

1999

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John O. McGinnis

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Recommended Citation

John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 Cath. U. L. Rev. 1029 (1999).
Available at: <http://scholarship.law.edu/lawreview/vol48/iss4/2>

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REPLIES

A NEW AGENDA FOR INTERNATIONAL HUMAN RIGHTS: ECONOMIC FREEDOM

*John O. McGinnis**

I am pleased to have the opportunity to comment briefly on Edwin D. Williamson's essay, *U.S.-EU Understanding on Helms-Burton: A Missed Opportunity to Fix International Law on Property Rights*.¹ The essay is a characteristically detailed and thoughtful work that outlines the failure of the U.S.-EU Understanding to vindicate the property rights that the Castro regime has abrogated. The essay then suggests that the United States and European Union (EU) should have used this opportunity to formulate an international convention for the protection of property rights.²

Rather than commenting further on the specifics of the proposal, I would like to focus on its contribution to transforming international human rights law. It is a sad truth that property rights and other individual economic freedoms have been the stepchild of international human rights. The Universal Declaration of Human Rights,³ and the two most important conventions, the International Covenant on Economic, Social, and Cultural Rights⁴ and the International Covenant on Civil and Political Rights,⁵ offer guarantees of all sorts of civil and political rights. They even mint welfare rights against the government, including, in one case, the right to have the government assure paid holidays!⁶ Neither of the Covenants, however, contains a right to compensation for takings of

* Professor, Benjamin N. Cardozo Law School. I am grateful to Professors Minasse Haile and Malvina Halberstam for their helpful comments, and to Edwin Williamson for suggesting me as a commentator.

1. Edwin D. Williamson, *U.S.-EU Understanding on Helms-Burton: A Missed Opportunity to Fix International Law on Property Rights*, 48 CATH. U. L. REV. 293 (1999).

2. *See id.* at 293, 304.

3. G.A. Res. 217A(III), at 71, U.N. Doc. A/810 (1948).

4. G.A. Res. 2200A, U.N. GAOR Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

5. G.A. Res. 2200A (XXI), U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

6. *See* International Covenant on Economic, Social and Cultural Rights, *supra* note 4, art. 7(d).

property or provides protection for other individual economic freedoms, such as the right to contract. The Universal Declaration of Human Rights mentions property rights but provides only for “the right to own property” and the right not to “be arbitrarily deprived of . . . property.”⁷ It provides no specification of what constitutes property. It is wholly silent on other economic freedoms, like the right to contract.

The neglect of property rights and other individual economic freedoms in international human rights law has deep roots in some of the most unfortunate chapters of this century’s history. First, the international human rights conventions were negotiated during the period of the Cold War. The Communist bloc opposed property rights because communism did not approve of large-scale property holding. Instead, the bloc supported the inclusion of welfare rights because this was an area in which it could argue (falsely, of course) that it had greater achievements than the West. The West, on the other hand, wanted to obtain agreement on human rights conventions in order to build a platform for pressing the Communist bloc on political rights. To some extent, the current international human rights covenants represent a compromise; the West obtained the inclusion of civil and political rights in these covenants in return for the exclusion of property rights and other individual economic freedoms.

Second, at the time the major human rights covenants were negotiated, economic freedoms were of relatively low priority, even in the West. This century has witnessed the rise of the welfare state with the concomitant decline of property rights. Indeed, the idea that property rights against the state should be subordinated to equality distinguishes the welfare state from the more laissez-faire regimes that they replaced. The powerful state necessary to provide welfare rights is prevented, theoretically, from acting tyrannically by civil and political rights. Therefore, after the rise of social democracy, civil rights, like the right to vote out and criticize leaders, became the paradigmatic constitutive liberties, displacing the right to hold and use property.

In the United States, this evolution can be traced through constitutional law. To gain the centralized authority necessary for large-scale social reform, the government had to be liberated from the features of the original design that had been crafted to limit its power to interfere with individual liberties, including economic freedoms. Thus, in the New Deal, the structural checks of federalism and the separation of powers

7. Universal Declaration of Human Rights, *supra* note 3, art. 17.

were weakened substantially.⁸ Moreover, until the last decade, substantive protections for property and contract rights all but disappeared.⁹ With the dissolution of these venerable checks on the power of the state, advocates of the New Deal had to look elsewhere for restraint; they found it in the reasoned deliberations of citizens in the democratic process.¹⁰

Under this new paradigm, the citizens' abilities to engage in sustained social criticism and vote out their rulers, rather than the autonomy provided by substantial property rights, would prevent a powerful state from becoming a tyrannical state. Thus, the First Amendment¹¹ and related civil rights naturally took center stage as the principal means of guaranteeing "open political dialogue and process."¹² It is therefore not surprising that the content of international human rights covenants reflect the social democratic consensus that was sufficiently powerful to dissolve much of our original Constitution.

Finally, the process of declaring human rights through treaties may also have contributed to the exaltation of welfare rights over economic freedoms. Treaties and government programs providing welfare rights empower politicians (and bureaucrats) that negotiate them because the same politicians (and bureaucrats) determine the beneficiaries of such programs, and the sources of revenues that fund them.¹³ On the other

8. For a discussion of the collapse of federalism, see generally Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987), and for a discussion of the collapse of separation of powers restraints, see generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

9. See generally G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972) (detailing the transformation of social thought that led to the declining willingness of the courts to enforce economic liberties).

10. See David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1734 (1991) (defining increased First Amendment protections as facilitating majority control of the newly empowered post New Deal state). First Amendment theory developed in the post-New Deal era to promote democratic deliberation was not entirely novel, but had roots in the progressive era and theories of Zechariah Chafee. See MARK A. GRABER, *TRANSFORMING FREE SPEECH, THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 122-64 (1991) (noting Chafee's belief that free speech is a procedural prerequisite for all democratic societies).

11. U.S. CONST. amend. I.

12. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 112 (1980) (explaining that the "central function" of the First Amendment is to "assur[e] an open political dialogue and process").

13. See generally Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925 (1996) (suggesting that politicians and bureaucrats try to expand their juris-

hand, property rights are effective in restraining the power of politicians and bureaucrats, and thus the lawmakers are less likely to include such provisions in their treaties.

One measure of the weak status of property rights in this era is the erosion of the right of aliens to compensation for expropriations. This guarantee is not rooted in international human rights law, but in international obligations of nations toward aliens of other countries. Nevertheless, this obligation has come under attack from both communist nations and former colonies. In *Banco Nacional de Cuba v. Sabbatino*,¹⁴ Justice Harlan observed: “[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens.”¹⁵

Today, the social democratic consensus responsible for the erosion of property rights and other economic freedoms has itself been challenged. Our age has rediscovered the powerful argument that respect for property is the best guarantor of wealth, social stability, and civil rights.¹⁶ Ownership of land, labor, and intellectual creation all generate riches because they assure that individuals gain the fruits of their improvements, toil, and creativity. Clearly delineated and rigorously enforced property rights also reduce social conflict because everyone knows what is his. Furthermore, property rights can ultimately protect the exercise of civil and political rights because property alone provides the resources empowering individuals to resist the state.

This view also has support in Western history — the history that is the source of human rights. This history has shown that property rights create prosperity.¹⁷ Prosperity, in turn, creates a rising middle class that demands civil and political rights because these rights help the middle class secure its property against the dangers of both tyrannical government and political instability.

The case for protection of property rights has drawn strength from empirical studies of countries throughout the world. In our contemporary world, respect for property and freedom from government regula-

diction and power through treaties).

14. 376 U.S. 398 (1964).

15. *Id.* at 428.

16. For a discussion of the revival of property rights in legal and political theory, see generally, TOM BETHELL, *THE NOBLEST TRIUMPH: PROPERTY AND PROSPERTIY THROUGH THE AGES* (1998).

17. For a book that shows the importance of prperty rights in generating prosperity, see generally, DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS* (1998).

tion and taxes continues to generate economic prosperity.¹⁸ There is a high correlation between respect for economic freedoms and respect for civil rights.¹⁹ Finally, there is no fundamental tension between property rights and social stability. Indeed, if property rights increase the average income of members of a nation, that nation becomes more stable.²⁰

Thus, it is a propitious time to consider how to translate the new intellectual respectability of economic freedom into new guarantees for property and contract rights internationally.²¹ Edwin Williamson's suggestion is to proceed with a new international convention on property rights.²² Other avenues also are possible. First, the General Agreement on Tariffs and Trade (GATT)²³ could be used to encourage greater respect for property rights. Ultimately, this route may be more plausible because the prospect of gains through international trade may give the friends of property rights greater leverage. I note, for instance, that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²⁴ recognizes a right to copyright.²⁵ Second, our foreign aid could be restricted statutorily so that recipients would have to provide a variety of property rights to their own citizens. This avenue may begin creating the consen-

18. See JAMES GWARTNEY ET AL., *ECONOMIC FREEDOM OF THE WORLD* xxiii (1995) (contrasting the growth rates of the countries that have the persistently high levels of economic freedom with countries that have persistently low levels).

19. See *id.* at 67. Listed countries with persistently high economic freedoms also enjoy greater protection for civil rights than listed countries with persistently low levels of economic freedom. See *id.*

20. See Richard A. Posner, *Equality, Wealth, and Political Stability*, 13 J.L. ECON. & ORG. 344, 344 (1997) (increasing "average incomes in a society . . . increase[s] political stability").

21. See generally Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998). Some conservatives who are sympathetic to property rights might nevertheless object to making them part of international law because they believe that human rights are not an appropriate subject for international law. First, however, property rights are related to commerce and therefore within the ambit of Congress' enumerated powers under the Commerce Clause, at least as this clause is now interpreted. Thus, a treaty on property rights would comport with the strict reading of the scope of treaty-making put forward by Curtis Bradley. See *id.* at 394. Second, even if one objects as a policy matter to international human rights covenants on grounds of interference with national sovereignty, these covenants are not likely to disappear. Insofar as they have become part of international law, it seems prudent to make the content of human rights covenants as sensible as possible.

22. See Williamson, *supra* note 1, at 293, 304, 312-13.

23. Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

24. Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994).

25. See *id.* art. 9; 33 I.L.M. at 87.

sus in favor of property rights necessary to make such rights customary under international law.

Whichever vehicles are chosen, economic freedoms, including property and contract rights, should be placed at the top of a new agenda for international human rights. It is time to share the benefits of the real sources of Western historical progress with the rest of the world. Security for property rights will not only generate prosperity, but will do much in the long run to strengthen the political and civil rights universally applauded, but widely ignored, in international covenants.