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Propter Honoris Respectum

Property as the Keystone Right?

Carol M. Rose*

The collapse of socialist regimes has revived an interest in property rights all over the world, as once-statist nations consider privatization as a route to commercial and economic revitalization.¹ Even here in the property-conscious United States, constitutional property rights have become a subject of renewed popular and political interest.²

But property rights have a somewhat uneasy place in a constitutional ordering. There are of course substantial libertarian arguments for property rights as an element of personal autonomy,³ but on the whole, the post-socialist enthusiasm for property seems to have been overwhelmingly economic: the allure of property is that it enhances wealth, both personal

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1 Amy Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 *COLUM. L. REV.* 223 (1995) (describing recent interest in privatization). Chua goes on to argue, however, that enthusiasm for privatization historically has see-sawed with enthusiasm for nationalization. *Id.* at 224-25.

2 For the emergence of the property rights movement in the United States, see, e.g., Christopher Georges, *Wider Property-Owner Compensation May Prove a Costly Clause in the "Contract With America"*, *WALL ST. J.*, Dec. 30, 1994, at A8; H. Jane Lehman, *Owners Aren't Giving Ground in Property Battles* (First in three-part series, *Whose Land Is It?*, on the private-property rights movement in the United States), *CHI. TRIB.*, Feb. 9, 1992, Real Estate §, at 1. As of the fall of 1994, all state legislatures had considered, and ten had enacted, some version of legislation to restrain governmental "takings" of private property. See Robert H. Freilich & RoxAnne Doyle, *Taking Legislation: Misguided and Dangerous*, *LAND USE L. & ZONING DIG.*, Oct. 1994, at 3. The Congress elected in 1994 has also considered takings legislation. The House passed the Private Property Protection Act of 1995, H.R. 925, 104th Cong., 1st Sess. (1995), on March 3, 1995, while the Senate considered several bills during 1995, most notably the Omnibus Property Rights Act of 1995, S. 605, 104th Cong., 1st Sess. (1995).

3 Even libertarians sometimes cite economic arguments. A very important book in the development of the American property rights movement is RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985), which thoroughly intermixes libertarian and economic rationales. Compare *id.* at 3-6 (utilitarian/economic considerations) with *id.* at 12 (natural rights).

and social. Constitutions, on the other hand, are concerned classically and fundamentally with *political* ordering. While property is often included among constitutionally protected rights,⁴ it seems less central to the political core of constitutional government than the rights most critical to self-governance—primarily voting, speech, and assembly. On the other hand, property's central role in *economic* (or "merely economic") ordering would seem to be peripheral to the political order, or to the individual rights that support democratic governance.

One of the classic property theorists was Jeremy Bentham, and it is easy to extract from his work the idea that property serves essentially economic ends rather than political ones. Bentham argued powerfully for the economic benefits of property, but he regarded property not as a right but as a creature of law, and indeed as "nothing but a basis of expectation."⁵ The security of property is vitally important, he said, not because property is a right with a political role, but because a society that safeguards property is *wealthy*.⁶ Being wealthy, that society can satisfy more individual preferences than a society in which property is at risk (and hence poor).

Bentham is one of many authors who have contributed to a very standard story about property as a wealth-creating institution. The point of origin is John Locke's observation that resources only become valuable if people work on developing them.⁷ But people will not work much without some inducement, and if there is no such inducement to labor, resources lie undeveloped and total wealth remains low.⁸

What induces people to labor? Property does. Let people have secure property, and they will learn to invest their labor on the things that they own, because they themselves will take the rewards.⁹ They will plan carefully and prudently, because if they do not, they will bear the losses. Moreover, they will organize trades, because property is a signalling device, telling everyone which things belong to whom and allowing people to bargain with one another instead of just taking things or (worse yet, and even

4 The original United States Constitution had no specific protection of property; the closest provision was the Contracts Clause, prohibiting the states from "impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1. Of course, the original document also had no reference to many other rights, including speech and assembly. Takings of property for public use and without due process of law were prohibited by the Fifth Amendment, passed as part of the Bill of Rights. U.S. CONST. amend. V.

5 JEREMY BENTHAM, *Principles of the Civil Code*, in THE THEORY OF LEGISLATION 111 (C.K. Ogden ed., 1931) [hereinafter *Civil Code*]. Bentham had little use for the notion of natural rights of any sort. See JEREMY BENTHAM, ANARCHICAL FALLACIES; BEING AN EXAMINATION OF THE DECLARATIONS OF RIGHTS ISSUED DURING THE FRENCH REVOLUTION, reprinted in 2 THE WORKS OF JEREMY BENTHAM 489, 501 (John Bowring ed., 1843) (arguing that natural rights are "simple nonsense," "natural and imprescriptible rights" are "nonsense upon stilts").

6 *Civil Code*, *supra* note 5, at 113-14.

7 JOHN LOCKE, TWO TREATISES OF GOVERNMENT, THE SECOND TREATISE, §§ 40-43, 338-40 (Peter Laslett ed., 1963) (1st ed. 1960) (arguing that most of the value of goods is due to labor).

8 *Id.* § 41, at 338-39 (making an unflattering comparison to the poverty of North American Indians, whose resources are less valuable because less labor is invested); see also *Civil Code*, *supra* note 5, at 118-19 (making similar observations).

9 *Civil Code*, *supra* note 5, at 112, 114. One of the few challenges to this standard story is by Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 744, 749 (1980) (arguing that the incentive effects of various property and contract rules cannot be known without empirical investigation).

more wasteful) fighting over them.¹⁰ Once able to trade, they will invest even more in socially useful activities, because the whole world becomes the market for their efforts.¹¹ Finally, they will monitor the behavior of others, because if others transgress, they themselves will lose the fruits of their investment, prudence, and planning; thus to a considerable degree, a property regime enlists the self-interest of individuals to become a self-policing system.¹²

By way of contrast, when ownership is insecure, we see something like the turmoil of recent Russia or indeed of any place undergoing social revolution. Investment and effort in trade or business may be dampened when "Mafia" thugs threaten the successful, or when vaguely-authorized officials siphon off the fruits of one's efforts.¹³ Valuable natural resources—forests, fisheries, minerals, waters—may be treated as unmanaged commons, where everyone takes and no one replenishes and the resources themselves dwindle to nothing.¹⁴ And indeed, the gains of the toughest takers dwindle too, since they may dissipate their proceeds in an effort to guard them from everyone else. The lesson is clear: we are better off with secure property rights, which induce us to invest, trade, and gently monitor each other in ways that make us all better off.

But suppose all this is true: from the perspective of constitutional ordering, the obvious question is, "So what?" Even supposing that the security of property brings greater wealth, why should a constitution aim at wealth? Should it not rather aim at orderly processes of governance and the individual rights that support those processes? Our own constitution protects property and commerce, but to what end? As Patrick Henry thunderously complained during the ratification debates: "You are not to inquire how your trade may be increased, nor how you are to become a great

10 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *5 (stating that property rights are necessary to avoid the "innumerable tumults" of many persons striving to get the same thing); Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 322-26 (1985) (asserting that clearly defined property facilitates exchange).

11 LOCKE, *supra* note 7, §§ 48-49, at 343 (stating that the availability of trade and money makes cultivation attractive and resources more valuable).

12 See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327-28 (1993) (discussing the advantages and incentives for monitoring on individual landed property). Even much more complex property-like regimes encourage monitoring by rights-holders; see, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171, 183 (1988) (arguing that the holders of tradeable emission rights will support monitoring and enforcement).

13 See, e.g., Steven Erlanger, *In Russia, Success Isn't Such a Popular Idea*, N.Y. TIMES, Mar. 12, 1995, § 4, at 1 (reporting that successful business people fear assassination); Adi Ignatius, *Raw Capitalism: Moscow Street Entrepreneurs in Street Kiosks Point Way to New Economy*, WALL ST. J., Mar. 25, 1992, at A1 (reporting on hard-driving trader's success in semi-underworld dealings, but including a discussion of the need to pay petty bribes and fear about long-term economic order). See generally STEPHEN HANDELMAN, *COMRADE CRIMINAL: RUSSIA'S NEW MAFIYA* (1995) (describing the extensive reach of criminal activity in Russia, both by "Mafiya" and former Soviet officials). For the depressing effect on free enterprise, see, for example, *id.* at 158-60.

14 See, e.g., Michael Specter, *Siberia Awaits the Onslaught*, N.Y. TIMES, Sept. 4, 1994, § 4, at 1, 4 (describing uncontrolled and environmentally damaging forest cutting, mining, pollution, and fish and wildlife destruction in Siberia).

and powerful people, but how your liberties can be secured; for liberty ought to be the direct end of your government."¹⁵

Other doubts about property are raised in the double standard of rights introduced by the notorious footnote four of *United States v. Carolene Products*, according to which "mere" economic rights like property take a constitutional back seat to the rights associated with political participation or the avoidance of majoritarian oppression.¹⁶ And a modern commentator on constitutional property, Jennifer Nedelsky, argues that the security of property may be as much a hindrance as a help in securing individual rights—particularly when individual rights are understood in the light of an egalitarian vision of constitutionalism.¹⁷

How different from these slights to property, then, are the startlingly bold observations of Adam Smith, not on the mere *importance* of property as a political matter, but on its *centrality* to governance. Here are his words in his *Lectures on Jurisprudence*, given in the 1760s, and somewhat unartfully passed on to us through his note-takers:

The first and chief design of every system of government is to maintain justice; to prevent the members of a society from incroaching [sic] on one anothers [sic] property, or siezing [sic] what is not their own. The design here is to give each one the secure and peacable [sic] possession of his own property. The end proposed by justice is the maintaining [of] men in what are called their perfect rights.¹⁸

Each of these three sentences essentially repeats the same message: three times over, Smith tells us that justice means protecting people in what is theirs. Note that this is not simply *an* object of government, but rather "the first and chief" one—a sort of Benthamite program for the security of property, but with the name "justice" tacked on.¹⁹

An even more pointed comment on property's centrality was made by an American contemporary of Smith's, Arthur Lee, according to whom property is "the guardian of every other right."²⁰ A modern legal historian,

15 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 44-45 (Jonathan Elliot ed., 1836) (remarks of Patrick Henry (VA)).

16 *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

17 JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 261-62 (1990); see also *id.* at 318, n.43 (noting the conflict between new statutorily created rights and property rights). Nedelsky to some degree spells out some constitutional implications of John Rawls' jurisprudence. See *id.* at 317, n.39 (describing Rawls as "the best known of the egalitarian theorists"); see also JOHN RAWLS, *A THEORY OF JUSTICE* 72-76, 78, 83 (1971) (describing features of the "difference principle," which requires that increases in the well-being of the better-off must also increase the well-being of the worse-off); cf. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 150-53, 195-96, 201-03, 207 (1974) (arguing that no one should be deprived of property rights justly acquired or justly transferred, and that this principle is incompatible with Rawls' theory).

18 ADAM SMITH, *LECTURES ON JURISPRUDENCE* 5 (R.L. Meek et al. eds., 1978). Smith later explained that "perfect rights" are those that may be compelled by force. *Id.* at 326-27.

19 Smith went on to say that the next object of government was "promoting the opulence of the state"; this suggests that protecting property was different from (though clearly compatible with) promoting prosperity. SMITH, *supra* note 18, at 5. Bentham also remarked that the legislator should protect the security of property "under the name of justice." *Civil Code*, *supra* note 5, at 119.

20 ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA* 14 (New York, Rivington, 4th ed. 1775), quoted in JAMES W.

James Ely, has titled his history of property with Lee's line, and he has used it to argue that property rights are equal in status to all other constitutional rights.²¹

To be sure, property may be *an* important right, but what is most interesting in Smith's and Lee's remarks is a much headier suggestion: that property rights are not simply *equally* important to other rights, but are the *most* important of all rights. Their remarks locate property as the linchpin, the pivot, the central right on which all the others turn, the "guardian of every other right."

As it turns out, this quite remarkable claim has had a number of permutations, old and new. All of them clearly look to property to do considerably more for a constitutional order than "merely" to secure economic prosperity. My purpose in this paper is to explore seven of those permutations, along with the caveats and critiques that they raise—caveats and critiques that at a minimum leave the political implications of property rights in an ambiguous state, though not without considerable residual force. Beneath the ambiguity, and complementing its "merely" economic role, I will conclude that property's most serious *political* claim is as an almost invisible educational institution.

There are many reasons why one might say that property is *an* important right. But why would anyone say that property is the keystone right, the central right on which all others rest? Here are seven answers.

I. THE PRIORITY ARGUMENT

Property is the key to all other rights because it is prior to politics, and hence the basis upon which all other civil rights rest.

The Priority Argument is undoubtedly the most familiar of all. It is usually associated with John Locke's social contract theory, a theory in which property plays an extremely important role. Locke's story is what might be called a "bottom-up" or "from below" theory of property: people begin by the most primitive appropriation, that is, literally consuming the nuts and berries and other natural foodstuffs around them.²² Then they take this primitive appropriation a step further, collecting and storing a few non-perishable items that make them better off—nuts again, perhaps some animal skins, and finally little bits of metal that they trade around among themselves.²³ To protect these acquisitions, they may use self-help, but given the "inconveniencies" of that enforcement method, they ultimately institute government to provide a more comprehensive safeguard for the property they have acquired through their efforts.²⁴

ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (1992).

21 ELY, *supra* note 20, at 134.

22 LOCKE, *supra* note 7, § 28, at 329-30.

23 *Id.* §§ 46-47, at 342-43.

24 *Id.* §§ 123-31, at 395-99.

There are modern versions of this story, and they are told especially by people interested in studies sometimes called the "new institutionalism" or "new institutional economics."²⁵ Elinor Ostrom, for example, describes a number of situations that have a general resemblance to the Lockean story: in her depictions, people are intelligent and inventive; they poke around in their surroundings and often figure out how to manage the raw materials of nature in informal ways—for example, ways to fish in a Sri Lankan village, irrigate in a Spanish community, or graze livestock in a Swiss or Japanese mountain area.²⁶ The people in these communities can make themselves better off by inventing property regimes for allocating the fishing or hunting spots, grazing rights, irrigation duties, or whatever. They manage to run things for themselves in a way that preserves the underlying resources and prevents outsiders from poaching and insiders from shirking or overreaching. When these common enterprises become big or complex enough, they may call on governments for more formal policing and enforcement.²⁷

On the other hand, in these "new institutional" stories, government may be just a waste and a nuisance. Ostrom and others give many examples of scenarios in which formal state officialdom badly disrupts the perfectly satisfactory informal property regimes that people set up for themselves. The formal governance structures may allow too many outsiders to get their hands on the fishing ground or community forest or other resource, turning a managed common property into an open access regime.²⁸ That move in turn leads to the ruination of the underlying resource, reenacting the tragedy of the commons in which everyone tries to take as much as possible, knowing that conservation is for naught.

Notice that in these scenarios, the wealth-producing success of the informal property regime is a kind of yardstick by which to criticize the performance of formal government. That is, in these modern stories, preservation of the pre-political property of the people is the measure of the goodness or badness of the state.²⁹

Thus, in the modern common-property-regime literature, property starts from just plain folks, and from their activities in appropriating the natural resources around them. Were it not for their efforts to create prop-

25 See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 22-23 (1990); Kenneth A. Shepsle, *Studying Institutions: Some Lessons from the Rational Choice Approach*, 1 J. THEORETICAL POL. 131 (1989).

26 OSTROM, *supra* note 25, at 61-69 (describing Swiss and Japanese communities' longstanding grazing institutions); *id.* at 69-82 (Spanish irrigation communities); *id.* at 149-57 (Sri Lankan fishing community).

27 James M. Acheson, *The Lobster Fiefs Revisited: Economic and Ecological Effects of Territoriality in Maine Lobster Fishing*, in *THE QUESTION OF THE COMMONS*, 37, 50 (Bonnie J. McCay & James M. Acheson eds., 1987) (describing a lobstering community that is successful with informal norms but that persuades the state to take on some enforcement).

28 See, e.g., OSTROM, *supra* note 25, at 154-57 (explaining how government intervention undermines local self-government of fishery); Evelyn Pinkerton, *Intercepting the State: Dramatic Processes in the Assertion of Local Comanagement Rights*, in *THE QUESTION OF THE COMMONS*, *supra* note 27, at 344, 359-63 (giving examples of governmental policies encouraging local overfishing).

29 See also Douglas Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 383 (1991) (arguing that natural rights tradition foresees prevention of harms to property as governmental function).

erty from raw nature, there would be no reason for government, or for the preservation of the political regime. That is the modern version of the bottom-up story of property, and it is not really all that different from the Lockean bottom-up story.

But now, let us take another look at Locke. Locke actually alluded to a second property story too, but it was a top-down story. In the telling, it was much more muted than his bottom-up story, but his top-down story was considerably more influential in practice.

Locke's top-down story of property (like his bottom-up story) was related to the soon-to-be standard economic argument that the security of property enhances total social wealth. But Locke took the story a further step: he hinted that this extra social wealth could be quite useful to rulers. Extra wealth meant bigger tax coffers, something quite attractive to monarchic governments whose military escapades meant that they frequently flirted with insolvency. But as Locke remarked in the middle of his discussion of property, "[T]hat Prince who shall be so wise and godlike as by established laws of liberty to secure protection and encouragement [sic] to the honest industry of Mankind . . . will quickly be too hard for his neighbours."³⁰ Much the same idea was to be expressed by the Physiocratic thinker Francis Quesnay a few decades later, when he pointed out that "it is earnings and expenditures of the subjects that creates the sovereign's revenues."³¹

And those eighteenth century sovereigns heard the message, particularly the "enlightened despots" on the Continent—not just the French kings but also the Empress Catherine the Great of Russia; the Hapsburg Empress Maria Theresa and her son the Emperor Joseph II, who ruled not only Austria but also Czechoslovakia and Hungary in the East and Belgium in the West; Kings Frederick William I and his son Frederick II (The Great) of Prussia, whose rule stretched from central Germany out to what is now Poland as well as to a string of principalities along the Rhine; the rulers of Denmark, Portugal, Saxony, Württemberg, Baden, and raft of smaller principalities through northern, central and southern Europe.³² In those countries, unlike the more pluralist and gradually changing England, economic policy was a matter of conscious legislation and decree, and it was there that the actions of the "godlike princes" were most obvious.³³

Despite a continuing pattern of mercantilist control, many of these rulers instituted some mix of measures to promote commerce and to permit property to be freely earned and traded, without regard to status or

30 LOCKE, *supra* note 7, § 42, at 340 (emphasis added).

31 Quoted in Betty Behrens, *Government and Society*, in 5 CAMBRIDGE ECONOMIC HISTORY OF EUROPE: THE ECONOMIC ORGANIZATION OF EARLY MODERN EUROPE 613 (E.E. Rich & C.H. Wilson eds., 1977) (translation mine). Behrens also notes that the Physiocratic doctrine was most appealing to the governments that were in the greatest financial difficulties.

32 For an overview of the major figures, see JOHN G. GAGLIARDO, ENLIGHTENED DESPOTISM 28-36 (1967).

33 LEONARD KRIEGER, KINGS AND PHILOSOPHERS, 1689-1789, at 135 (1970) (observing that while the scope of economic liberty in Continental principalities was narrower than in Britain, liberalization there was more noticeably marked by explicit legislation).

birth.³⁴ That meant authorizing factory production to operate outside town walls, free from the constraints of guild rules.³⁵ It meant relaxing some of the aggravating remnants of feudal service that complicated the lives of rural peasants, and restructuring some land tenures to permit individual enterprise.³⁶ It meant opening up previously closed businesses to Jews and other upstarts.³⁷

Such measures were political, in a dual sense: the so-called enlightened monarchs hoped that more and freer commerce would lead to more taxable wealth, of course, to be tapped for their own treasuries.³⁸ But freeing property and commerce could have another political consequence as well: it could loosen the economic stranglehold of the vast array of privileged groups, including the guilds and other urban elites of the towns, the aristocrats in the countryside, and the various elite families with longstanding monopoly franchises on particular businesses.³⁹ As a planned or unplanned side effect, the rulers' economic measures opened up trade and manufacture and even land ownership to a minor gaggle of upstarts and incipient capitalists, traders and factory owners, some of whom got mixed up in politics.⁴⁰ As such, liberalizing economic reform was part of a larger

34 GAGLIARDO, *supra* note 32, at 36-43; KRIEGER, *supra* note 33, at 131-36, 301-04. With respect to the Hapsburg monarchs, John Komlos has argued that mercantilist theory became less influential over time, being increasingly supplanted by free-market ideas; see John Komlos, *Institutional Change Under Pressure: Enlightened Government Policy in the Eighteenth-Century Habsburg Monarchy*, 15 J. EUR. ECON. HIST. 427, 431-34, 457-58 (1986); see also Gustav Otruba, *Die Wirtschaftspolitik Maria Theresias und Josephs II., in VON DER GLÜCKSELIGKEIT DES STAATES: STAAT, WIRTSCHAFT UND GESELLSCHAFT IN ÖSTERREICH IM ZEITALTER DES AUFGEKLÄRTEN ABSOLUTISMUS 77-78* (Herbert Matis ed., 1981) (distinguishing an earlier and later mercantilism, with the latter much more influenced by the ideas of the Physiocrats and Adam Smith).

35 GAGLIARDO, *supra* note 32, at 37. For France, see Hilton L. Root, *Privilege and the Regulation of the Eighteenth-Century French Trades*, 20 J. EUR. ECON. HIST. 301, 329-31, 333-34 (1991) (explaining that primarily for fiscal reasons, the crown first tolerated deviance from guild rules, then attempted to abolish guilds). For Germany, see MACK WALKER, *GERMAN HOME TOWNS: COMMUNITY, STATE AND GENERAL ESTATE, 1648-1871*, at 120-22, 125-26 (1971) (describing guild conflicts with larger non-guild merchants and bureaucrats' favoritism to latter). For the Hapsburg possessions, see Komlos, *supra* note 34, at 442-45; Otruba, *supra* note 34, at 89-90 (describing Maria Theresa's and Joseph II's relaxation of guild restrictions).

36 GAGLIARDO, *supra* note 32, at 39-40, 58-59; Komlos, *supra* note 34, at 437-42, 445-46. Even in Russia, where peasants were the most unfree, Catherine the Great made some effort to open up economic opportunity; see KRIEGER, *supra* note 33, at 300-01.

37 Komlos, *supra* note 34, at 460-62 (noting the existence of greater commercial opportunities for Jews in Hapsburg possessions, though real estate was more restricted); Root, *supra* note 35, at 340 (noting that French guilds opened to Jews after 1776, over protest of the existing members).

38 GAGLIARDO, *supra* note 32, at 44-45, 66.

39 For the general system of privilege, see C. B. BEHRENS, *THE ANCIENT REGIME 52-62, 177-80* (1967). See also HANS ROSENBERG, *BUREAUCRACY, ARISTOCRACY AND AUTOCRACY: THE PRUSSIAN EXPERIENCE, 1660-1815*, at 80 (1958) (describing aristocratic families' monopolies over various economic enterprises, particularly mining and metallurgy); WALKER, *supra* note 35, at 77-78, 86-87 (describing seventeenth and eighteenth century German urban elites' legal monopolies over various economic enterprises and conflicts with outside commercial interests).

40 One of the most spectacular examples was Joseph Süss Oppenheimer, commonly known as Jud Süß, a member of a Heidelberg Jewish trading family; in the 1730s he became chief financial adviser to the Duke of Württemberg, where he tried to reorganize and centralize finances. His efforts outraged the local notables, and after his patron the Duke died suddenly, Süß was tried and executed for various misdeeds. For a capsule history, including some of the literary treatments of his life, see Martarita Pazi, *Jud Süß—Geschichte und Literarisches Bild*, 118 LITERATUR UND KRITIK 480 (Sept. 1977); for a full biography, see SELMA STERN, *JUD SÜSS, EIN BEITRAG ZUR DEUTSCHEN UND ZUR JÜDISCHEN GESCHICHTE* (1929). Süß also became the subject of a virulently

effort to cabin and rationalize the crazy-quilt privileges of the established "constituted bodies," so central in the governance of Europe before the French Revolution.⁴¹

It would be a mistake to overstate the success of these mixed economic/political efforts. For one thing, most of the eighteenth century monarchs were only thinly committed to a liberalizing economic and political reform—immediate revenues were much more important to them.⁴² For another, they could only act within the confines of serious institutional constraints, and in the face of increasingly shrill opposition from entrenched interests.⁴³ Even supposedly enlightened monarchs like Frederick the Great and Catherine the Great did little to alter the economic and political privileges of the noble orders, or to reduce the noble domination of a servile peasantry.⁴⁴ Similarly, in France, anticompetitive guild organizations survived the "enlightened" royal policies that aimed to dispose of them,⁴⁵ while an increasingly restive and assertive nobility thwarted all attempts to make its members share the burden of taxes.⁴⁶

The reaction of these notables to economic and political reform in some ways recalls the considerably more recent reaction of the heavily-entrenched Soviet Nomenklatura, for whom privilege had become a way of life, and for whom capitalist reform was profoundly disruptive.⁴⁷ Despite the eighteenth century monarchs' inroads on ancient economic privilege, the decisive shift to capitalist property rights—freely acquired, freely traded, divorced from any attachment to birth and status—came to Europe

anti-Semitic motion picture during the Nazi era. See the brief entry for the film director, Veidt Harlan, in EPHRAIM KATZ, *THE FILM ENCYCLOPEDIA* (2d ed. 1994).

41 For the "constituted bodies" and their role in Old Regime political life, see 1 R. R. PALMER, *THE AGE OF DEMOCRATIC REVOLUTION* 27-30 (1959); see also C.B. BEHRENS, *supra* note 39, at 52-62, 177-80.

42 C.B.A. BEHRENS, *SOCIETY, GOVERNMENT AND THE ENLIGHTENMENT: THE EXPERIENCES OF EIGHTEENTH CENTURY FRANCE AND PRUSSIA* 124-28 (1985) (stressing the primacy of fiscalism and centralization over liberalization in Prussian economic measures); GAGLIARDO, *supra* note 32, at 66 (noting institutional constraints and low commitment); Root, *supra* note 35, at 329-30 (describing the primarily fiscal motives of the French crown in liberalization).

43 GAGLIARDO, *supra* note 32, at 62-63 (increasing resistance); Root, *supra* note 35, at 321-26, 332-33 (resistance to change).

44 KRIEGER, *supra* note 33, at 297-300; for Frederick, see ROSENBERG, *supra* note 39, at 151-55 (stressing Frederick's dependence on and sympathy for nobles); see also KARL ERICH BORN, *WIRTSCHAFT UND GESELLSCHAFT IM DENKEN FRIEDRICHS DES GROSSEN* 11-12 (1979) (explaining that Frederick thought serfdom was disgraceful but also thought emancipation was an unacceptable inroad on aristocracy). For Catherine, see ISABEL DE MADARIAGA, *RUSSIA IN THE AGE OF CATHERINE THE GREAT* 296-99 (1981) (describing how Catherine's dealings with nobles generally did not alter status quo).

45 Root, *supra* note 35, at 333-34.

46 For the increasingly strident conflicts between crown and the "constituted bodies" in France, see 1 PALMER, *supra* note 41, at 86-99, 448-65; for similar conflicts in Sweden and several provinces of the Hapsburg Empire, see *id.* at 99-108. A few months before the outbreak of the French Revolution, the most "enlightened" of all the monarchs, Joseph II of Austria, faced a rebellion in his Belgian provinces when he tried to revoke the guild privileges of the local urban elite; see *id.* at 341-48.

47 Root, *supra* note 35, at 327, n.60 (noting the relationship between guild rules and Eastern European socialist production: both regimes protected producers from having to meet consumer demand); cf. HANDELMAN, *supra* note 13, at 110-13 (arguing that in post-Soviet Russia, old nomenklatura has done well by aligning itself with the new underworld, which also resists economic reform).

not with the enlightened monarchs, but with the French Revolution and Napoleon, along with his various puppet states and imitators.⁴⁸ It was the Emperor's widely-adopted Code Napoleon that solidified the Revolutionary concept that property could be freely earned and traded by all.⁴⁹

Precisely that last point, however, might give one pause. First of all, it undermines the notion that modern European property regimes really do have a bottom-up character; their origins suggest at least as much a top-down character. Second, those top-down regimes were most closely associated not with any direct effort to widen more general liberties, but rather with the royal and imperial policies of building national treasuries for war.

Interestingly enough, this issue spilled into the American constitutional debates of the late 1780s, where the Anti-Federalists complained that Federalist free market ideas were part of a monarchic scheme, aimed at empire and mightiness instead of freedom.⁵⁰ In the Anti-Federalists' view, the Federalist plans for a unified commercial nation supported a "natural aristocracy" rather than well-established rights; they argued that this Federalist project was based on European ideas of large and powerful government—a regime that aimed not at liberty, but that was rather "framed . . . with a view to arms, and war."⁵¹

I do not want to suggest that all our modern property regimes derive from top-down schemes, or more specifically from monarchs bent on war and the revenues necessary thereto. Modern property and contract regimes clearly have vast numbers of bottom-up features. Commercial law includes the bottom-up customs of merchants, while nuisance law defines the boundaries of property by reference to the "reasonable" practices of ordinary people.⁵² Even a subject as formalistic as local zoning very largely reflects the ways that property owners actually use their land.⁵³ Indeed, it is

48 One of the dominating themes of Alexis de Tocqueville's OLD REGIME AND THE REVOLUTION was the continuity between the pre-revolutionary monarchs and the Napoleonic legacy, though Tocqueville stressed the relative weakness of the former. See, e.g., ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION 19-20, 32 (Stuart Gilbert trans., 1955).

49 André Tunc, *The Grand Outlines of the Code, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD* 19, 38-40 (Bernard Schwartz ed. 1956) (stating that the Code ratified Revolutionary abolition of feudal restrictions on property ownership and reaffirmed principles of freedom of contract). For the introduction of the Code in Napoleon's conquered states, see OWEN CONNELLY, NAPOLEON'S SATELLITE KINGDOMS 41-42 (1965) (modified version in Italy); *id.* at 159-60 (noting that the Code but not commercial law was introduced in Holland); *id.* at 222 (the Code was introduced in Westphalia [West Germany]).

50 See Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 89-93 (1989).

51 *Id.* "Framed for war" comes from the *Essay of Brutus to the Citizens of New York* (Jan. 2, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 400 (Herbert J. Storing ed. 1981). "The European governments are almost all of them framed . . . with a view to arms, and war," a model that "Brutus" eschewed for the American republic. *Id.* at 401.

52 See, e.g., *Middlesex Co. v. McCue*, 149 Mass. 103, 105 (1889) (explaining that "usual and reasonable" use of property is not a nuisance).

53 See Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 YALE L. J. 617-37 (1991) (describing informal land use patterns that were later incorporated into zoning); see also Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 569 (1992) (describing neighborhood consent requirements for some land uses in nineteenth century Chicago).

arguable that top-down regimes themselves only derive from usurpations of pre-existing bottom-up property.⁵⁴

But whatever the origins of top-down government itself, modern property regimes have some quite clear-cut and recognizably top-down aspects. The property regime of modern China certainly seems to be imposed from above. The new property and trading regimes of Eastern Europe also are in large measure top-down, imposed from above to get rid of earlier top-down socialist regimes. The patterns in these modern nations have much in common with the patterns of eighteenth century Europe, where monarchs introduced capitalist property and trade for reasons that were chiefly fiscal and military.

What we have to hope for is that the bottom-up activities of ordinary citizens can supplant and overwhelm the *dirigiste* origins of these modern property regimes. But indeed, even in the well-established democracies, some of the fanciest new forms of property simply could not exist without extensive governmental, legal, and administrative apparatus—for intellectual property, for example, or for the “tradeable emission rights” that are supposed to limit air pollution while adding flexibility to its regulation.⁵⁵

Summing up, then, the Priority Argument for property is normally narrated as a bottom-up story, first of property and then of governance. But in fact, the *history* of property regimes shows a strong streak of top-down features. From the top-down perspective, the central point of property and commerce is to build national strength and the ability to make war. And in that top-down story, property’s association with liberty is at most accidental.

It may be worth mentioning that eighteenth century political economists were very much aware of the pattern of monarchic involvement with economic development, and with the concomitant destruction of older constitutional privileges. This matter caught the attention of James Steuart, a writer associated with the Scottish Enlightenment school, but he thought that the autocratic proclivities of the enlightened monarchs could not long survive. According to Steuart, the very commerce, industry and liberalized property that monarchs promoted—“principally with a view to enrich themselves” and at the cost of traditionally privileged orders—would invigorate a new and opulent class of entrepreneurs. These individuals in turn would soon demand wider liberties and greater constraints on arbitrary power.⁵⁶

Occasionally this same argument surfaces today about the autocratic governance of modern China and other developing economies. Freely acquired property and free commerce, it is said, creates new entrepreneurial

54 For the pattern of such usurpation described in the “public choice” literature, see *infra* text accompanying notes 72-75.

55 See Clean Air Act Amendments of 1990, providing for tradeable “allowances” of acid rain precursor emissions. 42 U.S.C.A. §§ 7651-7651o (West 1995).

56 1 JAMES STEUART, AN INQUIRY INTO THE PRINCIPLES OF POLITICAL ECONOMY 248 (1767).

classes with their own demand for liberty, overwhelming the very autocrats who foster these enterprises.⁵⁷

But this argument means that the Priority Argument itself shifts quite dramatically, so that the reason for property's centrality among rights takes a different form. Now property is the central right not because it is the primitive reason for government and indeed the measure of government itself, but because the security of property makes other rights secure. This brings us to the second argument.

II. THE POWER-SPREADING ARGUMENT

Property is the most important of all rights because property diffuses power.

Unlike the Priority Argument, the best-known versions of the Power-Spreading Argument are the modern ones, particularly as they appeared in Friedrich Hayek's⁵⁸ and Milton Friedman's⁵⁹ biting critiques of socialist regimes during the last half-century.

Those critiques were based on the *political* characteristics of socialist regimes, rather than simply their economic aspects.

Putting the argument in a capsule form, these authors argued that free market economies have a comparative political advantage, stemming from the fact that they spread the ability to earn money and own property throughout the citizenry. This means that free market economies permit no particular persons or groups to entrench themselves in a monopolistic control over the all aspects of life. Why not? Because wealth is an alternative source of power to politics, and as long as many people can own property and attempt to earn money, power—including political power—will necessarily remain more or less diffused.⁶⁰ Money talks, and in a free market economy, the freedom that everyone has to own property or enter the market, in any way that she chooses, means that many people can talk, and they can and will resist the political temptations to suppress other rights.

Hence, on the Power-Spreading Argument, free-market economies, and the widely held property ownership they entail, are structurally capable of supporting an array of civil and political liberties—this by contrast with socialist regimes, which centralize both political and economic power and leave no room for alternative avenues to power. Judge Alex Kozinski, a prominent figure on the Libertarian speaking circuit, made an implicit

57 See *China's Challenge*, MACLEAN'S, Sept. 4, 1995, at 24 (reporting on the optimistic views of William Overholt, author of CHINA: THE NEXT ECONOMIC SUPERPOWER. Overholt believes that economic growth will give "the citizenry the confidence to demand [political] accountability, the resources to impose these demands, and the education to make appropriate choices."). For other developing countries, see, e.g., L. Gordon Crovitz, *Free Trade: Key Asian Value*, FAR EASTERN ECON. REV., Dec. 29, 1994, at 26 (citing Taiwan and Philippines as countries in which economic liberalization created new middle classes, which in turn have called for political reform); Peter Hyun, *General Park, Citizen Kim*, FAR EASTERN ECON. REV., Apr. 1, 1993, at 26 (making a similar argument about South Korea); Nicholas D. Kristof, *Ruthless Ex-Dictator Getting Credit for South Korea's Rise*, N. Y. TIMES, Nov. 24, 1995, at A18 (same).

58 FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

59 MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

60 FRIEDMAN, *supra* note 59, at 14-21; HAYEK, *supra* note 58, at 145-46.

nod to this argument when he observed that if rational people were given the choice, they might well prefer the right to build buildings or operate railways to the right to wear obscene slogans on their clothing.⁶¹ And why not? If they can build buildings and operate railroads, they will soon be able to wear whatever they please. This idea, roughly speaking, is the same idea that James Steuart expressed in his perhaps wistful hopes for the encouragement to entrepreneurs by the Enlightened Despots of his day.

But in Steuart's time, there was another and quite different version of this diffusion-of-power argument, perhaps especially interesting because it requires an imaginative leap into a world with a very different understanding of the appropriate political order. Prior to the French Revolution, most people in Europe thought that hierarchy was not at all an evil, but rather a good idea, both in the realms of politics and economics.⁶² The basic idea was that ordinary human beings are too unruly to govern themselves without hierarchical ordering. In this view, people *need* hierarchy, as a part of the natural order of things. Just as there is a Great Chain of Being from God through the angels to humans and then to the lower animals,⁶³ so is hierarchical ordering the basic structure in human institutions as well—in the family,⁶⁴ in the community,⁶⁵ in the larger political regime.⁶⁶ Without hierarchical order, it seemed, things would simply fall apart.

In the eighteenth century, economic thought generated some of the most important intellectual equipment to shake this view. Economic thinkers discovered "the market"—not the local Haymarket or Donkey Market,⁶⁷ but rather the abstract and generalized market in which all goods and services could trade against one another, until each arrived at equilibrium with all the others.⁶⁸ The stunning facet of this generalized and abstract "market" was that it seemed to run all by itself, in a natural ordering that required no supervision from nosy authorities and their minions.⁶⁹ And if that was the case for the market—if people could acquire and trade property without supervision—then who needed hierarchy in economic matters? And if not for economic matters, then who needed hierarchy for

61 Alex Kozinski, *Foreword: The Judiciary and the Constitution*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* at xi, xvii (James A. Dorn & Henry G. Manne eds., 1987).

62 Robert Darnton, *What Was Revolutionary About the French Revolution?*, *N. Y. REV. OF BOOKS*, Jan. 19, 1989, at 3, 4.

63 ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING* (1936). For the use of this metaphor in the eighteenth century, see *id.* at 183-207; see also KEITH THOMAS, *MAN AND THE NATURAL WORLD* 17-22 (1983) (arguing that animals were once considered entirely subordinate to human needs); *id.* at 135-36 (arguing that the view relaxed somewhat by the eighteenth century).

64 1 BLACKSTONE, *supra* note 10, at *416-20, 430-32 (describing the authority of the head of household over spouse, children, and servants).

65 PETER LASLETT, *THE WORLD WE HAVE LOST: ENGLAND BEFORE THE INDUSTRIAL AGE* 21, 62-66 (2d ed. 1971) (describing hierarchy in the preindustrial community).

66 For the widely-used metaphor of the commonwealth as a "body politic" with head, arms, feet, etc, see, e.g. CONRAD RUSSELL, *THE CRISIS OF THE PARLIAMENTS: ENGLISH HISTORY, 1509-1660*, at 41-43 (1971).

67 As in the *Eselmarkt* in the Dutch city of Maastricht, just a few yards from a University building in which one version of this Article was presented.

68 JOYCE APPELBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s* 28-33 (1984) (describing the late seventeenth-early eighteenth century discovery of an abstract market, working as a "natural system").

69 *Id.* at 33.

politics either?⁷⁰ The critical point, then, was that the discovery of the market aroused the seductive thought that hierarchical control over the economy was unnecessary, and by extension, so was hierarchical control of political life.

All this now seems quite archaic, but one can translate the most basic argument into more modern terms with a bit of reflection on the recent past of the authoritarian socialist regimes, particularly in Soviet views on the leading role of the Communist Party. At least in what was supposed to be a transition stage to true communism, the people were thought to be incapable of organizing their own economic and political affairs; they needed the hierarchy of the Party—the cutting edge of the proletariat—to govern these matters for everyone.⁷¹ With the collapse of those authoritarian socialist regimes, of course, the market was supposed to take over economic ordering as a kind of natural force: no one needed the Communist Party to run the economy, and by extension no one needed the Party to run political life either. Hence even as peculiar as the older discussion of hierarchy now seems, twentieth century history has a few eerie echoes.

But modern experience also suggests some of the practical difficulties of the Power-Spreading Argument. The first problem is extensively discussed in American political thought, particularly in the “public choice” branch of political science. The problem is that even initially-diffuse wealth winds up concentrating itself, particularly through politics. According to the public choice theorists, people with relatively narrow but intense interests can capture the political process from those with wide but diffuse interests.⁷² When they do so, they can pull up the gangplank behind themselves, and secure to themselves the special privileges, monopoly franchises, subsidies, and tax breaks that make their lives so easy, while making the lives of competitors and consumers more costly and difficult.⁷³ Commodities producers are a case in point. Through what seem to be unbreakable locks on legislatures the world over, agriculturalists, lumberers, miners, and ranchers enjoy price supports, import limits, subsidized water and transportation, and special rights to use public resources—and then they cite their foreign competitors’ subsidies as a justification for their own continued support.⁷⁴ Do they want diffusion of power, particularly eco-

70 *Id.* at 34, 95.

71 ROBERT H. MCNEAL, *THE BOLSHEVIK TRADITION* 71 (1963) (describing the Party’s elite role as Lenin’s lasting bequest to the Soviet Communism).

72 For the classics in this literature, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

73 For an interesting historical application, see Barry Baysinger et al., *Mercantilism as a Rent-Seeking Society*, in JAMES M. BUCHANAN, ET AL., *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 235-36 (1980) (quoting Adam Smith’s observation that merchants and manufacturers teamed with Parliament to impose mercantilist restraints on enterprise).

74 See, e.g., Jill Lancelot & Ralph De Gennaro, *Green Scissors Snip \$33 Billion*, N.Y. TIMES, Jan. 31, 1995, at A21 (describing efforts to curb agricultural, ranching, and other commodities subsidies on environmental grounds). For ranchers on public lands, see *infra* text accompanying note 81. For agricultural subsidies, see, e.g., Barnaby J. Feder, *Crop Subsidies: Help and Headaches*, N.Y. TIMES, July 5, 1994, at D1 (describing the argument that American farmers’ subsidies are necessary because of foreign subsidies); Andrew Pollack, *Japan Torn Between U.S. and Asians*, N.Y. TIMES, Nov. 16, 1995, at A6 (describing Japan’s efforts to protect its agricultural sector from foreign

conomic power? Don't bet the farm on it. Special interests are much more likely to want to keep the goodies for themselves. And to a surprising degree, they succeed, even in democratic governments. Indeed, they succeed so well that one prominent author in the public choice school, Mancur Olson, thinks that the natural fate of economic forces in stable governments is to drift toward oligopoly.⁷⁵

A second but closely related practical problem is a kind of cruel logic of entrenchment: once monopolistic interests have captured a favored place, the only practical routes to the diffusion of economic power may be quite unsettling to a regime of property rights.⁷⁶ In continental Europe, it took a revolution and a strong man to dislodge the prior monopolistic impediments to the acquisition of wealth. The nations and satellites of the former Soviet Union too may prove the point: short of the use of force, one cannot extensively diffuse property rights or even property opportunities without addressing the old Party interests. Either those old interests must be paid off, or something like a coup must oust them, and neither alternative seems particularly attractive.⁷⁷ We in the United States should not be too quick to criticize; we ourselves seem to have great difficulty in divesting ourselves of market intrusions as relatively simple as local rent control or national agricultural subsidies.⁷⁸

The public choice literature has given a name to this kind of problem: the "transitional gains trap."⁷⁹ Here is the scenario: some people play the political system to get special entitlements or monopoly status. Then they get used to their special entitlements, organize their affairs around them, and capitalize the entitlements into their deals.⁸⁰ This means, for example, that public lands grazing entitlements get factored into the price that a stockman pays for the adjacent ranch. Thus, abolishing low-fee grazing permits does not simply threaten this year's earnings—it threatens the value of the ranch itself, which may explain the adamant objections to alterations in grazing fee structure.⁸¹

competition); cf. David Hosansky, *Depression Era Programs Face Sweeping Changes*, CONG. Q., Nov. 18, 1995, 3523 (describing recent efforts to reduce agricultural supports dramatically).

75 MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 74 (1982) (summarizing the general scheme); *id.* at 75-78 (comparing West European countries and Britain); *id.* at 151 (premodern Japan); cf. *id.* at 177-80 (suggesting that drift to monopolization occurs with or without governmental assistance).

76 See, e.g., BORN, *supra* note 44, at 11-12 (explaining how Frederick II of Prussia excoriated serfdom but thought it could not be abolished without compensating the nobility); Root, *supra* note 35, at 332 (describing the French effort to abolish guilds which caused crisis among guild creditors). See also BENTHAM, *Civil Code*, *supra* note 5, at 119-20 (arguing that the principle of security forbade abolition of slavery and serfdom).

77 See Paul B. Stephan III, *Privatization After Perestroika: The Impact of State Structure*, 14 WHITTIER L. REV. 403, 421-25 (1993) (noting the moral unattractiveness of benefitting former Soviet officials, but also the difficulty and disruptiveness of purge).

78 On agricultural subsidies, see, e.g. Keith Bradsher, *Budget Ax Misses in Swing at Sugar-Crop Aid*, N.Y. TIMES, Sept. 29, 1995, at A1, A26. On rent control, see ANTHONY DOWNS, *RESIDENTIAL RENT CONTROLS: AN EVALUATION* 1-2 (1988) (concluding that rent control usually makes shortages worse).

79 Gordon Tullock, *The Transitional Gains Trap*, in BUCHANAN, *supra* note 73, at 211.

80 *Id.* at 212-14.

81 For an early example, see PHILLIP O. FOSS, *POLITICS AND GRASS* 174-75 (1960) (describing ranchers' objections to the first federal grazing fees). For current controversies, see, e.g.,

Ultimately, one may not be able to get rid of these special favors, benefits, perks, and privileges without undermining the security of people's expectations about their property.⁸² That prospect, however, pits the diffusion of power against a Benthamite perspective. The Power-Spreading function of property only works if property itself is diffusely-held, but once property is concentrated, the process of dispersing it might undercut property's all-important economic role—that is, making owners feel secure.

A final problem with the Power-Spreading Argument is perhaps the most basic: the diffusion of property and economic power is not entirely desirable, because diffusion sometimes raises the same problems as concentration of property—entrenchment, rigidity, and ultimately insecurity. The legal doctrine that is most likely to diffuse property is undoubtedly the Rule of Capture, or First Possession, as it is often called: when something is unowned, then property rights go to the first taker. The Rule of Capture, however, can cause difficulties, particularly when it is applied to environmental or common resources like air and water. An individual factory, a home furnace, or even an automobile may burn fuel that pollutes the surrounding air—that is, these activities use up some portion of a common resource. When there are only a few polluters, it really does not matter; dilution through the air can neutralize the effects, just as dilution through flowing waters can neutralize a considerable amount of pollution.⁸³

When these polluting activities become more intense, they may become exponentially more disruptive and costly.⁸⁴ But by that time, polluters have a transitional gains trap of their own: they have become used to polluting, they have made capital expenditures on that basis, and they think they are *entitled* to continue to pollute, just in the same way they always have. And their neighbors may well think, "If X can pollute, then I should be able to too." They all think that if they are required to stop, they must be compensated.

The point is that the diffusion of power can cause a kind of entrenchment as well. People come to think that they have entrenched rights to continue the Rule of Capture and that they can continue to take things "for free" from the commons, even when those common resources have become scarce and fragile.

In fact, at the extreme, too much diffusion of power is not compatible with a regime of property at all. Take for example modern Amazonia, where First Possession is the order of the day, and where loggers, wildcat

Timothy Egan, *In Battle Over Public Lands, Ranchers Push Public Aside*, N.Y. TIMES, July 21, 1995, at A1, A12 (describing ranchers' counterattack on Interior Secretary's efforts to reduce overgrazing).

82 Tullock, *supra* note 79, at 211 (describing this phenomenon as a "paradoxically . . . inefficient portion of the Pareian frontier").

83 See Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 585-86 (1990).

84 *Id.* at 585-86. I use the term "exponential" because pollution may have rising marginal costs. This is reflected, for example, in environmental and public health considerations of "dosage" of pollutants; small amounts of a toxin may be harmless, while slightly larger dosages may cause disproportionately higher harms. See, e.g., David D. Doniger, *Federal Regulation of Vinyl Chloride: A Short Course in the Law and Policy of Toxic Substances Control*, 7 ECOLOGY L.Q. 500, 513-14 (1978) (discussing the relationship of dosage to harm).

miners, would-be ranchers, and everyone else take what they can, as fast as they can.⁸⁵ Economic power that is this diffuse is not a regime of stable property, and it is not a regime of other civil liberties either. It is a regime of violence.⁸⁶ Indeed, it is just the kind of violence that John Locke thought called for the institution of government.

In fact, property regimes occupy a middle ground in the diffusion-of-power scale. Totally diffuse power is not really compatible with property at all; property can do little to help safeguard other rights in a regime where the governing principle is dog-eat-dog.

III. THE INDEPENDENCE ARGUMENT

Property is the keystone right because property makes individuals independent and thus capable of self-government.

The central idea of the Independence Argument is that property removes people's dependence on others, and fundamental autonomy makes them capable of exercising unencumbered judgment in the political forum. Hence all political powers, and certainly all the other rights, depend on the right to property.

Not just any old property will do for the Independence Argument, however. The foundational property for independence was deeply aristocratic in Old Regime Europe: the archetypical form was large and long-standing landownership. The owner of such property was in effect the "independent" head of a small regime. As such he had a dual role in governing; not only did he head his own little fiefdom, but he also had a role in the larger principality, as a kind of co-regent or co-governor with the crown.⁸⁷

In the American colonies and the new United States, the civic republican version of the Independence Argument was similar in principle, even though landownership was much more widely distributed.⁸⁸ In this republican version, the landowner was not a man of noble birth but rather a yeoman farmer.⁸⁹ But the yeoman farmer himself was the head of a self-

85 See, e.g., JUAN DE ONIS, *THE GREEN CATHEDRAL: SUSTAINABLE DEVELOPMENT OF AMAZONIA* 64-71, 93, 145-50 (1992).

86 *Id.* at 19-20; see also Carol M. Rose, *A Tale of Two Rivers*, 91 MICH. L. REV. 1623, 1632 (1993) (reviewing DE ONIS, *supra* note 85, and THEODORE STEINBERG, *NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND* (1991)).

87 See Dietrich Gerhard, *Problems of Representation and Delegation in the Eighteenth Century*, in *LIBER MEMORIALIS SIR MAURICE POWICKE* 117, 123, (1965) (using the term "co-governor"). Montesquieu called the aristocracy an "intermediate power" in monarchies, and though he called the nobility "subordinate" and "dependent," he also argued that they were the barrier against arbitrariness and despotism, and that monarchies could not exist without them. See 1 MONTESQUIEU, *1 SPIRIT OF THE LAWS* 18-20 (facsimile reprod. 1984) (1751); see also FRANKLIN FORD, *ROBE AND SWORD: THE REGROUPING OF THE FRENCH ARISTOCRACY AFTER LOUIS XIV* 239 (1953) (discussing Montesquieu's idea of intermediate powers).

88 CAROL M. ROSE, *"Takings" and the Practices of Property. Property as Wealth, Property as "Propriety,"* in CAROL M. ROSE, *PROPERTY AND PERSUASION* 49, 61-62 (1994) (and sources cited therein). For the role of property in civic republicanism, see generally Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1990-91).

89 See, e.g., Alexander, *supra* note 88, at 311-16 (describing Jefferson's insistence on small independent landholding (allodial title) rather than large-scale feudal landholding); see also

sufficient domain, including as "dependents" his wife, children, and slaves or servants. His property gave him a complete livelihood; he needed no one, not even commercial traders. This independence enabled him to speak freely and without hesitation in the political forum.

Note that this older Independence Argument for property had several features. First, the Argument generally meant that land was an especially significant type of property. Only land could sustain all the necessities of life, and thus provide an independent haven for its owner. Commercial wealth did not yield independence, because trade by its nature forces one to rely on others, through all the intricate webs of contracts, supplies, services, and buying and selling.⁹⁰ It is no accident that in seventeenth century England, men who made fortunes in commerce attempted to buy land;⁹¹ the same held true of the "nobility of the robe" in France, the newly-wealthy aristocracy who owed their noble status to the purchase of judicial offices.⁹² It is no accident that Montesquieu thought that monarchies needed to preserve the landholdings of the nobility and to discourage nobles from engaging in commerce.⁹³ And it is no accident that Jefferson spoke as if the ideal property were landed property, of a size and scale appropriate to republican independence.⁹⁴ Even the economically-minded Physiocratic thinkers favored agricultural property; indeed, it was one of Adam Smith's great achievements to make commercial property seem important too.⁹⁵

A second feature of the older Independence Argument was hierarchy. In the European version, the quintessentially independent actor was the landed aristocrat. The American civic republican version flattened the hi-

CAROL M. ROSE, *Ancient Constitution Versus Federalist Empire: Antifederalism from the Attack on "Monarchism" to Modern Localism in PROPERTY and PERSUASION*, *supra* note 88, at 71, 92 (describing the centrality of the yeoman farmer in Anti-Federalist arguments).

90 For republican mistrust of non-landed, commercial types of property, see LACY K. FORD, JR., *THE ORIGINS OF SOUTHERN RADICALISM: THE SOUTH CAROLINA UPOUNTRY, 1800-1860*, at 52, 73-74 (1988); see also Alexander, *supra* note 88, at 285-90. For the republican distrust of commerce for fostering uncontrolled desires for physical goods, see Joyce Appleby, *Consumption in Early Modern Social Thought*, in *CONSUMPTION AND THE WORLD OF GOODS* 162, 167 (John Brewer & Roy Porter eds., 1993) [hereinafter CONSUMPTION].

91 LAWRENCE STONE, *AN OPEN ELITE? ENGLAND 1540-1880*, at 13 (1984) (describing the prestige and political authority of landholding). The actual impact of new entry into the landed aristocracy has been a subject of very heated debate. See W. A. SPECK, *STABILITY AND STRIFE: ENGLAND 1714-1760*, at 70-74 (1977) (summarizing the shifting scholarship concerning landownership between 1500 and 1800). The overall picture shows professional and commercial families actively engaged in land purchases, but at a somewhat declining rate by the eighteenth century. Accord STONE, *supra* note 91, at 208, 210, 397-400. However, Stone has generally argued the long-term stability of the landed elite. See *id.* at 400-02; see also Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439, 1463-66, 1466 n.100 (1994) (pointing out that David Ricardo, whose early nineteenth century theory of "economic rent" implicitly undercut landed wealth in favor of entrepreneurial wealth, himself bought an estate in the country).

92 FORD, *supra* note 87, at 165-69 (describing this new aristocracy's entry into landholding).

93 1 MONTESQUIEU, *supra* note 87, at 66-67 (suggesting that the monarchies' laws should preserve entail since noble honor attaches to fiefs); 2 *id.* at 14 (commenting that English practice of allowing nobles in commerce weakened the monarchy).

94 See Alexander, *supra* note 88, at 288-90 (noting Jefferson's seeming favoritism toward small landowning and ambivalence toward commerce and manufacturing); *id.* at 311-16 (describing Jefferson's preference for allodial over feudal landholding).

95 For the physiocrats on agriculture, see BEHRENS, *supra* note 42, at 133-36. See also KRIEGER, *supra* note 33, at 198-99.

erarchical pyramid, but here too, only a mature male, the yeoman farmer head of the household, was a truly independent person.⁹⁶ It was perfectly consistent with that version of republicanism that married women and servants, who were themselves considered dependent, should not own any of the property that rendered a man independent and thus should play no political role.⁹⁷

Interestingly enough, the modern version of the Independence Argument is radically different. The basic idea is still there—that property nurtures the independence necessary for political participation—but in its modern permutation, this idea becomes a platform for distributive rights. The modern form of the Independence Argument is that all people should have a voice in the political order, but to acquire that voice they need a secure baseline of property—and if necessary, this baseline must be secured by redistribution.⁹⁸

Needless to say, this modern version of the Independence Argument drops the distinctive features of the older version. Most notably, the bias in favor of land has completely vanished. In modern discussions, baseline entitlements are just as apt to be described as the right to employment, health care, shelter, or the right to such human capital as education.⁹⁹ If anything, these “new property” rights foresee relational forms of wealth that have nothing to do with the older stress on landed self-sufficiency. Moreover, the newer version has no trace of hierarchy. Quite the contrary, this version is profoundly anti-hierarchical; it begins with the vision of equal rights to participate in politics, and carries through by reorganizing property entitlements to meet that end.

But precisely that point raises a predictable economic critique of the modern Independence Argument: as a variant on distributional rights, the Argument could have destabilizing effects on property as conventionally

96 Robert Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 351-52 (1989). Steinfeld notes, however, the strain placed on hierarchy by republican norms. *Id.* at 348-51.

97 Steinfeld, *supra* note 96, at 337, 344-47; see also FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 25-27 (1985). A trace of the older view—that “dependent” persons and especially women cannot speak “independently”—may still affect women’s credibility in courtroom settings. See, e.g., Kathy Mack, *Continuing Barriers to Women’s Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327, 329-31 (1993) (describing disbelief in women’s speech patterns as opposed to men’s “powerful” speech patterns); see also Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN’S RTS. L. REP. 195, 218 (1986) (arguing that use of expert testimony in abuse cases suggests that women witnesses alone are disbelieved).

98 See Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981); Charles A. Reich, *The New Property*, 73 YALE L. J. 733, 785-86 (1964). For an effort to combine the older and newer versions of “independence,” see Frank Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329-30 (1987); cf. Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 38-42 (1990) (distinguishing traditional and modern versions). For somewhat less overtly political versions of independence, see STEVEN MUNZER, *A THEORY OF PROPERTY* 241-46 (1990) (discussing the minimum entitlements necessary for “a decent human life in society”); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (arguing that property is necessary for self-development).

99 See, e.g., MUNZER, *supra* note 98, at 241, 245; see also Amar, *supra* note 98, at 40-41 (mentioning education as a “safety net” when land “runs out” since both are constructs giving individuals a “minimum stake” in society).

understood. Any claims of the poor to a baseline must be satisfied from some source, and that source is likely to derive from taxation or confiscation from other citizens. This solution elicits not only libertarian outrage, but also the standard utilitarian litany: redistributive rights are a kind of forced sharing, and could discourage industry, undermine enterprise, sap the very energy that creates wealth, and in the end, leave a smaller pie of social wealth.¹⁰⁰

Cass Sunstein has studied the modern Eastern European constitutional movement and suggests a rather different reason for caution: constitutional entitlements to "new property" or what Sunstein calls "positive rights"—minimum income levels, housing, and the like—may never be capable of practical fulfillment, and consequently, may never be treated as creating legally binding entitlements. While approving of redistributive programs as a policy matter,¹⁰¹ Sunstein argues that if such matters are called rights—turning societal aspirations into "aspirational rights"—they generally may give rights a bad name: they suggest that one may have "rights" that can never be fulfilled or legally enforced.¹⁰²

Perhaps most significant for present purposes, Sunstein's caveats suggest that the Independence Argument could undermine itself. On his account, if the new version of the Independence Argument means that property is at least partially an aspirational right, then property, understood as independence, may weaken other rights rather than supporting them.

Sunstein's caveat about the Independence Argument is fundamentally a warning about the impact of rhetoric, and it brings into focus the rhetorical or symbolic relation of property rights to other rights.

IV. THE SYMBOLIC ARGUMENT

Property is the keystone right because it symbolizes all other rights.

This Argument for property rests on a phenomenon that one notices often in the rhetoric of rights. It may be a matter of human cognition, but property analogies have a way of creeping into people's talk about all kinds of rights. The most notable example is no doubt the Holmsean metaphor of "the marketplace of ideas," which suggests that free speech consists not merely of standing on soapboxes and speaking, but rather means hawking the ideas as if they themselves were so many boxes of soap.

An older and almost equally famous use of the property metaphor appeared in a journal article by James Madison, in which he described him-

100 See, e.g., EPSTEIN, *supra* note 3, at 343; William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 35 (1985) (suggesting that "new property" rights may conflict with traditional property rights); see also *Civil Code*, *supra* note 5, at 120-21 (arguing that egalitarian concerns must yield to the security of property). Interestingly enough, Bentham himself approved of legislated relief for the poor, at least to those in absolute want. *Civil Code*, *supra* note 5, at 127-33. He could not refrain from the icy observation that "a law which offers to indigence an aid independent of industry is, to a certain extent, a law against industry." *Id.* at 128.

101 Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 917 (1993).

102 *Id.* at 919-20.

self as having a property in his religious beliefs, his reputation, and in a whole array of other matters.¹⁰³ Madison's use of property here suggests that the metaphor of property is the route by which people can visualize rights generally.¹⁰⁴

If property is so important for the visualization of all rights, then property itself becomes the critically important right: it is the symbolic means through which people convey and receive the meaning of all rights. If my property can be taken with impunity, speech and religion may come next. But if I am secure in my property, then I have the intellectual tools to understand what rights *mean*; I can think and talk about my other rights and convince other people that they too have an interest in protecting those rights.

But there are many challenges to this Symbolic Argument. One is that property is at best an incomplete and misleading symbol for other rights, a critique that is implicit in the work of Margaret Radin. As she points out, people normally think of property as imbued with characteristics that may or may not inhere in other rights; in particular, property rights are normally attributed to things that an owner can buy and sell.¹⁰⁵ Radin's work on "inalienability" argues that in some domains, the normal property attributes of buying and selling may be inappropriate—e.g. selling children, selling one's self into slavery, selling sexual services.¹⁰⁶ Extending Radin's argument, consider the consequences of using normal property as a central symbol for rights generally: do we want people to buy and sell their rights to vote or speak? Would we want government to be able to acquire by eminent domain the right to assembly or freedom of religion? That is, would we approve of a governmental taking of such rights, so long as the owner is compensated?¹⁰⁷

The point of these rhetorical questions is that other rights have functions and characteristics that are different from those conventionally understood as property. To use property as a symbol for them may not help us to understand those functions and characteristics, but may rather mislead us.

If Radin implicitly challenges the Symbolic Argument, Jennifer Nedelsky does so explicitly. Nedelsky has traced out the idea of property's symbolic centrality, and like Radin, she concludes that property is at best a blurred and messy stand-in for other rights.¹⁰⁸ Property, she argues, is far too implicated in its economic role to act as a surrogate for non-economic

103 James Madison, *Property*, NATIONAL GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983).

104 See NEDELSKY, *supra* note 17, at 21-22 (suggesting that although this statement is "atypical" of Madison, he was attempting to borrow property's esteem to extend to other rights).

105 Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1854 (1987).

106 See, e.g., *id.* at 1910.

107 *Id.* at 1854 n.21, 1887 n.139 (describing some traditional liberal concepts of inalienable rights); see also Lawrence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 332-33 (1985) (describing some "relational" rights as inalienable because they are not focused on the individual as such but on the avoidance of hierarchy, for example between governors and governed).

108 NEDELSKY, *supra* note 17, at 207-11 (discussing this concept in a sub-title called "The Distorted Lens of Property").

rights. More specifically, property as a right is inextricably linked with existing distributions of wealth. The language of property rights makes citizens think that those distributions are natural and untouchable; it masks the degree to which property itself is the product of social and political decisions, and it impedes the discussion of the real political issues inherent in the confrontation of individual autonomy with collective democratic decisionmaking.¹⁰⁹

Nedelsky's objections to property's "mythic" qualities¹¹⁰ recall one vivid and explicitly Marxist critique of property, revived to some degree by the scholars of the Critical Legal Theory movement. On the Marxist account, the notion of "property rights" is a kind of false consciousness—a set of concepts that laborers believe, contrary to their own best interests, never realizing that these very concepts simply naturalize the ways in which capitalists systematically bilk them of the true value of their efforts.¹¹¹ The Critical Legal Theorists point out that property rights are only one variant of what Mark Tushnet calls "rights-talk"—a part of the intellectual equipment by which the wealthy and powerful confuse, isolate, and disempower the disadvantaged.¹¹² Indeed, on the Marxist and Critical account, property rights might be the most egregious example of the way that rights-talk bolsters domination.¹¹³ If property symbolizes rights, then, it is only because, like property rights, the whole baggage of rights is corrupt—a kind of rhetorical diversionary tactic to cement the hegemony of the ruling classes.¹¹⁴

An oddly similar but considerably less theoretical objection to the Symbolic Argument might be dubbed the Curmudgeon's Critique. The Curmudgeon agrees that rights-talk is corrupt, but for a different reason. Among other things, she is a believer in tort reform, because she thinks

109 *Id.* at 242-49, 253-54, 271-72.

110 *Id.* at 246 (discussing this concept in a sub-title called "The Mythic Power of Property").

111 See KARL MARX, *CAPITAL*, in MARX 354-55, 361, 366 (M. Adler, ed., 1955) (describing capitalist "primitive accumulation," expropriation of workers' labor justified by property rights, and workers' belief in the natural character of capitalist relations). Some modern scholars state that Marx himself did not use the term "false consciousness," however. For the modern discussion of the role of false consciousness in Marx, see MICHELE BARRETT, *THE POLITICS OF TRUTH FROM MARX TO FOUCAULT* 4-17 (1991).

112 See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1382-84, 1387-88, 1393-94 (1984) (suggesting that rights language obfuscates issues and advances interests of the powerful); see also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 270-71, 282 (1987) (describing Critical Legal Studies positions); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Fact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1577, 1596 (1982) (suggesting that rights concepts isolate individuals and may fragment social movements).

113 See, e.g., Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 44-47 (1991) (using the example of Native Americans to illustrate the partiality and injustice of property definitions); see also James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 399-402, 451, 461 (1982) (arguing that elite groups depicted various self-serving legal doctrines as natural).

114 The Critical critique of rights-talk has generated a certain counter-criticism among writers interested in the status of women and minorities. For example, Elizabeth Schneider argues from her work with battered women that the concept of entitlement is indeed rhetorical and cultural, but that learning concepts of rights can be a critical step in getting people to regard themselves as equal players in the community. See Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 597-98, 611-12 (1986); see also Patricia J. Williams, *Alchemical Notes: Reconstruction Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 410 (1987) (arguing that rights rhetoric can be effective for minorities).

that modern western societies are already vastly too rights-conscious. Rights-talk is all over the place, she thinks, and it paralyzes us: schoolchildren's rights, animal rights, plant rights, gun-owners' rights, victims' rights, rights of this, rights of that—no one can move for fear of violating some right or other. On the Curmugeon's view, property may well symbolize rights, but that is a strike against it. We should be thinking less about rights altogether, and more about ways to get things done; if property rights make it easier for us to visualize other rights, then property be damned.

The Curmugeon's view presupposes that rights-talk in general, and property rights-talk in particular, has an ossifying effect on action. But this raises an unanswered issue in the general discussion of property-as-symbol-of-rights. Let us suppose that property is indeed a central or at least a partial symbol for rights generally: what is the symbol for property? It is easy to answer that *land* is that symbol. For most people, a house (adorned with a picket fence) is very likely to come to mind when the unmodified noun "property" is spoken, and among lawyers, "property law" means the law of *real property*.¹¹⁵

But why is land—immovable, enduring land—the central symbol for property? Why not, say, water? Water, after all, is in fact the subject of important and valuable property rights, and indeed, concerns about water can substantially modify the rules about land.¹¹⁶ If water were our chief symbol for property, we might think of property rights—and perhaps other rights—in a quite different way. We might think of rights literally and figuratively as more fluid and less fenced-in; we might think of property as entailing less of the awesome Blackstonian power of exclusion and more of the qualities of flexibility, reasonableness and moderation, attentiveness to others, and cooperative solutions to common problems. Those qualities are in fact even a part of landed property—as in nuisance law—however little the *symbol* of landed property may suggest them.¹¹⁷

More than a trace of that more fluid and cooperative vision of property lies in the next argument for property's centrality.

V. THE CIVILIZING ARGUMENT

Property is the keystone right because the acquisition and management of property inculcates the moral and civil behavior on which rights depend.

The Civilizing Argument sounds rather peculiar to modern ears. In our own time, the common-sense picture of property's relation to morality is probably closer to a Marxist view. On that depiction, property is at best a concession to the flawed character of human beings, and at worst an open

115 The same pattern appears in law school textbooks for classes on property; after brief introductions, most deal almost exclusively with landed property.

116 See, e.g., SHIU YAN TANG, INSTITUTIONS AND COLLECTIVE ACTION: SELF-GOVERNANCE IN IRRIGATION 73-74 (1992) (describing the pattern of scattered land ownership as a response to irrigation risk and the need for collective action).

117 See Ellickson, *supra* note 12, at 1387 (arguing that most property regimes are in fact eclectic mixtures of individual and group property).

gate to insufferable egocentrism, through which people grasp more, more, more for me, me, me.

Much medieval and early-modern culture was especially hostile to commercially-acquired property and regarded commerce as an activity of a largely despised class—despised precisely because commercial dealers supposedly acquired the habits of avarice and mean-spiritedness. One sees this attitude in artworks of the later Middle Ages, which typically represent capitalist or commercial enterprise in the guise of an ape or monkey, sometimes depicted as unwillingly defecating money.¹¹⁸ This depiction may be the original picture of anal retentiveness, and it is not at all a picture of virtue. Even later, eighteenth century Europe's vastly increased consumerism only recast the moral doubts about commerce: now commerce and trade were questioned as fomenters of pointless yearnings for material goods and as underminers of republican restraint.¹¹⁹

But some eighteenth century economic thinkers—particularly those associated with the Scottish Enlightenment—tried to alter attitudes about the commercial pursuit of property, by transforming the singularly unattractive sin of avarice into the sociable sense of "interest."¹²⁰ On this account, commerce was a moral antidote to the pride, violence and vainglory of aristocrats.¹²¹ In contrast to highstrung aristocratic bellicosity, they said, commerce was calm and above all "gentle."¹²² Would businessmen dream of fighting duels? Of course not. That is because commerce requires one to focus not on others' slights to one's own honor, but rather on satisfying the others' wants and interests. Commerce thus inculcates sociability and consideration, softening and civilizing rough manners instead of exacerbating them.¹²³ In this intellectual turnabout, the interdependency of commercial dealings, once considered cause for suspicion, turns out to be a fount of virtue.

118 Lester K. Little, *Pride Goes Before Avarice: Social Change and the Vices in Latin Christendom*, 76 AM. HIST. REV. 16, 37-39, 44 (1971). Moral qualms about commerce continued to be expressed even in the very commercial Dutch Republic of the seventeenth century. See, e.g., James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence* 16-20 (1995) (draft paper on file with author) (describing Dutch moralist literature).

119 Appleby, in CONSUMPTION, *supra* note 90, at 164-67. For increased consumerism, see Jan de Vries, *Between Purchasing Power and the World of Goods: Understanding the Household Economy in Early Modern Europe*, in CONSUMPTION, *supra* note 90, at 85, 100-01, 107-15 (describing an "industrious revolution" accompanying greater availability of consumer goods).

120 ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* 54-56 (1977).

121 *Id.* at 56-63.

122 *Id.* at 61-62. For the somewhat different accommodation of aristocratic values to wealth in the phenomenon of "dandyism," see Colin Campbell, *Understanding Traditional and Modern Patterns of Consumption in Eighteenth-Century England: A Character-Action Approach*, in CONSUMPTION, *supra* note 90, at 40, 49-52 (dandy retained aristocratic characteristics of stoicism and imperturbability).

123 Appleby, in CONSUMPTION, *supra* note 90, at 168. Hirschman's account suggests a feminizing description of commerce. See HIRSCHMAN, *supra* note 120, at 61-62. For a study of women's consumption in the eighteenth century, see Amanda Vickery, *Women and the World of Goods: A Lancashire Consumer and Her Possessions, 1751-81*, in CONSUMPTION, *supra* note 90, at 274.

Marx and Engels were soon to ridicule the notion of “gentle commerce,” of course,¹²⁴ and even earlier, Alexander Hamilton suggested that the notion was preposterous, at least insofar as it predicted that a widening commerce would foster peace among nations. Commercial nations, he said, are just as driven as any others by jealousy and fear—and they had better prepare themselves for the attacks of those who hope to plunder them.¹²⁵

But recent historical scholarship suggests that there may indeed have been some truth in the old thesis about “gentle commerce.” Although the issue is certainly contested,¹²⁶ some historians of the last generation have linked the early nineteenth century’s burgeoning commerce to the rise of new and vastly expanded forms of philanthropy. One thesis has it that through trade, commercial dealers became interested in people who were very distant from themselves, both socially and geographically. The traders felt some sympathy for the situation of those distant others, and perhaps most importantly, felt that they could make some difference in righting the wrongs that afflicted them.¹²⁷ And interestingly enough, some modern game theory experiments appear to confirm that complete strangers can develop strong social and moral bonds simply through the cultivation of trading relationships, especially when those relationships depend on mutual commitment and trust.¹²⁸

Perhaps the most interesting depiction of the way that the pursuit of property influences the “moral sentiments” lies in Alexis de Tocqueville’s portrait of mid-nineteenth century Americans. Tocqueville thought that Americans were intoxicated by trade and commerce, even with respect to that most aristocratic of possessions—land—which Americans seemed to regard as just one more commodity.¹²⁹ How did this ubiquitous commercial buzz affect personality? Tocqueville’s picture shows a people whose prodigious commercial activities left them restless and impelled them to even greater levels of commotion;¹³⁰ but those activities also left them largely unconcerned with social distinctions,¹³¹ sympathetic to all kinds of

124 HIRSCHMAN, *supra* note 120, at 62 n.aa; see also Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LIT. 1463, 1467-68 (1982) [hereinafter *Rival Interpretations*] (describing the Marxist view that capitalist *douceur* was self-destructive).

125 THE FEDERALIST No. 6 (Alexander Hamilton).

126 The most controversial issue for historians has been the relation of commerce to the growth of the antislavery movement. See, e.g., David Brion Davis, *Reflections on Abolitionism and Ideological Hegemony*, 92 AM. HIST. REV. 797 (1987) (expressing skepticism about the relation of capitalism and philanthropic antislavery); Seymour Drescher, *The Long Goodbye: Dutch Capitalism and Antislavery in Comparative Perspective*, 99 AM. HIST. REV. 44, 47-49 (1994) (same). See generally, CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION (Thomas Bender, ed., 1992).

127 Thomas Haskell, *Capitalism and the Origins of the Humanitarian Sensibility* (pt. 2), 90 AM. HIST. REV. 547, 549-59 (1985).

128 Peter Kollock, *The Emergence of Exchange Structures: An Experimental Study of Uncertainty, Commitment, and Trust*, 100 AM. J. SOCIOLOG. 313, 337-38 (1994).

129 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 163-67, 247-48 (Phillips Bradley ed. 1945).

130 1 *id.* at 305; 2 *id.* at 144-47.

131 2 *id.* at 161-62 (reporting that all professions are considered honorable); *id.* at 190-92 (discussing egalitarian master/servant relations).

people,¹³² generally respectful of other peoples' rights,¹³³ and infused with a kind of can-do attitude and capacity to work with others to get things done.¹³⁴ These traits, if true, seemed to confirm the thesis that commercial pursuits help to instill sociable qualities—though Tocqueville clearly thought that they also corresponded to a platitudinous and shallow intellectual life.¹³⁵

Do we have a modern version of the Civilizing Argument? Perhaps, but only a somewhat muted and contested one, appearing indirectly, for example, in recent historians' debates about whether capitalist growth advanced or impeded the global antislavery movement of the nineteenth century.¹³⁶ If there is a modern version, it may be best represented in literature. Here the commercial, property-pursuing person has been the subject of a number of fictional personifications as a moral type: George Babbitt,¹³⁷ Sammy Glick,¹³⁸ Rabbit Angstrom,¹³⁹ Scrooge McDuck.¹⁴⁰ These fictional characters are not entirely admirable types, but on the whole they are not so terrible either. They share with Tocqueville's Americans the tendency to an unfulfilled restlessness, but also, to a greater or lesser extent, most also share the Tocquevillian Americans' sociability, egalitarianism, pragmatism—and their platitudes as well. Taken together, they are of a type that I have described elsewhere not as Athenian, and certainly not Spartan, but rather Babylonian.¹⁴¹

The newly transformed republics of the post-socialist age are another intriguing modern showcase for the relationship between capitalism and what Tocqueville might have called morals or *moeurs*. Small facts about these countries tell volumes: some sales clerks have to be taught to smile at the newly-opened McDonalds;¹⁴² others have to learn to pay attention to customers rather than lounging around and insulting them;¹⁴³ new businesses have to learn that they cannot bait and switch the same partners

132 2 *id.* at 185-86; *id.* at 175-77. Tocqueville makes a similar point but notes that the great exception was the indifference to slaves, which negatively illustrated his view that sympathy is related to equality of social condition.

133 1 *id.* at 70, 308-09; 2 *id.* at 270.

134 1 *id.* at 198-99; 2 *id.* at 114-15, 117-18, 126-27.

135 In contrast to what he saw as the Americans' practical good sense, Tocqueville disparaged some of their qualities of mind; he thought Americans were unusually likely to have vastly generalized and uncreative ideas (2 *id.* at 14-18, 274-77), phantasmagoric religious notions (2 *id.* at 75, 82, 142-43), and, due to their inability to notice fine and precise detail, precious little poetic or literary refinement (2 *id.* at 62, 75, 82). The famous tyranny of the majority had an effect too, intimidating those who had novel thoughts. 1 *id.* at 273-74.

136 See *supra* notes 127-28.

137 SINCLAIR LEWIS, *BABBITT* (1922).

138 BUDD SCHULBERG, *WHAT MAKES SAMMY RUN?* (1941).

139 JOHN UPDIKE, *RABBIT, RUN* (1960), and perhaps even more, *RABBIT IS RICH* (1981).

140 For an extensive description of this Disney character, Donald Duck's fabulously wealthy capitalist uncle, see JEFF ROVIN, *THE ILLUSTRATED ENCYCLOPEDIA OF CARTOON ANIMALS* 235-37 (1991).

141 Rose, *supra* note 50, at 105.

142 Adi Ignatius, *Russians Who Wear Jungle Ties or Spit Need Not Apply*, WALL ST. J., June 9, 1992, at A1 (describing re-education needed for employees).

143 See Seth Faison, *Service With Some Bile*, N.Y. TIMES, Oct. 22, 1995, § 4, at 4 (describing efforts to correct atrocious service by Chinese store clerks, attributed to the legacy of Communist rule; officials have banned fifty rude remarks by clerks, including: "Who told you not to look where you're going? . . . Didn't you hear me, what do you have ears for? . . . Are you finished talk-

twice.¹⁴⁴ These events suggest that capitalist property has a kind of moral and cultural infrastructure that we may have mistakenly thought was simply natural, whereas in fact it is learned through sustained commercial practice, and lost when those practices deteriorate.¹⁴⁵ The content of this infrastructure includes the attitudes that Tocqueville noticed: confidence about one's ability to get things done, either individually or by joining with others; and accompanying that confidence, a certain absence of covetousness even amidst the mad scramble for more material things.¹⁴⁶ In the commercial society, well-being is not a zero-sum game, and apparently the citizenry is aware of that fact.

But how successful is this property-pursuing moral type in attending to other kinds of rights, and in shielding those from depredation? In the America that Tocqueville saw, property did appear to be a kind of school for self-restraint, perhaps most strikingly evident in the annals of the migrant trails west across the continent, where even the most desperate travelers showed a mind-boggling respect for the property of others.¹⁴⁷ Indeed, the Americans' dealings with property and commerce must have borne a striking resemblance to the "self-interest rightly understood" that Tocqueville found so impressive in American political life.¹⁴⁸

But Tocqueville himself was famously pessimistic about the Americans' ability to respect rights and liberties beyond property, due to their egalitarian propensity to give in to majority opinion.¹⁴⁹ Whatever Tocqueville thought of the "gentle commerce" thesis¹⁵⁰—or of the evidence that commerce could inculcate confidence, cooperativeness, or respect for others—when he discussed institutions that might dam the egalitarian floodwaters of majoritarianism, he focused on local government, voluntary associations

ing? . . . Why didn't you choose well when you bought it? . . . Stop shouting. Can't you see I'm eating? . . . Now you tell me. What have you been doing all this time?"

144 See, e.g., Marshall I. Goldman, *Do Business in Russia? For Now, No*, N. Y. TIMES, Aug. 7, 1994, § 3, at 9 (describing cavalier contract-breaking by Russian firms, among other problems; advising foreign firms to stay away).

145 For the development of commercial trust, see Kollock, *supra* note 128, at 338-41; Charles F. Sabel, *Studied Trust: Building New Forms of Co-operation in a Volatile Economy*, in *INDUSTRIAL DISTRICTS AND LOCAL ECONOMIC REGENERATION* 215, 229-30 (Frank Pike & Werner Sengenberger eds., 1992) (describing economic development project in Pennsylvania). For an example of the loss of respect for property and the related ethical damage, see Amy Barrett, *From Thefts of Art to Toilet Paper, Czechoslovakia Crime Wave Spreads*, WALL ST. J., Nov. 6, 1992, at A10C (describing growth of theft and resultant need for security and ethical education). See also Justice Marshall's opinion in *Ogden v. Saunders*, 25 U.S. 213, 354-55 (1827) (describing the importance of the Contracts Clause for avoiding measures that impair commerce while destroying trust and "sap[ping] the morals of the people").

146 2 TOCQUEVILLE, *supra* note 129, at 136-38 (noting that the American poor anticipate attaining the "good things" of the wealthy).

147 JOHN PHILLIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* 350-55 (1980) (describing punctilious respect for property rights in conditions of starvation, thirst, and other great distress on Overland Trail).

148 2 TOCQUEVILLE, *supra* note 129, at 129-32.

149 1 *id.* at 264-80.

150 As a reader of Montesquieu, Tocqueville probably knew about this thesis, although he did not pick up much on Montesquieu's analysis of the place of commerce in democracies. For Tocqueville's relation to Montesquieu, see Melvin Richter, *The Uses of Theory: Tocqueville's Adaptation of Montesquieu*, in *ESSAYS IN THEORY AND HISTORY* 74, 95 (Melvin Richter ed., 1970).

and the legal profession, far more than on property and commerce.¹⁵¹ Indeed, he often appeared to think that commercial pursuits were part and parcel of American egalitarianism and striving. Commerce seemed clearly as vulgar as those other egalitarian traits, and possibly even subtly dangerous to liberty.¹⁵²

Tocqueville's picture certainly leaves some ambiguity about whether the pursuit of property makes people more civil, and hence more capable of supporting and respecting rights generally. The haunting fear is that commerce and property may indeed have these civilizing qualities to some degree, but that they remain vulnerable to the sudden, irresistible blows of envy and majoritarian passions.

A similar specter haunts the next argument.

VI. THE DISTRACTION ARGUMENT

Property protects all other rights because the pursuit of property makes politics seem boring.

The essence of the Distraction Argument is that the pursuit of property can open up competing attractions to passion-driven political feuds, and thus safeguard all the other rights. Why muck about in politics to try to destroy the rights of others, when money-making and business are so vastly more exciting?

Like the Civilizing Argument, the Distraction Argument is probably most important in its historical form. Among their predictions for an American commercial republic, the great Federalist founders apparently included a hope that market enterprise, in a unified commercial republic, could divert the citizenry from the great man-made scourges of Europe—the political rivalries over honor, prestige, and place, the horrors of religious and sectarian conflict, the devastating carnage of class war.¹⁵³

In the founding period, some of that carnage was about as close in time as our own Civil War is to us. The mid-seventeenth century civil wars in England, with their heavy religious overtones, and the hideous destruction of the Thirty Years' War in Germany, ending only in 1648—those were events well within historical recall in late eighteenth century America.

151 1 TOCQUEVILLE, *supra* note 129, at 202 (associations), 282-90 (legal profession); for other institutions counteracting majoritarianism, see 1 *id.* at 281-82 (local government), 291-97 (jury trial). He did evidently think commerce important to the development of a taste for liberty, however, and said so in some fragments; see Richter, *supra* note 150, at 99-100 (citing Tocqueville, *Sur la Démocratie en Amérique*, (Fragments inédits), intro. by J. P. Mayer, *La Nouvelle Revue Française* 7 (1959)).

152 This is particularly notable in the later-written second volume of *DEMOCRACY IN AMERICA*, where he suggested that material pursuits can isolate individuals, presumably making them more vulnerable to majoritarianism. See, e.g., 2 TOCQUEVILLE, *supra* note 129, at 149-51 (suggesting that the quest for material well-being can make citizens withdraw from politics, opening the door to dictators); 2 *id.* at 163-65 (suggesting that the pursuit of wealth diverts Americans from political activity). See also 2 *id.* at 168-71 (suggesting that over time, manufacturing could bring a new aristocracy by degrading workers and opening the social gulf between the wealthy and workers).

153 Martin Diamond, *The Federalist*, in *HISTORY OF POLITICAL PHILOSOPHY* 631, 648-49 (Leo Strauss & Joseph Cropsey eds., 2d ed. 1972) (emphasizing the role of commerce in reducing class conflict).

They certainly had a place in the Federalist Papers, most famously in *The Federalist No. 10*.¹⁵⁴

Commercial enterprise, along with a careful structuring of the representative body, might help to offer a way out. If the acquisition of property could be divorced from personal status, and if trade could be opened up throughout a huge market, then everyone could aspire to make money and get rich. And that prospect would seem far more tempting, far more interesting than an endless round of zero-sum rivalries over political control—rivalries fueled by factional strivings, fears, and oppressions. Whatever Tocqueville's attitudes on commerce, his observations on the Americans' all-consuming commercialism suggested that, a half-century later, the Distraction Argument might well be working.¹⁵⁵

No doubt commerce does have the effect of diverting attention from political rivalries. Part of the reason, of course, is that commerce can make a country wealthier, and if there is more to go around, there is less reason to bicker over the scraps. But more importantly, an open economy makes bickering over scraps look tedious and silly.

But having said all that, the Distraction Argument is certainly not perfect, at least not all the time, and it is *modern* experience that especially sharpens this point. While the prospect of property and a market economy can distract people from politics and feuds, the events of the former Yugoslavia and post-colonial Africa suggest the converse is true too—that politics and feuds can distract people from property and a market economy. Commerce, trade and the pursuit of property are certainly interesting activities, but on the whole, they can only sustain their interest where a society *already has* a stable culture of property, where property *already is* secure. The Distraction Argument has an unfortunate element of circularity: Property and commerce only distract from politics in a political order that has determined that property and commerce are important, and that is capable of assuring the citizenry that it will make good on that determination.¹⁵⁶ This is no doubt one reason why it is difficult to establish full-fledged free market regimes in places with little history of protecting property.

Like the other arguments for property's centrality, then, the Distraction Argument has a certain ambiguity. What is left, then, is an Argument that brings us full circle, back to the outset and to the lowly "merely economic" arguments for property.

154 THE FEDERALIST NO. 10 (James Madison) (citing as a cause of faction the "zeal for different opinions concerning religion"); see also THE FEDERALIST NO. 19 (Alexander Hamilton & James Madison) (referring to the devastation of the Thirty Years' War); THE FEDERALIST NO. 52 (Alexander Hamilton) (arguing that freedom of religion depends on the number of sects).

155 See *supra* notes 150-52 and accompanying text.

156 See, e.g., Ignatius, *supra* note 13, at A1 (budding entrepreneur concerned about political extortion, feels need to make political alliances); Howard W. French, *Nigerians Lament "Locusts" That Pick Nation Bare*, N.Y. TIMES, Oct. 12, 1995, at A4 (attributing growth of scam artists in Nigeria to ethos of government corruption; suggesting that energies are directed not at production but at control of government).

VII. THE LUXURY-GOOD ARGUMENT

Property protects all other rights precisely by fulfilling its economic function, and by making a society wealthier.

This Argument builds directly on the Benthamite understanding of property's economic role: property encourages industry, investment, prudence, and trade, all of which make the society better off. In turn, greater wealth means not only that the citizens can do more things for themselves individually, but that they can also do more collectively. Governments in wealthier societies can use some portion of the citizenry's wealth for common enterprises—roads, parks, health, environmental protection, and even welfare. Finally, because they are wealthier, the citizens are happier, and hence more tolerant of each other—and more willing to acknowledge one another's rights.

The absence of prosperity, on the other hand, can induce citizens to undertake dangerous experiments. This is often said of the Weimar era in Germany, where a period of rampant inflation was followed by the economic collapse of the early Depression years, and where citizens began to take the National Socialists seriously, with all their crazy and murderous plans.¹⁵⁷ It has been said more recently about parts of what used to be the Soviet Union, where the snail's pace of economic development seems to make neo-Fascist politicians more attractive.¹⁵⁸

The argument here, then, is that most liberties are luxury goods—they follow after wealth is secured. On this argument, property and the resultant prosperity may not be *sufficient* for the enjoyment of liberties, but they are certainly *necessary*; without property and prosperity, other rights are in danger.¹⁵⁹ Thus of all the arguments for property's keystone role, the Luxury-Good Argument most directly builds on property's "merely economic" features.

Nevertheless, the Luxury-Good Argument is faced with an historical critique tracing back at least to Montesquieu. This riposte suggests that liberty is, if anything, less likely to be a luxury good than a poverty good. Montesquieu thought that the real glue of democratic government is the virtue and patriotism of the citizenry;¹⁶⁰ this is because republican government dispenses with hierarchical rule and instead demands great self-restraint in the citizenry itself.¹⁶¹ But he also argued that republican virtue cannot easily bear great disparities of wealth, because republican spirit gen-

157 See, e.g., MICHAEL L. HUGHES, *PAYING FOR THE GERMAN INFLATION 185-87* (1988). But see RICHARD F. HAMILTON, *WHO VOTED FOR HITLER?* 9-10, 228, 458-61 (1982) (disputing the common thesis that the lower-middle class supported Hitler; finding more evidence of support in the threatened upper and upper-middle classes).

158 See, e.g., Stephen Kinzer, *Fretful Latvians Turn to German With a Racist Past*, N.Y. TIMES, Oct. 17, 1995, at A13 (citing argument that lack of economic progress can cause "explosive" frustrations leading citizens to support a rightist).

159 See, e.g., Tina Rosenberg, *Force is Forever*, N.Y. TIMES, Sept. 24, 1995, § 6 (Magazine), at 44, 49 (stating that Chile seems to be safe from a new military coup as long as the country's economy is prospering).

160 1 MONTESQUIEU, *supra* note 87, at 24-27.

161 1 *id.* at 24.

erally requires equality and a “mediocrity” of fortunes.¹⁶² While he conceded that citizens of democracies might engage in commerce and even amass great wealth, the reason—a variant on the Civilizing Argument—was that commercial activity fostered frugality, prudence, and orderliness.¹⁶³ To maintain those virtues, commercial actors had to stay hungry, as it were; hence Montesquieu suggested that democracies might best subject wealth to various devices for more equal division.¹⁶⁴ Otherwise commerce might give rise to the inequalities in which “particular passions”¹⁶⁵ and corruption fester, while republican virtue collapses along with republican government itself.

A trace of this Argument resurfaced in some of the Anti-Federalist attacks on the Federalist Constitution. While clearly approving the security of property and even the benefits of commerce,¹⁶⁶ the Anti-Federalists were concerned about potential inequalities and their effects on the polity. An important Anti-Federalist tract, the “Letters from The Federal Farmer,” commented that:

If there are advantages in the equal division of our lands, and the strong and manly habits of our people, we ought to establish governments calculated to give duration to them, and not governments which never can work naturally, till that equality of property, and those free and many habits shall be destroyed¹⁶⁷

Notice that the Poverty-Good riposte does not directly contradict the Luxury-Good Argument, and indeed the two share a critical element: both tend to stress that there must be some relatively smooth curve in the distribution of wealth. Even on the pure Luxury-Good Argument, citizens threatened by impoverishment will not be soothed to learn that some of their fellow citizens are filthy rich. Quite the contrary.¹⁶⁸

The Poverty-Good caveat thus brings to light a crucial issue for the Luxury-Good Argument: whether some rough equality or at least some smooth curve of wealth distribution does indeed thrive in a market economy—the rising tide lifts all boats, as the saying goes.¹⁶⁹ That is of course the promise of the economic argument for property: property and commerce create wealth for all as a positive sum, rather than passing it around in a zero-sum game. And to some considerable degree, the historical record seems to support the “rising tide” view, that is, developed commercial

162 1 *id.* at 50-51.

163 1 *id.* at 56-57.

164 1 *id.* at 54-57. He suggested periodic redistribution of lands, the regulation of dowries, taxation on the wealthy, and division of inherited wealth. Failing those possibilities, he suggested what seemed to be a more serious policing of morals through boards of censors and strict paternal authority. 1 *id.* at 57-60.

165 1 *id.* at 50.

166 See Rose, *supra* note 50, at 92-93.

167 *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention, Letters from the Federal Farmer*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 51, at 251.

168 See Kinzer, *supra* note 158.

169 See John C. Weicher, *Private Production: Has the Rising Tide Lifted All Boats?*, in HOUSING AMERICA'S POOR 45 (Peter D. Salins ed., 1987) (arguing that an increase in overall housing quantity raises housing quality even among the poor).

societies are more likely to show a flourishing middle class, less dramatic extremes of wealth and poverty, greater opportunities for historically dependent categories of people, including women, and—not least—some noticeable apparatus for welfare.¹⁷⁰

The grim news is that if this optimistic expectation is mistaken, and if the security of property and commerce do yield harshly visible inequalities that transform civic self-restraint into envy and rage on the one side, and contempt and corruption on the other, then the security of property is at risk along with all the prosperity it brings, and all the liberty it safeguards.¹⁷¹ And in our own times, we clearly have some anxiety that capitalist wealth can corrode equality and civility. One sign is the persistence of the argument for redistribution as a “big bribe” to prevent social upheavals.¹⁷² Another sign is the elaboration of “indexes of inequality,” which social scientists and policy-makers clearly think is a matter of concern.¹⁷³ Indeed, earlier commercial republics may have been nervous about the social consequences of wealth disparities as well. Their characteristic symptoms appeared in their own extensive institutions for charity,¹⁷⁴ and perhaps also in the multilayered sumptuary laws that attempted (often futilely) to restrain the peacocks of the town from lording it over their less fortunate fellow citizens.¹⁷⁵ Seen in their most cynical light, then, redistri-

170 For the relative freedom of women in the Dutch Republic, see SIMON SCHAMA, *EMBARRASSMENT OF RICHES* 402-07 (1988). For the notable charitable institutions of commercial republics, see *id.* at 575-79 (describing extensive poor relief in seventeenth century Holland) and K.H.D. HALEY, *THE DUTCH IN THE SEVENTEENTH CENTURY* 155-59 (1972) (noting same). See also GERALD STRAUSS, *NUREMBERG IN THE SIXTEENTH CENTURY* 194-98 (1966) (describing charitable institutions in a wealthy German commercial center).

171 Variants on this theme have resurfaced often—the wealth of commercial democracies may undermine the very civic qualities that allow societies to become wealthy—for example, in Max Weber's observations on puritan religion, and in Schumpeter's gloomy predictions for capitalist democracy. For these and other variants, see Hirschman, *Rival Interpretations*, *supra* note 124, at 1463, 1466-70 (1982). Hirschman, however, does not find these doubts entirely persuasive. *Id.* at 1468, 1470 (describing planning and welfare state reforms as self-corrections of modern capitalism); *id.* at 1483 (gentle-commerce thesis and destructive-commerce thesis might both be true simultaneously).

172 See Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 154 (1978) (describing “big-bribe” as a rational-actor justification for welfare system); see also *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 423 n.4, 424, 434 (1934) (alluding to breaches of the peace and the need to maintain orderly government as the rationale for a Minnesota mortgage moratorium law); 81 *CONG. REC.* 8256 (1937) (reporting debates over the first federal housing statute, the 1937 Housing Act, and Senator Lee alluding to slums as “a seedbed for radical propaganda” and “spawning grounds of communism”); cf. EPSTEIN, *supra* note 3, at 316 (rejecting bribe rationale for welfare).

173 See, e.g., Keith Bradsher, *Widest Gap in Incomes? Research Points to U.S.*, *N.Y. TIMES*, Oct. 27, 1995, at D2 (reporting a study by the Organization for Economic Cooperation and Development that the income gap between the highest and lowest income segments is greater in the United States than in other large industrial countries).

174 See *supra* text accompanying note 170; SCHAMA, *supra* note 170, at 577 (observing that the well-to-do Dutch could only feel comfortable with their wealth if it also seemed to enhance the more general community well-being); see also EPSTEIN, *supra* note 3, at 319. Epstein distinguishes sharply between charitable giving and legally enforced redistribution, but this distinction may have less force for societies in which established religion or universal customary norms require giving.

175 See, e.g., STRAUSS, *supra* note 170, at 109-15 (describing strictures on clothing and extravagance in sixteenth century Nuremberg). Strauss thinks these sumptuary laws were motivated by decorum and morality; for example, the efforts to allay codpiece stuffing. *Id.* at 113. Strauss also

bution programs in some ways attest to a collective hedging of bets on the Luxury-Good Argument.

On the other hand, seen in their best light, redistribution programs are a recognition of the prerequisites of a democratic commonwealth, and perhaps of its commercial success as well.¹⁷⁶ Cass Sunstein regards redistribution as an integral part of mature free market constitutions.¹⁷⁷ If this is so, the Luxury-Good Argument for property's primacy—taken together with the Poverty-Good corrective—suggest some reasons why people might think so. Shifting some wealth to smooth the curve of life prospects is only one of those reasons. Just as important is the “story” that a society conveys about itself through such efforts, conveying an attitude of generosity and concern for fellow citizens, an attitude that in effect glues the whole together.¹⁷⁸

This is obviously an extremely tricky subject. The Luxury-Good Argument bases itself squarely on the wealth-producing characteristics of property regimes, and the obvious objection to redistribution is that it attacks property and saps the energy, care, and effort that property promotes; producers may be discouraged, while recipients become opportunistic, and everyone winds up the poorer.¹⁷⁹ More subtly, if redistributive efforts do have such unproductive effects, they can also breed resentment and cynicism, which in turn corrode the civility and law-abidingness on which commerce depends. Perhaps it was for that reason that historic charitable institutions took serious (and to a modern eye rather unattractive) precautions against free-riding.¹⁸⁰

Does wealth itself, then, promote a kind of stability in which other rights may flourish? Many have thought so—even Aristotle may have thought so¹⁸¹—but over a very long time, no one has seemed completely confident, at least not without conscious effort to adjust for the material and moral consequences of inequality. The Luxury-Good Argument quickly leads to the question of redistribution, and on that issue, the Argument walks a tightrope—perhaps “damned if you do,” but perhaps also “damned if you don’t.”

thinks that these laws retained class distinctions, but he notes that they did fall more heavily on the wealthy. *Id.* at 112, 114.

176 Hirschman, *supra* note 124, at 1470 (describing welfare state as a modification that sustains capitalism).

177 Sunstein, *supra* note 101, at 917.

178 Cf. Lawrence Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 595-98 (1985) (criticizing the sole focus on efficiency in judicial decisions, arguing that these decisions tell a “constitutive” story about the society in which we live).

179 See, e.g., EPSTEIN, *supra* note 3, at 320-22. For an interesting variant, see Howard W. French, *Does Sharing Wealth Only Promote Poverty?*, N.Y. TIMES, Jan. 14, 1995, at A4 (describing the strong norm of sharing with one's family in Ivory Coast, which discourages individuals from accumulating savings or investing more in business).

180 The seventeenth century Dutch not only expected recipients of charity to behave gratefully and respectably, but they also banned or jailed vagabonds who were thought to be incapable of adopting community values. See SCHAMA, *supra* note 170, at 579-83.

181 THE POLITICS OF ARISTOTLE 181-83 (Ernest Barker ed., 1962) (suggesting that democracies work best when there is a large middle class, rather than extremes of wealth and poverty, which cause dissension and diminish “friendship”). Parts of this passage, incidentally, are remarkably similar to Madison's FEDERALIST NO. 10.

VIII. CONCLUSION

Those, then, are seven arguments (with many permutations) why the right to property is not simply important but rather *the most important* right in a liberal constitutional order. The mere fact that many of these arguments are very old does not mean that they are trivial or false; even trite points can be true. And the fact that they are contested does not mean that they are false either; some may be more persuasive than their would-be rebuttals. This long-standing contestability only means that over a quite protracted period, the arguments for property's *political* centrality—its guardianship role over other rights—have not proved to be completely convincing to those concerned with constitutional ordering.

We know this in another way, too. If we really thought that property was the "guardian of every other right," we would not be so concerned to safeguard all those other rights independently. Protecting property would be enough, and the other protections of rights would be mere redundancy. Instead, to the great chagrin of some property rights champions,¹⁸² property is only somewhat ambiguously protected in our constitutional law—as is witnessed by the legendary inconclusiveness of Takings Clause interpretation—while other rights seem considerably more firmly established as a legal and constitutional matter.¹⁸³

Thus these seven arguments, with all their caveats, leave some questions. First, in the light of all these doubts, why are the arguments for property's keystone role so persistent? And second, in the light of this persistence, why are these arguments nevertheless so fragile and subject to doubt?

As to the question of persistence of these arguments, one might surmise in the first instance that there is a combination of two simple factors: first, the arguments themselves are at least partially persuasive, even if not rising to the Q.E.D. level; and second, the question of property's primacy really does *matter*. There are many parts of the world in which *no* rights are firmly established, and yet there is at least a plausible case—or rather several plausible cases—that the security of property can set the stage for more thoroughgoing protections of other rights.

It is not easy to say this about any other right. Consider the right to vote, or to speak freely—rights that could easily be cited as the most important among the political rights.¹⁸⁴ How far would they be likely to carry a citizenry whose property is at risk? What boldness, independence and crea-

182 See, e.g., ELV, *supra* note 20, at 132-34 (complaining of the constitutional neglect of property rights since the 1930s); Douglas W. Kmiec, *The Original Understanding of the Takings Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1634-36, 1666 (1988) (noting the instability of Takings Clause interpretation but arguing for core meaning).

183 See *supra* note 16 and accompanying text (noting that footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144 (1937) described a constitutional practice in which property and economic rights are taken to be less important than those that protect the political process or guard against oppression of minorities).

184 See, e.g., Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 980, 983-85 (1990) (citing free speech as an especially important right because it preserves autonomy, checks governmental abuses, advances access to truth, and especially creates an attitude of tolerance and self-restraint).

tivity are to be expected without the backstop of some security of property? Some, to be sure. But how much, among how many people?

Perhaps just as important a factor in the ever-renewed hopes for property as a keystone right, the institution of property itself is extremely persistent. Virtually all peoples of whom we have any knowledge have invented property regimes for themselves in order to manage the resources they find important.¹⁸⁵ People have created property even in the face of proscriptions against property-holding, as witnessed by the pervasive black-marketeering that occurs in centrally-organized economies.¹⁸⁶ Indeed, centralized economies have to expend much effort to stamp out the ever-sprouting mushrooms of informal or illegal property.¹⁸⁷

Property, then, seems so hardy a weed that its protection can be had on the cheap, as it were, and thus property seems especially attractive as a vehicle to carry other rights. Having already become wealthy, we in the West can enjoy the luxury of redundant protection of rights here at home, but in a world of scarce resources and conflicting priorities, where people may be able to bet only on one pony, property may look like the strongest horse.

But what about the continued doubts about these arguments for property's keystone role? Paradoxically, the fragility of the arguments may arise because property itself is fragile—much more so than one would think from its sheer persistence. A central feature of this fragility is this: property entails the cooperation of others. You cannot have property all alone. Even the rule of First Possession, seemingly so quintessentially individualistic, depends on the recognition and acquiescence of others; they must know what you are claiming, and tacitly agree to let you hold it—even against their own interests.¹⁸⁸

A property regime thus depends on a great deal of cooperation, trustworthiness, and self-restraint among the people who enjoy it; but unfortunately, the origins of those qualities are not entirely clear. Theoretical rational-actor models struggle to find some basis upon which individuals cooperate and recognize entitlements in others, instead of generally following the zero-sum strategies of brawling, thieving, and defrauding.¹⁸⁹ Moving from theory to practice, we know that in fact, small and close-knit

185 See, e.g., Martin J. Bailey, *Approximate Optimality of Aboriginal Property Rights*, 35 J.L. & ECON. 183, 189-94 (1992) (citing examples of varying types of property rights among different aboriginal groups); D. Bruce Johnsen, *The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians*, 15 J. LEGAL STUD. 41, 60-61 (1986) (describing property rights in various groups as an aspect of producing wealth).

186 See, e.g., Stephan, *supra* note 77, at 409, and sources cited therein (describing a "shadow" economy in Soviet Russia).

187 Judith L. Anderson, *Changing Conceptions of Economic Crime under Russian Law*, 14 WHITTIER L. REV. 451, 452 (1993) (stating that economic crimes were estimated at one-third of all convictions and incarcerations in Soviet Union); *id.* at 455 (describing Soviet-era economic criminalization of private entrepreneurial activity).

188 See Carol M. Rose, *"Enough and As Good" of What?*, 81 NW. U. L. REV. 417, 438-39 (1987) (describing claims of possession as depending on those who recognize claims, even against own immediate interest).

189 For a critique of the large body of scholarship that assumes away the problem, see James Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 332-39, 339 n.44 (1992). See also JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 203 (1989)

groups regularly succeed in establishing property regimes among themselves,¹⁹⁰ but the small size of such groups may dramatically limit their ability to produce commercial wealth; the opportunities for trade and specialization are simply too restricted.

In a larger arena, where property combines with far-flung commerce to produce genuine wealth, property is much more vulnerable. There, insofar as the institution of property helps people to become wealthier, it invites predators. John Locke knew this when he spoke of the "inconveniencies" of having to guard one's property from the forceful depredations of others. The ancient Norsemen knew it too, when they cruised about, looking for wealthy towns to sack. Modern scam artists know it just as well, when they concoct elaborate dramas to dupe their victims through an uncanny mimicry of ordinary business dealings.¹⁹¹

Property, in short, is a risky business. It is a persistent institution, to be sure, but a fragile one too—and most fragile precisely in those contexts where it can produce the greatest wealth. That may be a good reason why we follow a mixed strategy about rights and take a guarded approach to property as a keystone right. Perhaps property could protect other rights by its own force *if only it were easy to safeguard*; but instead, property is itself a delicate institution.

Still, property does bounce back constantly, in spite of the jolts it takes from predation. Why? The answer might lie in whatever truth there is in the Civilizing Argument. That is, property regimes may tend to regenerate endogenously, as it were, because given the slightest elbow room, they induce the very qualities of cooperation, attentiveness to others, responsibility, and self-restraint that themselves are the prerequisites to the successful handling and trade of property. In societies where people can cultivate those traits, property regimes generally reward them in a very simple way: the societies get richer. It should be noted that when property rewards cooperative traits, it also rewards the very qualities of "self-interest rightly understood" that helps democratic government to function. And the depredations to property are educational too, if only in a cautionary way; a few of the strong may become very much wealthier, but only temporarily, because everyone else becomes very much poorer.

All this suggests at most a rather modest claim for property as a keystone right, that is, as an educative institution. On that conception, property would play a central role not as the fierce bulldog guardian of autonomous individual rights, but rather as the gentle and somewhat fragile persuader, rewarding the character traits needed not only for commerce but also for self-government.

(suggesting that noncooperation is the dominant strategy of outcome-oriented rational individuals).

190 ROBERT C. ELLICKSON, ORDER WITHOUT LAW 167, 185-89 (1991) (hypothesizing that close-knit groups establish wealth-maximizing norms, and giving two property examples in trespass and fencing rules); see also Ellickson, *supra* note 12, at 1320 (similar hypothesis with respect to norms of landed property).

191 For the analysis of scams as dramas mimicking ordinary commerce, see ARTHUR LEFF, SWINDLING AND SELLING 28-29, 51 (1976).

The rhetoric of property often seems to resound with the notes of heroic autonomy—"I can do what I please with my property"—perhaps, as noted earlier, in the same way that we so often symbolize property by easily-segregated land rather than flowing and necessarily-shared water.¹⁹² But such heroic rhetoric rests on the quite mistaken notion that this most intensely social of institutions hinges on individualism alone, whereas in fact it thoroughly mixes independence and cooperation. Indeed, taken to an extreme, the in-your-face rhetoric of property rights can undermine actual institutions of property, suggesting that anything goes, and that the property owner need not care in the least for his fellows. That is not what makes property work to make a society richer. And it is not what makes democracy work to make a society freer. If property has a claim to a role as a keystone right, it is because those two facts are related, and because learning one may help in learning the other.

192 On water, see *supra* notes 116-17 and accompanying text. For some examples of ordinary conceptions of property, see SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 41-47 (1990).

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WRITINGS OF CAROL M. ROSE

BOOKS

PERSPECTIVES ON PROPERTY LAW (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman eds., 2d ed. 1995).

Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership (1994).

ARTICLES

A Dozen Propositions on Property Rights: Private Property, Public Rights, and the New Takings Legislation, WASH. & LEE L.REV. (forthcoming 1996) (Tucker Lecture, Washington & Lee Univ. Sch. of Law).

Trust in the Mirror of Betrayal, 73 B.U. L. REV. 531 (1995).

Rhetoric and Romance: A Comment on Spouses and Strangers, 82 GEO. L.J. 2409 (1994).

Environmental Lessons, 27 LOY. L.A. L. REV. 1023 (1994).

Given-ness and Gift: Property and the Quest for Environmental Ethics, 24 ENVTL. L. 1 (1994).

Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges and (More Importantly) Vice Versa, 44 FLA. L. REV. 295 (1992) (Dunwoody Lecture, Univ. of Fla.).

Women and Property: Gaining and Losing Ground, 78 VA. L. REV. 421 (1992).

Rethinking Environmental Controls: Management Strategies for Common Resources, 1991 DUKE L.J. 1.

Property as Wealth, Property as Propriety, 33 NOMOS 223 (1991) (Journal of the American Society for Legal and Political Philosophy).

Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach, 57 TENN. L. REV. 577 (1990).

Energy and Efficiency in the Realignment of Common-Law Water Rights, 19 J. LEGAL STUD. 261 (1990).

Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory, 2 YALE J. L. & HUMAN. 37 (1990).

The Ancient Constitution vs. the Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism, 84 NW. U. L. REV. 74 (1989).

Crystals and Mud in Property Law, 40 STAN. L. REV. 577 (1988).

"Enough, and As Good" of What?, 81 NW. U. L. REV. 417 (1987).

The Comedy of the Commons: Custom, Commerce and Inherently Public Property, 53 U. CHI. L. REV. 711 (1986) (reprinted as one of ten best land use/environmental articles of 1986, in 1987 LAND USE & ENVTL. L. REV.).

New Models for Local Land Use Decisions, 79 NW. U. L. REV. 1155 (1985).

Possession as the Origin of Property, 52 U. CHI. L. REV. 73 (1985).

Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. CAL. L. REV. 561 (1984) (reprinted as one of ten best land use/environmental articles of 1984, in 1985 LAND USE & ENVTL. L. REV.).

Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 CAL. L. REV. 837 (1983) (reprinted as one of ten best land use/environmental articles of 1983, in 1984 LAND USE & ENVTL. L. REV.).

Servitudes, Security and Assent: Some Comments on Professors French and Reichman, 55 S. CAL. L. REV. 1403 (1982).

Preservation and Community: New Directions in the Law of Historic Preservation, 33 STAN. L. REV. 473 (1981).

Recent Issues in the Liability of Children's Welfare Agencies (1976) (written for the Child Welfare League of America).

Citizen Participation in Revenue Sharing: A Report From the South (1975) (written for the Southern Governmental Monitoring Project).

Empire and Territories at the End of the Old Reich, in THE OLD REICH: ESSAYS ON GERMAN POLITICAL INSTITUTIONS (James A. Vann & Steven W. Rowen eds., 1974).

The Issue of Parliamentary Suffrage at the Frankfurt National Assembly, 1848-1849, 5 CENTRAL EUROPEAN HISTORY 127 (1972).

BOOK REVIEWS

Takings, Federalism, Norms, 105 YALE L.J. 1121 (1996) (reviewing WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS* (1995)).

A Tale of Two Rivers, 91 MICH. L. REV. 1623 (1993) (reviewing JUAN DE ONIS, *THE GREEN CATHEDRAL: SUSTAINABLE DEVELOPMENT OF AMAZONIA* (1992) and THEODORE STEINBERG, *NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND* (1991)).

The Guardian of Every Other Right: A Constitutional History of Property Rights, 10 CONST. COMMENTARY 238 (1993) (reviewing JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992)).

Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value By Any Other Name is Preference, 87 MICH. L. REV. 1631 (1989) (reviewing MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW AND THE ENVIRONMENT* (1988)).

Public Property, Old and New, 79 NW. U. L. REV. 216 (1985) (reviewing HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1983)).

Coming to Terms with Terminology: Evaluating Law Reform, 31 STAN. L. REV. 977 (1979) (reviewing JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978)).

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