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Property Rights: Origins and Theories

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> The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.
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> —James Madison, *The Federalist*, No. 10 (Nov. 23, 1787).

What is Property? What are Property Rights?

At least some description of the term *property* seems required at the outset for a proper understanding of the main points of the discussion that follows. *Webster's New International Dictionary of the English Language* (2nd ed., 1946) defines *property* variously as follows:

Property…from the Latin *proprietas*, a derivative of *proprius*, one's own or proper]…

> 3. Possessions irrespective of their ownership; wealth; goods; specif[cally], a piece of real estate.
>
> 4. The exclusive right to possess, enjoy, and dispose of, a thing; ownership; in a broad sense, any valuable right or interest considered primarily as a source or element of wealth; also, the relation or relative status of one owning a thing. In a narrower sense, *property* implies exclusive ownership (*general property*) of things, as where a man owns a piece of land or a horse; in the broader sense *property* includes, in the modern legal systems, practically all valuable rights (i.e., those that collectively make up a person's *estate* or *assets*), except, generally, those involved in public or family relations, these also being treated as property in the earlier legal systems. In this broader sense there are included various incorporeal rights, as patents, copyrights, rights of action, etc., and also certain minor rights, as that (called *qualified property*) to wild animals reduced to possession, or that (called *special property*) of a bailee in the thing bailed….
>
> 5. That to which a person has a legal title; thing owned; an estate, whether in lands, goods, money, or intangible rights, such as copyright, patent rights, etc.; anything or those things collectively, in or to which a man has a right protected by law; as a man of large *property*….[1]

For our purposes, Richard A. Posner's *Economic Analysis of Law* (1998) provides a broad working definition of *property* that is adopted here. Judge Posner notes that Common Law, "when viewed economically, has three parts:

> 1. The law of property, concerned with creating and defining property rights, which are rights to the exclusive use of valuable resources.
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> 2. The law of contracts, concerned with facilitating the voluntary movement of property rights into the hands of those who value them the most; and

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[1] *Webster's New International Dictionary of the English Language*, 2nd ed., Unabridged, Springfield, MA: G.&C. Merriam Co., Publishers (1946).

3. The law of torts, concerned with protecting property rights, including the right to bodily integrity."[2]

Although a definition of property as merely "valuable resources" might seem overly broad, even the most sketchy analysis of property rights soon reveals that the varieties of property to which men and women give value in economic exchange are so numerous, as are the types of legal protection afforded to the rights to their use, that it would be extremely difficult to lay down a hard and fast, universal definition of property. Posner's working definition seems as useful and all-encompassing as any other.

The principal subject of this essay is *general property*, and frequently only real estate or *real property* is meant (this is clear in context). The other principal form of legal property that is discussed here is *personal property* or *personalty*, which in law is a broad, general term encompassing, as Posner might put it, anything of value that is not real estate or real property.

Why Do Property Rights Matter

Increasingly, in the modern world, it has become clear that the failure to establish and protect property rights, at least in the sense that Posner means the term, goes far toward explaining persistent economic and social underdevelopment in many parts of the world. Underdevelopment has proved persistent in both countries that retained property rights in a narrow social hierarchy, using the typical 1950s Latin American military dictatorship as an example, and countries that assigned property rights to no one but the state (that is, to everyone and therefore to no one), using the member states of the former Soviet Union as a classic example.

The World Bank, together with associated regional development banks and, to a much lesser degree, the International Monetary Fund, have endeavored for more than 50 years to promote reconstruction from the ravages of war and development (principally in former European colonies) with varying degrees of success. Regardless of monetary and budget policies, development generally has tended to be both successful and sustainable in the comparatively few countries where adequate legal systems were organized to define and protect property rights and to enforce contracts; meanwhile, development either has failed or proved unsustainable in countries where property rights were unprotected or where contracts were incapable of enforcement.

Gangster states have difficulty in either attracting or retaining investment capital or productive citizens once the investors and citizens understand that whatever they have can be taken from them by governmental caprice or by bandits operating with governmental approval or acquiescence. Afghanistan currently illustrates this point perfectly. There are reasons, in other words, why the north of Italy developed into a modern European state since World War II, while Sicily and much of the south of Italy remained mired in public corruption and underdevelopment throughout most of the postwar period.

The economic reasons why underdevelopment would be a natural and logical consequence of the failures to assign property rights and to provide legal protection for them, to allow for their distribution through ordinary market processes, are self-evident. These reasons are derived, in turn, in Anglo-American economic and legal theories, from two 17th century English moral philosophers, Thomas Hobbes and John Locke. Hobbes held that the protection of property is the moral basis of society and of the establishment of governmental sovereignty over individuals. In his view, the absence of property rights enforced by the sovereign would lead to destructive anarchy.

Locke held that individuals acquired property rights through their labor regarding the things of nature and that property rights precede and are morally superior to the claims of government (Hobbes would deny these propositions). Locke also would allow individual defense of property rights by use of force, while Hobbes would prefer that the sovereign have a monopoly on the use of force. Both Locke and Hobbes would agree, however, that the protection of property rights is the principal objective of society and that property rights and personal liberty must either march hand in hand or not march at all.[3]

Competing Legal, Economic, and Philosophical Views of Property Rights

Competing theories and customs regarding property rights in, say, Africa, India, or China might be interesting to study but have little or nothing to do with the evolution of the Anglo-American system of property rights. For present purposes, before the modern period (after 1800), our review is confined to the Anglo-American jurisprudential tradition. Also, because a separate line of evolution of theories and practices of property rights began here by 1720, the latter part of this review is confined to the American tradition alone.

Since the late 18th century, changes in the British system of property rights have had comparatively little effect on the development of the American system of

[2] Richard A. Posner, *Economic Analysis of Law*, 5th ed., New York, NY: Aspen Publishers, Inc. (1998), p. 35.

[3] See, e.g., Thomas Hobbes, *Leviathan* (1651), and John Locke, *Second Essay on Civil Government*, or *Essay Concerning the True Original, Extent and End of Civil Government* (1689).

property rights. (Would that the same could be said of the French Revolution, Marxist theory, European corporatist or statist theory, and the post-World War II continental welfare states like Sweden, the United Kingdom before Prime Minister Margaret Thatcher, and France).

There are at least four distinct theoretical views of property in the modern canon of political economy models. These models are derived from socialism, corporatism or statism (further defined below), classical liberalism, and utilitarianism (which is the ancestral form of logical positivism, pragmatism, and certain varieties of economic positivism, for present purposes). With respect to property rights, only the corporatist or statist model (hereafter called "statism"), which has its historical roots in the social organization of medieval Europe and, earlier, of the Roman Empire, is as old as the classical liberal model.[4] The Anglo-American version of classical liberalism is rooted in the common law traditions of western Europe, especially the legal procedures of the ancient Germanic tribes that settled in Great Britain after the Roman imperial presence withdrew in the early 5th century A.D.

Early (biblical and classical) references to property *informed* but did not *determine* the decisions and actions of the historical figures who shaped the distinctive Anglo-American tradition of property rights. It is a mistake, albeit one often repeated, to view the English (or American) common law of property as a direct derivation from biblical precedents. The common law existed among the Angles, Saxons, and Jutes who settled in England even before the country became nominally Christian (after 597 A.D.). In France as well, the customs of another Germanic tribe, the Salic or Western Franks, were set down in a legal code that determined property rights more than 70 years before Clovis, their king, became a Christian in 496 A.D.

Perhaps the single most important influence on the economic aspects of the evolution of the English common law of property were the customs extant at the time of the Norman invasion (1066) and their modification by William the Conqueror and subsequent English kings. The political struggles of, first, the nobles and, later, the property-owning, non-noble classes to vindicate their property rights by advocating *restoration* of the pre-Conquest rules of property are illustrated by several surviving constitutional documents, including the Coronation Oath of Henry I (1101), Magna Carta (1215), and the Summons of the Model Parliament (1295). A constant theme of these early documents is that the king may not invade property rights except in accordance with established custom and due process of law. Magna Carta and the later constitutional documents provide that the king may not impose taxes without the consent of the common council of the realm. Thus, especially after 1295, both Parliament and the law courts were either interposed between king and subject (royal absolutist interpretation) or granted supremacy over the king (Whig interpretation) in the clearly related matters of property rights and taxation. Principles of taxation are completely intertwined with principles of property rights because, as Daniel Webster pointed out to the U.S. Supreme Court in arguing *M'Culloch v. Maryland* (1819), "The power to tax is the power to destroy."

The evolution of English and early American theories of property rights and taxation can be traced easily from the early sources already mentioned through the Agreement of the People (1649), the English Declaration of Rights (1689), John Locke's *Second Treatise on Civil Government* (1689), the Virginia Bill of Rights (1776), the Declaration of Independence (1776), the Northwest Ordinance (1787), and the U.S. Constitution.[5] The property rights provisions of these documents

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[4] *Corporatism* is the correct economic and philosophical term for this political economy model, the standard term for it outside the United States and the only relevant entry in John Eatwell, Murray Milgate, and Peter Newman, eds., *The New Palgrave: A Dictionary of Economics*, London, UK: Macmillan Press Ltd. (1987). The *Petit Larousse*, Paris: Librairie Larousse (1967), a standard French dictionary, defines *corporatisme* as (translated), "A doctrine favorable to groupings of corporations, inspired by the writings of the the Marquis de la Tour du Pin," an 18th century French nobleman. Under the *Larousse* definition of *corporation*, it is stated that, under the Old Régime, corporations were groupings of the members of the same skilled profession (that is, guilds of craftsmen of the medieval type). The French definition is intriguing because of what it does not say: Corporatism was the formal political ideology of the Vichy regime in France, 1940-1944. *The New Palgrave* (Joseph Halevi) defines *corporatism* as "[A] set of political doctrines aimed at organizing civil society on the basis of professional and occupational representation in chambers called Estates or Corporations. It maintains that class conflict is not inherent in the capitalist system. …Corporatism has its ideological roots mainly in 19th-century French and Italian Catholic social thought." In formal corporatism, the corporations (an inclusive term meaning labor unions on the Congress of Industrial Organizations model, trade associations of producers of steel, automobiles, electric utilities, and the like) are supposed to "diversify at the level of each industry the general principles of industrial legislation formulated by the political assemblies." In the modern Italian conception of corporatism (the root doctrine for Mussolini's Fascism), the corporations or estates become mere organs of the state through which all industrial production is directed by the state. In Italy, the Mussolini government eventually brought labor unions to heel by using state power to control the unions, either directly or indirectly through business firms, "a very subordinate form of unionism. . . ." "The main element of modern corporatism consists in a detailed network of technical and juridical norms, aimed at controlling the labor movement." The short-lived National Recovery Administration (1933-1935) of the First New Deal was organized along corporatist lines.

[5] The constitutional provisions reviewed are U.S. Constitution, Art. I,

should be compared with analogous provisions in the French constitutional documents adopted during the French Revolution, 1789-1795, which, through the propagation of the Napoleonic Code, became the bedrock or framework constitutional documents for most of the civil law countries of continental Europe and French North America, including Louisiana.

The French Revolutionary Challenge to English Common Law Ideas of Property Rights

The French Revolution introduced new elements into the development of modern notions of property rights. Particular attention must be paid to a speech to the French National Convention by Maximilien Robespierre on April 24, 1793. Robespierre's speech articulated for the first time in post-monarchical Western Europe (the king was executed in January of that year) a state-centered theory of property rights, a theory requiring that a citizen be found "moral" (today, we might say "politically correct") to be worthy of owning property and enjoying the associated rights and privileges.

Robespierre's speech, inspired by the earlier writings of Jean-Jacques Rousseau (1712-1778) and motivated by the contemporaneous street agitations of the *Hébertistes*, the extreme left-wing faction of the people, engendered a revolutionary, redistributive doctrine of property rights and a demand that all taxation be progressive. In their benign form, these French revolutionary doctrines became widespread on the continent of Europe during and after the reign of Napoleon I (1799-1815, with interruptions). In their extreme or *Hébertiste* form, Robespierre's (or Rousseau's) ideas became the basis of continental European socialist doctrines about property for the next 150 years. For example, decades later, Pierre Proudhon (1809-1865) wrote, "Property is the right of exclusion and theft" and also a "despotic power."

It seems appropriate to note here that Robespierre spoke in 1793—*after* the drafting of the United States Constitution in 1787 (*see* James Madison on property, quoted above), its subsequent adoption and implementation in 1788, and amendment by the Bill of Rights in 1791 with specific protections of private property.

In other words, unless time could be made to run backward, Robespierre's ideas should count for nothing in the traditional interpretation of the property clauses of the U.S. Constitution, the constitutions of the various states that already existed in 1793, or the constitutions of the states that were carved out of the Northwest Territory, beginning with Ohio in 1802.[6] Unfortunately, Robespierrean redistributionism has had proponents in every generation, a fact that proves the wisdom expressed in the following passage ascribed to a July 10, 1790, speech by Irish judge John Philpot Curran:

> The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime, and the punishment of his guilt.

No Marxists met in Philadelphia during the summer of 1787, and no European corporatists or statists did so, either. Such ideologies did not exist, as a general matter, and certainly did not count in ordinary political calculus before these two competing versions of central economic planning clashed in the western European revolutions of 1848 and again, with even greater force, in the Paris Commune of 1871.

Some might view the American New Deal of the 1930s as a triumph of Marxist influence on the Federal government. But New Deal legislation and regulations were drafted mainly by non-Marxist lawyers and economists drawn from the largest banks, corporations, and universities. As Henry Hazlitt wrote,

> [G]overnment "aid" to business is sometimes as much to be feared as government hostility. This applies as much to government subsidies as to government loans. The government never lends or gives anything to business that it does not take away from business. One often hears New Dealers and other statists boast about the way government "bailed business out" with the Reconstruction Finance Corporation, the Home Owners Loan Corporation and other government agencies in 1932 and later.[7] But the government can give no financial help to business that it does not first or finally take from business. The government's funds all come from taxes. When the government makes loans or subsidies to business, what it does is to tax successful private business in order to support un-

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sec. 7, cl. 1; Art I., secs. 8-10; Art. II, sec. 2, cls. 2-4 (1787); Amends. 5 (1791), 14 (secs. 1, 4)(1868), 16-17 (1913). AIER offers to both its subscribers and the general public a convenient, pocket reference version of the U.S. Constitution, published in March 2001. *See* AIER website at www.aier.org.

[6] The organic law of the Old Northwest is the Northwest Ordinance, originally drafted by Thomas Jefferson in 1783 and enacted by the Continental Congress in 1787. The Ordinance contains specific protections of private property.

[7] *See* Walker F. Todd, "The Federal Reserve Board and the Rise of the Corporate State, 1931-1934," *Economic Education Bulletin*, vol. 35, no. 9 (September 1995), AIER. *See also*, Todd, "History of and Rationales for the Reconstruction Finance Corporation," *Economic Review*, vol. 28, no. 4 (1992), pp. 22-35, Federal Reserve Bank of Cleveland.

successful private business.[8]

The American Civil War created fertile ground for the growth of what retrospectively could be described fairly as statism, and the rising statism of public policy was barely slowed down (in some cases, it was encouraged) by Progressive Era reforms, wartime economic planning (twice), the New Deal, and the Great Society. Unfortunately, in contemporary academic discussions of property rights, the anti-statist view all too often is espoused by believers (despite all the contrary evidence now available) in the efficacy of the British and Swedish models for welfare states. Meanwhile, many modern American policy leaders seem to take the view that either state or corporate central planning is desirable as the guiding force of aggregate welfare, as long as they themselves are allowed to implement it in the guise of *managed competition*.[9]

Mainstream Variations of Property Rights Theories: Utilitarianism

Jeremy Bentham (1748-1832) became the father of modern English utilitarianism in the late 18th and early 19th centuries (esp. *An Introduction to the Principles of Morals and Legislation*, 1789), and through a line of direct intellectual descent to James Mill (1773-1836) and then paternally to John Stuart Mill (1806-1873), another new, alternative political economy model of property rights emerged, one that still has great intellectual appeal to most American-trained economists.[10] Through the influence of similar ideas espoused about the same time by Alexander Hamilton and, later, Henry Clay, Daniel Webster, Chief Justice John Marshall, and others, a strongly utilitarian view of property rights emerged in the American legal tradition. This view protected *business* (fictive or incorporeal) interests in property as distinct from *individuals'* (or the crown's) direct interests in property, a phenomenon unknown in medieval and Renaissance England before the Tudors and Stuarts and which the Whig reformers of later centuries constantly criticized.

Joint-Stock Trading Companies and Early Colonial Charters

The role of American colonial charters in shaping the ideas of British and early American legal theorists on corporate (fictive or incorporeal) property rights deserves brief mention. The first significant colonial charter for a colony that lasted was a joint-stock trading company charter issued to the Virginia Company in 1606. The company was split into two divisions, a Plymouth Company and a London Company, and it was the London Company that founded the Jamestown colony the following year. The Plymouth Company also attempted to found a colony on the coast of Maine in 1607, but it failed. Initially, King James I retained the right of governing the charter company colonies, but by 1612 Virginia was issued a new charter requiring the company's shareholders (not necessarily representatives of the colonists) to meet in quarterly "great and general courts" *in London* (presumed but not specified) each year to make ordinances for governance of the colony, no longer subject to direct rule by royal agents.

The Council for New England received a royal charter (another joint-stock trading company, but with proprietary privileges—see below) for settlements north of Virginia in 1620, but the only colony that it founded successfully was the Plymouth Plantation, and those Puritan separatists originally were aiming to settle farther south, toward Virginia, but were blocked by Cape Cod. Later fishing village settlements that the Council founded were abandoned except for Dorchester and Cape Ann (founded in 1623, modern Salem). In 1628 the Dorchester colonists obtained "a dubious land grant" from the Council, and in 1629 they obtained a royal charter along the lines of the revised Virginia Company charter of 1612 in circumstances suggesting that bribes were paid for the charter (not impossible – the new King Charles I was far from frugal, and Parliament would not vote him the taxes he desired). In any event, the new Massachusetts Bay Company charter conflicted with the prior (and presumptively still valid) Council charter. Both corporations' charters and governing "courts" physically were still in England. The Massa-

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[8] Henry Hazlitt, *Economics in One Lesson*, New York: Crown Publishers, Inc. (1979 rev. ed., orig. 1946), pp. 47-48.

[9] This particular variant of statism is called *dirigism*, a neologism derived from a French term with a slightly different meaning. The English definition of *dirigism* is, "Economic planning and control by the state" (*Webster's New International Dictionary*, 3rd ed. [1961]). The word does not appear in *Webster's New International Dictionary*, 2d ed. (1946), and neither does *statism* as used here. In contrast, the French definition of *dirigisme*, which appears to be more precise, is translated as, "A political system in which the government exercises the power of orientation, direction, or decision in economic matters." *Petit Larousse*, Paris: Librairie Larousse (1967). The *Larousse* defines *statism* (*étatisme*) as "A political system in which the state intervenes directly in the economic realm," which constitutes a subtle but still distinct differentiation from *dirigism*.

[10] While recovering from a heart ailment at his London house in February 1938, John Maynard Keynes received a visit from his old friend Virginia Woolf and her husband. Woolf noted in her diary that, while Keynes was bemoaning the current state of world affairs (Austria was about to fall to Hitler in the *Anschluss*, and Keynes regarded British Prime Minister Neville Chamberlain as a "low, flat-footed creature"), Keynes remarked that "Bentham [was] the origin of evil." Robert Skidelsky, *John Maynard Keynes: Fighting for Freedom, 1937-1946*, vol. 3, New York: Viking (2001), p. 14. One of John Stuart Mill's more famous books was *Utilitarianism* (1863). The formal link between utilitarianism and Auguste Comte (founder of logical positivism) is illustrated by another book of Mill's, *Auguste Comte and Logical Positivism* (1865).

chusetts Bay Company shareholders fell into two main groups: London merchants interested primarily in trade, and Puritan separatists. The leader of the separatists was John Winthrop, and he emigrated, bringing the Company charter with him: This symbolic act enabled the colonists to claim that they now had the right to govern themselves in America without reference to a court of shareholders or directors *in London*, and by its terms the charter did not require that they stay *in London*. Winthrop, 700 colonists, and the charter arrived in Salem in 1630, but the colonists removed to the site of the present Boston. The Massachusetts Bay colony was organized along the lines of a theocracy: Only church members in good standing with the Puritan hierarchy were allowed to vote. This was an issue until the charter was revoked in 1684 and the colony was united with Plymouth Plantation under a new royal charter in 1691.

The third type of early colonial charter was for proprietary colonies. English aristocracy sought to perpetuate itself in the New World, and aristocrats obtained royal charters that enabled them to establish feudal estates in which they would retain much of the land ownership and rent land to tenants who could, if the feudal overlords wished, perform feudal service (e.g., plowing fields, serving in the manor house, etc.). The Council for New England had a proprietary charter (1620) but surrendered it in 1635. Nova Scotia was a proprietary grant to Sir William Alexander in 1621, and Lord Calvert obtained a proprietary grant in part of Newfoundland in 1623. The failure of Calvert's colony led to the issuance of a new proprietary grant for the Maryland colony in 1632. Calvert was given all the powers of the Bishop of Durham in Maryland – the Bishop of Durham was the sole governing authority in his realm. Calvert was required, however, to make laws and impose taxes (as distinguished from land rents) "only with the consent of the freemen resident" in his colony. Then all new English colonies in North America after 1660 were founded under similar proprietary charters: New York was a pre-existing Dutch proprietary colony (1609) started by the Dutch West India Company. The English captured New York in 1664, and the New York and New Jersey colonies were given to the Duke of York (later King James II). The Carolinas were given as proprietary colonies to friends of King Charles II in 1660. Georgia was chartered as a proprietary colony in 1732 for 20 years, after which title was to revert to the king. William Penn obtained a proprietary grant, intended as a settlement for Quakers and other religious dissenters, that later became Pennsylvania and Delaware, starting in 1681. Penn's grant also made it clear that the Crown intended to exercise a more direct role in colonial governance, even in the proprietary colonies.

The British government began to convert earlier colonial charters to royal provincial charters or direct royal government in 1691, beginning with Massachusetts Bay (the franchise was extended to non-members of the Puritan church). The royal colonies had home rule for most purposes, but they also had royal governors, were subject to British navigation and customs acts, and implicitly were subject to British taxation, at least in the eyes of London. By the period 1776-1781, only two joint-stock trading corporation charters (Connecticut and Rhode Island) and two proprietary colonies (Pennsylvania and Maryland) remained.[11]

The Colonial Corporate Legacy: Corporations Expand in America in the 19th Century

After independence, as early as 1791 (founding of the Bank of the United States) the utilitarian view of property rights spawned governmental protection and promotion of corporations in America, an utter abandonment of the classical liberal theories of property that most of the Founding Fathers and the Constitution's Framers shared.[12] The first identifiably modern corporation statutes were enacted in Connecticut in 1837 and in England in 1844. The defeat of the Confederacy in the Civil War marked the end of the older, classically liberal view of the interplay between government and property rights in American jurisprudence.

In protest of the "corporate protectionist" view of property that dominated American political economy after the Civil War, culminating in the Supreme Court's recognition of corporations as having the same legal standing in the courts under the 14th Amendment as individuals in 1886,[13] there arose divergent, non-classical lines of attack, ranging from Henry George (1839-1897, esp. *Progress and Poverty*, 1879) and the "single tax" idea to Henry Demarest Lloyd (*Wealth Against Commonwealth*, 1894), Ida M. Tarbell (*History of the Standard Oil Company*, 1904), and the origins of modern anti-trust theory (*e.g.*, Justice Louis Brandeis, *Other People's Money, and How the Bankers Use It*, 1914). The "protected" interests among their contemporaries denounced all these as "socialists" (the Duke of Argyll

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[11] The writer is indebted to Merrill Jensen, ed., *English Historical Documents: American Colonial Documents to 1776*, London: Eyre and Spottiswoode (1955), pp. 61-64, for the information on colonial charters in this section of the essay.

[12] When it was proposed at the Constitutional Convention in 1787 that the new federal government be allowed to charter corporations explicitly, the proposition was withdrawn when proponents saw that it would fail. James Madison, *Debates in the Federal Convention of 1787*, Sept. 14, 1787, in Charles C. Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States*, Washington, DC: U.S. Government Printing Office, 1965 (orig. 1927), pp. 724-725.

[13] *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886).

called George a "communist"), but none of them (with the possible exception of Lloyd) would have warmed Lenin's heart.

Modern Statism

A fourth and final modern strain of property theories is corporatism or statism, explained more fully above. Statist doctrines arose in reaction to both classical liberal and Robespierrean socialist ideas of the 18th century Enlightenment. The standard study of the problem attributes statism to certain French legitimist exile writings (*e.g.*, Joseph de Maistre, *Discussions in St. Petersburg* [1821]). The main outlines of these doctrines were encouraged by the Catholic Church in western Europe (and by the established Protestant churches of northern Europe) after the revolutions of 1848 as a socially acceptable alternative to the agnosticism and class warfare believed inherent in the rising socialist ideas of the day.[14] By 1871, in the large continental nations (Germany, Italy, and France), mildly statist ideas held sway: community interests prevailed over individual preferences with respect to property, central economic planning was favored, society was organized along the lines of the medieval guilds (now called trade unions, trade associations of businesses, and agricultural cooperatives), and national cooperation against external competitors was emphasized over internal economic competition. The beginnings of the modern welfare state, featuring state-chartered, state-regulated, state-subsidized, and sometimes state-owned corporations, arose.

In the 20th century, the main battleground of ideas was between European socialism, on the one hand, and European and American varieties of statism, on the other hand.[15] The dominant idea was to reduce internal economic competition and to compete abroad as one undifferentiated national economic unit. In the post-war years, Japan and, to only a slightly lesser degree, Germany followed this model of development and property rights. Great Britain adopted the ideals of the modern welfare state in the aftermath of World War II (the principal advocate was the economist William H. Beveridge), vacillating between extreme utilitarianism (Labor governments) and moderate statism (Tory governments). Only in the last two decades or so has Britain begun again to honor classical liberal views.

It is more or less the same story for the United States. A strong variety of statism, combined with the beginnings of a modern welfare state, reached its high-water mark in the mid-1930s.[16] The welfare state resumed its growth in Lyndon Johnson's Great Society, which Richard Nixon then *expanded*, 1964-1973. Only after the election of Ronald Reagan as President in 1980 was attention again directed toward classical liberal theory, with but slipshod execution of classically liberal economic policies. Classical notions of property rights were given short shrift from 1933 to 1981, and even recently, the closeness of the 2000 American election partly reflected the continuing indecisiveness of the American public about which theory of property it wished to endorse for the next decade or so.

Other Influences

Traditional Slavic, Native American, and Mexican theories of property deserve brief mention here as well. A common theme among these is what lawyers and legal historians term the unalienability of real property for a perpetuity. In other words, although these traditions might allow transfer of ownership or alienation of real property under certain conditions and for a certain time, such property should not and could not be alienated permanently. These customs bear at least a superficial resemblance to an Old Testament restriction on the alienation of rural real property (or the houses of Levites in the cities), the observance of the Jubilee, the liberation of the ancient homestead and of slaves and indentured servants, every 50th year.[17]

Finally, any general listing of competing ideas on property rights should mention the influences of post-modernist, feminist, and even hippie notions of property rights (*should private property rights even exist?*). However, exposition of such theories here is severely limited by space and time constraints. For those interested, post-modern theories of property rights, which have attracted considerable interest in western intellectual circles for several decades now, are expounded

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[14] On Joseph de Maistre, *see*, Isaiah Berlin, "Joseph de Maistre and the Origins of Fascism," in Henry Hardy, ed., *The Crooked Timber of Humanity: Chapters in the History of Ideas*, New York, NY: Random House (1992), pp. 91-174.

[15] *See*, Arthur M. Schlesinger, Jr., *The Coming of the New Deal*, vol. 2 of *The Age of Roosevelt* (1959), p. 3, Boston, MA: Houghton Mifflin Co.

[16] Walker F. Todd, "The Federal Reserve Board and the Rise of the Corporate State, 1931-1934," *Economic Education Bulletin*, vol. 35, no. 9 (September 1995), American Institute for Economic Research, Great Barrington, MA (AIER). The working definititon given there for *classical liberalism* (p. 46) is as follows: "*[C]lassical liberalism* began in the revolutions and civil wars of Great Britain in the 17th century and maintains the sanctity of individual political and economic liberty under the rule of law. Liberty or freedom, in turn, is a negative concept: the absence of coercion, or what Senator Robert A. Taft called the "liberty of the individual to think his own thoughts and live his own life as he desires to think and live" (quoted in John F. Kennedy, *Profiles in Courage* [1964], p. 235). Economic liberty ordinarily would require observance of the principles of free trade [Aristotelian voluntary exchange and proportional requital] and the absence of protection and subsidy."

[17] *See* Leviticus, chapter 25.

sufficiently (but not necessarily sympathetically) in other currently available works.[18] Outside of academia, they have yet to exert significant influence on the debate over property rights.

Conclusion

For a while, at least, socialist theories of property (especially features like state or community ownership of the means of production) seem unlikely to make much headway in the United States. However, statism remains an ever-present temptation to governing elites because of the facility for state- or corporate-directed central planning that it offers. Thus, modern statism, even in the moderate form usually encountered in industrial economies (often under the euphemism, "mixed economy"), remains a peril to individual liberties and property rights. Meanwhile, utilitarian notions that have been transformed into modern welfare liberalism probably still are the dominant ideology of the day with respect to property rights in many, if not most, parts of the United States. Nevertheless, the constitutionally supported view remains that of the classical liberal theory of property rights: Every free citizen has a natural right to acquire, possess, and enjoy property (in fee simple absolute for real property), to be protected in that enjoyment, and to dispose of his property according to his own free will.

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[18] *See, e.g.*, Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End*, New York, NY: New York Univ. Press (1995), esp. pp. 69-70, "Charles Reich's New Property." *See also*, Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in American History: Cases and Materials*, 4th ed., St. Paul, MN: West Pub. Co. (2000), esp. ch. 8, "The Current Struggle for the Soul of American Law," featuring, among other movements, law and economics, critical legal studies, law and literature, feminist legal theory, and "postmodern neopragmatic constitutional law." The writer commends both these surveys as introductions to the more exotic theories of property rights. The Minda text is comprehensible to non-lawyers.

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