RIGA GRADUATE SCHOOL OF LAW

The Dynamics of Private Property: Between Individual Rights and Common Interests

BACHELOR THESIS

AUTHOR: Svitlana Yelanska
LL.B 2020/2021 year student
student number B018039

SUPERVISOR: *Aleksandrs Fillers, PhD*

DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) ……………………………………

RIGA, 2021

ABSTRACT

The present research explores the tension implicit in the right to property as an exclusionary right. The conceptualization of the right to property as a necessary component of individual freedom stands at odds with a universal exercise of the right in the context of scarcity. Both moral and economic considerations align in the necessity for property, but these justifications are of a principlally divergent order. The natural law perspective is predominantly anchored in the atomic – the interest of the individual in personal freedom and well-being. The focal point of the economics approach is in the aggregate – the benefit to be reaped in the rights' systematic application. The present work explores the interaction between the two -whether a focus on the aggregate is capable of undermining the atomic, manifested in the potential for inequality. It is concluded that a tension between the two is endemic to the right to property, but can be alleviated through appropriate legal safeguards which prioritize welfare and constrain accumulation.

Keywords: property, natural law, inequality, wealth, scarcity, law and economics.

SUMMARY

The following research investigates the dynamics of the right to property and the balance to be struck between considerations of individual freedom and considerations of general equality. The primary objective is to illuminate the potential tension between property as an instrument central to individual autonomy and property as a stepping stone to greater levels of aggregate prosperity of a state.

To this end, the first Chapter concerns the origins of the right and the value of property as an essential element of individual self-fulfillment, analysis undertaken draws from the natural law tradition and its' prominent architects, such as Locke and Grotius. While the natural law approach takes root in much older thought, the writings of Locke and his contemporaries are justified as a starting point in view of the accelerating rates of industrial growth and international commerce observed at the time. The increasing rates of growth place acute tension on the subject of property rights. The pervasive association between the right to property and individual freedom, autonomy and justice is thus established.

The second part of the Chapter explores the spread of the right to property and its' central role in numerous national constitutions. Moreover, the overwhelming acceptance of the right is further articulated in its' iterations as part of international law. As such, two elements are considered – the meaning of the right to property as a prerequisite for personhood and the development of this notion as central to the organization of a legal system.

The second Chapter draws on the economic rationale in search for consequentialist justifications of the right to property. Firstly, the shift in definitions is addressed – the economic conceptualization of the right departs from the monolith of natural law, instead focusing on the functional attributes of property and their value as a tool for contracts and the free market mechanism.

Further, the second Chapter turns to the analysis on the empirical benefit attributed to the right to property as a mechanism for the growth of the productive forces of a state and wealth maximization more generally. It is concluded that the right to property is of primary importance to these ends. Lastly, the other practical aspect of the right is considered – the role of a secure system of property in minimizing transaction costs. It is thus concluded that the right to property serves these two aims by virtue of securing expectations and providing incentive.

The third Chapter focuses on the dynamic application of the right by, firstly, outlining the potential tension between the consequentialist ambition of maximizing growth and the value of the right to property for the individual, as embedded in the natural law position. This tension is addressed by considering the relevance of the conditions and constraints of the right in view of the natural law tradition in the modern day. It is found that the circumstance of scarcity stands, while the constraining effect of the Lockean Proviso is of lesser significance in the modern context.

Moreover, the second part of the third Chapter turns to role of inequality in the economic context, as well as addressing the question of whether inequality is detrimental to individual freedom as posited in the first Chapter. The claim that inequality serves to enhance growth and the question of whether inequality is inherent in property are considered.

Lastly, conclusions are drawn that some measure of inequality is inevitable in the construction of the right to property, in view of the expiry of the Lockean Proviso constraint and the welcoming of wealth accumulation as a positive aspiration. However, measures can be undertaken in limiting the effect of this inequality in terms of property ownership.

TABLE OF CONTENTS

Introduction 5
1. Natural law Justifications of Private Property 7
1.1 Private property and the individual. 7
1.2 The private property takeover. 12
2. Private Property in Economics 15
2.1 Property rights in economics: a problem of definition. 15
2.2 Wealth maximization as a product of secure property rights 19
2.3 The role of property rights in minimizing transaction costs. 23
3. Private Property in Dynamic Application 25
3.1 Points of tension in private property. 25
3.2 Property, growth and inequality. 29
Conclusion 33
Bibliography 34

INTRODUCTION

The discussions of the right to property have sparked academic and philosophical curiosity for centuries. The intense interest in property and the question of who should command it takes root in its' duality: property is a source of both opportunity and conflict. Opportunity, in the sense that property as a material resource enables the advancement of the social standing of the individual; conflict, in the sense that individuals compete for material resources or may have varying ideas as to its' ideal allocation.

The very definition of property is similarly contentious and increasingly difficult to pinpoint in the context of continuous technological development - for example, some 60 years ago, distinguished economists puzzled themselves with the nature of radio frequencies as property[1]; nowadays, perhaps the liveliest discussion surrounds issues of intellectual property, stocks, shares and art. Indeed, defining property by any set of common characteristics almost seems like a conceptual trap, in the words of Waldron:

> The objects of property – the things which in lay usage are capable of being owned - differ so radically in legal theory, that it is seems unlikely that the same concept of ownership could be applied to them all, even within a single legal system. [2]

In one of its' most straight-forward iterations, property has been defined as "things […] to which rights may be given as against the world"[3]. It is precisely this formulation, characteristic of the natural law tradition in its' categorical character, which directs the course of the present research. Intuitively, the exclusion of a "thing" from the commons for the sole use of an individual appears as a sort of privilege. At the same time, it is evident that in the inception of the right to property first as a constitutional right and later as a human right, an equalizing promise was envisioned, embedded in its' indiscriminate application. In principle, it is the right of every individual, and yet it is also a privilege against all others. This posits a conflict which the Author would not be the first to note. A radical formulation of the problem is offered by Proudhon:

> Then if we are associated for the sake of liberty, equality, and security, we are not associated for the sake of property; then if property is a natural right, this natural right is not social, but anti-social. Property and society are utterly irreconcilable institutions.[4]

Here, the point of theoretical interest lies in the value of the personal entitlement measured against the considerations of broader societal ideals, such as freedom and equality. Both the right to property and some notions of formal political equality are a staple of a liberal constitution, as will be illustrated in the body of the research. Both are conceived to lift up the individual – the value of the right to property as an instrument of self-fulfilment is extensively defended by the proponent of natural law. But does the right to property, applied systematically, fall into a tendency that is detrimental to the ideals of equality and freedom of the individual? The symptoms of this potential conflict are rather commonly observed in everyday life – some own more than others, some own nothing at all, and some own more than they could ever need. All of the abovementioned groups enjoy the same entitlement to property, but in practice, even

---

[1] Christopher S. Yoo, "Beyond Coase: Emerging Technologies and Property Theory," *University of Pennsylvania Law Review* (June 2012): p. 2191.
[2] Jeremy Waldron, *The Right to Private Property* (Clarendon Express, 1988), p. 32.
[3] Enrico Colombatto, *The Elgar Companion to the Economics of Property Rights* (Edward Elgar Publishing Limited, 2004), p. 224.
[4] Pierre-Joseph Proudhon, *What is property? An inquiry into the principle of right and of government* (Dover Publications Inc., 1970), p. 48.

in the wealthiest democracies, fewer and fewer are able to truly take advantage of it.[5] The right to property is exclusive to the individual and yet inclusive of everyone, social in the sense of setting boundaries between individuals, and anti-social in the sense of some groups acquiring disproportionate power to the detriment of others.

Delving into the heart of this contradiction requires tracing the implicit ideas contained therein, such as the original moral justifications of the right to property, as well as, on a broader scale, the concept of property as an ethically desirable phenomenon the benefits of which can be empirically observed. Further, an understanding must be established whether the aforementioned issues are a natural consequence of the right to property itself, or whether they can be attributed to a forever changing landscape of property ownership.

The primary methodological instrument of the present work is doctrinal legal research, enriched by an interdisciplinary perspective of law and economics. Doctrinal research is applied to investigate the moral underpinnings of the right to property, which were central to the infusion of the right into the fundamental legal order of a larger part of the world. Further, the doctrinal research approach aids in uncovering the meaning attributed to the right to property in the works of the most prominent thinkers. In addressing the evolution of the right to property, brief historical context is established. The interdisciplinary aspect is employed in the latter part of the work to reach a deeper understanding of the economic rationale behind property rights.

Property is the subject of numerous explanatory models spanning over centuries. Therefore, the present research is necessarily limited to analysing a select few – primarily, natural law theories of the 18th and 19th century, and the contributions of the Chicago school of economics in respect of consequential justifications of property. The scope of the research is further constrained in the sense that it does not venture into the solutions to the potential conflict in property. Rather, the focus is devoted to analysing the source of the possible contradiction vested in the dynamics of private property.

The research question can thus be formulated as follows: Is there an inherit conflict between the essence of the right to private property and its' systematic application?

The research proceeds as follows: In the first chapter, the deontological justifications for the right to property are explored, as well as their integration into the constitutional canvas of states and universal recognition; the second chapter begins with drawing a distinction between the deontological and consequentialist understandings of the right, and further continues to explain the two primary aspects that make property beneficial in the consequentialist sense : wealth maximization and minimization of transaction costs; the third and final chapter sheds light on the right to property and its' dynamics in light of deontological and consequentialist perspectives, with particular emphasis on the basic propositions of both and their modern day application.

[5] Richard A. Posner, "Equality, Wealth, and Political Stability," *Journal of Law, Economics, & Organization* 13, no. 2 (October 1997): p. 347.

1. NATURAL LAW JUSTIFICATIONS OF PRIVATE PROPERTY

1.1 Private property and the individual.

In fear of getting entangled in a general account of a right to property, which often begins with an insight into early human societies[6], the present Chapter analyses what the right to property has come to represent for the individual. The relevant starting point is the natural law theories of property, and the association drawn between the right to property and the intrinsic autonomy of a human being. One might question the relevance of a recourse to natural law theories to explain the right to property – a right almost universally codified, in one form or another, in national law. Bentham has been purported to regard the right to property as the prerogative of the government – a creature of positive law.[7] However, for the purposes of establishing a common core shared by the national systems and reaching into the rights' natural law justifications, a brief insight into its' origins is essential. For this, the inevitable reference must be made to writings of Locke, Grotius, Pufendorf and their intellectual successors.

In contextualizing John Locke's theory of property, the historical aspect is particularly important. For Britain, the decline of feudalism had already been a centuries-long affair, culminating in the 1660 Abolition Act - in Locke's lifetime.[8] The rapid growth of Mercantilism required a re-imagining of the political and economic system and the role of the individual in it.[9] In this, Locke is cited as an early individualist.[10] Although the meaning of individualism has come a long way since, it is generally defined as a political and social philosophy that emphasizes the moral worth of the individual.[11] Locke positioned his moral and legal philosophy in light of this respect for the individual. Presently uncontroversial, the idea that each human being was born as a "blank slate", or more generally equal to all others, was novel in a state governed by aristocracy. While hesitant to ascribe intent to Locke, who himself demonstrated certain apprehension towards the "lower class", the *tabula rasa* served to undermine the moral basis of aristocratic rule.[12]

Locke's theory carried an equalizing force, finding justification in the nature of the individual human being – hence the natural law perspective. He, like many before and after him, attempted to capture what is intrinsic to us as opposed to what is brought on by the community and later the state. Inescapably religious, Locke begins his analysis with the premise that all human beings are born with exclusive bodily autonomy.[13] Over time, the divine implication of human autonomy lost its' appeal, but the principal premise continued to gain recognition as a generally accepted moral convention.[14] What did this autonomy entail on

---

[6] George B. Newcomb, "Theories of Property," *Political Science Quarterly* 1, no. 4 (December 1886): p. 596.

[7] James E. Krier, "Evolutionary Theory and the Origin of Property Rights," *Cornell Law Review* 95, no. 1 (2009): p. 143.

[8] Charles Sumner Lobingier, "Rise and Fall of Feudal Law," *Cornell Law Quarterly* 18, no. 2 (1932-1933): p. 224.

[9] Edwin G. West, "Property Rights in the History of Economic Thought: From Locke to J. S. Mill," in *Property Rights: Cooperation, Conflict and Law*, ed. Terry L. Anderson and Fred S. McChesney (Princeton University Press, 2003), p. 3.

[10] Ruth W. Grant, "Locke's Political Anthropology and Lockean Individualism," *The Journal of Politics* 50, no. 1 (1988): p. 43.

[11] Britannica, "Individualism." Available on: https://www.britannica.com/topic/individualism. Accessed November 1, 2021.

[12] Newcomb, *supra* note 6, p. 601.

[13] John Locke. *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (John Wiley & Sons, 2014), p. 11.

[14] J. Roland Pennock, "Thoughts on the Right to Private Property," *Nomos: American Society for Political and Legal Philosophy,* 22 (1980): p. 179.

Locke's terms? One's freedom presupposes a restriction on the will of another, establishing a system of rights and obligations – not by virtue of contract or custom, but by reference to the natural order of things.[15] It is with this basic premise that Locke carves out his image of a naturally formed community.

For the purposes of this research, the connection made between individual bodily autonomy and labour is pivotal. The established autonomy of an individual is not passive, but active, where every person has the obligation to, at the very least, sustain themselves and their physical body. [16]The religious undertone is felt anew, as the life of every individual must be honoured by God's grace, and is not to be wasted. In the Authors view, this is crucial to the understanding of why the right to property has blossomed as it has. Locke drew on religious and moral authority in introducing a sense of urgency and necessity to the freshly established autonomy. Not only does a person have a right to their own body, but also an active duty to avail themselves of all resources vital for self-preservation.[17] The Christian tradition of Calvinism, established in the 16th century, further fuelled this duty of active pursuit of resources, restating resource accumulation as a virtue.[18]

Britain of the 17th century remained an agricultural society. At that point, primary resources, such as land, stood at the head of conversation.[19] The class of persons who could sustain themselves exclusively through trade remained narrow, and most Britons relied on their own immediate labour for survival. With this in mind, Locke saw that it was in the essential interest of the individual to own the fruits of their own labour.[20] Labour involves the mixing of the physical body of an individual with an item from the outside world, most obviously seen with farming.[21] The right to "own oneself" established, the interaction extends this right of ownership to the item interacted with. By applying labour, the item is removed from the commons and the labourer is given ownership.[22] It is by this action that the bounds of the individual against all other individuals is constructed.

The framing of the right to property as an extension of autonomy over ones' own livelihood lends itself to further profound conclusions, introduced by Locke and expanded upon by Hume and further Hegel. Locke's vision of property arose from a strong moral imperative to gain ownership of ones' own life. It is in ownership of property, and his interaction with the outside world, that an individual gains the ability to self-govern.[23] From this, the pervasive association between property, freedom and justice arises.[24] Of what relevance is this to the discussion of the right to property in a general sense? While natural law theories are seldom given much attention in practical application of existing black letter law, they retain their role as "an ideal element in law".[25] Therein, through Locke, the right to property can be viewed as

---

[15] Locke, *supra* note 13, p. 5.
[16] B. Andrew Lustig, "Natural Law, Property, and Justice: The General Justification of Property in John Locke," *The Journal of Religious Ethics* (1991): p. 144.
[17] John T. Sanders, "Justice and the Initial Acquisition of Property," *Harvard Journal of Law & Public Policy* 10, no. 2 (Spring 1987): p. 371.
[18] Harold J. Berman, "Religious Foundations of Law in the West: An Historical Perspective," *Journal of Law and Religion* 1, no. 1 (Summer 1983): p. 29.
[19] TT Clark, "Feudalism," *Journal of Jurisprudence* 2, no. 17 (1858): p. 216.
[20] Lustig, *supra* note 16, p. 144.
[21] Locke, *supra* note 13, p. 11, para. 27.
[22] *Ibid.*
[23] Johan Olsthoorn, "Self-Ownership and Despotism: Locke on Property in the Person, Divine Dominium of Human Life, and Rights-Forfeiture," *Social Philosophy and Policy* 36, no. 2 (2019): p. 254.
[24] Newcomb, *supra* note 6, p. 595.
[25] Roscoe Pound, "Natural Natural Law and Positive Natural Law,"*Natural Law Forum,* 5 (1960): p. 70.

a universal legal aspiration, on par, or derivative from, freedom of persons. Within the same moral claim of individual autonomy, it has been asserted that:

> The special standing characteristic of private ownership, therefore, transforms a natural duty to refrain from interfering with the external freedom of another into a common framework of property coordination […] [26]

Crucial to the exercise of freedom is the right to exclude others from the enjoyment of ones' own property:

> Rights to exclude others from a thing must be grounded in robust moral notions that are easy to communicate and shared by the relevant members of the population. [27]

As posited by early liberal thinkers, Locke among them, liberty, or freedom, is similarly derived from natural law, and constitutes an essential attribute of individuals.[28] In this context, the precise meaning assigned to freedom is arguably less important than its' significance as a an ideal that every society must strive towards, as is broadly accepted.

Hume suggests that the right to property was necessarily attached to the conception of justice.[29] Notably, this connection is restated in subsequent literature, which highlights the relevance of social and economic inequalities in conceptualizing justice.[30] In opposition to Locke, Hume departs from the purely natural reading of the right to property, favouring human convention as a more appropriate basis.[31] Nonetheless, this convention of property rights is essentially moral. A further contribution is made when Hume asserts almost a metaphysical perspective, stating that the right to property is not to be taken literally, but rather viewed as an "internal relation" between the individual and the object.[32] Here, immediate possession of the object is viewed as a way to communicate the intent to possess it to others, but the real right to property is a product of the mind. Essentially, the right to property becomes less literal – and more oriented towards the will and intent of the individual. In the same vein, the protection of possession from infringement from others has been defined as a protection of a "formal possibility of use", that may occur at some point in the future. [33]

As further reaffirmed by Hegel, property is to be viewed as a crucial platform for the exercise of one's freedom – persons are deserving of a room to "breathe", and further of a room to find their expression as individuals, to differentiate themselves from the rest.[34] Individual liberties practically necessitate property.[35] Further, property, it has been said, is necessarily linked to the concept of personhood.[36] This is perhaps one of the most crucial formulations of

---

[26] Avihay Dorfman, "Private Ownership and the Standing to Say So," *University of Toronto Law Journal* 64, no. 3 (2014): p. 440.
[27] Thomas W. Merrill and Henry E. Smith, "The Morality of Property," *William and Mary Law Review* 48 (2007): p. 1855.
[28] Locke, *supra* note 13, p. 10, section 22.
[29] Frederick G. Whelan, "Property as Artifice: Hume and Blackstone," *Nomos: American Society for Political and Legal Philosophy* 22 (1980): p. 106.
[30] Frank I. Michelman, "The Subject of Liberalism," *Stanford Law Review* 46, no. 6 (July 1994): p. 1811.
[31] Whelan, *supra* note 29, p. 107.
[32] Christopher J. Berry, "Property and Possession: Two Replies to Locke – Hume and Hegel," *Nomos: American Society for Political and Legal Philosophy* 22 (1980): p. 91.
[33] Arthur Ripstein, "Philosophical Foundations of Property Law," in *Philosophical Foundations of Property Law*, ed. James Penner and Henry Smith (Oxford Scholarship Online, 2014): p. 162.
[34] Christopher Pierson, "The German Enlightenment – and Beyond," in *Just Property: Volume Two: Enlightenment, Revolution, and History*, ed. Christopher Pierson (Oxford Scholarship Online, 2016), p. 98.
[35] Jean Baechler, "Liberty, Property, and Equality," *Nomos: American Society for Political and Legal Philosophy* 22 (1980): p. 272.
[36] Hans-Christoph Schmidt am Busch, "Personal Respect, Private Property, and Market Economy: What Critical Theory Can Learn from Hegel," *Ethical Theory and Moral Practice* 11, no. 5 (2008): p. 581.

the right in the context of this research, because not only the right to property is recognized as a moral entitlement, but it also further translates into the notion that everyone must have property – an assertion that already involves some measure of equality of property ownership among individuals. [37] This notion is exceptionally important for the research question at hand, because it materializes the connection between property and equality on moral grounds.

Moreover, in line with the Kantian ambition to establish an area of external freedom for every individual, the commitment to *mutual* respect of property rights between individuals is grounded in reason.[38] Locke arrives at the same conclusion regarding reciprocity, but invokes "law of nature" as the basis for it.[39] The relevance of Locke's exploration of the state of nature and right to property therein has been extensively debated, as this "state of nature" has since been regarded as a mere hypothetical and of little practical use.[40] However, Locke reached deeper than his contemporaries, such as Grotius and Pufendorf, who grounded the right to property in social convention.[41] As one of the most prominent philosophers of his time, John Locke is cited as vitally influential for the further development of the right to property.

The first apparent complication appears when justification of continuous, as opposed to immediate, ownership is considered. It is one thing to use a resource, and another to maintain exclusive right to it for a prolonged period of time. The justifications for private property brought forward by Grotius provide further insight. While Locke concerned himself primarily with what the natural state of co-existence might look like, Grotius made a clear-cut distinction between a use right and a property right.[42] The latter can only be achieved by virtue of recognition by the other individuals – the formation of a social convention of property rights. Locke's account of the right to property as a matter of natural order derives its' validity from the interaction between the person and the object, rather than the person with other persons. Grotius' view aligns with that of Locke with regards to the origin of a right to property, but the emphasis is placed on how such a right can be maintained.[43] Analysing the two theories, the transition from a right to property as a product of the "natural state of man" to a right to property as an institution can be visualized.

Important for the consideration of private property as an institution is the understanding of what society would have been without it. Why was it necessary, or inevitable, that humanity departs from its' original order? Most of Locke's contemporaries, including Grotius, were not keen to define this "natural order", absent of a civil construction, in favourable terms. While Grotius does permit a natural inclination for original peaceful coexistence among individuals, he asserts that such an order could not be maintained as resource became scarcer.[44] In order to reach more advanced stages of being – posited as a "desire for a more refined way of life" - an institution of private ownership had to be established.[45] As such, it can be said that the establishment of an agreement among men to support the right to property is a directed vector

---

[37] Waldron, *supra* note 2, p. 4.
[38] B. Sharon Byrd and Joachim Hrushcka, "The Natural Law – Duty to Recognize Private Property Ownership: Kant's Theory of Property and His Doctrine of Rights," *University of Toronto Law Journal* 56, no. 2 (Spring 2006): p. 220.
[39]Locke, *supra* note 13, p. 5, section 7.
[40] Newcomb, *supra* note 6, p. 600.
[41] Marcelo de Araujo, "Hugo Grotius, Contractualism, and the Concept of Private Property: An Institutionalist Interpretation," *History of Philosophy Quarterly* 26, no. 4 (2009): p. 358.
[42] Lustig, *supra* note 16, p. 131.
[43] Catherine Valcke, "Locke on Property: A Deontological Interpretation," *Harvard Journal of Law & Public Policy* 12, no. 3 (Summer 1989): p. 957.
[44] John Salter, "Hugo Grotius: Property and Consent," *Political Theory* 29, no. 4 (2001): pp. 542-543.
[45] *Ibid.*

of human development towards greater and more meaningful organization. One of the more radical visions of a natural community was put forward by Hobbes, who proposed that, without this agreement and a "common power" that would maintain it, humanity would remain in a state of war and chaos.[46] The natural state of man was similarly defined by Pufendorf as that of "miserable animals".[47] Going even further, Pufendorf views the scarcity of resources, as earth became progressively more "occupied", as a potential source of conflict, the resolution of which lied in the human convention of private ownership.[48] Therefore, the necessity of this departure from the natural state is further emphasized as a stepping stone towards more peaceful coexistence of men.

The emergence of private ownership as an institution offered solutions to more nuanced situations, such as that of continuous ownership. Reiterating that the right to private property was conceived as a mutual right, the agreement among individuals as to what belongs to who, and for how long, was arguably socially beneficial. The establishment of this institution meant that men left their natural state and entered a positive social community. This common agreement does not undermine the moral force of the right to property, but merely mirrors it in more defined and structured terms. As such, according to Locke, the right to property transcends (or, alternatively, supersedes) any particular communal agreement, convention, or law. [49]

Conceding to the necessity of a social convention for private ownership, the role of the state must further be considered. Why must the state involve itself in this agreement? Recognizing the inadequacies of the social agreement, Locke contends that the government must play the role of preserving the institution of private ownership.[50] The agreement as to the existence of private ownership, subjected to the realities of human interaction, is bound to suffer. Hume saw the government as a source of stability for private ownership.[51] Grotius contended that, while the right to property is present in the natural state of men, the full and exercise of this right is subject to the creation of an institution of private ownership.[52] One of the fundamental aspects of property ownership – the right to exclude others from the enjoyment of possessions – may be particularly difficult to enforce absent government intervention. Therefore, the right to property generally falls within the scope of the social contract as between the individuals and the state and is inherently political – a notion attributed to Rousseau, in contrast to the "natural" origins of property as stipulated by Locke, Grotius, Kant and others.[53] The state defines what property is (creating stability) and ensures the respect for it (introducing consequence for violation).

The present subchapter has attempted to outline role of the right to property as a legal phenomenon from the perspective on natural law theory. Property as a central tool of self-expression, self-determination, liberty and individuality – these indispensable formulations were key to the sanctity of property which, to a certain degree, arguably survives to this day. To further understand why the right to property plays an essential role in the current political,

---

[46] Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (London, 1651), p. 77.

[47] Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, ed. James Tully (Cambridge: Cambridge University Press, 1991), p. 34.

[48] *Ibid,* pp. 84-85.

[49] Locke, *supra* note 13, p. 12, Section 30.

[50] Locke, s*upra* note 13, p. 44.

[51] Adam J. MacLeod, "Bridging the Gaps in Property Theory," *Modern Law Review* 77, no. 6 (November 2014): p. 114.

[52] Araujo, *supra* note 41, p. 356.

[53] Dorfman, *supra* note 26, p. 415.

legal and economic context, it is necessary to address how the aforementioned ideas found their expression in the constitutions of states. The moral justifications of private property played a crucial role in incentivizing its' numerous codifications, as well as attempts to restate the right to property on an international level.

1.2 The private property takeover.

The second part of this Chapter attempts to outline how the philosophical conceptualizations of property came to be embodied in positive law. The point of departure is the adoption of written constitutions subsequent to the emergence of the discussed theories of property. The transition from monarchical systems to representative governments, anchored in a written document, is referred to as the Age of Revolution.[54] The revolutionary visionaries of the late 18th and 19th centuries were united by their desire to codify and cement their outcomes in the form of a constitution as a means of radically redefining the relationship between the individual and the state.[55] The inclusion or omission of a right to property in these documents, as further discussed, is illustrative of its' of a common perception of the right (or absence thereof).

In continental Europe, the wave of change started with the French Revolution at the twilight of the 18th century. In the first place, the French Revolution led to the passing of the Declaration of Human and Civic Rights of 1789. Notably, the Declaration lists the right to property among natural rights of men under Article 2, along with liberty and safety.[56] This formulation hints at the perception of property ownership as one of the fundamental rights – not derived from, but on par with the rest. The precise sources of inspiration behind the Declaration have been difficult to pinpoint.[57] Nonetheless, there is general agreement that the influences of the natural law philosophy, and Locke in particular, can be clearly felt. [58]Not only does Article 2 expressly include the right to property – the Declaration is saturated with reference to the original essence of man as a source of certain rights. Article 4 of the document is noteworthy in this regard, reading:

> […] thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. […][59]

In a sense, the French Declaration set a standard that other emerging documents of the character were compelled to follow.[60] Undoubtedly, the basic documents of each state have undergone significant transformations since the 18th century. It is not the intention of the Author to brush over these significant changes – instead, an argument can be made that certain aspects of the foundational documents maintain their relevance to the present day. Indeed, natural law was slowly departed from in continental Europe with the growing influence of positivism, particularly the writings of Kant.[61] Almost inevitably, however, the political turmoil and the

[54] Britannica, "The Age of Revolution," Available on: https://www.britannica.com/topic/history-of-Europe/The-age-of-revolution. Accessed 5 Nov 2021.
[55] Vincent Robert Johnson, "The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris," *Boston College International and Comparative Law Review* 13, no. 1 (Winter 1990): p. 14.
[56] France. Declaration of Human and Civic Rights of 26 August 1789. Available on: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf. Accessed 5 November 2021.
[57] Peter Garnsey, *Thinking About Property: From Antiquity to the Age of Revolution* (Cambridge University Press, 2007), p. 228.
[58]*Ibid*.
[59] France, *supra* note 56.
[60] Thomas Gergen, "The Reception of the Code Civil (Napoleonic Code) of 1804: An Example of Juridical Migration," *Journal on European History of Law* 5, no. 1 (2014), p. 29.
[61] William E. Conklin, *The Invisible Origins of Legal Positivism* (Springer, 2001), p. 37.

experience of the 20th century steered European constitutions back to the shores of natural law.[62] These post-war constitutions reflect the concern regarding unbridled positivism and aim to curb the influence of the state in matters relating to the basic rights of man.[63] This was also the case of France, which presently maintains the reference to the fundamental rights of man as embodied in the Declaration in the preamble to its' current constitution of 1958.[64] Similarly, the Italian and German post-war constitutions realized the natural law ideal, with the German Basic Law embracing the historical natural law approach.[65]

Perhaps even more influential was the more pragmatic inclusion of the right to property in the Napoleonic Code of 1804 under Article 537.[66] One of the prominent contributors to the French Civil Code was Jean-Etienne-Marie Portalis, who vigorously reaffirmed Locke's rendition of the right to property as a natural right.[67] As a result of the military conquests of Napoleon, the right to property as an element of the civil code made its' way through the continent.[68] As such, the core principles of the French Civil Code, and often times even literal adaptations, are echoed in numerous civil systems of Europe.[69] The recognition of the right to property is considered as one of the main principles of the Civil Code, alongside liberty of persons.[70] Further, these essential elements made their way across the globe, and represent the principles enshrined in the civil codes of Latin America.[71] Whether the natural law rationale survives the journey is unclear, and analysing the content of the Chilean Civil Code is outside the scope of the present research. However, what is evident is that the inception of the right to property as a natural right was followed by its' extensive codification in many parts of the world, inspired by the French Civil Code.

With regards to more recent development of the right to property, the emergence of international law norms governing the subject is deserving of further inquiry. The recognition of the right in instruments of international law further highlights its' close-to-universal acceptance, but also reveals something deeper about the nature of the right. Undeniably, the bond between state sovereignty and property is a product of centuries of historical and legal development – a connection that was particularly felt in the context of the feudal system, for example.[72] Without detracting from Locke's position that the right to property precedes sovereignty, the state has always played a prominent coordinating role in property issues through legal and judicial means. [73]The "chicken and egg" problem of the origins of property is of theoretical interest on its own – however, it would be difficult to conceive of an establishment better capable of managing the conflict of interest that inevitably accompanies the right to property than the state.

---

[62] Roscoe Pound, "Revival of Natural Law", *Notre Dame Law Review* 17, no. 2, (1942): p. 289.
[63]*Ibid*.
[64] France. Constitution of 1958 with Amendments through 2008, p. 3. Available on: https://www.constituteproject.org/constitution/France_2008.pdf?lang=en. Accessed 5 Nov 2021.
[65] Gottfried Dietze, "Natural Law in the Modern European Constitutions," *Natural Law Forum* (1956): p. 83.
[66] France. The Code Napoléon or the Napoleonic Code (1827), p. 148. Available on: http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf. Accessed 5 Nov 2021.
[67] Garnsey, supra note 57, p. 231.
[68] Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge University Press, 2019), p. 372.
[69] Carol M. Rose, "Property as the Keystone Right," *Notre Dame Law Review* 71, no. 3 (1996): p. 338.
[70] Dietze, *supra* note 65, p. 78.
[71] Ernst Rabel, "Private Laws of Western Civilization: Part II. The French Civil Code," *Louisiana Law Review* 10 (1950): p. 110.
[72] Lorenzo Cotula, "Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law," *International Journal of Law in Context* 11, no 2 (2015): p. 115.
[73] *Ibid.*

However, with the growing rates of globalization and interdependence among states in the second half of the 20th century, as well as the development of modern international law, the right to property became of interest for international institutions. In general, more and more spheres of control that are traditionally reserved for the sovereign were restated as part of international law. It has been argued that this trend results in positive effects on efficiency – a point more thoroughly addressed in the latter chapter. The blurring of state boundaries (in an economic sense) in light of an ever-growing number of international transactions and trade has made it necessary to harmonize the right to property or at least arrive at some common understanding of the right.[74]

Perhaps the most notable fruit of this attempt was the codification of the right to property under the Universal Declaration of Human Rights in 1948, Article 17 of which states:

> 1. Everyone has the right to own property alone as well as in association with others.
>
> 2. No one shall be arbitrarily deprived of his property.[75]

As one of the earliest of its' codifications, the inclusion of the right under the Universal Declaration of Human Rights was subject to much debate, particularly due to political circumstances present at the time – the East/West divide, with the capitalist and socialist states disagreeing on the formulation and importance of the right and the distinction between private and personal property. [76] What perhaps allowed the right to property to enter the final draft of the Declaration is its' non-binding nature – the Declaration represents a moral, rather than legal obligation.

Further inclusion in legally-binding documents was stalled, at least for the time the socialist/capitalist divide persisted in the international arena.[77] The right to property was not included in either the ICCPR or the ICESCR. Nevertheless, Sprankling argues that the right to property should be recognized as a general principle of international law, due to its' later inclusion in numerous regional human rights and anti-discrimination treaties, both bilateral and multilateral. [78]

One of the critiques posed against the codification of the right to property as part of human rights is the inevitable focus on the individual.[79] Human rights, as individual rights, tend to focus and prioritize the particular conflict, dispute, or violation. While these issues are by no means trivial, it has been argued that this focus draws attention away from society-wide implications of the property law regime in a state. Perhaps this points to the fact that the choice of the socio-economic system will forever remain in the sole hands of the nation-state, and states are not likely to welcome more drastic critique into their internal operations on the part of the international community.

---

[74]Cotula, *supra* note 72, p. 116.

[75] UN General Assembly. *Universal Declaration of Human Rights* (10 December 1948), Article 17. Available on: https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf

[76] Rhoda E. Howard-Hassmann, "Reconsidering the Right to Own Property," *Journal of Human Rights* 12, no 2 (2013): p. 181.

[77] *Ibid.*

[78] John G. Sprankling, "The Global Right to Property," *Columbia Journal of Transnational Law* 52, no. 2 (2014): p. 479.

[79] Anna Dolidze, "Promise and Perils of the International Human Right to Property," *University of the Pacific Law Review* 47, no. 2 (2016): p 177.

The horizontal aspect of private property is what allowed it to escape its' purely statist formulations.[80] If property is primarily perceived as a horizontal relation between individuals, as opposed to a vertical one as between the individual and the state, a unifying conceptualization of property was of importance for international trade and commerce.[81] As such, the existence of a codification of property rights in the sphere of public international law further points to its' widespread recognition.

To summarize, the aim of the present Chapter was two-fold – firstly, outlining the justifications of private property from the perspective of natural law, and secondly, analysing how these foundational concepts have entered the constitutional "consciousness" in most parts of the world.

2. Private Property in Economics

2.1 Property rights in economics: a problem of definition.

The deontological justification of property was sufficient to introduce private ownership as a foundational element of the constitutional order, but not necessarily specific enough to sustain private property as a distinct state-sanctioned institution. This was the critique posed by Bentham in his opposition to the codification of natural rights under the French Declaration.[82] Bentham condemned the imprecision with which natural rights, including property rights, were dealt with under the Declaration.[83] The criticism, as expanded upon by Waldron, is of general character – Bentham found issue with qualifying particular action or inaction as unacceptable in of itself, with little consideration for consequences.[84] As such, the goal of the present Chapter is to specifically examine the economic – or generally consequentialist - postulates lying at the core of private property, their more recent realizations, and their effect on the conceptualizations of equality. The first step, realized in the present subchapter, is to determine whether the consequentialist approach serves to "fill the gaps" of the natural law theory of property or can be classified as an entity of its' own.

While the natural law theory does presuppose constraints – for example, as previously mentioned, Locke saw that ownership could be justified only when it does not arise out of harm caused to others – it is nevertheless abstract. This is mainly the result of absence of sufficient information and resource that would allow to model the precise consequences of a chosen property regime at the time. The natural law theories of property supplied the crucial momentum for the right to property, but were principally single-ended. The natural law forefathers viewed property rights as a necessary precondition to an ordered society, yet, understandably, did not anchor the essential value of private ownership in aggregated social benefit that could be empirically observed. Rather, that was the achievement of neoclassical economics, which placed the pursuit economic equilibrium at the centre of the discussion.[85] Here, it is necessary to mark a distinction between efficiency as a neutral concept of economic

[80] Hanoch Dagan and Avihay Dorfman, "The Human Right to Private Property," *Theoretical Inquiries in Law* 18 (2017): p. 406.
[81] *Ibid,* p. 405.
[82] Jeremy Bentham, "Anarchical Fallacies," in *The Works of Jeremy Bentham*, ed. John Bowring (1843), p. 493.
[83] *Ibid.* .
[84] Waldron, *supra* note 2, p. 16.
[85] Lua Kamal Yuille, "Toward a Heterodox Property Law and Economics," *Texas A&M Law Review* 2, no. 3 (Spring 2015): p. 494.

analysis and efficient outcomes and economic growth that follows as an ethical aspiration; one does not presuppose the other, and the analysis of efficiency of a certain property system does not claim any normative weight on its' own[86] – it is, in a sense, a two-step process. First, an observation can be made that some regimes lend themselves to greater economic development, second, this economic development is deemed as socially desirable:

> An economist discussing a "hot" topic, such as whether human cloning should be permitted, might estimate the private benefits and social costs of human cloning, and even advise on the consequences of ignoring costs and benefits in fashioning public policy. But he could not tell the policymaker how much weight to give costs and benefits as a matter of social justice.[87]

This distinction must be made to avoid treating the further discussed wealth maximization as an ultimate "good", without recognizing that this judgement is not inevitable, but is rather a conscious choice of the policymaker. Thus, it has been argued, a decision as to property entitlements arises out of a combination of distribution and efficiency preferences.[88]

Furthermore, the same assumptions that grant the right to property its' essential character under natural law result in potentially reductive reading of the right. The prerequisites are present – as stated, in pursuit of an advanced societal order, right to property is of the essence. However, an apparent disconnect can be noted. Locke, Grotius and others probe the nature of the right in the context of a "Natural Order"[89], or, at most, a condition of some form of social agreement. Conceived as a building block of a better society, the natural law theory is somewhat lacking in explanations on how precisely that block will function as labour and market relations become more complex.

In describing the constraints of the right, Locke particularly relies on charity and good faith in general to safeguard the initial condition of *tabula rasa*, but the further dynamics of property ownership are left largely unaddressed.[90] This was not for the lack of insight – after all, wealth accumulation and trade were hardly a creation of the Enlightenment, although more prevalent with an increasing capacity of the government to ensure individual rights.[91]The central point of tension, and the decisive moment for the future political economy, was whether capital accumulation was within the bounds of the natural law theory. Perhaps not even the natural law theory as it has been so far described but, more broadly, whether wealth accumulation is a development that should be welcomed or shunned, embraced or limited.

As such, what was necessary to justify and reason in terms of more advanced forms of ownership, property transfer and accumulation was the formulation of an "end goal" – the convergence of the normative standard with empirical, observable benefit. The law and economics approach, which is arguably grounded in a "streamlined version of utilitarianism" is particularly valuable to this effect.[92] In writings the influence of which cannot be

[86] Richard Posner, *Economic Analysis of Law*, *3rd edition* (Little, Brown and Company, 1986), p. 13.
[87] Richard A. Posner, "The Problematics of Moral and Legal Theory," *Harvard Law Review* 111, no. 7 (May 1998): p. 1670.
[88] Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85, no. 6 (1972): p. 1110.
[89] Walton H. Hamilton, "Property – According to Locke," *Yale Law Journal* 41, No. 6 (April 1932): p. 871.
[90] *Ibid,* p. 868.
[91] Richard A. Posner, "A Theory of Primitive Society, with Special Reference to Law," *Journal of Law & Economics* 23, No. 1 (April 1980): p. 20.
[92] James Gordley, "Natural Law Origins of the Common Law of Contract," *Comparative Studies in Continental and Anglo-American Legal History* 8 (1990): p. 463.

underestimated in modern economic thought, Smith pushes forward the premises introduced by Locke, noting that:

> […] this original state of things, in which the labourer enjoyed the whole produce of his own labour, could not last beyond the first introduction of the appropriation of land and the accumulation of stock.[93]

Smith develops the concepts of specialization and division of labour – both of which further necessitate trade between individuals and wealth accumulation which enables it.[94] Though not completely divorced from the natural law tradition, the work of Smith reflects a discernible ambition behind the promotion of private property – a social benefit in the form of "opulence of the nation". [95]

While the consequentialist approach is deemed to be removed from natural law inclinations, a sense of morality was nonetheless present in the writings of Smith, for example. Therein, Smith concerns himself both with the outcomes of certain property regimes and the behavioural motivations behind the actions of its' actors. Writing of motivations, Smith emphasized those that go beyond the all-too-familiar self-interest, in particular, "moral sentiments". [96] This motivation attributed to human behaviour with regards to property has arguably been neglected in more recent law and economics analyses. [97] Perhaps this reflects the aspiration to examine property rights in more concrete and measurable terms in the sphere of economics.[98] It stands to mention that acts of altruism, which perhaps Smith had in mind, find a different explanation in the sphere of economics that is unsurprisingly based in maximizing utility of an individual by means of "reciprocal fairness". [99] Evidently, in anchoring the right to property in more definite terms, and thus answering the questions of the "end goal", the law and economics approach is indispensable. In fact, skipping ahead a few decades, property rights formed a separate unit in economic analysis in the work of Coase and his numerous contemporaries.[100] There are two main developments that set apart the right to property as previously discussed and the right to property as a product of economic inquiry.

Firstly, some economists tend to differentiate the right to property as a legal construct and property rights as a consideration of economics, constructing a picture of property that is "neutral vis-à-vis any legal culture".[101] In practice, the legal entitlement to property ownership and the exercise of control over it may be misaligned.[102] Unlawful possession as a product of theft, for example, places the individual in a position to derive at least some, if limited, benefit from an item without the necessity for a formal recognition of his entitlement to it. As such, the proponents of a narrower conceptualization of property rights in the context of economics, Barzel among them, argue that:

---

[93] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Electronic Classics Series, 2005), p. 59.
[94] *Ibid,* p. 13.
[95] *Ibid,* p. 16.
[96] Adam Smith, *The Theory of Moral Sentiments, 6th edition* (MetaLibri, 2006), p. 9
[97] Geoffrey M. Hodgson, "Much of the 'economics of property rights' devalues property and legal rights," *Journal of Institutional Economics* 11, no. 4 (2015): p. 686.
[98] Jonathan Wolff, "Libertarianism, Utility, and Economic Competition," *Virginia Law Review* 92, no. 7 (2006): pp. 1605-1606.
[99] Christine Jolls, Cass R. Sunstein and Richard Thaler, "A Behavioral Approach to Law and Economics," *Stanford Law Review* 50, no. 5 (May 1998): p. 1493.
[100] Kirsten Foss and Nicolai Foss, "Coasian and modern property rights economics," *Journal of Institutional Economics* 11, no. 2 (2015): p. 392.
[101] Boudewijn Bouckaert, *Economic Analysis of Property Law Cases* (Abingdon: Routledge, 2020), pp. 12-14.
[102] Hodgson, *supra* note 97, p. 690.

> The term ‘property rights’ carries two distinct meanings in the economic literature. One [. . .] is essentially the ability to enjoy a piece of property. The other, much more prevalent and much older, is essentially what the state assigns to a person. I designate the first ‘economic property rights’ and the second “legal (property) rights” [103]

This, of course, raises the question of whether the legal entitlement to property is even relevant, or does the economic analysis focus solely on “real control”. Perhaps a useful illustration of this is the idea that, in some situations, property rules can be substituted for liability rules to achieve a greater degree of efficiency.[104] In effect, this potential substitution draws away from the inherit value of property rights protection as such in favour of optimizing outcomes and securing socially desirable payoffs. [105]The described rationale is most commonly employed in various freeloader problems when the benefit of imposing a liability rule outweighs its’ cost. [106] Nonetheless, it has been argued that, even here, the legal entitlement is necessary to ensure the stability of a property right, which is key to its’ future productive use.[107]

Nonetheless, there are arguments to be made in favour of a more holistic property rights definition at the intersection of law and economics. The insular definition posed by Barzel, Umbeck, and others, where a right is largely equated with usage or possession does not serve the goal of efficiency in certain situations of conflict of rights.[108] In fact, it has been argued that it may devalue the meaning of property rights as a social institution.[109] The key feature missing from such definitions is, of course, legal enforceability – this becomes acutely evident in situations of a dispute between two individuals – possession of one can be trampled by the forceable occupation of another, and neither claims can be accorded legal precedence.[110] And, while legal enforceability is not a strictly crucial feature in establishing a right as such, it can be considered an important element in the search for a consequentialist justification of property rights.[111] It has been asserted that one of the most important aspects of a right to a certain property lies in the (if only theoretical) exclusivity of the right – the guarantee of non-interference.[112] From a practical perspective, the lack of exclusivity and enforceability may result in individuals being hesitant to invest resources into their possessions, hindering economic development.[113] The lack of certainty and exclusivity in definitions of property rights has been collated with slower economic growth.[114] As such, the fractured categorization of

---

[103] Yoram Barzel, *Economic Analysis of Property Rights, 2nd edition* (Cambridge: Cambridge University Press, 1997), p. 3.

[104] Calabresi, *supra* note 88, pp. 1106-1107.

[105] Jean-Yves Grenier, “The Dynamics of Capitalism and Inequality,” *Annales HSS* 70, no. 1 (2015): p. 10

[106] Thomas J. Miceli, *Economics of the Law: Torts, Contracts, Property, Litigation* (New York: Oxford University Press, 1997), pp. 122.

[107] Richard A. Epstein, “The Clear View of the Cathedral: The Dominance of Property Rules,” *Yale Law Journal* 106, No. 7 (May 1997): p. 2099.

[108] Daniel H. Cole and Peter Z. Grossman, “The Meaning of Property Rights: Law versus Economics?” *Land Economics* 78, no. 3 (2002): p. 327.

[109] Hanoch Dagan, “Just Compensation, Incentives, and Social Meanings,” in *Property: Values and Institutions* (Oxford Scholarship Online, 2011), p. 123.

[110]*Ibid*.

[111] David Lyons, “Utility and Rights,” *Nomos: American Society for Political and Legal Philosophy* 24 (1982): p. 122.

[112] Lee Anne Fennell, “Property beyond Exclusion,” *William & Mary Law Review* 61, no. 2 (November 2019): p. 528.

[113] Eirik G. Furubotn and Svetozar Pejovich, “Property Rights and Economic Theory: A Survey of Recent Literature,” *Journal of Economic Literature* 10, no. 4 (1972): p. 1139

[114] Michela Barbot, “When the History of Property Rights Encounters the Economics of Convention. Some Open Questions Starting from European History,” *Historical Social Research/Historiche Sozialforschung* 40, no. 1 (2015): p. 86.

property rights in economic analysis can be viewed as a divide that is yet to be filled in the interdisciplinary field.

Secondly, the input of economics into property rights theory has altered the perception of property rights as such. To demonstrate, it is sufficient to consider the definition of property rights posited by Blackstone in the 18th century. Described as a "sole and despotic dominion" of an individual, private property presupposes complete and definite exclusion of all others from its' enjoyment.[115] In many ways, this notion of property reflects the conception of property as an extension of an individuals' bodily autonomy and sovereignty discussed in the previous chapter – Bentham, Smith and Blackstone saw it necessary to centre the conceptualization of private property on the security arising from state enforcement of those rights.[116] Admittedly, even Blackstone, in his later works, recognized that the concept of unbridled sole ownership to be an exaggeration, although a legally and morally powerful one.[117] As such, the vision of property as a right *in rem* – the exclusive right towards a "thing" - has transitioned into a far less rigid "bundle of rights" approach, which envisions property as rights against persons. [118]

The dissection of the monolith of property rights into functional attributes is commonly attributed to the realist movement of the 20th century.[119] The realists aimed to strip property rights of their intrinsic merit largely for political reasons, particularly to promote state-enforced property redistribution.[120] The "bundle of rights" perspective reformulates property to a set of functional attributes, notably the right to use, exclude and transfer.[121] Embraced by some of the most prominent law and economics theorists such as Coase, the realist position thus entered the "mainstream" of law and economics, particularly in the common law tradition.[122] Perhaps one of the reasons of this shift in the understanding of property rights is that the "bundle of rights" lends itself to more thorough analysis from the perspective of economics. It certainly highlights the fluidity of property ownership and its' aspects, which lies at the root of its' economic rationale. With this conceptual framework of property rights in mind, the next step is taken in analysing the different "sticks" of the bundle in their systemic application and the consequences thereof.

2.2 Wealth maximization as a product of secure property rights

The present subchapter seeks to establish the right to property as a necessary prerequisite to the aforementioned "opulence of the nation" posited by Smith, which carries a resemblance to the concept of wealth maximization as defined by Posner.[123] Wealth maximization is construed as an appropriate benchmark, as it arguably strikes a balance between pure utilitarianism and essentialist justifications of property.[124] All maximization hypotheses are built upon the

[115] Whelan, *supra* note 29, p. 118.
[116] Thomas W. Merrill and Henry E. Smith, "What Happened to Property in Law and Economics?" *The Yale Law Journal* 111, no. 2 (2001): p. 363.
[117] Krier, *supra* note 7, p. 596.
[118]MacLeod, *supra* note 51, p. 1010.
[119] Jane B. Baron, "Rescuing the Bundle-of-Rights Metaphor in Property Law," *University of Cincinnati Law Review* 82, no. 1 (Fall 2013): p. 63.
[120] *Ibid.*
[121] Joshua Getzler, "Theories of Property and Economic Development," *The Journal of Interdisciplinary History* 26, no. 4 (1996): p. 654-655.
[122] James E. Penner, "The Bundle of Rights Picture of Property," *UCLA Law Review* 43, no. 2 (February 1996): p. 713.
[123] Richard A. Posner, "Wealth Maximization Revisited," *Notre Dame Journal of Law Ethics & Public Policy* 2, no. 1 (Fall 1985): pp. 86-88.
[124] Anthony T. Kronman, "Wealth Maximization as a Normative Principle," *Journal of Legal Studies* 9, no. 2 (March 1980): p. 228.

assumption that each individual entity aims to maximize their own outcomes – a proposition that has dominated the neoclassical conceptualization of economics and is difficult to either concretely prove or empirically refute. [125] If one agrees that wealth maximization is an ethically desirable phenomenon, and a sound system of property rights is instrumental to this end, an argument for a defined system of property rights can be constructed. This proposition is explored gradually and its' first step requires to illustrate the connection between property rights and contracts.

Despite being a product of much later theoretical development, the "bundle of rights" analogy is nevertheless significant in this regard, because it illustrates the interplay between the various "sticks" within the bundle. Several of the attributes of the bundle have already been enumerated earlier in the chapter, such as the rights to exclude (possess), use and transfer. The formulation of the contents of the bundle is not an easy task, since the handling of property comes in many different forms which may often be difficult to categorize. In fact, the possibility of the perpetual deconstruction of property into increasingly smaller fragments or entitlements has been the subject of critique of the "bundle" visualization.[126] Moreover, there is a persistent debate, expanded upon by Demsetz and Alchian, as to which aspects of the bundle can be considered as essential, or whether some aspects can be merged with others – a difficulty that is inevitable in attempts to define any complex phenomenon.[127] Nonetheless, there are some consistent basics that can be identified and which form the subject of the present analysis.

It is noteworthy that this model of defining property is not merely a one-way street, in the sense its' function reaches beyond the necessity to analyse property at a more molecular level. The aggregation of the various elements of the bundle in the hands of a single individual is the essential step in defining the individual as the *owner* of a thing.[128] As such, while others may hold some entitlement to the property, for example in the case of renting out a living space, they do not acquire the full title of the ownership, which holds a special place in the "core of western democratic capitalist systems".[129] While the control over some, or even most of the elements of the bundle does not guarantee the ownership status, in the words of Honore:

> […] the listed incidents are not individually necessary, though they may be together sufficient, conditions for the person of inherence to be designated "owner" of a particular thing in a given system.[130]

As such, the content of the bundle has notably been articulated by Honore, who, in his model, identified eleven components of an individuals' relation to a *thing*.[131] Possession, or exclusive control, is perhaps the least controversial of the elements and forms the basis of all other functions of ownership.[132] Naturally, possession is not limited to instances of physical control, insomuch as intangible property have long been the subject of the property law discussion – as it were, an ever growing list of "things" are being subjected to the rhetoric of

---

[125] Lawrence A. Boland, "On the Futility of Criticizing the Neoclassical Maximization Hypothesis," *The American Economic Review* 71, no. 5 (1981): p. 1034.
[126] Baron, *supra* note 119, p. 63.
[127] Foss, *supra* note 100, p. 399.
[128] A. M. Honoré, "Ownership," in *Oxford Essays in Jurisprudence*, ed. Anthony G. Guest (Oxford: Oxford University Press, 1961): pp. 112-113.
[129] Paul Babie, "Two Voices of the Morality of Private Property," *Journal of Law and Religion* 23, no. 1 (2007): p. 274.
[130] Honoré, *supra* note 128, p. 123.
[131] Michael A. Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets," *Harvard Law Review* 111, no. 3 (1998): p. 663.
[132] Krier, *supra* note 7, p. 590.

universal commodification.[133] It is primarily by virtue of possession that all other rights can be exercised.

It has been argued that all other functions of property arise out of regulating the degree of exclusivity vested in possession.[134] For example, in situations of rent, this exclusivity is altered in favour of the individual tenant as a result of an agreement between the parties. In a sense, the owner of the property "lets in" another individual, sharing the bundle (in this case, the right to use the property) with them. In a different scenario, more than one right out of the bundle can be surrendered – for instance, when a parcel of land is leased out to a farmer, the farmer gains the right not only to grow crops on the land, but also to profit from the grown produce. Continuing this visualization, a situation of alienation, or transfer of property emerges – all of the "sticks" are passed on to someone else. [135] As an owner of the property, the individual is not obliged to retain this title and may choose to transfer it, thus renouncing any claims over it. This, of course, does not necessarily entail the sale of the property – many instances of alienation do not involve a gain in profit for the owner, but most likely do involve some type of gain in utility or gratification – gifts as an example. Nevertheless, it cannot be denied that, in most circumstances, the alienation of property occurs by the way of its' sale in return for financial gain – such is the basis of commerce: "every alienation imports advantage". [136]

Following this logic, the discussion naturally lands on the link between the right to property and contracts. The focus of this subchapter is turned towards contracts of sale in particular, as contracts of this sort commonly result in the accumulation of a means for further exchange for one of the parties – money – a crucial "collateral" that lies at the root of economic development. [137]

The link between contracts and property has been extensively addressed in academic literature. [138] The connection seems obvious on an intuitive level – after all, in order to sell things, one must first own them; a transfer of rights can only occur in those rights are legitimately established and enforceable. This is supported by Honore's definition of possession, which entails the right of continuous control as its' second element – indirectly highlighting the importance of legal enforceability.[139] From contract itself as a form of property, to property as an essential prerequisite for contract – the definite relationship opens doors for further discussion of the role of property alienation in return for a set value in the context of the free market. The function of a free market depends on the ability of people to exchange goods in accordance with their individual preference.[140] In essence, the various rights to property form the substance of most, if not all (depending on the formulation of property, an individuals' labour, and thus his services, can arguably also be included) exchange occurring in the market

[133] Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review* 100, no. 8 (June 1987): p. 1861.
[134] Penner, *supra* note 122, p. 745.
[135] James Penner, "On the Very Idea of Transmissible Rights," in *Philosophical Foundations of Property Law*, ed. James Penner and Henry Smith (Oxford Scholarship Online, 2014): p. 268.
[136] Morris R. Cohen and Felix S. Cohen, *Readings in Jurisprudence and Legal Philosophy* (New York: Prentice-Hall, 1951), p. 167.
[137] Otto Steiger, "Property Economics versus New Institutional Economics: Alternative Foundations of How to Trigger Economic Development," *Journal of Economic Issues* 40, no. 1 (2006): pp. 189-190.
[138] Cohen, *supra* note 136, p. 101.
[139] Honoré, *supra* note 128, p. 123.
[140] Alfred Archer, "Community, Pluralism, and Individualistic Pursuits: A Defense of "Why Not Socialism?"" *Social Theory and Practice* 42, no. 1 (2016): p. 60.

– the role of the contract as a principal means of managing ones' own property rights was recognized going back centuries.[141]

In the words of Smith:

> A person who can acquire no property can have no other interest but to eat as much and to labour as little as possible.[142]

The free exchange of goods in the context of the market sets the system on a dynamic path where value can be increased by way of transferring the property rights to the "highest bidder".[143] If the property rights were indefinitely fixed, and the market did not allow for such transfer, individuals would be unable to allocate their resources in an individually advantageous ways. This is illustrated with an all-too-familiar hypothetical, analogous to that of Smith, of a farmer who owns a plot of land. In order to provide all the necessities for himself, the farmer must be versed in a number of different activities, such as agricultural skills for food, sewing and knitting for clothes, raising animals, etc. In a dynamic system of property rights, the farmer can outsource a number of these activities by the way of specializing in a particular one, triggering economies of scale, and thus increasing aggregate output.[144] This is the concept of division of labour posited by Smith.[145] A natural extension of this division is that, by improving his skill of choice, a farmer can acquire a surplus of means of exchange.

Moreover, the quality of any one chosen commodity will be improved as a result of specialization. One of the crucial qualities of a contract as a tool of economic progress, as pointed out by Kessler, is the guarantee of a certainty associated with property transactions, which enable the firm (or the individual) to allocate its' productive capacities in an efficient way.[146] Undoubtedly, subjected to the competitive forces, an individual will be encouraged to reinvest the resources acquired from the sale of property into improving his productivity, and the market will maintain a state of equilibrium by virtue of the balance of benefits and costs.[147] The ability to transfer the rights to property has the effect of reallocating property rights towards individuals who will value them the most, increasing efficiency – one of the primary metrics adopted in examining an economic system in terms of satisfying an individuals' needs in view of their preferences.[148]

As such, a robust system of competition underpinned by secure property rights leads to the increase in the wealth of the nation, generally defined as a composite of every individual's wealth. In the understanding put forward by Posner, wealth in a practical sense is measured by "houses, cars, rewarding work, leisure, privacy, and countless other "things"' which carry a correlation to an individuals' happiness. [149]

---

[141] Cohen, *supra* note 136, p. 58.
[142] Smith, *supra* note 93, p. 315.
[143] Miceli, *supra* note 106, pp. 122, 127.
[144] John F. Henry, "John Locke, Property Rights, and Economic Theory," *Journal of Economic Issues* 33, no. 3 (1999): p. 612.
[145] Smith, *supra* note 93, p. 13.
[146] Cohen, *supra* note 136, p. 140.
[147] Paul J. McNulty, "Economic Theory and the Meaning of Competition," *The Quarterly Journal of Economics* 82, no. 4 (1968): p. 643.
[148] J. R. Hicks, "The Foundations of Welfare Economics," *The Economic Journal* 49, no. 196 (1939): p. 699.
[149] Posner, *supra* note 123, pp. 87-88.

2.3 The role of property rights in minimizing transaction costs.

Any property rights transfer necessarily involves costs on both sides of the arrangement – these costs are "the defining phenomenon of any market relation".[150] Contract negotiation, formation, and the preceding information costs may be the decisive factor in whether the transfer occurs.[151] Where transaction costs outweigh the potential benefit from the transaction, individuals are discouraged from bargaining towards the optimal allocation, as discussed in the previous subchapter.[152] Transaction costs are often viewed as the "deadweight loss" of the economy – the inevitable waste of resource involved in the coordination of property rights.[153] The present subchapter aims to investigate the argument that well-constructed property rights entail lower transaction costs – a welcome circumstance if the goals of value and wealth maximization are taken as socially expedient. There are two main instances in which property action is accompanied by transaction costs – instances of bargaining in the course of a property rights transfer, and instances of conflict of rights.

In a perfect "costless" model envisioned by Coase, where the resource that is invested into the transfer is disregarded, optimal allocation occurs regardless of the initial property rights assignment - the forces of the market are the ultimate arbiter.[154] The *way* in which any particular conflict is resolved bears no real significance in the costless world – a proposition for which Coase specifically focused on instances of nuisance to exemplify.[155] In the famous example of crop and cattle, both the payment of damages as a result of litigation and the agreement as a result of a bargaining process generate a value-maximizing outcome. The conclusion made by Coase is that, in this constructed hypothetical, the actual content of property rights is largely irrelevant and any specific delineation of property rights could be achieved through bargaining.[156] Given infinite time and resource, a seller and a buyer could potentially reinvent and contract into their own vision of property rights, without relying on any existing legal constraints. On the other side of the spectrum, if all consideration of cost is removed from the equation, a begrudged seller of a one-dollar candy could take the non-paying buyer to court and engage in extensive litigation to ensure the payment of the contracted sum. These nonsensical examples would hardly come to be realized if the actual cost of bargaining was considered. Similarly, the choice of litigation involves costs both on the side of the parties (in the form of lawyer fees) and the courts themselves. Coase's thought experiment reveals that the real-world individuals' propensity to contract, as well as the way in which one chooses to contract, is primarily defined by the accompanying transaction costs. [157]

The first issue worth investigating is the effect of a "solid" or a well-defined property regime on transaction costs in the context of contracts – the transfer of property rights occurring in the free market. This effect is perhaps best understood by modelling the contract process in their absence. As such, the initial position of the parties is that both parties are facing information costs before the contract is ever concluded and some costs remain unknown even

[150] Cosmin Marinescu, "Transaction Costs and Institutions' Efficiency: A Critical Approach," *The American Journal of Economics and Sociology* 71, no. 2 (2012): p. 261.
[151] Louis De Alessi, "Property Rights, Transaction Costs, and X-Efficiency: An Essay in Economic Theory," *The American Economic Review* 73, no. 1 (1983): p. 71.
[152] Furubotn, *supra* note 113, p. 1144.
[153] Frank I. Michelman, "Ethics, Economics, and the Law of Property," *Nomos: American Society for Political and Legal Philosophy* 24 (1982): p. 12.
[154] Ronald. H. Coase, "The Problem of Social Cost," *Journal of Law & Economics* 3 (1960): p. 8.
[155] *Ibid,* p. 13.
[156] *Ibid,* p. 19.
[157] Colombatto, *supra* note 3, p. 110.

after conclusion, since it is difficult to account for all externalities that may emerge in the future.[158] In a practical sense, the parties must invest time and effort in finding out the contractual relations attached to each "thing" of their interest. This task would prove to be exceedingly burdensome in the absence of any type of standardized right. Contracts relating to property can take on many different forms, and it is their categorization and codification which significantly simplifies the parties' endeavour:

> To be sure, society, in order to accommodate the members of the business community, has placed at their disposal a great variety of typical transactions thus supplying the short-sightedness of individuals, by doing for them what they should have done for themselves […] [159]

If entitlements are assigned by means of ostensibly incidental contracts, getting a "full picture" of all the rights and duties assigned to each "thing" seems like an almost impossible challenge. In fact, this is the expression of one of the notable critiques of the "bundle of rights" approach to property – the "scattered" entitlements to each individual thing render the information hurdle too high to overcome, and some simplifications are necessary to maintain a cohesive property law structure. [160] It has been argued that a balance must be struck between a need to avoid property rights fragmentation and the necessity of preserving a certain flexibility to accommodate different types of property uses – for example, while the former objective is often embodied in the national constitution, with the right to property taking the form of an absolute right, the latter development is exercised through the court system. [161]

It follows that a system of standardized property rights makes up for a deficiency in contracts as a value maximizing tool. The most basic type of property entitlement – exclusion – cannot realistically be ensured by means of a contract for the mere fact that it is a "right against everyone" – an indeterminable number of parties.[162] This is an example of an argument in favour of a more holistic definition of property rights as *in rem.* [163] Thus, in reducing transaction costs, approximations must be made in the form of property rules. Shortcutting through a convoluted web of contracts, an individuals' transaction costs are substantially reduced and they are thus more likely to engage in a contract to alter their property entitlements. Undoubtedly a strong believer in the forces of free market, Coase himself recognized that government intervention may sometimes lead to greater efficiency where the cost of private regulation through bargaining is too high.[164] An example given is that of public nuisance, which similarly boils down to immense information costs.

A similar conclusion can be made with regards to the liability versus property rules debate mentioned elsewhere in this chapter. Transaction costs involved in litigation may tip the scale in favour of property rules. The resolution of rights conflicts *ex post* seems comparatively inconvenient as opposed to preventing the emergence of the conflicts to begin with.

To conclude, the present chapter has attempted to outline two socially desirable characteristics attributed to a stable system of property rights – maximization of wealth and minimization of transaction costs. While the first chapter focused on the meaning, content and

---

[158] Harold Demsetz, "Some Aspects of Property Rights," *The Journal of Law & Economics* 9 (1966): p. 64.
[159] Cohen, *supra* note 136. p. 142.
[160] Joseph William Singer, "Property as the Law of Democracy," *Duke Law Journal* 63, no. 6 (2014): p. 1295.
[161] Colombatto, *supra* note 3, pp. 75, 224.
[162] Dorfman, *supra* note 26, p. 418.
[163] Merrill, *supra* note 27, p. 1853.
[164] Coase, *supra* note 154, p. 17.

effect of property rights on an individual level, the present chapter turned to its' aggregate effect on society in economic terms – as a tool for expanding prosperity.

3. PRIVATE PROPERTY IN DYNAMIC APPLICATION

3.1 Points of tension in private property.

In the present subchapter, the association between the concepts of private property and self-expression, individual freedom and, most importantly, equality, will be addressed on a distinctly new scale. While Chapter I outlined the normative postulates of private property from the standpoint of natural law and natural rights, the present subchapter aims to investigate these ideas in their dynamic application. their systematic use and the potential drawbacks thereof. Of particular interest is the emerging distortions in the distribution of private property and their effect on the fulfilment of the private property "ideals", constructed by natural law thinkers, as well as the interaction between the right to private property and the conceptualization of equality among individuals.

To this end, a useful starting point would be to consider the presumptions that lie at the foundation of the earlier conceptions of the right to property. To trace the progression of the right to property and the potential conflicts that may arise therein, it is necessary to ascertain whether its' institution departs from an initial presumption of scarcity or abundance. In other words, a condition of scarcity could be construed as a type of "zero sum game"- this is significant in analyzing any distribution dilemmas that may surface as property relations gain complexity. Without doubt, the current property landscape, in its' great diversity across distinct legal regimes, escapes these binary constraints. However, if property as an institution was devised to serve the aforementioned "ideals", the degree to which it succeeds to do so depends on how the property context has historically evolved.

Whether it be due to his religious bent or some other pragmatic alternative, Locke is often found to refer to "abundance" bestowed upon mankind in terms of resource.[165] This is characteristic of the earlier discussion in chapter one, where Pufendorf and Grotius come across as rather pessimistic with regards to the question of the "initial framework" in which property is set, as compared to Locke. This rhetoric of natural abundance may lead one to question the relevancy of the posed normative ideals of property. In fact, the presumption that there is sufficient property for everyone who wishes to acquire it poses some internal contradictions in the writings of Locke himself. Specifically, if the proposition of God-given plenty is accepted, the constraints of exclusion, or simply put – not taking what does not belong to you – lose their meaning altogether.[166] The reason for this is that each individual would simply be able to choose their own share, or, in the case of forced capture of property, to move on and acquire identical property elsewhere. Considering this, it has been suggested such an interpretation of Locke's "natural abundance" would not be completely sincere.[167]

As such, it is the scarcity of resource which forms the foundation of ones' right to exclude others – scarcity hold the answer to the question of why a system of property rights

[165] John Locke, *Two Treatises of Government* (London: Printed for Thomas Tegg, 1823), Section 27, p. 113.
[166] Gary B. Herbert, "John Locke: Natural Rights and Natural Duties," *Jahrbuch fur Recht und* Ethik 4 (1996): p. 601.
[167] *Ibid.*

develops within a state, and why the issue of enforcement is topical to property rights.[168] Needless to say, property, in most of its' manifestations, is not finite – commodities can be reproduced to satisfy demand. Thus, when referring to the scarcity of resource, the focus is shifted to "productive" property – for example, in the time of Locke, the conversation was largely centered on land as property, less because of its' intrinsic value, and more because of its' potential for further exploitation.[169] What does this say about the systematic application of the right to property? The apparent conclusion is that some individuals, by virtue of owning a bigger "slice of the cake" of property, may be predisposed to a greater degree of self-development and liberty, if the association with the right to property holds true.

What makes scarcity a relevant point of discussion is that, in the following centuries, the concept of scarcity was positioned opposite of self-fulfillment of the individual – the race for greater economic security makes an individual "engrossed by the art of getting on" and ignorant of more meaningful ends.[170]Thinkers such as Mill and Keynes viewed scarcity as a hurdle to be overcome in reaching a state of society that would no longer hinge on the growth of wealth and productivity as its' primary ambition.[171] The free market and technological development, to which the right to property is instrumental, were said to be capable of resolving the problem of scarcity altogether, allowing individuals to seek "higher", non-material goals.[172] A distinct optimism with regards of the free markets' ability to resolve the problem of scarcity is characteristic of 20th century economic thought. [173]

In developed nations, with growing prosperity of and the cementing of other individual entitlements on a formal level, it was thought that inequality would largely cease to be a concern.[174] Absent scarcity, each individual would be capable of achieving a level of comfort that would usher other interests to the forefront. Arguably, the overall prosperity of a nation was equated to everyone receiving a "larger slice of the cake" by default, negating, or at least not accelerating inequality. This rhetoric was particularly prevalent in mid-20th-century United States, as exemplified by the political argument in favor of "trickle-down economics", which prioritized the largely unadulterated growth of large businesses in hopes of bolstering prosperity at all socioeconomic levels. [175]

Nevertheless, a sort of scarcity persisted. While it is true that, in cases of consistent economic growth the overall level of prosperity tends to rise, as demonstrated by the post-war industrial boom that was observed in developed countries, the structural deficiencies and the distribution tendencies cannot be neutralized without direct government involvement.[176] One reason for this, pointed out by Hirsh and relevant for the purposes of this research, is that the mechanism of the free market and private property replicates its' own "faults".[177] The size of the "cake" of capital, which is distinguished from the notions of property and wealth as

---

[168] Colombatto, *supra* note 3, p. 155.
[169] Colombatto, *supra* note 3, p. 69.
[170] John Stuart Mill, *Principles of Political Economy with Some of their Applications to Social Philosophy*, ed. William James Ashley (London: Longmans, Green and Co., 1909), Book IV, Chapter 6, p. 751.
[171] David Singh Grewal and Jedediah Purdy, "Inequality Rediscovered," *Theoretical Inquiries in Law* 18, no. 1 (January 2017): p. 71.
[172] Ibid.
[173] David Singh Grewal and Jedediah Purdy, "Inequality Rediscovered," *Theoretical Inquiries in Law* 18, no. 1 (January 2017): p. 65.
[174] *Ibid,* p. 66.
[175] Raymond R. Stevens, "Supply-Side Economics: The Trickle-down Theory Revisited," *Antitrust Law & Economics Review* 12, no. 1 (1980): pp, 33-34
[176] Posner, *supra* note 5, p. 347.
[177] Fred Hirsch, *Social Limits to Growth* (London: Routledge & Kegan Paul Ltd, 1977), p. 27-28

"productive property", and particularly important for discussions of the current market landscape dominated by the firm, is certainty larger, but that does not translate into every individual being able to acquire a bigger "piece".[178] At the very least, a "piece" that would live up to the liberal ideal of individual self-determination[179] mentioned earlier in the work – the real measure of which can hardly be quantitated in practical terms, but can perhaps be ascertained by comparison. In effect, growing production creates new demand, and there is seemingly no point in time where this demand can be fully satisfied – there is a constant shifting of the standard of what it means to have "enough" and, although the general standard tends to rise, those at the lower end of the spectrum of wealth will remain in a state of perpetual need. This same tendency of continuous shift of the goalposts is noted by Marx: "A society can no more cease to produce than it can cease to consume."[180] This is perhaps why, in most developed countries, focus has shifted to problems of redistribution as a means of correcting the existing deficiencies and ensuring that the economic position of each individual corresponds to some minimum standard, as often defined by the government.

Another aspect to consider is the manner in which the constraints and limitations on private property, envisioned by Locke and his contemporaries, have evolved with the increasing separation of the individual from the immediate products of their labor. Nowadays, practically all instances of private property ownership do not arise out of the act of initial acquisition.[181] For the most part, property is purchased, inherited, or otherwise indirectly acquired – this is one of the reasons why the "state of nature" posited by Locke has arguably lost its' philosophical appeal. It can be argued that Locke's focus on initial acquisition is a product of a sort of pre-industrial bias which relates to the previous discussion of scarcity and abundance.[182] Even if the initial framework of scarcity is accepted, an impression endured that there remains a substantial portion of property that is yet to be claimed – further reinforced in his texts by the idea of vast and uncultivated opportunity the Americas held:

> […] several nations of the Americans are of this, who are rich in land and poor in all the comforts of life; whom Nature, having furnished as liberally as any other people with the materials of plenty—i.e., a fruitful soil, apt to produce in abundance what might serve for food, raiment, and delight; […][183]

This context will prove to be useful in further discussion of limitations on private property ownership. The latter part of this subchapter will discuss the limitations placed on the acquisition of property by natural law, how these limitations have changed in their dynamic application in the course of history, and the effect of these changes on the conceptualization of the right to property as a tool for self-fulfillment and individual liberty.

A fundamental element of the so-called Lockean Proviso, and the primary constraint for property acquisition is that there is "as good left in common for others".[184] In essence, an individual should be mindful of the needs of others in acquiring property. Derived from this notion is the principle that one should not acquire more than one can effectively use or consume[185] – a notion that can be construed as an element of social morality that compels

---

[178] Jonathan Levy, "Capital as Process and the History of Capitalism," *Business History Review* 97 (Autumn 2017): p. 487

[179] Dagan, *supra* note 80, p. 406.

[180] Karl Marx, *Das Kapital, Volume I, 4th edition* (1890), p. 1613. Available on: https://content.csbs.utah.edu/~ehrbar/cap1.pdf. Accessed 10 November 2021.

[181] Sanders, *supra* note 17, p. 382.

[182] Hamilton, *supra* note 89, p. 868.

[183] Locke, *supra* note 13, p. 15, Section 41.

[184] Sanders, *supra* note 17, p. 372.

[185] Donna M. Byrne, "Locke, Property, and Progressive Taxes," *Nebraska Law Review* 78, no. 3 (1999): p. 707.

members of society to be conscious of general welfare. These limitations are appropriately explained by the historical circumstances of the time, and even more so by the framework of the "natural society" which Locke focused upon. A major part of the discussion on property centered upon tangible goods that are, at least in some sense, subject to spoilage – be it land (which, if not handled properly, could cease to be usable) or food. However, with the introduction of money into the framework, as something that cannot materially go to waste, the spoilage principle no longer holds.[186]

As a result, accumulation of capital, as property which cannot be ruined or spoiled, avoids the rather straight-forward rule of spoilage that prevailed in earlier historical iterations of the right to property. Perhaps another reason why the logic of "spoilage" has become increasingly irrelevant is the issue of scale and complexity of property "interactions". In an increasingly fragmented fabric of labor and its' fruits, the moral aspect of "taking away from another" is difficult to maintain. It is no longer realistic to predict how certain transfers of property will affect the grand picture of the "common good" - the costs can be dispersed in the public domain.[187] The manner in which this positive shift in attitude towards accumulation carries implications for the exercise of individual liberties is demonstrated by the second argument of Hirsh, discussed below.

As previously mentioned, adjustments to the distribution of wealth, most commonly in the form of taxes, were seen as an acceptable solution to the perpetual problem of inequality that arises with strong property rights and glorified accumulation of capital as its' backdrop.[188] The ideal position, as viewed by Galbraith, is that a society which concerns itself with inequality would be capable of instituting programs addressing it.[189] What is left out of this equation, however, is the link between economic and political power. This was the point made by Rawls, who recognized that concentrations of private wealth posed a threat to the democratic process[190] and further developed by Hirsh, who argued that, despite the fact that the free market provides individuals with the freedom of personal choice, actors with more economic power are in a better position to extend their influence over the rules of the "game", meaning the various attempts at distribution undertaken by the government.[191] This is in line with the celebrated logic that all economic actors will act in their own self-interest – the means in which they do so are not necessarily limited to their participation in the free market, but may extend to the political sphere as well. Some have argued that this is the extension of the capitalist ideology of rational egoism, which may in the end turn self-destructive.[192] Further, even within the internal logic of the capitalist order and norms of equality implicit in the Kaldor-Hicks criterion, it has been argued that the weight of influence held by those with more still matters:

> This means that the desires of the wealthy carry greater weight than those of the poor in applying the KH-criterion, and so the KH-criterion will tend to produce outcomes favored by the rich.[193]

---

[186] *Ibid,* p. 708.
[187] A. K. Dragun, "Property Rights in Economic Theory," *Journal of Economic Issues* 21, no. 2 (1987): p. 865.
[188] Jonathan Riley, "Justice under Capitalism," *Nomos: American Society for Political and Legal Philosophy* 31 (1989): p. 130.
[189] Kohn Kenneth Galbraith, *The Affluent Society* (New York: Houghton Mifflin Company, 1958), p. 292.
[190] John Rawls, *A Theory of Justice: Revised Edition* (Cambridge: Harvard University Press, 1999), p. 198.
[191] Hirsch, *supra* note 177, p. 119.
[192] Vittorio Hösle and Notre Dame, "Ethics and Economics, or How Much Egoism Does Modern Capitalism Need? Machiavelli's, Mandeville's, and Malthus's New Insight and Its Challenge," *Archives for Philosophy of Law and Social Philosophy* 97, no. 3 (2011): p. 439.
[193] Robert T. Miller, "Norms of Equality Implicit in Capitalism," *Supreme Court Economic Review* 23 (2015): p. 248.

The defeat of the Lockean Proviso and the acceptance of accumulation of resource as a positive ambition created a sort of a feedback loop – those who acquired more weighted in disproportionately in the question of distribution.[194] In other words:

> The greatest barrier to equality, in prosperous Western democracies, is the otherwise happy fact that many more voters now lose through genuine egalitarian programs than gain.. [195]

Moreover, with regards to redistribution, the general growth of prosperity poses a problem of deciding on what constitutes a bare minimum of wealth necessary for the exercise of the earlier discussed individual liberties, requiring dynamic and consistent reevaluation by the government.

To summarize, the emphasis on the inclusivity present in practically all codifications of the right to property, as discussed in the latter part of the first chapter, faces pronounced obstacles in the systemic application of the right. This is for no reason external to the right itself – on the contrary, it is the product of its' exclusive character. As has been established, the exercise of the right to property presupposes the exclusion of others to certain goods – the owner alone is entitled to use, dispose or transfer the property. Scarcity considered, the inevitable result of this is that some individuals exercise more "self-fulfillment" and "self-expression" than others, while some are left with nothing at all – the issue of poverty, for example, persists in virtually all parts of the world. [196] What is especially peculiar in this regard is that poverty rates are not reduced at the level that the growth of the economy would warrant, connection between economic growth and individual prosperity considered – the countries most riddled with the issue of poverty are now classified as middle-income.[197] Private property, conceived as an ideal carrying equalizing force in the context of natural law, stands at a certain contradiction with itself. Even attempts at retrospectively adjusting this issue by means of redistribution, for example, often play into the same fundamental deficiencies:

> […] the enforcement of social and economic rights tends to focus on alleviating poverty or helping the poor, and therefore insufficiently addresses the destabilizing dynamics resulting from wealth that is perceived to be excessive. [198]

3.2 Property, growth and inequality.

The traditional view on the relation between growth and inequality, although presently challenged, is that inequality, to a certain extent, serves to enhance growth.[199] One of the most commonly cited explanations is that inequality provides incentives for innovation by fostering the ambition for greater wealth in the rational actor.[200] Taken independently, the desire to improve one's own economic position is easily understood as a means of satisfying needs and improving comfort; on a grander scale, the compound effect of this desire defines the vector of

---

[194] K. Sabeel Rahman, *Democracy against Domination* (Oxford Scholarship Online, 2016), pp. 59-60.
[195] Ronald Dworkin, "Confronting the End of the Socialist Era," *Bulletin of the Australian Society of Legal Philosophy* 16, no. 1 (1991): p. 9.
[196] Andy Summer, *Global Poverty: Deprivation, Distribution, and Development Since the Cold War* (Oxford Scholarship Online, 2016), p. 56.
[197] Ibid.
[198] Rosalind Dixon and Julie Suk, "Liberal Constitutionalism and Economic Inequality," *The University of Chicago Law Review* 85, no. 2 (2018): p. 388.
[199] Philippe Aghion, Eve Caroli, and Cecilia García-Peñalosa, "Inequality and Economic Growth: The Perspective of the New Growth Theories," *Journal of Economic Literature* 37, no. 4 (1999): p. 27.
[200] Shi-Ling Hsu, "Inefficient Inequality," *Indiana Journal of Law and Social Equality* 5, no. 1 (2016): p. 9.

economic development, pointing towards greater overall economic prosperity.[201] In this sense, the existence of private property regulation can be seen as advancing the implicit utilitarian goals of ensuring economic growth and technological progress. This increase of the general level of prosperity implicit in a private property regime and the associated free market is among the most often cited justifications for the capitalist economic organization.[202] What is interesting in this respect is whether the systemic application of private property rights and the associated freedoms (such as freedom of contract) implies an unequal distribution of such rights, or whether this unequal distribution is somehow external to the property rights system itself. In other words, whether "the greatest happiness of the greatest number" inevitably leaves some with very little in terms of wealth – not enough, even, to meaningfully participate in the market dynamics and "carve out their own individual space", as posited in Chapter I.

In defense of private property and the market, emphasis is often placed on the formal freedoms embedded therein:

> "[…] under capitalist norms, a person's rights in property, contract, and tort are determined without regard to, among other things, the person's personal characteristics such as race or gender or his social, financial, or political position in society". [203]

Arguably, this is a more general characteristic of any legal system that fulfils the premise of the rule of law and incorporates some basic notions of human rights within it. It follows that, among other norms, the rules of private property, applied indiscriminately, ensure a default standing for all members of society – this is on par with the understanding of equality as equality of opportunity. [204]There is, however, a noticeable conceptual caveat in this argument – the defined equality of opportunity is conditional on the adequate functioning of the other branches of the government and the absence of corruption.[205] Often, a defined system of property rights, which is characteristic of capitalism, goes hand in hand with the rule of law and the upstanding performance of the judicial and executive branches – as can be broadly observed in the case of the United States and Western Europe, for example.

However, the notion of equality of opportunity and property rights are seemingly not intrinsically connected – there can exist a property regime which does not presuppose equality in any accepted sense. An obvious example of this is the case of Eastern Europe where, during the transition period that started with the fall of the Soviet Union, it was of special importance to attempt to incorporate both a functioning free market system and a transparent democratic and judicial system alongside each other. [206]

It can be argued that the focus on the initial, formally equal position of the individual prevails in the conception of property rights in the context of economic analysis, while any further benefits and pitfalls are delegated to the forces of market exchange, in which a person can develop in accordance with their individual preference. The confidence in the efficiency of the exchange process is arguably inspired by the Coase Theorem, which discharges with the initial property allocation altogether, provided transaction are costless.[207] It is only the fact that they are not, in fact, costless, which brings attention to the issues of initial allocation.

---

[201] Riley, *supra* note 188, p. 128.
[202] Miller, *supra* note 193, p. 245.
[203] Miller, *supra* note 193, p. 242.
[204] Rawls, *supra* note 190, p. 63.
[205] Miller, *supra* note 193, p. 243.
[206] Thorsten Beck, "Legal Institutions and Economic Development," in *The Oxford Handbook of Capitalism*, ed. Dennis C. Mueller (New York: Oxford University Press, 2012), p. 2.
[207] Coase, *supra* note 154, p. 16.

The non-discriminatory nature of property rights considered, there are nonetheless certain processes, endemic to the free market, which lead to the concentration of economic power.[208] The radical version of this is the monopoly – a situation when the prices of goods are dictated by the supplier as a consequence of a lack of competition in the defined market of goods. The monopoly, which is deemed as a market arrangement that requires correction, has often been the subject of government intervention.[209] While monopolies are not necessarily inefficient on their own, they are thought to stall technological progress.[210] What is important for the purposes of the present research, however, is that, for various reasons, competition, and by extension the distribution of profits and ultimately wealth, is inherently imperfect.

What makes this imperfection worth addressing? Perhaps the answer lies in the relationship between the government and the individual. If property rights are conceived within the ambit of the social contract, it must be supported by a rationale that begets benefits for all participating individuals. The social contract is devised on the basis of mutual gain.[211] If some groups of people are categorically excluded from enjoying the benefits of the arrangement, the moral potency of the system is undermined:

> In any event, it seems that some principle ensuring that everyone significantly benefits from the system of property rights is essential [212]

As such, the justification of the property rights system requires supplementation by considerations of welfare – in other words, it is imperative that those who are "behind" are uplifted. As mentioned in the preceding subchapter, the choice of tool for this supplementation is often redistribution. This choice highlights the perceived immutability of property rights that is arguably grounded in the moral realm and elucidated in Chapter I. Moreover, the constraints placed on accumulation of property reflects the general vigilance with which the consequentialist "good" is treated. If overall economic growth comes at the cost of too much economic insecurity, the morality of such policy choices may come into question. In other words, a society may be less tolerant towards the "greater good" if too much "bad" comes with it: "Willingness to destroy a basic good in order to achieve some greater good is willingness to do something irrational."[213] Nevertheless, the system of property rights can be argued as the optimal solution provided some corrective measures are in place.[214] The next apparent complication concerns the *extent* to which the apparatus of property needs adjustment by external measures – a topic of persistent debate in any state. It appears that the measure of intervention is determined by the social attitudes held in a particular jurisdiction, either favoring freer markets or a greater social security net.

Alternatively, addressing wealth maximization on its' own terms also presents some difficulties, which are becoming more and more apparent as the system grows and evolves. It should be considered that the effects of distribution of wealth tend to aggregate – a point stressed by Rawls in his discussion of intergenerational justice.[215] A broader look at growth

[208] Baechler, *supra* note 35, p. 282.
[209] Robert Cooter and Thomas Ulen, *Law and Economics, 6th edition* (Boston: Addison-Wesley, 2012), p. 30.
[210] *Ibid.*
[211] Jean-Jacques Rousseau, *Discourse on Political Economy and the Social Contract* (Oxford: Oxford University Press, 1999), p. 54.
[212] Gerald F. Gaus, "A Contractual Justification of Redistributive Capitalism," *Nomos: American Society for Political and Legal Philosophy* 31 (1989): p. 110
[213] MacLeod, *supra* note 51, p. 1019.
[214] Peter Bernholz, "Expanding Welfare State, Democracy and Free Market Economy: Are They Compatible?" *Journal of Insitutional and Theoretical Economics* 138, no. 3 (1982): p. 590.
[215] Klaus Mathis, "Future Generations in John Rawls' Theory of Justice," *Archives for Philosophy of Law and Social* 95, no. 1 (2009): p. 50.

factors demonstrates that inequality can in fact be detrimental to growth.[216] A prominent contributive factor is, for example, education, the reduced access to which may result in less innovation and slower growth in turn.[217] Moreover, it has been observed (although, also disputed) that individual wealth increases more rapidly than the economy as a whole[218], which is a further indication that the productive resources are often directed away from the objectives of general prosperity. A far more salient point can be made, however, with regards to the basic entitlements that arise out of property rights, notably freedom, as discussed previously. What is apparent is that concentration of property results in concentration of labor, which has a detrimental effect on freedom of choice. The choice is effectively narrowed for an individual subjected to the corporate structure. [219]

To conclude, the present chapter aimed to address the effects of property rights in their dynamic application – extending the analysis to the discussion of the free market and its' influence on associated individual entitlements, such as equality and freedom. One of the main observations that can be drawn is the "inevitability" of property, pronounced in the treatment of the issues that arise therein. This quality can be summarized as follows:

> 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 decision-making. [220]

As such, it is apparent that the right to property does not always correspond to equality and freedom, particularly if the bounds of wealth accumulation are left unaddressed. This is not often the case in modern times – which does speak to a notable weariness with which property rights are treated.

[216] Shi-Ling Hsu, "Inefficient Inequality," *Indiana Journal of Law and Social Equality* 5, no. 1 (2016): pp. 16-17.
[217] *Ibid,* p. 18.
[218] Grenier, *supra* note 105, p. 11.
[219] Daniel W. Bromley, *Possessive Individualism: A Crisis of Capitalism* (Oxford Scholarship Online, 2019), p. 103.
[220] Rose, *sura* note 69, p. 350.

CONCLUSION

The value of the right to property as a fundamentally moral sentiment positioned at the core of the claim to personhood and freedom cannot be understated – ownership of "things" serves as a crucial organizational principle in both law and economics. The natural law roots of the right, established in Chapter I, illuminates property as something inalienable, inescapable and acutely important to our fabric of social interaction – a point that holds true regardless of whether the right is construed in terms of the mythical "original order" or the celebrated social contract. The weight of this link places property under substantial scrutiny with regards to its' ability to respond to moral issues closely related – that of equality and fairness. Said to promote and adhere to both, the right to property as a constitutional value made its' way through the continent, and later across the ocean. The prevalence of the right has reached a point where it is difficult to even conceive of a system which would exclude it – at least in a way that overcomes philosophical fancy.

Perhaps even here the description of the earlier conceptions of the right to property are saturated with a flair of morality that arguably obscures the practical meaning of the right. Hence, Chapter II aimed to illustrate the contemporary treatment of the right as a functional element of the economy, in the hopes of uncovering the justifications of the right in terms of empirical benefit. The theoretical allure of the right to property lies in the fact that, no matter the formulation, it always leaves something to be desired. Considered in the context of law and economics, the right to property presents as a continuum, with unbridled expansion at one end and the welfare state at the other. Unbridled expansion is ensured by sufficient incentive and non-interference, while the welfare state relies on intrusion for the sake of equitable outcomes. The first cannot be achieved without compromising some measure of equality, while the second struggles to promote growth absent the stimulus of not great, but *greater* wealth.

Addressing the research question: "Is there an inherit conflict between the essence of the right to private property and its' systematic application?", two points can be made:

Firstly, the nature of the right to property casts doubts on whether the right was originally envisioned as belonging to each individual. Recognizing the condition of scarcity, property right can be understood as the right of *potential* – while every state maintains property available for acquisition, in reality, the myriad of social factors, such as that of education and generational privilege, renders the exercise of the right more available to some. In a sense, the Lockean thesis of *tabula rasa* can never be fulfilled without substantial intrusions on property, which are themselves contrary to the essence of the right.

Secondly, the fact that, in any modern rendition, the right to property (and therefore the system of property transfer, which forms the free market) practically requires supplementation, either in the form of taxes or other mechanisms of redistribution, points to the existence of such conflict. Property transfer and its' consequent concentration creates an imbalance in the distribution of wealth that has potential of threatening other ethical values, such as that of political equality.

In the opinion of the Author, a point of interest for further research is the analysis of whether genuine redistribution programs are capable of fully compensating for the established conflict, and, further, the ethical and economic issues vested in redistribution.

Bibliography

Primary sources.

1. Legislation.

1. France. Declaration of Human and Civic Rights of 26 August 1789. Available on:https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf.. Accessed 10 November 2021.
2. France. Constitution of 1958 with Amendments through 2008. Available on: https://www.constituteproject.org/constitution/France_2008.pdf?lang=en. Accessed 10 November 2021.
3. France. The Code Napoléon or the Napoleonic Code (1827). Available on: http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf. Accessed 10 November 2021.
4. UN General Assembly. *Universal Declaration of Human Rights* (10 December 1948). Available on: https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf Accessed 10 November 2021.

Secondary sources.

1. Books and treatises.

1. Beck, Thorsten. "Legal Institutions and Economic Development," in *The Oxford Handbook of Capitalism*, ed. Dennis C. Mueller. New York: Oxford University Press, 2012.
2. Bentham, Jeremy. "Anarchical Fallacies," in *The Works of Jeremy Bentham*, ed. John Bowring (1843).
3. Bouckaert, Boudewijn. *Economic Analysis of Property Law Cases.* Abingdon: Routledge, 2020.
4. Cohen, Morris R. and Felix S. Cohen. *Readings in Jurisprudence and Legal Philosophy*. New York: Prentice-Hall, 1951.
5. Colombatto, Enrico. *The Elgar Companion to the Economics of Property Rights* Edward Elgar Publishing Limited, 2004.
6. Conklin, William E. *The Invisible Origins of Legal Positivism*. Springer, 2001.
7. Cooter, Robert and Thomas Ulen. *Law and Economics, 6th edition*. Boston: Addison-Wesley, 2012.
8. Dagan, Hanoch. "Just Compensation, Incentives, and Social Meanings," in *Property: Values and Institutions*. Oxford Scholarship Online, 2011.
9. Galbraith, Kohn Kenneth. *The Affluent Society*. New York: Houghton Mifflin Company, 1958).
10. Garnsey, Peter. *Thinking About Property: From Antiquity to the Age of Revolution.* Cambridge University Press, 2007.

11. Hirsch, Fred. *Social Limits to Growth*. London: Routledge & Kegan Paul Ltd, 1977.

12. Hobbes, Thomas. *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill.* London, 1651.

13. Honoré, A. M. "Ownership," in *Oxford Essays in Jurisprudence*, ed. Anthony G. Guest. Oxford: Oxford University Press, 1961.

14. Lesaffer, Randall. *European Legal History: A Cultural and Political Perspective*. Cambridge: Cambridge University Press, 2019.

15. Locke, John. *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government.* John Wiley & Sons, 2014.

16. Marx, Karl. *Das Kapital, Volume I, 4th edition* (1890), Available on: https://content.csbs.utah.edu/~ehrbar/cap1.pdf.

17. Miceli, Thomas J. *Economics of the Law: Torts, Contracts, Property, Litigation.* New York: Oxford University Press, 1997.

18. Mill, John Stuart. *Principles of Political Economy with Some of their Applications to Social Philosophy*, ed. William James Ashley. London: Longmans, Green and Co., 1909.

19. Penner, James. "On the Very Idea of Transmissible Rights," in *Philosophical Foundations of Property Law*, ed. James Penner and Henry Smith. Oxford Scholarship Online, 2014.

20. Pierson, Christopher. "The German Enlightenment – and Beyond," in *Just Property: Volume Two: Enlightenment, Revolution, and History*, ed. Christopher Pierson. Oxford Scholarship Online, 2016.

21. Posner, Richard. *Economic Analysis of Law*, *3rd edition*. Little, Brown and Company, 1986.

22. Proudhon, Pierre-Joseph. *What is property? An inquiry into the principle of right and of government.* Dover Publications Inc., 1970.

23. Pufendorf, Samuel. *On the Duty of Man and Citizen According to Natural Law*, ed. James Tully. Cambridge: Cambridge University Press, 1991.

24. Rawls, John. *A Theory of Justice: Revised Edition*. Cambridge: Harvard University Press, 1999.

25. Ripstein, Arthur. "Philosophical Foundations of Property Law," in *Philosophical Foundations of Property Law*, ed. James Penner and Henry Smith. Oxford Scholarship Online, 2014.

26. Rousseau, Jean-Jacques. *Discourse on Political Economy and the Social Contract.* Oxford: Oxford University Press, 1999.

27. Smith, Adam. *An Inquiry into the Nature and Causes of the Wealth of Nations*. Electronic Classics Series, 2005.

28. Smith, Adam. *The Theory of Moral Sentiments, 6th edition*. MetaLibri, 2006.

29. Waldron, Jeremy. *The Right to Private Property*. Clarendon Express, 1988.

30. West, Edwin G. “Property Rights in the History of Economic Thought: From Locke to J. S. Mill,” in *Property Rights: Cooperation, Conflict and Law*, ed. Terry L. Anderson and Fred S. McChesney. Princeton University Press, 2003.

2. Journal articles.

1. Alessi, Louis De. “Property Rights, Transaction Costs, and X-Efficiency: An Essay in Economic Theory,” *The American Economic Review* 73, no. 1 (1983).
2. Araujo, Marcelo de. “Hugo Grotius, Contractualism, and the Concept of Private Property: An Institutionalist Interpretation,” *History of Philosophy Quarterly* 26, no. 4 (2009).
3. Archer, Alfred. “Community, Pluralism, and Individualistic Pursuits: A Defense of “Why Not Socialism?” *Social Theory and Practice* 42, no. 1 (2016).
4. Babie, Paul. “Two Voices of the Morality of Private Property,” *Journal of Law and Religion* 23, no. 1 (2007).
5. Baechler, Jean. “Liberty, Property, and Equality,” *Nomos: American Society for Political and Legal Philosophy* 22 (1980).
6. Barbot, Michela. “When the History of Property Rights Encounters the Economics of Convention. Some Open Questions Starting from European History,” *Historical Social Research/Historiche Sozialforschung* 40, no. 1 (2015).
7. Baron, Jane B. “Rescuing the Bundle-of-Rights Metaphor in Property Law,” *University of Cincinnati Law Review* 82, no. 1 (Fall 2013).
8. Barzel, Yoram. *Economic Analysis of Property Rights, 2nd edition* (Cambridge: Cambridge University Press, 1997).
9. Berman, Harold J. “Religious Foundations of Law in the West: An Historical Perspective,” *Journal of Law and Religion* 1, no. 1 (Summer 1983).
10. Bernholz, Peter. “Expanding Welfare State, Democracy and Free Market Economy: Are They Compatible?” *Journal of Insitutional and Theoretical Economics* 138, no. 3 (1982).
11. Berry, Christopher J. “Property and Possession: Two Replies to Locke – Hume and Hegel,” *Nomos: American Society for Political and Legal Philosophy* 22 (1980).
12. Boland, Lawrence A.“On the Futility of Criticizing the Neoclassical Maximization Hypothesis,” *The American Economic Review* 71, no. 5 (1981).
13. Bromley, Daniel W. *Possessive Individualism: A Crisis of Capitalism* (Oxford Scholarship Online, 2019).
14. Byrd, B. Sharon and Joachim Hrushcka, “The Natural Law – Duty to Recognize Private Property Ownership: Kant's Theory of Property and His Doctrine of Rights,” *University of Toronto Law Journal* 56, no. 2 (Spring 2006).
15. Byrne, Donna M. “Locke, Property, and Progressive Taxes,” *Nebraska Law Review* 78, no. 3 (1999).
16. Calabresi. Guido and A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,” *Harvard Law Review* 85, no. 6 (1972).

17. Coase, Ronald H. “The Problem of Social Cost,” *Journal of Law & Economics* 3 (1960).

18. Cole, Daniel H. and Peter Z. Grossman, “The Meaning of Property Rights: Law versus Economics?” *Land Economics* 78, no. 3 (2002).

19. Cotula, Lorenzo. “Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law,” *International Journal of Law in Context* 11, no 2 (2015).

20. Dagan, Hanoch and Avihay Dorfman, “The Human Right to Private Property,” *Theoretical Inquiries in Law* 18 (2017).

21. Demsetz, Harold. “Some Aspects of Property Rights,” *The Journal of Law & Economics* 9 (1966).

22. Dietze, Gottfried. “Natural Law in the Modern European Constitutions,” *Natural Law Forum* (1956).

23. Dolidze, Anna. “Promise and Perils of the International Human Right to Property,” *University of the Pacific Law Review* 47, no. 2 (2016).

24. Dorfman, Avihay. “Private Ownership and the Standing to Say So,” *University of Toronto Law Journal* 64, no. 3 (2014).

25. Dragun, A. K. “Property Rights in Economic Theory,” *Journal of Economic Issues* 21, no. 2 (1987).

26. Epstein, Richard A. “The Clear View of the Cathedral: The Dominance of Property Rules,” *Yale Law Journal* 106, No. 7 (May 1997).

27. Fennell, Lee Anne. “Property beyond Exclusion,” *William & Mary Law Review* 61, no. 2 (November 2019).

28. Foss, Kirsten and Nicolai Foss, “Coasian and modern property rights economics,” *Journal of Institutional Economics* 11, no. 2 (2015).

29. Furubotn. Eirik G. and Svetozar Pejovich, “Property Rights and Economic Theory: A Survey of Recent Literature,” *Journal of Economic Literature* 10, no. 4 (1972).

30. Gaus, Gerald F. “A Contractual Justification of Redistributive Capitalism,” *Nomos: American Society for Political and Legal Philosophy* 31 (1989).

31. Gergen, Thomas. “The Reception of the Code Civil (Napoleonic Code) of 1804: An Example of Juridical Migration,” *Journal on European History of Law* 5, no. 1 (2014).

32. Getzler, Joshua. “Theories of Property and Economic Development,” *The Journal of Interdisciplinary History* 26, no. 4 (1996).

33. Gordley, James. “Natural Law Origins of the Common Law of Contract,” *Comparative Studies in Continental and Anglo-American Legal History* 8 (1990).

34. Grant, Ruth W. “Locke's Political Anthropology and Lockean Individualism,” *The Journal of Politics* 50, no. 1 (1988).

35. Grenier, Jean-Yves. “The Dynamics of Capitalism and Inequality,” *Annales HSS* 70, no. 1 (2015).

36. Grewal, David Singh and Jedediah Purdy, “Inequality Rediscovered,” *Theoretical Inquiries in Law* 18, no. 1 (January 2017).

37. Hamilton, Walton H. “Property – According to Locke,” *Yale Law Journal* 41, No. 6 (April 1932).

38. Heller, Michael A. “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,” *Harvard Law Review* 111, no. 3 (1998).

39. Henry, John F. “John Locke, Property Rights, and Economic Theory,” *Journal of Economic Issues* 33, no. 3 (1999).

40. Herbert, Gary B. “John Locke: Natural Rights and Natural Duties,” *Jahrbuch fur Recht und* Ethik 4 (1996).

41. Hicks, J. R. “The Foundations of Welfare Economics,” *The Economic Journal* 49, no. 196 (1939).

42. Hodgson, Geoffrey M. “Much of the ‘economics of property rights’ devalues property and legal rights,” *Journal of Institutional Economics* 11, no. 4 (2015).

43. Hösle, Vittorio and Notre Dame, “Ethics and Economics, or How Much Egoism Does Modern Capitalism Need? Machiavelli's, Mandeville's, and Malthus's New Insight and Its Challenge,” *Archives for Philosophy of Law and Social Philosophy* 97, no. 3 (2011).

44. Howard-Hassmann, Rhoda E. “Reconsidering the Right to Own Property,” *Journal of Human Rights* 12, no 2 (2013).

45. Hsu, Shi-Ling. “Inefficient Inequality,” *Indiana Journal of Law and Social Equality* 5, no. 1 (2016).

46. Johnson, Vincent Robert. “The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris,” *Boston College International and Comparative Law Review* 13, no. 1 (Winter 1990).

47. Jolls, Christine, Cass R. Sunstein and Richard Thaler, “A Behavioral Approach to Law and Economics,” *Stanford Law Review* 50, no. 5 (May 1998).

48. Krier, James E. “Evolutionary Theory and the Origin of Property Rights,” *Cornell Law Review* 95, no. 1 (2009).

49. Kronman, Anthony T. “Wealth Maximization as a Normative Principle,” *Journal of Legal Studies* 9, no. 2 (March 1980).

50. Levy, Jonathan. “Capital as Process and the History of Capitalism,” *Business History Review* 97 (Autumn 2017).

51. Lobingier, Charles Sumner. “Rise and Fall of Feudal Law,” *Cornell Law Quarterly* 18, no. 2 (1932-1933).

52. Lustig, B. Andrew. “Natural Law, Property, and Justice: The General Justification of Property in John Locke,” *The Journal of Religious Ethics* (1991).

53. Lyons, David. “Utility and Rights,” *Nomos: American Society for Political and Legal Philosophy* 24 (1982).

54. MacLeod, Adam J. “Bridging the Gaps in Property Theory,” *Modern Law Review* 77, no. 6 (November 2014).

55. Marinescu, Cosmin. “Transaction Costs and Institutions' Efficiency: A Critical Approach,” *The American Journal of Economics and Sociology* 71, no. 2 (2012).

56. Mathis, Klaus. "Future Generations in John Rawls' Theory of Justice," *Archives for Philosophy of Law and Social* 95, no. 1 (2009).
57. McNulty, Paul J. "Economic Theory and the Meaning of Competition," *The Quarterly Journal of Economics* 82, no. 4 (1968).
58. Merrill, Thomas W. and Henry E. Smith, "What Happened to Property in Law and Economics?" *The Yale Law Journal* 111, no. 2 (2001).
59. Merrill, Thomas W. and Henry E. Smith. "The Morality of Property," *William and Mary Law Review* 48 (2007).
60. Michelman, Frank I."Ethics, Economics, and the Law of Property," *Nomos: American Society for Political and Legal Philosophy* 24 (1982).
61. Miller, Robert T. "Norms of Equality Implicit in Capitalism," *Supreme Court Economic Review* 23 (2015).
62. Newcomb, George B. "Theories of Property," *Political Science Quarterly* 1, no. 4 (December 1886).
63. Olsthoorn, Johan. "Self-Ownership and Despotism: Locke on Property in the Person, Divine Dominium of Human Life, and Rights-Forfeiture," *Social Philosophy and Policy* 36, no. 2 (2019)
64. Penner, James E. "The Bundle of Rights Picture of Property," *UCLA Law Review* 43, no. 2 (February 1996).
65. Pennock, J. Roland. "Thoughts on the Right to Private Property," *Nomos: American Society for Political and Legal Philosophy,* 22 (1980).
66. Posner, Richard A. "A Theory of Primitive Society, with Special Reference to Law," *Journal of Law & Economics* 23, No. 1 (April 1980).
67. Posner, Richard A. "Equality, Wealth, and Political Stability," *Journal of Law, Economics, & Organization* 13, no. 2 (October 1997).
68. Posner, Richard A. "The Problematics of Moral and Legal Theory," *Harvard Law Review* 111, no. 7 (May 1998).
69. Posner, Richard A. "Wealth Maximization Revisited," *Notre Dame Journal of Law Ethics & Public Policy* 2, no. 1 (Fall 1985).
70. Pound, Roscoe. "Natural Natural Law and Positive Natural Law," *Natural Law Forum,* 5 (1960).
71. Pound, Roscoe. "Revival of Natural Law", *Notre Dame Law Review* 17, no. 2, (1942).
72. Rabel, Ernst. "Private Laws of Western Civilization: Part II. The French Civil Code," *Louisiana Law Review* 10 (1950).
73. Radin, Margaret Jane. "Market-Inalienability," *Harvard Law Review* 100, no. 8 (June 1987).
74. Riley, Jonathan. "Justice under Capitalism," *Nomos: American Society for Political and Legal Philosophy* 31 (1989).
75. Rose, Carol M. "Property as the Keystone Right," *Notre Dame Law Review* 71, no. 3 (1996).

76. Salter, John. "Hugo Grotius: Property and Consent," *Political Theory* 29, no. 4 (2001).

77. Sanders, John T. "Justice and the Initial Acquisition of Property," *Harvard Journal of Law & Public Policy* 10, no. 2 (Spring 1987).

78. Schmidt am Busch, Hans-Christoph. "Personal Respect, Private Property, and Market Economy: What Critical Theory Can Learn from Hegel," *Ethical Theory and Moral Practice* 11, no. 5 (2008).

79. Singer, Joseph William. "Property as the Law of Democracy," *Duke Law Journal* 63, no. 6 (2014).

80. Sprankling, John G. "The Global Right to Property," *Columbia Journal of Transnational Law* 52, no. 2 (2014).

81. Steiger, Otto."Property Economics versus New Institutional Economics: Alternative Foundations of How to Trigger Economic Development," *Journal of Economic Issues* 40, no. 1 (2006).

82. Stevens, Raymond R. "Supply-Side Economics: The Trickle-down Theory Revisited," *Antitrust Law & Economics Review* 12, no. 1 (1980).

83. TT Clark. "Feudalism," *Journal of Jurisprudence* 2, no. 17 (1858).

84. Valcke, Catherine. "Locke on Property: A Deontological Interpretation," *Harvard Journal of Law & Public Policy* 12, no. 3 (Summer 1989).

85. Whelan, Frederick G. "Property as Artifice: Hume and Blackstone," *Nomos: American Society for Political and Legal Philosophy* 22 (1980).

86. Wolff, Jonathan. "Libertarianism, Utility, and Economic Competition," *Virginia Law Review* 92, no. 7 (2006).

87. Yuille, Lua Kamal. "Toward a Heterodox Property Law and Economics," *Texas A&M Law Review* 2, no. 3 (Spring 2015).

3. Websites.

1. Britannica, "Individualism." Available on: https://www.britannica.com/topic/individualism.

2. Britannica, "The Age of Revolution," Available on: https://www.britannica.com/topic/history-of-Europe/The-age-of-revolution.