

## APERTURA

# PROPERTY AND DEMOCRACY IN HISTORY OF THE UNITED STATES

The rise of representative government was closely connected with the ownership of property—both land and slaves—in the history of the United States. In the United States, democracy originated in the assemblies of property owners in the colonial era who asserted themselves and assumed control over lawmaking in the face of imperial officials who also sought power to rule. The first representative legislatures were constituted by property owners and viewed the protection of property interests as a principle role of government.

The ownership of property made individuals stakeholders in the society. The eighteenth century view was that owning land conferred an “attachment” to the political order, meaning that landowners were in the best position to protect the society’s long-term interests. In contrast, merchants and others profiting from commerce were not sufficiently attached to the realm to gain seats in representative bodies, like the English House of Lords (much like the questionable allegiance to nations of multi-national corporations today). In England, rule by a landed nobility was defended on the grounds that nobles were deeply attached to the realm based on their inherent ties to fixed landed estates. Landowners were also believed to have the necessary “independence” for political decisions. Those who could support their family totally from the income generated by landed property were assumed to make decisions without being beholden to anyone superior to them (in contrast to people who were dependent for their income on others, whose interests would be tainted by the patronage relationship). For these reasons, until the early nineteenth century, even in America, landownership was a prerequisite to vote and to participate in the political system.

Throughout the colonial era of the United States, the policy of the English empire was to distribute land widely to settlers in small parcels, under 160 acres, and to encourage cultivation. Immigration from Europe and the importation of slaves were encouraged by explicit English policy. The English policy of directly granting small parcels may have differed substantially from the land-granting policy of the Spanish Empire, which was famous for granting large estates. The English policy of granting land in small parcels was designed primarily to maximize the land under cultivation in order to increase the wealth of the realm. It was feared that granting land in large parcels might lead to land being held in reserve, delaying cultivation. The English hoped that land put under cultivation would increase the wealth of England. The colonies would provide exclusive access to natural resources or locally produced goods, like tobacco and rice, which English merchants could export at a profit to other parts of the world.

Moreover, landowners that cultivated crops could afford to consume more imports from England. By granting every immigrant and laborer free acres of land, the English encouraged immigration and spread land ownership widely among the population. In granting small parcels, the English crown appears to have been indifferent to the political repercussions on colonial society. Very likely, the English crown believed that its appointed imperial officials, the colonial governors and proprietors, would successfully rule the colonies. The English believed the colonies owed allegiance to the crown due to their dependence on the English military, English creditors, and English commerce.

By creating a nation of landowners, the imperial policy therefore, without the express intention of doing so, laid the foundation for a republican society, a radically different sort of political system than existed in England. The key element was that the great extent of landowners led to a society where many people held an important stake—by owning land. These landowners, capable of representation in elected assemblies with the power to make laws, served as the foundation of the democratic political system.

At the time of the American Revolution, the accepted wisdom was that a defining feature of the United States was its very high proportion of landowners among the white males. To Thomas Paine (who immigrated from England to America in 1774), for example, a central difference between English and American society was that “[i]n America, almost every farmer lives on his own lands, and in England not one in a hundred does.” The large distribution of land among free men contributed to the power gained by representative legislatures throughout the colonial era. In the British imperial governance structure, there was constant struggle for power between the crown-appointed imperial officials, and the representative assemblies. My research has found that the representative assemblies gained power throughout the empire by asserting control over local institutions related to property: by regulating the structure of institutions, by divesting control over local institutions to counties, and by setting the fees and costs the property institutions could charge. The colonial legislatures buffered landowners from the colonial executives by creating institutions such as courts and land title registries that would be run and managed at the county-level. The legislatures assumed control over the manner of appointment and election of the officials that would operate the institutions and chose to divest power to the counties. The legislatures retained ultimate control over institutional design and controlled fees and costs. In sum, the colonial legislatures gained power throughout the empire—a landmark event entrenching the representative form of government—in part by creating local institutions relating to property rights, and by improving upon them, and regulating their appointment processes and fees. As historians such as Jack Greene have also described, over the eighteenth century, American politics was characterized by a “rise in the assembly” so that, by the American Revolution, representative assemblies had assumed control over most important aspects of governance.

The society that emerged was one with strong representative politics. In the face of the assertion of power by imperial officials, the colonists became fiercely protecting of representative institutions. The emphasis on property ownership also led to individuals' focus on their liberties. In describing the causes of the American Revolution, Joseph Story explained that early Americans "jealous watchfulness of their rights and . . . a steady spirit of resistance against every encroachment" was a character trait flowing from the fact that the "yeomanry are absolute owners of the soil, on which they tread."

The society was also highly market oriented. The republicans of the United States Founding Era were fearful of the entrenchment of an aristocracy like in Europe. The dominant ideological framework of the Founding Era equated large consolidated landholdings with aristocratic property law that privileged inheritance and inalienability. Aristocracies were believed to exist, in part, because property law protected land from the dynamism of the market. Land markets, in contrast, were predicted to break down aristocracy. To many legal thinkers, property laws allowing landowners to sell or devise land out of the family line, in property parlance, the alienability of land, was a central defining feature of the American property system. This connection is perhaps surprising from the vantage of the modern day where markets are often associated with wealth consolidation and the inequalities of capitalism.

Security of title was the foundation upon which the political and economic virtues of landowning emanated. Local courts and public title recording offices were the institutional forum where landowners could prove title. Daniel Webster, a famous lawyer and politician of the early nineteenth century wrote the Plymouth Oration, which emphasized as one of many important aspects of property in America that "[t]he establishment of public registries, and the simplicity of our forms of conveyance, have greatly facilitated the change of real estate from one proprietor to another". Chancellor James Kent, writing about American law in 1825, remarked in a section on conveyancing law that: "In no other part of the civilized world is land made such an article of commerce, and of such incessant circulation".

The simplicity and relative inexpensiveness of American conveyancing allowed landowners to buy and sell property as a liquid asset, and supported the vast colonial credit system. From the perspective of William Knox, one of the central strategists of English policy in the American colonies, the advantage of the British colonies in America derived from the "superior credit" given to colonial planters. The source of this credit was the fact that property throughout the colonies was secured "in the deepest recesses of the woods." The institutional infrastructure developed in colonial America was the formal mechanism for protecting property rights, and the essential foundation underlying the credit system. That credit system also promoted the slave system of labor. It is estimated that by 1770, 467,000 black people lived as slaves in the North American colonies, in the South slaves constituted 35.6% of wealth. Property

held in slaves was a central underpinning of colonial American credit markets. Indeed, because slaves were literally mobile wealth, they were more easily transferred than land. Slaves were routinely mortgaged, and leased and sold to pay debts.

As described by the historian Edmund S. Morgan in *American Freedom, American Slavery* (1975), “[t]he rise of liberty and equality in America had been accompanied by the rise in slavery.” The concept that all free white men were equal, such as in the U.S. Declaration of Independence of 1776, which states that it is self-evident “that all men are created equal,” emerged most profoundly in the parts of the U.S. where slavery was the dominant labor system. Whites united as “equal” in the highly unequal system of racial domination under slavery. The concept of equality led to acceptance of early democracy.

Thus, the republican government championed in Founding Era America and in the United States Constitution was based on several historical contingencies: the profound commitment of the longstanding British imperial policy to equal land distribution among white males and the relatively equal landholding that resulted; the rise in power of strong representative institutions in the face of crown-appointed officials; the emergence of the concept of equality, which appeared most profoundly in the slaveowning south; and a commitment to the protection of property rights.

In today’s world, landholding is no longer an important basis for participation or influence in the political system. Wealth is vastly more unequal. The government may still define its mission as protecting a broad-base of landowners—the American dream—but the influences of special interests and corporations are now acute problems. The American history presented here can serve as a basis for comparative work with Chile and other countries to understand the trajectory of the relationship of property and democracy and the likely future.

Ph. D. Claire Priest  
Simeon E. Baldwin Professor of Law  
Yale Law School