and the pursuit of Happiness." In Jefferson's day, the common sense of the subject was that the pursuit of happiness included the unalienable right of the individual to acquire, possess, protect and dispose of property. Because the purpose of civil governments was to secure unalienable rights, violations of one's unalienable right of property were subject to civil sanction.

Today, however, the common sense of the subject is quite the opposite. The modern idea is that civil government properly possesses all power over all subjects of property. Any rights that may exist are derived from the civil government. Any rights to property that a person has may be regulated, limited or revoked by the civil government in order to satisfy the "public interest." Some have advocated that there are no such things as rights, but merely social duties.

There is a clear distinction between the common sense in Jefferson's day and current thinking about property rights. This has resulted from a failure to remain faithful to the laws of nature and of nature's God. Scholars have adopted alternative theories of property premised upon power and expediency. They have supported such theories by inaccurate interpretations of feudal history. They have failed to recognize the fact that colonial America rejected European feudalism. When such ideas infiltrated the political arena, the progressive movement was able to extend the power of American civil government and its control over private property.

The rejection of the laws of nature and of nature's God has led to expanded civil power and the violation of unalienable rights. Once the unalienable right of property is violated, life and liberty are no longer secure. The challenge facing America is to end the violation of not only property rights but also unalienable rights in general. The only way such a challenge can be won is to return to the Declaration of Independence, the laws of nature and of nature's God, and unalienable rights.

In 1776 representatives of the thirteen United Colonies gathered to declare their independence from a tyrannical English government. They fashioned an unimpeachable legal basis for their claim to liberty. The Declaration of Independence stated the fundamental principles upon which civil governments should be established. Understanding the Declaration is crucial to a proper assessment of the principles of law in the United States.

> *If the declaration of independence is not obligatory, our intire political fabrick has lost its magna charta, and is without any solid foundation. But if it is the basis of our form of government, it is the true expositor of the principles and terms we have adopted.*[2]

Grasping these principles is also essential to a correct comprehension of the foundation of property law in the United States. The whole Declaration is premised upon the "Laws of Nature and of Nature's God." An examination of the foundation of property rights is meaningless apart from this language.

B. THE LAWS OF NATURE AND OF NATURE'S GOD

Reliance upon the laws of nature and of nature's God was not a new position created as an expedient measure to justify independence from Great Britain. Thomas Jefferson verified this by his statement that the intent was "[n]ot to find out new principles, or new arguments, never

before thought of."[3] Rather, the Framers were relying upon a centuries' old premise of law.

Sir Edward Coke addressed the subject of the law of nature as early as the seventeenth century.

> *The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is lex aeterna, the moral law, called also the law of nature. . . . This law of nature, which indeed is the eternal law of the Creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written, and before any judicial or municipal laws.*[4]

Blackstone in the eighteenth century provided an exposition of the laws of nature and of nature's God as that phrase was historically understood. Blackstone began with the common definition of law as "a rule of action . . . which is prescribed by some superior, and which the inferior is bound to obey."[5] From this he made it clear that "[m]an, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being."[6] Blackstone concluded that because "man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will."[7] This argument was crucial because the "will of his maker is called the law of nature."[8]

> *This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.*[9]

Blackstone affirmed that the Creator endowed man with the faculty of reason so that he could recognize the purpose of these laws. Regrettably, man's reason is no longer, "as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance."[10] Rather, every person now finds that his ability to reason and understand is full of error.

Man's faulty intellect has been aided by direct revelation. 'The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures."[11] Blackstone explained that the revealed precepts were recognizable as a part of the original law of nature. As a result, he concluded that "[u]pon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."[12] Blackstone referred to the law of revelation as the "law of God." Thus, we have the law of nature and the law of God.

Blackstone used the two separate phrases, the "law of nature" and the "law of God," because they referred to different expressions of God's revelation. The "law of nature" referred to God's eternal law revealed in Creation. The "law of God" referred to the law revealed in Scripture.

Jefferson's construction of the phrase "Laws of Nature and of Nature's God" evidenced reliance upon the same symmetry used by Blackstone. Jefferson was careful to use the distributive plural "laws." This word choice served to distinguish the law of nature and the law of God who is over nature. As well, the distributive plural served to link the two phrases as signifying the same thing.[13]

Jefferson obviously was not formulating some new philosophy. His phraseology carried a commonly understood meaning. "It was not Jefferson's task to create a new system of politics or government but rather to apply accepted principles to the situation at hand."[14] Jefferson phrased the Declaration to indicate that all men were created with certain inherent rights premised upon the laws of nature and of nature's God.

The colonists had to appeal to the laws of nature and of nature's God because the British Parliament declared the colonists to be outside the British constitution and denied the colonists the protection of the laws. British execution of law was no longer consistent with the laws of nature and of nature's God and therefore did not warrant obedience. Once inconsistent with the laws of nature and of nature's God, British execution of law also proved violative of human rights. Therefore, in order to protect their rights, the colonists had to appeal to unalienable rights. The rights of Englishmen were apparently contingent upon the good graces of the Crown and were too country specific.

The laws of nature and of nature's God are the foundation for unalienable rights. The word "unalienable" may be defined as that which is not alienable nor transferable.[15] Therefore, that which is unalienable may not be sold or transferred to another. By this, it is apparent that unalienable rights speak of rights which no man may sell, trade or transfer. As well, if a man may not freely transfer such a right by his own choice, certainly he may not be compelled to do so by some other person or power.

To better understand the text of the Declaration, we must also comprehend the nature of "rights." A simplistic definition would be that a right is a just claim.[16] However, a more complete definition indicates that a right is a just claim based upon conformity to the perfect standard of truth and justice; that perfect standard is found only in the infinite God and His will or law.[17] This definition evidences the relation of rights to the laws of nature and of nature's God.

The two above definitions are consistent with a contextual examination of the Declaration of Independence. The statement that all men are "endowed by their Creator with certain unalienable Rights" affirmed rights as just claims based in God's will. Men have certain rights which they may not be denied because the Creator fashioned man's nature in such a way that denial of those rights denies man's humanity. The nature of man and the nature of rights inherent within man was not left to subjective manipulation. The Declaration of Independence relied upon the laws of nature and of nature's God as the only objective standard.

Unalienable rights may be properly alienated only as a result of forfeiture for the commission of a wrongful act. Forfeiture occurs when subsequent to an individual's commission of a civil wrong for which he is found liable by due process, or by commission of a criminal act for which he is procedurally determined guilty, he is deprived of life, liberty or property in accordance with justice. Such deprivations do not involve the alienation of an unalienable right because any just claim to life, liberty or property was forfeited when the wrongful act was committed.[18]

The Declaration of Independence was an effort by the colonists to declare their ultimate reliance upon the laws of nature and of nature's God. Their appeal to an absolute and objective standard was an effort to secure the unalienable rights of the colonists. They recognized that they had a just claim to the unalienable right to life. The same held true for liberty. They also declared a just claim to the unalienable right to the "pursuit of Happiness." This phrase must be examined in order to understand the foundation of property law in the United States.

C. THE MEANING OF THE "PURSUIT OF HAPPINESS"

The Declaration of Independence affirms that people are endowed with unalienable rights, including "Life, Liberty and the pursuit of Happiness." The language is distinguishable from the "life, liberty and property" wording usually attributed to John Locke. An examination of appropriate documents reveals a deliberate purpose for the specific wording of the Declaration. The intent was to select language which would not be considered redundant because the Lockean use of the word property included liberty. Also, the intent was to avoid standardizing eighteenth-century practices or concepts of property law, such as slavery. The intent was to select language which referred to a person's general rights which include property, contract and other economic liberties consistent with the eternal laws of justice found in the laws of nature and of nature's God.

The Magna Carta of 1215 served to influence American constitutional liberties.[19] This document was the result of protests against the use of governmental power for tyrannical purposes. It affirmed that the rule of law limits the authority of men exercising governmental power. From this premise, the Magna Carta affirmed the principle that life, liberty and property must be protected. Sir Edward Coke supported this interpretation in his treatise concerning that document.[20]

The First Virginia Charter of 1606 stated that rights enjoyed by Englishmen, principally those of the Magna Carta, would be enjoyed by settlers of the new colonies in North America.[21] This same general guarantee is found in the Charter of New England of 1620,[22] the Charter of Massachusetts Bay of 1629,[23] the Charter of Maryland of 1632,[24] the Charter of Maine of 1639,[25] the Charter of Connecticut of 1662,[26] the Charter of Rhode Island of 1663,[27] and the Charter of Carolina of 1663.[28] So the colonies were initiated upon the principle that the rule of law protected inherent rights of life, liberty and property.

The Bill of Rights of 1689 was another major British document affirming fundamental rights and liberties of Englishmen.[29] This document fostered further protections of life, liberty and property. The document obliged the British government to secure these rights of the colonists because they too were Englishmen. However, as noted previously, the rights of Englishmen were eventually violated by Parliament and the Crown.

John Locke published his *Two Treatises of Government* within a few years of the enactment of the Bill of Rights. *The Second Treatise* is the primary source for Locke's arguments concerning life, liberty and property. He used several variations of the phrase: "Life, Health, Liberty, or Possessions";[30] "Life, Liberty, Health, Limb or Goods";[31] "Estate, Liberty, Limbs and Life";[32] "Lives, Liberties and Estates";[33] "Lives, Liberties, and Possessions";[34] and "Lives, Liberties, or Fortunes."[35] Locke did not use the phrase "life, liberty and property" in his second treatise. To do so would have been redundant. Locke repeatedly pointed out that by using the word property, he meant "that Property which Men have in their Persons as well as Goods."[36] He used "the general Name, *Property*" to refer to "Lives, Liberties and Estates."[37] Using the phrase "pursuit of Happiness," the Declaration of Independence avoided the redundancy which occurred if the Lockean use of the word property was related to liberty.

Further insight into the "pursuit of Happiness" is available from Blackstone. Blackstone discussed the fundamental rights of Englishmen in light of the Magna Carta. The declaration of rights and liberties in the Magna Carta conformed to the natural liberties of all individuals.[38] The natural liberties inherent within the individual were endowed by God at the person's creation.[39] Blackstone indicated that these rights were reducible to three primary articles: the right of personal security, the right of personal liberty and the right of private property.[40]

Blackstone indicated that the inherent right of personal security included the person's "enjoyment of his life, his limbs, his body, his health, and his reputation."[41] This list may be summarized in the word "life." Life is a gift from God and is therefore an inherent right.[42]

Blackstone addressed the subject of personal liberty as a God-given, inherent right. Blackstone argued that it consisted of the liberty to move about, at will, from place to place without fear of restraint or imprisonment without due process.[43]

According to Blackstone a third inherent right was the God-given gift of private property. The right "consists in the free use, enjoyment, and disposal of all [personal] acquisitions."[44] He also spoke of the "sacred and inviolable rights of private property."[45]

Blackstone's three-part expression was translated into the American legal tradition by the Declaration and Resolves of the First Continental Congress. The document affirmed the position that "the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts" were "entitled to life, liberty and property."[46] This language indicated reliance upon both the Magna Carta and the immutable laws of nature because the Magna Carta was a voidable act of man, while the laws of nature were permanent. The language indicated that the draftsmen did not rely upon the Lockean view of property as simply another way of saying life, liberty and estate. Rather, they relied upon Blackstone's three-part division of God-given, inherent rights.

The meaning of the "pursuit of Happiness" is further revealed by the Bill of Rights to the Constitution of Virginia. Adopted June 12, 1776, roughly one month prior to the Declaration of Independence, a key provision states:

> *That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*[47]

This language reflected Blackstone's three-part expression of inherent rights. Life, liberty and property were recognized as inherent rights of the individual and not originating with civil society. The property aspect was expanded to reflect just what sort of property rights were inherent.

Apparently, the means of acquiring and possessing property generally were inherent rights. This does not imply that people have an inherent right to any specific item or amount of property. The language indicated that the means of pursuing and obtaining happiness were equally inherent rights. This may include such economic rights as contract and profession.

The language of the Virginia Bill of Rights was similar to that of the Declaration. The Declaration, however, relied upon the "pursuit of Happiness" rather than property. This word choice served the purpose of avoiding the Lockean redundancy and of encompassing in few words, more than rights in property. To understand the context of the phrase, recourse must again be made to Blackstone's *Commentaries*.

Blackstone indicated that the Creator "has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action."[48] Blackstone clarified this by pointing out that the Creator

> *has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things . . .; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness."*[49]

An unalienable right to the "pursuit of Happiness" meant simply that every individual was created with the inherent right to live in accordance with the laws of eternal justice. The phrase also avoided redundancy by the use of the word "property." It allowed recognition of more rights than that of property or the legal procedures for dealing with property. It also allowed for use of Blackstone's own pretext test to determine whether property right "tends to man's real happiness, and therefore justly concluding that . . . it is a part of the law of nature."[50] It may be concluded that the denial of property rights is "destructive of man's real happiness, and therefore that the law of nature forbids it."[51]

The above interpretation of the "pursuit of Happiness" phrase was adopted by individual states. State constitutions drafted after the Declaration of Independence indicated a common understanding.

The Constitution of Pennsylvania of August 16, 1776, affirmed:

> *That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.*[52]

The Delaware Declaration of Rights of September 11, 1776, indicated "[t]hat every member of society hath a right to be protected in the enjoyment of life, liberty and property."[53] Delaware chose to use Blackstone's brief three-part expression of inherent rights.

The Constitution of Vermont of July 8, 1777, affirmed:

> *That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty: acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.*[54]

The Constitution of Massachusetts of October 25, 1780, recognized:

> *All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.*[55]

A Justice of the United States Supreme Court, D. J. Brewer, referred to the Constitution of Massachusetts for his argument to protect private property.[56] He informed Yale graduates:

> *Its last clauses simply define what is embraced in the phrase, - "the pursuit of happiness." They equally affirm that sacredness of life, of liberty, and of property, are rights, - unalienable rights; anteceding human government, and its only sure foundation; given not by man to man, but granted by the Almighty to every one: something which he has by virtue of his manhood, which he may not surrender, and of which he cannot be deprived.*[57]

The Constitution of New Hampshire of June 2, 1784, affirmed:

> *All men have certain natural, essential, and inherent rights; among which are - the enjoying and defending life and liberty - acquiring, possessing and protecting property - and in a word, of seeking and obtaining happiness.*[58]

As the constitutions of Massachusetts and New Hampshire indicated, seeking and obtaining happiness was used as a shorthand reference to a host of unalienable rights, including property. The Framers paralleled the inherent right of property with the unalienable right to the pursuit of happiness. The "pursuit of Happiness" phrase of the Declaration referred to the right to use just means of acquiring, possessing, and protecting property, and seeking, pursuing and obtaining happiness, but by using more abbreviated language. Judge Brewer affirmed this definition of the phrase:

> *When among the affirmations of the Declaration of Independence, it is asserted that the pursuit of happiness is one of the unalienable rights, it is meant that the acquisition, possession, and enjoyment of property are matters which human government cannot forbid, and which it cannot destroy . . . .*[59]

Clearly, the "pursuit of Happiness" phrase carried a very specific meaning. Part of the problem involved when addressing the unalienability of property rights is that, historically, the specific meaning has not been carefully maintained or clearly articulated. In a certain, carefully defined context, property rights are alienable. In a more general sense, property rights are unalienable.

Obviously, property of various descriptions is bought and sold daily. When a person sells a piece of property, be it a house, a piece of land or a car, he is transferring his right to that item of property. He is alienating his property right to that item. He is alienating his right to that particular subject of property. He is not, however, alienating his right to own property.

Because of the ability to alienate one's right to a particular subject of property, some writers have concluded that one's general right to property is necessarily an alienable right.[60] The misunderstanding is due to a failure to distinguish between the right to freely transfer or alienate particular items by use of the procedural means provided in law, and the inability to transfer the general right to acquire, possess or dispose of property. The unalienable right of property refers to that general right to acquire, possess or transfer property. That right cannot be denied without denying an inherent right that is indicative of one's humanity. The general right to acquire, possess or transfer property is an unalienable right, derivative of the laws of nature and of nature's God, and encompassed in the phrase the "pursuit of Happiness."

Unalienable rights are general rights understood only in light of the laws of nature and of nature's God. A person has an unalienable right to life in general. He does not have an unalienable right to a specific quality of life, or quantity of life. Likewise, a person has an unalienable right to liberty in general. He does not have an unalienable right to unlimited liberty without responsibility. Similarly, the unalienable right to the pursuit of happiness is a general statement. A person does not have an unalienable right to a particular degree of happiness, or particular kind of happiness. An unalienable right to property also must be understood in a general sense. A person does not have an unalienable right to a particular piece of property, or amount of property. The unalienable right of property refers to the general right to use means consistent with the laws of nature and of nature's God in order to acquire, possess or transfer property. That right cannot be denied without denying an inherent aspect of a person's humanity. The same is true of all unalienable rights.

According to the Declaration of Independence, the United States is established upon principles derived from the laws of nature and of nature's God. Therefore, the civil government of the United States is obligated to secure the unalienable rights of the individual. The unalienable right to the pursuit of happiness includes the general right to property. This foundation must be embraced in order to secure property rights. To do this, it is necessary to demonstrate that although modern theorists have assumed that American property law is premised upon ancient feudalism, Americans consciously rejected feudalistic practices.

D. THE BREAK FROM FEUDAL NOTIONS OF PROPERTY

The foundation for law in the United States is the law of nature and of nature's God. This objective standard differs from a system based upon feudalistic concepts. This standard facilitated rejection of the feudalistic principle that all property was subject to ultimate title in the civil ruler. Such feudal subordination threatened unalienable rights.

Historically, feudal institutions were implemented in Europe to meet the need for an effective military force to stabilize power in the state. The system provided strict military and political cooperation. Individuals were commonly supported by a grant of land in return for obedient service, thereby becoming vassals dependent upon the lord.[61]

Feudalism originated with the military practice of the nations that migrated into the regions of Europe at the decline of the Roman Empire.[62] The ultimate proprietor of property held the source of political power.[63] A proper military subjection was introduced. "Military ideas predominated; military subordination was established; and the possession of land was the pay which the soldiers received for their personal services."[64] But because the chief represented the society, the ultimate property of the soil and the source of power vested in him.[65]

The feudal relationship was primarily defensive.[66] The military tenure was to maintain the power of the Crown by protecting against rebellion from within and invasion from without.[67]

The institution of the Domesday Book formalized the subordination of feudal estates.[68] By consenting to the introduction of feudal concepts, the English meant no more than to establish a defensive military system.[69] The system was firmly rooted in English common law by the thirteenth century.

A fundamental maxim of English tenures, though Blackstone called it a mere fiction, was

> *"that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feodal services."*[70]

Blackstone considered such a doctrine of subordination contrary to English understanding and intent.

The Norman lawyers, skilled in the feudal constitutions, and understanding the import and extent of the feudal terms, introduced rigorous doctrines and services as if the English owed everything they had to the bounty of their sovereign king.[71] The principle of military organization was coupled with the notion that all lands were originally granted out by the sovereign. The grantor forcefully retained the dominion or ultimate property of the land while the grantee had only the use and possession. In this manner, the feudal system came to be considered a civil establishment, rather than only a military plan. As a result of subordination to the king, oppressive consequences were instituted hindering the civilization and improvement of the people.[72]

Kent affirmed that the feudal system degenerated and, except in England, "annihilated the popular liberties of every nation in which it prevailed."[73] Kent indicated that "the great effort of modern times" should be "to check or subdue its claims, and recover the free enjoyment and independence of allodial estates."[74]

Under the feudal system, the absolute power of the king included the only true ownership right to property of any sort. The concept of holding the right to use by grant of right from the king was a part of the English common law. At best one might argue that American property law was premised upon the common law and the inherent feudal traditions. However, America rejected the feudal concept of subordination because it threatened unalienable rights. By custom and by statute Americans sought to establish a legal tradition distinguishable from the English common law. The legal terminology of feudal law continued for convenience, but the oppressive practice of feudal subordination was rejected.

Powell has noted the American independence from the common law of England. The early colonial charters included a power to legislate so long as the laws were not repugnant to the laws of England. The mere absence of repugnance allowed freedom for substantial change. Being free from the impositions of the laws of England, the colonists began to regulate their affairs by a generally popular sense of right derived from the Scriptures. Some aspects of the English common law were found helpful and were eventually legislated; others were rejected. The theory was one of selective incorporation of certain common law principles.[75]

Jesse Root also affirmed liberation from the English common law. While the colonists were knowledgeable of that common law, they were free from total subjection to it. This freedom allowed the Americans to reject many of the feudal practices inherent in the English system. The Americans fostered increased property rights, because they recognized that all rights were derived from the law of nature and of revelation. As a result, their title to land was not subject to the king.[76]

Current property law asserts that if feudal property law was a part of English common law, and if the colonies in America were subject to English common law, then America would also be subject to feudal property law. The arguments of Root and Powell, however, affirm the American independence from the English version of the common law and the rejection of feudal subordination. Other writers give further evidence for the American independence from feudal subordination.

Washburn said that "Great Britain relinquished all claim . . . to the proprietary and territorial rights of the United States: and these rights vested in the several States . . . ."[77] The states consisted of landowners acting as a corporate body to secure individual rights. New York New Jersey, South Carolina and Michigan expressly denied the existence of feudal subordination. In 1793 Connecticut "declared every proprietor in fee-simple of land to have an absolute and direct dominion and propriety in it."[78] In 1779 Virginia statutorily abolished feudal subordination practices. Pennsylvania, Maryland and Wisconsin declared their land allodial.

Joseph Story indicated that

> *[i]n all the colonies the lands within their limits were by the very terms of their original grants and charters to be holden of the crown in free and common socage . . . . All the slavish and military part of the ancient feudal tenures was thus effectually prevented from taking root in the American soil; and the colonists escaped from the oppressive burdens [of subordination] . . . . In short, for most purposes, [American] lands may be deemed to be perfectly allodial, or held of no superior at all . . . .*[79]

Kent affirmed that the states were never marked by subordination. In all the states, the "ownership of land [was] essentially free and independent."[80] The New York legislature abolished any notion of the existence of subordination and declared all lands within the state to be allodial. The entire and absolute property vested in the owner. The title to land was essentially allodial, and every tenant in fee simple had an absolute and perfect title, even though the technical language called his estate fee simple and the tenure free and common socage. This technical language was "interwoven with the municipal jurisprudence" of the states, while all vestiges of feudal subordination were rejected.[81]

Writing in 1896, Earl Hopkins gave a brief history of feudalism in Europe. He pointed out that "[t]he feudal system never took root in the United States."[82] An estate would have been "by free and common socage, and not subject to the burdensome incidents of subordination of tenure . . . . Lands [were] allodial; that is, held in absolute ownership . . . ."[83]

Minor and Wurtz indicated that

> *[t]he only feudal tenure ever recognized in this country was that of free and common socage, . . . the tenure upon which all the grants of colonial land by the crown were based . . . . [A]t the time these grants were made, the socage tenure had already been stripped of all its burdensome incidents, so that they never existed here.*[84]

After the War for Independence, even the "subservience to sovereignty evidenced by the socage tenure" was abolished.[85] In essence, feudal subordination was abolished entirely. An American's authority over property must be free from any obligation to superior title in the state.

Hopkins did point out that the documentary title evidencing ownership of the land was originally derived from the state. This was merely a legal convention evidencing title so that the state could help secure the person's property right. Until the patent was issued, the legal title remained in the United States as trustee. The equitable title was in the holder of the certificate of entry which was issued by the register of the land office and entitled the claimant to the patent.[86]

Washburn also addressed the patent process.

> *[W]hile in equity a purchaser acquires a good title to land which he may have entered and actually paid for, and for which he holds the certificate from the proper officer, in order to prevail in a court of law he must have had a title by patent . . . . [A]fter the purchase from the United States, the purchaser acquires all the property which the United States had in the*

> *land; that the equitable and legal title passes from the United States, which only retains the formal technical legal title in trust for the purchaser until the patent issues . . . . "Lands which have been sold by the United States can, in no sense, be called the property of the United States . . . . When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser . . . ."*

> *. . . "The patent [was] conclusive evidence . . . of the relinquishment to the patentee of all interest the United States held, as trustee, in the land."*[87]

Feudalism never existed in the United States. Some of the feudal language was used because it was familiar, but the burdens of feudalism were rejected. References to socage tenure denoted land held by a fixed service, which is not military, nor in the power of the lord to vary.

> *Socage tenures do not exist any longer . . . . An estate in fee-simple means an estate of inheritance, and . . . it has lost entirely its original meaning as a beneficiary . . . estate . . . . Whether a person holds his land in pure allodium, or has an absolute estate of inheritance in fee-simple, . . . his title is the same . . . .*[88]

Escheat was another of those incidents which has lost its feudal character.

> *[E]scheat of lands was regarded as merely falling back into the common ownership of the State . . . because the tenant did not see fit to dispose of them in his lifetime, and left no one who . . . has any claim to inherit them . . . . Land being allodial in the United States, escheat properly speaking did not apply to it, but in case of failure of heirs . . . .*[89]

The principle was that if land escheats to the state, it was held in trust for the citizens until a bona fide purchaser seeks a patent.

Washburn indicates that some aspects of

> *our law of real estate, including the forms of conveyance, as well as the terms in use in applying them, were borrowed originally from the feudal system . . . . [However,] the adoption of expressions or forms of process borrowed from a once existing system of laws, does not necessarily imply that that system has not become obsolete.*[90]

States frequently passed statutes to emphasize the fact that the feudal practice of subordinating all property right to the civil authority was rejected.

Thus, the colonists made a conscious and absolute break from the systems which they knew to be a threat to the unalienable right of property. While it is true that they used the technical legal language of the feudal and common law tradition, this was done for convenience. To have fostered feudal subordination would have undermined the effort to affirm the unalienable rights of the individual as dictated by the laws of nature and of nature's God. The continued use of feudal terminology in deeds and titles would be used eventually to argue that America was established upon feudal principles and to deny any just claim to unalienable property rights.

The Declaration of Independence affirmed unalienable property rights. The history of the phrase "Laws of Nature and of Nature's God," the foundation of the Declaration of Independence, evidences the validity of unalienable rights and the necessity to secure them. The history of the phrase "pursuit of Happiness" evidences that it included unalienable property rights. American legal writers recognized that the laws of nature and of nature's God and the pursuit of happiness supported the rejection of the European feudalistic practice of subordination. The next section evidences that the challenge to secure unalienable property rights has been brought about by a failure to adhere to the Declaration of Independence in favor of European theories of property.

Next: **The Gradual Demise of the Unalienable Right of Property**

FOOTNOTES

1. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *reprinted in* 16 The Writings of Thomas Jefferson 117, 118 (A. Lipscomb ed. 1905) [hereinafter Writings].
2. J. Taylor, New Views of the Constitution of the United States 2 (Washington 1823 & photo. reprint 1971).
3. Writings, *supra* note 1.
4. Calvin's Case, 77 Eng. Rep. 377, 392 (1609).
5. 1 W. Blackstone, Commentaries *38.
6. *Id.* at 39.
7. *Id.*
8. *Id.*
9. *Id.* at 41.
10. *Id.*
11. *Id.* at 42.
12. *Id.*
13. Gary T. Amos, Biblical Principles of Government 270 (1987) (unpublished manuscript).
14. Sources of Our Liberties 318 (R. Perry ed. 1978) [hereinafter Sources].
15. Black's Law Dictionary 1366 (5th ed. 1979).
16. 2 S. Johnson, A Dictionary of the English Language, s.v. "right" (London 1755).
17. 2 N. Webster, An American Dictionary of the English Language, s.v. "right" (New York 1828 & photo. reprint 1980) (reprinted in one volume).
18. Christians for Justice International, A Declaration of Universal Rights 2 (1988).
19. The Magna Carta (1215), *reprinted in* Sources, *supra* note 14, at 11.
20. *See generally* E. Coke, The Second Part of the Institutes of the Laws of England (London 1797 & photo. reprint 1986).

21. 7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3788 (F. Thorpe ed. 1909 & photo. reprint 1977) [hereinafter Thorpe].
22. 3 *id.* at 1839.
23. *Id.* at 1857.
24. *Id.* at 1681.
25. *Id.* at 1635.
26. 1 *id.* at 533.
27. 6 *id.* at 3220.
28. 5 *id.* at 2747.
29. Bill of Rights (1689), *reprinted in* Sources, *supra* note 14, at 245.
30. J. Locke, Two Treatises of Government 311 (P. Laslett rev. ed. 1963).
31. *Id.*
32. *Id.* at 356.
33. *Id.* at 395.
34. *Id.* at 429.
35. *Id.* at 460.
36. *Id.* at 430.
37. *Id.* at 395.
38. 1 W. Blackstone, Commentaries *127-29.
39. *Id.* at 125.
40. *Id.* at 129.
41. *Id.*
42. *Id.*
43. *Id.* at 134.
44. *Id.* at 138.
45. *Id.* at 140.
46. Declaration and Resolves of the First Continental Congress (1774), *reprinted in* Sources, *supra* note 14, at 287.
47. 7 Thorpe, *supra* note 21, at 3813.
48. 1 W. Blackstone, Commentaries *40.
49. *Id.* at 40-41.
50. *Id.* at 41.
51. *Id.*
52. 5 Thorpe, *supra* note 21, at 3082.
53. Delaware Declaration of Rights (1776), *reprinted in* Sources, *supra* note 14, at 338.
54. 6 Thorpe, *supra* note 21, at 3739.
55. 3 *id.* at 1889.
56. D. Brewer, Protection to Private Property from Public Attack, An address delivered before the graduating class at the sixty-seventh anniversary of Yale Law School on June 23, 1891 (The Microbook Library of American Civilization 40071).
57. *Id.* at 4.
58. 4 Thorpe, *supra* note 21, at 2453-54.
59. D. Brewer, *supra* note 56, at 5.
60. Story, Natural Law, *in* 9 Encyclopedia Americana 150,151 (F. Lieber new ed. 1836), *reprinted in* 7 J. Christian Jurisprudence 31 (1988). Story wrote many articles on private law for Lieber's Encyclopedia. These articles, though written on the behest of Lieber, are unsigned, as Story requested. *See* 1 F. Lieber, Civil Liberty and Self-Government 232, at nn. 3, 14 (1883). *See also* Letter from Joseph Story to Edward Everett (Nov. 1, 1832) (Story Papers, Massachusetts Historical Society).
61. S. Painter, Feudalism and Liberty 3-7 (1961).
62. 2 W. Blackstone, Commentaries *45.
63. Watkins, *Introduction* to G. Gilbert, The Law of Tenures vi (London 5th ed. 1824).
64. *Id.* at viii (quoting Robertson, I Hist. of Scotl. 16 c. 1).
65. *Id.* at ix.
66. 3 J. Kent, Commentaries *492.
67. C. Moynihan, Introduction to the Law of Real Property 3-4 (2d ed. 1988).
68. 2 W. Blackstone, Commentaries *49. In 1086 William the Conqueror instituted a comprehensive and detailed survey of English lands. This resulted in a statistical record of the feudal tenures embodied in two volumes commonly known as the Domesday Book C. Moynihan, *supra* note 67, at 6-7.
69. *Id.* at 51.
70. *Id.*
71. *Id.*
72. *Id.* at 53-58.
73. 3 J. Kent, Commentaries *501.
74. *Id.* The term "allodial" simply meant land held in absolute ownership, not in dependence upon any other body or person in whom the proprietary rights were supposed to reside, or to whom the possessor of the land was bound to render service.
75. 1 R. Powell, The Law of Real Property 97-106 (1988).
76. J. Root, The Origin of Government and Laws in Connecticut, 1798, *reprinted in* The Legal Mind in America 31-40 (P. Miller ed. 1962). Perry Miller also indicates that James Kent and David Hoffman defended an American legal tradition divested of the peculiarities of the English common law and premised instead upon the laws of nature. *Id.* at 93-94. *See also* D. Hoffman, A Course of Legal Study (Philadelphia 2d ed 1846 & photo. reprint 1968).
77. 1 E. Washburn, A Treatise on the American Law of Real Property 68-69 (5th ed. 1887).
78. *Id.* at 69.
79. 1 J. Story, Commentaries on the Constitution of the United States 125 (5th ed. 1905).
80. 3 J. Kent, Commentaries *488.
81. *Id.*
82. E. Hopkins, Handbook on the Law of Real Property 31 (1896).
83. *Id.*
84. R. Minor & J. Wurtz, The Law of Real Property 12 (1910).
85. *Id.*
86. E. Hopkins, *supra* note 82, at 403.
87. 3 E. Washburn, *supra* note 77, at 208-10.
88. 3 J. Kent, Commentaries *514.
89. 3 E. Washburn, *supra* note 77, at 52-53.
90. 1 *id.* at 71.