Property, Power, and Freedom: Reich's "New Property" at Fifty

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Introduction

Fifty years ago this year [2014], Charles Reich published his landmark article, *The New Property*.[1] In the article, Reich meditated on the rise of the "public interest state," with its vast resources and unbridled discretionary authority over the "largess" it distributed.[2] The expansive power of the modern welfare state over the lives of people who depend on it for their livelihoods, he argued, threatened to create a "new feudalism," a system in which all entitlements are held subject to state approval.[3] "Caught in the vast network of regulation" generated by the public interest state, Reich claimed, "the individual has no hiding place."[4] Today, Reich's article is often remembered for its call to treat welfare benefits as property.[5] But the article is also notable for its stark description of property rights as a bulwark for the individual against state power and majority sentiment. "The institution called property," Reich asserts in the very first line of the article, "guards the troubled boundary between the individual man and the state."[6]

The half-century since the *New Property* has witnessed the rise of a sophisticated property-rights movement aimed at protecting – and expanding – the prerogatives of private ownership against encroachment by the "public interest state" Reich so feared.[7] This period has also coincided with a collective turning away from the kinds of social welfare programs that Reich wanted to convert into entitlements in order to better secure individual autonomy.[8] Instead of expanding welfare rights into a "New Property," the preoccupation of property-rights discourse since Reich's article has been on the corralling the power of government over the old property.

As a consequence of the rise of the property-rights movement, a private owner who feels mistreated by the government can reach out to any number of public-interest litigation groups that have formed since the 1960s. The Institute for Justice, for example, calls itself "the nation's only libertarian public interest law firm."[9] Founded in 1991 with seed money from the conservative billionaire Charles Koch, it has litigated dozens of lawsuits on behalf of property owners. Several of its cases have culminated in the United States Supreme Court, including *Kelo v. New*

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[1] 73 Yale L.J. 733 (1964).

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[4] Id. at 760.

[5] Cites.

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[7] Teles.

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[9] *See* http://ij.org/about.

London.[10] The Pacific Legal Foundation (another libertarian public-interest law organization) has also litigated numerous property rights cases up to the U.S. Supreme Court. Its mission statement describes its purpose as protecting "individual liberty against government encroachment, especially in areas of private property rights, discrimination by government, and regulations and programs that interfere with the entrepreneurial spirit of the American people." The Pacific Legal Foundation "represents individuals and businesses who sue or are sued by the federal, state, or local government in a matter of constitutional law."[11]

Strikingly absent from contemporary property rights discussions – just as they are in Reich's article and the litigation priorities of property-rights groups – is the potential for private forces to undermine property rights. To whom do owners turn for help fighting off violations of their property rights by other private actors? Not to property-rights litigation shops. The Institute for Justice does not get involved in disputes between private parties. It describes its mission as protecting "individuals whose most basic rights are denied *by the government*." "Simply put," the group's website declares, "we challenge the government when it . . . unconstitutionally takes away individuals' property."[12] If the taker is a private party, however, the owner needs to look elsewhere for assistance. The Pacific Legal Foundation similarly limits its invitation to parties bringing it "cases where there is a current dispute with a government agency, as opposed to a dispute between private parties."[13] The relative invisibility of threats to property by private actors in property-rights discourse is particularly notable among libertarians, who focus their attention on what they perceive to be the unique threat that the state poses to property. But it is hardly unique to them, as the first line of Reich's article illustrates.

The focus on state violations need not reflect a considered philosophical judgment by libertarians that private threats to property are unimportant. If pressed, some would probably say that, in a world of scarce resources, they have simply chosen to dedicate their efforts to what they perceive to be the most significant threat to individual owners – the overreaching regulatory welfare state.[14] But libertarian silence in the face of recent large-scale private abuses of property rights – such as the robo-signing, foreclosure scandal – does seem to suggest that property-rights groups make a sharp distinction between public violations of individual (particularly property) rights – a proper subject of their concern – and private violations, which they assume private parties should fight off for themselves.[15]

Libertarian inattention to private disputes is an interesting phenomenon that calls out for deeper consideration because, at least for statist libertarians like Robert Nozick and Ayn Rand, private disputes over property lie at the center of their

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[10] 545 U.S. 469 (2005).
[11] *See* http://www.pacificlegal.org/page.aspx?pid=343.
[12] *See* http://ij.org/about.
[13] *See* http://www.pacificlegal.org/page.aspx?pid=343.
[14] See Epstein.
[15] See infra notes XXXX and accompanying text.

political philosophies. The state is justified, Nozick contends, when it limits itself to "protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts," even if the way it funds these activities is redistributive in some sense.[16] "[T]he proper purpose of government," Ayn Rand concurs, is "to make social existence possible to men, by protecting the benefits and combating the evils which men can cause to one another."[17] In this, she echoes Locke's assertion that "[t]he great and chief end of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."[18] For (non-anarchist) libertarians, then, the private threat to property is logically prior to the public threat, and the threat that democratic governments pose to property rights arises only because of the need to institute governments so as to combat the potential for private abuse in the state of nature.[19]

For libertarians and others working in the natural-rights tradition, property rights are *moral* entitlements that others are duty-bound to respect, whether or not there is a state to force them to do so. Different theorists have asserted various philosophical foundations for natural property rights. Lockean theorists argue that self-ownership grounds the original acquisition of property rights and requires that subsequent transfers of property occur through voluntary transactions.[20] Hegelians justify natural property rights in terms of the connection between ownership and development of the autonomous will.[21] And theorists working in the broadly Aristotelian tradition understand access to stable property rights as vital to the project of human flourishing.[22] My purpose in this paper is not to adjudicate among these competing grounds for, or conceptions of, natural property rights. Instead, I want to explore the implications of private violations of property rights for libertarian accounts of property like the one Reich embraced in *The New Property*.

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[16] Robert Nozick, Anarchy, State and Utopia 26, 113 (1974).

[17] *See* Ayn Rand, "The Nature of Government," in Capitalism: The Unknown Ideal 295, 300 (1966). But see, e.g., Murray N. Rothbard, For a New Liberty: The Libertarian Manifesto (1978).

[18] John Locke, Two Treatises of Government (Everyman ed. 1993) (1698), II, 124. By "property," Locke meant something much broader than what we understand by the term. As he makes clear in the sentence just before the passage quoted above, Locke intends property to encompass a person's life, liberty, and estates.

[19] This tendency is hardly universal. Indeed, it is probably because he understood property as primarily aimed against other private actors that libertarian economist James Buchanan focuses his book, *Property as a Guarantor of Liberty*, almost exclusively on how private ownership, including self-ownership, empowers individuals to resist exploitation by other private parties. He turns to the threat posed by government only in a brief concluding note, which he says he only wrote at the urging of his editor who was surprised by Buchanan's failure to discuss government's threat to property rights. See James M. Buchanan, *Property as a Guarantor of Liberty* (1993), 12.

[20] Nozick.

[21] Penner; Waldron; Radin.

[22] Alexander & Peñalver.

My default throughout the paper will be a narrow, noninterference account of property rights and the freedom they safeguard.[23] I adopt this default, not because it is my own, but because most commentators perceive it to be hostile to the implications I will ultimately try to draw out.[24] In addition, exploring the tensions that this account of property creates for Reich's policy agenda will help to highlight the puzzles that arise from the exclusively state-focused nature of contemporary property-rights discourse.

More specifically, the questions I will explore in this paper are twofold: first, what are the dimensions of the libertarian state, properly understood, and, second, building on the supposed protective obligations of the libertarian state, is something more than the minimal state (as it has traditionally been understood) required? I will argue that the notion of an affirmative state duty to protect natural property rights suggests a state obligation to provide meaningful access to civil (and not just criminal) protection. In addition, and arising out of this obligation, I will argue that it is not an enormous step to assert an even broader interest in curbing excessive inequality.

Before making that argument, it is helpful to understand how property rights discourse has developed to its present condition in which it property is treated primarily as a bulwark against state intrusion. This condition was so entrenched by the time of *The New Property*, that Reich felt no need to even defend it. In Part I, I describe in broad strokes the trajectory of American property-rights rhetoric from the turn of the nineteenth century up to the mid-20th century, when Reich wrote his groundbreaking article. As many have observed, throughout American history, the property thought of John Locke has consistently played a dominant role in shaping that rhetoric.[25] Despite this, or, rather, because of it, the invocation of the language of property rights was, until the twentieth century, characterized by a great deal of ideological diversity.[26] Thinkers of widely divergent stripes framed their arguments in favor of and opposed to redistribution of land, wealth, and power in terms of property rights, drawing heavily on Locke's conception of labor as the foundation of private entitlements. Embodying the polyvalence of Locke's property thought at the turn of the nineteenth century is Thomas Paine. On the one hand, Paine was an eloquent critic of government overreach and an ardent advocate of natural property rights and free markets. On the other, he was the earliest advocate of something

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[23] Contemporary Lockeans tend to view property rights through the lens of a concern with noninterference with properly acquired entitlements. Property rights are, for them, the most important element of human freedom similarly understood as noninterference. Hegelians and Aristotelians share the Lockean concern with nonintereference, which they see as creating a zone of authority, stability and privacy necessary for human development, but they supplement it with an interest in assuring that people enjoy affirmative rights of access to the institution of ownership and the human goods that it facilitates.

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[25] Foner; Epstein.

[26] Foner.

like the modern welfare state. Both of these positions were rooted in his Lockean understanding of property.

Over the course of the nineteenth century, property-rights discourse existed in (broadly) two competing strains, both of which had been present in embryonic form in Paine's writings on property. The first built on Paine's advocacy of minimum welfare entitlements to generate a radical critique of private power rooted in property inequality.[27] The other embraced a version of the laissez faire that viewed the existing distribution of property entitlements as radically constraining the legitimate scope of government action.[28] For all their differences, both of these schools of thought presented their arguments in terms of natural property rights. In the twentieth century, in place of the decentralized rhetoric of property rights, progressives and realists turned to a more centralized conception of expert policymaking in which property became the end product of discussions conducted largely in other terms.[29] It was in the wake of this progressive and legal realist abdication that the rhetoric of property-rights came to be identified almost exclusively with a conservative brand of libertarianism preoccupied with restricting state power to redistribute and regulate.

In Part II, I describe how, for very progressive reasons, Charles Reich rejected the progressive turn away from the concept of property rights as an organizing principle. The concept of property, he correctly argued, is an important component of individual dignity and autonomy. But, rather than look to the property rights tradition associated with Thomas Paine and his radical successors, Reich embraced the laissez faire tradition's focus on property as a restraint on government interference. Reich's decision to employ of the property rhetoric of the laissez faire undermined and constrained his argument in favor of converting welfare rights into property entitlements.

In Part III, I explore the implications of Reich's approach for property disputes between private parties with vastly asymmetric resources. I suggest that a property-rights perspective attuned to these sorts of conflicts favors an obligation by the state to provide affirmative assistance to strengthen the enforcement of property rights against private encroachments in contexts where parties of unequal power are likely to confront one another. The argument builds outward from the implications of a conception of property rights as noninterference. At a minimum, I argue, that account justifies and requires a nightwatchman state to protect existing property rights. But, contrary to typical libertarian descriptions, the nightwatchman state must go beyond the enforcement of property rights against criminal violations if it is to ensure the security of property entitlements.

The difficulty of ensuring meaningful access to civil justice in light of extreme economic inequality creates some tensions for the noninterference theories of property and freedom and suggests that even those who view freedom as noninterference should be concerned about the impact of excessive inequality on the security of (natural) property rights. Moving beyond freedom as

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noninterference further broadens the implications of this account of property rights for existing distributions. Taken to its limits, this position offers novel arguments in favor of welfare entitlements along the lines that Reich advocated. It also suggests the need for even more ambitious redistributive policies that aim to prevent the kinds of economic inequality that could lead to the formation of ossified, caste-like class divisions. It does not make this argument as a limitation on natural property rights, but as a way of ratifying and protecting them.

I. The (Accidental) Imbalance of Contemporary Property Rights Discourse

Contemporary debates over property rights tend to focus narrowly on the proper scope of – and limitations on – government action.[30] By and large, conservatives, particularly property rights libertarians, want to restrict the power of even democratic government to regulate or redistribute private property. The priority of this (anti)government focus of contemporary property libertarianism is reflected in the mission statements of the libertarian property rights litigation groups I described above. On the other side, the contemporary left tends to argue in favor of expansive government authority to regulate and redistribute property. The rhetoric of property rights is typically a motivating ideal only on the conservative side of this split. Thus, debates over the proper role for government often seem like debates over the value of private property rights themselves.[31] Focusing on the state-dependence of property rights, however, suggests a third position, distinct from both property-rights libertarians fixated on restraining state power and from a progressive effort to justify empowering the government in which individual property rights serve merely as obstacles to be overcome. This third position constructs an account of ownership that takes individual property entitlements seriously but views them as justifying and indeed requiring, rather than simply resisting, progressive government action. Such a radical property rights position has played an important role in past debates but it has faded from the scene in recent years.

Although conflict over the nature and justification of property rights reaches back to the origins of the western philosophical tradition, we can understand the contours of current American debates over property well enough without going that far. John Locke's theory of the relationship between moral property rights and democratic government provides a useful starting point. For Locke, as for the contemporary property rights theorists who draw inspiration from him, the existence of natural property rights generates an argument about the shape government must take. The important point about property rights for Locke was that (whatever they included) they preceded the formation of governments. Because those property rights could only be abridged with their owners' consent, only a government based on popular consent (by which Locke meant majority rule)

[30] See, e.g., Buchanan, supra, 59.

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could legitimately claim the power to regulate private property.[32] Unlike contemporary libertarians, Locke did not evince any concern about protecting property owners from democratic majorities. As Karl Polanyi put it, Locke's ideas of constitutionalism "were directed only against arbitrary acts from above," not against democratic eruptions from below.[33]

Thomas Paine is the paradigmatic proponent of this polyvalent Lockean property-rights approach within the American property tradition. Paine shared Locke's preoccupation with the potentially oppressive power of government.[34] In contrast with Locke, however, Paine extended his suspicion of the state to include democratic governments.[35] He explicitly considered the problem of the tyranny of the majority, which is absent from Locke's theory of property and politics. "[D]espotism," Paine says, "may be more effectually acted by many over a few than by one man over all."[36] Particularly in his earlier writings, Paine attributed the sufferings of the poor primarily to government malfeasance and overreach. He distinguished between society, the domain of private commercial and social interaction, and government. "Society," he said, "is produced by our wants and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices. . . . Society is in every state a blessing, but government, even in its best state, is but a necessary evil."[37] Fix government, Paine thought, and society will take care of itself. And fixing government mostly meant asking it to do less, not more.[38]

Paine became a forceful advocate of free markets and government restraint. His experience with economic regulation in Philadelphia during the war was instrumental in the development of his thought in this regard. Faced with rapid inflation caused by congressional funding of the war effort, an extra-legal committee of leading figures in the independence movement in Philadelphia (including Paine) sought to impose strict price controls on a variety of commodities in 1779. When farmers and merchants refused to provide products at capped prices, the system collapsed and Paine became convinced of the futility of the price controls and government intervention in markets more broadly. As Eric Foner notes, 1779 marked a fundamental shift in [Paine's] thinking on economic matters. . . . Never again would he support the regulation of prices."[39]

But Paine did not understand his embrace of limited government, free markets, and rights of private ownership to rule out ambitious, and necessarily

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[32] See Locke, Two Treatises, II, 140; see also Alexander & Peñalver, An Introduction, ch. 7.

[33] Polanyi, The Great Transformation XXXX.

[34] See Michael Foot & Isaac Kramnick, *Editors' Introduction*, Thomas Paine Reader 26-27.

[35] See id.

[36] Thomas Paine, Dissertations on Government, in 1 Political Writings of Thomas Paine 371 (Solomon King ed. 1830).

[37] Thomas Paine, *Common Sense*,

[38] Id. at 92-98.

[39] Eric Foner, Tom Paine and Revolutionary America 181 (Rev. ed. 2005).

state-sponsored, schemes of property redistribution. In his 1795 pamphlet *Agrarian Justice*, for example, Paine deployed Lockean property concepts in support of his proposal to create a "national fund, out of which there shall be paid to every person, when arrived at the age of twenty-one years, the sum of fifteen pounds sterling, as a compensation in part, for the loss of her natural inheritance, by the introduction of a system of landed property."[40] Paine planned to pay for the fund by means of an estate tax.

How do we square these two features of Paine's thought – his affirmation of property rights and his endorsement of broad-based redistribution – with one another? Part of the explanation is Paine's affirmation, particularly in his later writings, to a highly qualified account of natural property rights rooted in human beings' original common entitlement to the fruits of nature. Although he shared the Lockean intuition that most of the value in improved land was the product of human labor and therefore properly subject to individual ownership, he believed that there remained in all property a residual common interest that could not be extinguished.

> As it is impossible to separate the improvement made by cultivation from the earth itself, upon which that improvement is made, the idea of landed property arose from that parable connection; but it is nevertheless true, that it is the value of the improvement, only, and not the earth itself, that is individual property. Every proprietor, therefore, of cultivated lands, owes to the community a *ground-rent* (for I know of no better term to express the idea) for the land which he holds; and it is from this ground-rent that the fund proposed in this plan is to issue.[41]

The common interest in private fortunes extended even to property other than land, since wealth in general was dependent on social preconditions for which individuals could not properly claim credit. Wealth generated from participation in market transactions is always rooted in cooperative work. Value is generated by (and depends upon) both supply and demand. Even the simplest act of buying and selling requires the successful collaboration of two parties. Consequently, Paine argued, even owners of non-landed wealth could not claim to be the sole origins of their fortunes. As a result, this wealth too was subject to a kind of social servitude:

> Separate an individual from society, and give him an island or a continent to possess, and he cannot acquire personal property. He cannot be rich. So inseparably are the means connected with the end, in all cases, that where the former do not exist the latter cannot be obtained. All accumulation, therefore, of personal property, beyond what a man's own hands produce, is derived to him by living in society; and he owes on every principle of justice,

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[40] See Thomas Paine, *Agrarian Justice*, in Thomas Paine Reader 471, 478 (Michael Foot & Isaac Kramnick eds. 1987).
[41] Id., XXXX.

> or gratitude, and of civilization, a part of that accumulation back again to society from whence the whole came.[42]

Because Paine viewed his redistributive proposal in *Agrarian Justice* as rooted in a common human entitlement on which property rights are engrafted, he was emphatic that "it is a right, and not a charity, that I am pleading for."[43]

Finally, it was no accident that Paine planned to finance his proposal with revenue from a tax on inheritance. Locke's emphasis on the importance of labor for the creation of legitimate property rights cast doubt for Paine on the legitimacy of intergenerational transmission of wealth from those who have labored to those who have not. Locke himself did not believe that owners had an absolute right to dispose of their estates as they wished upon their death.[44] Paine took this intuition even farther with his proposal: "the bequeather gives nothing: the receiver pays nothing. The only matter to him is that the monopoly of natural inheritance, to which there never was a right, begins to cease in his person. A generous man would not wish it to continue, and a just man will rejoice to see it abolished."

In the middle years of the nineteenth century, agrarian and urban radicals in the United States built on Paine's tradition of Lockean property. They kept their focus on threats from above, and, drawing heavily on ideas of self-ownership and God's original common endowment of nature, constructed a unified critique of slavery, landlordism, and wage labor. Their understanding of the implications of these ideas eventually led them away from Locke's focus on the illegitimacy of absolutist government and towards an identification of large private property owners – whether slaveowners, large landlords, or the owners of emerging urban industrial enterprises – as the most salient threats to individual property rights within America's imperfectly democratic society.[45] Paine's tendency to emphasize government oppression over private exploitation led these later nineteenth century radicals to distance their views from his, even as they were deeply influenced by many of his ideas about the limited nature of property rights.[46]

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[42] Id., 485.

[43] Id. at XXXX.

[44] See Locke, First Treatise of Government, XXXX (denying the propriety of primogeniture).

[45] This radicalism encompassed a broader set of views than those typically identified by historians as "republican." Instead of the traditional republican focus on the connection between property and virtue, many of the nineteenth century property radicals viewed property through the lenses of individual autonomy and self-ownership. Like republican property theorists, however, the account of property rights that emerges from this branch of the American property tradition emphasized the relational, qualified and redistributive nature of those rights.

[46] See Thomas Skidmore, Rights of Man to Property!, at 63-77 (1829) (criticizing Paine's argument that the rich and poor alike are entitled to have what they own protected against intrusions by government, democratic or otherwise); Foner, supra note XXXX, at .

Living within an established democratic system, but one characterized by the growing inequality, radicals in the middle years of the 19th century viewed powerful private actors, even more than government, as the principal threats to their rights and freedom.[47] The influence of Lockean and Paineite concepts of self-ownership and the commons on this later form of American property radicalism is best represented in the working class politics of the National Reform Association ("NRA"). During the middle years of the nineteenth century, the NRA waged simultaneous political battles on behalf of tenants against the large landlords of the Hudson Valley, for improved conditions for urban workers, and for the distribution of federal lands to settlers rather than land speculators.[48] Although they did not always see eye to eye with abolitionists, particularly on the matter of religion, they considered opposition to chattel slavery to be a natural corollary of their commitment to self-ownership.

Following Paine, these radicals did not reject the notion of private ownership. Instead, they took seriously the idea that God had originally given the world to all human beings in common and structured their understanding of private ownership to accommodate the persisting entitlements derived from that original grant. In this, as in their commitment to self-ownership, they were faithful to the Lockean property tradition, particularly Locke's proviso that appropriating property from the commons was only permissible if the appropriator left "enough and as good" for others to appropriate themselves.[49] Building on that proviso, nineteenth century radicals argued for upper limits on the amount of land any individual could legally own in order to avoid impinging on the rights of others to likewise become owners. In Wisconsin, for example, members of the state legislature proposed a bill in the winter of 1850-51 that would have limited individual property ownership to four city lots or 640 rural acres.[50]

The NRA and similar groups pushed relentlessly during the middle decades of the nineteenth century for the free distribution of federal lands to those willing to work them. On their view, only a system that prohibited land monopoly and included an avenue for continued individual appropriation through labor was consistent with God's original endowment of the earth to human beings in common.[51] NRA efforts provided a vital source of support for the movement that culminated in successful passage of the 1862 Homestead Act.[52] That law allowed

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48 For a history of the NRA, see Mark A. Lause, Young America: Land, Labor, and the Republican Community (2005). For a related discussion of the nineteenth century anti-landlord movement in the Hudson Valley, see Reeve Huston, Land and Freedom: Rural Society, Popular Protest, and Party Politics in Antebellum New York (2000).

49 John Locke, Second Treatise of Government, XXXX.

50 See Lause, Young America, 106-07. Although the legislation attracted significant support, it ultimately failed to become law.

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52 See Lause, Young America, 121-23.

settlers to acquire up to 160 acres of federal land for free if they could show that they had lived on and improved the land for a period of five years.[53]

Property radicals were skeptical of the emerging system of factory wage labor for the same reasons they questioned the legitimacy of landlordism and chattel slavery. Taking Locke's notion of self-ownership in the direction that presaged Marxist theories of exploitation, they argued that, in the absence of affirmative efforts to enhance workers' bargaining power, wage labor tended towards the immoral expropriation of workers' labor power in ways that signaled a violation of their continuing interest in God's original common endowment (out of which employer's property ultimately derived).[54] To counter this exploitation, they advocated the formation of workers cooperatives and early labor unions.

Although they were sensitive to the threat to private rights posed by landlords, employers, and monopolists, radicals were not blind to the danger of state power. They tended to view government as a necessary evil – a counterweight to concentrated private power, but one that could become an independent source of oppression if left unchecked. Thus, their political program also sought to limit government. But their conception of limited government left plenty of room for the state to combat concentrated private power.[55]

The same Lockean private property tradition that inspired supporters of land and labor reform also gave rise to a laissez faire ideology built around rights of private property and freedom of contract. Although similarly rooted in a commitment to self-ownership, supporters of the laissez faire insisted that government, was the most significant threat to individual rights.[56] Through the middle years of the nineteenth century, the radical and laissez faire property rights overlapped to a certain extent, and adherents reached common conclusions on some of the most salient issues of the day, particularly slavery.[57] But the tension between the two positions grew with the rise of industrialism after the Civil War.[58] An emphasis on either government or private power led them to very different conclusions about issues like landlordism or labor standards. By the end of the nineteenth century, a hybrid position like Paine's – combining egalitarianism with a belief in minimal government – was increasingly difficulty to sustain.

On the left, property rights radicals perceived tenancy and wage labor as tending almost inevitably towards exploitation and violation of natural rights.[59] On the right, proponents of the laissez faire saw both as unproblematic manifestations

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[53] 12 Stat. 392 (1862).

[54] See Gregory Alexander, Commodity and Propriety 124-25 (1997) (discussing Thomas Skidmore, Rights of Man to Property! (1829), and describing his arguments against land monopoly as "[a]nticipating Marx"); see also Lause, Young America, ch. 6; see also Sean Wilentz, Chants Democratic.

[55] CITE – Lause.

[56] CITE.

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of the freedom of contract.[60] Whereas radicals perceived powerful economic actors –employers and landlords – as grave threats to self-ownership, proponents of the laissez faire believed that the fact that (unlike government) private parties interacted with one another through putatively voluntary transactions in competitive markets defanged that threat.[61] Consequently, late nineteenth century supporters of the laissez faire, like contemporary property libertarians, kept their attention fixed on the menace of government coercion.[62]

The progressive (and, later, realist) critique that emerged in the early 20th century in reaction to the laissez faire took a variety of forms, but the dominant approaches largely agreed in shifting the category of "property" away from center stage. Rather than deploying a morally grounded concept of moral property rights in support of redistributive goals, as the nineteenth century radicals had done, progressive and realist theorists adopted their own understanding of property rights as largely indeterminate "bundle of sticks."[63] On their view, property was a flexible set of positive legal rights among persons with respect to scarce resources. One goal of the progressive account of property was to create space for government regulation and redistribution of property, but this came at the cost of weakening the degree to which property (so understood) could protect the individual against the state. Rather than understanding property as the sort of concept with enough determinate content and independent moral weight to guide or constrain judicial or legislative decisions, progressives treated property simply as the collection of substantive entitlements that emerged as the end-result from lawmaking decisions that were themselves undertaken in other terms.[64]

The progressives' account of property as an indeterminate and malleable concept cohered particularly well with two elements of their political thought. The first was progressive thinkers' skepticism about natural rights. Their rejection of

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62 *See, e.g.*, Morton Horowitz, *The Transformation of American Law, 1870-1960*, at 23 (1992); Huston, Land and Freedom, *supra*, 136 see also William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 Md. L. Rev. 1, 9 (1985); see also Duncan Kennedy, *Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, 3 Research in L. & Soc. 3 (1980); Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975. I am not making a claim here about the motives of judicial proponents of *Lochnerism*, *see* Alexander, *Propriety and Commodity*, supra, at 249-50 (challenging the notion that the *Lochner* era courts were engaged in crude class politics); but rather a broader claim about how and why a particular (laissez faire) version of property thought was (and, for that matter, remains) appealing to industrialists and other property elites.

63 See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357 (2001) (discussing the progressive motivations behind the "bundle of sticks" account of property); XXXX Penner, UCLA.

64 Alexander; Katz; *cf.* Felix Cohen, Dialogue on Private Property, 9 Rutgers L. Rev. 357, 380 (1954).

laissez faire ideology of property rights was rooted in, or perhaps in some cases motivated, a rejection of natural rights theory more broadly.[65] That suspicion of natural rights entailed the rejection of the radical property rights tradition of the NRA just as much as it did the dismissal of laissez faire commitments of classical legalism. Second, the progressives' account of property fit nicely with their faith in technocratic expertise.[66] Nineteenth-century property radicals' tendency to frame their claims to redistribution in terms of individual natural rights to and of private property had a populist, decentralized and democratic valence that ran against progressives' tendency to prefer more centralized, expert-driven models of law and policy making.[67]

Some theorists have accused the realists' "bundle of rights" conception of ownership of dissolving (by design) the very idea of property.[68] This almost certainly overstates the case. As Felix Cohen put it in his famous Dialogue on Private Property, property is more than a "euphonious collection of letters."[69] Nevertheless, it is true that progressives' account signaled a retreat on the left from organizing legal arguments around a morally grounded concept of property as it was employed by the nineteenth century radicals. Progressives hoped that by redefining property as the flexible output of (expert-informed) lawmaking they could create room for state action in pursuit of progressive ends. Implicit in this approach was a view of property rights as obstacles to be overcome.[70] Thus, the progressive approach to property had the predictable result of shifting the concept of property to the outer edges of progressive policy discussions. Instead of an animating force, property became largely a nominal placeholder. Over the course of the twentieth century, the debate between progressives and conservatives as it related to private ownership increasingly ceased to be, as it had been in the nineteenth century, a conflict between competing visions of natural property rights. Instead, debates over state regulation and redistribution assumed the now familiar dynamic of a struggle between advocates of state-sponsored redistribution or regulation, on the one hand, and champions of "property rights," on the other.[71]

This progressive move away from the concept of property would not merit much discussion if it had no impact on the outcome of those debates. If property is as empty a vessel as progressives believed, then what really matters is the soundness of the bottom-line policy positions the progressives advocated. But the

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[65] Horowitz, supra, at 156-59, 170 (discussing opposition to natural law as a central motivation of progressive legal theory and moral skepticism as characteristic of the legal realists); Alexander, supra, at 334; see also Barbara H. Fried, The Progressive Assault on Laissez Faire 14, 76 (1998) (arguing that many legal realists thought that "rights talk" had to be "shucked off in favor of explicit policy analysis").

[66] CITE

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[68] See, e.g., Thomas C. Grey, *The Disintegration of Property*, in Nomos XXII: Property (J. Roland Pennock & John W. Chapman eds. 1980); Merrill & Smith.

[69] Felix Cohen, Dialogue on Private Property, 9 Rutgers L. Rev. 357, 359 (1954).

[70] See, e.g., Fried, supra note XXXX, at 16.

[71]

shift away from property as a meaningful category has substantive consequences. For instance, I have already mentioned how the notion of property rights lends itself, as a conceptual matter, to decentralized policy solutions that put power in the hands of owners rather than policymakers.[72] Property solutions therefore tend to have a populist, bottom-up quality, at least when ownership is sufficiently dispersed. That decentralized quality may be valuable in its own right. Even if the concept of property is not sufficiently determinate to resolve many fine-grained policy questions, it has enough definitive content to steer policy discussions in the direction of solutions structured in such a way as to grant owners a privileged position vis-à-vis a particular resource and to delegate to those owners a broad zone of discretion over their use.[73] And such owner-oriented solutions may be what is required, at least from the perspective of certain moral theories.[74] In addition, solutions structured in decentralized property terms may be attractive for (indirect) consequential reasons.[75]

Second, as a positive legal matter, in the American constitutional system, calling something "property" has a particular set of consequences for the state's power with respect to that particular something. The Takings and Due Process Clauses of the Fourteenth Amendment limit the power of governmental actors to take "property" for public use or deprive owners of that property without due process. The distinction between property and nonproperty is particularly salient when the something in question comes from the government itself, as Reich observed.

Finally, and somewhat more speculatively, the progressive shift away from framing their claims in property terms may have undermined the attractiveness of progressive policy proposals, even to their supposed beneficiaries. At least within American political culture, the language of private ownership has exerted a powerful gravitational force on the popular imagination.[76] As Jennifer Hochschild has observed, for example, respect for the "sanctity" of private property causes even those with no prospect of passing great wealth to their heirs to oppose steeply progressive estate taxation.[77]Ownership of private property – whether one's home or business – is enshrined in the concept of the "American dream."[78] And belief in the possibility of achieving it is virtually a fixed point in the American national character, even when reality fails to live up to the myth.[79]

II. Charles Reich and The New Property

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[72] Abandonment article; Katz.
[73] Katz; Intro to Property Theory.
[74] Waldron; others.
[75] Henry Smith; Hayek; etc.
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[77] See Jennifer L. Hochschild, What's Fair? American Beliefs About Distributive Justice 280 (1981).
[78] Perrin; others.
[79] Cites.

It was against the progressive approach to (or disdain for) the concept of property that Charles Reich (in the service of very progressive ends) was reacting when he wrote his classic article, *The New Property*.[80] For this reason, no one better highlights the contradictions engendered by the progressive rejection of the classical conception of property. His ends were progressive in the sense that his principal concern was to improve the lives of the least well-off: welfare recipients. But his focus on the case of welfare rights and his choice of a libertarian account t of property led him toward the view that the principal threat to individual liberty was the very welfare state created by the progressives and their New Deal allies. The failure of these architects of the welfare state to craft the entitlements they established in terms of traditional property categories arguably facilitated the very abuses Reich lamented. And his orientation against overweening state power and the humiliations it visited on vulnerable welfare recipients, pushed Reich further into the arms of the laissez faire conception of property. As I will discuss in the next section, however, Reich's embrace of the laissez faire's account of property as primarily protecting individuals against the state undermined his case for welfare rights in general, whether conceived as discretionary largess or as a new kind of property.

A. *New Property*

It is difficult to overstate the impact of Reich's *The New Property*. It has been cited in six Supreme Court opinions (though mostly dissents) and by over a thousand law review articles. When discussed today, it is typically for Reich's innovative argument that many forms of government benefits – particularly welfare and social insurance– should be protected by the Constitution to the same degree as more traditional forms of private property.[81] Focusing on the progressive nature of Reich's policy proposals, however, obscures the degree to which *The New Property* relies on a conception of private ownership usually associated with the right wing of the American property tradition.

Reich began *The New Property* with an observation that could have been embraced by any property rights libertarian. Private ownership, he said, "guards the troubled boundary between the individual man and the state" and is, indeed, "the very foundation of individuality."[82] Writing at the threshold of the Great Society, the year President Johnson proclaimed a war on poverty in his State of the Union Address, Reich observed that "[i]ncreasingly, Americans live on government largess – allocated by government on its own terms, and held by recipients subject to conditions which express 'the public interest.'"[83] Government largess is vulnerable to this imposition of conditions, Reich argued, because the law treats it as a privilege or "gratuity," not as the "property" of the recipient.[84]

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[80] 73 Yale L.J. 733 (1964).
[81] EXAMPLES.
[82] Id., 733.
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Because property is an important protector of independence and individuality, increasing reliance on government largess raises the specter of widespread dependence, which the government can leverage into what Reich called a "new feudalism."[85] Reich cited numerous examples of this leverage in action. He emphasized the onerous and often humiliating conditions the government imposed on welfare recipients, but he also discussed the power that discretionary government authority creates over those who must obtain contracts, licenses or franchises from the state to earn their livelihood. Conservative libertarians have treated the risk of dependence fostered by government largess as a reason to oppose government assistance.[86] As a political progressive, Reich supported government assistance, but he was genuinely worried about overbearing state power over its recipients. Thus, the puzzle Reich set out to solve was how to reconcile the existence of the welfare state with the values of independence and individuality he saw as embodied by Americans' traditional commitment to private property. His solution was to extend to many forms of government largess the security traditionally associated with individual ownership. By wrapping government-created wealth in procedural and substantive protections, Reich argued, recipients can derive the same independence from this "new property" that owners have traditionally obtained from their private property.[87]

In the landmark 1970 case of *Goldberg v. Kelly*, the Supreme Court took a step in the direction Reich was advocating. Relying heavily on Reich's scholarship, it held that welfare recipients are entitled to an evidentiary hearing before the termination of their benefits.[88] Echoing Reich almost word-for-word, the Court observed that "[m]uch of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."[89] Because the erroneous termination of welfare benefits "may deprive an eligible recipient of the very means by which to live" while the recipient tries to rectify the error, the Court held, the constitutional requirement of due process demands that the government provide recipients an opportunity to be heard and to cross-examine witnesses before it may terminate their benefits. The Court did not go as far in *Goldberg* as Reich had advocated in his article. It did not, for example, hold that welfare benefits were a constitutional entitlement, as Reich had recommended in the closing pages of his article. But it did emphasize the importance of welfare to its recipients, pointedly noting that welfare was "not mere charity."[90]

B. Old Property

The New Property was bedeviled by a powerful tension between Reich's progressive support for redistributive welfare-state policies and his reliance on a conception of ownership typically associated with the opponents of those policies.

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[85] Id., 768.
[86] Cite?
[87] Reich, supra, 778-87.
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[89] 397 U.S. at 263 n.8.
[90] 397 U.S. at 265.

Property, on Reich's view, "performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and 'antisocial' activities are given the protection of law; the owner may do what all or most of his neighbors decry."[91] Property, Reich argued, "draws a circle around the activities of each private individual and organization."[92] Outside that circle, people have to justify or explain their actions, but "[w]ithin, he is master."[93] Although the Bill of Rights serves a similar protective function, Reich argued that "[c]ivil liberties must have a basis in property, or bills of rights will not preserve them."[94] In Reich's view, the principal threat to "independence, dignity and pluralism" at the time he was writing was the growing power of the welfare state over individuals. "When government – national, state, or local – hands out something of value, whether a relief check or a television license, government's power grows forthwith."[95] The bulk of The New Property was therefore focused on exploring the dangers of this growing government power over the recipients of largess for individual liberty and dignity. "Caught in the vast network of regulation," Reich claimed, "the individual has no hiding place."[96]

Reich's conception of property as a zone within which owners have unfettered freedom, and of the government as the principal threat to that freedom, fit very comfortably with the laissez faire property tradition. But Reich's reliance on that tradition's account of property generated a number of problems for him. One obvious difficulty, as other commentators have observed, was that this version of property leaves little room for a state to pursue the sorts of progressive welfare policies he favored without violating the property rights of current owners. Treating property rights as a bulwark against majoritarian politics, in the way that Reich did, prevents the government from gathering the resources necessary to convert welfare benefits into property-like entitlements.[97]

There are a number of responses Reich could make to these charges. For example, he could argue that nondiscretionary, generalized taxation constitutes a lesser kind of threat to private ownership than the ad hoc actions of welfare administrators. But the awkward fit between Reich's libertarian conception of property as a shield against the state, on the one hand, and the coercive state-sponsored redistribution necessary for a welfare system to operate, on the other, is undeniable.

A second problem with Reich's effort to reconcile a laissez faire conception of property with the welfare state is his tendency to downplay the significance of private threats to private property and to the individual autonomy that property (on his view) safeguards. Reich's selection of instances of government largess abets his narrow focus on government. His article is heavy with examples drawn from the

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[91] Id.

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[93] Reich, supra, 771.

[94] Id.

[95] Id. , 746.

[96] Id., 760.

[97] See Simon, supra, 30-31.

world of business: government contracts, broadcast licenses, and professional and small business licensing.[98] When he talked about the poor, he focused on those receiving government benefits or social insurance. For all of these groups, the potentially oppressive power of government does indeed loom large. "When government . . . hands out something of value," Reich argued, "it automatically gains such power as is necessary and proper to supervise its largess. It gains new power to investigate, to regulate, and to punish."[99]

Almost totally absent from the *New Property*, however, were those whose vulnerability is not primarily to the state – for example, members of the working class – those who are employed, and therefore dependent on others (their employers) for their well being, but who were not particularly dependent on government largess for their livelihoods. If dependence on another for one's daily bread subordinates the recipient to the payer, as Reich asserted, then employees would seem to be particularly vulnerable. Why did Reich ignore the dependence of those – that is, most of us – who earn our income by working for someone else, often as at-will employees with few legal protections against arbitrary termination?[100] Reich's omission is particularly puzzling in light of the connection that he (along with many other theorists) draws between property ownership and individual liberty. "Political rights," he said, "presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated largely by self-interest, their well-being must first be independent."[101]

Reich occasionally acknowledged that large property owners could overwhelm even the government, subverting public power to private ends.[102] And, although he recognized that, "[f]rom the individual's point of view, it is not any particular kind of power, but all kinds of power, that are to be feared,"[103] he had little to say about the need to rein in the private power of the "farm landowner, the city landlord, and the working man's boss," all of whom he recognized as capable of using their property rights "to oppress their tenants and employees."[104] Notwithstanding his recognition of the possibility of threats from private power, as Reich surveyed the developments of the prior decade from his vantage in 1964, he saw "the emergence of government as a major source of wealth" as the principal threat.[105] The problem with this view is that, while it protecting welfare recipients

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[98] Reich, supra, 737, 756, 758.

[99] Id., 746.

[100] Cite.

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[103] Reich, supra, at 774.

[104] Reich, supra, 733.

[105] Id., 733. Reich's description of the famous 1962 showdown between the Kennedy administration and the U.S. Steel Company typifies his tendency to disregard the power at work within the private domain. In a very public confrontation, the administration had used the threat of lost government contracts to get the company to rescind a planned price increase. Reich treats the episode as an ominous example of government's power to leverage its contracts into coercive

against the state, it does not offer any reason for the state to create welfare in the first place. Faced with the increasing state power engendered by government largess, Reich theory of property arguably fits better with a call to shrink government's provision of largess than with one to convert discretionary largess into property rights.

Part of the explanation for this choice is no doubt that Reich was writing at the very apogee of postwar economic equality. By most measures, economic inequality in the United States reached its high point in the late nineteenth and early twentieth century. After the onset of the Great Depression and the implementation of New Deal labor and welfare policy, economic inequality in the United States steadily declined in what some economists have termed "the great compression."[106] Economic inequality was hovering at its lowest levels in the 1950s and 1960s, right around the time Reich was penning *The New Property*.[107] And most economic theorists accepted Simon Kuznet's hypothesis that low inequality was a normal and permanent state for developed industrial economies.[108] If, as Kuznets argued, the vast inequality of the Gilded Age was the anomalous (and transitory) consequence of the shift from an agrarian to an industrial economy, concerns rooted in that experience may have seemed (permanently) outmoded to Reich. In the years since *The New Property*, however, economic inequality has exploded back onto the scene in the United States, even as it has largely remained in check elsewhere in the developed world.[109] Increasing inequality in the United States has brought with it a renewed attentiveness to its potential impact on the insecurity of the poor in their interactions with powerful private economic actors.[110]

Despite the hint in *Goldberg* that welfare benefits were more than mere privileges, the Court has – in the years since that case – steadily moved away from

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authority over private enterprise.[105] But Reich fails to note that, shortly before its run-in with U.S. Steel, the Kennedy administration had used its leverage to convince the United Steel Workers to accept under a new contract wage increases that were more modest than the union had hoped to win. See Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America*, MIT Working Paper, MIT-IPC-07-002, at 27; *see also* Timothy Noah, *The Great Divergence* 135 (2012). Coming as it did on the heels of those wage concessions, the Kennedy administration (and the union) saw U.S. Steel's proposed price increase as a betrayal: an attempt to capture for the company revenue that might have gone to higher pay for workers. Focused as he is on the conflicted relationship between the property owner (U.S. Steel) and the government, Reich ignores the relationship between the property owner and its employees.

[106] See Claudia Goldin & Robert A. Margo, *The Great Compression*, 107 Q.J. of Econ. 1 (1992); see also Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998,* Q.J. of Econ. 1 (2003).

[107] See, e.g., Timoty Noah, The Great Divergence 20-25 (2012);

[108] Simon Kuznets, *Economic Growth and Income Inequality*, 45 Amer. Econ. Rev. 1 (1955).

[109] See id.

[110] Examples.

Reich's vision of constitutionally protected, substantive welfare rights. Indeed, far from finding an affirmative constitutional obligation to provide the indigent with resources, the Court has reaffirmed the traditional libertarian view that the Constitution limits state power and does not impose affirmative duties on the state to act.[111] As Judge Richard Posner put it in a 1982 case, "[t]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."[112] Fifty years after *The New Property*, Robin West is correct when she describes the conventional wisdom among jurists and scholars alike as reflecting the notion that the government has "no positive constitutional duties to protect citizens against anything at all – no duty to protect against private violence, for example, no duty to provide a police force, [and] certainly no duty to provide shelter or food for the homeless . . . ."[113] Building on this widespread view, courts have continued to uphold the sorts of onerous and intrusive conditions on the receipt of welfare benefits that Reich decried.[114]

III. Balancing Public and Private Power

In thinking about the tensions within *The New Property*, it is useful to bring Reich's insights into dialogue with those of Adolf Berle.[115] A year after the publication of *The New Property*, Berle, a law professor and economist at Columbia, surveyed the same economic developments as Reich. But where Reich saw the threat of a new feudalism lurking in government's power over largess, Berle diagnosed a potential for feudal domination in the concentration of productive property in corporate hands.

A. Adolf Berle and Private Power

In his unfairly neglected essay, *Property, Production and Revolution*, Berle observed that economically productive property – property that confers the sort of independence that Reich was eager to defend – was increasingly owned by large corporations. The typical individual, he argued, owns property primarily for consumption, not for economic production. She may own a few shares of some large corporations, but she exercises no real control over their operations. "[T]he American owns his home, his car, and his household appliances; these are for his

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[111] See DeShaney v. Winnebago County, 489 U.S. 189 (1989).
[112] *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.).
[113] Robin West, *Normative Jurisprudence* 37-38 (2011).
[114] See, e.g., Wyman v. James, 400 U.S. 309 (1971); Sanchez v. County of San Diego, 483 F.3d 965 (9th Cir. 2006) (upholding warrantless searches of welfare recipients' homes). **[more cases]**
[115] Cf. Amnon Lehavi, The Corporation as a Nexus of Property.

consumption." And for his income, "he has a job, paying him a wage, salary or commission."[116]

Although Berle conceded that consumption property – and the privacy it facilitates – is an important part of the experience of individual freedom, he worried that it does not foster the kind of independence that Reich feared was buckling under the weight of growing government power. As a consequence of the concentration of productive property in fewer and fewer hands, Berle concluded, the relationship between property and liberty was fundamentally changing. Concentrated ownership of the means of production undermined individual independence and subjected the individual to new threats from powerful private actors:

> The political ideal invested in the Constitution and reflected in the Bill of Rights, and the fourteenth and fifteenth amendments, contemplated individuals whose personality was not to be invaded, save for police purposes designed to protect other personalities from invasion. In the simpler days of the eighteenth century, the state was the principal threat: the Bill of Rights restrained the federal government and by the fourteenth amendment extended the restraints to state governments. As the twentieth century entered its later half, it was clear that personal freedom could be abridged or invaded by denial of economic facilities offered or provided by privately-owned enterprises. Such facilities indeed were chiefly in private hands – overwhelmingly, in fact, offered or conducted by corporations. Yet they were essential to life and personality.[117]

The threat that concentrated private ownership poses to individual freedom justified – in Berle's view – state regulatory efforts to protect individuals operating within the zone of corporate control. Berle pointed to laws like the federal minimum wage, the Wagner Act (protecting, however imperfectly, the rights of industrial workers to form unions), and the Civil Rights Act of 1964 as examples of justified government efforts to protect individuals from private power.[118] Berle saw in these New Deal and Civil Rights era regulations an effort to extend to privately-owned productive property "rules derived essentially from the Bill of Rights."[119] The purpose of these rules was "to assure that the market power of enterprise shall not be used so as to create or perpetuate conditions which the state itself is forbidden to create or maintain."[120]

While Reich's preoccupation with the threat of government led him to discount excessively its role in combating private economic power, Berle

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[116] Adolf A. Berle, *Property, Production and Revolution*, 65 Colum. L. Rev. 1, 3 (1965); see also Adolf A. Berle & Gardiner C. Means, The Modern Corporation and Private Property (revised ed. 1968), ch. 1.

[117] Berle, *Property, Production, and Revolution*, 11-12.

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[120] Id., 10.

emphasized this liberty-protecting role for government. Berle's narrow focus on concentrated corporate power led him to misapprehend the significance of the sorts of small economic producers at the heart of Reich's libertarian account. This may explain why Berle fails to recognize the (small-scale) productive aspects even of some of the property he classifies as for consumption. As James Buchanan observed, for example, one way of understanding homeownership is as the production of one's own housing services by becoming, in effect, one's own landlord.[121]

Looking forward, Berle expected the concentration of corporate power to continue.[122] He hoped that the New Deal's early efforts to protect individuals from private power presaged a trend towards a more general bifurcation within the law of property, one that would couple strong protection for individuals' (consumption) property with pervasive regulation of productive property to protect those same individuals from overbearing private power. "The emerging principle," he said, "appears to be that the corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself."[123]

Subsequent developments have not been kind to Berle's predictions. Instead of continued concentration, the 1980s and 1990s witnessed a reversal of the mergers of the 1960s that generated the industrial behemoths that preoccupied Berle.[124] As the United States moved away from manufacturing and towards a post-industrial economy, large corporations split up and shrank in a wave of "bust-up takeover[s]."[125] Whereas, at the time Berle was writing, about 1 in 20 American workers were employed by one of the ten largest employers in the country.[126] By the turn of the millennium, the number had fallen almost by half.[127] On the legal side, far from imposing constitutional restraints on private corporations, the Supreme Court has gone in the opposite direction, extending to corporations a greater share of the Bill of Rights' protections against government intrusion[128] while doing little to expand workers' protection against private employers.

B. Property and State Power

Berle's and Reich's insights (and oversights) complement each other nicely. Combined, they seem to reunify the radical Lockean tradition. As Locke (and Berle) understood, a robust state is essential if we are to fend off private abuse. And, yet,

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[121] See James M. Buchanan, Property as a Guarantor of Liberty 35 (1993).
[122] Cite.
[123] See Adolf A. Berle, *Constitutional Limitations on Corporate Activity – Protection of Personal Rights from Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933, 942 (1952).
[124] *See* Gerald F. Davis & J. Adam Cobb, *Corporations and Economic Inequality Around the World: The Paradox of Hierarchy*, 30 Research in Organizational Behavior 35, 41-43 (2010).
[125] Id.
[126] Id. at 47.
[127] Id.
[128] See Citizens United; Hudgens.

Locke and Reich were also correct that state power constitutes an independent threat. To think otherwise, Locke famously warned, is to "take care to avoid what mischiefs may be done . . . by pole-cats, or foxes" at the cost of being "devoured by lions."[129] A government powerful enough to accomplish the task of taking on private threats to individual rights is also capable of becoming an independent threat to freedom.

Those concerned with protecting a robust sphere of individual autonomy need to tell a more complicated story than the prescriptions of either Reich or Berle, considered in isolation. A more accurate account of the relationship between property and freedom is one in which threats to autonomy arise with any form of concentrated power, public or private. Bromides about the state, the market, private property and freedom help us to rule out corner solutions of anarchism and communism, but they do little to guide us through the enormous range of options we actually confront in a mature, modern state built on capitalist foundations.

Digging deeper into the question of the relationship between property and freedom, we see that from the very first line of his article, Reich had the mechanism exactly backwards. Far from being an institution whose primary purpose is "guard[] the troubled boundary between individual man and the state," property works, at least in the first instance, by empowering private individuals to call upon the government to protect them from other private actors. In contrast, Reich repeatedly asserts that property ownership protects individual freedom against the state by fostering the independence of owners. He argues that "[c]ivil liberties must have a basis in property or bills of rights will not preserve them."[130] Reich does not, however, probe the mechanism supposedly linking property and freedom. He simply takes for granted that property confers on the owner the power to restrain or exclude the state, and then argues for extending that power to certain categories of government largess.

Many theorists have made similar claims about property's power to limit state intrusions on individual freedom. Their arguments take a variety of forms. Some assert that private property rights are essential to individual liberty, which simply cannot exist in their absence. "[F]reedom in economic arrangements," Milton Friedman plausibly observed, "is itself a component of freedom broadly understood."[131] Some argue that property rights are, as a causal matter, more fundamental than respect for other individual rights because, even in politically repressive societies, the genuine recognition of and respect for private property rights will lead to the gradual the emergence of other civil liberties.[132] Finally, some

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[129] John Locke, Second Treatise, ch. VII, sec. 93.

[130] Reich, supra, 771.

[131] Milton Friedman, Capitalism and Freedom 8 (1962).

[132] Cf. Jeane J. Kirkpatrick, *Dictatorships and Double Standards*, Commentary, Nov. 1979, 34-45 (distinguishing between traditional "authoritarian" regimes and "totalitarian" communists regimes, and asserting that the former respect existing allocations of status and wealth, are more likely to tolerate some dissent, and therefore have the possibility of decaying into regimes that respect individual liberty); Ellickson.

theorists claim that, once successfully in place, private property rights provide a means for resisting the encroachment of state power.[133]

It is very difficult to assess the empirical accuracy of these distinct arguments. It seems very likely true that, as Friedman argued, the complete socialization of the means of production is utterly inconsistent with political and civil liberty.[134] But it does not follow that the same is true of a modern, mixed economy that combines significant market elements with a robust regulatory welfare state.

What is important to recognize, in any event, is what each of these arguments assumes about the role of government and what each claims about the ability of property to protect individuals from the state. Far from establishing that property itself protects owners against the state, all the various versions of the argument linking private property rights with liberty assume the existence of a state that is already predisposed to protect (or at least tolerate) individual freedom. This is because the constraints that private property places on the state are ultimately imposed by the state on itself.

Respect for private property is simply the means by which the state expresses its prior acceptance of some degree of individual liberty and the rule of law. If liberty cannot exist in the absence of private ownership, then a state that wants to protect liberty will recognize and respect private property rights even when they are used in ways that cut against the state's (or ruling party's) perceived interests. Even if the state views political liberty as an unfortunate byproduct of a decision to respect private property rights, a decision it takes for other reasons (e.g., to pursue economic growth), the property-derived liberty exists only with the acquiescence of the state. On this view then, liberty does not exist through the creation of centers of power that are independent of the state. It is therefore hardly surprising to find Friedman conceding the obvious: "[g]overnment is necessary to preserve our freedom."[135]

Arguments about the freedom-protecting power of pluralism are harder to parse. These arguments take many forms, but they usually describe private property as facilitating the creation of plural power centers within society. As Thomas Merrill puts it, "private ownership of resources allows political dissidents to organize opposition parties and distribute literature critical of the government. It allows unpopular minorities to resist threats from the government."[136] These plural centers then serve as counterweights to state power, or "checks and balances" as Merrill puts it.[137] Such private power centers provide leverage for resisting attempts by the state to encroach on individual freedom.[138] The existence of such plural, decentralized power structures, the argument seems to be, creates a kind of

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[133] See Randy Barnett, The Structure of Liberty; Thomas Merrill, *The Property Strategy*, 160 U. Pa. L. Rev. 2061, 2087-88 (2012).

[134] See Friedman, supra, at 16-19.

[135] Id. at 2.

[136] Merrill, supra note XXXX, at 2087-88.

[137] Id. at 2087.

[138] See, e.g., Merrill in U. Pa. L. Rev.

inertia that is self-reinforcing. Thus, intrusions on property rights, even those undertaken for the best of reasons, weaken these plural power centers and make individual liberty more fragile.

As I will discuss later in this paper, pluralism does seem fairly obviously to contribute to freedom as against private actors by enhancing rights of exit from private relationships. But what does it mean for a private actor – even a large, economically powerful private actor – to constitute a center of power apart from the state, one that is capable of resisting state encroachments? After all, the power that private actors possess by virtue of their ownership of property is the power to call upon the instrumentalities of the state – the courts, regulatory agencies, etc. – for their own ends, whether against the state itself or (perhaps more commonly) against other private actors.

Felix Cohen famously defined property as follows:

> That is property to which the following label can be attached: To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private Citizen. Endorsed: The state.[139]

More recently, in their 1999 book, *The Cost of Rights*, Stephen Holmes and Cass Sunstein claimed that "[t]he idea that rights are essentially aimed 'against' government, rather than calling on government, is patently wrong."[140] Rather than getting government off owners' backs, private property rights constitute the power to call upon the state against those (public or private) who would violate owners' entitlements. Indeed, in the absence of state authority, Holmes and Sunstein contend, property rights would have no meaning. "Without government, capable of laying down and enforcing compliance with [property] rules, there would be no right to use, enjoy, destroy or dispose of the things we own."[141]

One can accept the truth of these realist claims even if one affirms the notion that property rights are somehow natural rights that are ontologically prior to the state and therefore not wholly dependent on positive law for their moral force. Indeed, it is precisely *because* natural rights theorists understand private property rights as strong moral entitlements that they ought to embrace Holmes and Sunstein's realist observation about the crucial role for the state in the protection of property. Assume, for example, that at least some property rights constitute moral entitlements that exist independently of the state. Some private owners would no doubt be able to exercise their (natural) property rights even in the absence of an effective state with the power to coerce others to respect those rights. After all, some people (let's call them the "good" people) would choose to respect the natural rights of others (as far as they could ascertain their content in the absence of authoritative state structures) notwithstanding the absence of the threat of state-sponsored punishment. Others would refuse to respect rights not backed by the

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[139] Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).
[140] Stephen Holmes and Cass R. Sunstein, The Cost of Rights (1999), 49.
[141] Id., 59.

threat of force. These people (call them "bad") would violate the property rights of others whenever they perceived it to be in their interests to do so. In the absence of a state-like authority, some (those who were physically strong, well armed, or able to hire or otherwise enlist the aid of good people who were either strong or armed) would be able to deter these bad actors from violating their rights.[142] But others – likely most people – would not be strong enough or rich enough to protect their own entitlements against bad people. For these, the absence of effective state power would make their (moral) property rights largely meaningless if they were unlucky enough to come across a strong, bad actor.

As moral entitlements, the property rights of even the weak and powerless deserve recognition and protection.[143] But, because, as a practical matter, property rights are insecure against the threats posed by other private parties in the absence of state authority, something like the minimal, nightwatchman state is not merely justified, but arguably required.[144] Even this seemingly banal conclusion is legally interesting, since it suggests that – contrary to what the Supreme Court has held the Constitution to mean as a matter of positive law[145] – we should strive to understand state actors as having affirmative duties to act to protect private property rights (along with other moral entitlements, such as bodily integrity).[146]

And, once a legal system is established, the power of private owners exists as an exercise of the state's (delegated) coercive power.[147] Even if the natural rights view is accurate as a description of the moral universe, and even if certain informal property-like rights can exist in the absence of (or in the shadow of) a formal state,[148] an owner who must rely entirely on self-help to protect her moral property rights, *particularly against the state*, is barely an owner at all. Property law is still positive law, even if the moral force behind that positive property law is natural right. And so private property only protects owners against the state with the state's active cooperation.

At a minimum, the necessary role of the state in enforcing property rights powerfully qualifies the kind of protection that property can be thought to grant owners against the state. If a state functions well – if it is structured properly and if its officeholders are honest and well-intentioned individuals pursuing the public good – then it will tend to honor formal property entitlements (as well as other types of moral and legal rights), whatever they might be. But it is the fact that the state functions well and respects the rule of law that does the lion's share of the work in this story.[149] Property, on this view, literally *marks* the troubled boundary, but it hardly "guards" it, as Reich claimed.

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[142] Social norms.

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[145] DeShaney v. Winnebago.

[146] See Christopher Serkin on the state's obligation to protect property.

[147] See Holmes & Sunstein, supra, ch. 3; see also Bernard E. Harcourt, The Illusion of Free Markets, ch. 8 (2011); Cohen.

[148] See generally Robert Ellickson, *Order Without Law* (1994).

[149] Buchanan on rule of law.

It is useful to contrast property's relative toothlessness against the state with the liberty-protective functions of gun-ownership claimed by radical gun-rights advocates. According to Wayne LaPierre, head of the National Rifle Association, "Freedom is nothing but dust in the wind till it's guarded by the blue steel and dry powder of a free and armed people . . . . Our founding fathers understood that the guys with the guns make the rules." The government might have the power to restrict gun-ownership and ammunition, but they are widely dispersed (or so the argument goes) owners can use those guns to resist further state encroachment without ever having to avail themselves of the state's own mechanisms of state power. The laws of physics are enough to give guns their power. Commentators sometimes refer to this argument as the "Red Dawn" fantasy.[150] However implausible the scenario may be, the idea of gun-owners deterring tyranny by deploying the state-independent power of their munitions bears no resemblance to the law-dependent (and, therefore, ultimately, state-dependent) mechanisms by which private property is supposed to "protect" (rather than merely embody) individual liberty against state encroachment. Reich treated property as the equivalent of a loaded gun. But, levied against an uncooperative state, a claim to property is no more potent than a plea for mercy.

Of course, the degree to which formal private property rights constrain state actors in their pursuit of the common good will (and does) vary a great deal based on the degree to which the country's law entrenches private property rights against state intrusion or rearrangement. In the United States, for example, the Constitution constrains state actors from interfering with existing property entitlements through, among other provisions, the Fourth Amendment protections against unreasonable searches and seizures as well as the Takings and Due Process Clauses of the Fifth Amendment. But if the American government were hopelessly corrupt or a lawless predator, these formal constitutional property rights would do little (nothing?) to protect individuals from government abuse.[151] Determining how much protection to attribute to respect for the rule of law in the absence of, for example, constitutional property rights is an interesting empirical question. But it is a question that is almost totally unrelated to the all-too-common form of argument exemplified by Richard Pipes's observation that both the Nazis and the Stalin trampled over property rights.[152]

Reich's call to enhance the freedom of welfare recipients by treating welfare as property is therefore a call for the state to stay its own hand. His argument has force because the state has in fact failed to afford largess the dignity it has traditionally granted to property rights and because he assumes the state would feel bound by the change of labels he is advocating. But his failure to go beyond the state-owner dichotomy robs him of the tools he needs to justify the existence of welfare rights in the first instance and, moreover, prevented Reich from grappling

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[150] XXXXCITE (Talking Points Memo)

[151] See Merrill, supra note XXXX, at 2078 (describing the "bandit state" as substantially undermining the institution of property).

[152] See Richard Pipes, Property and Freedom 214-18 (1999).

with the implications (and limits) of the *New Property* for individual freedom from private coercion.

C. Property, Freedom and Private Actors

In contrast to the state-dependence of property's protection from the state, property ownership does seem to empower owners as against other private actors. Private property law involves the allocation among private actors (by instrumentalities of the state) of rights over scarce resources.[153] When the state respects the rule of law, property owners have the power to call upon it to enforce their property rights against other private parties (and even, under many circumstances, against the state itself). Owners of property can usually summon the coercive power of the state against the thief, the defrauder, and trespasser.[154] Indeed, this is precisely why the situations where owners cannot count on state assistance are so instructive. African-Americans owners driven from their homes by white neighborhood associations[155] and Native Americans trying in vain to hold off encroachments on tribal land by white settlers[156] illustrate the empty promise of property rights without state backing.

When libertarians talk about the state's proper role in protecting owners from force and fraud, they are describing the mechanism by which the state's enforcement of property rights empowers individuals against other private parties. In the remaining pages of this paper, I will explore the implications of this relationship between property and private coercion. At first I will limit myself to a narrow conception of coercion that even libertarians should accept. I will then move beyond that account to think about the implications for property's conferral of private power under more expansive conceptions of freedom.

Property Rights and Access to Law Enforcement

As I have already discussed, it is for the most part uncontroversial (even banal) to observe that effective property rights – and any legal rights for that matter – require certain institutional (state) underpinnings in order to operate effectively.[157] To be able to enforce their property rights on a scale beyond the relatively small and local, owners need police, property records, and courts, but also roads and telephones (to call the police), and host of other legal, social, and physical infrastructure. Some of this infrastructure will be funded through general tax revenue in ways that are plainly redistributive.[158] This is true, for example, of roads and police protection and criminal prosecution, all of which enjoy the support of all but the most anarchist of libertarian theorists.

Libertarian opposition to private coercion suggests that, at a minimum, a central concern of their property theories ought to be the ability of private owners

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[153] See Alexander & Peñalver, Property Theory, at XXXX.

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[157] Holmes & Sunstein; Friedman; Alexander on Public/Private.

[158] Nozick, 55.

to access the levers of law enforcement in order to enforce property rights against other private actors. This includes access to the principal venue for noncriminally enforcing formal private property rights – the courts. And yet, while libertarian theorists generally favor (or at least tolerate) public expenditures on criminal law enforcement, they show almost no interest in the question of access to noncriminal law enforcement to resolve private property disputes except when the state is involved as the rights violator.[159]

This is interesting for a number of reasons. First, the line between crimes and torts is indistinct. More importantly, the division of labor between public and private enforcement efforts, even for criminal property violations, shifts over time.[160] In the eighteenth century, most criminal prosecutions were brought by private parties (usually the victims) at their own expense.[161] Over the course of the nineteenth century, the state took over most criminal enforcement, though pockets of private enforcement remain.[162] Many crimes that today are prosecuted by the state at taxpayer expense were previously torts whose enforcement was left in private hands.[163]

Shifts between the categories of crime and tort, and between private and public enforcement continue in modern times. For example, when the lunch counter sit-ins spread across the south in the spring of 1960, many southern states lacked criminal trespass statutes. In order to facilitate the arrest and prosecution of civil rights protesters, legislators in several southern states rushed to enact laws that made it a criminal violation to remain on private property after having been asked to leave.[164] These laws empowered state governments to use state law-enforcement resources to, in effect, subsidize the claims of property owners asserting a property right to operate segregated dining facilities.

Expanding the criminal protection of property rights offers one way for protecting private owners against private violations, but there are ample reasons to resist the use of the criminal justice system as a means of securing the protection of property rights against most private violations.[165] The severity of criminal sanctions and the intrusive nature of the criminal process necessitate that criminalization be reserved for the clearest and most intentional violations. Consequently, much private behavior that we can plausibly describe as consisting of some degree of "force" or "fraud" will (for very sound reasons) lie beyond the potential reach of the criminal justice system.

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[159] See supra notes XXXX and accompanying text.

[160] See David Friedman, *Beyond the Tort/Crime Distinction*, 76 B.U. L. Rev. 103, 103-04 (1996).

[161] See J.M. Beattie, Crime and the Courts in England 1660-1800, at 35 (1986); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. Rev. 59 (1996).

[162] *See, e.g.*, State v. Shack (privately initiated criminal trespass action).

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[164] XXXXProperty Outlaws (or sources cited therein).

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A great deal of behavior in the property context would not count as criminal, even though it is coercive. An owner who takes advantage of his neighbor's absence to build a structure over the property line will not face (state subsidized) prosecution, no matter how intentional the encroachment. While we resist criminalizing this behavior, it is not obvious that we ought always to leave owners to their own devices in trying to protect themselves against such threats to their property. Despite the harm of private rights violations, noncriminal law enforcement remains the ugly stepchild of libertarian property rights theory. Access to noncriminal enforcement is crucial to the use and enjoyment of property, and yet in most cases libertarians seem unperturbed that it is available only to those owners who are willing and able to pay for it. In order to effectively make use of our adversarial legal system, prospective civil litigants will need to hire a lawyer. And here, the relatively poor who cannot afford a lawyer's fees will find they have very few alternatives.

A number of mechanisms can reduce the anticipated costs of litigation for owners and therefore help to mitigate the impact of those costs on the security of property rights against private intrusion. These include the (1) fee-shifting mechanisms that require defeated parties to pay the prevailing parties fees (the so-called English Rule);[166] (2) the possibility of obtaining supracompensatory damages (such as treble damages or punitive damages) if an owner-plaintiff prevails in an action to reverse an egregious act of self-help;[167] and (3) more broadly, access to cost-saving procedures for aggregating claims or alternative dispute-resolution procedures that help to reduce the costs of litigation, like class actions, small claims courts, or specialized courts, such as landlord tenant courts.

For those in the United States, features of property litigation, particularly among private parties, make it difficult for owners to access these sorts of cost-saving and fee shifting mechanisms. First, U.S. law does not typically provide for fee-shifting in property litigation. If the owner is litigating against a government for a violation of civil rights, fee-shifting may be available under federal law.[168] But if the owner is litigating against a private party, she will have to pay for her own attorney even if her opponent's legal position is plainly without merit. And, unlike some tort actions, the measures of damages typically used in property lawsuits are sufficiently constrained that they do not provide a means of surreptitiously providing fee-shifting to the prevailing party. Indeed, lawsuits involving tangible property are typically about in-kind rights like possession or use rights. They therefore often involve relatively small cash damage awards.[169] Consequently, they do not lend themselves to the sort of contingent fee arrangement common in torts. An exception in this regard involves litigation between owners and the state over eminent domain compensation. Here, the issue is by and large the amount of cash

[166] See Parchomovsky & Stein, manuscript at XXXX.
[167] See id., manuscript at XXXX.
[168] See 42 U.S.C. 1988.
[169] Cite?

compensation, and a relatively sophisticated contingent fee bar has emerged to improve access to legal representation for property owners facing condemnation.[170]

Second, and relatedly, supracompensatory damages are difficult to obtain in most property litigation. Punitive damages are available for the most egregious property rights violations.[171] As a result, they are the rare exception rather than the rule in property disputes.

Finally, property claims tend to involve a small number of players with highly individualized claims. This makes cost-aggregating mechanisms like the class action difficult to apply. Small claims courts typically refuse to hear at least certain categories of property claims, such as claims involving disputes over ownership of real property.[172] And, even in specialized courts with simplified procedures, such as landlord-tenant court, studies have found significant advantages (in terms of final outcome) to being represented by counsel.[173] This suggests that, by themselves, the creation of these kinds of fora does not address the relative vulnerability of the property rights of those who cannot afford counsel. Although access to justice is a problem for the poor in all sorts of contexts, the availability (at all) of fee-shifting and (sometimes) contingent fee mechanisms when engaged in property disputes with the government means that the problem of access is even more severe in the private-against-private property litigation context.

The burden of private law enforcement has a number of important effects on the value of property rights to private owners, particularly for the poor.[174] First, if the anticipated cost of litigation to vindicate private property litigants is high, it may not be feasible for the owners of private property to go to court to get their rights enforced, even when they are confronted with a clear violation. Although it is difficult to estimate the cost of a typical property lawsuit, some estimates have put the cost of litigating a typical, not overly complex, civil action to trial in the range of $50,000.[175] For many households, this figure will approach and even exceed the value of all the property they own.

Most cases do not go to trial, but the high cost of even pretrial litigation means that a property owner who must go to court to assert her rights will not do so unless the value to the owner of the property interest in question at least approximates the expected costs of litigation. This substantially mitigates the security provided by formal property rights where the value of the property right is below those expected private cost of enforcement. A prospective violator of those property rights can evaluate the likely costs an owner will have to incur in order to enforce her rights and act accordingly. In many cases, the owner's implicit cost-benefit-analysis will suggest to the violator that it will not be cost-effective for the

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[170] See Nicole Garnett; Serkin; others.

[171] See Jacques.

[172] CITE.

[173] See supra note XXXX.

[174] I am using "owner" here to include anyone with a property entitlement. This could be a tenant, for example, or a mortgagor or even, under the right circumstances, a squatter or bare possessor.

[175] See, e.g., William A. Taylor, *The Economics of a Civil Lawsuit*, Business Lawyer.

owner to enforce her rights. And, as Gideon Parchomovsky and Alex Stein have correctly argued, this, in turn, will encourage the prospective violator to go ahead and violate the owner's rights.[176]

Where the property rights in question belong to a poor person, a prospective violator is even more likely to conclude that the owner will not enforce them. Wealth effects mean that, all things being equal, litigation costs will tend more often to a poor person's willingness to pay to protect any given entitlement. Moreover, even where the poor person would be willing to pay, they are less likely than the rich person to be able to actually marshal the resources to do so. Even if the poor person were willing and able to go to court pro se to enforce her rights, she will find herself at a distinct disadvantage.[177] We would therefore expect to see more of the kind of predatory self-help that Parchomovsky and Stein predict in situations involving poor property owners.

In some contexts, the existence of strong norms against rights violations will significantly mitigate this impulse.[178] As I argue below, however, such norms will operate unevenly. Crucially, they will be least effective in the most troubling category of cases -- categories characterized by wide asymmetries in the resources available to the parties.[179]

It is important to acknowledge that there are some benefits from the high expenses associated with formally enforcing property rights. Among these is a beneficial tendency to underenforce property rights and to favor instead informal accommodations. Sonia Katyal and I discussed the benefits of underenforcement in property in our book, *Property Outlaws*.[180] Intellectual property scholars have observed a similar dynamic, at least until recently, in the world of copyright and patent.[181] Particularly in the area of property, underenforcement leads owners to tolerate relatively harmless infringements of their rights, and the result is probably a superior state of affairs than would occur in if perfect property-rights enforcement were free and easy. In addition, social norms permit communities to enforce their own ideas about how property rights out to operate that sometimes vary in dramatic ways from formal legal norms.[182] High litigation costs provide a kind of backstop to these informal understandings. If, instead of suing each other at the drop of a hat, neighbors have an incentive to talk things out, they are more likely to resolve their differences informally, even if not necessarily amicably. Any proposal to increase people's access to the formal property law-enforcement has to grapple

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[176] Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, working paper on file with author (available for download at http://ssrn.com/abstract=2018309).

[177] *Cf.* D. James Greiner et al., *The Limits of Unbundled Legal Assistance*, 126 Harv. L. Rev. 901 (2013); Steven Gunn, Eviction Defense for Poor Tenants, 13 Yale L. & Pol'y Rev. 385 (1995).

[178] See Ellickson, supra note XXXX, at ____.

[179] See infra notes XXXX and accompanying text.

[180] See Eduardo M. Peñalver & Sonia K. Katyal, Property Outlaws 147-48 (2010).

[181] Tim Wu (tolerated use); Shyam Balganesh (underenforcement).

[182] Ellickson; Acheson; etc.

with the problem that reducing the cost of going to court will predictably increase the volume of litigation, siphoning people away from efforts to resolve their disputes without involving the courts and perhaps even undermining valuable informal norms.[183]

But underenforcement or reliance on informal mechanisms like social norms is most likely to seem benign where, as between neighbors or other private individuals, the parties are relatively equally situated or where, as used to be the case in intellectual property, it is a party with deep pockets who declines to enforce her rights. Where, instead, it is the result of wide asymmetries in the access to resources for civil law enforcement, underenforcement can start to just look like abuse.

In an intriguing recent cross-national study, New School economist Terra Lawson-Remer studied the homogeneity of property rights security in different societies. Lawson-Remer found that, in many countries, the property rights of marginalized groups were significantly less secure than those held by members of favored groups.[184] Crucially, Lawson-Remer observed this heterogeneity of property security – to the detriment of marginalized groups – even in countries that scored very high on the most frequently cited international measures of the security of property rights.[185] Indeed, she found no correlation between the overall security of property in a country (as measured by international indices of property security) and the security of minority property rights.[186] Although just one study, Lawson-Remer's findings suggest that a commitment to the protection of property is not an all-or-nothing choice, and that protection of the property of the powerful (or even the vast majority) does not guarantee the security of property for those at the margins of society in the absence of an affirmative commitment to those marginalized communities.[187]

Closer to home, consider, the example of the robo-signing scandal. In the years after 2008, millions of homeowners (far more than the numbers affected by eminent domain abuse) faced foreclosure proceedings at the hands of some of the largest banks in the country. Because of sloppy record keeping during the rush to create mortgage-backed securities in the early years of the new millennium, many of those mortgage holders could not easily produce documents proving they were actually entitled to foreclose the homes against which they were proceeding. Rather

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[183] Depending on how it is structured, a subsidy of access to civil justice might also cause an increase in frivolous lawsuits.

[184] See Terra Lawson-Remer, Property Insecurity, 38 Brook. J. Int'l L. 145, 159-66 (2013).

[185] See id. at 163. The indices to which Lawson-Remer compared minority property rights are the International Country Risk Guide and the Heritage Foundation's property rights index.

[186] See id. at 163.

[187] Cf. A. J. van der Walt, Property in the Margins 230-47 (2009) (discussing the need for property law and legal theory to focus on people operating at the margins of formal property law).

than slow down the process and get their documents in order, these banks frequently resorted to the practice of foreclosing even though they did not possess proof that they were entitled to do so or, in some cases, knowingly submitting false affidavits in support of foreclosure proceedings. These affidavits stated, for example, that the affiant had inspected the records in question and that everything was in order even when it was obviously impossible for that inspection to have occurred.[188] Homeowners who could not afford counsel could not expose the flaws in the banks' filings. Banks and commentators minimized the significance of the sloppy record-keeping as mere "formalities," but those formalities are designed to ensure that the entity foreclosing on a property is entitled to do so.[189] As a consequence of banks' sloppiness, numerous homeowners were foreclosed who were not even behind on their payments to banks.[190] And hundreds of thousands of properties were probably sold by banks that were not legally entitled to do so, either because they were not the actual party entitled to foreclose or because they had not properly complied with the requisite procedures.[191] Some jurisdictions, notably Massachusetts and New Jersey, have taken a hard line against banks playing fast and loose with foreclosure documentation.[192] But courts in other states have proved willing to look the other way in the face of obvious abuses of the foreclosure process.[193]

To date, none of the national property rights advocacy groups involved in the eminent domain abuse movement has called for reform of the foreclosure process or for punishment of banks who fraudulently foreclosed. Why not? Part of the answer is likely the public-private distinction I outlined earlier in the paper. Property rights groups, by and large, have focused their attention on what they perceive to be pervasive public abuse of private property rights. If a homeowner defaults on her mortgage, her loss of her home pursuant to her mortgage agreement is a simple matter of private contract. This is in contrast to eminent domain abuse, where property owners lose their land without any prior consent on their part.

But, as David Dana has argued, the procedural requirements of foreclosure exist to ensure that homeowners do not lose their homes through bank error. Skirting those procedures increases the risk of error. Moreover, respect for the consistent application of procedural rules (even those derided as formalities) constitutes an important dimension of the rule of law, which is itself an instrument by which property rights protect owners' freedom from encroachment by the state.[194] Judicial complicity in banks' sloppy foreclosure practices demonstrates the

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189 See David A. Dana, *Why Foreclosure Formalities Matter*, 24 Loyola Consumer L. Rev. 101 (2012) (collecting examples of these statements).

190 Cite.

191 See David Dana; Levitin.

192 See Ibanez; NJ order.

193 See Florida, California.

194 See Richard A. Epstein, Design for Liberty: Private Property, Public Administration and the Rule of Law 5-8, 10-27 (2011).

essential role of the state in defining and enforcing property rights and gives the lie to the notion that foreclosure abuses are purely private affairs.

The unchecked conduct of powerful private actors constitute a potentially significant threat to property rights in the hands of poor people. Fighting these types of threats to formal entitlements is an important part of the state's legitimate role, even in the most libertarian of political theories. Giving adequate attention to the category of asymmetric private-private property conflicts undermines the conventional characterization of libertarian rights as negative rights. Even on the libertarian view, the purpose of the state is to protect persons and property. A state that fails to provide this protection has no legitimate reason even to exist. But, while (in our legal system) the state does typically provide some protection, such as police and criminal enforcement, to owners free of charge (at least at the time the services are provided), it tends to leave even the poorest private owners with the burden of paying many of their own costs for civil law enforcement. Such a choice leaves the poorest owners vulnerable to well-resourced private predators.

The connection between access to justice and property insecurity suggests that some kind of affirmative government support is necessary to empower the poor to defend their rights against private, non-criminal aggressors. In other words, a narrowly libertarian logic that obligates the state to provide police protection and criminal law enforcement to combat force and fraud supports the requirement that the state take steps to ensure meaningful access to civil law enforcement for the poor. One way to do this would through the direct provision or subsidization of legal services. Such legal aid would be particularly effective in areas where property conflicts are predictably characterized by resource asymmetry and where a contingent fee system is unlikely to develop. Mortgage foreclosure and landlord-tenant are obvious examples. Industrial nuisances likely fit the bill as well.

As an alternative to subsidizing private law enforcement, the state might be justified – again, on narrowly property protective grounds – to engage in proactive regulatory efforts to prevent property violations from emerging in the first place. Viewed through this lens, at least some state regulation operates as an analog to the criminal law – taking the prohibition and punishment of certain harmful behavior over from private owners. We can view environmental regulation – though certainly not all of it – as performing such a proactive, property-protective function. The same is true for building and housing codes.

My purpose is not to defend any of these suggestions in a thorough-going way. Instead, it is to make the more general point that, because of his focus on protecting owners against the government, Reich did not consider the challenge of enforcing property rights for those without access to the levers of private law enforcement. By expanding the focus to include private conflicts over property, the enforcement problem comes into relief. In the enforcement context, the state's role shifts from threat to individual freedom to protector of individual entitlements. Adopting the perspective of entitlement-enforcement also allows us to see that Reich's solution – shifting the formal status of entitlements from largess to "property" – addresses only half the problem of the vulnerability of the poor.

D. Inequality and Property Insecurity

Focusing on private-private property disputes also highlights the connection between economic inequality and property insecurity for the least well off. In light of the high costs of litigation for property owners, large property owners in an extremely unequal society enjoy a number of advantages in the market for legal services relative to the poor. These advantages in turn affect the quality of property law enforcement they can obtain relative to the poor. As Marc Galanter observed in his pathbreaking article on how litigation favors the "haves," these advantages include: economies of scale that allow repeat-players in litigation to reduce their own legal costs; long-term strategies that allow well-resourced repeat players (a) to drive up the costs of their opponents in ways that make litigation cost-ineffective for small players and (b) to shape the law to their advantage over time or (c) to engage in a kind of transactional self-help that shapes the factual context from which disputes arise; and the nature of legal talent as a positional good.[195]

An important question about the disadvantage that the "have-nots" face in private property litigation is whether increasing economic inequality makes this problem of unequal access to justice worse, or whether the large-versus-small player dynamic is endemic to a system with any significant degree of inequality or whether it is sensitive to shifts in the overall degree of inequality. There are reasons to think that it is responsive to shifts in inequality.

One way that economic inequality might undermine the protection of property rights for property owners at the bottom of the distribution is by simply making it more likely that, in light of the high costs of litigation, it will not be cost-effective for owners on the bottom end of the property distribution to go to court to defend their property rights. Wealth (i.e., property) distributions are typically more unequal than income distributions. For example, the Gini index in the United States for income is estimated to be around 0.8, and exceeds 0.9 if we focus on economically productive property.[196] This compares with a Gini index of for U.S. income of approximately 0.5.[197] Nearly a fifth of American households own no (net) wealth at all or have negative net worth.[198]

Some of these zero net-worth households will "own" significant property, but they typically owe debt that exceeds the value of their assets. Most low or negative net worth households just own very little property, or property that is not worth very much. For such low and negative net worth households, spending tens of thousands of dollars to defend rights in property will be either cost-ineffective or, more likely, a practical impossibility. This means that their response to a noncriminal infringement of their rights will be to acquiesce, either by failing to file lawsuits or, if sued, by failing to contest them. High wealth inequality characterized

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[195] Galanter.

[196] Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze—An update to 2007* (Working Paper No. 589, March 2010)

[197] Andrea Brandolini & Timothy M. Smeeding, *Income Inequality in Richer and OECD Countries*, in The Oxford Handbook of Economic Inequality 71, 80 (Wiemer Salverda et al. eds. 2009).

[198] See Wolff, *supra*.

by a lot of households owning very little property, combined with high private litigation costs, make thefore seem to make it more likely that a significant portion of (small) property owners will find it uneconomical to defend their property rights against noncriminal encroachment by powerful private parties. And this, in turn, would seem to make them appealing targets for (noncriminal) private abuse by parties not vulnerable to informal enforcement mechanisms such as social norms.

Economic inequality might also erode access to justice less directly. Many of the contexts in which the harms of inequality loom largest involve what economists call "positional goods," goods whose value to the consumer derives at least in part from how much of the good (or what quality of the good) is consumed by others.[199] Positional goods are those for which consumers – in addition to the intrinsic enjoyment they derive from consuming the good – place a great deal of value on how their own level of consumption stacks up against their local competitors. This is in contrast to nonpositional goods, where consumers focus more on their absolute levels of consumption. Because we derive greater benefits from positional goods when we consume more of them than others, competition to consume a bigger share of these goods tend to generate bidding wars that – in a highly unequal society – the highest earners are almost certain to win. Relative economic inequality makes competition with the wealthy for positional goods more expensive for median earners and the poor than such competition would be in a more egalitarian society.[200] All things being equal, then, greater inequality increases the gap between the degree to which the rich and poor are able to enjoy positional goods.

In addition, by feeding bidding wars over positional goods, increasing inequality leaves those in the middle and bottom of the income distribution with less income net of the money spent on other items. Elizabeth Warren and Amelia Tyagi have described a dynamic like this with respect to housing in their book on the "two income trap." They observe that the price of housing increased by nearly 80 percent between 1980 and 2001. As Warren and Tyagi put it, over this period (which coincides with the explosion in income inequality) "the market for homes in desirable areas exploded into an all-out bidding war."[201] As housing takes on an increasing share of stagnating middle and low-income earnings, it leaves behind less income to pay for other things, including litigation costs when members of these groups need to defend their property rights against well-heeled aggressors.

And of course, legal talent is itself a positional good. The more unequally wealth is distributed, the more disadvantaged lower-income and lower-wealth property-owning households will fare in this regard in conflicts with their high-income and high-wealth counterparts when it comes to hiring lawyers. The more people there are at the top and the bottom of the income and wealth distributions, the more insecure their property rights will be against private depredations.

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[199] See Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 Am. Econ. Rev. 137 (2005).

[200] See id.; see also Darwin Economy.

[201] Elizabeth Warren & Amelia Warren Tyagi, The Two Income Trap: Why Middle Class Parents are Going Broke 20, 32 (2003).

The foregoing discussion suggests that, in addition to benefitting from the direct provision of legal aid, property rights of the poor are also enhanced by broader redistributive policies that increase their disposable income and therefore the resources that the poor can dedicate to defending their existing property rights.[202] Obviously, this is a counterintuitive prescription from the point of view of libertarian property theory, which opposes affirmative government assistance outside the domain of criminal law enforcement. But it is consonant with a broad commitment to protecting private property rights, even when those rights are understood narrowly as noninterference.

E. Property and Private Coercion

I have been discussing how, because of his preoccupation with government power, Reich's *New Property* failed to consider the vulnerability of formal property entitlements against private violation. Combining a regard for private violations with an expanded conception of "force" as including the kind of power that employers exert over employees who depend on them for their livelihood would justify even more affirmative redistributive actions by the state interested in safeguarding individual freedom. We can see seeds of this in Locke's assertion that there are moral limits to what it is permissible for someone with resources to demand from someone in need.[203] As Jed Purdy has put it more recently, the law of property is appropriately concerned with the "terms of recruitment" at work in seemingly private consensual transactions.[204]

In considering the power that property confers over other private actors, Berle's distinction between property for consumption and property for production is a helpful one to consider. Consumption property protects freedom to a certain extent. It does so primarily by providing a zone of informational privacy within which the individual can undertake activities without the knowledge (and therefore without earning the censure) of disapproving others. The information-blocking power of that zone of privacy is uneven and shifts over time with changes in the technology of surveillance and the location of essential behavior.[205] But even holding that information blocking power constant, the freedom created by it is undermined by the property-owning individual's dependence on others for access to productive property in order to earn an income, as Berle recognized.[206] An owner (of, say, a home) who depends on others for income can be coerced by those others to (at least formally with consent) forego a degree of privacy as a condition of continuing to receive that income.

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[202] Gowder on Rule of Law.

[203] Locke, First Treatise of Government, §42.

[204] See Jedediah Purdy, *People as Resources*, 56 Duke L.J. 1047, 1094-98 (2007).

[205] Kyllo; Jones; etc..

[206] As I mentioned above, this dichotomy between consumption and production is an oversimplification. As James Buchanan has observed, owning a home – arguably consumption property – is the equivalent of going into business as your own landlord – making the ome also arguably productive property. See Buchanan, supra, at XXXX.

Considering how dependence on others undermines the power of property-based privacy, Reich's focus on the state seems partially justified. Because of its monopolistic position with respect to certain forms of income of last resort (e.g., welfare, unemployment benefits, and Social Security), the power conferred on state actors over those who are dependent on the state is particularly severe. But because of the potential disruptiveness of even relatively short stretches of unemployment, private employers can also exert significant pressure on employees to forego privacy.

An employee's power to resist employer demands will depend in part on her access to alternative sources of income. Ownership of economically productive property, whether a small business, a trust fund or the proverbial family farm, frees the individual from having to seek income from employers. The ability to call on the power of the state to enforce rights over economically productive property does genuinely confer on owners a degree of independence from others. Americans often exaggerate this independence, as scholars of social norms have long understood. As I have argued elsewhere, norms tend to operate through informal mechanisms ancillary to ownership that can subtly coerce even owners of productive property to conform to broadly prevailing social values.[207] We can think of these social norms as "horizontal" informal constraints on individual freedom. Rather than liberating owners from the influence of others, property ownership may even strengthen these sorts of horizontal influences.[208]

On the other hand, someone who owns economically productive property is less subject to the coercive power of the landlord and the employer, which depend for their force more on the assertion of formal property rights.[209] This assertion takes the form of withholding from someone seeking access the right to make use the owner's property unless the owner's conditions are satisfied. These top-down (vertical) assertions of power can powerfully constrain individual freedom. From these sorts of assertion, ownership of productive property does seem to offer some immediate relief. The power of property rights to protect owners against this kind of vertical private coercion is largely absent from Reich's discussion of the "new property."

The close connection between welfare entitlements and the private power of employers over their workers forms the crux of Frances Fox Piven and Richard Cloward's classic theory of welfare benefits as tools for disciplining labor.[210] "The workhouse," they argue, "was designed to spur people . . . to offer themselves to any employer on any terms." "Conditions in the workhouse," Piven and Cloward explain, "were intended to ensure that no one with any conceivable alternatives would seek

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[207] See Peñalver, Property as Entrance, at XXXX; *see also* Ellickson, Order Without Law XXXX.

[208] See id.

[209] Cite.

[210] See Frances Fox Piven & Richard A. Cloward, Regulating the Poor: The Functions of Public Welfare (2d ed. 1993).

public aid." [211] An 1834 statement by a Poor Law Commissioner illustrates this connection between public welfare and the terms of private employment:

> Into such a house none will enter voluntarily; work, confinement, and discipline, will deter the indolent and vicious; and nothing but extreme necessity will induce any to accept the comfort which must be obtained by the surrender of their free agency, and the sacrifice of their accustomed habits and gratifications.

Welfare benefits that are stingy and highly conditioned – even humiliating – serve to "instill in the laboring masses a fear of the fate that awaits them should they relax into beggary and pauperism. To demean and punish those who do not work is to exalt by contrast even the meanest labor at the meanest wages."[212] On the other hand, welfare benefits that are generous and unconditional provide both recipients and laborers with a viable alternative to paid employment when private employers fail to offer a better deal.

Nineteenth century property radicals understood very well this connection between government largess and bargaining power in the private market for employment. In advocating for the liberal distribution of free land to settlers in the west, they framed the continued opportunity to appropriate land as a crucial escape hatch to empower workers in their dealings with employers. The historian Mark Lause describes their thinking as follows: "[i]f a thousand carpenters vied for 950 jobs in the city, [NRA activists] argued, it made practical sense to raise the money to send fifty workers and their families to the West, which would give the migrants unavailed opportunities and allow those who remained the chance to organize, reduce the length of the workday, and secure 'full employment at fair prices.'"[213] For the NRA, government largess – for them, government land policy – was a means to counteract workers' lack of access to productive property, making them more independent and thereby increasing their bargaining power with employers.

Building on Reich's concern with dependence and domination by recognizing the power that property confers over other private parties casts his proposal to create an entitlement to welfare in a more expansive light. Reich's focus on protecting individuals from the vertical power rooted in their dependence on the state provides no necessary reason to favor expanding state welfare programs in the way Reich recommends. After all, the individual could just as easily (and more cheaply) be freed from dependence on the state by eliminating those welfare programs altogether. But if access to a reliable source of income (even just a backstop) helps individuals resist private vertical coercion, then a concern with safeguarding individual freedom provides a reason both to provide that income and

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[211] Id., 34.

[212] Id., 3-4.

[213] Lause, Young America, 65. It was likely his exposure to agrarian thought in late nineteenth century Wisconsin that inspired Frederick Jackson Turner's "safety-valve" theory of the frontier. See id., 134.

to structure delivery mechanisms in ways that do not merely substitute state domination for the domination of the private employer.

Conclusion

The current environment of increasing economic inequality and tightening middle-class budgets makes the questions of access to justice and economic dependence as salient as they have been at any time since Reich's publication of *The New Property.* Inequality in the distribution of economic resources to devote to rights-enforcement has a deleterious effect on the ability of the less well off to vindicate their formal legal rights, including their property rights.