

The Horse Before the Cart: The Necessity of the Right to Acquire Property to Property Rights

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James W. Ely, Jr., *Buchanan and the Right to Acquire Property*, __ **Cumberland L. Rev.** __ (forthcoming), available at [SSRN](#).

Can property rights really exist if we do not have a right to acquire property?

When we hear about debates over property rights, they are often about the claims of people who already own property. The focus is on how owners can use property and what regulations the state can place on the use of one's property. We often lose sight of perhaps a more fundamental set of questions about how we protect, facilitate, and pave the way for earning the means for the acquisition of property.

Only if one can acquire property do any of those other questions even matter. We first need to ensure that people have an equal opportunity to acquire property and become owners. Property rights issues related to possession and use only becoming relevant thereafter. Professor [James Ely](#)'s recent work, *Buchanan and the Right to Acquire Property*, reveals this important lesson: the debate over what property owners can do with property is of little consequence if we do not first resolve the debate over whether individuals have a right to acquire property and how that right is supported.

Professor Ely's article takes readers on a precedential tour through important jurisprudential moments too often neglected. He starts with the 1917 opinion by the U.S. Supreme Court in [Buchanan v. Warley](#). Ely explains how the *Buchanan* Court—long before more well-known anti-segregation rulings like *Brown*—used the right to acquire property as the arrow for slaying a Louisville ordinance that prevented individuals from occupying property in areas dominated by occupants who were not of their race.

Buchanan, Ely recalls, was responsible for halting the progress of racial segregation movements in many cities. Nonetheless, he speculates that the case became a “constitutional orphan” because its property-rights focus made it an “awkward fit for post-New deal constitutionalism” while similarly interfering with and becoming eclipsed by the agenda of Progressives interested in planning and land use controls. (P. 1.)

Ely's article is notable and worth reading for its retelling of the *Buchanan* precedent and for its tutorial on the development of the “right to acquire property” in various state and federal cases both before and after *Buchanan*. He explains that these cases were especially helpful at empowering the poor and minorities because the right to acquire rationale was focused on equalizing them in the marketplace. The later shift toward economic regulation—instead of rights—as a vehicle for social change, Ely laments, proved to be more beneficial to those who engage in rent-seeking to concentrate benefits upon certain interest groups than helpful to the individuals for whom such regulations were purportedly targeted.

Ely's article is also an important contribution beyond simply the history of *Buchanan* and the right to acquire, because it traces two interconnected jurisprudential lines of inquiry in state and federal courts. His history reveals a key understanding within state and federal court opinions in the late 1800s and early 1900s—a realization that individuals cannot enjoy a right to acquire property if they are unable to acquire the means necessary to purchase property.

In other words, there must be a right to pursue a lawful calling if the right to acquire property is to be protected. Individuals must be able to use their comparative advantage in the marketplace to earn a living so that property

acquisition is an attainable end. In fact, perhaps one of the reasons that the right to acquire property has not survived in a robust independent line of precedent is that by the early twentieth century the “right to acquire property had been as a practical matter folded into the right to pursue lawful callings.” (P. 11.)

Ely concludes with some comments on the modern relevance and renewed importance of understanding these historical lines of jurisprudential thought. Recent debates on occupational licensing requirements are drawing on the right to pursue lawful calling precedents and should be informed by the immediate impact the decisions in this space have on the correlated right to acquire property.

Individuals are prevented from meaningfully accessing the marketplace for property if they cannot meaningfully access the market for occupational development to earn a living. We too often see these issues as silos, looking at the costs and benefits of regulating workplaces or protecting consumers by requiring individuals to obtain licenses before they can work, and then looking independently and having separate debates on how we regulate property and make housing more affordable.

Ely’s work reminds us that there was a time when the courts understood the key interdependent relationship between acquiring property and maintaining an occupation, or calling, of one’s choice. A marketplace, and legal structure facilitating it, that allows individuals to exploit their comparative advantage in the occupational marketplace empowers them to obtain the means for acquiring property so long as the law also does not place any artificial and discriminatory barriers to such acquisition.

Beyond licensing, readers of Ely’s work on the right to acquire will leave it with a newfound appreciation for what should be an obvious point—we cannot enjoy what we cannot access. And no matter how much we improve the quality of certain assets—like the qualities of owners’ rights—they remain meaningless if some people are shut out from the ability to acquire them. Rights to acquire are a prerequisite to the value of a property system.

Most directly, Ely’s work provokes some fundamental questions that all readers will be eager to explore. What responsibility does the state have to create market conditions in which the acquisition of property is a real possibility? What duty does the state have to empower acquisition or at least remove artificial barriers to it?

Undoubtedly, the realization regarding the role that the right to acquire must play in property systems can lead to differing policy prescriptions regarding the proper means for facilitating access to property and empowering acquisition.

Not everyone believes, as Ely seems to, that the best way to achieve these things will be for the removal of legal constraints on pursuing lawful callings, enforcement of non-discrimination principles, and invalidation of state-conferred monopolies. Others will no doubt think the state needs to take a more interventionist role.

But either way, Ely’s article should be a catalyst for debating the right to acquire and revisiting its jurisprudential foundations whenever we are confronting myriad modern-day property controversies—including land use, zoning, housing affordability, homelessness, continuing issues of racial segregation, and others.

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