

A HUMEAN THEORY OF PROPERTY RIGHTS

by

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DEDICATION

For R. Kenneth and Sylvia Lindsay
parents and teachers

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ABSTRACT

My dissertation defends a Humean theory of property rights against its neo-Lockean and ‘resource egalitarian’ rivals. Humean property rights are conventional and not grounded in pre-institutional moral entitlements. Nevertheless, the importance of property rights for facilitating social cooperation between people with differing views about justice gives them normative authority even when they do not conform to ideal principles of distributive justice or ‘natural right.’ I develop a conceptual architecture of property rights and property interests in order to dispel confusion about the relationship between property’s legal form and economic substance. Although the structure of property rights constrains the extent to which property ownership can be fragmented in the service of egalitarian distributive goals, robust private property rights are compatible with extensive social insurance. This analysis undermines the neo-Lockean position that all redistributive taxation is an infringement of property rights and provides an attractive middle ground between libertarianism and strong forms of egalitarianism. Humean theory justifies giving normative weight to pre-tax property entitlements when determining tax obligations. I use this insight to rebut Liam Murphy and Thomas Nagel’s argument that principles of tax equity are vacuous because pre-tax income has no moral significance. Viewing tax policy exclusively from the perspective of post-tax income effaces the important role of tax fairness norms in preventing wasteful tax policy when people disagree about fundamental principles of distributive justice. I distinguish my view from Gerald Gaus’ recent critique of Murphy and Nagel. Whereas Gaus is skeptical of redistributive taxation, my theory of tax fairness is compatible both with classical liberalism and with a more robust social welfare state.

CHAPTER I

HUMEAN PROPERTY THEORY: A DEFENSE

Discussions of property rights in political philosophy usually take John Locke as the central figure.¹ Lockean property rights are central to an important strand of classical liberal and libertarian traditions and are often the target of criticism from those with views further to the left.² Neo-Lockean views, such as Robert Nozick's, are, however, a minority position. In the wake of the paradigm setting work of John Rawls, property rights are most often analyzed in light of more abstract principles of distributive justice. Under this approach, rules fixing property entitlements are an output of a theory of justice and not, as Lockeans would have it, an independent constraint on state action. I will call theories that evaluate property rights in light of abstract principles of distributive justice founded on some conception of equality 'resource egalitarian'.³ Discussions of property in political philosophy are often structured as a debate

¹ E.g., Jeremy Waldron, *The Right to Private Property* (New York: Oxford University Press, 1988); Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974). Despite Waldron's longstanding interest in Lockean property, he has recently written, "I think it would be a good idea if [Hume's] theory were as widely studied, or as widely used as a template for the study of property, as the Lockean theory presently is." Jeremy Waldron, "'To Bestow Stability upon Possession': Hume's Alternative to Locke" in *Philosophical Foundations of Property Law*, James E. Penner & Henry E. Smith, eds., (Oxford: Oxford University Press, 2013), 12.

² E.g., Nozick, *Anarchy, State and Utopia*; Eric Mack, "The Natural Right of Property," *Social Philosophy & Policy* 27 (Winter 2010): 53-78; Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987).

³ Resource egalitarianism is most strongly associated with the work of John Rawls, which is largely responsible for framing the resource egalitarian research agenda. However, Ronald Dworkin might be a better example of an archetypal resource egalitarian since his theory of distributive justice follows more directly from a conception of moral equality. See Ronald Dworkin, "What is Equality? Part 2: Equality of Resources," *Philosophy and Public Affairs* 10, no. 4. (Autumn, 1981): 283-345.

between resource egalitarians and neo-Lockeans. There is, however, a third alternative. Humean theories of property rights provide an ideological middle ground between neo-Lockean and resource egalitarian theories. Humeans join resource egalitarians in rejecting natural rights as a source of property entitlements. But they join Lockeans in believing that private property rights are a constraint on state action independent of abstract principles of distributive justice. Although somewhat neglected in mainstream political philosophy,⁴ Hume's theory of property was an important forerunner of game theoretic analysis of norms and conventions and Humean property theory is more closely connected with the social sciences than either of its rivals.⁵

In this chapter, I defend a Humean approach to property rights. Hume's treatment of property rights in the *Treatise* is innovative, but far from comprehensive and so any Humean theory must fill in important details. My approach is Humean in that it embraces most of the elements of Hume's theory, but is not exactly the same as Hume's. I aim to show that Humean property theory is a compelling alternative to neo-Lockean and 'resource egalitarian' theories and will explore how it can ground a broader neo-Humean political theory. First, I will introduce the two main rivals to Humean property theory. Second, I briefly explain Hume's account of property rights and artificial virtue in *A Treatise of Human Nature*. Third, I describe the advantages of Humean theory over neo-Lockean and resource egalitarian alternatives. Finally, I

⁴ Exceptions include Jerry Gaus, Jeremy Waldron and Brian Barry. See Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World*, (Cambridge: Cambridge University Press, 2011); Jeremy Waldron, "The Advantages and Difficulties of the Humean Theory of Property," *Social Philosophy and Policy* 11 (1994): 85–123; Brian Barry, *A Treatise on Social Justice, Volume I: Theories of Justice* (Berkeley, CA: University of California Press, 1989).

⁵ E.g., Robert Sugden, *The Economics of Rights, Cooperation, and Welfare* (New York: Palgrave MacMillan, 2004); Ken Binmore, *Game Theory and the Social Contract, Vol I: Playing Fair* (Cambridge: MA: MIT Press, 1994); Ken Binmore, *Game Theory and the Social Contract, Vol II: Just Playing* (Cambridge: MA: MIT Press, 1998); Herbert Gintis, *The Bounds of Reason: Game Theory and the Unification of the Behavioral Sciences* (Princeton, NJ: Princeton University Press, 2009); Nicolas Baumard, Jean-Baptiste Andre & Dan Sperber, "A Mutualistic Approach to Morality: the Evolution of Fairness by Partner Choice," *Behavioral and Brain Sciences* 36 (2013): 59-78.

respond to several common objections to Humean property theory and sketch several lines of argument that will be developed in more detail in subsequent chapters.

1. TWO THEORIES OF PROPERTY RIGHTS

Humean theories of property represent a minority position in political philosophy that is often ignored in favor of its two main rivals. Since it is easier to explain what is distinctive about Humean theories of property in contrast to their main rivals, I will start by describing the neo-Lockean and resource egalitarian approaches.⁶ My account will focus on the broad commonalities shared by each family of views without exploring their numerous permutations.

Neo-Lockean property rights are “natural” rather than conventional and relatively invariant across different social contexts. They reflect pre-institutional moral entitlements justified by desert or first appropriation. The justification of neo-Lockean property entitlements depends on their historical pedigree, but does not (except in extreme cases) depend on the overall distribution of property rights. A neo-Lockean theory of property has several elements. First, there must be rules that license first appropriation. Second, various rules allow property owners to modify or transfer their holdings by consent. These rules should be quite permissive since the ability to trade is an important part of human freedom. Third, there are rules specifying compensation in the case that a person’s property is taken or damaged. Property entitlements are justified insofar as their provenance conforms to these rules of justice. Entitlements are, in this sense, path dependent. They are also non-systemic in that property that is justly acquired is a full-blooded moral entitlement regardless of the broader distribution of property rights. Finally, property rules are relatively inflexible. Like property entitlements, the rules of just acquisition,

⁶ Although it is standard to call views such as Nozick’s neo-Lockean, I feel a bit queasy about this terminology. The proper interpretation of Locke’s defense of private property is controversial and it may be that Locke’s commitments are rather different than those of representative “neo-Lockeans” such as Nozick.

contract and tort do not depend on contextual facts about the broader distribution of property. Instead, they are a matter of “natural right.” The particular theological views underlying Locke’s position are not an essential part of Lockean property theory. All that is required is some universal deontological set of moral rules. These might be justified in terms of some moral theory other than the one Locke actually appeals to.

Most neo-Lockean theory appeals to moral desert, personal freedom or a combination of the two in order to justify strong property entitlements. Appropriation by “mixing labor” might justify ownership in virtue of a moral entitlement to the products created through one’s own labor.⁷ Alternatively, first appropriation might be justified by the desirability of allowing people to control certain resources exclusively so that they can pursue their personal projects.⁸ Finally, first appropriation might be justified as a Pareto improvement in cases in which it makes the new owner better off and nobody else worse off.⁹ Once property has been legitimately acquired, neo-Lockeans support strong property rights and extensive freedom of contract. Again, there are a variety of possible justifications for this stance. Freedom of contract might be thought necessary to allow people to receive the full benefit of their efforts and talents. Alternately, one might argue that consenting adults should be free to form agreements to do anything that does not directly harm third parties on the grounds that people should enjoy the maximal freedom from

⁷ See Eric R. Claeys, “Productive Use in Acquisition, Accession, and Labour Theory” in *Philosophical Foundations of Property Law*, James E. Penner & Henry E. Smith, eds., 13-45 (Oxford: Oxford University Press, 2013).

⁸ E.g., Lomasky, *Persons, Rights, and the Moral Community*; Mack, “The Natural Right of Property,” 53-78.

⁹ “Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his inclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all.” John Locke, *Two Treatises of Government*, Peter Laslett, ed., (New York: Cambridge University Press, 1988), Treatise II, Chap. V, Para. 33. This passage raises the suspicion that what Locke presents as “natural right” actually has a rule consequentialist justification. If so, one might question whether “neo-Lockean” theories such as Nozick’s are truly Lockean.

restraint compatible with equal freedom for others. Obviously, these two lines of argument may be mutually supporting to some extent.

The scope of legitimate state action is substantially constrained by neo-Lockean property rights. Neo-Lockeans sometimes embrace an actual (rather than hypothetical) consent standard for political legitimacy.¹⁰ According to such theories, property may be legitimately acquired in the “state of nature” and property owners should have their rights respected whether or not they choose to join a state. The bounds of governmental authority are determined by consent by the governed. On any version of neo-Lockean theory, property owners have broad rights against unwanted incursions by the state unless they choose to alienate their property rights. Such unwanted incursions include regulation of what property owners may do with their property beyond the minimum level of restriction necessary for maximal equal freedom for all property owners as well as taxation that goes beyond what is necessary to support the minimal state. Neo-Lockean theories are minimally (at most) concerned with egalitarian distribution of property. Because people have a natural right to the means necessary to sustain life, Locke held that people have a right to some minimal level of support if they are too poor to feed and cloth themselves.¹¹ Neo-Lockans likewise tend to accept some minimal level of welfare rights. However, so long as there are arrangements to assure citizens of some minimal level of welfare, many neo-Lockeans argue that the state is not justified in engaging in any further redistributive projects.

¹⁰ Notably, Robert Nozick begins *Anarchy, State, and Utopia* with the question of whether there should be a state at all. Nozick, *Anarchy, State, and Utopia*, 3.

¹¹ “And therefore no man could ever have a just power over the life of another by right of property in land or possessions; since it would always be a sin in any man of estate, to let his brother perish for want of affording him relief out of his plenty. As justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man a title to so much out of another’s plenty, as will keep him from extreme want, where he has no means to subsist otherwise: and a man can no more justly make use of another’s necessity to force him to become his vassal, by with-holding that relief God requires him to afford to the wants of his brother, than he that has more strength can seize upon a weaker, master him to his obedience, and with a dagger at his throat, offer his death or slavery.” Locke, *Two Treatises of Government*, Treatise I, Chap. I, Para. 42.

The most popular alternative to neo-Lockeanism is what I will call ‘resource egalitarianism.’ Resource egalitarian theories evaluate property rights in light of egalitarian principles of distributive justice. Resource egalitarians deny that pre-institutional moral entitlements to property such as Lockean natural rights constrain legitimate state action. Instead, the distribution of property rights should be based on principles governing political institutions that would be endorsed by free and equal people. There are many candidates for the principle governing distribution: Rawls’ difference principle, equal opportunity for welfare,¹² an ‘envy free’ division of resources,¹³ and so on. Although resource egalitarians are sharply divided on the principles that should determine property rights holdings, they share a common view of the sort of question at issue. John Rawls, Ronald Dworkin, and G. A. Cohen are representative resource egalitarians.

Jeremy Waldron, whose tripartite division of property theories I am indebted to, categorizes theories of property that I am calling ‘resource egalitarian’ as “neo-Rousseauian.”¹⁴ I use different terminology for several reasons. First, although Rousseau may have held views somewhat similar to those of contemporary resource egalitarians, the logic of his position is quite different. Rousseau is mainly concerned with material inequality because it is a threat to political equality and good government. The modern conception of distributive justice dates to the late eighteenth century, slightly postdating Rousseau.¹⁵ Although resource egalitarians typically share Rousseau’s concern that material inequality corrupts the political process, their main reason for favoring egalitarian distributive outcomes is typically that they believe that they

¹² Richard Arneson, "Equality and Equal Opportunity for Welfare," *Philosophical Studies* 56, no. 1 (1989): 77-93.

¹³ Ronald Dworkin, "What is Equality? Part 2: Equality of Resources," *Philosophy & Public Affairs* 10, no. 4. (Autumn, 1981): 283-345.

¹⁴ Waldron, "The Advantages and Difficulties of the Humean Theory of Property," 85.

¹⁵ See Samuel Fleischacker, *A Short History of Distributive Justice* (Cambridge, MA: Harvard University Press, 2004).

are required by principles of equal moral status or worth.¹⁶ Moreover, there are certain theories that arguably count as neo-Rousseauian by virtue of their emphasis on the importance of justifiability to free and equal people that do not favor egalitarian distributive principles. For example, Gerald Gaus explicitly cites Rousseau as the inspiration for his theory of justification but uses this theory to argue for a form of classical liberalism that significantly limits redistributive policies.¹⁷ Although neo-Rousseauian approaches to property are often treated as a species of Kantian political theory, Kant's theory of property is similar to Hume's in its focus on the advantages of a stable system of property rights rather than the fairness of particular distributions of property.¹⁸

Resource egalitarianism theories have a number of distinctive characteristics. First, they are typically ideal theories in the sense that they tend to abstract from questions of motivation and stability by assuming some sort of ongoing political community regulated by principles of justice. Some resource egalitarians even abstract from the question of whether people will comply with just principles on the grounds that justice is a matter of what people ought to do rather than a set of policies designed based on predictions about what people actually will do when faced with various possible sets of rules.¹⁹ Other theorists take stability into account in a fairly restricted way. Rawls allows the parties in the original position to consider the extent to

¹⁶ E.g., "In Part I of this essay we considered the claims of equality of welfare as an interpretation of treating people as equals. In Part 2 we shall consider the competing claims of equality of resources." Dworkin, "What is Equality? Part 2: Equality of Resources," 283.

¹⁷ Gaus' views will be discussed at length in Chapter Three.

¹⁸ Kant argued that property rights were necessary for people to live in a "relation of right" because they define a sphere of free action for each individual. He also endorsed a variation of the Lockean claim that the poor were entitled, as a matter of right, to a minimal level of resources sufficient to preserve life and health, but denied they were entitled to equal shares of material resources. See Immanuel Kant, *The Metaphysics of Morals*, Mary Gregor, trans., (New York: Cambridge University Press, 1991); Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge MA: Harvard University Press, 2009), 267-299.

¹⁹ E.g., G. A. Cohen, "Where the Action is: On the Site of Distributive Justice," *Philosophy & Public Affairs* 26, no. 1 (Winter, 1997): 3-30.

which rules selected in the original position will contribute to social stability.²⁰ But since Rawls assumes a society in which people are motivated by suitably chosen principles of justice, it is difficult to know how much this matters.²¹ In any case, there is a strong tendency for resource egalitarians to downplay questions of social stability and moral motivation. This feature of resource egalitarianism is problematic since it abstracts from one of the problems that property rights are meant to solve.

Second, resource egalitarian theories appeal to a conception of justice based on equal moral status. Brian Barry divides theories of justice into those based on mutual advantage and those based on impartiality.²² Theories of justice as mutual advantage conceive of justice as adherence to rules that facilitate the long run interests of all members of a community by restricting various kinds of negative sum activities. On this understanding, rules of justice are a bit like hypothetical contracts between self-interested actors. Justice as impartiality conceives of justice as a body of rules that regulate people's conduct with one another on grounds that do not unfairly advantage any party. When all parties begin in a similar position with respect to initial endowments and abilities, considerations of mutual advantage and impartiality will tend to yield similar rules. However, when the parties are differently situated, justice as impartiality tends to rule out certain ways of exploiting superior bargaining power that may be unobjectionable under theories of justice as mutual advantage. Barry claims to find elements of both theories in the work of Hume and Rawls.²³ But on the whole, justice as mutual advantage predominates in Hume and justice as impartiality predominates in Rawls. Likewise, justice as mutual advantage

²⁰ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 119.

²¹ "The other limitation on our discussion is that for the most part I examine the principles of justice that would regulate a well-ordered society. Everyone is presumed to act justly and to do his part in upholding just institutions." Rawls, *A Theory of Justice*, 7-8.

²² Brian Barry, *A Treatise on Social Justice, Volume I: Theories of Justice* (Berkeley, CA: University of California Press, 1989).

²³ Barry, *A Treatise on Social Justice, Volume I: Theories of Justice*, 148-152.

is characteristic of Humean theories of property whereas justice as impartiality is characteristic of resource egalitarian theories. Ronald Dworkin, for example, is quite explicit in arguing that egalitarian principles of distributive justice follow directly from a deep moral obligation to treat people as equals.²⁴ Humean theories of justice, by contrast, are entirely compatible with wholesale skepticism about the moral value of equality²⁵ as well as with forms of egalitarianism that respect existing property claims.²⁶ Instead, they are centrally concerned with ensuring stability by appealing to the interests of all members of the community.

A third feature of resource egalitarian theories is that they take a systemic view of justification. In order to know whether a distributive scheme is fair in the sense of respecting equal status, one must know its effect on all parties. Any particular property entitlement must be evaluated against the background of, at the very least, the entire distribution of property rights and quite possibly all of the benefits and burdens of social cooperation. For Rawlsians, the appropriate unit of analysis is the “basic structure” of society. This includes property entitlements, social insurance, and laws concerning contracts, torts, inheritance, taxation and employment among other matters. Systemic theories of justification have obvious appeal insofar as property rules are part of a larger web of rights and duties such that advantages in one instance may be balanced by burdens in another. In complex economies, it is very difficult to make judgments about property entitlements in isolation. The Rawlsian solution is to ask whether the basic structure as a whole is justified. Wages and other entitlements fixed under the rules of a just basic structure are just; those that follow from an unjust basic structure are not. Although

²⁴ Dworkin, “What is Equality? Part 2: Equality of Resources,” 283-345.

²⁵ Despite the recent influence of egalitarianism, there are prominent skeptics about the value and significance of equality as a substantive rather than merely formal principle. E.g., Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 217-244; Peter Westen, “The Empty Idea of Equality,” *Harvard Law Review* 95, no. 3 (Jan. 1982): 537-596.

²⁶ Chapters Two and Three will develop this position in greater detail.

this methodology has considerable appeal insofar as it can yield relatively determinate results while attending to the full range of normatively relevant considerations, it has the disadvantage that normative consensus about anything seems to require normative consensus about everything. Recognition of this problem may have been part of the motivation for Rawls' focus on "overlapping consensus" in *Political Liberalism*.²⁷ In contrast to the "top-down" resource egalitarian approach, neo-Lockean and Humean theories take a "bottom-up" approach. Both theories begin with the justification of property rights and then use these to help build a more fully specified political order. This has the advantage of allowing localized assessment of property entitlements without evaluation of all aspects of the basic structure.

A fourth feature of resource egalitarian theories is that they are flexible with respect to the rules that implement distributive principles. Since justice is a matter of generating the right distributive outcomes, it is plausible that different rules of private law will be appropriate in different circumstances. For example, private ownership might be appropriate for resources that are not scarce in nature (e.g. uncleared land in some societies) but inappropriate when such a rules would generate objectionable inequalities (e.g. oil and gas resources in a complex industrial economy). There is a vigorous debate over the wisdom of using private law rather than tax and transfer programs to achieve distributive aims.²⁸ For resource egalitarians, however, the question of whether to use rules of contract and tort to achieve egalitarian ends or to rely exclusively on tax and transfer schemes is basically a technical one to be made on grounds of economic efficiency, political feasibility or ease of administration.

²⁷ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996).

²⁸ E.g., Anthony T. Kronman, "Contract Law and Distributive Justice," *Yale Law Journal* 89, no. 3 (Jan., 1980): 472-511; Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2006); Christine Jolls, "Behavioral Economics Analysis of Redistributive Legal Rules," *Vanderbilt Law Review* 51 (1998): 1653-1677; Chris W. Sanchirico, "Taxes versus Legal Rules as Instruments for Equity: A More Equitable View," *Journal of Legal Studies* 29 (2000): 797-820.

Finally, resource egalitarian theories are ahistorical. Distributive patterns that violate egalitarian principles cannot be justified by virtue of having the right history; distributive patterns that are sanctioned by such principles cannot be undermined because they lack the “right” historical origins. Justice for resource egalitarians is not path dependent. Particular property entitlements may be justified by their history only insofar as this history takes place against a background of a just basic structure. Resource egalitarians have a place for pure procedural justice. But it is not one that has application outside a system of rules structured by principles of distributive justice.

2. HUME’S THEORY OF PROPERTY

Hume first analyzed property rights in the context of his discussion of justice as an artificial virtue in *A Treatise of Human Nature*. Although the basic outlines of Hume’s theory remains the same in the *Enquiry*, his presentation in that work is less interesting insofar as it puts greater emphasis on public utility and less on convention as the central organizing principle. For that reason, I will focus on the argument presented in the *Treatise*. Hume’s use of the word “justice” in the *Treatise* is somewhat idiosyncratic. Justice, as Hume uses the term, picks out roughly the domain of normative relations regulated by private law. Contemporary use of the term is, obviously, quite a bit broader and includes, at minimum, distributive justice and procedural fairness in addition to the substantive doctrine of private law.²⁹ In this section, I’ll follow Hume in using ‘justice’ to refer to rules governing property rights, the transfer of property and promises. Hume argues that justice is an *artificial* virtue in that it does not spring directly from the *natural* moral sentiments of mankind, but instead is based upon artifice – what we

²⁹ It is worth noting, however, that Kant and Hegel both treat something like private law as a distinctive normative category. See Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge MA: Harvard University Press, 2009); Ernest Weinrib, “Right and Advantage in Private Law,” *Cardozo Law Review* 10, no. 1 (1989). So it is probably the case that Hume’s approach is less idiosyncratic than it appears from the perspective of the twenty-first century.

might today call “social practice.” Rules of justice respond to certain features of the human condition: limited benevolence, scarcity of resources and the tendency of people to pursue immediate gratification even to the detriment of their long-run interests. And so, although justice is not natural in the sense that just acts do not generally elicit moral approval independent of a social practice, the ubiquity of the circumstances of justice means that rules of justice are necessary for all complex societies.³⁰

Hume’s discussion of justice is intended both to bolster the account of human psychology advanced in the rest of the *Treatise* and to provide a deflationary account of property rights, promissory obligation and political authority that shows how rules in these domains emerge from social practice rather than from abstract reason or natural law. This distinguishes his view from Locke and other natural law theorists. Unlike his fellow natural law skeptic, Thomas Hobbes, Hume argued that rules of justice do not require an authoritative lawgiver for either their creation or their operation. Instead, conventional rules of justice may emerge spontaneously without the type of central authority that Hobbes believed was essential for social order.

The insight that property rights arise from convention rather than by natural right or by governmental fiat is Hume’s most important contribution to property theory. “Justice establishes itself by a kind of convention or agreement; that is, by a sense of interest suppos’d to be common

³⁰ This is Hume’s position in the *Treatise*. In that work, Hume treats property as emerging before the state and governments as being created once a system of property rights is already in place. By the time he wrote his histories, however, Hume concedes that primitive political organization in the form of tribal chieftains arose among the Anglo-Saxons and other Germanic tribes before property in land. Ownership of land was granted by such chieftains as a sort of pay for military service. This suggests that “primitive” Europeans had social structures based on tribal allegiance rather than private property. See Andrew Sabl, *Hume’s Politics: Coordination and Crisis in the History of England* (Princeton: Princeton University Press, 2012), 97-100; Annette C. Baier, *The Cautious Jealous Virtue: Hume on Justice* (Cambridge, MA: Harvard University Press, 2010), 95-96. This later view seems to be the more realistic one: although all societies must devise ways to manage resources, a network of personal obligations and relations of authority may substitute for impersonal property rights in performing this function. Private property rights have a number of advantages over rule by tribal chieftains or village elders, but they are probably more fragile than Hume seemed to believe at the time he wrote the *Treatise*.

to all, and where every single act is perform'd in expectation that others are to perform the like."³¹ In the absence of any social practice regulating property rights, there is no natural propensity to disapprove of one person taking the possessions of another. However, social order may emerge spontaneously from tacit agreements to respect one another's property, so that the resulting system of norms might have the appearance of an implicit contract without any formal agreement ever having been made. Because property is not, at its core, a matter of formal agreements, laws, or universal moral rules, but instead a complex set of behavioral dispositions, property rights are at once both robust and fragile. They are robust because once a community of people has internalized the relevant dispositions, property conventions can often be maintained without external enforcement. But property rights are fragile because when circumstances undermine expectations about the behavior of others, property conventions may unravel quickly.

Hume's theory is a form of indirect consequentialism: justice consists in adherence to conventional rules that promote the public interest. Because just action is a matter of conforming to the rules of justice, just acts do not have desirable (let alone optimal) consequences in every instance. In all but exceptional cases, the value of supporting the conventions of property, contract, and promise outweighs any ill effects of following the rules in individual cases.³² In extreme cases, rules of justice may be disregarded on the grounds of public necessity. For example, during a famine the public may open granaries and distribute grain without consent of

³¹ David Hume, *A Treatise of Human Nature*, L. A. Selby-Bigge, ed., (Oxford: Clarendon Press, 1886), Book 3, Part 2, Section 3. Further citations will be to the Selby-Bigge edition of the *Treatise*.

³² "As the obligation to justice is founded entirely on the interests of society, which require mutual abstinence from property, in order to preserve peace among mankind; it is evident, that, when the execution of justice would be attended with very pernicious consequences, that virtue must be suspended, and give place to public utility, in such extraordinary and such pressing emergencies. The maxim, fiat Justitia & ruat Coelum, let justice be performed, though the universe be destroyed, is apparently false, and by sacrificing the end to the means, shews a preposterous idea of the subordination of duties." David Hume, "Of passive obedience" in *David Hume, Political Essays*, Knud Haakonssen, ed., (New York: Cambridge University Press, 1991), 202.

their owners.³³ Hume's position is not that justice permits such acts, but rather that in cases of extreme urgency, the principles of justice are either suspended or supplanted by rules of equity. As Samuel Fleischacker points out, this position is consistent with traditional natural law doctrine as found in Aquinas and Grotius and so is not a Humean innovation.³⁴

The three fundamental rules of justice are “the stability of possession, its transference by consent, and the performance of promises.”³⁵ Hume discusses property rights first. In some ways this is the most fundamental aspect of justice because rights over property must be defined before property can be transferred by consent or be the object of promises.³⁶ Hume's account of property rights explains both how they emerge and why they are socially useful. In the natural course of affairs, people come to gain control over various objects. People are naturally acquisitive and, all else equal, prefer to obtain more possessions.³⁷ Before the emergence of property rights, therefore, they are inclined to take what they can when they can. But mere possession in the absence of any socially recognized *right* to one's possessions is insecure. Moreover, conflict over possessions is costly and dangerous. Given the advantages of secure

³³ “Where the society is ready to perish from extreme necessity, no greater evil can be dreaded from violence and injustice; and every man may provide for himself by all the means which prudence can dictate, or humanity permit. The public, even in less urgent necessities, opens granaries, without the consent of the proprietors; as justly supposing, that the authority of magistracy may, consistent with equity, extend so far.” Hume, David, *Enquiries Concerning the Humean Understanding and Concerning the Principles of Morals*, L. A. Selby-Bigge, ed. (Oxford: Clarendon Press, 1902), Section 3, Part 1, p. 186.

³⁴ Fleischacker, *A Short History of Distributive Justice*, 31-34.

³⁵ David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 4, p. 526; David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 11, p. 567.

³⁶ Promises, of course, do not necessarily depend on property rights since one may make promises regarding future actions that have nothing to do with external objects.

³⁷ E.g., “For as it is evident, that every man loves himself better than any other person, he is naturally impelled to extend his acquisitions as much as possible; and nothing can restrain him in this propensity, but reflection and experience, by which he learns the pernicious effects of that licence, and the total dissolution of society, which must ensue from it. His original inclination, therefore, or instinct, is here checked and restrained by a subsequent judgment or observation.” David Hume, “Of the original contract” in *David Hume, Political Essays*, Knud Haakonssen, ed., (New York: Cambridge University Press, 1991), 196.

possession and the dangers of fighting over resource, people are usually willing to abstain from trying to take the possessions of others if others do likewise. This willingness to respect others' possessions is conditional: I may be willing to refrain from trying to take your possessions, but only if you refrain from taking mine. In the absence of property conventions, there is no sense in sacrificing one's own interests by respecting the possessions of others. Respect for other's possessions and a free-for-all in which people seize whatever they are able to take are each potentially stable equilibria. Moving from one to the other is no simple matter.

Stable property conventions require both mutual expectation of compliance and the belief that general compliance with the convention is in the long run interest of all. Property rights are better for all than a free-for-all, but they require that people mostly refrain from exploiting the trust of others by violating property rights when they can get away with it. In an environment in which most people respect property rights, the threat of punishment may be enough to keep most of the rest in line. But punishment is impractical when people are constantly violating the rules. Voluntary compliance and coercive enforcement are compliments since the more people follow the rules, the easier it is to detect and punish violations. Even complex legal systems usually rely on widespread willingness to follow property rules for their own sake and not because of the risk of being punished.

Rules of justice emerge slowly as people experiment with different patterns of behavior and come to recognize the advantages of coordinating on property rules. The initial conventions may arise through a sort of trial and error.³⁸ Neighbors refrain from taking each other's possessions. At first, this may be indistinguishable from prudent avoidance of direct conflict. Over time, however, the neighbors may develop expectations that each will act non-aggressively.

³⁸ One possibility which Hume does not appear to consider, but that seems Humean in spirit, is that humans, like many other animals, are hardwired with a sense of territoriality and that this makes property conventions – hawk-dove strategies – especially salient.

They may begin to rely on each other's continued good behavior, perhaps by leaving their possessions unguarded from time to time. If these expectations are satisfied, the obvious advantages of peaceable behavior may encourage others to emulate it. Over time, respect for others' possessions may evolve from a collection of bilateral conventions between neighbors to a more general convention between members of the community as a whole.³⁹ This convention ratifies present distributions of goods (whether they came about by means fair or foul) and establishes rules for appropriation of new property.

Hume is often credited as being an important forerunner of game theoretic analysis of social norms.⁴⁰ Although Hume influenced David Lewis' classic modern exposition of convention, the property conventions discussed by Hume differ importantly from Lewis' conventions.⁴¹ Lewis' conventions are solutions to pure coordination problems in which people

³⁹ This discussion follows Hume in supposing that property conventions initially arise between members of a community. In reality, it is likely that members of some close-knit groups, such as small hunter-gatherer bands or extended family groups, have little difficulty establishing a system of property rights for personal property. For such groups other forms of close cooperation (e.g. hunting and sharing food) probably preexist private property rights. In some contexts it might be more realistic to apply Hume's analysis to relations between small collectives (extended families, hunter-gatherer bands, small tribes) that may otherwise be inclined to seize land, livestock and other valuables from each other in the absence of any convention to the contrary. The structure of the explanation is the same whether individuals or extended families are the unit of analysis.

⁴⁰ E.g., "The account I have given of the evolution of conventions is, I believe, essentially the same as Hume's account of the origin of justice – fleshed out with more details and formulated in game-theoretic terms." Sugden, *The Economics of Rights, Cooperation, and Welfare*, 150.

⁴¹ Lewis defines a convention as:

A regularity R in the behavior of members of a population P when they are agents in a recurrent situation S is a convention if and only if it is true that, and it is common knowledge in P that, in almost any instance of S among members of P,

- (1) almost everyone conforms to R;
- (2) almost everyone expects almost everyone to conform to R;
- (3) almost everyone has approximately the same preferences regarding all possible combinations of actions;
- (4) almost everyone prefers that any one more conform to R, on condition that almost everyone conform to R;
- (5) almost everyone would prefer that any one more conform to R' on condition that almost everyone conform to R',

most prefer that their behavior is coordinated with others and it is of only secondary importance which behavior is the object of coordination. In other words, all people prefer to follow some rule, R_1 , if others follow R_1 and follow some other rule, R_2 , if others follow R_2 . In this case, ‘everyone follows R_1 ’ and ‘everyone follows R_2 ’ are each a Nash Equilibrium.⁴²

Property conventions are not Lewis conventions because regulation of access to scarce resources is not a pure coordination game. In Lewis’ examples of pure coordination games – conventions determining who calls back when a telephone conversation is cut off or what side of the road to drive on – the parties are more or less indifferent as to which rules is adopted so long as everyone follows it. Unlike the coordinating conventions that Lewis explores, management of material resources presents an impure coordination problem in which people have interests that are partially overlapping and partially conflicting. Everyone has an interest in avoiding a destructive free-for-all, but each would also prefer that they control more resources at the expense of others. Coordination is important because each person’s ability to use material resources depends on the behavior of others. This holds for any resource that is what economists call a rival good – a good for which one person’s use of the good diminishes the ability of others’ to enjoy it. The vast majority of physical objects are rival. Exceptions such as air for breathing and the waters of the open ocean tend not to be the object of property rights because excluding others from their use serves no purpose.⁴³ Intellectual property, by contrast, is usually non-rival.

where R' is some possible regularity in the behavior of members of P in S , such that almost no one in almost any instance of S among members of P could conform both to R' and to R .

David K. Lewis, *Convention: A Philosophical Study* (Cambridge, MA: Harvard University Press, 1969), 78.

⁴² A Nash Equilibrium is a state of the world in which each person has no incentive alter their strategy given the strategies of the others. Any set of strategies that is not a Nash Equilibrium is inherently unstable because at least one person will do better by changing their behavior.

⁴³ It should be noted that these claims only hold for certain types of usage. One person’s breathing does not diminish the ability of others to breath air. Use of air to soak up pollutants, however, is quite another matter. In this case, the obstacle to treating air as private property is not that use is non-rival but that the

One person's use of a patent or of copyrighted material does not impinge on the ability of others to do so.⁴⁴ The reasons for recognizing intellectual property have more to do with providing incentives for innovation than with coordination. For this reason, the discussion in this chapter will follow Hume in discussing property rights in land or chattels but not intellectual property.

When people who are not close friends or relatives share in an environment with rival goods, they typically will have differing preferences regarding their use. For example, Ann might most prefer that she take whatever goods she wants and that Beth yield control over whatever Ann expresses interest in. Beth's first preference and Ann's least favored result is the inverse of this. The worst possible outcome for both Ann and Beth is a protracted fight over resources that will result in more expected harm to each than the resources are worth. An intermediate result is one in which Ann and Beth each refrain from taking goods that the other has possession of and thus avoid destructive conflict. This game can be represented as follows with the numbers representing Ann's and Beth's preference rankings, [Ann,Beth], so that 1,3 indicates Ann's most preferred outcome and Beth's third most preferred outcome.

Table 1.1

		Beth	
		Hawk	Dove
Ann	Hawk	[4,4]	[1,3]
	Dove	[3,1]	[2,2]

A game with this structure is usually referred to as a hawk-dove game. Hawk-Dove games present a classic situation in which property rights solve an impure coordination problem.

resource is non-divisible since pollution emitted in one place affects air quality to some extent everywhere else on the planet.

⁴⁴ Trademarks are a somewhat different matter. Although use of a trademark is non-rival if considered as a purely physical activity, the trademark is useful because it symbolically represents a brand. The use of brand symbols is rival since Coca Cola's ability to exploit its brand would be compromised by Ace Cola's marketing of its product using symbols associated with Coca Cola.

Maynard-Smith and Price originally used the game to explain territorial behavior among animals.⁴⁵ Unlike coordinating conventions, the parties here have partially overlapping and partially opposing interests. They both have good reason to avoid Hawk/Hawk outcomes, but if one party plays Dove, the other is able to gain by playing Hawk. Because populations with many Hawks will be subject to destructive conflict and populations with many Doves are vulnerable to infiltration by Hawks, neither Hawk nor Dove is an evolutionarily stable strategy (“ESS”). Unlike ‘play Hawk’ and ‘play Dove’, the rule ‘play Hawk if threat to my possession, play Dove with respect to others’ possessions’ is a Nash equilibrium and an ESS. This Hawk/Dove mixed strategy creates a system of proto-property rights in which all keep their present possessions. It also tends to spread the gains from cooperation because different agents are permitted to control resources depending on who initially has possession.

Abstract discussion of Hawk-Dove strategies may make coordination over the use of material resources seem more simple than it actually is. For one thing, some resource management problems are better modeled by a prisoner’s dilemma, which differs from the Hawk-Dove game in that parties always have incentive to adopt the non-cooperative strategy regardless of the strategies of others. Property conventions are also often vulnerable to people who adopt opportunistic strategies. If property rights can sometimes be violated without anyone noticing, people may feign compliance while stealing when they think that they can get away with it. Many of the benefits of property conventions are lost if everyone must constantly guard their possessions for fear of others taking them while nobody is looking. Third, even if people make good faith efforts to respect the rights of others, conflict may nonetheless arise if rights are vague or difficult to interpret. Some ambiguous cases are inevitable; the danger for conventional

⁴⁵ J. Maynard-Smith & G.R. Price, “The Logic of Animal Conflict,” *Nature* 246 (1973): 15-18.

property rights is that conventions can unwind if people attribute bad faith to each other in cases of sincere disagreement between reasonable people.

The conventional nature of property implies that there is a trade off between optimality and stability for property rules. In order to settle distributive questions authoritatively, property rules must be usually be followed even in cases where they require substantively undesirable outcomes. Justice sometimes requires that property be given to the rich and prodigal when it would be of greater benefit to the poor and thrifty because stability of possession cannot be achieved except by respecting rules that are abstract and generally applicable.⁴⁶ For similar reasons, Hume denies that property rights arise via a fittingness relationship between a person and her property.⁴⁷ Property rules thus function as a kind of a second best solution to distributive questions. The best solution would put property in the hands of those who would benefit most, but this requires a sort of situation specific judgment would make property entitlements uncertain and encourage partiality.

The overriding advantages of a system of stable entitlements mean that there is a range of possible rules that could be adopted as property conventions. Being in a place where others follow a certain rule can give one sufficient reason to follow it even if some other rule could play the same role in stabilizing expectations (and even if the other rule might be more desirable).

⁴⁶ “A single act of justice is frequently contrary to public interest; and were it to stand alone, without being follow’d by other acts, may, in itself, be very prejudicial to society. . . . But however single acts of justice may be contrary, either to public or private interest, ‘tis certain, that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society, and to the well-being of every individual. ‘Tis impossible to separate the good from the ill. Property must be stable, and must be fix’d by general rules. Tho’ in one stance the public be a sufferer, this momentary ill is amply compensated by the steady prosecution of the rule, and by the peace and order which it establishes in society.” David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 2, p. 497.

⁴⁷ “However useful, or even necessary, the stability of possession may be to human society, ‘tis attended with very considerable inconveniences. The relation of fitness or suitableness ought never to enter into consideration, in distributing the properties of mankind; but we must govern ourselves by rules, which are more general in their application, and more free from doubt and uncertainty.” David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 4, p. 514.

Morally arbitrary conventions can serve the morally vital purpose of preventing wasteful conflict over resources. Although certain property conventions might arise ‘naturally’, in the sense of spontaneously, because of their utility in solving coordination problems, there is no unique ‘natural’ set of property rules that all spontaneously arising conventions must converge on.⁴⁸ Considerations of stability count strongly in favor of choosing rules that are simple, psychologically salient or grounded in existing custom even if some different rule, if followed regularly, might bring about slightly better results. The particular contours of property rules may depend on historical accident.⁴⁹ They also depend on facts about human psychology. Rules are more likely to be stable if they pick out features of a situation that are especially psychologically salient.⁵⁰ For example, Hume suggests that the doctrine of *accession* is grounded in associative psychology. It is intuitive to associate an apple with the apple tree from which it fell and a calf with its mother. This psychological propensity leads people to coordinate on the rule that the owner of an apple tree is the owner of tree’s apples and the rule that the owner of a cow is the owner of her calf.⁵¹ Psychological salience also helps to explain the enormous significance of possession for property and property law and, if Hume is right, various of the legal doctrines that

⁴⁸ Obviously, it is possible for such patterns of behavior to be biologically hardwired rather than conventional. Some animal species mark their territory with scent. And others instinctively defer to resources occupied or possessed by members of the same species. Humans’ ability to assign conventional meanings to arbitrarily selected symbols gives them the ability to employ a much more varied and much more complex conventions to solve coordination problems related to the use of various resources.

⁴⁹ This seems a clear implication of the Humean approach, although Hume does not stress the significance of path dependence in his discussion of property in the *Treatise*.

⁵⁰ Hume seems to have anticipated Thomas Schelling and David Lewis by two centuries in his emphasis on the importance of psychological salience. See Thomas C. Schelling, *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1960); Lewis, *Convention: A Philosophical Study*.

⁵¹ David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 3. More provocatively, Hume suggests that the same analysis applies to labor as a source of ownership. Labor on an unowned object often gives rise to ownership not because of one’s natural right to the value of one’s labor but because the salience of labor makes it a good candidate for a convention of first appropriation. This claim is, however, stronger than necessary: particular property conventions may be explained by factors other than psychological salience. Humean property theory is consistent with the notion that people may sometimes converge on certain property conventions because of their shared moral intuitions or because these conventions are clearly more efficient.

regulate acquisition of unowned objects. “Everyone gets to keep what they possess” is a salient rule for restricting wasteful competition over resources that is often justifiable in light of the great advantages of stable property entitlements even when the resulting distribution of property is suboptimal.

Hume’s discussion of the content of the rules of justice is substantially clearer than his account of the moral psychology of artificial virtue. Hume’s moral psychology steered a middle course between predecessors such as Mandeville and Hobbes on the one hand who saw people as motivated largely by self-interest and Shaftesbury and Hutcheson on the other who believed that natural benevolence plays a more important role.⁵² Hume argued that people are characterized by genuine but limited concern for the well-being of others.⁵³ Though the welfare of others can be intrinsically motivating, our sympathy for those who are not close associates is sharply limited and tends to decline with social and physical distance.⁵⁴ Justice is necessary for human society in part because people cannot be sufficiently motivated by the welfare of strangers.⁵⁵ Even when people act out of altruistic impulses, their preference for friends and relatives lead

⁵² Michael L. Frazer, *The Enlightenment of Sympathy: Justice and the Moral Sentiments in the Eighteenth Century and Today* (New York: Oxford University Press, 2010), 66; Michael Gill, “Hume’s Progressive View of Human Nature,” *Hume Studies* XXVI, no. 1 (April, 2000), 87-88. David Millar concurs, comparing Hume with slightly different figures: “We began with his conception of human nature, about which he held a view midway between the pessimism of, say, Hobbes, and the optimism of, say, Rousseau or Godwin. Men were on the whole neither egoists nor altruists, but tended to be partially benevolent—benevolent towards those in their immediate social vicinity.” David Miller, *Philosophy and Ideology in Hume’s Political Thought* (Oxford: Oxford University Press, 1981), 191-192.

⁵³ “So far from thinking, that men have no affection for any thing beyond themselves, I am of opinion, that tho’ it be rare to meet with one, who loves any single person better than himself; yet ’tis as rare to meet with one, in whom all the kind affections, taken together, do not over-balance all the selfish.” David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 2, p. 487.

⁵⁴ “But tho’ this generosity must be acknowledg’d to the honour of human nature, we may at the same time remark, that so noble an affection, instead of fitting men for large societies, is almost as contrary to them, as the most narrow selfishness. For while each person loves himself better than any other single person, and in his love to others bears the greatest affectation to his relations and acquaintance, this must necessarily produce an opposition of passions, and a consequent opposition of actions; which cannot but be dangerous to the new-establish’d union.” David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 2, p. 487.

⁵⁵ David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 2, p. 487-489.

them into conflict just as self-interest does. Altruism combined with partiality toward one's friends and relations can be even more socially disruptive than unbridled pursuit of narrow self-interest since it facilitates cooperation among members of a family, clan or tribe in order to aggress against outsiders.⁵⁶

Hume distinguishes the original motive for justice from the moral motivation that rules of justice provide once the relevant conventions are established. Although observance of conventional property rights is very much in the public interest, the initial adoption of rules of justice is motivated by self-interest not public spiritedness.⁵⁷ Each person has an interest in the stability of possessions not only because this allows each to enjoy his own possessions but also because general observance of property rights leads to a more peaceful and prosperous society. People come to perceive that they will do better in the long run by conforming to rules of justice than they would by grabbing whatever they can in the moment. And this leads them to form a conditional intention to respect property rights so long as others do so as well. Because they are initially motivated by considerations of self-interest, property conventions may arise spontaneously even in communities of largely self-regarding actors. Hume insists that dispositions to act justly cannot arise from either public benevolence (concern for the interest of the public as a whole) or private benevolence (concern for the interests of particular people). The former is excluded because people who are disposed to act out of public benevolence would

⁵⁶ The recent history of persistent clan warfare in the Scottish highlands and British border areas probably made this point more salient to eighteenth century Scots than it is to most contemporary westerners.

⁵⁷ “[I]f men had been endow’d with such a strong regard for public good, they wou’d never have restrain’d themselves by these rules; so that the laws of justice arise from natural principles in a manner still more oblique and artificial. ‘Tis self-love which is their real origin; and as the self-love of one person is naturally contrary to that of another, these several interested passions are oblig’d to adjust themselves after such a manner as to concur in some system of conduct and behavior. This system, therefore, comprehending the interest of each individual, is of course advantageous to the public; tho’ it be not intended for that purpose by the inventors.” David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 6, p. 529.

have no need of rules of justice to regulate their affairs with others. Each person would be independently motivated to pursue the public interest regardless of what others do.⁵⁸ The latter is excluded because rules of justice sometimes require actions that do not follow from concern for the interests of those directly affected such as when property must be given to a rich and profligate rightful owner rather than a poor and thrifty unlawful claimant.⁵⁹

In the *Treatise*, Hume often suggests that although justice is usually the best policy from the perspective of long run self-interest, people have difficulty of following rules of justice partially due to temporally inconsistent preferences.⁶⁰ He argues that threats of punishment are required primarily because people have difficulty foregoing some immediate gratification in favor of some distant future benefit and thus are apt to violate property conventions even when this is harmful to their *own* interests in the long run.⁶¹ When both the benefits of violating the rules and the harms are in the distant future, a person may believe that the harms outweigh the benefits and judge that following the rules of justice is in her self-interest. However, when an opportunity to violate the rules for short term gain presents itself, she may reverse her judgment as the appeal of the near term gain outweighs the aversion to the more distant long term cost. Rules of justice may help solve this problem in two ways. First, the threat of punishment may

⁵⁸ David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 3, p. 481.

⁵⁹ David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 3.

⁶⁰ This observation was not original to Hume. Robert Frank notes that predecessors such as Descartes, Hobbes and Locke all expressed similar very ideas. Robert Frank, *Passions Within Reason: the Strategic Role of the Emotions* (New York: W. W. Norton & Co., 1988), 85. Hume's particularly strong embrace of this position may in part reflect his difficulty in explaining altruistic acts of artificial virtue within the framework of his theory.

⁶¹ "All men are sensible of the necessity of justice to maintain peace and order; and all men are sensible of the necessity of peace and order for the maintenance of society. Yet, notwithstanding this strong and obvious necessity, such is the frailty or perverseness of our nature! It is impossible to keep men, faithfully and unerringly, in the paths of justice. Some extraordinary circumstances may happen, in which a man finds his interests to be more promoted by fraud or rapine, than hurt by the breach which his injustice makes in the social union. But much more frequently, he is seduced from his great and important but distant interests, by the allurements of present, though very often frivolous temptations. This great weakness is incurable in human nature." David Hume, "Of the origin of government" in *David Hume, Political Essays*, Knud Haakonssen, ed., (New York: Cambridge University Press, 1991), 20.

cause people who otherwise would act unjustly in the heat of the moment to refrain from doing so out of fear of punishment. Second, moral emotions may have a similar function insofar as feelings of guilt or shame provide an immediate sanction for acting unjustly.⁶²

As tentative expectations crystallize into social norms, people become inclined to count transgressions as marks of bad character. They come to sympathize with the victims of these transgressions and to condemn acts of injustice without consideration of their own personal interest. Acts that were once considered matters of prudence become questions of morals. Although self-interest is the original motive for justice, new forms of motivation are possible when property rules are moralized. As people gain experience with the favorable social consequences of just acts, they associate justice with peace, prosperity and harmonious social relations. Once this connection is established, approbation of just acts is supported by “sympathy with the public interest.”⁶³ It is further reinforced by the “artifice of politicians” as well as by the efforts of parents and teachers to inculcate artificial virtue in the next generation.⁶⁴ One interpretation of Hume’s view is that although people are not capable in their “natural” condition of being intrinsically motivated by justice, their dispositions can change as a result of the “progress of sentiments” so that in a civilized condition they may be motivated by considerations of justice quite apart from self-interest.⁶⁵

Many commentators believe that Hume is unable to reconcile his account of justice as an artificial virtue with his theory of the relationship between moral motivation and moral

⁶² See Robert Frank, *Passions Within Reason: the Strategic Role of the Emotions* (New York: W. W. Norton & Co., 1988). George Ainslie has a similar theory of the sense of fairness as constraining intertemporal irrationality. See George Ainslie, “Intertemporal Bargaining Predicts Moral Behavior Even in Anonymous One-Shot Economic Games,” *Brain and Behavioral Sciences* 36, no. 1 (2013): 78-79.

⁶³ David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 2, p. 499-500.

⁶⁴ David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 2, p. 500.

⁶⁵ Michael Gill, “Hume’s Progressive View of Human Nature,” *Hume Studies* XXVI, no. 1 (April, 2000), 98-100. Jacqueline Taylor advances a similar view. Jacqueline Taylor, “Justice and the Foundations of Social Morality in Hume’s Treatise,” *Hume Studies* XXIV, No. 1 (April, 1998), 5-30.

judgment.⁶⁶ Hume argues that moral judgment involves approbation of the virtuous motive of an action where motive is construed very broadly to include character traits, dispositions and emotions as well as the ordinary meaning of the term.⁶⁷ For example, moral approbation of a generous act involves a favorable appraisal of the benevolent impulse that motivated the act. This sentiment may be triggered by sympathy for the person who benefits from a generous act. The motive for action must be, at its root, non-moral in nature. Since being moral means being such that others are disposed to respond with moral approval, a moral act with no further motive other than acting morally would appear to involve an infinite regress. This presents a puzzle for artificial virtues since Hume argues at some length that the sort of benevolent impulses that motivate acts of natural virtue are insufficient to account for justice and other artificial virtues.⁶⁸ Although Hume appears strongly committed to the view that moral approbation requires a favorable assessment of some non-moral motive in order to avoid a vicious circularity, he seems to explicitly reject all possible non-moral motives for just acts including self-interest, private benevolence and public benevolence.⁶⁹

There are various proposals for resolving this apparent inconsistency. Haakonssen and Gauthier conclude that just acts involves a sort of self-deception about one's actual motives.⁷⁰ Once people internalize the rules of justice, they see compliance with them as reflecting a virtuous motive although there is in fact no such thing because the self-interest that is the original

⁶⁶ Don Garrett, "The First Motive to Justice: Hume's Circle Argument Squared," *Hume Studies* 33, no. 2 (November 2007), 257-258. Hume's discussion of the "sensible knave" in the *Enquiry* may stem from a later judgment that his treatment of this issue in the *Treatise* was unsatisfactory. See Frazer, *The Enlightenment of Sympathy*, 76-77.

⁶⁷ Garrett, "The First Motive to Justice: Hume's Circle Argument Squared," 257-258.

⁶⁸ Garrett, "The First Motive to Justice: Hume's Circle Argument Squared," 257-258.

⁶⁹ *Id.*

⁷⁰ Knud Haakonssen, *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith* (Cambridge: Cambridge University Press, 1989); David Gauthier, "Artificial Virtues and the Sensible Knave," *Hume Studies* XVIII (1992): 401-427. Their view is discussed in Stephen Darwall, "Motive and Obligation in Hume's Ethics," *Noûs* 29, no. 4 (Dec. 1993), 439-440.

motive of justice is not apt for moral approval. This reading of Hume puts him closer to Hobbes than is commonly thought. Marcia Baron argues that Hume believes that people internalize rules of justice as a result of successful political propaganda notwithstanding his apparent disagreement with Mandeville in his discussion of the “artifice of politicians”.⁷¹ Both of these approaches downplay the extent to which artificial virtues involve distinctive forms of moral motivation.

Stephen Darwall takes the opposite approach. He suggests that Hume ends up being committed to the position that moral rules can be intrinsically motivating despite Hume’s protestations to the contrary.⁷² Although self-interest motivates the initial adoption of conventions of justice, once these conventions are in place, people take rules of justice as having independent normative force and appraise others favorably for acting out of a sense of obligation to follow the rules of justice.⁷³ Darwall’s reading requires a substantial deviation from Hume’s official theory of the will, which is that action is motivated by approbation of the consequences of one’s action. Instead, people have to capacity to act out of *principle* in the sense of acting so

⁷¹ See Marcia Baron, “Hume’s Noble Lie: An Account of his Artificial Virtues,” *Canadian Journal of Philosophy* 12 (1982): 539-555.

⁷² Darwall, “Motive and Obligation in Hume’s Ethics,” 415-448. Brian Barry takes this point even farther by suggesting that Hume eventually allowed that people might have an intrinsic desire to act in ways that can be justified to others in impersonal terms: “In the end, I think that Hume was forced to abandon his official theory and allow that the desire to behave in a way that can be justified in impersonal terms must be admitted as an irreducible motive.” Barry, *A Treatise on Social Justice, Volume I: Theories of Justice*, 148-152.

⁷³ A variation of Darwall’s strategy turns on the distinction between the original motive for justice and the disposition that is the object of moral approbation once the relevant conventions have been established. Richard Garrett argues that Hume believes that once rules of justice regulate social life, people are motivated to adopt a *policy* of complying with them out of a sense of enlightened self-interest. According to Garrett, the *original* motive to justice is a fairly direct calculation of the benefits of respecting the possessions of others on the condition that they do the same whereas the *continuing* motive is a sense of the advantages of adopting a policy of acting justly. At this stage, one’s motivation is no longer contingent on the dispositions of others but takes rules of justice to be more than merely conditional preferences. Once these non-conditional dispositions are in place, people may favorably appraise actions taken due to a policy of acting justly even though having a policy of acting justice may be entirely consistent with self-interest. Garrett, “The First Motive to Justice: Hume’s Circle Argument Squared,” 271-272.

as to conform to certain authoritative rules rather than to secure some good consequence or to avoid a bad one.⁷⁴

As this is a work of political philosophy, not Hume exegesis, I will not attempt to resolve the tensions in Hume's position or argue for a particular reading of Hume's moral psychology. I will return to the question of what sort of moral psychology is implied by Hume's theory of justice and discuss how various ways of clarifying Hume's position might suggest different avenues for developing Humean political theory. But first, now that my exposition of Hume's theory of justice is complete, I will explore how Humean property theory differs from its main competitors.

3. HUMEAN PROPERTY THEORY

Neo-Humean (henceforth I'll use 'Humean' for simplicity's sake) theories of property rights occupy an intermediate position between neo-Lockean and resource egalitarian views.⁷⁵ Humean theories appeal to the systemic benefits of stable property entitlements as justifying strong, but context sensitive property rights. They have several distinctive elements. First, property rights are conventional. Rules of property emerge from conventions between persons who have partially overlapping and partially conflicting interests. They tend to be adopted out of a sense of long-run self-interest as people come to realize that they are best served by respecting each other's possessions. When property conventions are in place, however, they serve the public interest generally because everyone benefits from an environment in which possessions are respected, resource conflicts are not resolved by force and people can engage in commerce, philanthropy and other activities that are only possible when possessions are secure. Property rights do not depend, therefore, upon legitimate political authority, universal moral impulses, or

⁷⁴ Darwall, "Motive and Obligation in Hume's Ethics," 440.

⁷⁵ Just as neo-Lockean theories are inspired by Locke's work but arguably depart from it in certain respects, neo-Humean theories do not perfectly match Hume's actual theory.

explicit consent. Convention is both necessary and sufficient.⁷⁶ The content of property rules are shaped by the twin requirements of common interest and mutual expectation. Rules that do not tend toward the public interest will not be stable because people will not have conditional preferences to follow them on the condition that others do.⁷⁷ And rules that are excessively complex, opaque, or are not psychologically salient will not be adopted because they are unlikely to be the object of mutual expectation.

The advantages of property rights as a basis for social cooperation may justify property entitlements that are entirely morally arbitrary outside of the context of the particular social conventions that support them. This is an important point of contrast with neo-Lockean theories and other natural rights views. Lockean rules of first appropriation might be the object of Humean property conventions. But it is not necessarily an injustice if they are not. For a Humean, even if the initial distribution of possessions is determined by a mix of luck, thuggery and fraud, the emergence of property conventions converts mere possession into full-blooded property. Indeed, the evolution from bandits to barons should be commended as social progress. Resource egalitarians usually agree with Humeans that property entitlements are based on conventional rules rather than on “natural rights” and so in this respect the two approaches are opposed to neo-Lockeanism.

⁷⁶ Furthermore, according to Hume, legitimate political authority is also a matter of convention, so even insofar as property rights might be created or modified by a government, this does not vitiate the conventional roots of property rights.

⁷⁷ Obviously, once governments are in the picture, it becomes possible to impose property rights by force. However, enforcement of property rights becomes challenging in cases in which most people are disinclined to respect them because no government has the capacity to monitor and punish constant violations of property rights. For this reason, highly unequal societies are likely to adopt hierarchical social structures in which the high status property owners are delegated power to enforce property rights against the masses. In such societies, property conventions might effectively operate only within particular estates (i.e. peasants respect each other’s use rights but have little intrinsic motivation to respect the property rights of the landlord; the landlords respect each other’s landholdings but do not regard peasants as having standing to complain about the incursions of a neighboring landlord).

Where the Humean and resource egalitarian theories come apart is on the conditions necessary for property rights to be justified. According to Humean theory, existing property entitlements have normative significance that is independent from their contribution to some larger distributive scheme. Property conventions are valuable because they address a crucial problem for cooperative social life. The regulation of access to scarce resources presents a coordination problem that must be solved in any complex social order. A system of property rights solves this coordination problem by assigning rights to regulate access. Assignment of property rights provides a framework for future decision making by dividing spheres of decisional authority. In order for property rules to serve this function, certain questions must be considered settled so that people do not have to solve their coordination problem from scratch each time a new question arises. Just as being an effective agent might require treating one's intentions as having at least provisionally settled certain questions, treating certain questions concerning access to resources as settled by property conventions might be necessary for complex forms of social cooperation.⁷⁸ Because the persistence of conventions requires continued compliance by most people most of the time, conventional property rights are to some extent fragile. Any property convention that manages to solve the coordination problem arising from resource scarcity ought to receive at least some weight in normative deliberation. Existing property conventions therefore have moral significance even when they are *not* based on Lockean natural rights and do *not* meet resource egalitarian standards for public justification in light of some conception of equality. Instead, Humean theory subjects property conventions to the much weaker standard of serving the public interest relative to a free-for-all. This means that

⁷⁸ This analogy draws on Michael Bratman's work on intentions. See Michael Bratman, *Intention, Plans, and Practical Reason* (Cambridge, MA: Harvard University Press, 1987).

Humean theory tends to be much less exacting in its standards for justification than resource egalitarian theories and much more sensitive to local history and culture.

From this perspective, the problem with both neo-Lockean and resource egalitarian approaches is that they invite moral claims that threaten to unsettle property conventions.⁷⁹ Existing property conventions, whether or not they are congruous with natural property rights, may require a sort of deference to existing rules that fits uneasily with the resource egalitarian approach. Simply because property convention Z would bring about a more equitable distribution of property than the existing convention A does not mean that one is justified in disregarding A in favor of Z. Resource egalitarians typically agree that people should not feel free simply to disregard property laws that they find non-optimal. Instead, it is the state that should respond to considerations of distributive justice by moving to Z from A, perhaps with some transition policy. This move does not, by itself, adequately address Humean concerns. Property rights are meant, in part, to authoritatively settle distributive questions in order to prevent wasteful conflict over resources. If, instead of being settled by property law, political authorities are allowed to determine property entitlements without any real constraints, this simply displaces the danger of wasteful resource conflict into the public sphere. Under non-ideal conditions, redistribution in light of some abstract philosophical account of equality is problematic unless it treats existing property rights as having independent normative significance weight because it threatens to undermine the conventional foundations of political order.⁸⁰

⁷⁹ My claim here has similarities to Scott Shapiro's recent argument that Dworkinian jurisprudential methodology threatens to destabilize the legal system by allowing the substantive moral views of the interpreters of legal texts to upset established legal conventions. See Scott Shapiro, *Legality* (Cambridge MA: Harvard University Press, 2011).

⁸⁰ Chapters Two and Three will be centrally concerned with how to integrate Humean property rights and redistributive governmental policies.

Humean theories rely on a “realist” moral psychology in the sense that they assume that people have limited sympathy for those who are not close friends or family and that social institutions must therefore appeal, at least to some extent, to the self-interest of their participants in order to provide a basis for stable cooperation. People are sensitive to the division of gains from cooperation and likely to resist arrangements in which these accrue almost entirely to others. They are also unlikely to cooperate if they doubt that others will follow the rules when it might be personally costly. Although Humean emphasis on justice as mutual advantage rather than justice as impartiality runs against the main currents of recent political philosophy, it is congruent with much social scientific work on fairness norms.⁸¹ One need not be a hardened cynic to think that in dealings among strangers, it is safer to appeal to interest than sympathy. In matters such as property, which require constant cooperation with strangers, the natural human impulse to rejoice at the happiness of one’s friends and relations is far from sufficient for stable cooperation.

As we have already seen, there is some ambiguity in Hume’s account of the moral psychology of artificial virtue. Humean property theory is consistent with several distinct accounts of moral motivation each of which has at least some affinities with Hume’s argument in the *Treatise*. One possibility is that compliance with property conventions is motivated by individual long run self interest. Ken Binmore is the leading proponent of this sort of neo-Humean political theory.⁸² He credits Hume with explaining cooperation in terms of reciprocal

⁸¹ E.g., “Ultimately, the mutualistic approach considers that all moral decisions should be grounded in consideration of mutual advantage.” Nicolas Baumard, Jean-Baptiste Andre & Dan Sperber, “A Mutualistic Approach to Morality: the Evolution of Fairness by Partner Choice,” *Brain and Behavioral Sciences* 36, (2013), 109.

⁸² E.g., Ken Binmore, “Why do People Cooperate?” *Politics, Philosophy & Economics* 12, no. 2, (Feb. 2006): 81-95.

altruism (an insight rediscovered by game theorists and biologists in the twentieth century).⁸³ Binmore argues that social contracts – the set of norms governing the social behavior of members of a society⁸⁴ - specify rules of action that form Nash equilibria. Any set of rules not at equilibrium is unstable and will be replaced by one that is.⁸⁵ Rules of justice tend to evolve toward Pareto efficiency (at least insofar as it is consistent with stability) because rules that are not Pareto efficient forego potential gains that could be divided in a mutually advantageous way.⁸⁶ Changing conditions may disrupt a social contract that is at equilibrium by changing the payoffs for various strategies. When this occurs, social norms must be adjusted to reach a new Nash equilibrium. Fairness intuitions play a crucial role in helping people to coordinate their behavior so as to settle on a new stable equilibrium.⁸⁷ Binmore argues that “fairness norms evolved because they allow groups who employ them to coordinate quickly on Pareto-improving

⁸³ Ken Binmore, *Game Theory and the Social Contract, Vol II: Just Playing* (Cambridge: MA: MIT Press, 1998), 265. The key passage is found in the *Treatise*: “I learn to do service to another, without bearing him any real kindness, because I foresee, that he will return my service in expectation of another of the same kind, and in order to maintain the same correspondence of good offices with me and others. And accordingly, after I have serv’d him and he is in possession of the advantage arising from my action, he is induc’d to perform his part, as foreseeing the consequences of his refusal.” David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 3, p. 521.

⁸⁴ It is important to note that Binmore’s social contract is emphatically *not* a set of basic laws regarding political institutions. The social contract specifies, among other things, rules for complying with or ignoring governmental authorities as well as for punishing those who do not play by the rules. Governments and formal laws are therefore the products of social contracts that state that people should cooperate with them, at least in some circumstances, and specify sanctions for those who do not do so. Laws may become part of the social contract if they are actually followed. But as a good Humean, Binmore believes that fundamental conventions are constitutive of social order and prior to any formal state institution.

⁸⁵ “A fair social contract is simply an equilibrium in the game of life that calls for the use of strategies which, if used in the game of morals, would leave no player in the game of morals with an incentive to appeal to the device of the original position.” Ken Binmore, *Game Theory and the Social Contract, Vol I: Playing Fair* (Cambridge: MA: MIT Press, 1994), 41.

⁸⁶ Societies with massively inefficient social contracts also are at risk of being conquered or having their members recruited away by societies that are more efficient.

⁸⁷ “*Homo economicus* would perhaps have no need to join homo sapiens in his capacity for sentimentality if one could always count on equilibria being *unique*. But multiple equilibria have to be confronted, and societies of *homo economicus* therefore require coordinating conventions that incorporate common understandings about which of the available equilibria should be selected.” Binmore, *Game Theory and the Social Contract, Vol I: Playing Fair*, 57.

equilibria as they become available, and hence to outperform groups that remain stuck at the old equilibrium.”⁸⁸ Although people are naturally inclined to learn and apply fairness norms to structure their cooperation with others, they are *not* disposed to follow norms harmful to their long-run interests. Fairness norms, therefore, generally specify a division of the gains from cooperation that gives all parties benefits commensurate with their bargaining position.⁸⁹ Although this may sound rather inegalitarian, stable bargains often involve minimizing the concession of the party that gives up the most relative to their most favored result. Those relatively disfavored by the social contract, e.g., low wage workers, may require compensation above market rates in order to secure their support.

Binmore unapologetically favors a rational choice neo-Hobbesian interpretation of moral psychology.⁹⁰ He complains that experimental economics results that suggest deviations from standard rational choice models tend to dissipate when people are given more time to learn about the novel conditions they are confronted with in the experiments or when greater sums of money are at stake.⁹¹ People rely on norms, strategies and heuristics that they have picked up elsewhere when confronted with unfamiliar circumstances, but given sufficient time and sufficient incentives, they will tend to change their behavior so as to maximize their expected payoffs given their particular utility function even if this requires overriding the impulsive response that has been inculcated by experiences in their normal (i.e. non-experimental) environment.

Binmore’s hardline rational choice moral psychology requires that much seemingly altruistic behavior be explained away. In contrast to some rational choice theorists, however,

⁸⁸ Ken Binmore, *Natural Justice* (New York: Oxford University Press, 2005), 171.

⁸⁹ This is, needless to say, an oversimplification. I have omitted Binmore’s interesting theory of how people evaluate trade-offs between the preferences of different people. This plays a key role in his argument, but is not necessary for understanding Binmore’s account of the moral psychology of justice.

⁹⁰ Binmore, “Why do People Cooperate?,” 81-95.

⁹¹ Binmore, *Natural Justice*, 171.

Binmore is *not* skeptical about the importance of social norms and moral emotions in explaining behavior.⁹² Binmore believes that some actions that might seem to violate the predictions of rational choice models, such as turning down non-zero offers in the ultimatum game, reflect an emotional response to the violation of social norms. This explanation only makes sense within his framework if, as seems likely, people are disposed to internalize fairness norms and apply them in ways that sometimes preempt calculation of expected payoffs. This inclination might reflect a sort of higher order rationality given well-known cognitive limitations that make effortful deliberation costly and the advantages of conforming to others' expectations. Binmore's theory is therefore compatible with a psychology that allows both moral emotions and moral rules to be proximately motivating. Where it differs from other versions of neo-Humean moral psychology is on the question of whether the public interest or intrinsic concern with interests of others ultimately motivates compliance with moral norms.⁹³ Given enough time and incentive, people will "unlearn" moral norms that do not further their aims in life.

A second possible source of Humean moral motivation is sympathy with the public interest. In the *Treatise*, Hume argues that, "self-interest is the original motive to the establishment of justice; but a sympathy with public interest is the source of the moral approbation, which attends that virtue."⁹⁴ Hume's observation relates to the source of moral approbation of just acts, but it is consistent with the notion that people might also be motivated to act out of sympathy with the public interest. The crux of this second theory of moral motivation is that compliance with the rules of justice can be seen as a contribution to a public good. A person may follow widely accepted property rules out of a sense of common interest in

⁹² Binmore, *Natural Justice*, 83-84.

⁹³ Binmore's position, like Hume's, is compatible with intrinsic concern for the welfare of others motivating a great range of generous or benevolent acts. What Binmore denies is that this is sufficient to explain property rights and other rules of justice.

⁹⁴ David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Sec. 2, p. 499-500.

upholding these rules even in cases in which it is individually advantageous to violate them. On this account, people are conditional cooperators who usually follow property conventions regardless of their expected gains or losses so long as they (a) believe that others will mostly obey the rules, (b) believe that general observance of the rules is in the public interest and (c) expect to share in the benefits of the flow from general observance of these rules. This is not to say that conditional cooperators are insensitive to the costs and benefits of just acts: people will usually act justly when this requires only small personal sacrifices and are more likely to act unjustly when they can secure some great gain for themselves. Sugden, while acknowledging that Hume appears to argue to the contrary, expresses skepticism that sympathy with the public interest can be sufficiently motivating.⁹⁵ There *is* something somewhat incongruous here with Hume's skepticism about the motivating power of sympathy with those distant from ourselves: if rules of justice are apt for situations in which natural sympathy is insufficient to assure good behavior, it seems peculiar to argue that sympathy with an abstract collective largely made up of such people will do the trick. Perhaps "self-love" combined with identification of oneself as a member of a collective that shares certain interests can go some way to resolving this apparent contradiction. But in cases concerning large collectives – and rules of justice mostly concern such situations – it seems a stretch to argue that people usually weigh their interest in upholding the rules of justice qua member of the public as outweighing the potential benefits of being a rule breaker.

One potential response to this difficulty is to identify sympathy with the public interest not as directly motivating just acts but instead as providing a motive to treat the rules of justice as authoritative. As discussed previously, this is what Darwall argues is the most attractive

⁹⁵ Sugden, *The Economics of Rights, Cooperation, and Welfare*, 175-76.

interpretation of Hume's position.⁹⁶ Darwall's interpretation of Hume's moral psychology of artificial virtue might go some way to explaining how a sense of common interest can be motivating. Conforming one's actions to the rules of justice *is* a contribution to a public good, namely the conventions that make harmonious life in complex societies possible.⁹⁷ Like many public goods, this is a collective project. Since the point of conventions is to coordinate one's behavior with others, there is no sense in following rules that one does not expect others to follow. But if others are disposed to follow the rules, then to treat the rules of justice as binding on oneself is to do one's part in a common project. Once a person has decided to treat the rules of justice as authoritative, she does not typically weigh sympathy with the public interest against her particular ends. Instead, justice preempts other considerations. If this account is correct, it would explain why people treat the rules of justice as being authoritative on the condition that their neighbors also comply with these rules.

A third possible motivation for compliance with rules of justice is strong reciprocity. Strong reciprocity is "a predisposition to cooperate with others, and to punish those who violate the norms of cooperation, at personal cost, even when it is implausible to expect that these costs will be repaid."⁹⁸ Strong reciprocity is distinct from generic altruism in that it involves intrinsic motivation to help those who help oneself rather than some more general motivation to help others. It is distinct from enlightened self-interest in that it motivates genuinely self-sacrificing

⁹⁶ Darwall, "Motive and Obligation in Hume's Ethics," 415-448.

⁹⁷ Conventional rules of justice are not quite a pure public good. Public goods in the technical sense of the term are goods that are non-rival and non-excludable. Conventions of property, promise, and contract are non-rival since one person's benefits from participation in the conventional practice do not threaten another's person's ability to benefit. To the contrary, one person's participation tends to facilitate the participation of others by enlarging the scope of the conventional practice. However, conventions practices of justice may be partially excludable since one might deny certain people the benefits of being a property owner or a promisee. Such people might still indirectly benefit from the existence of property rights for others, so conventions of justice seem to be a partially excludable good.

⁹⁸ Herbert Gintis, "Behavioral Ethics Meets Natural Justice," *Politics, Philosophy & Economics* 12, no. 2, (Feb. 2006), 17.

behavior in cases where an agent knows that she will receive no future benefit. For example, one might care for a dying friend who has been helpful in the past even when there is no prospect that this final act of kindness will be reciprocated. There is a plausible functional explanation for strong altruism as a psychological trait. In order to secure favors from others, it is best to appear to be the sort of person who will reciprocate favors in the future. But sometimes returning a favor is costly and sometimes there is no prospect for any future advantage. People will want to help others who are disposed to return a favor even when they will get nothing further out of the deal. Given that people are always on the lookout to see who can be trusted in cooperative ventures and who cannot, it would be useful to be able to signal that one will return favors. And the surest way to do this is to actually be such a person. Proponents of strong reciprocity sometimes suggest that this form of motivation may be hardwired into human psychology.⁹⁹ But regardless of whether strong reciprocity has biological underpinnings, there is abundant anthropological evidence that reciprocity norms are ubiquitous.

Strong reciprocity differs from “sympathy with the public interest” in that it postulates that people have a very general intrinsic motivation to reciprocate favors that goes far beyond contributions to common projects. Strong reciprocity can motivate compliance with property rules even among people who are relatively agnostic about the utility of these rules. People who are intrinsically motivated to reciprocate favors may respect the property rights of others not because they judge that this serves an important public purpose but because they think that they owe this to those who respect their own property. Given the complexity of determining which property rules serve the public interest (and the disinclination of many people to engage in such

⁹⁹ Whether this functional explanation also is a plausible evolutionary explanation is more complicated. Under some circumstances (it is very controversial just how wide such circumstances are), natural selection *might* select for those who are intrinsically motivated to return favors to fellow cooperators regardless of their personal pay-off.

abstract speculation), strong reciprocity could lead to more stable compliance than either enlightened self-interest or sympathy with the public interest. For example, strong reciprocity can provide a motive to respect property rights even for those ideologically opposed to private property.

The three candidates theories of moral motivation have somewhat different implications for Humean property theory. The enlightened self-interest theory and strong reciprocity theory lend themselves to development of Humean theory in a contractarian direction since they posit that people are more sensitive to individual outcomes than social outcomes. The “sympathy with the public interest” interpretation is more congenial to utilitarianism since it builds in some concern with social outcomes. However, all three versions of the moral psychology of Humean justice are united in seeing people as conditional cooperators whose willingness to follow conventional rules of justice depends on expectations about others’ willingness to follow and enforce them.¹⁰⁰ Because property conventions rely on voluntary compliance, they are fragile and can be destabilized if people’s expectations about each other’s behavior shifts quickly or if compliance with property conventions becomes disadvantageous for a significant fraction of the population. All three theories are therefore similar in the way in which they make stability a threshold condition for a successful theory of justice.

4. HUME CONTRA LOCKE

Humean and Lockean theories of property are sometimes lumped together under the banner of classical liberalism. This obscures as much as it reveals. Although Humean property

¹⁰⁰ This is approaching conventional wisdom in social scientific and philosophical literature on social norms. For example, Christina Bicchieri writes, “There is plenty of evidence that most people are conditional cooperators. They cooperate when they expect others to cooperate and defect otherwise. In other words, most people are neither pure altruists nor selfish brutes. They rather tend to condition their choices on what they expect other choosers to do, and, in cases in which such choices have a cost, they also take into account what others expect them to do.” Christina Bicchieri, *The Grammar of Society*, (New York: Cambridge University Press, 2006), 140-41.

theory might be consistent with neo-Lockean policy preferences, they are more versatile.¹⁰¹ The Humean approach has several advantages over neo-Lockean theory. First, neo-Lockean theory has notorious trouble with situations that require constraining property owners rather than empowering them. Problem spots include eminent domain, activities that pose risks to one's neighbors (i.e. torts), and environmental regulations. Insofar as the function of the state is to protect property rights and the function of property rights is to protect the freedom of choice of property owners, it is not clear how various involuntary restrictions on the rights of property owners can be justified. The tort problem is probably the most straightforward. The issue here is that one property owner's action might risk damage to the property of another. If property rights demarcate boundaries that must not be crossed without consent, then risky activities with an extremely low probability of causing damage or a high probability of causing very minor damage would seem to be either chilled in the first case or prohibited in the second case. For example, air pollution involves physical invasion of particles emitted by one landowner onto the property of many neighbors. Soot and other pollutants make air less pleasant to breathe, reduce lung capacity and cause other harms. Occasionally, they cause cancer (although it is only possible to establish probable causality in the case of large polluters and their nearby neighbors).

The torts problem is not, I believe, fatal to neo-Lockean property theory. It might be fatal to attempts to derive a complete system of property rights from a principle of self-ownership.¹⁰² But this is probably not a promising enterprise for other reasons as well: intuitions about the implications of self-ownership are simply too indeterminate when it comes to control over resources external to the body. With respect to property theory, however, it is possible for a

¹⁰¹ Humean property theory is also consistent with decidedly non-Lockean policy preferences as well.

¹⁰² See Peter Railton, "Locke, Stock, and Peril: Natural Property Rights, Pollution, and Risk" in *Facts, Values, and Norms: Essays Toward a Morality of Consequence* (New York: Cambridge University Press, 2003); David Sobel, "Backing Away from Libertarian Self-Ownership," *Ethics* 123, no. 1 (October 2012): 32-60.

Lockean to concede that risky activities, incompatible land uses and the like raise a line drawing problem. In some such cases, it may be necessary to stipulate the contours of property rights on grounds that are not determined by Lockean principles. If this is the case, Lockean natural rights are not a complete theory of property. But this would not undermine the entire Lockean project: a theory of property does not have to explain everything in order to count as correct. Neo-Lockeans could be right about what grounds property entitlements and whether redistributive taxation is justified even if their theory leaves open questions such as the proper way to regulate incompatible land uses.

More problematic for neo-Lockeans are domains in which the interests of property owners are compromised in order to provide benefits that are widely dispersed. The difficulty in such cases is that the freedom of choice or the material interests of property owners are sacrificed for some general public benefit that accrues only in small part to the property owner. Even if a property owner does not wish to sell their property at whatever is considered fair market value at a particular moment, the government may take it for public use via eminent domain. This seems both a violation of the freedom of property owners to determine how to use (or not use) their property and an expropriation of part of the value of the property (the difference between fair market value and value to the government), which would ordinarily be realized through bargaining over the sale price.¹⁰³ Although difficult to justify in a neo-Lockean “natural rights”

¹⁰³ Eminent domain only requires compensation at fair market value rather than at a price that approximates the outcome of bargaining between a seller, who would have already sold the property if she valued it at less than fair market value, and a purchaser who values the property at more than fair market value because of its contribution to some larger project (i.e. the government’s intended use of the property). For this reason, most legal scholars believe that eminent domain undercompensates property owners. Various proposals have been advanced to provide a formula for compensation above fair market value. However, this view is not universal and Brian Lee has recently argued that eminent domain should generally not compensate for subjective valuations above fair market value. See Brian A. Lee, “Just Undercompensation: the Idiosyncratic Premium in Eminent Domain,” *Columbia Law Review* 113 (April 2013): 593-655.

framework, eminent domain is of great practical importance. It is hard to see how one could accomplish major infrastructure projects without it. Likewise, although some environmental regulation is meant to prevent relatively concrete harms to neighboring property owners, a fair amount of it is aimed at some systemic social benefit such as the preservation of scarce natural resources. Endangered species protection, for example, does not seek to protect the rights of other property owners since nobody in particular could possibly have a right to have a particular species of wild animal wonder across their property. Wetlands regulation has a similar structure in that it restricts the activities of property owners in order to secure systemic and diffuse benefits. It is unclear how such regulations are to be squared with a theory of property that holds that natural property rights serve as a trump to protect owners' freedom of choice.

Humean property theory is not committed to the proposition that property owners should be given maximal degree of freedom consistent with equal freedom for others. Instead, restrictions on freedom of action and forced exchanges of property might be acceptable if all property owners tend to benefit from such restrictions on property rights. Eminent domain serves the *ex ante* interests of the vast majority of property owners in an effectual and efficient public sector. The requirement that the state compensate property owners at fair market value mitigates property owners' losses *ex post* so that the costs of common projects are not concentrated on a small number of individuals. Compensation for takings thus prevents (or at least substantially constrains) parties from using the public law to aggress against their neighbors by appropriating their property.¹⁰⁴ Because property rights should reflect stable, mutual

¹⁰⁴ Richard Epstein has argued that the takings rule should be fundamental to the constitutional order and apply well beyond eminent domain. Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985). Although Epstein frames his position in Lockean terms, I think that it is perhaps more Humean in spirit. This comes out most clearly when Epstein explains how the takings principle improves on Nozick's neo-Lockean framework by providing an attractive theory of when the state may impose forced exchanges. Epstein, *Takings*, 336-37.

advantageous relations between typical property owners, eminent domain is permissible even if some property owners, for whatever reason, prefer greater control over their property to the benefits of eminent domain.¹⁰⁵ In cases where uniform rules are necessary, the interests of those with highly idiosyncratic preferences must sometimes give way to the majority. Eminent domain is such a case; endangered species protection is another. Property conventions that do not permit property owners to eliminate endangered species on their property might be in the *ex ante* interest of property owners as a whole even though this represents a restriction on freedom of choice for all and does not increase the scope of free action for anyone. Because it is not possible for regulation to reflect the preferences of both those who support and those who oppose endangered species protection, a uniform policy must be imposed on all.

Neo-Lockeans often support some form of eminent domain. Some of them also support limiting property rights in the name of environmental protection. How this is consistent with the normative foundations of neo-Lockean theory is less clear. Notably, when Robert Nozick addresses issues such as pollution in which restrictions of the rights of property owners seem necessary, he quickly concedes that “it is difficult to imagine a principled way in which the natural-rights tradition can draw the line to fix which probabilities impose unacceptably great risks upon others” and suggests that pollution regulation should be set according to net costs and benefits.¹⁰⁶ The logic of this position is much more clear if one jettisons the Lockean foundations in favor of a Humean analysis of both property entitlements and the scope of property rights because Humeans derive property rights from mutually advantageous

¹⁰⁵ There are proposals to customize eminent domain protections in various ways so as to mitigate the vulnerability of property owners to unwelcome uses of eminent domain. E.g., Christopher Serkin, “Local Property Law: Adjusting the Scale of Property Protection,” *Columbia Law Review* 107, no. 4 (May, 2007): 883-948; Lee Anne Fennell, “Taking Eminent Domain Apart,” *Michigan State Law Review* 2004, no. 4 (2004): 957-1004. Allowing property owners to opt out of eminent domain altogether, however, would defeat its purpose.

¹⁰⁶ Nozick, *Anarchy, State and Utopia*, 75, 79-81.

conventions regardless of whether such conventions augment the freedom of choice of property owners.

The source of property entitlements presents an even greater difficulty for neo-Lockeans than their scope does. If one looks closely, the historical provenance of many property claims is rather dubious. Examine the chain of title for any given plot of land closely enough and it is likely to begin with some disreputable act of thievery or fraud. The original occupier of a piece of land is, more often than not, someone who took it by force. And when this is not the case, the original title often reflects a grant from a government that dispossessed the prior owner in some morally dubious manner. Lockeans are thus faced with a quandary. If they take a hard line against dubious property claims, Lockean theory will tend to undermine the claims of present possessors in ways that seem worrisome. At first blush, a theory such as Nozick's seems to call a huge range of property claims into question. Intellectual property of various kinds may be relatively unproblematic because patents, copyrights and trademarks usually are of recent vintage. But almost any kind of land claims and some chattels would be under a cloud. Commerce does not help matters here. The usual rule is that a seller who does not possess good title cannot transmit good title to a buyer – otherwise thieves could easily profit from their ill-deeds by selling property to clear title. Lockeans might argue that title could be “cleansed” by improvements that require significant labor on the part of the new owner. This seems plausible in some cases. Homesteaders in the west might be thought to acquire moral rights to their farms through labor even if the government's claim to have the right to grant the land in the first place was questionable. This sort of theory works well when (as in nineteenth century America) land is very plentiful relative to labor. But in other cases, it seems more questionable. When natural resources are scarce enough to have economic value, income reflects returns to both capital and

labor. Returns to capital tend to average around five percent in the modern era.¹⁰⁷ Even without any special investment skill, ill-gotten gains can easily grow over time rather than diminish. Natural resources sometimes appreciate in value for reasons that have nothing to do with labor or investment. For example, land in Manhattan is fantastically valuable with or without “improvements.” Finally, the labor theory of ownership creates numerous line-drawing problems. Can an absentee landlord gain a moral right to property through improvements made by their tenants? Does construction of residential buildings count as an improvement that gives rise to a valid claim to the land underneath it? Does ordinary upkeep of a house require enough labor for Lockean principles to apply? Once we set aside the Lockean fiction that natural resources have little economic value, many cases raise hard questions. The uncertainty of these questions suggests that Lockean labor theory of value is poorly suited to underwrite property rights in a complex economy.

One possible solution to the uncertainty of property entitlements is to adopt a strong principle of adverse possession. Adverse possession is the legal doctrine that allows an occupier of land to gain legal title after some period of continuous and conspicuous occupation despite lacking of any preexisting right to the land. Adverse possession rules, however, do not follow neo-Lockean logic. They are not much concerned with how much work the adverse possessor puts into improving the land but rather with whether possession is “open and notorious” (i.e. whether the adverse possessor acts in a way that gives notice to others). In many jurisdictions, the adverse possessor does not even have to be acting in good faith!¹⁰⁸ The apparent policy motive is to promote clear title, not to reward the industrious. Of course, one could make

¹⁰⁷ Thomas Piketty, *Capital in the Twenty-First Century*, Arthur Goldhammer, trans., (Cambridge, MA: Belknap Press of Harvard University Press, 2014), 206-209.

¹⁰⁸ Henry Smith & Thomas Merrill, *Property: Principles and Policies* (New York: Foundation Press, 2007), 207.

adverse possession doctrine more Lockean by requiring significant investment or improvement and, perhaps, good faith. But there are good reasons to be cautious about such an approach. “Improvement” is a much more nebulous standard than possession. To the extent that improvement is read narrowly to include only actions that greatly increase a plot’s market value, many titles will be unclear. Moreover, possessors might have undue incentive to “improve” land merely to establish title even at the cost of long-term environmental damage. The environmental effects of encouraging slash and burn agriculture on the property of others would be deleterious to say the least. To the extent that improvement is read broadly so that minimal investments are sufficient for title, adverse possession will still reward the ‘undeserving.’ In this case, the Humean amendment threatens to swallow the Lockean system as claims of present possession supersede claims of natural right.

Although Humean theories and Lockean theories have deeply opposing stances on the grounds of property entitlements, Humean theory can assimilate many aspects of Lockean theory. For example, considerations of moral desert are compatible with Humean theory so long as they supplement fundamental property conventions rather than replace them. The problem with Lockean claims, according to Humeans, is that property rights ultimately rest on fundamental conventions of respect for others’ possessions. And these cannot be stable if they require widespread moral agreement about who deserves what. Once such fundamental conventions are in place, considerations of moral desert may be helpful in filling in the more detailed rules about how to acquire unowned goods. Widely shared moral intuitions about certain relations between people and objects might be particularly good candidates for certain such conventions. But to think that non-conventional moral rules can replace the fundamental convention is to put the cart before the horse.

5. HUMEAN THEORY AND RESOURCE EGALITARIANISM

Humean theory is a straightforward competitor to Lockean theory. Humean theory aims to displace Lockean theory by showing that Lockean property rights either can be explained in Humean terms as the object of conventions or are not justified because they yield undesirable results. The relationship between Humean property theory and resource egalitarianism is more complex. Unlike Humean and neo-Lockean theory, Humean property theory and resource egalitarian theories have somewhat different purposes. Whereas Humean theory is primarily about the form and origin of property entitlements and only secondarily about their distribution, resource egalitarianism is primarily concerned with the distribution of property rights and only secondarily (if at all) with their form and origin. The two types of theories tend to conflict, however, in that Humean theories usually endorse the existing pattern of property rights so long as it meets certain minimum conditions whereas resource egalitarian theories almost invariably suggest that the existing order should be reformed. Humean property theory is robustly non-ideal and does not tend to deal in universal prescriptions whereas resource egalitarianism faces a serious problem of determining how ideal principles interact with non-ideal circumstances.

Resource egalitarians tend to take the following approach. First, they seek to establish fairly abstract principles of distributive justice such as John Rawls' difference principle. Second, they use these principles to evaluate rules of property, taxation, and so forth. The problem here is that justification is rather fragile. Agreement on property rights, tax rules and so forth requires agreement on the underlying principles of justice. But these principles are extremely controversial: there are almost as many resource egalitarian theories as there are resource egalitarians. And although there may be fairly broad consensus among resource egalitarians that,

for example, there should be some form of progressive taxation, there are stark differences about the extent to which differences in wealth holdings are permissible.

John Rawls' response to this problem in *Political Liberalism* is to argue that principles of justice can be the object of an overlapping consensus between people who endorse various "reasonable comprehensive doctrines."¹⁰⁹ In other words, all citizens can endorse common principles of justice even though they each may do so for slightly different reasons. Justification of basic civil liberties seems a better fit for this methodology. Matters of distributive justice are more divisive – even stable western democracies with wide public consensus on civil liberties feature rather significant disagreements about, e.g. progressivity in taxation, social insurance, welfare, economic regulation and property rights. This is not surprising: although the interest of most supporters of mainstream parties in "advanced democracies" is relatively symmetric when it comes to freedom of speech, material interests concerning distributive justice diverge quite plainly. And these differences often cut across other lines – for example, people who consider their identify as Catholic to be central to their political views embrace an extremely wide range of views on economic policy.

Given disagreements about fundamental principles of distributive justice, resource egalitarian theories tend to undermine the conventional basis of political authority.¹¹⁰ According to Hume, political authority is at root conventional.¹¹¹ People obey governments (to the extent that they do) in part because they expect others to do so. Effective government, like a system of property rights, is a public good that requires compliance from a large part of the population in order to be realized. A government that does not command its subject allegiance cannot perform

¹⁰⁹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 140-154.

¹¹⁰ As will be argued below, extremely inegalitarian property distributions also might have this tendency if the result is that many citizens do not believe that they benefit very much from public order. So the point may cut against neo-Lockean views as well.

¹¹¹ See David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 7.

its essential functions and therefore may be ignored. By contrast, even a morally compromised government is worth listening to if the alternative is anarchy. Part of the reason for expecting others to obey the government is that they believe that the government will not rewrite the “social contract” through wholesale revision of existing property rights. Obedience (or at least acquiescence) to government relies on informal understandings about the relative powers of state and citizens. In a stable polity, certain actions are considered permissible by the state and citizens will usually not resist even when they disagree with them. However, even when these are very much tipped in favor of the state, transgressions against established prerogatives of the common people may cause revolt.¹¹² So long as the state acts within its conventionally determined limits, people expect their fellow citizens to mostly follow its directives. When it ceases to do so, all bets are off.

The relationship between redistributive policies and political legitimacy is complex. A polity with well-entrenched conventions of deference to political authority may be able to pursue a more aggressively redistributive policy without undermining political order. Political orders in which there are public recognized limits (which might be matters of law, but are just as likely to be informal norms or shared understandings) on property redistribution are likely to have an easier time securing compliance with governmental directives since citizens will have less cause to worry that giving an inch will result in the state taking a yard. Redistributive measures in such polities are also less likely to degenerate into transfers to supporters of a political dominant faction. Stable property conventions and stable political conventions are likely to go together. And the converse is true for political and property instability. A government that violates existing property conventions risks political disorder; political instability increases the risks that one faction or faction will try to use its moment in power to redistribute property from its

¹¹² Numerous peasant revolts and serf rebellions in medieval Europe fit this description.

enemies to its friends. As Daron Acemoglu and James Robinson have argued, much of recent Latin American history has been characterized by cycles of populist redistributive regimes and authoritarian right-wing regimes in which rival political factions have waged a protracted, economically destructive battle for political and economic supremacy.¹¹³ Successful political systems in North America and Western Europe, on the other hand, created democratic institutions that ensured that the benefits of economic growth would be shared with workers while giving property owners greater long-term security. This created a virtuous cycle of stability and shared prosperity. The larger point here is that respect for the claims of existing property holders may be crucial even when these claims do not meet resource egalitarian standards. Aggressively redistributive policies might undermine the conventions of political authority and political accommodation that enable effective government. Incorporating existing property claims into resource egalitarian analysis by calculating the efficiency losses from expropriation is not sufficient to account for the relationship between political order and respect for property rights.

This is not to say that it is impossible to integrate resource egalitarian concerns into a Humean framework. Resource egalitarian theories and Humean theories of property purport to be about the same subject – “justice” – but, properly understood, they play different roles. These roles are not necessarily incompatible, but most plausible synthesis of these theories will adopt a Humean view of property rights while analyzing other aspects of policy according to resource egalitarian standards. Humean property theory explains and justifies the normative authority of

¹¹³ See Daron Acemoglu & James A. Robinson, *The Economics Origins of Democracy and Dictatorship* (New York: Cambridge University Press, 2005). North, Wallis, and Weingast present a slightly different analysis of the same phenomenon. They emphasize the fundamental distinction between “open access orders” characterized by the rule of law and economic freedom and “limited access orders” in which the state maintains order by buying loyalty with a system of special privileges. See Douglass North, John Wallis & Barry Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (New York: Cambridge University Press, 2009).

existing property rules and property entitlements in minimally decent and functional political orders. It also provides guidance as to how such rules can be revised under conditions characterized by limited altruism and moral disagreement.

Ideal theories of justice have a different function. Rather than explaining the nature and scope of our obligation to comply with existing property rules, they provide a framework to evaluate reform proposals. For example, if I am deciding whether to support a ballot measure increasing the minimum wage, I might decide how to vote by asking myself whether it increases the primary goods available to the least advantaged or whether it would increase aggregate utility. Once in the voting booth, I need not coordinate my activities with others, nor, given the small bore nature of the proposal, worry much about destabilizing norms of cooperation between people with differing moral views. Voting is my very limited opportunity to act as a dictator rather than a cooperator. If, on the other hand, I am trying to decide whether it is just to comply with the actually prevailing property conventions, ideal theory may give misleading advice.

This analysis suggests the following division of labor between the two types of theories. Humean theories address the justifiability of conventional norms such as those regulating basic property entitlements and political authority. Ideal theories of distributive justice may then be used to evaluate more fine-grained (but none-the-less crucially important) questions of policy that are decided against the background of these conventional norms in contexts in which a single actor (usually the government) can simply impose its preferred rules on the populace.¹¹⁴

¹¹⁴ Ken Binmore puts this point colorfully: “In arguing that current versions of the notion of an a priori common good get only lip service from most people in modern societies, and that there is no reason why newly invented versions should command any greater respect, I am not saying that welfare economists might as well pack their bags and go home to mother. On the contrary, their approach is clearly very relevant when some person or institution can impose its will on others – just as a mother may insist on certain house rules being obeyed for what she sees as the common good of the family. It will certainly help things along if people can be persuaded to respect the common good in such circumstances, but disaster will not ensue if attempts at persuasion fail, since respect can be enforced if necessary.” Binmore,

For this reason, the versions of resource egalitarianism that are most appealing for Humeans are those that yield metrics that score reform proposals as better or worse rather than determinate principles such as Rawls' difference principle that govern the basic structure as a whole. The latter includes utilitarianism¹¹⁵ as well as Sen's capabilities metrics.¹¹⁶

6. OBJECTIONS TO HUMEAN THEORY

Humean theories of property are not especially popular among moral and political philosophers.¹¹⁷ Hume's theory of justice is often seen as too thin to justify strong moral entitlements as well as unduly conservative in its implications. My account of Humean property theory provides resources to reply to both claims. Humean theories of property are morally thin in that they trace the obligation to respect property rights to contingent social practices rather than to some deeper theory of respect for persons, natural rights, or human equality. The moral

Game Theory and the Social Contract, Vol I: Playing Fair, 137.

¹¹⁵ How to categorize utilitarianism is an interesting question. There is a sense in which analysis of property rights in terms of welfare maximization is a resource egalitarian view that takes the normatively relevant sense of equality to be the equal moral significance of each person's welfare. A variant of Rawls' position that replaces the difference principle with distribution according to welfare maximization would seem to count as a resource egalitarian view. On the other hand, utilitarian analysis that takes into account considerations of political stability might well embrace of Humean theory of property rights under rule utilitarian logic. Jeremy Bentham, for example, supported strong property rights on broadly Humean grounds.

¹¹⁶ See Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009).

¹¹⁷ E.g. Waldron, "The Advantages and Difficulties of the Humean Theory of Property," 85–123; Barry, *A Treatise on Social Justice, Volume I: Theories of Justice*. The Humean approach is rather more popular among legal theorists and game theoretically minded economists. E.g. Binmore, *Game Theory and the Social Contract, Vol I: Playing Fair*; Binmore, *Game Theory and the Social Contract, Vol II: Just Playing*; Sugden, *The Economics of Rights, Cooperation, and Welfare*; Herbert Gintis, *The Bounds of Reason: Game Theory and the Unification of the Behavioral Sciences* (Princeton, NJ: Princeton University Press, 2009); James E. Krier. "Evolutionary Theory and the Origin of Property Rights," *Cornell Law Review* 95 (2009): 139-159. There are a few exceptions. Political philosopher Peter Vanderschraaf has explicitly defended a neo-Humean approach to justice as mutual advantage. E.g. Peter Vanderschraaf, "Justice as Mutual Advantage and the Vulnerable," *Politics, Philosophy & Economics* 10 (May 2010): 119-147. David Gauthier claimed Hume as an early contractarian. David Gauthier, "David Hume, Contractarian," *The Philosophical Review* 88 (Jan. 1979): 3-38. And there appears to be a small revival of interest in Hume among political theorists. E.g., Russell Hardin, *David Hume: Moral and Political Theorist* (New York: Oxford University Press, 2009); Frazier, *The Enlightenment of Sympathy: Justice and Moral Sentiments in the Eighteenth Century and Today* (New York: Oxford University Press, 2012); Andrew Sabl, *Hume's Politics: Coordination and Crisis in the History of England* (Princeton: Princeton University Press, 2012).

parsimony of Hume's approach is an advantage for property theory because Humean theory squarely confronts the problem of cooperation between people who have fundamental moral disagreements. Rather than appealing to controversial notions of moral desert or freedom (as neo-Lockean theories do) or equality (as resource egalitarian theories do), Humean theories identify the source of obligations to follow property rules in our common interest in coordinating our use of resources with others so as to prevent overexploitation and conflict. This is a motive that may be shared by those who subscribe to differing ideal theories.

Some critics, however, doubt that Humean theory can explain how property rights are full-bloodedly *moral* rights. Jeremy Waldron asserts that Humean theory is unable to account for extremely common intuitions about the importance of justice.¹¹⁸ He argues:

The Humean model is supposed to explain not only the emergence of a stable set of holdings, but also the emergence of property *rights*, and with a sense of rights a sense also of *fairness* and *justice*. But it is not at all clear that it can do that. No doubt some sense of an immutable *balance of power* might emerge from Humean negotiation, similar to the sense that characterizes international diplomacy. But why should we expect heavily moralized standards like justice and fairness – standards that connote the idea of the rightfulness of the proportion of one person's holding to another's – to emerge from the essentially amoral process that Humean and Buchanan describe?¹¹⁹

This is a significant challenge for Humeans. The first point in defense of the Humean approach is that a great variety of moral norms depend on social practice, so that Hume's account of property rights arising from the moralization of conventional social practices is not anomalous.¹²⁰ Many instances of genuine moral outrage depend on conventional social practices. Cheating at a game of cards may be morally outrageous (especially if money is involved) even if it is not intended to communicate any personal disrespect and even though nobody has a moral right to win at games of chance. Moreover, once a conventional social

¹¹⁸ Waldron, "The Advantages and Difficulties of the Humean Theory of Property," 85–123.

¹¹⁹ Waldron, "The Advantages and Difficulties of the Humean Theory of Property," 115.

¹²⁰ This is probably not the source of Waldron's unease.

practice is in place, its elements can be used to communicate attitudes that may be virtuous or objectionable for unrelated reasons. Cheating someone or stealing his property might be a way of communicating disrespect, contempt or scorn. This can even be the case even in situations where the material losses from cheating or theft are completely trivial. With property conventions, the stakes are high, so it should not be surprising that they tend to become moralized.

Waldron's real objection, however, is not to the roots of Humean property rights in social practice but to their origins in stable equilibria that reflect the bargaining power of the various parties. Waldron doubts that "balance of power" reasoning can yield sufficient moral oomph to account for property *rights*. This criticism understates the power of theories of justice as mutual advantage. Concern with property entitlements can be viewed as one element in a broader set of norms of fair cooperation. Moralizing rules that reflect an approximate balance of power in situations fraught with the potential for destructive conflict helps to entrench stable equilibria and facilitates cooperation between people who may not agree on conceptions of equality or other potential foundations for property rights. That such norms reflect the "balance of power" rather than some abstract notion of human equality is useful for fostering stable relationships because it reduces the likelihood that people will violate social norms in hopes of getting a better deal with other partners or under a different social contract.

Neo-Humean theories of fairness, introduced earlier in the context of Ken Binmore's work, analyze distributive fairness norms as tools to divide cooperative surplus in a way that is efficient and stable.¹²¹ In most contexts there are a huge range of outcomes that are Pareto

¹²¹ The foregoing account is influenced by Ken Binmore, Robert Sugden, Peyton Young and Nicolas Baumard. See Binmore, *Game Theory and the Social Contract, Vol I: Playing Fair*; Binmore, *Game Theory and the Social Contract, Vol II: Just Playing*; Sugden, *The Economics of Rights, Cooperation, and Welfare*; H. Peyton Young, *Equity in Theory and Practice* (Princeton: Princeton University Press, 1994);

efficient so that the Pareto efficiency alone cannot be used to resolve distributive questions.¹²² Fairness norms select outcomes that are both Pareto efficient and stable in that nobody has incentive to undermine the norms in hopes of getting a better deal in the future or leave the cooperative scheme in order to find a better deal elsewhere. In order to do so, fair solutions must reflect the approximate balance of power between cooperators. In cases in which people are symmetrically situated, this usually requires equal division of the gains from cooperation. But when different people make different contributions to the cooperative scheme, this may require that some be allocated more of the benefits than others. Manna from heaven, therefore, should be divided into equal shares. But for goods that are produced through human effort, it might be fair to give more to those who make greater contributions whether because of special talents, greater efforts or greater contribution of material resources. Even people who make little material contribution, however, may be entitled to share in the gains of cooperation to some extent, if their adherence to the social contract allows others to be productive. The underlying idea is that a fair person is a desirable partner in a cooperative scheme. People who cooperate under fair terms will do about as well as they can over the long term so that each will want to continue the mutually advantageous relationship. Fairness norms sometimes produce outcomes that maximize utility, but the division of gains necessary to induce parties to maintain a cooperative scheme do not necessarily match those that would result for the application of

Baumard, Andre & Sperber, "A Mutualistic Approach to Morality: the Evolution of Fairness by Partner Choice," 59-78.

¹²² "In problems of local justice, equity and efficiency often complement each other. Principles of equity are the instruments by which societies resolve distributive problems when efficiency by itself yields indeterminate results." Young, *Equity in Theory and Practice*, 19.

utilitarian principles. There is some tension, therefore, between evaluation in terms of utility and in terms of fairness.¹²³

This conception of fairness is congruent with many common intuitions about distributive questions. People often view unequal benefits as just if these inequalities reflect different levels of contribution to the common enterprise. Higher pay for those with special talents is therefore often considered morally unobjectionable even when these talents are ultimately the product of good fortune rather than special effort.¹²⁴ A reasonable return to capital investment may be considered fair for the same reason. One interpretation of such intuitions is that they reflect in some inchoate way the insight that higher wages might be desirable in order to encourage talented to work harder or investors to invest. Another factor, however, may be that balancing contributions and benefits facilitates stable cooperative relations in environments in which people may exit the relationship if they are likely to find a better deal elsewhere. This consideration may be important even to those who are unmoved by efficiency arguments because they are unconcerned with aggregate utility.

If this interpretation is correct, then people who violate the rules of stable, mutually advantageous cooperative schemes are apt objects of moral resentment. It makes sense to resent people who take more than their just share even if the overall distribution of property rights is regrettably lopsided. People are sensitive to violations of property rules just as they are quick to anger at cheaters and those who withhold required contributions to collective projects. These

¹²³ The three theories of moral motivation have some implications for how to balance these considerations. Sympathy with the public interest is suggestive of a political theory tilted toward utilitarianism. Theories based on enlightened self-interest or on strong reciprocity, on the other hand, suggest a greater role for fairness norms.

¹²⁴ The intuition here is that it is fair for Wilt Chamberlain to receive above average pay even though his pay is largely a function of winning the genetic lottery (this is particularly obvious in the case of N.B.A. centers since well over 99% of the population is disqualified from the job solely on the basis of height). This is not to say that particular market outcomes are sacrosanct, particularly since markets are only one of many distributive mechanisms that may result in unequal outcomes.

impulses are usually not wholly insensitive to the aggregate distribution of property rights. Some distributions may be so inequitable that the “have-nots” see no point in voluntarily respecting the property rights of the “haves” because their gains from compliance with property conventions are so negligible.¹²⁵ The key is for people to see respect for the “balance of power” in present property holdings as being advantageous for rich, poor and those in between. Once mutually beneficial property conventions are in place, however, everyone has an interest in maintaining the “balance of power”.

In practice, concern with fairness as mutual advantage often complements concern with fairness as impartiality. Imagine a group of relatively impoverished workers who revolt against the terms of their employment. The workers might justify their revolt on the grounds that they are not treated as equals to owners and managers by the political and economic system. But they also might do so on the grounds that they are denied their fair share of the cooperative surplus relative to their contributions. The two sorts of justifications are mutually supporting. For a given individual, there might not be any clear answer to the question of which kind of justification she finds more persuasive. Social movements often mix these two sorts of claims since workers sometimes feel both that the terms of trade are unfairly tilted toward employers and that material inequalities reflect inequitable social relations between members of different classes. In any case, it is unclear that ‘justice as mutual advantage’ is at a disadvantage in accounting for a range of common intuitions about justice.

One cautionary point should be emphasized. The preceding account of fairness is nicely congruent with Hume’s account of property and is useful in responding to some of the standard objections to Hume’s theory. However, it is possible to be a Humean about property rights while

¹²⁵ Rawls’ difference principle, by contrast, requires that the least advantaged do as well as they possibly could. This goes much further than is required by the logic of mutual advantage.

rejecting the larger political theory on offer here. Jeremy Bentham, for example, incorporated a Humean commitment to stable property rights into his larger utilitarian political and moral theory. Conversely, it is possible, although in my view less appealing, to embrace of neo-Humean account of fairness without endorsing a Humean theory of property rights. My appeal to it here is purely defensive as far as the purpose of this chapter is concerned. If one does not like it, it is entirely possible to embrace Humean property theory while discarding the broader political theory.

Perhaps, though, the real force of Waldron's criticism is that Hume provides an account of how property conventions arise, but not how they become moralized. So although Hume's account may explain how property *norms* arise, it does not explain how property *rights* do so. Here, the moral psychology of conditional cooperation can fill in gaps left in Hume's account. When property norms first emerge, they are not moralized. They first appear as tentative expectations and then, as respect for others' possessions becomes more widespread, as a descriptive norm. At this stage, the logic of hawk-dove strategies may be sufficient to explain compliance. Once a social norm of defending one's own possessions and respecting those of others is in place, it may be rational to defend one's own property from aggressors while refraining from aggressing against others. At this point, a sense of reciprocity and fair play may generate feelings of resentment against those who do not reciprocate respect for others' property. Before observance of property rights becomes generalized, people may follow a policy of respecting the possessions of those who respect their possessions on the basis of rational calculation that this will further their own ends. However, once people develop stable expectations concerning others' behavior, respect for property rights becomes the new baseline for fair play. Violations of property rules are judged to be unfair because they involve taking

advantage of the benefits of property rules while declining to share the burdens. This sort of blatant free riding is apt to draw moral disapproval from “conditional cooperators” even if property norms are not antecedently strongly moralized. This account of the moralization of property norms is sufficient, I think, to address Waldron’s worry. It requires a somewhat more precise moral psychology than that described by Hume. And it introduces at least some concern with distributive considerations into Hume’s theory. The claim that people are especially sensitive to “free riders” who fail to uphold cooperative schemes or reciprocate favors from others is both empirically plausible and consistent with what Hume does say about the moral psychology of justice.

A second common criticism of Hume is that his theory of property is little more than rationalization of his deeply conservative political predilections or, considered a bit more sympathetically, an important intellectual contribution that is limited by ideologically prejudice.¹²⁶ This perception is reinforced when figures such as Hayek claim Hume as a important forerunner.¹²⁷ This is a threat to my defense of Humean property theory because part of the appeal of such theories is that they provide guidance in contexts where people disagree about principles of distributive justice. Humean theory promises to provide a framework in which both ‘liberal’ and ‘conservative’ policy proposals can be fairly evaluated. But if the Humean approach is irremediably tilted to “conservative” policy outcomes, then these purported advantages are illusory.

¹²⁶ E.g., “Thus institutions that reflect relations of power may be criticized as failing to measure up to the criteria of justice in the sense that detaches it from mutual advantage. That Hume did not acknowledge and investigate the implications of this possibility simply shows that at this point in the development of his theory he proved to be a better conservative than he was a philosopher.” Barry, *A Treatise on Social Justice, Volume I: Theories of Justice*, 164.

¹²⁷ E.g., “On these issues which will be my main concern, thought seems to have made little advance since David Hume and Immanuel Kant and in several respects it will be at the point at which they left off that our analyses will have to resume.” Friedrich A. Hayek, *Law, Liberty and Legislation, Volume I: Rules and Order* (Chicago: The University of Chicago Press, 1973), 6.

Hume's theory of property may be used as a starting point to devise a more complete Humean political theory.¹²⁸ This requires extending Humean analysis to questions that arise once a system of property rights is in place. Hume provides no analysis of how states might modify property rights beyond a fairly vague suggestion that the state sometimes must alter existing property rights to fit new circumstances.¹²⁹ Given that Hume did not write systematically on questions of political philosophy and did not address many of the controversies of the past several hundred years, it is probably best to call such theories 'neo-Humean'. Neo-Humean theories evaluate not only the institutions of private law, but also the ways in which states may or may not reshuffle property entitlements and impose taxes. They leave room for revision of existing property rights so long as such revisions take place according to procedures that respect existing property rights and are consistent with the Humean framework of justice as mutual advantage. The challenge is to move beyond the sort of picture contemplated by Hume in the *Treatise* in which property rights, once established, are fairly static, and develop a theory under which Humean property rights constrain changes in property entitlements while allowing some scope for policies that alter property entitlements, impose taxes and establish welfare and social insurance programs.

Neo-Humean political theory takes rules of justice to approximate stable bargains between people with limited altruism and differing moral views but a willingness to adhere to

¹²⁸ This theory is political in the sense that it is meant to be a theory of rules for politics, commerce and other spheres in which strangers or mere acquaintances interact at arm's length, not of morality as a whole. Being a Humean about political theory is consistent with being a utilitarian, a contractualist or a virtue theorist about moral theory. Political morality is suited for situations in which large groups of people without close personal ties must act in concert. Entirely difficult moral rules may apply to people in close, mutually sympathetic personal relationships. Whatever one's preferred moral theory, it is plausible to think that different sorts of norms will be appropriate for these two different kinds of situations.

¹²⁹ Hume approved, for example, of Henry VII's breaking of noble entails, a rather large change in property law. See Sabl, *Hume's Politics: Coordination and Crisis in the History of England*, 67-69, 235.

mutually advantageous rules of fair play. In this respect, they are similar to Rawls' model of the circumstances of justice – this is no coincidence since Rawls was influenced by Hume. Where Humean theory differs from Rawlsian theory is that it does not abstract away from the personal characteristics of the bargainers or their current allotment of possessions. Because Humean theory does not assume motivation to comply with rules of justice in absence of considerations of personal advantage, Humean rules of justice must be calculated to appeal to actual persons, not their idealized selves stripped of purportedly biasing characteristics. Once fundamental conventions of property, contract and allegiance to the state are in place, Humean theory evaluates further rules against the background of the existing social contract in light of their stability, efficiency and utility.¹³⁰ Because Humean theory takes the existing social contract as the starting point for reform,¹³¹ considerations of fairness and utility may support different reforms in different contexts.

As I will argue in this and subsequent chapters, Humean political theory is not necessarily conservative in the ideological sense of the term, but rather can be developed in both

¹³⁰ Hume's frequent appeals to the consequences of rights and duties make him appear a sort of proto-utilitarian. Bentham gave this strand of Hume's thought a more precise formulation. Neo-Humeans need not be Benthamites. A wide range of other consequentialist metrics can be incorporated into neo-Humean political analysis and even the more consequentialist versions of Humean theory are centrally concerned with fairness as a tool for social stability.

¹³¹ "It is not with forms of government, as with other artificial contrivances; where an old engine may be rejected, if we can discover another more accurate and commodious, or where trials may safely be made, even though the success be doubtful. An established government has an infinite advantage, by that very circumstance of its being established; the bulk of mankind being governed by authority, not reason, and never attributing authority to any thing that has not the recommendation of antiquity. To tamper, therefore, in this affair, or try experiments merely upon the credit of supposed argument and philosophy, can never be the part of a wise magistrate, who will bear a reverence to what carries the marks of age; and though he may attempt some improvements for the public good, yet will he adjust his innovations as much as possible, to the ancient fabric, and preserve entire the chief pillars and supports of the constitution." David Hume, "Idea of a Perfect Commonwealth" in *David Hume: Political Essays*, Knut Haakonssen, ed., (Cambridge: Cambridge University Press, 1994), 221.

“liberal” and “conservative” directions.¹³² Conservative Humean political thought is concerned with the preservation of social order against the twin dangers of anarchy and governmental predation.¹³³ It favors a classically liberal political order so as to prevent wasteful conflict over resources and secure broad freedoms for property owners to use their property as they see fit. Unlike neo-Lockeans, however, Humean conservatives do not see classically liberal property rights as protecting the pre-institutional moral entitlements of property owners. Friedrich Hayek and James Buchanan are leading representatives of the conservative Humean tradition.¹³⁴ They each follow Hume in his emphasis on formal rules of justice and his lack of interest in the fairness of initial property entitlements. However, Buchanan and Hayek were not minimal state libertarians who believed that government should be the smallest size necessary to maintain social order. They each believed the state justified in providing various non-essential public goods as well as some form of social insurance. Although neither endorsed Rawls’ difference principle, Hayek and Buchanan each indicated sympathy for aspects of Rawls’ *A Theory of Justice*. Hayek believed that Rawls’ emphasis on procedural fairness avoided the dangers posed

¹³² There is a sense in which Humean theories are unquestionably small “c” conservative: existing property conventions are entitled to deference on account of the advantages of stability. However, this point seems to apply equally well to market socialist arrangements as to “nightwatchman state” property regimes. As I argue in this dissertation, this is an advantage of the theory and not something to apologize for.

¹³³ Rawlsian ideal theory avoids confronting these issues by assuming motivation to comply with principles of justice. One result of this is that when reading contemporary political theory, it sometimes seems that contemporary “liberals” and “conservatives” (who are often classical liberals) are talking past one another because they are addressing different questions, with Rawlsian liberals asking what ends our political institutions should pursue and “conservatives” asking how our political institutions should be designed in light of the less-than-worthy ends that political actors are likely to pursue in practice.

¹³⁴ I believe that Richard Epstein is also best categorized as a conservative Humean despite the Lockean gloss that he sometimes gives his theories. Epstein defends classical liberal principles from a consequentialist perspective and is sympathetic to conventionalist accounts of the origin of property rights. See Richard A. Epstein, “Possession as the Root of Title,” *Georgia Law Review* 13 (1978-1979), 1221-1243; Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985).

by most theories of “social justice.”¹³⁵ Buchanan initially embraced Rawls’ contractarian approach, although his enthusiasm seems to have subsided somewhat in the years following publication of *A Theory of Justice*.¹³⁶ Hayek and Buchanan both seem motivated by broadly consequentialist normative views, albeit not of a standard utilitarian sort.¹³⁷ They argued that classical liberalism is justified by the benefits it provides to the population as a whole and not as a way of vindicating the pre-institutional entitlements of the talented or highly productive. This lead both Hayek¹³⁸ and Buchanan¹³⁹ to reject the moral desert argument for property rights that is

¹³⁵ In *The Mirage of Social Justice*, Hayek emphasized the similarities between his view and Rawls making clear that Rawls was not a target of his critique: “[A]fter careful consideration, I have come to the conclusion that what I might have to say about John Rawls’ *A Theory of Justice* (1972) would not assist in the pursuit of my immediate object because the differences between us seemed more verbal than substantial. Though first impressions of readers may be different, Rawls’ statement which I quote later in this volume (p. 100) seems to me to show that we agree on what is to me the most essential point.” Friedrich Hayek, *Law, Legislation and Liberty: Vol. 2: The Mirage of Social Justice*, (Chicago: University of Chicago Press, 1976), xii-xiii.

¹³⁶ See James M. Buchanan, “Rawls on Justice as Fairness,” *Public Choice* 13, no. 1 (Fall 1972): 123-128; James M. Buchanan, “A Hobbesian Interpretation of the Rawlsian Difference Principle” in *Freedom in Constitutional Contract: Perspectives of a Political Economist*, (College Station, Texas: Texas A&M University Press, 1977), 194-211.

¹³⁷ Hayek seems to endorse something like an original position or ex ante decision under uncertainty criterion similar to that endorsed by Harsanyi and Rawls. “The conclusion to which our considerations lead is thus that we should regard as the most desirable order of society one which we would choose if we knew that our initial position in it would be decided purely by chance (such as the fact of our being born into a particular family). Since the attraction such chance would possess for any particular adult individual would probably be dependent on the particular skills, capacities and tastes he has already acquired, a better way of putting this would be to say that the best society would be that in which we would prefer to place our children if we knew that their position in it would be determined by lot.” Hayek, *Law, Legislation and Liberty: Vol. 2: The Mirage of Social Justice*, 132.

¹³⁸ “It is probably a misfortune that, especially in the USA, popular writers like Samuel Smiles and Horatio Alger, and later the sociologist W. G. Sumner, have defended free enterprise on the ground that it regularly rewards the deserving, and it bodes ill for the future of the market order that this seems to have become the only defence of it which is understood by the general public. That it has largely become the basis of the self-esteem of the businessman often gives him an air of self-righteousness which does not make him more popular.” Hayek, *Law, Legislation and Liberty: Vol. 2: The Mirage of Social Justice*, 74.

¹³⁹ In reviewing *Anarchy, State, and Utopia*, Buchanan wrote, “I was somewhat disturbed by the widespread reception of Robert Nozick’s much-acclaimed book by the intellectual-academic community in the United States. I was concerned lest Nozick should succeed or appear to succeed in tying together a libertarian position with an entitlement theory of distributive justice. This tie-in, should it be accomplished, would discredit, and substantially destroy, the moral appeal of the basic libertarian position.” James M. Buchanan, “The Libertarian Legitimacy of the State” in *Freedom in Constitutional*

central to Nozick's framework in favor of appeal to various systemic benefits of strong protection for private property.

Although conservative Humeans are the best-known representatives of the Humean tradition, Humean insights can be developed in directions more congenial to modern liberalism as well. Humean theories of distributive justice are a peculiar creature. They are neither what Nozick calls patterned theories and so count, on Nozick's account of distributive justice as "historical theories." Humean theories do not necessarily condemn redistributive schemes. Humean theory is indeed hostile to claims that any particular distribution of property rights is morally required. And it requires deference to existing property entitlements. But this is consistent with robust social insurance, progressive taxation and other programs that may have the effect of mitigating inequalities of income or consumption. A liberal Humean theory begins with Humean property rights and goes on to show how policies that bring about more egalitarian distributions of income can be justified while still respecting these rights.

There are several ways for liberal Humeans to argue that a Humean framework is consistent with, or even requires, significantly redistributive government policies. First, the Humean emphasis on the importance of long-term mutual advantage might constrain the sort of inequality that is possible in a stable property regime. Property conventions that deny some people the possibility of benefiting from property ownership while requiring them to obey rules of justice will tend not to be self-enforcing because a significant part of the population will not see adherence to property rules as in its long-range self-interest. This may provide reason to reject rules that generate huge structural inequalities such that a significant portion of the population does not own property, cannot reasonably aspire to acquire any, and earns only

Contract: Perspectives of a Political Economist, (College Station, Texas: Texas A&M University Press, 1977), 50-51.

enough to meet basic survival needs. And it serves to rule out types of status inequality that are incompatible with a sense of common interest in the stability of a property regime. Such rules may be maintained by force. But by blocking any appeal to natural rights, Humean theory provides little reason to think that massive coercion is justified under normal circumstances.¹⁴⁰

Second, in many circumstances, the long-run interests of the powerful are not well-served by widespread poverty. Large impoverished populations are a drag on economic growth. Poverty and low productivity form a vicious cycle: unproductive workers are likely to be poor and the poor may be unable to make investments that would make them more productive. High productivity workers, by contrast, benefit their fellow citizens through their increased purchasing power, ability to support public goods through higher tax payments, and, under some conditions, through returns to scale in combining the labor of high productivity workers. Improving the productivity of poor workers both improves their standard of living and may also allow the wealthy to increase their consumption (although as the cost of labor increases, their patterns of consumption may change as well).¹⁴¹ Moreover, countries with large masses of poor people are less pleasant to live in even for the relatively well off.¹⁴² Whatever the benefits of being part of a small elite in a poor society, it is almost certainly better to be a wealthy person in an affluent

¹⁴⁰ At minimum, when involuntary redistribution would improve the condition of the propertied by creating greater security at less cost, such redistributive measures seem justified according to even the more conservative versions of neo-Humean theory. By contrast, hardline neo-Lockeans such as Nozick regard any redistribution beyond basic welfare provisions as unjustified.

¹⁴¹ Adam Smith pointed out that the rise of commercial relations transformed British society from one in which feudal elites spent their wealth on a large number of retainers and dependents to one in which aristocrats maintained smaller households but spent more money on luxuries that supported numerous independent craftsmen. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Edwin Cannan ed., (London: Methuen, 1904), Book III, Chap. IV, Para. 1-17. It is likely that he owes this observation to Hume's *History of England*. Andrew Sabl collects a number of the relevant passages and observes that this transformation had important political as well as economic implications. See Sabl, *Hume's Politics: Coordination and Crisis in the History of England*, 66-68.

¹⁴² Since the end of European colonialism, it has been commonplace for elites from the third world to move to the more prosperous countries of the first world, but there is little permanent movement in the other direction. It is also the case that even in rich countries affluent people tend to live in neighborhoods with similar types of people and are willing to pay a premium to do so.

country. This suggests that there are usually ways to structure such transfers from rich to poor that are mutually beneficial at least when considering the interests of the wealthy over the very long run to include those of their descendents.

The requirement of mutual advantage may be in tension with some of the more libertarian versions of neo-Lockean theory. Although Lockean theory suggests that there is a natural right to life-sustaining sustenance, conservative neo-Lockeans take this to mean that provision of welfare benefits that are enough to sustain life discharge our duties to provide for the poor. Humean logic is somewhat different. For productive (or potentially productive) members of the community, it is in everyone's long term interest that they have enough resources to meet their economic potential. In poorer countries, this may mean that state intervention is justified in order to ensure that the poor have enough food to work effectively.¹⁴³ In wealthier countries, support for the economically disadvantaged may include access to free education and training. A fair amount of such support may be justified as public investment rather than in terms of distributive fairness. Insofar as such resource transfers benefit the public generally, the less advantaged may be at a baseline considerably above subsistence *before* consideration of how to divide the cooperative surplus.

Not all Humean considerations cut in favor of more generous assistance, even on a liberal Humean theory. Strong reciprocity as a basis for distributive justice has significant implications for welfare and social insurance policies. Welfare payments to able-bodied persons uninterested in gainful employment are disfavored.¹⁴⁴ Because willingness to help others is partially conditional on others' willingness to make contributions when they are able, programs that

¹⁴³ For workers engaged in heavy physical labor this goes far beyond the subsistence minimum.

¹⁴⁴ For a discussion of the implications of strong reciprocity for welfare programs, see Amy Wax, "Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes and the Political Economy of Welfare Reform," *Law & Contemporary Problems* 63, nos. 1 & 2 (Winter/Spring 2000): 257-297.

appear to transfer money from workers to people who prefer life on the dole to low wage jobs are likely to be politically unsustainable over the long haul.¹⁴⁵ There seems some danger of falling into a situation characterized both by great inequality in property holdings and corresponding inequality in economic contributions. Under such conditions the haves may be resistant to redistribution to the have-nots on the grounds that the have-nots make little contribution to the common good. And this may become a self-validating belief if inadequate public investment contributes to the creation of a large, unproductive underclass.¹⁴⁶ Hectoring workers to support social insurance payments for a largely non-working underclass on egalitarian grounds is likely to be ineffective no matter how compelling the case is according to various resource egalitarian theories. Bare wealth transfers to those who make marginal social contributions are far less palatable than transfers as part of a genuine scheme of mutual insurance or assistance for those plainly unable to provide for themselves.

So far this argument only suggests that there is a strong case for benefits to the poor that go well beyond the subsistence minimum. Once basic property entitlements and welfare rights have been established, we are faced with a bargaining problem over the gains from cooperation. As will be argued in Chapter Two, existing property entitlements constrain the options at this stage, but still leave some scope for redistributive policies. In particular, respect for property rights requires that most of the economic returns from property ownership go to property owners.¹⁴⁷ However, at this stage of the analysis, justice as mutual advantage may imply outcomes that are more egalitarian than those commonly associated with Humean theory. Ken

¹⁴⁵ Concern that even the poor make social contributions is hardly limited to affluent capitalist countries. It is worth noting that Soviet ideology glorified work and condemned “parasitism”, a label that applied both to capitalists and rentiers on the one hand and Soviet citizens unwilling to work on the other.

¹⁴⁶ The recent decline of workforce participation among males of working age with lower levels of education is particularly worrisome in this respect.

¹⁴⁷ This constraint is less severe than it sounds. Even under strongly progressive tax rates, returns to property held by the non-wealthy will be taxed at significantly below 50%.

Binmore has argued that something akin to Rawlsian substantive principles can be defended using a neo-Humean game theoretical conception of justice.¹⁴⁸ Binmore's basic insight is that bargains between self-interested parties that maximize relative gains to the least advantaged party tend to be uniquely stable because such bargains minimize incentives to undermine the agreement in hopes of getting a better deal in the future.¹⁴⁹ This has two important implications. First, there is reason to expect division of gains from cooperation to provide relatively greater benefits to the less advantaged. Such arrangements may systematically deviate from utilitarian prescriptions in an egalitarian direction. Second, over time, successive renegotiations of the social contract in response to new circumstances will distribute benefits widely in order to secure agreement. Each movement to a new equilibrium will involve a different division of the gains so that people who received less from the last renegotiation might receive more from the next.

Third, Humean property rights are consistent with robust social insurance. Social insurance, broadly construed, consists in the pooling of risk so as to mitigate the effects of various misfortunes that may befall individuals in the course of their lifetime. These include illness, disability, premature death (i.e. losing one's parents at a young age), poverty of extreme old age (i.e. outliving one's assets), involuntary unemployment, economic bad luck of various kinds, and natural disasters among other misfortunes. Social insurance includes programs explicitly structured as such (i.e. social security and unemployment insurance) as well as various programs that are primarily directed at other ends but have a social insurance component as well (i.e. income taxation, public education). Social insurance programs are redistributive *ex post* because they collect taxes from all to pay benefits to the unfortunate. *Ex ante*, however, they might be in the interest of all because each person receives compensation in the form of

¹⁴⁸ See Binmore, *Game Theory and the Social Contract, Vol I: Playing Fair*, 43-49.

¹⁴⁹ The technical details differ a bit from Rawls' minimax principle. Binmore argues that stable bargains are those that minimize the maximum concession relative to a party's best possible outcome.

insurance for the payments that they make in taxes. Because social insurance schemes involve an implicit forced purchase of insurance (whether or not the taxpayer wants it), neo-Lockeans sometimes find them objectionable.¹⁵⁰ From a Humean perspective, pure social insurance is unexceptionable. Just as people are justly required to respect the property rights of others so that all can enjoy the systematic benefits of stable property entitlements, all people may be compelled to contribute to a social insurance scheme so that all may enjoy its benefits.¹⁵¹ As noted above, both Buchanan and Hayek thought social insurance a legitimate function of government. In practice, pure social insurance is usually combined with some degree of redistribution. Social security, for example, provides benefits for low-income workers that are more generous than those that the workers would likely be able to finance if they were to save the money that they pay in payroll taxes for retirement. This contributes to the political stability of redistributive measures since (a) the downward redistribution function is disguised to some extent by social insurance and (b) even those who do not benefit from downward redistribution feel that they have a stake in the continuance of the program. In Chapter Two, I will argue that moderately redistributive social insurance is compatible with respect for property rights. For now I wish only to observe that left Humeans may appeal to social insurance as a way to achieve a more egalitarian distribution of income *without* disrupting existing property entitlements.

The next two chapters will, among other things, suggest ways in which alteration of property entitlements, including redistributive taxation, can be accomplished within a Humean framework. I will argue that fundamental property conventions structure social order in several ways. In Chapter Two I will show, first, that they provide a set of default rights for property

¹⁵⁰ The controversy over the individual mandate in the Affordable Care Act is only one such example.

¹⁵¹ Hume makes clear that the creation of public works and other public goods is among the core functions of government because of the role government plays in solving the collective action problem inherent in the provision of public goods. See David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 7, p. 538-39.

owners that apply unless modified by law and second, that the existence of property entitlements limits the extent to which the state may tax property owners at least insofar as it is bound to respect private property rights. These limits are consistent, however, with quite redistributive social welfare policies including progressive taxation and social insurance. In Chapter Three I argue that although progressive taxes up certain levels are consistent with Humean property rights, Humean theory suggests that tax law should respect principles of fairness that require that citizens with similar property holdings pay similar tax. And I will argue against an alternative to my theory that purports to show that classical liberalism is to be preferred over the social welfare state.

CHAPTER II

PROPERTY AS GOVERNANCE AND WEALTH

In Chapter One, I defended Humean theories of property rights at a fairly high level of abstraction. This chapter will examine the structure of property rights in more detail. It aims both to make a contribution to the analysis of property rights and to bolster my overarching defense of the Humean approach. I explore the relationship between property rights conceived as allocations of decisional authority (governance) and property rights conceived as allocations of consumption possibilities (wealth).¹⁵² I will show how the contrast between wealth and governance can illuminate the structure of property rights and provide a way to map out certain arguments about the value and justification of property rights. Some theorists suggest that the concept of ownership might be divided roughly along the lines of wealth and governance in order to reconcile private ownership and distributive justice. I argue that this is a mistake because the dual function of property rights limits the extent to which property rights can be fragmented to reconcile commitments to private control and strongly egalitarian theories of distributive justice. However, I also argue against the view that *all* redistributive taxation violates private property rights. Rather than conceiving of taxes as a means of fragmenting ownership, it is more fruitful to analyze the relationship between property ownership and

¹⁵² I will use control and governance interchangeably in this paper. Control is the standard term, although I prefer governance since it highlights the importance of decisional authority as opposed to mere physical possession.

taxation in terms of choices between alternative bundles of property rights and duties to (a) support collective goods and (b) contribute to social insurance. Conceiving of progressive taxation as a tool for risk spreading suggests an attractive middle ground between libertarianism and strong forms of egalitarianism that is consistent with robust private property rights. All of these arguments are consistent with the Humean theory of property rights defended in Chapter One, but do not depend on it. They illustrate one way of defending the claim made in Chapter One that Humean property rights constrain policy choices, while being consistent with both conservative and liberal policy preferences and thus support the argument made in that chapter.

My argument unfolds in several stages. First, I introduce two theories of the nature of property rights. I argue tentatively in favor of the “exclusionary rights” theory as opposed to the “bundle” theory and provide a novel analysis of how attributions of property ownership trigger a set of default rules concerning the rights and duties of owners. Second, I introduce two perspectives on property rights: governance and wealth. My argument will proceed by considering and rejecting two ways of analyzing of the relationship between governance and wealth. I first consider John Christman’s argument that “control ownership” might be separated from “income ownership.”¹⁵³ I show how it goes astray in analyzing governance and wealth as types of rights rather than differing perspectives on the same rights. A strict separation of control rights and income rights will typically require the “control owner” to act as the agent of the “income owner”. This undermines the benefits of “control ownership” for the holder of control rights. Full unbundling of governance interests and wealth interests is not possible.

¹⁵³ John Christman, *The Myth of Property*, (New York: Oxford University Press, 1994).

Daniel Attas argues for a position at the opposite extreme: taxation is always an infringement on private property rights.¹⁵⁴ I show that a strong interpretation of Attas' argument leads to the implausible conclusion that taxes that maximize property values violate property rights and that on a weaker interpretation, Attas' theory lacks the resources necessary to identify which taxes violate property rights. I propose a different way of thinking about the relationship between property ownership and taxation. Rather than viewing taxation as a way of fragmenting property ownership, one might conceive of tax obligations as duties that are bundled with property rights. This analysis of property and taxation illuminates how modern tax regimes are functionally similar to other sorts of social organization, such as feudal duties, that bundle property ownership with duties to maintain political loyalty and to contribute to public goods. The result, I will claim, is that property rights significantly constrain tax policy (and thus distribution of post-tax income), but there is still considerable scope for redistributive policies that are consistent with respect for property rights. This result will redeem the promissory note issued in Chapter I regarding the compatibility of Humean property rights with liberal (in the contemporary American sense) policy preferences as well as conservative ones.

1. PROPERTY RIGHTS: CONCEPTUAL ISSUES

Property can be evaluated on any of three levels: property rights, the interests of right-holders protected by these rights, and the justification of these rights. Property rights regulate access to resources. Access to resources may be regulated either by laws or by social norms. Although the institutional structure (or lack thereof) differs in each case, the functional role of property rights is the same in both cases since either social morality or law can coordinate behavior and expectations across people with disparate beliefs and aims. Because property rights

¹⁵⁴ Daniel Attas, "The Fragmentation of Property," *Law and Philosophy*, Vol. 25, No. 1 (Jan. 2006): 119–149.

coordinate the actions of all of the people who are potential users of a valuable resources, property rights differ from rules that might function as elements of a purely personal moral code that may be successfully followed regardless of the behavior of others: e.g., ‘don’t waste one’s talents,’ ‘don’t deceive oneself into believing pleasant falsehoods,’ ‘don’t eat meat,’ etc. Property rights do not serve their purpose unless they govern the behavior of *groups* of people.

At a very general level, a property right protects an owner’s interest in using her property by permitting her to determine if and how others may access it. It is sometimes possible to justify a person’s property rights in terms of these interests. However, this approach fits uneasily with property rights for several reasons. First, the interests at stake may be interests of those other than the right-holders (i.e. property rights in trust property protect the interest of the beneficiary rather than the trustee). Second, the justification of a particular property right often depends on systemic effects. For example, privatization as a solution to a tragedy of the commons may provide large benefits even to those who do not receive a property interest by preserving a common pool resource that would otherwise soon be exhausted. One might manage a fishery by giving certain people tradable rights to catch a certain number of fish. Here, the proprietary right to fish protects a fisherman’s interest in catching fish. The rationale for granting the right, however, may have nothing to do with protecting the interests of the individual fishers granted rights (for one thing, depending on a fisherman’s discount rate and likely retirement age, a particular fisherman may do better in an unregulated open access regime). Instead, the justification of this sort of right is based on the interest of the public or of future fisherman in preserving the fishery for future use. Whether a particular property right is justified depends, at least in part, on whether the set of fully specified property rights to which it belongs is justified. I’ll call a set of property rules, whether found in social morality or law, a

property regime.¹⁵⁵ Holistic justification of property rights on the level of property rights regimes is the dominant approach in twentieth century political philosophy.

I will turn to the interests protected by property rights in the latter part of this chapter. But first I will discuss the nature of property rights themselves. Legal theorists are divided as to whether property is best conceived of as a “bundle of rights”, or as being a normative relation characterized by an owner’s right to exclude others from the use of a particular resource.¹⁵⁶ Although the proper analysis of property rights is an analytic question on its face, in practice the matter tends to be rather ideologically charged. The “right to exclude” conception of property is historically associated with classical liberalism, although its pedigree is even older than that.¹⁵⁷ Something like this view was probably the dominant one in the Anglophone world until the late nineteenth century.¹⁵⁸ The core insight that property rights are exclusionary rights is an appealing one insofar as it identifies a feature that unifies property relations and distinguishes them from other kinds of rights.

The main rival of this conception portrays property as a “bundle of rights.” The basic idea is that property ownership consists of a collection of discrete rights that may (subject to certain limitations) take any number of forms. A person who owns land in fee simple absolute (the most extensive form of land ownership in common law jurisdictions) may grant one person the right to extract sub-soil resources, another person the right to walk across her land (an

¹⁵⁵ J. W. Harris refers to these as “property institutions.” See J. W. Harris, *Property and Justice* (Oxford, Clarendon Press, Oxford University Press, 1996). I use the term property regime to emphasize that I mean merely a collection of norms that may or may not have any formal institutional manifestation. A “primitive” society could have a complex and sophisticated set of property rules without formal legal institutions.

¹⁵⁶ Daniel B. Klein & John Robinson, “Property: A Bundle of Rights? Prologue to a Property Symposium,” *Econ Journal Watch* 8, no. 3 (2011), 193.

¹⁵⁷ For a history of the debate see Jane Baron, “Rescuing the Bundle of Rights Metaphor in Private Law,” *University of Cincinnati Law Review* 82, no. 82 (2014), 62-67.

¹⁵⁸ Klein & Robinson, “Property: A Bundle of Rights? Prologue to a Property Symposium,” 195.

easement) and a third the right to occupy the land for a term of one year (a lease). Just as the owner may give different “sticks” to different people, these “sticks” may be reassembled by, e.g., letting the lease expire and buying back the easement and sub-soil rights, so that the owner has the full “bundle of sticks” again. The “bundle” conception is sometimes made more precise by appealing to a collection of incidents of ownership. The classic exposition is Anthony Honoré’s. Honoré defines ownership as “the greatest possible interest in a thing which a mature system of law recognizes.”¹⁵⁹ According to Honoré, the liberal conception of ownership includes the following incidents: (1) the right to possess, (2) the right to use, (3) the right to manage, (4) the right to income, (5) the right to capital, (6) the right to security, (7) the incident of transmissibility, (8) the incident of absence of term, (9) the prohibition of harmful use, (10) liability to execution.¹⁶⁰ Obviously, this is a rather heterogeneous list that includes duties and liabilities as well as rights. The basic idea behind the bundle theory is that the incidents of ownership may be fragmented or combined in various ways. Some of the individual incidents – e.g. the right to use – can be further divided in numerous ways. Full liberal ownership – concentration of all incidents in unlimited form in the hands of one party – is relatively unusual. Property owners may decide to fragment property rights for various reasons and government often restrict various incidents of ownership leaving the property owner with less than the full “bundle of sticks.” The “bundle of rights” conception of property rights was enthusiastically embraced by progressives in the twentieth century who wished to diminish the normative significance of property so as to finesse the conflict between property rights and the modern regulatory state.¹⁶¹ This position is sometimes carried so far as to deny that property has a

¹⁵⁹ A. M. Honoré, “Ownership” in *Oxford Essays in Jurisprudence*, A. G. Guest, ed., (London: Oxford University Press, 1961), 108

¹⁶⁰ Honoré, “Ownership,” 112-124.

¹⁶¹ See Thomas W. Merrill & Henry E. Smith, “Making Coasean Property More Coasean,” *Journal of*

substantive role to play in political philosophy because it lacks any determinant structure. One oft-cited article in this tradition even argued that property has “cease[d] to be an important category in legal and political theory.”¹⁶²

Although the “bundle of rights” view was dominant for much of twentieth century, the legal philosopher James Penner and legal theorists Henry Smith and Thomas Merrill have rehabilitated “right to exclude” conception of property rights in the past fifteen years.¹⁶³ Penner defines a property right as “the right to determine the use or disposition of a separable thing (i.e. a thing whose contingent association with any particular person is essentially impersonal and so imports nothing of normative consequence), in so far as that can be achieved or aided by others excluding themselves from it, and includes the rights to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.”¹⁶⁴ There is a lot packed into this definition. The reference to “separable things” is intended to exclude rights to bodily integrity and the like from the scope of property rights as “non-separable” rights.¹⁶⁵ Although a

Law and Economics 54, no. S4, (2011), S77-S104. These inclinations are not universal. Some classical liberals, such as Richard Epstein, favor the bundle view while some progressives favor the right to exclude view. On Epstein’s view, the bundle model illustrates that *any* restriction on an owner’s property rights are a prima facie taking – not merely physical invasion and other violations of the right to exclude.

¹⁶² Thomas C. Grey, “The Disintegration of Property” in *Property*, J. Roland Pennock & John W. Chapman eds., (New York: New York University Press, 1980): 69-86, 81.

¹⁶³ James E. Penner, *The Idea of Property in Law* (New York: Oxford University Press, 1997); Thomas W. Merrill & Henry E. Smith, “What Happened to Property in Law and Economics?” *Yale Law Journal* 111, no. 2 (2001), 357-398; Thomas W. Merrill & Henry E. Smith, “Optimal Standardization in the Law of Property: The Numerus Clausus Principle,” *Yale Law Journal* 110, no. 1 (2000), 1-70; Thomas W. Merrill, “Property and the Right to Exclude,” *Nebraska Law Review* 77, (1998), 730-755.

¹⁶⁴ Penner, *The Idea of Property in Law*, 152.

¹⁶⁵ This way of delineating property rights can be traced to Hume: “There are three different species of goods, which we are possess’d of; the internal satisfaction of our minds, the external advantages of our body, and the enjoyment of such possessions as we have acquir’d by our industry and good fortune. We are perfectly secure in the enjoyment of the first. The second may be ravish’d from us, but can be of no advantage to him who deprives us of them. The last only are both expos’d to the violence of others, and may be transferr’d without suffering any loss or alternation; while at the same time, there is not a sufficient quantity of them to supply every one’s desires and necessities. As the improvement, therefore, of these goods is the chief advantage of society, so the instability of their possession, along with their

person can transfer the right to do certain things to their body to another person, this is not biologically possible with respect to mental sensations or mental control over bodily actions. A person's relationship to their own body may be damaged (i.e. by maiming them) but cannot be transferred to another. The human body might (in certain morally depraved legal systems) be treated as an object of property like any other physical object.¹⁶⁶ But there is no way for another person to have mental access to another person's body. Even forced labor requires that the master operate through the will of the laborer using coercive threats since the master cannot move the laborer's limbs directly.

Penner's definition is attractive in that it identifies property rights as (a) a distinctive type of right that differs from other sorts of legal rights (contractual rights, etc.) and (b) a distinctive way to manage access to valuable resources (i.e. by allowing an owner to exclude all others rather than specifying in a more fine grained way which persons may use a resource in what ways). Competing theories of property fail to specify a sufficiently narrow domain of rights, either by identifying property with all economically valuable entitlements (thereby severing the tie with the right to exclude) or by failing to distinguish property from other sorts of rights to exclude (for example bodily integrity). The "right to exclude" conception treats the decision to employ property rights as a substantive one: property rights are one of the various possible ways of regulating access to valuable resources. By contrast, theories that treat any right with respect to material goods as "property" efface the distinction between using property as a strategy to determine the use of resources and using other techniques such as government regulation, open access regimes and so forth.

scarcity, is the chief impediment." David Hume, *A Treatise of Human Nature*, Book 3, Part 2, Section 2, p. 487-488.

¹⁶⁶ The term "chattel slavery" is instructive here: chattel is the legal term for property that is a movable physical object (as opposed to land or incorporeal intellectual property).

Penner's definition distinguishes full-blooded property rights from proprietary rights and contractual rights. Property rights consist in a power to exclude others from use of a resource whereas proprietary rights permit access to a resource without a general power to exclude others. Property rights, therefore, give the right holder a special privileged power over an object. This is very different from proprietary rights, which might be held by many persons with respect to an object so that each person has the same normative relation to the object. For example, everyone living a village might enjoy a proprietary right (perhaps even transferable) to graze their cattle on the town common. Such a right would not entitle them to exclude others from use of the common – this right might be retained by the village as a collective body – or to engage in some other activity, growing tomatoes for example, on the town common. Contractual rights allow parties to transfer control over a resource in exchange for something of value. They differ from property rights in several ways. First, contractual rights are (for the most part)¹⁶⁷ enforceable only against parties to a contract whereas property rights are enforceable against the world. This is sometimes expressed as the distinction between *in personem* rights and *in rem* rights. Second, property rights have relatively standardized legal forms. Attempts to create legal rights that do not have one of the standardized forms are invalid. Contractual rights, by contrast, can have almost any form whatsoever. The presumption is that one may create contractual rights that take any form not prohibited by law (i.e. selling oneself into slavery, creating contractual obligations to commit crimes, etc.) whereas property rights are usually invalid unless they take one of the specific forms permitted by law. Third, contracts often take property or proprietary rights as their objects and in such cases the contractual rights rely on preexisting property or proprietary rights.

¹⁶⁷ There are some narrow cases in which contractual rights may be enforced against third parties who interfere with contractual relations. This is the tort of tortious interference with contract.

Penner's work on property rights has led to responses from "bundle theorists" that advance more sophisticated versions of the bundle model.¹⁶⁸ Engaging directly with the latest moves in this rather intricate debate would take me too far afield of my real object in this work.¹⁶⁹ While I believe that the Humean theory of property most naturally supports the exclusionary rights view, I leave open the possibility that it is consistent with some of the more sophisticated versions of "bundle theory."¹⁷⁰

The Humean theory of property rights entails that property rights initially take the form of exclusionary rights. Property conventions are only stable when most people can easily perceive that their neighbors are following them and thus form expectations of mutual compliance. It is therefore crucial at early stages that property rights are not complex. Rights of exclusive use are easy to respect, easy to monitor and can develop organically out of prudent avoidance of conflict. They are the initial objects of Humean property conventions. In this way, at least, rights of exclusive use have pride of place. Once basic property conventions are established, more complex forms of property relations can be created through legal systems that specify rights and duties in a great deal of detail. Exclusionary rights, however, are still important because more complex forms of property relations are built against this background. An easement, for example, relaxes the right to exclude by giving certain people (or perhaps any member of the public) the right to cross a particular piece of land without permission of the owner. Similarly, land use regulation of various kinds restricts what a landowner may do on her land. But the general presumption is that the owner may do anything consistent with generally

¹⁶⁸ E.g., Stephen R. Munzer, "Property and Disagreement" in *Philosophical Foundations of Property Law*, Henry E. Smith & James Penner, ed., (Oxford: Oxford University Press, 2013): 289-319.

¹⁶⁹ E.g., James E. Penner, "Potentiality, Actuality and 'Stick' Theory," *Econ Journal Watch* 8, no. 3 (Sept. 2011), 274-278; Arthur Ripstein, "Possession and Use" in *Philosophical Foundations of Property Law*, Henry E. Smith & James Penner, eds., (Oxford: Oxford University Press, 2013): 156-181.

¹⁷⁰ It is also possible that Penner and the bundle theorists are simply working with two distinct concepts each of which is useful for certain purposes.

applicable laws (i.e. it isn't legal for private parties to build nuclear bombs regardless of whose land they do it on) that is not specifically prohibited. For non-owners, the presumption is the reverse: it is not legal to do anything on another's land without their permission unless specifically permitted by law.

Exclusionary rights define zones of authority for property owners. This provides a default rule for determining what owners and others may and may not do. Property rights regulate actions by allowing property owners to exclude others from the use of a resource and by creating a presumption that an owner may do what she likes with her property insofar as her actions are consistent with generally applicable laws and do not invade the property of others. For example, blasting activity creating shock waves that damage a neighbor's buildings is presumptively not permissible. Painting one's house a particular color, however ugly, is presumptively permissible. These default rules are not, of course, always appropriate. In such cases they might be amended to permit or prohibit certain activities that violate the logic of exclusionary rights. Zoning regulations, for instance, sometimes regulate the ways in which it is permissible to paint one's own house because even though ugly houses do not violate anyone's property rights, neighbors whose views might be spoiled may have a stronger interest in the color of a house than its owner does. Moreover, the owner's real interest in an ugly paint job might be to spite their neighbors. A great deal of zoning, environmental and other regulation limits the ways in which property owners may use their property. These regulations, however, carve out exceptions against the background default rule of exclusive use.

The notion that property ownership creates a set of default rules is a somewhat unorthodox one.¹⁷¹ Christina Bicchieri's theory of social norms provides a useful framework for

¹⁷¹ In particular, property theorists tend to be divided into those who think that property ownership has strong (non-default) normative implications and those who think that property ownership has no

this claim. Bicchieri argues that many social norms are embedded in schemata. Schemata “are cognitive structures that represent stored knowledge about people, events, and roles.”¹⁷² They represent general knowledge that may be applied in a range of concrete circumstances. For example, the buying schema has variables such as buyer, seller, money, merchandise, bargaining and so forth that may be represented by different elements in different situations. Schemata contain scripts that specify roles as well as permissible and required actions tied to these roles in a given situation type. *Bargaining*, for example, is permissible for *buyers* in the buying schema applicable to open air markets in most countries. Turning *merchandise* over to the *buyer* upon *payment* is a required action for sellers in this schema. When people encounter a new situation, they compare it (usually subconsciously) to familiar situation types. If the new situation seems similar to a prior situation that is associated with a schema, the schema and its scripts are activated. Activation of a schema and its scripts triggers the norms embedded in them and thus influences a person’s behavior and their expectations of others. Agreement on the applicable norms, therefore, requires both a shared schema and a similar interpretation of the situation at hand. Both sorts of mismatches might cause normative disagreement. People from different cultures may disagree on the norms applicable in a given situation even though they agree on the relevant non-normative facts because they possess different schemata.¹⁷³ Two people might also disagree on the applicable norms even though they share the relevant schemata because they interpret a set of facts differently and so apply different schemata. Since people are apt to be at

determinant content until some bundle of rights has been specified. Henry Smith’s emphasis on the information cost advantages of property rights is an exception; this section is influenced by his general approach.

¹⁷² Christina Bicchieri, *The Grammar of Society* (New York: Cambridge University Press, 2006), 93.

¹⁷³ Not all such conflicts are necessarily hostile. Travelers in places with especially strong guest host norms may be pleasantly surprised by the generosity of the locals. Similarly, people from places without strong norms of honest dealing in business with strangers may be pleasantly surprised by the moral probity of their business associates in places with stronger norms of commercial honesty.

least slightly biased in favor of their own interests, this is especially likely in cases where people have conflicting interests. The possibility of divergent interpretations is even greater when the facts themselves are somewhat hazy.

Bicchieri argues that the contextual relativity of many norms is explained by their status as scripts in schemas. If the relevant schema is activated, people apply the norm. If not, they do not. This may explain divergent behavior in situations in which there does not appear to be any rational explanation for applying the norm in one case but not the other. For example, one might explain a range of “framing effects” in terms of the activation of different scripts based on different contextual cues. Some framing effects might, therefore, not simply be irrational psychological quirks but instead reflect the application of a store of past experiences about the sorts of situational facts that make it more likely that one schema rather than other will be applicable. Conversation can help both to increase agreement on the sort of norms applicable in a given situation and increase trust that others will act according to these norms. Bicchieri believes that her theory can explain why letting people converse in laboratory experiments involving public goods games increases cooperative behavior even when there is no way to punish non-cooperators.¹⁷⁴ Standard rational choice theory suggests, by contrast, that such so-called “cheap talk” should have no influence on subsequent behavior.

Property rights are elements in a great range of schemata. These include contractual or trade norms, norms of gift exchange, norms governing contributions to public goods, norms governing fair division of gains from a common enterprise, norms concerning damage to property, guest-host norms, friendship norms and so on. This has several implications. First, some of these schemata require a relatively determinate answer to the question of who plays the role of property owner in order for a person to determine how to apply the schemata. If property

¹⁷⁴ Bicchieri, *The Grammar of Society*, 98-99.

is merely a bundle of rights and property ownership has no characteristic form, then it is difficult to see how attributions of property ownership can play the role that they do in various schemata. The “right to exclude” theory emphasizes that property rights are held by the party with the right to exclude others from use of an object. This role is something like an office.¹⁷⁵ Any competent legal person is eligible to fill it. For some objects, the “office” may be unoccupied in which case the object is not owned. The “office” can also be temporally filled by another – for example, a tenant – if the owner so chooses. Alternately, operational control may be delegated to managers who are authorized to make decisions for the owner. Regardless of the internal structure of ownership, knowledge that an object is owned by someone activates various scripts: we may infer that we need the owner’s (or their agent’s) permission to use the property, that we should pay damages if we damage the property, and so on. The internal modularity of property ownership (the ability to reconfigure ownership interests) is often irrelevant to third parties once they have determined that someone else owns the property. All that is necessary is to identify an object and a person or entity with exclusionary rights over it.

Property schemata play an important role in allowing inferences about property rights in factually novel situations. Schemata often license inferences from ownership to various rights and duties of the owner. As is suggested by the “right to exclude” theory, exclusive use functions as a sort of default rule. If I know that John owns a plot of land, I may infer that I may not walk across it without his permission, that he may build a house on it if he likes and that he may sell it or give it to Sally if he so chooses. Any of these inferences could turn out to be false. It could be that there is a public easement that allows me to walk across John’s property. It could be that John’s deed forbids him from building a house or that John holds his property through

¹⁷⁵ See Christopher Essert, “The Office of Ownership,” *University of Toronto Law Journal* 63, no. 3 (2013), 418-461.

some sort of an irrevocable trust that prevents him from selling it to Sally. But the default rule allows someone to make the correct inference in the vast majority of cases. In high stakes cases it usually makes sense to consult legal materials to determine the precise content of legal rights and duties. But in low stakes cases, people often act according to inferences from the default rules. In practice, rights of exclusive use are often relaxed either by limiting the right to exclude (for example, public accommodations law or right to roam laws) or by restricting otherwise lawful uses (for example, zoning and other land use laws). However, the fairly detailed set of default rules provided by concept of ownership facilitates cooperation by allowing people to coordinate their actions based on very limited information.

In cases where schemata are applied to familiar fact patterns, proponents of the bundle theory can explain rights in terms of their preferred theory. Given knowledge that someone is the owner of an object, we might infer that they possess any of the rights commonly found in the bundle – for example, the right to exclude or the right to alienate for consideration. The “right to exclude” theory, however, does better in explaining shared intuitions about novel fact patterns. Suppose a tornado hits town, lifts a container of toxic chemicals high in the air and deposits them in an unsightly pool on John Dow’s front yard. The chemicals are in no danger of leeching into the soil of neighboring plots but they do give rise to noxious vapors that waft around the neighborhood. Although nobody in the neighborhood is likely to have encountered this situation before, they are likely to converge on the judgment that Dow is responsible for cleaning up this mess.¹⁷⁶ Landowners are responsible for keeping their property in a condition that is not dangerous for the neighbors even if the danger is the result of an act of God. In Bicchieri’s terms, the presence of the toxic chemical triggers a “dangerous conditions” script that licenses

¹⁷⁶ He might ask for help from the owner of the chemicals if they can be identified and located, but that is up to him.

the inference that the owner is responsible. This is likely to be the case even if similar situations in the past have involved cases in which the owner bears some responsibility for the presence of the dangerous condition (such as operating a business that uses toxic chemicals) and are therefore easily distinguishable from dangerous conditions caused by acts of God.

Scripts containing property norms will not resolve all novel situations. Suppose John Dow does nothing about the toxic chemicals. May his neighbor, Joan DuPont, enter his property to remove the toxic chemicals? This is a harder question. On the one hand, Joan is generally not permitted to enter John's property and interfere with things on it without his permission. But perhaps he forfeits the right to exclude for these purposes by failing to remediate dangerous conditions. In such cases, there may be no convergence of intuitions and the community will need to turn to some authoritative source of property rules – such as a legal system – in order to resolve the dispute. Property norms therefore have a somewhat open texture – some questions are settled by ownership attributions and default rules in the absence of a legal rule to the contrary, but others are indeterminate in the absence of formal laws or legal precedents.

Philosophical debates over the normative significance of ownership illustrate the virtues of the default rule view. Analyzing property rights in terms of permissible uses of resources wildly underdetermines the resolution of “conflicting” uses. Although the exclusion view leaves a wide range of cases – those of unintended harms or accidents – to be resolved by tort law or some other form of regulation, exclusionary rights explain why, in cases of foreseeable harm, one owner's right not to have their property harmed typically trumps another owner's supposed right to use their property as they see fit. Defenders of Lockean property rights sometimes attempt to derive the content of property rights by defining ownership as the broadest set of

rights over an object compatible with similar rights for other property owners.¹⁷⁷ If rights are specified on the level of use rather than exclusion, this standard is too indeterminate. Should I be permitted to use my hammer to smash your car? Peter Vallentyne, Hillel Steiner, and Michael Otsuka claim that this use of a hammer is inconsistent with others' ability to enjoy equal rights over their property.¹⁷⁸ But this conclusion is too hasty. There are at least two formally equivalent sets of equal maximal property rights. Under one set of rights, I may smash your car with my hammer and you may run over my hammer with your car. Under another set, I may not smash your car and you may not run over my hammer. Both sets of rules treat each property owner symmetrically even though they have opposite implications in this case. One set of rights is not "logically stronger" than the other because each includes a right that the other does not.¹⁷⁹ Peter Vallentyne, Hillel Steiner, and Michael Otsuka claim that the latter case involves security rights in addition to use rights where as the former case involves only use rights. But this conclusion depends on the way in which they individuate rights. They lump all uses of an object into the category of "use rights" even when the "use rights" are actually more extensive in the case in which car smashing is permitted than when it is not. If one chooses a way to categorize rights that does not elide this difference, the argument collapses. If, instead, we call the right to smash your car with my hammer an "invasion right", then our choice is between "use rights +

¹⁷⁷ "There is nothing magical about full ownership. It is simply (roughly) the logically strongest set of ownership rights over a thing that a person can have compatibly with others having such rights over everything else." Peter Vallentyne, Hillel Steiner, & Michael Otsuka, "Why Left-Libertarianism Is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried," *Philosophy & Public Affairs* 33, no. 2 (2005), 204.

¹⁷⁸ This example is drawn from an exchange between Peter Vallentyne, Hillel Steiner, and Michael Otsuka, who defend left-libertarianism and Barbara Fried who critiques it. Vallentyne, Steiner, & Otsuka, "Why Left-Libertarianism Is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried," 206.

¹⁷⁹ Peter Vallentyne, Hillel Steiner, and Michael Otsuka, define "full self-ownership [as] the logically strongest set of ownership rights that one can have over one's person that is compatible with someone else having the same kind of ownership rights over everything else in the world. Here and throughout, we take one set of rights to be logically stronger than another set if and only if the first contains all the rights of the second plus some additional ones." Vallentyne, Steiner, & Otsuka, "Why Left-Libertarianism Is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried," 205.

security rights” and “use rights + invasion rights”. Neither package of rights is logically stronger than the other. There are usually very good reasons to prioritize the right of owners not to have their property smashed over the rights of others to use their property for smashing other people’s objects. But this cannot result cannot be derived from the formal properties of “bundles of rights.”

In her critique of left-libertarianism, Barbara Fried argues that the concept of ownership is insufficient to resolve questions about conflicting uses.¹⁸⁰ As far as Peter Vallentyne, Hillel Steiner, and Michael Otsuka’s theory goes, this seems correct. However, Fried moves too quickly to the conclusion that the *only* alternative way to determine what belongs in the bundle of rights is to use some form of normative analysis (she prefers utilitarianism). The “right to exclude” theory of property can explain some common intuitions about the implications of property ownership without sophisticated normative analysis. The right to exclude others is the default rule for privately owned objects. Furthermore, a landowner gets some latitude to determine what others may do with their chattels on the landowner’s property. In the car / hammer case, this means that if the conflict happens on a public road, a local government sets the ground rules: not only is it illegal to smash cars, hammer owners must also keep their property off the roadway where it might be hit by a moving vehicle. Where no rule is specified, the default is that one may not use one’s property to physically invade the property of others because this violates the other’s “right to exclude.” The key move is to recognize that not all “property rights” are on a par. The core of property is “exclusion” rather than “use” and so one owner’s right to exclude injurious “uses” trumps another’s supposed right to use their property as

¹⁸⁰ Barbara Fried, “Left-Libertarianism: A Review Essay,” *Philosophy & Public Affairs* 32, no. 1 (2004), 66-92. Fried diagnosis of what goes wrong is somewhat different than mine, but I agree with her overarching point that the left-libertarian project of deriving substantive normative conclusions from the concept of “self-ownership” leads down a blind alley.

they see fit. This rule is sometimes relaxed when there are strong reasons to do so. And it leaves open to question what to do when the invasion of another's property is not intentional (or at least grossly negligent) but rather the result of an accident or genuine mistake. In both cases, Fried's preferred cost-benefit analysis may play an important role. In any event, one may be skeptical that conceptual analysis of "ownership" settles controversial questions in political philosophy without thinking that property ownership has no content until all of the rights in the "bundle" are determined on the basis of some extrinsic normative theory.

This analysis is not likely to satisfy either side of the 'left-libertarian' debate. Vallentyne, Steiner, and Otsuka wish to use the concept of full ownership in order to argue that workers have the right to be compensated for the full value of their labor. The "right to exclude" theory, however, is inapt for theories of "self-ownership" because although one may exclude others from the use of material resources, objects of intellectual property or even financial instruments, human labor itself is not a possible object of exclusion. Since only I have privileged control over my body, nobody can cause me to perform bodily actions in the same way that I can (i.e. through mental control). By contrast, material objects, ideas, and financial instruments can be used by one person as well as another. Nor does it help to claim that self-ownership amounts to a right to exclude others from enjoying the benefits of one's labor without one's permission. There is and cannot be any such general right. Building a landmark work of modern art on my property does not give me the right to collect money from my neighbors even if they greatly enjoy the fruits of my labor (and even if they financially benefit from their land's increased value). And if another neighbor is inspired by my creation and influenced by it when they redesign their own home, I

am not likely to be able to collect anything from them.¹⁸¹ The relevant category when it comes to ownership over the value of one's labor is not property, but rather contract and the appropriate normative claim is one of freedom of contract rather than self-ownership. A contractual right may *become* a kind of property (for example, a transferable right to payment), but analyzing the concept of property will not help build a theory of freedom of contract for workers.¹⁸²

Fried, however, appears to adopt the “bundle theory” in part out of commitment to the realist proposition that property rights have no determinate form and thus their content must be filled using normative analysis. This commitment makes her hostile to formalistic accounts of property rights (even only moderately formalistic ones) such as the one outlined above. But if the foregoing argument is correct, viewing property rights as establishing a set of default rules is consistent with believing that it is relatively unproblematic to violate these defaults when there is a good reason for doing so. Altering default rules raises information costs since the default rules are widely known and easy to apply whereas the non-default rule must be learned by all interested parties.¹⁸³ So there is a case for erring on the side of maintaining simple exclusionary rights when other considerations do not provide decisive reason for changing them. There is no conflict between the “right to exclude” theory, rightly understood, and sophisticated consequentialist analysis of the rights and duties of property owners.

2. TWO FACES OF PROPERTY RIGHTS

¹⁸¹ The forms of intellectual property—patent, copyright and trademark—cover only a small subset of the range of ideas that may be used by others. A legal system that gave people the right to secure all revenue created from their ideas would create legal gridlock.

¹⁸² It is, perhaps, suggestive that employment law diverges from contract law in a whole host of ways that for the most part restrict what employers and employees may agree to. In practice, then, the law takes neither property nor contract as a model for employment relations.

¹⁸³ For an influential analysis of property rights in terms of information costs, see Henry E. Smith, “Exclusion Versus Governance: Two Strategies for Delineating Property Rights,” *Journal of Legal Studies* 31, (2002), S453-S487.

In this section, I will explore how property rights simultaneously divide spheres of control and delineate wealth entitlements. Property rights provide an answer to two different questions about social organization: (A) Who is authorized to make what decisions with respect to which resources? and (B) How are the benefits and burdens of resource management, use, and consumption to be divided among people? I will call the former the governance question. It is a matter of division of spheres of authority. One way to divide such authority is to give certain people (owners) exclusive rights to make certain sorts of decisions about how a resource is to be used (or not used) – private property. Another way is for the state to determine how a resource is to be used and by whom – public property. A third is to permit everyone to use a resource in a particular way and forbid anyone from excluding others – open access property. From the governance perspective, property rights serve to specify who has decisional authority with respect to an object and the extent of this decisional authority. The package of rights enjoyed by an owner of private property determines the decisional authority of the owner. Likewise, public property and open access property require rules concerning who may make what decisions with respect to property.

The second question, I will call the wealth question. It concerns the share of value derived from external objects enjoyed by each citizen. One might consider questions of wealth distribution from the perspective of the economy as a whole or with respect to a single resource. Wealth should be understood capaciously as the ability to realize value from objects of a type that could be the object of property rights¹⁸⁴ and stores of such value (i.e. money and other

¹⁸⁴ This qualification is meant to exclude sources of value that are not separable from an individual, such as their subjective experiences, thoughts, feelings and the like. Although subjective experiences can be affected by changes in wealth distribution, they are not themselves transferable objects of value. I cannot sell or give to you as a gift my enjoyment of Bach's music. "Human capital" also does not constitute property-based wealth on this account since it is not an object of property rules under political systems

financial assets). It includes not only the ability to exchange property for value but also the value of using or consuming property. A complete set of property and proprietary rights will determine for each person their share of privately held wealth – at least at a single point in time. Other areas of private law are concerned with the rules that license transfers of property rights – contracts, wills, trusts and estates. Such rules determine permissible and impermissible ways of altering wealth entitlements.

Except with respect to liquid financial assets (money, publicly traded stocks and bonds and other readily monetizable financial assets), property rights do not directly determine wealth entitlements. Rather, property rights structure decisional authority. Wealth is a function of the access to resources enabled by the property rights and the underlying value of these resources. One's wealth might change for one of two reasons – either because one's rights have changed or because the resources to which they give access change in value. A full ownership interest exposes the owner to full upside and downside risk: the entitlement tracks the future value of the property perfectly. However, it is possible to fragment wealth interests so that more than one person is exposed to such risk. An owner might transfer downside risk by purchasing an option to sell at a certain price at a certain time in the future. Or the owner might sell some of the upside by selling the right to purchase at a given price in the future.

Governance interests and wealth interests, although distinct, are causally linked. Consider a plot of farmland located by an agricultural village. One might divide the land into individual plots, each owned by a villager, or leave the plot as a whole to be managed collectively by the village. From the perspective of wealth, one might compare the two alternatives in terms of the market value of each villager's rights. A villager's right to participate

that forbid slavery. Of course, the various abilities that constitute “human capital” might affect one's ability to realize value from objects of property, so the value of these two kinds of assets is related.

in collective ownership might be more or less valuable than private property rights over a single plot or vice versa. This would largely depend on the relative efficiencies of collective and individual management of the land and on the insurance value of collective ownership. From the perspective of governance, collective and individual ownership implicate different sorts of value. Individual ownership might better protect individual autonomy since the owner is able to make unilateral decisions without permission from the rest of the village. On the other hand, some people might find the ability to participate in collective governance with one's neighbors intrinsically valuable. If most would-be buyers find individual ownership intrinsically appealing and collective governance distasteful, this will increase the market value of private property rights and thus increase the wealth of private plots owners relative to holders of rights in collective property.¹⁸⁵

Wealth and governance represent two different ways of evaluating the interests protected by property rights. In archetypal cases of private ownership, where an owner enjoys a complete right to exclude and a right of use consistent with generally applicable laws, the same property right protects both sorts of interests. The right to exclude protects the owner's governance interests directly by making authoritative the owner's decisions with respect to her property and protects wealth interests indirectly. The congruence of governance and wealth interests is characteristic of full ownership.¹⁸⁶ But the two sorts of interests can be divided with respect to a

¹⁸⁵ A right holder's tastes might differ from those of most potential buyers. That potential buyers would pay more for one's right *if* one wished to sell increases one's consumption possibilities. However, if one does not want to sell, this increase in one's wealth might not further one's interests.

¹⁸⁶ It is interesting to note that governance and wealth correspond to the two categories of *per se* regulatory takings in U.S. constitutional law. The first type of *per se* taking – physical invasion – represents a flagrant affront to governance interests. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The second type of *per se* taking – “denial of all economically beneficial or productive use” – represents a near total evisceration of wealth interests. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Takings doctrine is commonly seen as, at best, a “muddle”. E.g. Bradley C. Karkkainen, “The Police Power Revisited: Phantom Incorporation and the Roots of the

particular object. A trust is a particularly conspicuous example. Property rights protecting trust property protect the decisional authority of the trustee from interference by third parties.¹⁸⁷ But the wealth interest protected by these property rights is that of the trust beneficiary. Property held in trust looks like any other property from the outside – third parties are held to the same duties to the trustee with respect to the trust property as they would to any other property owner. However, the trustee is constrained to act in the interest of the beneficiaries and may be legally called to account for failure to do so. The peculiar duality of trust property is reflected in legal procedure. From the perspective of common law, the trustee is the owner of trust property and has full rights of ownership. Traditionally, beneficiaries could only enforce their claims in equity before the Court of Chancery so that the division of legal and beneficial title was reflected by a separate set of legal institutions.¹⁸⁸

Separation of ownership and control is now pervasive given the rise of corporate entities over the past two centuries. Corporate executives exercise control over corporate property, but the wealth interests protected by these rights are those of shareholders and bondholders. Corporate governance is structured differently than trust management. Corporate officers are agents of a legal person, the corporation, which is owned by shareholders. But with respect to corporate property, the separation of governance rights and wealth interests is functionally rather similar.¹⁸⁹ Although shareholders are formally entitled to supervise executives, in practice,

Takings ‘Muddle’,” *Minnesota Law Review* 90 (2006), 826; Jane B. Baron, “Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property,” *Fordham Urban Law Journal* 34 (2007), 613-655. My analysis of property in terms of governance and wealth suggests that there is some internal logic to takings law. Takings doctrine may be a bit of a kluge, but it is not, at least when it comes to *per se* takings, a complete muddle.

¹⁸⁷ And in some instances even from interference by beneficiaries!

¹⁸⁸ See E.g., Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (New York: Oxford University Press, 2007), 149-150.

¹⁸⁹ As Berle and Means observed: “In this concept, corporation law becomes in substance a branch of the law of trusts. The rules of application are less rigorous, since the business situation demands greater

executives at large publicly traded corporations are shielded by the infeasibility of day-to-day shareholder oversight, the ease of exit for dissatisfied shareholders by selling one's shares, and a legal regime that insulates plausible business decisions from legal action by aggrieved shareholders.¹⁹⁰ However, because shareholders are both residual claimants and retain ultimate authority over the agents of the corporation, it is proper to consider them, not the corporate executives, as the true owners.

Less commonly, an owner may retain legal title and thus governance rights over property while alienating the right to receive income. A securitization of future payments works in more or less this fashion. An owner of some asset sells the right to future income from the asset to another party while retaining title to the asset. Securitization agreements typically contain significant restrictions on the rights of owners so as to mitigate the principal-agent problem inherent in dividing governance and wealth interests in this way. In an extreme case, however, the securitization scheme may achieve a division of governance and wealth interests similar to that of a trust or a public corporation. The form of the arrangement is the inverse of that of the corporation – formal ownership is retained by the party with control rights while the party with the primary wealth interest is neither the residual claimant nor exercises general supervisory authority over those in control of the property. Division of governance and wealth interests always creates the potential for a principal-agent problem and so the possessor of control rights over an object of property must be constrained in some way in order to protect wealth interests. This makes complex forms of property interests cumbersome and partially explains why the

flexibility than the trust situation. Probably the requirements as to motive and clean-mindedness on the part of the persons exercising the powers are substantially similar.” Adolf A. Berle Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* (New York: The MacMillan Company, rev. ed. 1968), 242.

¹⁹⁰ The “business judgment rule” shields corporate executives from personal liability for any decision (even misguided decisions that harm corporate interests) so long as it was motivated by some plausible concern with corporate interests.

common law expresses a preference for full ownership even though it permits certain forms of divided ownership.¹⁹¹

Although my primary aim in this chapter is to explore alternative ways of conceiving of the relationship between property rights and taxation, it is worth briefly exploring how the distinction between governance and wealth illuminates larger debates in political philosophy. Governance and wealth perspectives represent alternative ways of conceiving of the value of choice. Governance interests concern our interest in the process of choice. Wealth interests concern our interest in the objects of choice. The dominant contemporary trend is to treat consumption possibilities as the central normative concern. This approach is shared by most egalitarian theories of distributive justice¹⁹² and by economists who analyze institutions from the point of view of wealth maximizing or, more plausibly, welfare maximization.¹⁹³ The key commonality between the two approaches is that allocations of decisional authority are taken as instrumental to some end specified in terms of wealth interests. For example, scholarship in ‘law and economics’ (which is currently the dominant approach to private law in American legal academia) typically takes wealth maximization as the goal and proscribes governance structures according to what will maximize wealth. A maximally efficient property rights regime is one in which the allocation of property rights minimizes the sum of net negative externalities and transaction costs. Although Rawlsians may aim at different ends, much Rawlsian political philosophy is no less instrumentalist in its approach to property rights.

¹⁹¹ Common law doctrines such as the doctrine of worthier title and the rule against perpetuities serve to reunite fragmented ownership interests into a fee simple (the standard common law form of full ownership).

¹⁹² What exactly the object of egalitarian distribution should be is, of course, a hotly debated question as testified to by the voluminous ‘equality of what’ literature.

¹⁹³ The more plausible versions of the former suggest that wealth is a rough proxy for welfare. The empirical plausibility of this claim is difficult to assess.

There is, however, a venerable strand of political theory that takes governance rather than wealth to be of foundational normative importance. This tradition includes those who see private property as a potential threat to democratic decision making¹⁹⁴ and those who view property ownership as valuable as a means of self-governance. Private property is often thought to facilitate autonomy or self-governance by permitting the owner to exercise control over a personal sphere.¹⁹⁵ The role of private property in protecting personal autonomy is an enduring theme in both the Lockean and Kantian traditions of liberalism. Neo-Lockean liberals Loren Lomasky and Eric Mack argue that rights in private property are justified by the role of property in furthering the personal projects and ends of the owner.¹⁹⁶ The Kantian tradition also treats self-governance as of foundational importance in political philosophy. Kant, Hegel, and Fichte argued that private property rights are necessary to provide a sphere of free choice that allows owners to carry out plans over time without interference from others. The purpose of private law is, in large part, to define spheres of decisional authority so that individuals can be free and autonomous. Defining spheres of decisional authority will also, of course, entail a particular division of wealth. From this perspective, wealth has a sort of derivative importance, because if the objects of my choices (the resources over which I have control) are too limited to sustain me, my freedom is dependent on the mercy of my neighbors'. Some amount of wealth is therefore necessary in order for a person to be a self-governing agent. For this reason, Kant believed that a

¹⁹⁴ For a recent expression of unease with private ownership because of the ability of private owners to undermine democratically determined decisions see Thomas Christiano, "The Uneasy Relationship Between Democracy and Capital," *Social Philosophy & Policy* 27 (Winter 2010), 195-217.

¹⁹⁵ E.g. "The importance of private property is that it enables us to control how we live." John Kekes, "The Right to Private Property: A Justification," *Social Philosophy & Policy* 27 (Winter 2010), 5.

¹⁹⁶ Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), 19-124. Mack argues that "[t]he wrong-making feature of [violations of private property rights] is the precluding of the holder from pursuing his own ends through the chosen disposition of his extra-personal holdings." Eric Mack, "The Natural Right of Property," *Social Philosophy & Policy* 27 (Winter 2010), 78.

system of welfare for the destitute is required in order for a system of private ownership to be just. However, so long as everyone has some minimum level of access to basic necessities, inequalities in property holdings are morally permissible.¹⁹⁷

In the next two sections, I will consider two recent attempts to make sense of the relationship between governance and wealth in private property. The first tries to use the distinction to argue that wealth entitlements and control rights can be unbundled. The second goes to the other extreme in arguing that the two kinds of interests are so intimately connected that taxation is necessarily an infringement on private property. Both arguments fail because they rely too heavily on conceptual analysis of property rights and do not adequately appreciate the importance of institutional constraints on the structure of a property rights. Private ownership of valuable assets significantly constrains but does not fully determine possible allocations of wealth.¹⁹⁸

3. CHRISTMAN ON “CONTROL RIGHTS” AND “INCOME RIGHTS”

In *The Myth of Property*, John Christman advances a deflationary theory of private property that divides property rights into separate bundles of control rights and income rights. He aims to expose the “myth of property” by showing the best justifications for granting control rights over an object to a person do not entail granting that person income rights as well.

¹⁹⁷ See Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge MA: Harvard University Press, 2009).

¹⁹⁸ My discussion presupposes, without argument, that private ownership of at least some kinds of assets is desirable. To a large extent, economic considerations determine the proper form of governance for an asset. Farmland, is, as a general matter, best left in private hands because of informational and incentive problems with public or collective ownership. By contrast, dividing a navigable river between private owners would be foolish because the transaction costs of negotiation with numerous private owners who each have the right to block a ship from traveling the length of the river will typically swamp any efficiency gains from private management. It is a complicated question which assets are best managed privately and which publicly (i.e. state-owned) or collectively (for example, a customary property regime in which a number of parties manage an asset without individual rights of partition or exit). I presuppose only that some valuable assets are best left in private hands.

Decoupling control rights from income rights permits allocation of income rights according to egalitarian principles of distributive justice. According to Christman, once the error in thinking that income must follow control is revealed, there is no reason to think that private property rights stand in the way of constructing social and economic institutions “to ensure that individuals’ life prospects truly manifest their equal dignity and equal moral status.”¹⁹⁹ Christman concludes that the “liberal conception of ownership should be discarded as the paradigm of individual ownership in any society.”²⁰⁰ Christman’s strategy is defective because it distinguishes between what I am calling governance and wealth on the level of rights rather than interests. This approach is unworkable because the same property rights typically have deep implications for both governance and wealth.

According to Christman, property rights can be viewed as “two sets of rights that must be considered separately in any evaluation of economic policies for a society.”²⁰¹ These two analytically distinct forms of ownership are “primary functional control” (control ownership) and “primary claim to income” (income ownership).²⁰² Christman’s notion of control ownership corresponds closely to what I am calling governance. Control ownership includes “the rights to possess, use, manage, modify, alienate, and destroy one’s property.”²⁰³ Control ownership essentially involves decisional authority over property: “The control-owner of the object maintains decision-making authority over the physical state of the item.”²⁰⁴ The right to dispose of one’s property by abandonment or gift is a control right but the right to exchange one’s

¹⁹⁹ John Christman, *The Myth of Property*, (New York: Oxford University Press, 1994), 184.

²⁰⁰ Christman, *The Myth of Property*, 184.

²⁰¹ Christman, *The Myth of Property*, 7.

²⁰² Christman, *The Myth of Property*, 127-28.

²⁰³ Christman, *The Myth of Property*, 128.

²⁰⁴ Christman, *The Myth of Property*, 128.

property for something of value is an income ownership right.²⁰⁵ Income ownership is defined as “the right to transfer and the right to retain goods received in trade.”²⁰⁶ The problems with this analysis are twofold. First, it is not possible to cleanly separate control ownership from income ownership on the level of rights. The same rights often protect both income and control interests to some degree. Second, to the extent that it is possible to separate income and control *rights*, this separation will usually compromise control or income *interests* because constraints must be placed on the exercise of control rights in order to protect income interests or on income rights in order to protect control interests.

I will consider the second problem first. It is possible in some sense to separate control *rights* from income *rights* – the trust and the public corporation more or less accomplish this – but it does not follow that one can thereby separate the *interests* in control and in income that are protected by these rights.²⁰⁷ Although the trustee has the right to manage the trust property and to exclude others from its use, the trustee has fiduciary duties to exercise these control rights for the benefit of the beneficiary. Likewise, corporate officers and executives control corporate property, but they are under an obligation to manage it for the benefit of the corporation, protecting the “income rights” of shareholders and bondholders.²⁰⁸ This relationship between control rights and income rights is not an accidental feature of the situation: to the extent that

²⁰⁵ Christman, *The Myth of Property*, 129.

²⁰⁶ Christman, *The Myth of Property*, 130.

²⁰⁷ The distinction that Christman draws can be traced to Berle and Means’ classic discussion of the public corporation. Adolf A. Berle Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* (New York: The MacMillan Company, rev. ed., 1968). Berle and Means observe that the modern corporation separates control rights and income rights to an unprecedented degree and that this form of ownership differs greatly from the traditional logic of private property in which both sorts of rights were vested in a single individual or group. Berle and Means, do not, however, follow Christman in arguing that the interests protected by control and income are fully separable and instead emphasize the extent to which corporate property differs from traditional forms of private property.

²⁰⁸ Because of the need to give decision makers a free hand in business dealings, enforcement of this duty is reserved only for egregious breaches. In practice, stock options and the like are used to “incentivize” corporate executives to pursue shareholder interests zealously.

beneficiaries and shareholders have “income rights,” it is precisely because those who have control rights have a duty to look after beneficiaries’ and shareholders’ economic interests. The obligation to act in the interest of the income owner severely circumscribes the extent to which the control owner may realize her interests in exercising control. If she takes her fiduciary duties seriously, a conscientious trustee or corporate executive is simply not free to do what she pleases with respect to corporate property in the same way as the owner of private property typically is.²⁰⁹ Control rights may have value for such a person in the sense that they are able to control their work environment, are not beholden to anyone on a day-to-day basis, and can act on their own judgment. These are not insignificant considerations. But they differ from the open-ended freedom of action protected by private ownership. Private ownership is often thought to further the autonomy interests of the owner precisely because the owner is *not* accountable to others for her decisions with respect to her property. Separation of ownership and control may therefore undermine the control interests of both parties – the trustee possesses control rights but is severely constrained in their exercise while the beneficiary lacks control rights altogether. Similarly, income rights are less secure to the extent that the party with control rights might not exercise these rights in a way that protects income.²¹⁰ Whenever beneficial ownership and control are separated, the two sorts of interests are in at least partial conflict which presents some

²⁰⁹ Liberals have long viewed trusts as a potentially illiberal mode of ownership with at least a faint echo of the feudal system. For example, John Chipman Gray expressed exasperation at the development of spendthrift trusts which shield a beneficiary’s income from creditors, tort victims and others with legally valid claims against the beneficiary, thus protecting improvident scions of wealthy families from the consequences of their own folly. John Chipman Gray, *Restraints on the Alienation of Property* (Boston: Boston Book Co., 1883).

²¹⁰ Although corporate ownership is now regarded more benevolently by most classical liberals, Adam Smith thought the joint stock corporation a recipe for mismanagement given the incentive problems inherent in giving one group of people great discretion in managing the investments of another group. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Edwin Cannan ed., (London: Methuen, 1904), Book V, Chap. I, Part III, Art. 1; Berle & Means, *The Modern Corporation and Private Property*, 346-351.

danger to the party not in control. The point is not that every fragmentation of ownership interests will come to grief. Rather, it is that the principal-agent problem inherent in such a situation will always require some mechanism to align the interests of “income owners” with those who have operational control. Such mechanisms may be costly not only in economic terms but also for some of the non-economic values such as autonomy that are sometimes protected by property rights.

Christman does seem to acknowledge in at least one instance that the separation of income ownership and control may threaten the interests protected by control ownership. After endorsing John Roemer’s proposal for competition using market prices between state-owned enterprises, Christman qualifies his endorsement by suggesting that he favors worker-managed cooperatives in place of Roemer’s professionally managed state owned enterprises.²¹¹ The problem with the latter arrangement is that it serves worker’s income interest, but not their interest in control over the workplace. But the principal-agent problem inherent in the division of control and income is particularly acute here. Worker-managers who have little income interest in their enterprise have tremendous incentive to divert “public” resources to their own ends: lavish office furniture, generous expense accounts, management that tolerates a culture of shirking and even outright theft.²¹² Roemer’s model is attentive to the need for managers who maximize profits so as to serve the economic interests of the public. This tends to compromise the control interests of workers and reproduces some of the principal-agent problems inherent in privately owned corporations. But Christman’s modification makes the latter problem much worse by doing away with the governance structures meant to discipline enterprises. To the

²¹¹ Christman, *The Myth of Property*, 181-82.

²¹² It is probably not accidental that the latter was a huge problem in the Soviet economy. A Russian friend once commented on the worker building his parents’ house: “Kolya is good: he works hard and doesn’t steal. Well, at least not too much anyway. He worked all his life in a Soviet factory, so of course he’ll take something!”

extent that income equality is assured by state management or supervision of property (either directly or through state-owned enterprises), this has negative implications for workers' control interests and to the extent that workers have control over public capital assets, this creates the possibility of managing those assets for the benefits of workers at the expense of everyone else.²¹³ The natural solution would be to give worker-owners substantial income rights in their enterprise so that they have incentive to manage it profitably. But this merely highlights the folly of thinking that one might allocate "control rights" and "income rights" according to wholly separate sets of principles. Nothing I have said here rules out a system of public ownership of capital assets. But arguments in favor of such a system must be made directly, not via a conceptual repackaging of property rights.

The distinction between "control rights" and "income rights" is problematic for a second reason. Neither "control ownership" nor "income ownership" cleanly tracks distinct types of normative concerns. Instead, the same rights typically further both sorts of interests to a greater or lesser extent. First consider income ownership. From an economic point of view, one might accrue income either by acquiring new property rights or through the increase in value of one's existing property rights.²¹⁴ Economic income therefore cuts across the categories of "control

²¹³ Berle and Means noted the parallel between corporate ownership and communist management and the contrast of both with the traditional logic of private property: "As a qualification on what has been known as private property in Anglo-American law, this corporate development represents a far greater approach toward communist modalities than appears anywhere else in our system. It is an odd paradox that a corporate board of directors and a communist committee of commissars should so nearly meet in a common contention. The communist thinks of the community in terms of a state; the corporation director thinks of it in terms of an enterprise; and though this difference between the two may well lead to a radical divergence in results, it still remains true that the corporation director who would subordinate the interests of the individual stockholder to those of the group more nearly resembles the communist in mode of thought than he does the protagonist of private property." Adolf A. Berle Jr. & Gardiner C. Means, *The Modern Corporation and Private Property*, (New York: The MacMillan Company, rev. ed. 1968), 278.

²¹⁴ In analysis of tax policy, it is customary to refer to Haig-Simons income. This is defined as "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value

ownership” and “income ownership.” This means that Christman is committed to treating “income” differently based on whether it is obtained by trade or mere fluctuations in the value of existing property rights. If I eat apples from my apple orchard, I am acting as a “control owner”. But if I trade these apples to you in exchange for pears and eat the pears, I am acting as an “income owner”. This makes little sense. The apples are a part of my wealth whether or not I trade them for pears. To the extent that Christman tries to avoid this implication of his scheme by distinguishing between income from trade and other forms of wealth, he is not relying on a principled distinction: income is valuable precisely because it represents an increase in one’s net wealth. There is an analogous problem with control rights. Control ownership over an orchard gives me the right to decide whether to plant apple trees or pear trees depending on whether I wish to eat apples or pears. And some part of the value of control is that it enables me to decide the form in which to consume my wealth. But the right to trade one’s property may serve the same end. Trading apples for pears and planting pears rather than apples are alternative means to the same end. Christman is committed to treating these two sorts of decisions as reflecting different concepts of ownership. As the example shows, this seems rather arbitrary.

The fact that control ownership and income ownership do not track economic categories is a significant problem for Christman’s theory. Efforts to protect the interests of the income owner almost inevitably have implications for control ownership. If a house increases in value, this is income from an economic perspective. Should the owner be permitted to retain this increase in value? On Christman’s theory, insofar as the control owner has no right to income, perhaps not. But it is very difficult to respect control rights without granting at least some interest in the income. Suppose we tax the control owner of the house enough to eliminate the

of the store of property rights between the beginning and the end of the period in question.” Henry C. Simons, *Personal Income Taxation* (Chicago: University of Chicago Press, 1938), 50.

“income” from the appreciation of the house. Since expenditures on the house will change its market value and the owner will not be able to capture this increase in value when she sells the house, the state should have to compensate her in some way for improvements. If it does not, she is likely to make the absolute minimum in improvements. But when the state pays for home improvements, there will be a significant principal-agent problem. The owner has incentive to make “improvements” that she will enjoy, but are not appreciated by others. Indulging idiosyncratic tastes allows her to take a deduction for “improvements” while the state takes the loss when the “improved” house is sold. Conversely, she will have little incentive to make improvements to which she attaches little value, but which maintain the long-term value of the house. There are further difficulties as well. Suppose she makes certain improvements on the house herself. How much should she be paid for her labor? There must be some system to monitor quality so as not to pay too much or too little. And when should improvements be made? Does the owner or the state decide? Inevitably, either the state will have to allow the owner significant scope to realize income in one way or another or adopt such invasive oversight as to impinge significantly on “control ownership.”

There is an analogous problem with control ownership. Although the right to sell one’s property is associated with “income ownership”, there are often significant control interests at stake in the ability to exchange one form of property for another. Suppose a farmer wishes to become a blacksmith. Unless the farmer is particularly wealthy, he will likely have to sell some of his farm equipment or farmland in order to buy a blacksmith’s tools and workshop. Allowing this sort of exchange of property rights greatly expands the scope of possibilities for property owners. Rather than being locked into one occupation, residence, or way of life, one can use one’s existing property as a means to acquire the property necessary for a different way of life.

Ability to reconfigure one's property rights thus increases a person's control over their circumstances. The interests protected by "control ownership" are in this way also furthered by the right to transfer property rights for value. Of course, it is possible to permit the farmer to exchange property entitlements without allowing the farmer to make a profit on the exchange. One might institute a 100% capital gains tax so that the farmer pays anything exceeding the cost of the farm equipment to him – in tax law, this is called basis – to the government.²¹⁵ However, a farmer with farm equipment that has become much more valuable will be apt to hold onto such equipment rather than sell it for only a small fraction of its market value. Extremely high marginal tax rates "lock in" owners to assets even when they value them much less than their monetary equivalent. When property values have changed little, even a very high tax rate might not greatly deter exchanges. But when the tax comes to represent a very large fraction of the purchase price, a high tax rate will significantly discourage transactions between would-be farmers and would-be blacksmiths. Insofar as significant control interests are furthered by such exchanges, assignment of income ownership to the state has adverse consequences for these control interests. There are, of course, other possible approaches besides the capital gains tax scheme. For example, capital assets could be owned directly by the state and leased to citizens according to their declared occupations. They will tend, however, to involve more direct state regulation than the tax scheme and thus greater compromise of control interests.

Any precise specification of control and income rights will encounter the problems described above. Christman argues that "any principle of distributive justice, when it assigns property rights to people, ought to use different arguments in the case of each kind of ownership. And it should not be surprising if control ownership and income ownership over the same goods

²¹⁵ More realistically the tax would have to be reduced somewhat below 100% in order to give the seller incentive to get the best price.

end up being vested in different individuals under those principles.”²¹⁶ But this sort of conclusion does not adequately attend to the distinction between modes of normative justification and the actual content of rights in a fully specified property regime.²¹⁷ Once one moves beyond justificatory arguments to consider actual legal rights, it is not possible to consider income interests and control interests in isolation.²¹⁸ The lesson for theories that aim to unbundle liberal ownership is this: simply because one can draw an analytic distinction between control interests and wealth interests, this does not mean that either sort of interests will track particular rights in actual property regimes. The paradigm property right – a right to exclude others from use of a particular resource – implicates both sorts of interests. Unbundling of ownership must be done at the level of particular rights, not the more abstract interests that they protect and so one cannot avoid the messy work of reconciling tensions between the two types of interests in actual property regimes by assigning rights to control and to income separately.

4. ATTAS AND “ABSOLUTE” PROPERTY

Christman’s attempt to unbundle control and income rights is not successful because the same rights protect both control and income interests. However, recognizing the

²¹⁶ Christman, *The Myth of Property*, 128.

²¹⁷ Christman concedes that “any two rights in the property bundle (indeed, any two rights whatsoever) may well, under a precise enough specification, not always be fully distinguishable”, but does not seem to fully acknowledge the difficulty of designing well-functioning property regimes that separate control and income. Christman, *The Myth of Property*, 131.

²¹⁸ Although Christman’s real concern seems to be the justification of property rights regimes, he persistently writes as if control and income are analyzable on the level of rights. For example, he sums up his argument in the following way:

[T]his distinction suggests that instead of asking whether private property per se can be justified, we should ask whether, on the one hand, control rights can be justified (and what scope they should have and what objects they should cover), and, on the other, whether and what sort of income rights can be defended. The latter are of most concern to leftists who think that distributive considerations motivate sharp curtailment of individual property rights, with the state being the rightful holder or regulator of these rights. The former are most stressed by liberals (and conservatives), who are concerned with the importance of individual liberty and autonomy. Since these two elements of ownership are justified with reference to different values, and one does not entail or necessitate the other, they should be dealt with separately.

Christman, *The Myth of Property*, 146.

interdependence of control interests and income interests should not lead one to embrace the opposite extreme. Daniel Attas has recently defended a rigid conception of private ownership according to which any separation of wealth entitlements from control rights is a violation of property rights.²¹⁹ Attas' aims are somewhat convoluted, so a brief detour is in order. Attas' chief objective is to argue against a strategy he sees as common to a number of modern progressives who argue that taxation, even redistributive taxation, is not an infringement upon private property. This approach involves identifying property with some subset of Honoré's incidents of ownership so that property ownership is compatible with income or property taxation.²²⁰ Attas identifies Jeremy Waldron,²²¹ Barbara Fried,²²² and John Christman as employing some variant of this strategy. He contends that their arguments fail because the concept of property has far more structural unity than these authors realize. Honoré's canonical list of incidents can be reorganized into a scheme that distinguishes between content incidents and form incidents. Content incidents are those incidents that take the thing owned as their subject whereas form incidents are those that take the right itself as their subject. For example, the right to manage is a content incident whereas immunity from expropriation and reversion to the owner are form incidents. Content incidents may be further divided into primary control incidents and secondary income incidents. Each control incident is matched with a corresponding income incident.²²³ There are three such pairs of control and income incidents: (1) the right to manage (control) and the right to rents (income), (2) the right to use (control) and the right to profits (income) and (3) the right to possession (control) and the right to the fruits of

²¹⁹ Daniel Attas, "The Fragmentation of Property," *Law and Philosophy* 25, no. 1 (Jan. 2006), 119–149.

²²⁰ A. M. Honoré, "Ownership," 107-47; Attas, "The Fragmentation of Property," 120-21.

²²¹ Jeremy Waldron, *The Right to Private Property* (New York: Oxford University Press, 1988).

²²² Barbara Fried, "Wilt Chamberlain Revisited: Nozick's 'Justice in Transfer' and the Problem of Market-Based Distribution," *Philosophy & Public Affairs* 24, (1995), 226-245.

²²³ Attas, "The Fragmentation of Property," 140-47.

one's property (income).²²⁴ Rights to income are therefore secondary content incidents that depend on the primary control incidents. Each control right is matched with an income right that represents a right to receive the economic value protected by the control right whether by use on one's own or by sale to another. Full ownership (which Attas calls 'absolute property') consists in the vesting of all incidents in a single owner. Attempts to fragment ownership in order to make it consistent with taxation by treating income incidents as inessential to ownership are therefore conceptually confused. Attas concludes that "a justification of redistributive taxation requires a restriction of property or abandoning it altogether rather than redefining it."²²⁵

Although Attas' analysis is interesting in several respects, I will focus on his contention that taxation is incompatible with full private ownership. Attas is ambiguous about the scope of his argument. He defends the claim that "absolute property rights cannot be made compatible with taxation."²²⁶ But in several places he qualifies this by stating that his argument applies to "involuntary taxation particularly for redistributive purposes"²²⁷ or arguing that "justification of redistributive taxation requires a restriction of property or abandoning it altogether rather than redefining it."²²⁸ One way to interpret Attas is to read him as claiming that all taxation infringes on private property because all taxation is redistributive. Taxes are necessarily redistributive in the sense that they alter relative benefits and burdens between taxpayers. This is true even for taxes in a minimal state that go only to fund public goods such as common defense, a legal system, and so on. Even if all pay taxes to support public goods that benefit all, it is almost inevitable that some will benefit relatively more from their contributions and others less. Measuring the exact benefits to any one person provided by a public good is difficult because

²²⁴ Attas, "The Fragmentation of Property," 147.

²²⁵ Attas, "The Fragmentation of Property," 120-21.

²²⁶ Attas, "The Fragmentation of Property," 148.

²²⁷ Attas, "The Fragmentation of Property," 121.

²²⁸ Attas, "The Fragmentation of Property," 121.

their non-excludable character makes it challenging to determine willingness to pay. Even if a government wished to levy taxes on citizens in strict proportion to benefits granted, it could do so only in a very approximate way.

This first interpretation is entirely consistent with Attas's claims. If adopted, however, it severely undermines the import of his argument. If "absolute property" is inconsistent with any form of taxation, then it is an ideal type rather than an institutional form that could be the object of moral claims.²²⁹ The basic problem is that support for public goods such as common defense through voluntary contribution is likely to be unstable. Although all might benefit from such goods, everyone has an incentive to free ride on the contributions of others. Unless the scope of the cooperative community is so small that each person thinks that her individual decision about whether to contribute to public goods has a significant impact on the choices of others, the system creates a sharp conflict between self-interest and the public interest.²³⁰ Even when most people are public spirited, they are far more likely to feel that their contributions are unfairly large and reduce them than they are to feel that they are unfairly small and increase them. Systems of voluntary contribution will therefore tend to unravel among large groups without some formal means of resolving disputes over distributive shares and coercive method for enforcing such resolutions. Attas believes that his argument shows that supporters of redistribution must give up commitment to absolute private property. But if this first

²²⁹ Under this interpretation, absolute property is something like sovereignty – a zone of control that is not subject to any outside infringement without consent of the sovereign. Property rights, even in states that are more or less classically liberal, are always subject to at least minimal infringements in the form of taxation or in kind social obligations. Sovereign states, by contrast, typically claim complete control over their territory clear of *any* obligations to outsiders beyond those that are voluntarily assumed.

²³⁰ To the extent that a community is this small, it is unlikely to be large enough to defend itself against outsiders even if all do contribute. Stateless societies almost everywhere have been relegated to marginal lands because, whatever their other advantages, they are usually unable to muster the resources necessary to defend valuable territory from would-be aggressors.

interpretation is correct, then only anarchists are committed to absolute private property for the very good reason that this form of ownership is inherently unstable.

A second objection to the “all taxation is redistributive” interpretation is that it is possible for a tax that is redistributive in the sense that it changes the relative benefits enjoyed and burdens endured by different citizens to benefit all citizens relative to a baseline of no taxation. Taxes that pay warriors to protect crops grown by a predominantly agricultural society might increase the expected wealth of all property owners in the society relative to a “no taxation and no warriors” baseline even if the warriors benefit more than the farmers. On the “all taxes are redistributive” interpretation, this would be an infringement of property rights. Such a view is strongly counter-intuitive because it treats as an infringement of private property the imposition of a tax that *increases* the value of a taxpayer’s property.

It is difficult to see how such a tax interferes with either control incidents or income incidents. Taxation payable in cash imposed upon an owner of a plot of land does not directly change the property owner’s legal right to exercise control over her property. The property owner may still exclude others from use of the land, use the land as she likes, or alienate the land by transferring all of her rights to the property to another party. When it comes to property rights considered as wealth entitlements, matters are not quite so simple. Property rights do not entail a right to a particular amount of wealth as such. Wealth is a function of the value of particular property rights and this value fluctuates over time based on a huge number of factors, some intrinsic to the owner’s relationship to her property (for example, an owner’s improvements of her property) and others wholly extrinsic (for example, events on the other side of the world that make a certain commodity more scarce). As Attas points out, the various incidents of ownership typically have some monetary value. For example, the right to use property for some term might

be transferred to another person in exchange for rent. Likewise, when a person sells their property at a profit, the state takes some of the sale proceeds in the form of income or capital gains tax. In either case, the property owner loses an amount of money equivalent to some of the value of their property (whether or not they realize this value directly in terms of cash receipts). Attas regards this as the functional equivalent of the state “expropriating” some of the owner’s property. However, if the tax in question actually increases the value of the taxpayer’s property because the benefits of services supported by the tax outweigh the burden of the tax, it seems myopic to speak of the tax as a violation of property rights. Measured in terms of wealth, the tax is a net benefit, rather than a net burden.²³¹ This is particularly obvious if the tax is collected only upon sale of the property so that the net price received by the seller is greater when the state takes a slice of the sale price as tax than without any taxation. Taxation neither adds nor subtracts from an owner’s formal rights to exclude others from use of her property. So it is difficult to see how taxes to support public goods that raise property values can infringe upon property rights on any reasonable theory of property rights.

Attas could reply to this argument in two ways. One is to emphasize that involuntary taxation, even when it increases the market value of a property owner’s property violates property rights by forcing upon the property owner an involuntary exchange of tax payments for the “enjoyment” of public goods regardless of whether she values them. A person is not necessarily better off simply because the market value of their property increases. A property owner might not care to use roads, schools or other public amenities, but prefer to spend money otherwise payable as tax on some personally meaningful project that requires little in the way of

²³¹ Of course, a property owner may prefer that she be exempt from taxes while enjoying the benefits of public goods supported by the taxes of others. But such an immunity from taxation would not be a form of property ownership in the ordinary sense, but rather a special personal privilege of immunity from taxation.

public goods. Public goods that raise the market value of properties in a given jurisdiction will not necessarily satisfy the subjective preferences of every property owner. The imposition of a tax seems to deprive the property owner of the choice between public and private goods. But this is merely a *reductio* of the insistence that absolute property is an appropriate normative baseline. Even Richard Epstein, a hard line small state classical liberal, thinks it absurd to require matching benefits and burdens in the context of public goods: “To insist that classic public (nondivisible, nonexclusive) goods provide equal subjective benefits, much less benefits that exceed tax payments, is entirely inconsistent with our (indeed any) system of organized government.”²³² Allowing each property owner to weigh individually the value of public goods against tax burdens creates the free rider problem discussed above. Maximal freedom of choice for property owners to determine contributions to public goods is not a live option in polities with extensive private property.²³³

One alternative is to appeal to a more narrow interpretation of “redistribution”. A second interpretation of Attas’ position is that taxation is a violation of absolute property ownership only when it makes some property owners worse off in an absolute sense in order to benefit others. Taxes to support public goods that increase property values by an increment greater than the amount of the tax do not qualify as redistributive under this standard. This avoids the awkward result that taxes that maximize property values violate property rights. This second interpretation of Attas’ position bears great similarity to Richard Epstein’s theory of takings.²³⁴ A taking, according to Epstein, is a diminution of a person’s of legal rights to resources (including property rights, proprietary rights, contractual rights and various sorts of remedial rights defined by tort

²³² Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985), 295.

²³³ States with large amounts of publicly owned property (for example, sub-soil resources) may use this as a substitute for taxation.

²³⁴ Epstein, *Takings: Private Property and the Power of Eminent Domain*.

law) without commensurate compensation of some kind.²³⁵ Compensation might be direct, such as a cash payment for property taken through eminent domain, or be provided in the form of some other sort of benefit. Indirect compensation might include enjoyment of public goods supported by tax payments or beneficial restrictions on the rights of others. For example, a zoning law in a residential neighborhoods that prohibits property owners from engaging in manufacturing might reduce the rights of every homeowner by taking away the right to use one's property for heavy industry, but compensate each homeowner by restricting the rights of their neighbors. Such a rule would not be a taking if the mutual restriction tended to increase property values because this would be sufficient evidence that the value of being protected from disruption by the manufacturing operations of one's neighbors exceeds the value of the right to manufacture on one's own property. The Epstein interpretation of redistributive taxation is far more attractive than the "all taxation violates absolute property" interpretation because it does not imply that full private ownership entails a power to block the sort of broadly win-win exchanges of rights that are necessary for even a minimal state. Permitting involuntary exchanges provided that property owners receive adequate compensation solves the holdout problem inherent in allowing each property owner to block any proposed exchange of rights no matter how broadly beneficial. And in doing so it provides a standard to distinguish illicit redistribution from other modifications of property rights.

One virtue of Epstein's approach is that the takings formula is plausible even if one does *not* believe that there is any natural rights justification for the present distribution of property rights. One might see the takings formula as a tool to prevent the government from enacting

²³⁵ Epstein argues that the Takings Clause of the Fifth Amendment of the U.S. Constitution mandates monetary compensation whenever an uncompensated taking of private rights occurs.

negative sum policies rather than as a means to vindicate natural rights.²³⁶ Given the awesome power of the state, there is always some temptation for those in power to transfer wealth to themselves or their friends.²³⁷ Requiring compensation for takings of property disciplines this tendency by requiring the state to compensate those who would otherwise lose when the rules change so that the costs of new policies will be spread across the population as a whole rather than being concentrated among those without political influence. In theory, this should discourage negative sum policies without deterring positive sum policies that leave “winners” better off even after “losers” have been compensated.²³⁸ In other words, such a rule should select for policies that are Kaldor-Hicks efficient by forcing compensation of the “losers” so that the final result is a Pareto improvement over the previous state of the world.

5. REDISTRIBUTION AS “TAKING,” INSURANCE, AND THE BASELINE PROBLEM

Analyzing redistribution in terms of Epstein’s takings formula is a potentially fruitful way to understand how taxation might violate property rights. It provides an account of how robust property rights can coexist with a state strong enough to defend them by identifying a principled way to prevent free riding while still constraining the government’s power to redefine property rights. The “takings” interpretation, however, raises questions about the appropriate

²³⁶ Both sorts of arguments appear in Epstein’s work. See Epstein, *Takings: Private Property and the Power of Eminent Domain*, 3-6, 336. Epstein believes that Lockean natural rights as well as the rules of private law that emerge from the Roman law and common law traditions reflect principles that are justified on utilitarian grounds. His theory is therefore justifiable in both Lockean and utilitarian terms. My own sense that by making overly generous assumptions about the utility maximizing nature of “natural rights,” Epstein is having his cake and eating it too. I think that it is most charitable to reconstruct Epstein’s argument along the lines I suggest in the main text. This gives the argument a Humean rather than a Lockean flavor and coheres better with Epstein’s consequentialist moral views.

²³⁷ Douglass North, John Wallis and Barry Weingast argue that this is the standard means of securing political order in pre-modern states and is still common in many places in the world today. See Douglass North, John Wallis & Barry Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (New York: Cambridge University Press, 2009).

²³⁸ I worry that in practice Epstein’s proposal (a) relies too much upon judges to make complicated determinations about the benefits and burdens of various policies and (b) leads to policy gridlock since a great many good policies arguably impose costs on some identifiable group and fear of incurring takings liability will therefore excessively deter changes in policy.

normative baseline against which to measure changes in holdings. If the baseline is the state of nature – no state and no public services – then, given the great wealth created in complex developed economies, an extremely high rate of taxation would still leave property owners better off than they would be without a police force or a legal system. Staving off this outcome requires a theory of just division of gains from cooperation in the provision of public goods.

Epstein argues in favor of a flat income tax and against both progressive income taxation and a per capita tax.²³⁹ This position, however, cannot be defended solely in terms of the takings formula. For pure public goods, the case against the latter two taxes is not obvious.²⁴⁰ Services provided by the minimal state might suffice to leave everyone better off (or, more precisely, make everyone better off in the sense of giving them better *ex ante* prospects regardless of how matters turn out once some people are jailed for crimes or killed while serving as soldiers) even though a per capita tax is burdensome for those with little property.²⁴¹ Epstein suggests that lump sum taxes cause redistribution from poor to rich because the rich bear a burden less than their proportionate share of wealth.²⁴² But this claim depends crucially on the relative benefits of government to those at different levels of income. If many of the gains from government are

²³⁹ Epstein, *Takings: Private Property and the Power of Eminent Domain*, 295.

²⁴⁰ Epstein has a rather unconvincing argument in the first chapter of *Takings* that fair cooperation requires that all people share in the gains from government in proportion to their holdings of Lockean rights in the state of nature. Governments, therefore, should seek to maintain the rough balance of Lockean holdings when they enact policies that expand the pie for all citizens. See Epstein, *Takings: Private Property and the Power of Eminent Domain*, 3-6. Even if one grants the moral principle, this argument faces a number of immediate difficulties. First, there much reason to think that the sort of extensive cooperation made possible by government changes the value of people's Lockean state of nature holdings immensely – the relative value of skill in bashing one's neighbors' heads declines immensely and the returns to skill in managing large organizations increases hugely. Second, there is no good reason to think that utility gains from civilization are monotonically related to income, wealth or any other plausible tax base. See Barbara H. Fried, "Proportionate Taxation as a Fair Division of the Social Surplus: The Strange Career of an Idea," *Economics and Philosophy* 19 (2003), 211-239, for a convincing argument against Epstein's view.

²⁴¹ In practice it will be burdensome to collect from the truly penniless, so the working poor might end up most disadvantaged by such a policy.

²⁴² Epstein, *Takings: Private Property and the Power of Eminent Domain*, 295.

realized in terms of goods other than greater income or wealth (such as personal security or good health), then regressive taxes might better approximate the gains from the minimal state. This is plausible if those who earn low incomes would be least able to defend themselves from predatory neighbors without a government.²⁴³ At the very least, Epstein needs a better argument for why proportionate share of wealth or income is the right standard. Epstein's case against progressive income taxation is unconvincing for the same reason. The wealthy in affluent countries are made better off by provision of basic public goods even if they bear the entire tax burden to pay for such services. Very sharply progressive taxation to support the pure public goods necessary for a complex economy will not violate the takings principle. Even under a rough proportionality test, progressive taxation might still best match benefits and burdens. If the marginal utility of income is much lower for the wealthy than for middle class or poor, progressive tax rates might best match the benefits from public goods provision and burdens of taxation. Whether this is actually the case is a very difficult question to answer empirically.²⁴⁴ If a flat tax turns out to be the best way of matching benefits from public goods and tax obligations, this is because considerations that support regressive taxation and those that support progressive taxation happen to roughly cancel each other out. The takings formula therefore provides little obvious constraint on taxation to support the basic functions of government even when it is supplemented by a proportionality standard.

Even if one grants that income is a good proxy for benefits received from government provided public goods, one might still justify some degree of progressive income taxation as a

²⁴³ John Stuart Mill, *Principle of Political Economy*, (London: Longmans Green, 1917), Book V, Chap. 2.

²⁴⁴ See H. Peyton Young, *Equity: In Theory and Practice*, (Princeton, NJ: Princeton University Press, 1994), pp. 102-104, for a discussion of the benefit theory of taxation.

form of insurance.²⁴⁵ Income taxes are levied not against the value of a taxpayer's assets,²⁴⁶ but rather against the (realized) change in value of a taxpayer's assets. The two measures are, of course, closely related since property that is not consumed (or simply wasted) is generally used to produce income and thus the more property one owns, the more income one will tend to receive. However, taxing income as measured by changes in wealth rather than taxing wealth directly mitigates some of the risks of private ownership. A person's income tax liability is tied to the success of their investments, so that tax obligations go up as these investments are successful and down as they are unsuccessful. This reduces the variance in outcomes for each taxpayer by spreading some of each investment's upside and downside risk across all taxpayers.²⁴⁷ *Ex post*, taxation redistributes money from "winners" to "losers". But *ex ante* it might be in the interest of all taxpayers for those whose property holdings increase the most to pay a greater share of taxes. Whether a proportionate or progressive scheme makes sense for a taxpayer from a self-interested point of view depends on a variety of factors. For a person with a highly diversified portfolio of assets, the risk mitigating value of progressive taxation might be quite low. But for those whose assets are tied up in a single business (or in human capital), the insurance value of progressive taxation could be considerable even for a fairly wealthy person.

Estimates of the insurance value of progressive taxation are quite sensitive to the point in time at which the risk mitigating advantages of progressive taxation are assessed. Taxpayers with no knowledge of their property holdings and prospects for earning income are likely to

²⁴⁵ Similar arguments may be deployed against neo-Lockean natural rights theories. See Allan Gibbard, "Natural Property Rights," *Noûs* 10, no. 1 (Mar., 1976): 77-86.

²⁴⁶ I will ignore the problem of taxing labor income, which raises similar issues, but also introduces a host of questions unrelated to my argument in this chapter. One can make a parallel argument about the value of risk mitigation as a justification for progressive taxation of income from labor (treating the ability to work as an asset "owned" by the laborer), but I will not attempt to do so here.

²⁴⁷ Taxpayers may respond by shifting into riskier investments. If investors are risk averse and thus require greater returns to undertake riskier investments, this response should increase aggregate returns.

favor progressive schemes because of the declining marginal utility of income. But if our concern is with how to measure insurance and redistribution, abstracting entirely from initial holdings does not make sense.²⁴⁸ At the other extreme, taxpayers who know their exact property holdings and income for a particular year no longer have any interest in risk mitigation since there is no uncertainty about the success of their investments. From this prospective, progressive taxation (assuming that that the wealthy do not benefit from public services vastly more than the poor) amounts to downward redistribution. But it is hard to see why tax policy should be evaluated from the fully *ex post* perspective. Tax rates are set prospectively for taxpayers who know their initial entitlements but are uncertain about the exact amount of income they will produce. For the purpose of evaluating whether a given tax on property is redistributive, it probably makes sense to evaluate policies from the perspective of young people who know roughly what they might inherit and have some sense of their personal talents and abilities but face all sorts of uncertainties about how they will fare over course of their lives. The advantage of this perspective is that it allows evaluation of the insurance value of income taxation across a taxpayer's entire life cycle without abstracting from initial entitlements. Taxpayers from extremely wealthy families may prefer self-insurance through investment diversification to risk spreading through progressive taxation.²⁴⁹ But for most taxpayers, the value of such risk spreading is probably quite significant.²⁵⁰

²⁴⁸ As argued in Chapters One and Three, it is also problematic in that it tends to treat property entitlements as wholly unsettled.

²⁴⁹ Given the uncertainties of life and the imperfections of financial markets, risk spreading through income taxation probably has some value even for some of those with a fair amount of inherited wealth as well as for those with high earning potential but little inherited wealth. For the super wealthy, much of the value of insurance comes in the form of reducing the chances of political instability resulting in expropriation.

²⁵⁰ James Buchanan and Gordon Tullock endorse a similar defense of social insurance. See James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: The University of Michigan Press, 1962), 192-199.

Because income taxes tend to mitigate risk for taxpayers as they become more progressive, it is important to disentangle the insurance function of income tax from any purely redistributive function. Simply because a tax system “redistributes” income *ex post* does not mean that high earning taxpayers do not receive *ex ante* compensation in the form of insurance against low income outcomes. Epstein might be right to think that current levels of progressive taxation are redistributive, but this conclusion cannot be established merely by comparing pre-tax and post-tax levels of income. Attas’ position is worse off in that it ignores the very possibility that bundling taxes with property ownership might serve to make property owners wealthier. He is either committed to the implausible position that even taxation that increases property values is an infringement on property rights or lacks any sort of a theory to distinguish redistributive from non-redistributive taxation. The larger lesson here is that there are, in most contexts, a range of possible tax regimes that work to everyone’s expected benefit. This is true even of tax regimes that look, from the *ex post* perspective, to be redistributing gains from the wealthy to the poor.

Attas and Christman share the methodological fault of engaging in conceptual analysis of the nature of property ownership that is too far removed from the institutional structure in which property relations are embedded. Christman fails to adequately distinguish between property rights and the interests that they protect. Dividing property rights into governance rights and wealth rights is not feasible because the same legal rights protect both sorts of interests. Attas’ approach commits him to a normative baseline that either makes no sense given the role that public goods such as police services, legal systems, and military defense play in enhancing the value of property rights or is ill-specified. Analysis of the relationship between taxation and

property rights requires consideration of the complete package of benefits and burdens under a particular system of government.

6. BUNDLING AND UNBUNDLING PROPERTY AND TAXATION

Rather than regarding taxation as an infringement on or fragmentation of private ownership, it is more fruitful to conceive of property rules and tax obligations as forming packages of rights and duties. The foregoing discussion suggests two important motivations for bundling or unbundling property rights and tax obligations: the need to finance public goods and the desire to mitigate the risks of private ownership. The first explains why property rights are often bundled with duties to support public goods either through taxes or in kind contributions. The second explains much of the complexity of private property arrangements and some of the motivation for progressive taxation. I will discuss each in turn.

There are a number of reasons to bundle obligations to support public goods with property ownership. First, in an economy in which most productive assets are in private hands, it is difficult to provide public services without some form of contribution from private property owners. Second, until the rise of modern bureaucracies capable of administering complex tax regimes and managing centrally provided public services, it was often more practical to delegate these functions to local property holders. Since medieval states did not have the resources or institutional capacity to provide dispute resolution for the thousands of agricultural villages under their control, feudal lords typically provided rudimentary law courts and other forms of local dispute resolution.²⁵¹ Third, funding public goods with contributions from local property holders may achieve a rough matching of benefits and burdens. Property owners benefit from local public goods directly and in the form of increased property values. It therefore makes

²⁵¹ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 325.

sense for them to bear the cost of these goods.²⁵² Taxation tied to property ownership will often be *less* redistributive than forms of taxation (or services in kind such as compulsory military service or agricultural labor) that are not in some ways tied to property holdings. This is a particular concern where redistribution is likely to be upward rather than downward as is probably historically typical. Forth, local funding may facilitate local oversight. To the extent that local property taxes support local public goods, people have some scope for selection of packages of taxes and services to their liking by choosing to live in jurisdictions that match their preferences for public goods.²⁵³

The possible bundles of property entitlements and obligations to support public goods depend on a society's degree of institutional sophistication and wealth. In general, wealthier societies with more complex legal and political systems are able to support greater unbundling of property rights and public goods obligations. This is because legal complexity is expensive and because weak institutions constrain the ways in which public services can be provided. Furthermore, centralized provision of public goods requires sources of finance that may be poorly or wholly undeveloped.²⁵⁴ Taxes, whether on property or income, are very difficult to collect in an economy in which there is little commerce or that is not monetized.²⁵⁵

²⁵² Owners are also often well positioned to shift part of these costs to non-owners who benefit from these local public goods. For example, property taxes to support local public schools will tend to increase rents (both because the cost of providing rental housing increases and because such housing becomes more desirable) which means that renters in effect contribute to the public services from which they benefit.

²⁵³ The Tieboutian hypothesis suggests that people select homes in part on the basis of the differing packages of taxes and services offered by local governments within a metropolitan area. See Charles M. Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64 (1956): 416–424.

²⁵⁴ "Before 1400, in the era of patrimonialism, no state had a national budget in the understood sense of the word. Taxes existed in Europe's more commercialized states, but rulers everywhere acquired most of their revenue from tribute, rents, dues, and fees. Individual sovereigns borrowed money, but usually in their own names and against real collateral." Charles Tilly, *Coercion, Capital, and European States, A.D. 990-1990* (Cambridge, MA: Blackwell Publishing, 1992), 74.

²⁵⁵ Tilly, *Coercion, Capital, and European States, A.D. 990-1990*, 88-89.

One salient feature of the liberal conception of property is that it focuses almost entirely on duties owed by others to the property owner to the exclusion of duties of the owner toward outsiders. Of course, the interests of others often limit the rights and powers of property owners. But it is rare that ownership entails specific positive duties to do things for the benefit of others. This pattern is not necessarily typical of historical property regimes. Two kinds of duties are particularly likely to attach to property ownership: duties of loyalty to political authorities and duties to contribute to public goods. The feudal system of medieval Europe provides an example of illiberal property relations that bundle property rights and political duties. Land ownership in medieval Europe was bound up in a system of obligations that required loyalty to one's feudal superiors, accountability to provide certain sorts of public goods to those living on one's lands and, often, to field armies for the king in times of war. Many feudal lordships were originally granted for service to the king, so land ownership functioned both as a means to raise fighting forces and as a reward to particularly valued lieutenants.²⁵⁶ Feudal lords were responsible for local dispute resolution and operated courts with quite broad powers.²⁵⁷ Disposition of property rights in land, therefore, was a means both to secure loyalty to the state and to provide public goods. Disloyalty to the King was grounds for forfeiture of all one's property rights in land wherever one stood in the feudal hierarchy. A similar logic governed the relations between peasants and feudal lords. An individual agricultural village unconstrained by feudal obligations would be vulnerable to predations of bandits, warlords, or foreign adventurers. The village might need the help of a warrior with a ready fighting force to defend the village. But the

²⁵⁶ In England, the high nobility largely gained their holdings from William the Conqueror. After the Norman Conquest, the land of a tenant of the King reverted to the King on the tenant's death. The principle of heritability of estates through the operation of law (rather than upon payment of "relief" to the King) was established only slowly. A. W. B. Simpson, *An Introduction to the History of the Land Law* (Oxford: Oxford University Press, 1979), 6-7.

²⁵⁷ Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 324-328.

warrior would require some sort of reliable revenue stream.²⁵⁸ The sort of feudal obligations that were the bane of the first generations of European liberals were, at some point in the early Middle Ages, an important tool for providing stable political order in a context of frequent warfare and weak governments.

The history of land law since the early Middle Ages has featured a progressive decoupling of property entitlements and duties to contribute to public goods. In the high Middle Ages, payments of money replaced feudal obligations such as knight service and common law courts replaced manorial courts.²⁵⁹ Subsequently, feudal incidents gave way to taxation (or to licenses of proprietary rights such as monopoly privileges) as a means to exact support for public goods from property owners.²⁶⁰ The advent of modern professional bureaucracies including modern systems of tax administration allows for greater provision of public goods by the state itself. Decoupling property ownership from public goods provision permits the rearrangement of property institutions in the interest of wealth creation, personal autonomy, democratic control or other ends. For example, ownership of an estate can be fragmented in new ways when there is no longer any need for there to be a unique lord who owes knight service.²⁶¹ As long as someone

²⁵⁸ Harold Berman estimated that in the eleventh century, the household of a one well-trained and equipped knight required the support of fifteen to thirty thousand peasants. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 302-03.

²⁵⁹ Simpson, *An Introduction to the History of the Land Law*, 7-8.

²⁶⁰ In a classic paper on the subject, Joseph Schumpeter distinguished between “domain states” in which revenue is derived from the King’s domain and “tax states” in which revenue is raised by taxation of private property. Joseph A. Schumpeter, “The Crisis of the Tax State” in *Joseph A. Schumpeter, the Economics and Sociology of Capitalism*, Richard Swedberg, ed., (Princeton University Press, 1991): 99-140.

²⁶¹ It is anachronistic to refer to a feudal lord as an owner of land. “This concept [ownership] – even when taken together with various qualifications of it – was inadequate to describe feudal landholding, in which each parcel was subject to the rights of superiors and inferiors in the feudal hierarchy. It was hard to say that a lord ‘owned’ land which was granted to him on condition that services be rendered and which would be repossessed by his superior lord upon his death until his heir paid a ‘relief.’ It is of the essence of feudal law – or at least of Western feudal law – that there are divided interests in land, not absolute, indivisible ownership.” Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 453-54.

pays taxes on a parcel of land, the modern state need not concern itself deeply with how legal interests in the land are divided between different parties.

Moving from property taxation to income taxation as the main means of public finance represents a continuation of this trend of unbundling of duties to support public goods from property ownership. Property taxes are assessed on the value of property held *regardless of the income this property produces* in any particular period. Income taxes assess tax on the change in net property holdings, *regardless of initial property holdings*. Income taxation has several advantages over property taxations. First, taxation of income rather than property greatly reduces the danger that an owner will have to liquidate property to cover taxes.²⁶² Second, it greatly expands the tax base by allowing direct taxation of earnings from labor. Third, moving from property taxation to income taxation has some value as insurance for risk averse property owners since tax is only due on gains and not losses. However, income taxes require a system of tax administration of greater complexity. Taxes on real property require registration, assessment, and collection. Land, the most popular object of property taxes, is immobile and impossible to conceal thus greatly simplifying all three tasks. An income tax, by contrast, requires the state to track citizens' income and collect taxes from persons who may not be easy to locate or have easily identifiable assets. This is a matter of enormous complexity that relies on a high degree of voluntary compliance by private individuals and businesses. It is conceivable that in the not so distant future the increasing international mobility of capital and the corresponding difficulty of imposing tax on capital will cause greater reliance on property taxes, reversing the several centuries long trend toward unbundling of property rights and duties.²⁶³ But this is speculative –

²⁶² The “realization requirement” provides that tax is only assessed upon realization of income from one’s property in the form of payment, rather than upon mere appreciation in value.

²⁶³ The ability of wealthy individuals to shift assets to tax havens and for multinational corporations to “realize income” in low tax jurisdictions is a serious threat to the tax base of most advanced economies.

from the Middle Ages to the present, nearly all trends have been in the direction of unbundling rights and duties to achieve greater flexibility for property owners.

A second crucial function of property institutions is risk spreading. Historically, much of the complexity of property rights regimes has involved mitigation of the risks inherent in full ownership. For this reason, various forms of customary law do not permit full ownership of valuable assets by particular individuals. Ownership is sometimes vested in a family rather than an individual and even when the head of a family (often an extended family rather than a nuclear family) is in some sense the real owner, ownership often comes with obligations to the rest of the family unit.²⁶⁴ Familial ownership, especially in societies with strong extended family structures, spreads risk by allowing for larger property holdings by the extended family and sharing between more and less fortunate family members. Common property regimes are in some cases driven by narrow considerations of economic efficiency, but also have an insurance function in guaranteeing all community members some access to valuable resources. Agricultural communities operating in extremely risky environments and settler communities in remote or hostile territory often use group ownership despite the poor incentives inherent in this form of land tenure.²⁶⁵ The risks of individual ownership can also be mitigated through periodic repartition of farmland, such as found in the customary law of many pre-revolutionary Russian

See e.g., Reuven Avi-Yonah, "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State," *Harvard Law Review* 113, no. 7 (2000): 1573-1676; Edward D. Kleinbard, "Stateless Income," *Florida Tax Review* 11 (2011): 699-774.

²⁶⁴ Segmentary lineages and extended family land ownership are a basic form of social organization found in diverse societies throughout history. Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (New York: MacMillan Press, 2011), 59-64, 101-104.

²⁶⁵ Robert C. Ellickson, "Property in Land," *Yale Law Journal* 102 (1993), 1341-44. Ellickson discusses Jamestown, Plymouth, and Salt Lake City as settler communities that initially adopted collective ownership of agricultural land but moved toward individual ownership as conditions became more favorable.

peasant communities.²⁶⁶ Forms of customary law that fragment property entitlements so as to allow limited public access to privately held assets, for example allowing the poor to glean crops after a harvest, assure non-owners of at least some minimal level of access to valuable resources.²⁶⁷

New means to mitigate the risks of full ownership appeared in the modern era. Complex forms of property ownership found in customary law have been displaced by even more complex contractual instruments as the private sector has developed powerful new ways of pooling and spreading risks of ownership: insurance, public companies, annuities, mutual funds, and so on. The tendency in the private sphere, therefore, is toward greater concentration of incidents of ownership – a move toward full liberal ownership – coupled with greater use of contracts to fragment wealth interests. In the sphere of public law, income taxation coupled with various social insurance and social welfare programs help to protect against misfortune and imprudence and mitigate some of the risks of market economies. Social insurance can be seen as a replacement for the common and familial property regimes that reduced the risk of extreme poverty for pre-modern people. Bundling control of productive assets into more or less full liberal ownership allows for more efficient use of valuable resources while tax and transfer regimes replace the insurance function of the old customary property regimes. The connection between liberal ownership, which facilitates efficient use of resources under market relations but concentrates risks, and social insurance is recognized even by strident classical liberals such as Friedrich Hayek and Richard Epstein.²⁶⁸

²⁶⁶ Ellickson, “Property in Land,” 1393-94; Stephen F. Williams, *Liberal Reform in an Illiberal Regime: The Creation of Private Property in Russia, 1906-1915* (Stanford, CA: Hoover Press, 2006), 39-49.

²⁶⁷ Henry E. Smith, “Semicommon Property Rights and Scattering in the Open Fields,” *Journal of Legal Studies* 29 (2000): 131-169.

²⁶⁸ “The assurance of a certain minimum income for everyone, or a sort of floor below which nobody need fall even when he is unable to provide for himself, appears not only to be a wholly legitimate part of

This conception of the relationship between property ownership and taxation provides reason to be skeptical of claims that taxation necessarily impinges on private ownership. Support for public goods and risk spreading are essential social functions. Political orders that cannot muster resources for collective projects, whatever their other virtues, are usually conquered and eliminated by polities better able to organize effective military forces. And even if outsiders do not topple such governments, their subjects may fill the functional void that they leave with other forms of social organization. Kinship networks, for example, serve to provide social insurance and organize provision of public goods in social contexts in which the state does not serve these functions.²⁶⁹ This is not surprising – if kin selection is one of the basic sources of altruistic impulses, social groups based on genetic relatedness might have advantages in organizing activities that involve some sacrifice of one’s own personal interests for the good of the group. The alternative to private ownership of valuable resources combined with substantial taxation might, in practice, not be the minimal state, but rather kinship based forms of social organization. Needless to say, social organization based on common descent does not readily lend itself to liberal politics nor to complex market economies. We should be skeptical, therefore, of claims that anarcho-libertarian social orders of the type endorsed by Nozick will be conducive to high levels of personal freedom. Weak states are more likely to be replaced by

the Great Society in which the individual no longer has specific claims on the members of the particular small group into which he was born. A system which aims at tempting large numbers to leave the relative security which the membership in the small group has given would probably soon produce great discontent and violent reaction when those who have first enjoyed its benefits find themselves without help when, through no fault of their own, their capacity to earn a living ceases.” Friedrich Hayek, *Law, Legislation and Liberty, Vol. 3, The Political Order of a Free People* (Chicago: University of Chicago Press, 1979), 55. “Even before the advent of the welfare state, many social institutions developed to share and pool risk. Certainly the family has this function, and the same role can be ascribed to the large clans of primitive society.” Epstein, *Takings: Private Property and the Power of Eminent Domain*, 337.

²⁶⁹ In his book on clan societies, Mark Weiner makes this point explicitly: “When no person can make it alone, lineage provides a natural basis for relationships of mutual dependence – with the significant advantage that this trustworthiness grows with each successive generation. Clans are like insurance companies into which one is enrolled at birth and from which one cannot unsubscribe.” Mark S. Weiner, *The Rule of the Clan* (New York: Picador, 2014), 100.

illiberal forms of social organization than they are to protect freedom in the long run.²⁷⁰ And to the extent that they are not able to perform basic governmental functions, these may be displaced onto parties more likely to perform them in a way that is arbitrary, repressive or inequitable.²⁷¹

The bundle model of taxation – as befitting a Humean approach to property – is consistent with a variety of liberal views. Classical liberalism will be more attractive to the extent that one favors (a) greater constraints on the extent to which governments are permitted to alter the basic bundles of property rights and tax duties and (b) private tools for risk spreading and resource management over public ones. Classical liberals such as Richard Epstein and James Buchanan are centrally concerned with preventing negative sum government policies by severely constraining the ability of the government to shift wealth from one party to another. This preference tends to have quite conservative implications and increases the importance of existing property entitlements.²⁷² Liberal Humeans who embrace the bundle model of property

²⁷⁰ The historical record provides models for limited government of the sort preferred by classical liberals (for example, northern states in the early American Republic), but very little for the anarcho-libertarianism at least since the advent of agriculture.

²⁷¹ David Hume makes this point with respect to the Ottoman custom that forbade the Sultan from levying taxes on the populace: “It is regarded as a fundamental maxim of the TURKISH government, that the *Grand Signior*, though absolute master of the lives and fortunes of each individual, has no authority to impose a new tax; and every OTTOMAN prince, who has made such an attempt, either has been obligated to retract, or has found the fatal effects of his perseverance. One would imagine, that this prejudice or established opinion were the firmest barrier in the world against oppression; yet it is certain, that its effect is quite contrary. The emperor, having no regular method of encreasing his revenue, must allow all the bashaws and governors to oppress and abuse the subjects: And these he squeezes after their return from their government. Whereas, if he could impose a new tax, like our European princes, his interest would so far be united with that of his people, that he would immediately feel the bad effects of these disorderly levies of money, and would find that a pound, raised by general imposition, would have less pernicious effects, than a shilling taken in so unequal and arbitrary a manner.” David Hume, “Of taxes” in *David Hume, Political Essays*, Knud Haakonssen, ed., (New York: Cambridge University Press, 1991), 164

²⁷² When large entitlement programs are already in place, there may be a conflict between this conservative impulse and small government policy preferences. For example, Epstein, who regards the creation of Social Security as unjust, concedes that present and some future beneficiaries have reliance interests that must be respected. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 326.

and tax can recognize the appeal of this position while disagreeing with how it resolves the trade-off between constraining government power and pursuing important public ends.

A very different sort of conservative position is based on preference for non-state alternatives to social insurance such as religious organizations, extended families and local communities. This sort of position is not classically liberal, but instead is usually paired with conservative views on social issues and ambivalence (at best) about free market economies. Unlike neo-Lockean or Humean theories, this brand of conservatism views the modern unbundling of property rights and public duties with unease if not outright alarm. Although this brand of ideology has few proponents in Anglo-American political philosophy, it has continuing public influence among theocratic religious conservatives in some parts of the world.

The bundle conception can be used to recast progressive arguments as well. Justification of progressive taxation as a risk-spreading device is a more modest alternative to resource egalitarian theories of distributive justice. It is possible to justify a significant degree of risk pooling without evaluating the fairness of the initial distribution of property entitlements or staking out a position on principles of distributive justice that regulate post tax shares. In addition to its direct insurance value to persons unsure of their future prospects, social insurance has a number of indirect benefits as well. Even net contributors to a social insurance scheme may benefit greatly from the support it provides to close friends and relations whom they would otherwise feel obligated to support. Humean moral psychology suggests that people have strong other regarding preferences for close associates as well as weaker sympathetic concern for other members of society. When these benefits of social insurance are included (and social insurance schemes, like property rules, must be relatively standardized and thus reflect the preferences of

typical members of the public), they may tip the balance toward more extensive social insurance schemes.

Social insurance is consistent with the Humean point that the costs of destabilizing existing property regimes usually far outweigh the benefits. Egalitarian principles that cannot be implemented largely through social insurance schemes or provision of public goods threaten to undermine social order either by licensing expropriation of current property owners or by requiring frequent changes in legal rules. In one sense, however, the risk spreading approach is broader than egalitarian theories, such as Ronald Dworkin's luck egalitarianism, that distinguish between brute luck and option luck.²⁷³ Social insurance mitigates both the downside risk of voluntary choices and the effects of brute luck (albeit not nearly to the degree that most luck egalitarians would prefer). To the extent that luck egalitarians draw too stark a line between freely assumed risks and "brute luck,"²⁷⁴ the social insurance perspective may be a more attractive approach. Moreover, as a practical matter, there is much broader consensus about the value of social insurance than there is about pure redistribution – social insurance schemes are among the most popular government programs whereas virtually any program that smacks of "welfare" invites stigma.

²⁷³ Ronald Dworkin "What is Equality? Part 2: Equality of Resources", *Philosophy and Public Affairs*, Vol. 10, No. 4 (Winter 1981): 283-345.

²⁷⁴ See Elizabeth Anderson, "How Should Egalitarians Cope with Market Risk?" *Theoretical Inquires in Law* 9, (2008): 61-92.

CHAPTER III

PROPERTY RIGHTS, TAX OBLIGATIONS

In this Chapter, I will consider how private property rights constrain tax policy. One response to the insight that property rights must be evaluated within their institutional context is to conclude that bundles of property rights and associated obligations should be arranged to bring about results that are sanctioned by externally derived principles of distributive justice. On this approach, the design of such bundles may be constrained by the need to give property owners appropriate incentives (i.e. no 100% tax rates and the like), but otherwise the bundles have no interesting internal normative structure. Property entitlements and associated tax obligations are just insofar as they are part of a system that achieves results endorsed by principles of justice and unjust insofar as they are not.

I argue that treating an initial distribution of property rights as having normative significance facilitates agreement on norms of contribution to public goods between persons with differing moral commitments. By contrast, the resource egalitarian approach to property rights obscures the way in which property rights structure more complex forms of social cooperation. My argument is consistent, however, both with strongly redistributive tax schemes and with only lightly redistributive schemes. In the first part of the chapter, I will defend using pre-tax income as a normative baseline in assessing tax policy. I use Humean property theory to defend the principles of horizontal and vertical equity against Thomas Nagel and Liam Murphy's attack on "the myth of ownership" in tax policy. The second part of the chapter will turn to Gerald Gaus'

recent argument that his theory of “justificatory liberalism” provides reason to reject highly redistributive tax and transfer policies. Although I am sympathetic to many aspects of his approach, I argue that it ultimately fails to provide a basis for favoring a classical liberal order over a mixed economy with a generous social welfare state.

1. TAX FAIRNESS AND HORIZONTAL EQUITY

In this section, I will defend the principles of horizontal equity and vertical equity in taxation.²⁷⁵ Horizontal equity is the principle that taxpayers with equal income should pay equal tax.²⁷⁶ Vertical equity concerns the way in which tax obligations vary in proportion to income. I will defend a minimalist principle of vertical equity that requires only that taxpayers with higher income should owe more tax in absolute terms than taxpayers with lower income.²⁷⁷ Although horizontal and vertical equity are textbook criteria of tax fairness,²⁷⁸ the scholarly literature is largely hostile and often emphatically so.²⁷⁹ In the years since Louis Kaplow and Richard

²⁷⁵ The terms horizontal equity and vertical equity were coined by Richard Musgrave over half a century ago. Richard A. Musgrave, *The Theory of Public Finance: A Study in Public Economy* (New York: McGraw-Hill Book Co. Inc., 1959), 159.

²⁷⁶ I explain horizontal equity and vertical equity in the context of income taxation for ease of exposition. A more precise formulation would describe horizontal equity in terms of equal treatment of individuals who are identically positioned relative to the tax base. The tax base might be specified in terms of wealth or consumption rather than income. Horizontal equity under a consumption tax regime would require that taxpayers with equal levels of consumption owe equal tax and under a wealth tax would require that taxpayers with equal wealth holdings owe equal amounts of tax.

²⁷⁷ This principle of vertical equity is quite permissive. It is compatible with progressive, proportionate or even regressive tax rates. It is only violated in situations in which Taxpayer A realizes more income than Taxpayer B, but B owes more in taxes than A does. More stringent principles of vertical equity are possible as well. For example, one could require that wealthier taxpayers pay at least as high a percentage of their income in tax as poorer taxpayers do. Because I aim to show that principles of tax fairness can play a useful role in structuring bargains between people with differing views about distributive justice, I have chosen a principle of vertical equity designed to be as innocuous as possible. I do not mean to imply that more restrictive principles of vertical equity are not also justified. I take no position on that question.

²⁷⁸ E.g. Michael J. Graetz & Deborah H. Schenk, *Federal Income Taxation* (New York: Foundation Press, 2005), 27-28; Laurie L. Malman, Linda F. Sugin, Lewis D. Solomon, & Jerome M. Hesck, *The Individual Tax Base: Cases, Problems and Policies in Federal Taxation* (St. Paul, Minn.: West Group, 2002), 14-15.

²⁷⁹ E.g. Louis Kaplow, “Horizontal Equity: Measures in Search of a Principle,” *National Tax Journal* 42 (1989): 139-50; Jeffrey H. Kahn, “The Mirage of Equivalence and the Ethereal Principles of Parallelism

Musgrave's debate over the significance of horizontal equity, the weight of scholarly opinion seems squarely against it.²⁸⁰ Scholars question not only its normative import, but even whether horizontal equity is conceptually coherent. Thomas Nagel and Liam Murphy contend that concern with horizontal and vertical equity is just one manifestation of what they call the "myth of ownership" – the view that pretax income is of independent normative significance.²⁸¹ I will use Humean property theory to explain the moral significance of pretax income and provide a new defense of horizontal and vertical equity. Rather than being an ideal principle of tax justice, horizontal equity is a fairness norm useful for structuring compromises between people who disagree about ideal principles of tax justice or about the empirical consequences of tax policy. The case of tax fairness shows that we are sometimes justified in treating property entitlements and the pre-tax income they generate as having normative significance even in the absence of any justification in terms of natural right or moral desert.

2. MURPHY AND NAGEL ON "THE MYTH OF OWNERSHIP"

In *The Myth of Ownership*, Liam Murphy and Thomas Nagel aim to refute what they call "everyday libertarianism" – the view that people have a prima facie moral claim to their pretax income and that justice in taxation should therefore be evaluated according to a baseline of pretax income or holdings.²⁸² They argue that because market outcomes have no independent moral significance, there is no reason to evaluate taxes in relation to pretax income or wealth. Property entitlements and associated tax obligations are just insofar as they are part of a system that

and Horizontal Equity," *Hastings Law Journal* 57 (2006): 645-692; David Elkins, "Horizontal Equity as a Principle of Tax Theory," *Yale Law & Policy Review* 24 (2006): 43-90.

²⁸⁰ Kaplow, "Horizontal Equity: Measures in Search of a Principle," 139-50; Richard A. Musgrave, "Horizontal Equity, Once More," *National Tax Journal* 43 (June 1990): 1113-22; Louis Kaplow, "A Note on Horizontal Equity," *Florida Tax Review* 1, no. 3 (Dec. 1992): 191-96; Richard A. Musgrave, "Horizontal Equity: A Further Note," *Florida Tax Review* 1, no. 6 (1993): 354-39.

²⁸¹ Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002).

²⁸² Murphy & Nagel, *The Myth of Ownership*, 38-39.

achieves post-tax results endorsed by principles of justice and unjust insofar as they are not. Since post-tax outcomes are the appropriate objects of moral evaluation, evaluation of tax policies against a baseline of pre-tax holdings is misconceived in that it adopts a baseline that has no special normative status. For this reason, Murphy and Nagel reject the principles of “horizontal equity” and “vertical equity.” And they reject claims that “tax discrimination” as such can be unfair unless it is done on the basis of some independently problematic ground such as race, sex, religion, or national origin.²⁸³ So, for example, “[t]here would be nothing unfair, for example, in a tax on chocolate ice cream but not on vanilla, though it would be arbitrary.”²⁸⁴ Nor is there anything unfair about similarly arbitrary deductions and tax credits. A just tax regime might end up satisfying horizontal and vertical equity. But, according to Murphy and Nagel, this would be mere coincidence: tax regimes are just insofar as they bring about post-tax distributions that are just. Whether these results bear any particular relation to pre-tax income is of no normative import.

Murphy and Nagel reason as follows. Property rights are conventional in the sense that they do not track pre-institutional moral rights.²⁸⁵ Principles of distributive justice determine which distributions of property are just and which are unjust. Each citizen’s access to and control over social resources is determined by the concurrent effect of rules of private law, taxation, and government spending. In a just political order, a citizen’s morally legitimate property claims are determined by the combined results of these policies. Because taxes are a necessary element of the system of rules that determines legitimate property entitlements, “there

²⁸³ Murphy & Nagel, *The Myth of Ownership*, 170-72.

²⁸⁴ Murphy & Nagel, *The Myth of Ownership*, 170.

²⁸⁵ Murphy and Nagel seem to mean by this that they fall on the conventional side of the moral / conventional distinction, not that they are conventions in the more technical sense discussed in Chapter One.

are no property rights antecedent to the tax structure.”²⁸⁶ A person’s moral entitlement to property under a fully specified legal regime depends both on her pre-tax holdings and on her tax obligations. Because a person is only morally entitled to their post-tax income under a just economic system and post-tax income depends on both property conventions and tax conventions, nobody has any moral claim to their pre-tax income. And because pre-tax income has no independent moral significance, there is no legitimate ground for complaints (outside of certain forms of invidious discrimination, for example, on grounds of race) that a particular tax improperly favors one group or another by treating those with similar pre-tax incomes differently. For this reason, criteria of tax fairness, such as horizontal and vertical equity, that use pre-tax income as a normative baseline are entirely vacuous.

Murphy and Nagel take an approach to distributive justice that is typical of resource egalitarians. They argue that the justification of rules of taxation is *systemic* in that it depends on the entire system of property entitlements and tax obligations and *teleological* in that it is based on the resulting pattern of post-tax income and not sensitive to the ways in which pre-tax income translates into post-tax income. Natural rights theories of property might suggest that systemic justification is not necessary either because pre-tax income reflects property rights that are justified by moral desert or because the state has acquired a moral obligation to defend these rights when the property owner entered the social contract. I do not endorse these sorts of “natural rights” arguments and to this extent agree with Murphy and Nagel that taxes must be justified systemically.²⁸⁷ I will argue, however, that purely teleological justification may not be desirable under conditions of reasonable normative and empirical disagreement and so Murphy and Nagel are mistaken in their rejection of horizontal and vertical equity.

²⁸⁶ Murphy & Nagel, *The Myth of Ownership*, 74.

²⁸⁷ I discuss my reasons for rejecting such theories in Chapter One. A more detailed analysis of the relationship between property rights and tax obligations appears in Chapter Two.

Murphy and Nagel are far from the only critics of horizontal equity. Although Murphy and Nagel favor deontological principles of distributive justice,²⁸⁸ an argument of the same form can be made by those who believe that tax laws should be arranged so as to maximize aggregate welfare or utility. From this perspective, horizontal and vertical equity are irrational metrics because tax rates should be set in whatever way maximizes welfare regardless of the implications for horizontal and vertical equity. The legal scholar Louis Kaplow makes an argument that has this form.²⁸⁹ It is probably fair to say that skepticism about the normative significance of horizontal and vertical equity is now the dominant view among tax scholars.²⁹⁰

Murphy and Nagel's argument has considerable intuitive appeal. I agree with Murphy and Nagel that property rights *are* conventional in the sense that people do not have pre-institutional property entitlements to particular objects external to their bodies²⁹¹ and that it *is* myopic to consider the justification of property rights in isolation from tax policy. But from the fact that property rights are conventional and that nobody has a non-institutional right to particular property entitlements, it does not follow that rules governing the creation and transfer of property entitlements cannot be judged unfair against the conventional baseline.²⁹² People care about fair procedures in a great range of cases in which nobody has any antecedent right to a

²⁸⁸ Although Murphy and Nagel do not commit themselves to particular principles of distributive justice in *The Myth of Ownership* – and they may not agree with each other about the particulars – they appear to favor a more or less Rawlsian conception of distributive justice.

²⁸⁹ E.g. Kaplow, “Horizontal Equity: Measures in Search of a Principle,” 139-50.

²⁹⁰ Other critics include Paul McDaniel, James Repetti, Jeffrey Kahn, and David Elkins. Paul R. McDaniel & James R. Repetti, “Horizontal Equity and Vertical Equity: The Musgrave / Kaplow Exchange,” *Florida Tax Review*, Vol. 1, (1993): 135-55; Kahn, “The Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity,” 645-692; Elkins, “Horizontal Equity as a Principle of Tax Theory,” 43-90.

²⁹¹ This leaves open the possibility that people have a right to acquire some form of private property that must be respected in any just institutional arrangement. Eric Mack has advanced this interpretation of natural property rights. See Eric Mack, “The Natural Right of Property,” *Social Philosophy & Policy* 27 (Winter 2010): 53-78.

²⁹² It seems that Murphy and Nagel's argument might suggest a similarly skeptical view toward questions of procedural fairness in private law since contract law or tort law, like tax law, are ways of specifying legal rights to property given a particular baseline set of entitlements.

particular outcome.²⁹³ For example, nepotistic hiring procedures for government bureaucracies might be considered procedurally unfair even when there is no uniquely justified merit based hiring procedure such that any particular candidate has a claim to be hired on the merits. So there is nothing especially incongruous about rules of fairness that measure tax obligations in relation to property holdings even if nobody deserves their pre-tax property holdings as a matter of natural right. The challenge for defenders of tax fairness is to develop a positive case for concern with horizontal and vertical equity as norms that constrain the translation of property holdings into tax obligations.

3. A HUMEAN DEFENSE OF TAX FAIRNESS

Humean property theory suggests the basic contours of such a case.²⁹⁴ It shows how common sense principles of tax equity can be vindicated in the face of Murphy and Nagel's critique without appeal to natural rights or pre-institutional moral desert. If one rejects theories of natural property rights, giving normative weight to pre-tax ownership may have value in preventing tax policy from unsettling the property entitlements fixed by private law. Horizontal and vertical equity are best understood as compromise principles for people who disagree about the empirical and moral facts bearing on the justice of redistributive taxation in order to prevent conflict over tax policy from generating the sort of negative sum resource conflict that property

²⁹³ Perceptions of procedural fairness also play a large role in the legitimacy of governmental authorities. See Tom R. Tyler, *Why People Obey the Law* (New Haven, CT: Yale University Press, 1990), 161-165.

²⁹⁴ The only similar critique of Murphy and Nagel's work that I know of is Brian Galle's. Brian Galle, "Tax Fairness," *Washington and Lee Law Review* 65, (2008): 1323-1379. Galle argues that "horizontal equity can be reconceived as a commitment by the authors of tax legislation to honor the past and future policy choices of others, with whom they are jointly engaged in a project of deliberative democracy. Alternately, horizontal equity may be justified by welfare gains from a shared agreement to leave certain controversial questions of distributive justice undecided during the revenue-raising process." Galle, "Tax Fairness," 1323. The Humean case for tax fairness unifies Galle's alternative justifications of horizontal equity by showing how treating the existing distribution of property as normatively significant leads to welfare gains over the long run even if one does *not* assume that this distribution has any other morally attractive characteristics.

rights serve to prevent. What ideal theory in both its resource egalitarian and consequentialist guises obscures is the importance of principles such as horizontal and vertical equity for structuring agreement between people who have starkly opposing moral and empirical commitments. Humean property theory, by contrast, addresses the problem of cooperation under conditions of moral disagreement and thus provides resources to understand fairness rules that seem irrational when considered from the perspective of ideal theory.

Hume argues that observance of conventional property rights prevents negative sum free-for-all conflicts over resources. Property rights, and indeed private law more generally, serve to prevent wasteful conflict by providing authoritative rules that determine who may take what actions with respect to which resources. This is the case even for property conventions with morally neutral content such as “everyone gets enforceable property rights over whatever objects they possess (regardless of how they came to get them).” Hume’s analysis of the justification of private property might be extended to rules of fairness for apportioning the benefits and burdens of cooperation between property owners. Even when private law defines stable property rights, there is a danger that the equilibrium established in the private sphere will be upset by aggressive use of public law. Just as property rights function to prevent wasteful resource conflict in the private sphere, rules of tax fairness serve to constrain self-interested parties who may wish to use the tax system to gain at the expense of their fellow citizens. By requiring that similarly situated persons be treated similarly and that persons with more income pay more tax, principles of tax fairness limit the extent to which distributions of wealth that have been fixed by private law may be unsettled by public law. Horizontal and vertical equity do not rule out sharply progressive rates of taxation and so are fully consistent with high levels of redistribution from rich to poor. Vertical equity is violated by extreme forms of redistribution from poor to rich, for example a tax

that applies to wage laborers and salaried workers but not to fund managers or by allowing interest deductions for second homes but not for first cars. Horizontal equity is violated by certain kinds of redistribution between groups that are similarly situated with respect to income, for example redistribution from farmers to factory workers via a tax credit for “manufacturing labor.” The two principles thus rule out forms of redistribution that are *prima facie* suspicious while remaining neutral on the extent to which tax policy ought to mitigate income inequality.

Different polities might adopt different tax bases (for example, contribution in proportion to wealth rather than in proportion to income) or different levels of progressivity (for example, different personal exemptions and different tax rates for income over a certain threshold). Since there is more than one way of specifying the tax base, there is more than one plausible fairness norm for public goods contributions. As long as the tax base is wide, however, observance of tax fairness norms will constrain the extent to which tax policy can be used to destabilize relative property entitlements. Once a tax base has been fixed, the norm of horizontal equity requires that any difference in tax obligation for two people with the same position vis-à-vis the tax base must be justified in terms of some public interest other than raising revenue. Such justifications might include the desirability of disincentives for socially harmful activities such as cigarette smoking or air pollution or subsidies for socially beneficial activities. Taxes such as these that are used as a sort of regulatory policy are known as Pigouvian taxes after the English economist, Arthur Cecil Pigou, who showed how taxes could be used to correct externalities by altering the market price of an activity so as to reflect total social cost.²⁹⁵ The opposite policy, tax deductions or tax credits designed to encourage certain forms of behavior, are really a covert sort of public spending – “tax expenditures” – and must be justified as a worthy use of public resources. Because candidates for Pigouvian taxes and subsidies are not especially hard to come

²⁹⁵ A. C. Pigou, *The Economics of Welfare* (London: Macmillan, 1920).

by, the public interest criterion is not an especially restrictive constraint. The principle of horizontal equity should not, therefore, be seen as ruling out *any* deviation from equal treatment of those equally positioned relative to the tax base, but rather as requiring a particular sort of *justification* for such deviations. Because legislators are besieged by an endless army of special interest lobbyists whose job it is to construct arguments that their clients' favorite tax benefits are really in the public interest, principles of tax fairness exert less normative pressure in practice than they might if taxes were negotiated by taxpayers themselves. But even in this dysfunctional context, compromise on a package that reduces deductions and credits to lower tax rates or raise revenue is the usual formula for comprehensive tax reform.²⁹⁶

Although tax fairness norms cannot be used to deduce a unique tax regime from a set of property entitlements, they serve to structure tax policy in a way that may be embraced by people with opposing policy preferences. Consider two people, John and Robert, who have fundamentally different views about distributive justice. John favors highly egalitarian tax and transfer policies whereas Robert favors policies that do not greatly alter market outcomes. The current tax code is somewhere between the policy preferences of John and Robert: John favors a more progressive code and Robert favors a less progressive code. Given the current tax code, John tends to favor any tax breaks that will result in a more equitable distribution of post-tax income, whereas Robert tends to favor tax breaks that will counteract progressive tax rates and thereby result in a less equitable distribution. John thus prefers to make food purchases at grocery stores deductible since this would benefit those with low income more than those with high income, whereas Robert would like to abolish limits on student loan and educational expense deductions for high income taxpayers since this will tend to favor the wealthy and bring effective tax rates closer to his preferred flat tax. Achieving "tax justice" through a motley

²⁹⁶ The 1986 Tax Reform Act took this form.

assortment of tax breaks is, however, inefficient. And it is unfair to those whose tastes are not favored by the resulting subsidies. It might be better for both John and Robert if they each agree to abstain from supporting these sorts of tax breaks even when one of them thinks the particular policy desirable in light of their larger theory of distributive justice. Adherence to norms of horizontal equity therefore represents a compromise position that is neutral between John's and Robert's substantive views about progressive taxation but, if adhered to scrupulously, will make the tax code better by each of their lights at any given level of progressivity.²⁹⁷ The same may be true if John and Robert are self-interested taxpayers rather than ideologues: lower tax rates without tax subsidies are, *ceteris paribus*, preferable to a patchwork of inefficient tax subsidies for both John and Robert if each prefers different subsidies and both are equally likely to get their preferred subsidies enacted. And it may also be true if John and Robert are public spirited citizens who share a common theory of justice, but disagree about the empirical consequences of progressive taxation.

As the example of John and Robert suggests, norms of fair contribution are functionally similar to property rules in that, if they are generally respected, they prevent wasteful competition over resources. One of the virtues of private law (or at least the private law of major common law and civil law legal systems) is that it defines access to resources according to impersonal rules of a general character. Although the resulting distribution of property might sometimes turn out to be substantively undesirable, the process by which property entitlements are created and transferred will be (at least in a well-functioning legal system) procedurally fair

²⁹⁷ Note that this is not a case of overlapping consensus but rather a sort of mutual disarmament. John and Robert each have different preferences for tax policy, but each may be willing to give up some of their second best strategies if the other is willing to do so.

in the sense that it does not result from favoritism to particular individuals or groups.²⁹⁸ It allows resolution of disputes over resources without resort either to moral first principles or to judgments about the general moral merits or demerits of particular individuals. For example, rather than asking who is most deserving of a particular plot of land, one need only to apply the preexisting legal rules that determine property entitlements. Tax laws that apply to abstract economic categories (property, income, or consumption) rather than to particular activities or to identifiable groups of people are, *ceteris paribus*, preferable for the same reason. By contrast, taxes, deductions, and credits targeted at narrow classes of readily identifiable individuals (for example, the tax on purchases of chocolate ice cream) are *prima facie* suspicious. As Murphy and Nagel point out, it would be foolish to think that a taxpayer has a moral entitlement to any particular structure of relative prices.²⁹⁹ However, it does not follow from this that any way of determining prices is equally fair. Chocolate ice cream lovers have no grounds for complaint if supply chain problems cause chocolate ice cream to become more expensive than vanilla. But it does seem objectionable if prices rise because those who do not like chocolate ice cream succeed in shifting the tax burden to those who do.

Such intuitions about fairness can be supported by more sophisticated policy analysis. There are two problems with arbitrary taxes and tax expenditures. First, they often represent rent-seeking behavior.³⁰⁰ Laws such as a deduction for vanilla ice cream purchases do not have

²⁹⁸ The contrast here is with estate based societies in which rights and duties are determined in large part by one's social group and thus the same rules are not generally applicable to all members of society but only to members of a particular estate.

²⁹⁹ Murphy & Nagel, *The Myth of Ownership*, 109.

³⁰⁰ Rent seeking behavior is behavior that aims to achieve profit beyond the normal risk adjusted rate of return by receiving special privileges from the government. "Rents" in this sense of the term might include monopoly privileges, state subsidies, or regulations that provide special benefits to particular parties. Unlike profits earned in competitive markets through more efficient production, "rents" do not represent gains in national wealth but rather wealth transfers from one party to another. See Anne

an even vaguely plausibly public purpose. Rather, the law is simply an attempt to shift the tax burden from one group of people to another. It is the functional equivalent of a wealth transfer that distorts private consumption decisions. For this reason, rent-seeking taxes and tax subsidies are likely to be negative sum policies. Second, narrowly targeted taxes and tax expenditures have the effect of substituting public judgments about what is worth consuming for private judgments. This effect is particularly strong at high marginal tax rates. Substituting public judgment for private judgment burdens citizens with minority tastes. This may be entirely appropriate when people have private preferences for socially harmful activities such as air pollution, alcohol use, etc. However, since one of the purposes of private property is to provide a sphere of individual control in which individuals may make choices according to their own values and own tastes, allowing majority tastes (or the interests of a concentrated minority) to trump minority tastes undermines part of the rationale for private ownership. If my neighbor prefers relatively larger houses than I do, then this is a good reason for him to buy a larger house and for me to buy a smaller one, but not a good reason for the government to tax me more than him.³⁰¹ Although some degree of such unfairness is inevitable (in particular, it is very hard to treat preferences for consumption of leisure and market goods symmetrically), this does not mean that we should give up on the notion of tax neutrality altogether in favor of some fully specified theory of distributive justice.

Krueger, "The Political Economy of the Rent-Seeking Society," *American Economic Review* 64, no. 3, (1974): 291–303.

³⁰¹ Murphy and Nagel think that this question should be decided on the basis of "(a) whether it distorts the broader pattern of redistribution and financing of public provision that our general conception of justice requires, by shifting some of the costs or by surreptitiously diminishing or increasing the amount of redistribution; (b) whether it serves other purposes, legitimate for fiscal policy, which are important enough to override any such shortfall." Murphy & Nagel, *The Myth of Ownership: Taxes and Justice*, 171. This analysis seems to identify the right trade-off. But it is possible to bracket questions concerning "general conceptions of justice" and to simply ask whether the policy benefits are worth the violation of horizontal equity (a principle that may be shared by partisans of widely differing conceptions of justice).

People do not need to agree on principles of distributive justice to agree that rent seeking tax discrimination is an unfair allocation of burdens. Standards of horizontal equity (people with the same income ought to pay the same amount of tax) and vertical equity (people with more income ought to pay more tax) serve to pick out normatively suspect tax provisions. As the John and Robert example showed, it is advantageous for people with differing views on progressive taxation to agree on opposing policies that violate horizontal or vertical equity without any justification in terms of regulation of externalities. Fairness judgments that track such hypothetical agreements play a valuable role by ruling out certain bundles of property rights and tax obligations even in the face of disagreement over larger questions of distributive justice or empirical uncertainty about the consequences of certain tax policies. Evaluating tax policy exclusively from the perspective of post-tax outcomes effaces the role of fairness norms in allowing people with disparate views to cooperate on questions of tax policy. If a single person could design and guarantee enforcement of a tax code that perfectly implements her ideal theory of distributive justice, one could ignore metrics such as horizontal and vertical equity that use pretax holdings or income as a normative baseline. But this is not remotely like the situation faced by anyone living under a democratic government.³⁰² Tax fairness is therefore a genuine concern for real world (as opposed to ideal theory) tax policy, and not merely a distraction from the real questions of distributive justice. Although Murphy and Nagel's substantive views on taxes and tax expenditures do not seem inconsistent with the policy prescriptions suggested here,³⁰³ their method recommends jettisoning some of the tools that allow for convergence on

³⁰² Indeed, modern tax codes are sufficiently complex that they will require coordination between different officials even in a political regime in which decision makers are *not* accountable to the populace.

³⁰³ Murphy and Nagel do not explore cases in which their policy prescriptions might conflict with horizontal equity. For example, if doctors are much less sensitive to the incentive effects of high tax rates than lawyers are, should we tax doctors more heavily than lawyers so as to minimize economic distortions per unit of revenue? For similar reasons, some versions of optimal tax theory suggest that marginal tax

better policy between people with different views. Property entitlements provide a useful baseline against which to evaluate public goods contributions precisely so that discussion of tax obligations *does not* reduce to the question of who deserves what post-tax income. This is not the sort of consideration that neo-Rousseauian tends to take seriously. But from the Humean perspective, rules of justice secure a stable framework for mutually advantageous cooperation rather than arrange affairs to correspond to principles of justice extrinsic to our actual institutions. Using pretax income as a normative baseline is instrumental to this end *whether or not* it has any other special moral status.

The neo-Humean perspective on tax fairness can illuminate the debate over the flat tax. One could make an argument for proportionate taxation (i.e. the “flat tax”) analogous to the defense of horizontal equity outlined above. One of the dangers of any scheme of taxation, particularly when combined with generous transfer payments, is that the tax system will be used to entirely efface the pattern of entitlements generated by the relatively impersonal rules of private law by redistribution in accordance with political power. One *might* think that the former tends to be positive sum whereas the latter tends to be a negative sum game.³⁰⁴ In other words, whereas property law is supposed to define entitlements in such a way as to prevent a wasteful free-for-all, a regime of excessive and inequitable taxation may serve to unsettle distributive questions by recreating a free-for-all in the political arena. This is pathological. Opponents and proponents of proportionate taxation should be able to agree that considerations of vertical equity

rates should decline at high levels of income. H. Peyton Young, *Equity: In Theory and Practice* (Princeton: Princeton University Press, 1994), 109-111.

³⁰⁴ Of course, it is hard to generalize here. If private law is configured to give a few individuals monopolistic positions that allow them to accrue great rents at the expense of everyone else, private ordering could be quite undesirable. Conversely, risk spreading via tax and transfer programs may be broadly positive sum.

are a good heuristic for distinguishing tax schemes (especially regressive schemes)³⁰⁵ designed to transfer wealth from the less powerful to the more powerful from tax regimes that might have a plausible justification in terms of risk spreading. Taxation proportional to income or wealth might be best justified by analogy to vertical equity as a psychologically salient compromise rule that severely constrains use of the tax code for negative sum redistribution and other forms of wasteful rent seeking. Barbara Fried suggests psychological salience as a deflationary explanation for the broad popularity of proportional taxation schemes (including among unlikely figures such as John Rawls).³⁰⁶ But if the Humean defense of fairness norms in taxation is correct, then the argument from psychological salience may be quite plausible under certain conditions. Insofar as stable convergence of judgment among persons with disparate moral commitments is important, psychological salience *is* a normatively relevant factor. Whether this is a good argument for adopting a flat tax depends on institutional context. In affluent countries with stable and relatively well-functioning political systems, I do not see great value in requiring proportionate taxation, especially if norms of vertical equity are observed so as to prevent upward redistribution.³⁰⁷ Under conditions of poorly constrained governments, low social trust,

³⁰⁵ It is probably more often the case that deviations from proportionate taxation will be regressive rather than progressive since wealthy people are likely to have disproportionate political power for a variety of reasons. Democratic government may be atypical in this respect.

³⁰⁶ Fried argues, “The ‘focal point’ explanation may explain why people as divergent in their political commitments as Rawls, Hayek, Gauthier and Epstein have gravitated towards proportionate rates to begin with, as good-faith, unselfconscious participants in a Schelling-like convergence. It may also explain why people like Epstein and Hayek, who are clearly predisposed against progressive taxation on libertarian or quasi-libertarian grounds, would fix on flat rates for strategic reasons, seeing it as an alternative that is both politically obtainable and politically sustainable.” Barbara H. Fried, “Proportionate Taxation as a Fair Division of the Social Surplus: The Strange Career of an Idea,” *Economics and Philosophy* 19 (2003), 237.

³⁰⁷ Insofar as the real problem is rent-seeking, comparison of the U.S. corporate tax code and individual tax code suggests that eliminating progressive tax rates would not be helpful in the U.S. The U.S. corporate tax rate is 35% for all midsized or large corporations, but the effective tax rate varies from the single digits to almost 30% for different sectors of the economy. See Mike Bostock, Matthew Ericson, David Leonhardt & Bill Marsh, “Across U.S. Companies Tax Rates Vary Greatly,” *New York Times*, May 25, 2013, available at <http://www.nytimes.com/interactive/2013/05/25/sunday-review/corporate->

highly predatory elites and or class or ethnic conflicts that lend themselves to a taste for punitive taxation, the case for norms that sharply constrain taxation authority is stronger.³⁰⁸ The larger point here is that there may be some trade-off between institutional stability and the ability to achieve optimal policy. Norms that provide greater stability and protect against governmental predation sometimes impede the pursuit of optimal policy. The costs and benefits of this trade-off will be different in every context.

4. IS HORIZONTAL EQUITY VACUOUS OR BANAL?

One possible objection to this defense of horizontal equity is that horizontal equity is empty until a tax base is defined. One might worry that any tax scheme may be horizontally equitable if the tax base is defined so as to exclude all deductible and creditable items. For example if one wants to impose a special tax on certain exotic animals and give tax deductions for tourism in Michigan's Upper Peninsula, one could define the tax base as all income from labor and capital, plus the value of all zebras and capybaras owned less expenditures on vacations in the U.P. Although this particular example is frivolous, a large number of deductions including education and medical expenses can plausibly be defended as "not really income" in the relevant sense either because they are really a form of investment³⁰⁹ or because they represent non-discretionary spending that is categorically different from other consumption.³¹⁰

[taxes.html?ref=sunday](#), for a graphical representation of the disparity in effective corporate tax rates across sectors of the U.S. economy. The individual tax code is significantly less distorted by credits and deductions despite a far more progressive rate structure.

³⁰⁸ Of course, under these conditions, it is likely to be difficult to reach agreement on proportionate taxation or even to inculcate the necessary sense of fairness, so it may be that the flat tax is infeasible precisely where it is needed.

³⁰⁹ Technically, this theory suggests that education should be treated as a capital asset and should give the taxpayer basis that might be deducted against future labor income attributable to investments in education. But this scheme would probably be too hard to administer through the tax code given the difficulty of determining baseline income.

³¹⁰ Given the current structure of health care spending, this does not seem especially realistic. It may have been more realistic in the early twentieth century.

The danger is that any credit, deduction or surcharge may be justified by defining the tax base so that it includes or excludes the relevant items. Some limits must be placed on what can count as an acceptable tax base for horizontal equity to be a meaningful principle.

At minimum, the tax base must meet three criteria. First, it must be broad. If a tax that is paid into general revenue affects only a small number of people, there is reason to worry that the relationship between taxpayers and non-taxpayers is inequitable even if the tax is horizontally equitable with respect to those who do pay it. Second, the tax base should be psychologically salient. An overly complex tax base is not likely to trigger intuitions concerning equity and if people have difficulty keeping track of their position relative to others, horizontally equitable tax rates are unlikely to have a legitimating effect. Finally, the tax base should be economically meaningful. A tax base that does not track citizen's economic status reasonably well will not be perceived as fair even if tax rates are horizontally equitable relative to this base. These criteria leave open a wide array of options. Income taxes, wealth taxes, VATs, real estate taxes, endowment (ability to earn) taxes and consumption taxes all easily qualify. Tariffs, luxury taxes, and payroll taxes, however, seem questionable at least if they are used primarily to raise general purpose revenue and not for some other end such as industrial policy or unemployment insurance.

A somewhat different reason for thinking that horizontal equity is trivial is the concern that it does not rule out any sort of taxation that can be endorsed on principled grounds. Horizontal equity might, therefore, be a useful heuristic for identifying suspicious provisions in the tax code, but does not do any real normative work because all good faith observers will oppose horizontally inequitable policies on other grounds. This conclusion is too strong. First, as Joseph Stiglitz has shown, horizontal equity cannot be derived from utilitarian premises and

welfare maximizing tax policy can be proven to violate horizontal equity given certain plausible assumptions.³¹¹ Second, in a variety of contexts there is an efficiency case for shifting the tax burden onto persons unlikely to change their behavior in response to the tax even if this requires violation of horizontal equity. Commitment to horizontal equity entails that these sorts of tax strategies are disfavored. If revenue is raised through a consumption tax, higher taxes on products with relatively inelastic demand curves will be more efficient than taxes levied on products for which demand is elastic. The intuitive idea behind so-called Ramsey taxation is that taxes are more efficient insofar as they do not change behavior.³¹² Inelastic demand curves are ones for which changes in consumption are not very sensitive to changes in price and so when the price to consumers is increased by the imposition of a tax, consumer behavior changes little. Although Ramsey taxation might be economically efficient, it may have sharply differing effects on people with similar levels of consumption or income. If one person is inclined to consume more of the taxed product than another person, the first person will bear more of the tax burden. Although the tax elasticities of labor supply are probably less than those of demand for most consumer items (in other words, people are less likely to change their work habits in response to taxation than they are to change their buying habits), it is possible to use a similar strategy with respect to taxation of income. This would involve taxing people at different rates depending on whether they fall into groups likely to work less when faced with higher taxes.³¹³ It is possible, therefore, for horizontal equity to conflict with considerations of economic efficiency (as well as

³¹¹ Joseph Stiglitz, "Utilitarianism and Horizontal Equity: the Case for Random Taxation," *Journal of Public Economics* 18 (1982): 1-33.

³¹² Frank P. Ramsey, "A Contribution to the Theory of Taxation," *Economic Journal* 37 (1927): 47-61.

³¹³ Arguably the tax code already does so to the extent that it allows entrepreneurs (who might be more tax sensitive) to realize some of their income as capital gains and thus pay a lower effective tax rate than salaried employees. However, this is an artifact of the distinction between ordinary income and capital gains rather than a purposeful attempt to treat different types of labor differently.

a variety of other normative considerations). This is not to say that horizontal equity should always trump other considerations: such judgments must be made on a case-by-case basis.

5. DOES HORIZONTAL EQUITY MATTER IN PRACTICE?

The last several sections have been devoted to a theoretical exploration of the significance of horizontal equity as a principle of fairness that facilitates coordination on tax law between persons with differing normative or empirical views. In this section I will present evidence that horizontal equity actually does play this role in practice. First, taxpayers tend to view more horizontally equitable policies as more legitimate. This makes voters more willing to support taxes and taxpayers less likely to evade them. Second, successful tax reform efforts in the past have used the goal of horizontal equity as a focal point for compromise and as a tool to build the support necessary to overcome opposition from those who benefit from tax inequities.

Like many other social institutions, tax collection relies on a high degree of voluntary compliance, without which the sheer volume of opportunistic law-breaking would overwhelm the ability of authorities to detect and punish violations of the law. For this reason, “tax morale” – the willingness of taxpayers to comply with the law for reasons other than fear of formal sanctions – is crucially important. Tax morale is sensitive to a range of factors including attitudes toward the state, ethical commitments, perceptions of tax fairness, perceptions of procedural fairness, perceptions of tax compliance by other taxpayers, and perceptions of influence over government policy.³¹⁴ Many if not most taxpayers comply with tax laws voluntarily even when tax evasion might have positive expected value given the probability of

³¹⁴ It is likely that the general population contains three types of taxpayers” (1) those disposed to follow the law under almost all circumstances, (2) taxpayers who will cheat whenever they think doing so is worth the risk and (3) taxpayers who pay or evade taxes based on a variety of contextual factors including their perceptions of the behavior of other taxpayers, the benefits they receive from the government and their general views about the fairness and legitimacy of the tax system. The important question, therefore, is whether horizontal equity has an important influence on this third type of taxpayer.

audits and enforcement.³¹⁵ Revenue collection would be far lower if taxpayers complied only when the risk of punishment made it financially advantageous to do so.³¹⁶

Although the results of laboratory experiments are not uniform, most studies have found that tax compliance increases with perceptions of horizontal equity and decreases when taxpayers perceive themselves to be treated differently from others who are similarly situated relative to the tax base.³¹⁷ Experimental subjects respond differently to tax increases and decreases depending on whether they violate horizontal equity.³¹⁸ One experiment found that tax increases that fall equally on all members of a group and preserve horizontal equity do not tend to reduce compliance.³¹⁹ However, tax increases that fall inequitably on different groups of

³¹⁵ “[A] large number of empirical studies (see previous chapters) demonstrate that the majority of taxpayers are inherently honest and willing to pay their share. If taxpayers are unable to understand the complex tax law and seek help from tax practitioners, they do it with the goal of preparing a correct tax file rather than finding aggressive strategies to reduce their taxes within the legal scope.” Erich Kirchler, *The Economic Psychology of Tax Behavior* (New York: Cambridge University Press, 2007), 167. “Clearly, not every taxpayer is a rational gamer straight out of Gary Becker's model of crime and punishment. It is hardly surprising, therefore, that the continuing emphasis on fines and audits has produced no apparent improvement in tax compliance. Alex Raskolnikov, “Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement,” *Columbia Law Review* 109 (May, 2009), 696.

³¹⁶ “Application of the standard economic theory of crime to tax avoidance . . . produces an unambiguous prediction of behavior: throughout the 1970s no one should have paid the taxes they owed . . .” Michael J. Graetz & Louis L. Wilde, “The Economics of Tax Compliance: Fact and Fantasy,” *National Tax Journal* 38, no. 3 (Sept. 1985), 358.

³¹⁷ Kirchler, *The Economic Psychology of Tax Behavior*, 78. Multiple studies find that horizontal equity has a significant effect on tax compliance. Michael W. Spicer, & Lee A. Becker, “Fiscal inequity and Tax Evasion: an Experimental Approach”, *National Tax Journal* 33, no. 2 (1980): 171-175; Ana de Juan, Miguel A. Lasheras, & Rafaela Mayo, “Voluntary Tax Compliant Behavior of Spanish Income Tax Payers,” *Public Finance* 49, no. 4 (1994): 90-105; Donald V. Moser, John H. Evan, & Chung K. Kim, “The Effects of Horizontal and Exchange Inequity on Tax Reporting Decisions,” *The Accounting Review* 70, no. 4, (Oct. 1995): 619-634; Bernard Fortin, Guy Lacroix & Marie-Claire Villeval, “Tax Evasion and Social Interactions,” *Journal of Public Economics* 91 (2007), 2089-2112. One study, however, found a contrary result. P. Webley, H. Robben, & I. Morris, “Social Comparison, Attitudes and Tax Evasion in a Shop Simulation,” *Social Behavior* 3, no. 3 (1988), 219-228.

³¹⁸ “We also find fairness effects in term of horizontal equity: for a given gross income and a given personal tax rate, the individual will report less when facing a reduction in the mean tax rate of his group. Perceived unfair taxation may thus lead to increased tax evasion. At the policy level this means that a taxation system that is more horizontally equitable is likely to improve tax compliance.” Fortin, Lacroix & Villeval, “Tax Evasion and Social Interactions,” 2107.

³¹⁹ “We find that, in the presence of horizontal inequity, subjects respond to an increase in exchange inequity (resulting from a tax- rate increase) by reporting less income. . . . In contrast, in the presence of

taxpayers and thus increase horizontal inequity lead to lower rates of tax compliance. It appears that at least in the laboratory, people do tend to perceive horizontally equitable tax schemes as more fair and this makes them more willing to tolerate higher taxes. There is some survey evidence for this effect outside of the laboratory as well. Surveys of Dutch entrepreneurs found that perceptions of fairness, including horizontal equity, were unrelated to intentions to comply with tax law for entrepreneurs with strong general personal dispositions to follow laws and moral rules, but appeared to have a significant impact on entrepreneurs who lack this general disposition.³²⁰ There is reason for caution in extrapolating these results. Effects outside the laboratory depend on public understanding of the tax code and this is generally quite poor.³²¹ Nevertheless, experience with comprehensive tax reform gives some reason to believe both that horizontal equity is an attractive compromise principle and that improvements in horizontal equity enhance the legitimacy of the tax system.

The most important U.S. tax legislation of the past fifty years is the 1986 Tax Reform Act. Passage of the 1986 Act surprised most observers (including the special interest lobbyists whose job it was to stop it).³²² The reform reflected a very simple general policy: elimination of

horizontal equity, subjects do not significantly change the amount of income they report as the tax rate increases. Subjects react less to the increase in exchange inequity associated with a tax-rate increase, apparently because they realize that all other taxpayers face the same tax-rate increase. Thus, in the presence of horizontal equity, the effect of the increased exchange inequity no longer dominates the effect of the economic incentives associated with a tax-rate increase.” Moser, Evan, & Kim, “The Effects of Horizontal and Exchange Inequity on Tax Reporting Decisions,” 620.

³²⁰ Peter Verboon & Sjoerd Goslinga, “The Role of Fairness in Tax Compliance,” *Netherlands Journal of Psychology* 65, (2009), 143.

³²¹ Kirchler, *The Economic Psychology of Tax Behavior*, 32-37.

³²² Prior to the 1986 Act, there was widespread pessimism about the prospects for reform. In 1984, Michael Graetz wrote, “Prospects for structural tax reform have been dimmed by recent ‘reforms’ in congressional practices; public pressure to enact income tax reforms seems nonexistent; political leadership on tax matters has become increasingly diffuse; committee deliberations are now open to the public and are well-attended by representatives of groups with a special interest in the outcome; and political action committees now have great influence in guiding policy decisions. In short, for those who would urge massive tax reforms, there is more than ample cause for despair.” Michael J. Graetz, “Can the

exemptions, deductions and credits were used to expand the tax base in order to lower tax rates. This allowed both President Reagan and congressional Democrats to claim important victories. Reagan achieved a major goal in lowering tax rates in a context in which significant budget deficits made it very difficult to secure support for policies that would decrease tax revenue. Liberal reformers were able to close a large number of loopholes that mainly benefited large businesses and wealthy individuals. The reform was roughly revenue neutral, which meant that neither conservatives nor liberals could claim victory in their ongoing battle over the size of the federal government. Although elite opinion was squarely behind the reform, its improbable passage required overcoming opposition from the numerous interest groups that benefited from the pre-1986 code.

Horizontal equity was an explicit aim of the 1986 Act. Conlon, Wrightson and Beam note that “by the mid-1980s, most experts—including those within government—were in agreement on basic principles. According to the consensus, an ideal income tax should be horizontally equitable; it should be investment-neutral; and it should be administratively efficient. All three goals could be obtained by broadening the tax base and lowering rates.”³²³ The reform’s key legislative architect, Sen. Bill Bradley, also appealed to horizontal equity as a central goal of reform.³²⁴ Horizontal equity thus played two roles in the 1986 tax reform. First, it provided a focal point for compromise between a conservative White House and a more liberal Congress. Second, it provided an intuitive conception of tax fairness that was used to publicly

Income Tax Continue to be the Major Revenue Source?” in *Options for Tax Reform*, Joseph Pechman, ed. (Washington, D.C.: Brookings Institutions, 1984): 39-69, 42.

³²³ Timothy J. Conlan, Margaret T. Wrightson & David R. Beam, *Taxing Choices: the Politics of Tax Reform* (Washington, D.C.: Congressional Quarterly, Inc., 1990), 242-243.

³²⁴ In a 1982 speech proposing what became the basic framework for the 1986 tax reform, Bradley stated, “we should have a tax code in which all citizens with equal incomes are treated essentially the same way.” Jeffrey H. Birnbaum & Alan S. Murray, *Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform* (New York: Random House, 1987), 23.

justify the reform. Despite disagreements about the effects of the final reform package, even skeptics acknowledge that it did make some progress toward greater horizontal equity.³²⁵ In any case, the reform appears to have improved public impressions of the tax code. Survey data from the late 1980's suggests that citizens viewed the tax code as more fair after the 1986 reform and were more willing to comply with tax law as a result.³²⁶

This experience is not unique. Horizontal equity was a key goal of successful tax reform in Australia, Canada, and New Zealand.³²⁷ Equitable treatment of different types of income was crucial for the successful introduction of income taxation in nineteenth century Great Britain. Robert Peel, who reestablished the income tax in 1841 was partially motivated by the promise of establishing “a sense of equity between different types of wealth and income.”³²⁸ Peel's calculation appears to have been correct: the British state was able to raise more revenue with less political opposition in comparison both with its rivals on the continent and with its prior system of public finance.³²⁹ The broader lesson is that tax policies that observe horizontal and vertical equity build public trust in the tax system and thus can help to create the conditions necessary for public support of social welfare spending and public investment.

6. THE ROLE OF TAX FAIRNESS NORMS

³²⁵ E.g., Michael Graetz wrote, “I would agree that the real merits of this legislation must be located in its improvements in tax equity, particularly in its promotion of greater ‘horizontal equity’ among taxpayers – the idea that people with similar incomes should pay similar amounts of tax. Once again, however, the achievements of the 1986 act seem to have been exaggerated.” Michael Graetz, “The Truth about Tax Reform,” *Florida Law Review* 40, no. 4 (1988), 629-30.

³²⁶ Karyl A. Kinsey & Harold G. Grasmick, “Did the Tax Reform Act of 1986 Improve Tax Compliance? Three Studies of Pre- and Post-TRA Compliance Attitudes,” *Law & Policy* 15, no. 4, (Oct. 1993), 318-320.

³²⁷ Cedric Sandford, *Successful Tax Reform: Lessons from an Analysis of Tax Reform in Six Countries* (Bath, U.K.: Fiscal Publications, 1993), 66, 73-74, 100-101, 154, 163.

³²⁸ Martin Dounton, “The Politics of British Taxation” in *The Rise of Fiscal States: A Global History 1500-1914*, Bartolome Yun-Casalilla, Patrick K. O'Brien & Granciso Comin, eds., (New York: Cambridge University Press, 2012), 133.

³²⁹ Dounton, “The Politics of British Taxation,” 141-42.

Concern with horizontal and vertical equity may, at first blush, appear to be irrational if one rejects natural rights or moral desert accounts of property rights because it accords normative weight to market outcomes that have no particular moral significance. In a world with broad agreements on the normative and empirical questions germane to tax policy and a political system strong enough to implement the policies that this consensus implies, it would be sensible to determine taxes by considering the effects of various policies rather than their relation to patterns of pre-tax income. Under conditions of pervasive disagreement about relevant moral or factual matters, however, norms of tax fairness can play a valuable role in preventing disagreements about distributive questions from unsettling relative property entitlements fixed by private law. Proponents of differing ideologies can agree that it is desirable to avoid a wasteful patchwork of taxes and tax subsidies at any level of redistribution. Horizontal and vertical equity are thus best understood as requiring a sort of procedural fairness in allocating obligations to contribute to public goods. They provide a partial solution to problem of how to assign tax obligations in the same way that “everyone gets to keep what they possess” provides a partial solution to the problem of control over resources. Like property rules, fairness norms such as horizontal and vertical equity appeal to the long-run interests of all parties in maintaining stable forms of social cooperation. Stable fairness norms approximate a sort of hypothetical rational bargain in that all have an interest in maintaining the norms so long as they expect others to do so. Because they appeal to long-run mutual advantage, fairness norms can enable cooperation between persons with conflicting interests or values.

This defense of horizontal and vertical equity as focal points for compromise is a modest one. It does not necessarily imply policy prescriptions different from those endorsed by Murphy and Nagel. And I have not tried to consider alternative means of constraining systems of

taxation to prevent wasteful resource conflict – even if horizontal and vertical equity are useful principles of fairness under some circumstances, this does not necessarily mean that they are the only or best ways to constrain opportunistic use of the power to tax.

7. GAUS ON PRIVATE PROPERTY AND REDISTRIBUTIVE TAXATION

In this section, I analyze a prominent alternative to my critique of Nagel and Murphy's *The Myth of Ownership*, which, despite its Humean flavor, has quite different implications for the relationship between property ownership and taxation. In his recent book, *The Order of Public Reason*, Gerald Gaus argues that his theory of “justificatory liberalism” supports both a political order based on private property and a “tilt” against strongly redistributive political institutions.³³⁰ Gaus' theory is neo-Rousseauian in its approach to justification but neo-Humean in its treatment of non-natural property rights as constraints on other aspects of political order. Gaus' treatment of property rights is framed as an implicit reply to Nagel and Murphy. He argues that property ownership puts significant moral limits on tax policy. However, unlike my critique, which is consistent both with highly progressive taxation and with a flat tax, Gaus believes that his theory of the moral significance of property ownership tells against taxation for redistributive purposes. In this section, I will critique Gaus' argument. I will argue that there is reason to doubt that the neo-Rousseauian aspects of Gaus' approach are well suited to analyze property rights and will show that Gaus' argument for a “tilt” toward classical liberalism fails even if one accepts Gaus' methodology. Taking property rights seriously is consistent with both classical and modern liberalism.

³³⁰ Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World*, (Cambridge: Cambridge University Press, 2011). An earlier version of the same argument appeared in Gerald Gaus, “Coercion, Ownership, and the Redistributive State: Justificatory Liberalism's Classical Tilt,” *Social Philosophy & Policy* 27, no. 1 (2010): 233-275.

Gaus' larger project is to reconcile the authority of social morality—"the set of social-moral rules that require or prohibit action, and so ground moral imperatives that we direct to each other to engage in, or refrain from, certain lines of conduct"—with our status as free and equal persons.³³¹ Social morality is crucial for cooperative social life, but it makes demands that often limit individuals' freedom of choice or restricts their pursuit of their own interests. Gaus' discussion of social morality is intriguing, but it is not my subject here. What is crucial for Gaus' theory of property rights is the conception of public justification that he derives from it. Gaus' argument combines Humean and Rousseauian elements.³³² It is Humean in its emphasis on the importance of coordination on shared norms and on the moral significance of existing moral practice. Because social morality coordinates the behavior of different individuals, it must consist of a common moral code – the social contract – in order to perform its function. But in order for its demands to be justified, its content must be justifiable to each individual. The emphasis on justification to free and equal citizens is the Rousseauian aspect of his theory.

Gaus argues that rules of social morality are binding on a person only when that person has sufficient reason to accept them and when the person is in a context in which others generally follow the rule. Gaus' Basic Principle of Public Justification states that:

A moral imperative " ϕ " in context C, based on rule L, is an authoritative requirement of social morality only if each normal moral agent has sufficient reason to (a) internalize rule L, (b) hold that L requires ϕ -type acts in circumstances C and (c) moral agents generally conform to L.³³³

³³¹ Gaus, *The Order of Public Reason*, 2.

³³² In calling Gaus' approach neo-Rousseauian, I am using Jeremy Waldron's trichotomy of property theories. See Jeremy Waldron, "The Advantages and Difficulties of the Humean Theory of Property," *Social Philosophy and Policy* 11 (1994): 85–123. In Chapter 1, I discuss "resource egalitarian" theories in place of neo-Rousseauian theories because the term "Rousseauian" is an awkward fit for theories primarily distinguished by their commitment to a conception of distributive justice that post-dates Rousseau. Gaus' theory is not 'resource egalitarian'. It is, however, openly indebted to Rousseau in its emphasis on justification to each member of the political community as a free and equal citizen.

³³³ Gaus, *The Order of Public Reason*, 263.

According to Gaus, “normal moral agents” might be quite different from one another. Each moral agent evaluates rules according to their own “evaluative standards.” Such standards vary from person to person. However, normal moral agents embrace evaluative standards that are mutually intelligible and are widely acknowledged to have bearing on moral issues even by those who disagree.³³⁴ Rational egoists who care exclusively about their own welfare are not normal moral agents, nor is Rawls’ blades of grass counter. The former is entirely unconcerned with social morality while the latter lacks evaluative standards that are intelligible to outsiders.³³⁵ Intelligibility in this context means more than that a person’s behavior can be interpreted in light of a coherent set of values. It means that even if other moral agents do not share an agent’s evaluative standard, they at least can understand the appeal of doing so. The scope for reasonable disagreement is nonetheless wide. Reasonable moral agents may agree on a set of prima facie moral considerations but have stark disagreements about how to weigh them. Being able to see how a consideration could matter to a reasonable, morally responsible person is consistent with thinking that the consideration is in practice simply not very important.³³⁶

Because social morality coordinates the behavior of free and equal people, it must be a set of rules that people with differing evaluative standards may endorse. Each member of the public ranks rules according to their own evaluative standards. A rule is in the “eligible set” of rules of social morality if all reasonable members of the public think it superior to having no rule

³³⁴ Gaus, *The Order of Public Reason*, 276-283.

³³⁵ Gaus, *The Order of Public Reason*, 281.

³³⁶ For example, radical egalitarians might acknowledge that considerations cited by libertarians – freedom from interference by the government and compensation that tracks economic contributions – are intelligible moral concerns, but not of much importance relative to egalitarian standards of distributive fairness. Conversely, the libertarian might find egalitarian standards of distributive fairness intelligible and think that at least some of them have moral significance, but believe that these are not of much importance relative to libertarian considerations.

at all.³³⁷ A rule is part of the “optimal eligible set” if it is in the eligible set and is not ranked lower than a mutually exclusive alternative rule by all members of the public.³³⁸ In other words, a rule of social morality, x, is only justified if it is acceptable to all reasonable members of the public and it is not the case that some rule, y, is preferred to x by all members of the public. This theory implies that there may be more than one justifiable social morality. If x and y are mutually exclusive rules, all members of the public favor either x or y over having no rule and not all members of the public agree on how to rank both x and y, then both x and y will be in the optimal eligible set. Because all parties agree that any given rule in the optimal eligible set is better than not having a rule, they will tend to converge on some rule in the set despite their disagreements over the ranking of the candidate rules within the set. Gaus provides an account of how social evolution can select particular rules out of the eligible set. However, since his argument concerning property hinges on which rules are within the optimal eligible set, rather than how rules are selected from those in the set, it is unnecessary to discuss the details of this part of his argument.

One feature of Gaus’ argument that will be important is the notion of an “order of justification.” Roughly speaking, the idea is that since trying to settle all questions at once might leave us hopelessly at sea with respect to which rules are justified, justification proceeds by settling certain more fundamental questions and then evaluating other rules against the background of already settled principles. So, for example, rights to life, bodily integrity and political freedom are determined first whereas matters such as speed limits, property tax rates and jurisdictional rules for administrative agencies are determined later. Rights determined early

³³⁷ Gaus, *The Order of Public Reason*, 322.

³³⁸ Gaus, *The Order of Public Reason*, 322-323.

in the order of justification might be specified only at a fairly abstract level at first.³³⁹ For example, the right to freedom of speech and the press might be justified as an abstract right without any specification of how it interacts with campaign finance regulation. Campaign finance regulation would be justified (or not) at a later stage of analysis when any proposed campaign finance regulation is evaluated against a background of basic rights that includes freedom of speech. As the example implies, the order of justification gives us reason to suspect that highly restrictive campaign finance measures will be hard to justify.³⁴⁰

The justification of laws proceeds in a similar matter to the justification of the rules of social morality, but is subject to an even more stringent test. Laws backed by the coercive power of the state entail costs in terms of restricted freedom of choice and harmful sanctions—“coercion costs”—that go beyond the costs of enforcement of rules of social morality. Since all persons have a presumptive right not be coerced, any coercively imposed law stands in need of justification in order to overcome this presumption. A law is justified if and only if its coercion costs are outweighed by its benefits (pro tanto utility) according to the standards of each *reasonable* member of the political community. Members of the public may disagree, however, both about the pro tanto utility of any given law and about the coercion costs of the law. The nature and normative significance of coercion is controversial in a great range of cases. The laws for which coercion is justified by the standards of all reasonable citizens form an “eligible set” from which a just state may select laws. Justification of laws is sequential: basic rights are specified first and then other laws are evaluated against the background of basic rights. Laws

³³⁹ Gaus, *The Order of Public Reason*, 391.

³⁴⁰ As will be discussed below, campaign finance regulation both reduces the option set of members of the public and uses coercive means to secure compliance. Given a background commitment to free speech, both features will tend to count against campaign finance regulation, although it is entirely possible that these costs will be outweighed by the benefits according to the standards of all reasonable members of the public.

that might, in some context, be acceptable to all members of the public, may be rejected in a more fully specified political order.

In his abstract presentation of his theory of political justification, Gaus tends to discuss particular laws as the objects of analysis. But this is imprecise. Instead, members of the public rank their preferences for “issues” where an issue might include more than one law if the justification of one law is “dependent” on another law or laws. This move is required to avoid the cases in which the status of two complementary laws is indeterminate because the ranking of each depends on whether the other is in force. Justificatory dependence is defined as follows:

Justificatory Dependency: Legislation x has justificatory dependence on legislative issue y if and only if

- (1) there is some Member of the Public Alf, such that for Alf, if Alf makes his individual decision about the eligible members of $\{x_1 \dots x_n\}$ in the absence of considering y , his eligible set is $\{x_1 \dots x_i\}$ whereas if he considers his y eligible set, his x eligible set becomes a different set $\{x_1 \dots x_k\}$;
- (2) The socially eligible set differs depending on whether Alf's set is $\{x_1 \dots x_j\}$ or $\{x_1 \dots x_k\}$.³⁴¹

The upshot of this is that justificatory questions are individuated on the basis of whether the eligible set for one issue depends on the rankings for another issue. So, for example, spending programs are usually dependent on sources of public finance since there are usually members of the public whose views on the spending program will depend on the source of revenue. At first blush, the justificatory dependence principle seems to suggest that it is proper to consider issues of property rights alongside redistributive taxation. For example, the acceptability of robust private property rights might, for some reasonable members of the public, depend on the existence of social welfare programs that meet the basic needs of those who do not own property.³⁴² Gaus appears ambivalent about this conclusion. In any case, the justificatory

³⁴¹ Gaus, *The Order of Public Reason*, 495.

³⁴² This is, for example, roughly Kant's view. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge MA: Harvard University Press, 2009), 267-299.

dependence of tax laws on property rights will ultimately undermine his argument for the “classical tilt.”

Gaus advances two arguments for robust private property rights, including private ownership of capital assets. The first is that private property is a useful way to respond to the problem of evaluative diversity. Different members of the public evaluate moral rules and laws according to different standards. This makes it difficult to find a common set of rules acceptable to all members of the public. One response to this problem is to adopt an idealized model of reasonable members of the public. This serves to reduce the range of evaluative standards and leads to greater convergence in normative judgment among the idealized members of the public. For example, Rawls’ original position guarantees normative consensus by making the parties in the original position alike in that they are ignorant of their personal characteristics and have identical knowledge of history, economics, sociology, etc. Gaus rejects this type of idealization because it either abstracts from the problem of evaluative diversity rather than solving it (as with Rawls’ original position) or fails to generate convergence of judgment even under idealized conditions (as he believes is the case with ideal observer theories). Instead of seeking a single best evaluative standard to settle all controversial questions, Gaus argues that it is often best to manage evaluative diversity by establishing a system of “jurisdictional rights” that determine whose evaluative standards hold sway in any given case so that everyone will see their standards prevail some of the time. Private property rights are one form of jurisdictional rights.³⁴³ Property rights allocate authority over external resources to particular individuals or groups. They allow a sort of compromise between people with different evaluative standards – each property owner may act according to their own standards with respect to the own property but must abstain from insisting that their standards determine the use of others’ property. Property

³⁴³ Gaus, *The Order of Public Reason*, 374-381.

rights may be customized to suit the needs of individual owners: whereas some people may prefer a set of rights that approximates Honoré's full liberal ownership, other people may find that it suits their purposes better to craft some more customized set of rights and duties. This argument for private ownership, therefore, does not require any particular configuration of property rights, but only that the rights protect private decisional authority over external resources so as to remove some decisions from the domain of public justification.³⁴⁴ It also has limited implications for the distribution of property rights so long as a sufficient stock of property is in private hands rather than under public management and private property is not so concentrated in the hands of a narrow group of property owners that the same evaluative standards hold sway despite being controversial among the larger non-property owning public. The implications for tax rates are equivocal. Using private property as a response to evaluative diversity provides reason to support relatively high tax rates insofar as taxes are used to support transfer payments to those with little property, but relatively low tax rates insofar as taxes are used to support public goods since the former disperses and the latter concentrates decision making authority.

Gaus' second argument for robust private property rights is that all reasonable citizens, whatever their particular judgments about distributive justice, have reason to support extensive private ownership of valuable resources, including at least some capital assets, because of the strong association in developed countries between capitalist economics and political freedom. Gaus argues that although not all capitalist political systems protect political liberties, all contemporary countries that effectively protect political liberties feature extensive private

³⁴⁴ To clarify, private property rights must be publicly justified. Private property owners, however, may make decisions according to their own standards so long as these decisions do not transgress the bounds fixed by publicly justified rights.

ownership of both personal and capital property.³⁴⁵ These include the more market oriented Anglo-Saxon economies as well as the mixed economies of north-central Europe. By contrast, polities with complex economies without private ownership of capital assets have always failed to respect political freedom. Of course, this failure has been more extreme in some cases (e.g. China under Mao) than others (e.g. Yugoslavia under Tito). Any reasonable member of the public, Gaus concludes, will favor extensive private ownership even though reasonable people might disagree about the appropriate scope of redistributive policies and state spending.³⁴⁶

Extensive private ownership is consistent with both a libertarian minimal state and a Scandinavian-style mixed economy. Therefore, normative consensus concerning private ownership leaves open a great range of possibilities. However, because of the importance of private property in responding to the problem of diversity of evaluative standards, protecting political freedom, and promoting economic prosperity, the right to own private property is justified early in the “order of justification.” This right is only abstract at an early stage. It requires that the state permit members of the public to own private property and protect these property rights, but does not specify rights and duties with respect to particular objects.

Against the background of a political order that features extensive private ownership of capital assets, more redistributive proposals will tend to count as relatively more coercive than less redistributive proposals and thus require higher ratings in terms of pro tanto utility in order to count as justified. Reasonable members of the public will disagree about how to rate both the benefits and the coercion costs of redistributive taxation. Gaus argues that some reasonable parties will find higher tax rates to be significantly more coercive than lower tax rates for two reasons. First, higher rates of taxation require, on average, harsher and more intrusive

³⁴⁵ Gaus, *The Order of Public Reason*, 511-521.

³⁴⁶ Gaus, *The Order of Public Reason*, 520-521.

enforcement in order to ensure payment of taxes.³⁴⁷ Second, as tax rates go up, the option set for those subject to the tax is reduced because higher marginal tax rates reduce the set of mutually advantageous exchanges. Highly redistributive tax and transfer schemes will tend to be eliminated from the eligible set because some reasonable citizens will find that the social costs of coercion necessary for high tax rates outweigh the social benefits of redistribution.³⁴⁸ Although some reasonable citizens may favor high taxes to fund such redistributive transfer programs, these cannot be publicly justified in light of reasonable disagreements about the value of such programs and the coercion costs of redistributive taxation.³⁴⁹ Because Gaus' justificatory liberalism tends to eliminate highly redistributive proposals from the eligible set, he believes that his account of political justification "tilts" toward classical liberalism by excluding some of the more redistributive mixed economies. He concludes that "a liberalism based on a commitment to public justification – a justificatory liberalism – leads not to socialism, or a thoroughgoing egalitarian liberalism, or to libertarianism, but to the more nuanced approach to legislation we find in the fifth book of Mill's *Principles*, allowing that there are a number of tasks that government justifiably performs, but having a strong overall inclination toward less rather than more 'authoritative' (i.e. coercive) government."³⁵⁰

³⁴⁷ Gaus, *The Order of Public Reason*, 523-524.

³⁴⁸ It should be emphasized here that reasonable members of the public are evaluating the costs and benefits of a proposed tax rate in terms of what they believe is normatively acceptable, not in terms of their personal interests. So the fact that some may pay higher taxes in order to benefit others does not necessarily give them grounds to object.

³⁴⁹ Both reasons for rating high tax rates as unduly coercive are rather questionable. Although high tax rates reduce the scope of possible exchanges for some people, they also (assuming that the tax revenue isn't entirely wasted by, e.g. fighting losing wars) increase consumption possibilities via transfer payments or more extensive public goods. Although higher tax rates may require more coercive methods for collection *ceteris paribus*, there is reason to doubt that this effect is strong over most ranges of tax rates. Perceptions of tax fairness (which are not necessarily related to marginal rates in any consistent way) and the behavior of one's fellow taxpayers may be far more important. In any case, Gaus' argument requires only that the belief that higher taxes are more coercive is reasonable, not that it is correct.

³⁵⁰ Gaus, *The Order of Public Reason*, 526.

Gaus' argument fails even if one grants its methodological premises. The fundamental problem is that Gaus appeals to inconsistent ways of modeling how to determine the eligible set when arguing for "the classical tilt." He equivocates on whether the benefits to be weighed against coercion costs include only the benefits of taxation or all of the benefits of private property. In arguing for the "classical tilt," Gaus treats taxation as a separate issue from the right to private property. When the gains from private property rights are separated from the gains from taxation, the benefits of taxation are more modest and it is quite plausible to think that some reasonable members of the public will object to high (effective or marginal) tax rates. But this form of argument seems open to two fairly obvious objections. First, it seems that the views of the most libertarian-minded reasonable member of the public will fix tax rates. Once taxes are sufficient to fund a minimal state that effectively protect civil liberties and private property, this "libertarian dictator" may view any further taxes as unjust because the coercion costs of additional taxation outweigh the benefits.³⁵¹ For transfer payment programs, this result seems likely. If one attaches little to no weight to distributive considerations (and nowhere does Gaus say that such views are unreasonable), then programs that tax A to provide a transfer payment to B will almost invariably come out as having negative pro tanto utility once one figures in administrative costs and deadweight loss. This result is peculiar. An eligible set of one determined by the views of the most libertarian member of the public hardly seems like a reasonable result. Second, it seems that Gaus' argument depends on a controversial analysis of coercion costs not likely to be shared by all reasonable members of the public.³⁵² While classical liberals may find highly redistributive institutions unreasonably coercive, egalitarians may reasonably find highly non-redistributive institutions coercive. In a state with very little

³⁵¹ Gaus, *The Order of Public Reason*, 501-503.

³⁵² Gaus, *The Order of Public Reason*, 507.

redistribution, high levels of coercion might be required to prevent the propertyless from stealing from the propertied and to maintain social order more generally.³⁵³ Although high tax rates reduce the option set of those subject to tax, stingy social welfare programs reduce the option sets of those with little income. An egalitarian might therefore rate the night-watchman state as more coercive than the social welfare state and do so for reasons that are structurally analogous to the libertarian's reasons for considering high tax rates coercive. Gaus concedes that such views are not prima facie unreasonable.³⁵⁴ Nor are evaluative standards that favor the minimal state. This presents a serious problem. It seems as though welfare state liberals have just the same grounds for rejecting low tax / low redistribution laws as classical liberals have for rejecting high tax / high redistribution laws.

Gaus' reply to both objections reflects a similar strategy: appeal to the overwhelming benefits of private property as evidence that reasonable members of the public, even those who rate coercion costs highly, will think them outweighed by the pro tanto utility of private ownership. In the case of the libertarian dictator, Gaus points out that although a reasonable libertarian might believe that the minimal state maximizes the difference between pro tanto utility and coercion costs, pro tanto utility will still exceed coercion costs for a range of higher tax rates as well.³⁵⁵ Since tax rates are only excluded from the eligible set when at least one reasonable member of the public rates their costs as outweighing their benefits, the reasonable libertarian might have to settle for something other than her optimal tax rate. And this is consistent with Gaus' general theory: "free and equal persons can freely act on nonoptimal options (including those who employ more coercion than one thinks is optimal), so long as the

³⁵³ That such activity would be unjust is no objection to counting justified punishment as a coercion cost since this sort of coercion is exactly parallel to that employed against tax cheats. See Gaus, *The Order of Public Reason*, 523.

³⁵⁴ Gaus, *The Order of Public Reason*, 506-08.

³⁵⁵ Gaus, *The Order of Public Reason*, 501-03.

gains (in terms of one's evaluative standards) exceed the costs."³⁵⁶ A similar argument is used to block the second objection. Gaus concedes that private property rights and redistributive laws (especially redistributive tax laws) are not "even remotely independent issues."³⁵⁷ So members of the public who believe highly inegalitarian economic orders to be unjust cannot be expected to evaluate private property rights until they know their distributive implications. However, Gaus argues that even welfare state egalitarians must acknowledge the great benefits of small-government political orders that protect civil liberties and private property. Even if they believe that such arrangements entail high coercion costs, they will usually be in the eligible set because a functional legal system that regulates property rights has high pro tanto utility.³⁵⁸

Both of Gaus' responses to these objections seem very plausible. But their form tends to undermine his argument for the "classical tilt." Gaus' argument for the classical tilt hinges on treating tax laws, or at least tax laws for the purposes of funding redistributive schemes, as standalone proposals that must be independently justified. If this were not the case, then classical liberals would be in a position structurally analogous to that of egalitarians who object to classically liberal states. Although the classical liberal might find the welfare state to involve levels of coercion that are far from what she considers optimal, the benefits of private property rights protected under a stable political order would seem to provide enough pro tanto utility to outweigh even very substantial coercion costs. Likewise, Gaus would not be able to avoid the libertarian dictator objection unless the pro tanto utility of something other than redistributive

³⁵⁶ Gaus, *The Order of Public Reason*, 502.

³⁵⁷ Gaus, *The Order of Public Reason*, 522.

³⁵⁸ Gaus is careful about how far to push this point. He seems to acknowledge that distribution of property rights could be so horrifically inequitable that a small-state political order would be outside the eligible set. See Gaus, *The Order of Public Reason*, 526. I suspect that what he has in mind is something like a *latifundia* economy in which the great masses of people are trapped working for subsistence wages on the estates of a few great landowners.

social welfare programs counted in the libertarian's evaluation of redistributive taxation. The libertarian does not think that redistribution is valuable at all.³⁵⁹

Gaus' presentation of his argument appears inconsistent. It remains to be seen if it can be reconstructed in some way that preserves the classical tilt. Gaus' argument for the classical tilt depends on a two-step process.³⁶⁰ All laws must be justifiable to all reasonable members of the public. This means that each reasonable member of the public prefers the law to having no law at all. The first step of the argument is that (1) all reasonable members of the public will agree that private property rights should be protected. Property rights are fundamental jurisdictional rights and therefore these are settled early in the order of justification. Once an abstract right to private property has been fixed, Gaus argues that (2) against a background of a right to private property, some reasonable members of the public will find high rates of taxation impermissibly coercive and thus the structure of public justification will "tilt" against redistributive taxation and toward classical liberalism. But given Gaus' theory of justification, there is no way to model this argument that establishes the classical tilt and avoids the libertarian dictator result.

The crucial issue is how to understand pro tanto utility in the second step of the argument. One option would be to consider the first step of the argument to establish only an abstract right to acquire private property and the second step both to specify certain rules for fixing property entitlements and a tax and transfer system to mitigate wealth inequality.³⁶¹ Under this interpretation it seems that for a huge range of possible laws all reasonable members of the public will agree that the pro tanto benefits of establishing a concrete system of property

³⁵⁹ More precisely, because wealth inequality is not a normatively weighty consideration, the value of extra income for the poor is cancelled out by the lower income of the rich and the deadweight loss associated with taxation.

³⁶⁰ This is most explicit in Gaus, "Coercion, Ownership, and the Redistributive State: Justificatory Liberalism's Classical Tilt," 233-275.

³⁶¹ Gaus lends credence to this interpretation when he discusses the problem in terms of the justification of "large states" vs. "small states". E.g., Gaus, *The Order of Public Reason*, 508.

rights swamp the coercion costs of both property rights enforcement and redistributive taxation. If the “no law” alternative means that there is no authoritative standard for establishing property rights, then even relatively objectionable property regimes will count as acceptable. Libertarians will rate big government mixed economies as being better than no functional state; likewise egalitarians will rank an austere classically liberal state as better than no state at all.³⁶² This is, I think, a quite reasonable result. But it obliterates the “classical tilt” since almost any set of laws that counts as instantiating the “abstract right” to private property will make it into the optimal eligible set. The optimal eligible set would include both small-state libertarian orders as well as any social welfare state that does not rely on tax rates so high as to effectively convert private ownership into trusteeship.

A second possibility would be to treat the first step of the argument as establishing some basic rules fixing private property entitlements and the second step as fixing public finance and spending. But this formulation does seem vulnerable to the libertarian dictator objection. Once the benefits of private property rights are built into the background, they should not count toward pro tanto utility in the second step of the argument. And this means that small government libertarians will believe that the coercion costs of taxation outweigh the pro tanto utility of anything more than the “night-watchman state.” It does not seem to matter much how one individuates issues at this stage because small-government libertarians are opposed to most spending projects whether they are considered individually or collectively. Bundling tax and transfer programs with other programs objected to by small government advocates does nothing to achieve public justification.

³⁶² Even under Gaus’ rather permissive standards for “reasonableness” it seems fair to consider people who prefer anarchy to otherwise just states that violate one’s ideals of distributive justice to be unreasonable.

A third possibility would be to treat the first step of the argument as securing the efficiency benefits of private ownership, but being silent as to the likely distributive consequences. Thus the economic benefits of private ownership would not count toward pro tanto utility at the second step. Unlike the second scenario, the small government libertarian could not veto any further laws modifying property rights with confidence that this would result in her preferred private property based distribution. This version of the model, however, would result in a stalemate. Large state redistributivists would reject all orders that do not include strongly redistributive social institutions. Small state libertarians, on the other hand, would reject all strongly redistributive orders. The eligible set would be empty. So this way of modeling the order of justification is not plausible.

One final possibility is that the argument should involve three steps rather than two steps. At the first step, property doctrines such as trespass rules that are necessary for any form of ownership are justified while leaving open the question of what sort of entities (individuals, groups, or states) may possess such property rights. Any complex society, including one's based on public ownership of productive assets, requires trespass rules and the like. There should be broad normative consensus on such rules. The importance of these rules makes it possible that their justification will not depend on other questions under the Justificatory Dependence principle.³⁶³ At the second step, rules that allow private groups and individuals to acquire property are justified. Here it may be the case that reasonable members of the public with egalitarian views will reject property systems that do not provide for some degree of

³⁶³ One difficulty with Gaus' system is that it is extremely difficult to analyze such questions. The existence of one idiosyncratic but reasonable member of the public whose ratings of possible trespass rules depends on broader questions of distributive justice (or anything else) could be enough to make the justification of trespass rules dependent on broader questions of distributive justice. It seems plausible that, for example, judgments about the proper scope of the private necessity exception to trespass (this is the doctrine that allows use of another person's property for life-sustaining purposes) may depend on broader distributive questions. But whether this actually changes the eligible set is more difficult to say.

social insurance. The second step of justification will, therefore, tilt very modestly *against* classical liberalism and toward welfare state mixed economies since some of the more extreme free market orders may be excluded. At the third step, laws regarding taxation and redistributive spending are considered. Now that the benefits of property law and private ownership have been secured, libertarian minded members of the public believe that the pro tanto utility of most taxation (which they believe to have very modest benefits) is outweighed by coercion costs. The libertarian dictator rears its head yet again. This result is mitigated somewhat at the second step which may result in some form of minimal welfare rights. But the fundamental problem remains: insofar as one alters Gaus' argument by adding extra steps to the order of justification, libertarian dictator concerns are more and not less difficult to address because the sources of pro tanto utility for libertarian minded members of the public will be more limited and therefore there is *less* scope for securing justification for redistributive taxation and spending.

These results point to several fundamental difficulties with Gaus' approach to property rights. Treating property rights and tax obligations as analytically separate while seeking public justification under conditions of broad normative disagreement is unworkable. A complex private property regime requires a state with some source of public finance. It seems artificial, therefore, to justify private property in the absence of some enforcement mechanism in much the same way that it is artificial to endorse some law requiring government spending without specifying a source of public finance.³⁶⁴ Given that all complex political orders require a mixture of property rights, public finance and government spending, there is no neutral way to order justification of these elements. Gaus prefers to start with private property rights and then evaluate proposals against this background. An egalitarian might prefer to start with an

³⁶⁴ Gaus rails against the latter error but does not address the former point. E.g., Gaus, *The Order of Public Reason*, 496-97.

assumption of equal distributive shares and then alter this distribution in light of the benefits of private ownership.³⁶⁵ An intermediate position would be to begin with something like a right to a social minimum and then consider proposals for private property and taxation against this background. Gaus argues private property rights are fundamental building blocks in the order of justification. But one might accept large parts of his case for private property while maintaining that basic welfare rights are still more fundamental since the freedoms secured by a system of private property rights have little value to those who lack sufficient resources to meet their basic needs. Both perspectives seem reasonable and it is hard to see how to choose between them without passing judgment on the substantive merits of the underlying political ideologies. At this level of analysis, there do not appear to be compelling reasons to consider justificatory questions in one order rather than another.

A more thoroughgoing Humean perspective on this question might help break the stalemate by recasting the analysis in terms of implicit bargains between free and largely (but not exclusively) self-interested actors rather than justification for free and equal ideologues. Certain sorts of conventions are fundamental to social order. Among these are property rights, promise, and allegiance to the state. It is crucial for people to coordinate their conduct in these areas if they wish to live harmoniously. Questions about tax rates and the like are decided against a background of property rights not because property rights are more fundamental as a matter of moral justification, but because such questions only arise when certain fundamental conventions are in place. Because some people can expect to do quite poorly under purely market distributions of property, stable fundamental property conventions are often only possible under the condition that there will be mechanisms that allow the less fortunate to derive significant benefits from observing property rules. Once basic entitlements are fixed, one might evaluate

³⁶⁵ One way of arguing for Rawls' position takes something like this form.

further policies in light of their fairness against this background. This strategy buys stability at the cost of justificatory power. The basic idea is that people are unlikely to subvert property institutions that benefit them even if they object to them for ideological reasons. Neo-Rousseauians will object that this might require enforcing property rules against those who have sincere moral objections to them. But the sting of such charges might be mitigated by the observation that those who share in the benefits of a social practice should be expected to share in the burdens even if these burdens may not be justly imposed on some third party.

Alternatively, Gaus' framework might be revised by distinguishing the level of justification needed for constitutional fundamentals from that required for ordinary legislation. Instead of considering each law as a potentially separate issue that requires justification to all reasonable members of the public, it might be preferable to apply such strict standards of public justification to constitutional provisions and treat specific taxing and spending provisions as justified so long as they are enacted through procedures specified by the applicable constitutional provisions. Despite the obvious influence of James Buchanan's constitutional economics on Gaus' theory,³⁶⁶ Gaus does not seem to consider this approach. It seems plausible that the *constitutional* order of a free liberal society would tilt toward classical liberalism in the sense that it contains constitutional protection for private property. This might serve to prevent democratic majorities from expropriating minorities as well as to combat various pathological forms of rent seeking. Redistributive taxing and spending programs would then be left to be decided according to ordinary democratic procedures. Such an arrangement might be acceptable to welfare state liberals on the supposition that well-functioning democratic procedures (i.e. ones in which the wealthy are not able to buy off legislatures) will tend to result in generous social insurance programs. Limited protection of private property rights as a matter of constitutional

³⁶⁶ E.g., Gaus, *The Order of Public Reason*, 540-545.

basics might be acceptable to reasonable members of the public so long as it prohibits only the sort of bare expropriations that may be condemned by people who have widely differing views on political economy. Distinguishing between matters of constitutional order and ordinary politics has the further benefit of side stepping awkward questions about the “order of justification.” Because the bounds of legislative authority are determined by constitutional basics, one *cannot* consider ordinary legislation until the constitutional background is fixed. Therefore, one need not appeal to any controversial theory of justification to argue that constitutional provisions are prior to ordinary legislation regarding public finance and spending.

A second fundamental difficulty with Gaus’ methodology is that it makes the bounds of publicly justifiable rules depend on the “reasonableness” of extreme views. This is particularly troubling in cases in which small “reasonable” minorities may reject rules that are endorsed by the vast majority of members of the public. Gaus counts both night-watchman state libertarianism and radically egalitarian standards as “reasonable.”³⁶⁷ In and of itself, this is not problematic. But his account of justification sets the parameters of the “eligible set” by considering which policies can be endorsed by all reasonable members of the public. People whose views are highly idiosyncratic, extremely unusual or just barely reasonable are thus given a veto over public policy. For example, tax and transfer schemes that have the support of the vast majority of the public may count as unjustified if they are rejected by reasonable libertarians on grounds that may be only mildly responsive to empirical facts about the consequences of such policies.³⁶⁸ This is not a mere quibble: because Gaus’ theory is not based on compromise in the

³⁶⁷ There are reasons to be skeptical that the bounds of reasonable disagreement are really as wide as Gaus claims.

³⁶⁸ Libertarians who are wholly indifferent to distributive consequences *might* count as unreasonable because they are not responsive to whole classes of moral considerations. But Gaus apparently believes that it is reasonable to weigh distributive consequences having much less significance than other considerations. So small-state libertarians who believe that the Gini coefficient is far less important than

form of bargaining, there is no general reason to believe that actual policies will fall in the approximate center of the eligible set. Democratic procedures tend to push results toward compromise positions. Gaussian eligible sets do not share this feature. Instead, compromise positions that might emerge from bargaining between different interest groups might be excluded from the eligible set. If the policies with the greatest public support are excluded from the eligible set, normal democratic procedures are likely to settle on policies on the boundary of the eligible set. When the bounds of acceptable public policy are set according to whether or not the views of small numbers of extremists count as reasonable, it seems that something has gone wrong. In matters relating to the distribution of material resources, this is particularly worrisome. One attractive feature of bargaining approaches to such questions is that their internal logic inclines them toward win-win arrangements. If there are potential efficiency gains to be had by rearranging entitlements, there is scope for agreements that redistribute some resources from “winners” to “losers”. Models based on convergence of moral views rather than mutual interest do not necessarily have this feature. For example, parties that object to certain property regimes because they do not reflect moral desert or egalitarian distributive norms cannot be persuaded by offering them a greater cut of the pie. All that matters is that a normative view, however idiosyncratic, is minimally reasonable. Even if Gaus is correct that applying a justice as bargaining model to domains such as civil liberties is inappropriate, it is not clear that this generalizes to property.

None of the reconstructions of Gaus’ argument considered above appear both to justify the “classical tilt” and to stave off the “libertarian dictator” objection. If we analyze the justification of private ownership concurrently with tax and transfer regimes, a great range of

the individual freedom of choice afforded by extensive private ownership and low taxes may count as reasonable even if libertarians who believe redistributive taxation to be immoral regardless of the distributive consequences do not.

systems will end up in the eligible set given the overwhelming advantages of property rights as compared to a free-for-all. Both egalitarians and libertarians can agree that the coercion costs of having property rules are outweighed by the advantages at most feasible levels of redistribution. So the eligible set is quite large. But once we have settled on a system of private property rights and authorized the minimum level of taxation necessary to enforce them, it may be impossible to get agreement on any further rules. If the gains from property rules are no longer included in pro tanto utility, there may be no level of taxation for which both egalitarians and libertarians believe that the pro tanto utility outweighs the coercion costs. Libertarians are likely to consider the pro tanto benefits of any additional level of tax and transfer to be defeated by coercion costs. When Gaus explains why libertarians will not be able to insist on a minimal state (and why large state egalitarians cannot insist on high taxes), he appeals to the great benefits of property rules and private property as factors that outweigh significant coercion costs of taxation according to any reasonable standard. But when justifying the “classical tilt” of justificatory liberalism he suggests that the costs and benefits of higher taxes must be evaluated separately from the costs and benefits of the property regime as a whole. Gaus’ argument therefore equivocates on the right way to evaluate property rules and tax rates. If we do not evaluate property rights and tax obligations together, libertarians can veto any taxes above the minimal state. If we do bundle property and taxation for the purposes of normative evaluation, the enormous benefits of having property rules will result in a large eligible set because the alternative (open access or state ownership) is so unattractive that neither reasonable classical liberals nor reasonable egalitarians will reject any of a great variety of possible property regimes. Within this large “optimal set” considerations of stability and utility, (rather than justification to reasonable members of the public), may dictate the precise contours of property rights and tax obligations. It is this Humean

conclusion that I believe is the correct one: even for people with starkly differing moral views, the overwhelming gains from coordinating on property rules give sufficient reason to follow the rules in force even to those who think the rules in their society very far from optimal. Gaus' 'justificatory liberalism' in its most plausible formulation radically underdetermines institutions of property and taxation. And this is as it should be: respect for existing property entitlements constrains the form which taxation may take but permits a wide range of substantive policies.

8. CONCLUSIONS

Even if property rights do not track pre-institutional moral entitlements, treating pre-tax property rights as having normative weight structures bargaining over contributions to public goods in a useful way. The problem with treating pre-tax ownership as "mythical" and pretax income as morally irrelevant is that it effaces the structure of the norms that we use to coordinate on fair terms of political cooperation in the face of moral and factual disagreements. Rather than merely being a burdensome constraint on the pursuit of social justice (i.e. the distribution of income should ideally be more egalitarian, but existing property entitlements limit the feasibility of redistribution), property entitlements provide a baseline that facilitates compromise on rules governing contribution to public goods between people who may hold starkly different moral views. Treating certain distributive questions as partially settled by property law facilitates cooperation on others matters whereas treating such questions as perpetually open to wholesale revision through tax policy tends to encourage wasteful conflict. Taking this view of property rights does not, however, commit us to classical liberalism or another 'small-government' political order. So long as tax obligations track income or initial property holdings, Humean property rights are consistent both with high and progressive tax rates and with low and flat rates. The importance of property rights in structuring bargaining over contributions to public

goods is evidence in favor of the Humean approach to property. There is a place for top-down resource egalitarian theorizing that starts with systematic high-level principles of justice and uses them to evaluate our institutions. But there is also insight to be gained from bottom up non-ideal political philosophy that traces the development of successful cooperation from the most basic property conventions to highly complex political institutions.

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