



Property Privileges (Not Rights)

The Cipro case reminds us property rights are subordinate to the public good



BY MARJORIE KELLY

It's intriguing how incidents can open windows into the public psyche, illuminating ideas that we as a collective hold, without being aware we're holding them. The recent brouhaha over the Cipro patent is one such incident. Cipro is of course the anthrax treatment made by the German pharmaceutical company Bayer, which everyone and their great uncle wants to stockpile these days. With the anthrax scare escalating, the question of the hour has been whether Bayer can make enough Cipro fast enough, and if not, whether the government should override Bayer's patent and order the stuff from generic drug makers. Canada announced it was doing so in mid-October. Senate minority leader Trent Lott said Congress ought to debate stripping Bayer of its patent. And the White House actually threatened to do so unless Bayer slashed its price—which it did on Oct. 24.

So the immediate issue has been resolved. But we are left with the very interesting notion—hitherto dormant in the public mind—that government can override patents to protect public health. Or to phrase it more powerfully: *Property rights are subordinate to the public good.*

Now, many will find this notion immediately compelling. It is a principle I would love to see added to the Great Seal on the dollar bill: "Novus Ordo Seclorum," and above it, "Property Rights are Subordinate to the Public Good." (Now that really *would* lead to a "new order of the ages.") We could print it on a banner and hang it on the front of the White House—where even conservative Republicans seem to be embracing the idea, without a great deal of angst.

We should exult that this notion is tripping off the tongue of folks who earlier were lecturing about the sanctity of property rights in overseas trade. These are the folks who said South Africa may in no circumstance override pharmaceutical patents to fight its AIDS crisis. It's shameful that tens of thousands of South Africans dying of AIDS do not constitute the same threat to the public good as a handful of Americans contracting anthrax. But the more encouraging point is that, even if it took a threat close to home to bring out the principle, the principle nonetheless has emerged. Conservatives' own actions have illuminated this idea held deep in the public psyche: Property rights are subordinate to the public good.

Future debates need no longer dispute *whether* this principle is valid, but only at what point it kicks in. There are things we as a collective know intuitively: first, that property rights are not unassailable *rights*—like the right to vote—but rather *privileges* granted by government, which can be withdrawn by government. Second, there is a higher law than that

of property rights, and it is the law of the public good.

If patents are subordinate to this higher law, so too are corporations—for they are simply another form of legally invented property. Here we see a related principle emerging today, that *corporations must not harm the public good*. This idea runs through anti-tobacco lawsuits, labor laws, environmental laws, and health and safety laws.

The public good as higher law is an idea whose time has come. Or rather, its time has come again, for it represents a return to America's oldest economic tradition. At America's founding, corporations were created by state charters *only* to serve the public good. As an 1832 treatise on corporate law put it, "The design of the corporation is to provide for some good that is useful to the public." Or as the Pennsylvania legislature in 1834 declared, "A corporation...may be molded to any shape or for any purpose the Legislature may deem most conducive for the common good."

It wasn't until the mid-nineteenth century Robber Baron era that this purpose was eroded in the law. It was a time when public power was privatized in pursuit of private profit. While that remains the animating spirit of corporations, it is a corruption of the founding generation's original intent. The corporate form was intended to be subject to the sovereign will of the people, and to serve the common good.

It could not have been otherwise, for serving the public good was, as one general put it, the "polar star" of the American Revolution. Serving private groups at the expense of the public was heresy. In a letter to Thomas Jefferson, Horatio Gates wrote that Americans opposed a system holding "that a Part is greater than its Whole; or, in other Words, that some Individuals ought to be considered, even to the Destruction of the Community."

If we drifted from this vision for a time, we returned to it in the Great Depression. As the Supreme Court wrote in the 1937 *West Coast Hotel v. Parrish* case, the community may use its lawmaking power to "correct the abuse which springs from...selfish disregard of the public interest." Or as Supreme Court Justice Owen Roberts put it in the 1934 case of *Nebbia v. New York*, "Neither property rights nor contract rights are absolute."

Property rights apologists may pretend property rights are sacred, but that view is out of keeping with America's highest ideals. As the Cipro dispute reminds us, our deepest traditions embrace the idea that property rights, and corporate rights, are subordinate to the public good. ✕