Private Property: Essential to Democratic Capitalism

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In an opinion piece appearing in the *New York Times,* March 23, 2015, Michael Novak, author of *The Spirit of Democratic Capitalism* endorsed the definition of capitalism offered by Pope John Paul II: "...[A]n economic system which recognizes the fundamental and positive role of business, the market, private property and the resulting responsibility for the means of production, as well as free human creativity in the economic sector...circumscribed within a strong juridical framework..." Emphasis added. Novak and Pope John Paul II believed that "private property" was and remains an essential ingredient in the making of a capitalistic system. This paper will concentrate on what private ownership of property means, various philosophical/religious defenses for its existence, its connection to liberty, its significance for producing economic prosperity, and various attacks leveled against it in the past and present.

I. What is Private Property? How has it Been Defended

A. The Classic Anglo-American Answer—A Bundle of Rights

In an often quoted essay, A.M. Honere explained that "a people to whom ownership is unknown or who accord it a minor place in their arrangements...would live in a world that is not our own." (Honore, 370) Honere is maintaining that one of the chief characteristics of mature, modern societies is a well-developed system ownership which recognizes the private property of its members. What does it mean to be an owner, a property holder?

Owners of private property are often described as possessing "a bundle of rights." This is the classic, Anglo-American formulation of what private property means. Forest McDonald says that "neither liberty or property was a right, singular, each was a complex and subtle combination of many rights, powers and duties." (McDonald, 13) In fact, Honore in his essay, says that if a system failed to validate this amalgam of rights and …. "did not provide for them to be united in a single person, we would conclude that it did not know the [classical] liberal concept of ownership..." (Honore, 370) What rights are in this composite?

Ownership begins with the right to possess. "[T]o have exclusive physical control of the thing...is the foundation on which the whole superstructure of ownership rests." (Honore, p. 371)

Blackstone pointedly rendered it this way: "...that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." (Blackstone, 304) Not only is the right to possess a right to control external things exclusively, but "to remain in control," that is, to keep possession. (Honore, 371) Much of the apparatus of a mature legal system is dedicated to the establishment and maintenance of private property possession—laws against theft, fraud and misappropriation, as well as laws requiring the recording of land titles and their transfers, and laws against trespassing, just to name a few.

Another right in the bundle is the right for the owner to make personal use of the property. (Honore, 372) This is an obvious but important incident of ownership. Numerous items of personal property, that is, non-realty, give owners regular benefits—from the transport available to the owner of an automobile to the music provided to the owner of a subscription to the local symphony. Of course, the owner of a residence (real estate), has a place to repose and a place in which to lodge his family.

A third right is the right to manage the property. Managing is "the right to decide how and by whom the thing owned shall be used." (Honore, 372) Managing the property often implies that the owner foregoes the use of the property himself by allowing another to use it. This arrangement frequently gives rise to a fourth right, the right to income produced by the property. Income, depending on the type of property, may take the form of rents, profits, or royalties, for example.

A fifth right in the bundle of rights we call property is the right to transmit or transfer the property to someone else. The most common mode of transfer is sale. This is nothing more than a willing seller finding a willing buyer for the property in question. However, ownership can be

transferred to another by gift, called inter vivos if the donor and donee are living, or by will, if the donor is deceased, called inheritance.

By becoming an owner of private property, the owner acquires a package of rights—the rights to possess, use, manage, gain income from the property—and if the owner chooses, to transfer it to another by sale, gift, or bequest.

B. How has the Right to Private Property been Defended and by Whom?

The right to the ownership of private property has been justified in a variety of ways by thinkers from Aristotle to John Paul II; from the Bible to America's Founders. The treatment here is not intended to be exhaustive but to focus on the justifications used by several key figures and sources on the subject of private property.

1. The Ancients. Among the Ancients, Aristotle in *Politics* discussed the reasons for his support for private property as opposed to common ownership advocated by Plato. Plato viewed the common ownership, where all property is shared in common, as the ideal arrangement for a society. Aristotle disagreed, first arguing that harmful consequences will follow from common ownership. "Property that is common to the greatest number of owners receives less attention; men care most for their private possessions, and for what they own in common less..." (Aristotle, Politics, II sec. 1261(b)) Common property where all work and all share sounds ideal, but as Aristotle points out, each person's contribution of work versus each person's claim on what is produced may be "unequal." Those who work hard and take little will eventually complain about those who work little and take much, creating discontent and disputes. (Aristotle, Politics, II, sec.1263(a)) In addition, owning property privately allows the owner to practice virtue such as helping friends in distress. By contrast, common ownership does not offer the opportunity to exercise liberality and charity. (Aristotle, Politics, II sec. 1263(a)), 1263(b)) Finally, "...to feel

that a thing is one's own private property makes an inexpressibly great difference for pleasure..." In other words, ownership brings a kind of happiness which is unique to being an owner. (Aristotle, Politics, sec.1263(a)).

2. The 17th Century Locke. We move ahead to the 17th century to the English philosopher and physician, John Locke. Locke's explanation for the origin of private property is one of the most referenced defenses of ownership in political thought and has a moral/religious component to it. All references here are to his *Second Treatise of Government.*

Locke starts with the proposition that "God...has given the world to men in common..." (Locke Ch. 5, sec. 26) Then Locke asks, how is it that "men could come to own various particular parts of something that God gave to mankind in common..." (Locke Ch. 5, sec. 25)

Locke now explains that "[E]very man has a property in his own person; this is something that nobody else has any right to. The labor of his body and the work of his hands, we may say, are strictly his." (Locke Ch. 5, sec. 27) This formulation may seem strange to us. Locke scholar George H. Smith, however, explains that the word "property" in the 17th and 18th centuries meant <u>having rightful dominion over something</u>. It was common, says Smith, for persons to speak of "property in one's conscience, in one's freedom, in one's happiness, and in one's time." (Smith, p. 5)

Locke, having taken the morally defensible position that each of us has property in our person, now argues that transferring this dominion over self to external objects, creates property in that object, which makes the ownership of private property morally defensible. Locke says it this way: "So when he takes something from the state that nature has provided and left it in, he mixes his labor with it, thus joining to it something that is his own; and in that way he makes it his property." (Locke Ch. 5, sec. 27) Locke reiterates: "He has removed the item from the

common state that nature has placed it in, and through his labor the item has had annexed to it something that excludes the common right of other men; for this labor is unquestionably the property of the laborer, so no other man can have a right to anything the labor is joined to..." (Locke Ch. 5, sec. 27)

Later in the *Second Treatise,* he states his view of how individual property is tied to the creation mandate to work and subdue the earth:

> "A man owns whatever land he tills, plants, improves, cultivates, and can use the products of. By his labor he, as it were, fences off that land from all that is held in common. Suppose someone objected: 'He has no valid right to the land, because everyone else has an equal title to it... That is wrong. When God gave the world in common to all mankind, he commanded man to work, and man needed to work in order to survive. So God and his reason commanded man to subdue the earth, i.e. to improve it for the benefit of life; and in doing that he expended something that was his own, namely his labor. A man who on obedience to this command of God subdued, tilled and sewed any part of the earth's surface thereby joined to that land something that was his property, something that no-one else had any title to or could rightfully take from him." (Locke Ch. 5, sec. 32)

Fundamental to Locke's moral defense of private property is that private property's origin, as an institution, arises prior to civil government. The right to private property antedates the state. America's founders, in the Declaration of Independence, adopted this view of preexisting rights with which His creatures were "endowed by their Creator."

Locke then proceeds to the next logical step. In a state of nature, property rights may not be well protected. Therefore, he says in Chapter 9 of the *Second Treatise*, that men form civil governments for this very reason. "The great and chief end therefore, of men's uniting into commonwealths and putting themselves under government, is the preservation of their property. (Locke, Ch. 9, sec. 124) [*emphasis added*] The Declaration continues in agreement with Locke: "That to secure these rights, governments are instituted among men..." In summary then, Locke explains the origin of property rights, identifies them as pre-dating civil government and argues that the government's primary reason for being is the preserving of those preexisting rights.

3. The 18th Century and Blackstone. We move from the 17th century to the 18th century and Sir William Blackstone, whose discussion of property rights is of particular importance. Blackstone was the commentator on the English common law who had untold influence on America's founders and colonial America. The American edition of his *Commentaries on the Law of England* published in 1771-1772 drew a pre-publication subscription of 1557 sets. The subscribers included "16 of the signers of the Declaration of Independence, 6 delegates to the 1787 Constitutional Convention, one was elected President of the United States [John Adams] and one became Chief Justice of the Supreme Court [John Jay]. Blackstone influenced James Madison (Nolan, pp. 743-745), later, John Marshall, and later yet, Abraham Lincoln." (Steiner, p. 1291)

His *Commentaries* describes the origin of private property by reference to the dominion mandate of the Bible. "In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man 'dominion over all the earth'...This is the only true and solid foundation of man's dominion over external things..." (Blackstone, p. 304) Blackstone goes on to explain that though the earth was at first given in common to all, "when mankind increased in number...it became necessary to entertain conceptions of more permanent dominion..." in order to avoid disputes and disorder. (Blackstone, 305) Blackstone continues: "It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage; but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art and labor." (Blackstone, p. 306) "Necessity begat property; and, in order to insure property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants—states, government, laws..." (Blackstone, p. 307) In short then: "Property, both in lands and movables, being thus originally acquired by the first

taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use… [gives the occupier] the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." (Blackstone, pp. 304 & 30)

4. The Scriptures. In addition to these philosophical/legal defenses, the Scriptures themselves, as interpreted by Christian commentators and clerics, maintain the principle of ownership. The Scriptures give specific protection to real and personal property owners by providing for punishment for those who commit crimes against owners of property. Most obviously, theft of property is condemned in the Decalogue by requiring restitution, that is, restoring of the good or its value, as well as super-restitution, which is requiring the violator to pay back an amount which is a multiple of the value of the item stolen. (Exodus 20:15; 22:1-4; Deut. 5:19; 23:24-2 5; Lev 19:11; 6: 2-7) Surely, a Commandment against theft has no meaning unless some things are one's own and some things belong to another.

Other Old Testament verses give protection to real property by declaring laws against boundary meddling which condemn moving landmark boundary stones by which the Hebrews marked the limits of their holdings. (Deuteronomy 19: 14; 27: 17) The moving of such boundary markers, a practice followed by land thieves, was hated with a righteous wrath by the Almighty. (Kent, p. 120ff) (See also Hosea 5:10; Proverbs 22:28; 23:10 and Job 24:2.) On the subject of inheritance, there are clear legal rules designed to protect the descent of property to family members. (Deut. 21: 15, 17; 25:5-6, Numbers 27: 1-11; 36:1-12.)

Holy Writ provides ample evidence of God's consistent recognition of ownership rights in property. He shows his intention to maintain and protect these arrangements, as well as his extreme dissatisfaction with those who attempt to take lawful property from another.

5. Religious Figures. Theologians and prelates over the centuries understood that the protection of property was supported by the Word of God. John Calvin, 16th century Protestant Reformer, commented on the eighth Commandment against theft. "To sum up: we are forbidden to pant after the possessions of others and consequently are commanded to strive faithfully to help every man to keep his own possessions." (Calvin, p. 408) Calvin also says that one of the functions of civil government is that "it provides that each man may keep his property safe and sound." (Calvin, p. 1488)

In like manner, Pope Leo XIII, speaking three centuries later, defended private property. In the encyclical, *Rerum Novarum* (1891) he disputed the rising socialist claim that common state ownership would be an answer to those who found themselves in poverty. "[E]very man has by nature the right to possess property as his own…. (p. 3) The fact that God has given the earth for the use and enjoyment of the whole human race can in no way be a bar to the owning of private property. For God has granted the earth to mankind in general, not in the sense that all without distinction can deal with it as they like, but rather in the sense that no part of it was assigned to any one in particular, and that the limits of private possession have been left to be fixed by man's own industry..." (p. 4)

Later still, Pope John Paul, II, already referred to above, stated in *Centesimus Annus* (1991):

> "God gave the earth to the whole human race for the sustenance of all its members, without excluding or favoring anyone...But the earth does not yield its fruits without a particular human response to God's gifts, that is to say, without work. It is through work that man, using his intelligence and exercising his freedom, succeeds in dominating the earth and making it a fitting home. In this way, he makes part of the earth his own, precisely the part which he has acquired through work; thus the origin of individual property. Obviously, he also had the responsibility not to hinder others from having their own part of God's gift; indeed, he must cooperate with others so that together all can dominate the earth." (p. 26)

6. America's Founders. Finally, American's Founders spoke eloquently in support of private property. Here is just a sample of numerous statements that could be cited:

In 1787 John Adams wrote: "Property is surely a right of mankind as really as liberty...The moment the idea is admitted into society, that property is not as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." (*Works*, Vol. 6, pp. 8-9)

In 1792 James Madison wrote: "Government is instituted to protect property of every sort...This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own...That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest." (Madison, p. 1)

Thomas Jefferson wrote to James Madison in 1789: "Persons and property make the sum objects of government." (Jefferson (1) p. 459)

Thomas Jefferson wrote to James Maury, 1812: "The first foundations of the social compact would be broken up were we definitely to refuse to its members the protection of their persons and property while in their lawful pursuits." (Jefferson (2) p. 145)

II. What Is Private Property's Relationship to Other Rights, Particularly Liberty?

"[T]he Framers treated the concepts of "liberty" and "property" as equally important and inseparable aspects of the freedoms guaranteed Englishmen on either side of the Atlantic before July 4, 1776." (Larkin, p. 16) Moreover, there is evidence that key Founders viewed the right to private property not only as being in parity with other rights, such as liberty, but that it occupied a position of primacy since property was essential to the full enjoyment of other rights.

Expressing this view of the preeminence of property, John Adams wrote in 1790 that "Property must be secure or liberty cannot exist." (*Works,* Vol. 6 p. 280*)* Even more direct is the statement by Arthur Lee, colonial patriot and publicist, in a pamphlet siding with the colonials against Britain's attempt to tax them without giving them representation in the body imposing the tax. Lee said, **"The right of property is the guardian of every other right and to deprive a people of this, is in fact to deprive them of their liberty."** (Lee, p. 25)

James Madison's well known article on "Property" captures this view that property, in the sense of dominion and ownership over things tangible and intangible. Property, to Madison encompasses an exceedingly wide scope of what might be regarded as "other rights." He wrote in 1792: "This term [property] in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in the exclusion of every other individual." (Madison, p. 1) This is a nearly word-for-word quotation from Blackstone. But Madison continues by explaining that there is a "larger and juster meaning" which "embraces every thing to which a man may attach a value and have a right…"

> "[M]an has **property** in his opinions and the free communication of them. He has **property** of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has **property** very dear to him in the safety and liberty of his person. He has an equal **property** in the free use of his faculties and free choice of the objects on which to employ them. **In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions."** Emphasis mine. (Madison, p. 1)

Is property entitled to a kind of foundational preeminence among the array of constitutional rights that Adams, Lee, and Madison claim for it?

Nobel laureate F. A. Hayek, in *The Constitution of Liberty*, supports that view. He argues, first, that liberty is the absence of coercion exercised over an individual against his will. Coercion "can be prevented by enabling the individual to secure for himself some private sphere

where he is protected against such interference...Coercion...would be much more common if no such protected sphere existed." (Hayek, p. 139) Hayek continues: "The solution that men have found for this problem [preventing coercion] rests on the recognition of general rules governing the conditions **under which objects**...become part of the protected sphere of a person or persons… [T]he recognition of private ...property is thus an essential condition for the prevention of coercion, though by no means the only one. **We are rarely in a position to carry out a coherent plan of action unless we are certain of our exclusive control over some materials objects; and where we do not control them, it is necessary that we know who does if we are to collaborate with others**." (emphasis added) (Hayek, p. 140)

To summarize: Hayek says that a secure private sphere where one cannot be reached by the coercion of another or by the state and in which a citizen owns exclusive control over material objects, that is, private property, is essential to the enjoyment and exercise of other non-property rights.

If one tests this with an example, say freedom of the press, Hayek, Madison, Adams and Arthur Lee are making an important point. Suppose the publisher of a newspaper is about to issue an editorial critical of a governmental policy. He is putting his right to freedom of the press into action. Their argument is that in order to convert his right into a tangible expressive act—a critical editorial—he requires the use of property. Adopting the terms of Hayek's formulation, one would say that in order to carry out his "coherent plan of action," the editor must have "control over materials objects"—paper, presses, distribution trucks, a building to house the operation and hosts of other pieces of property. Even in the digital era, where our editor is producing a podcast, he must have computer equipment, various microphones, proper lighting, internet access, pieces of software, and a secure physical location from which to launch his

digital editorial. If the editor, whether he is using a traditional or electronic medium, were to be denied these pieces of property by a legal prohibition, it would effectively thwart the exercise of the right of freedom of the press he is said to possess. Therefore, access to protected property helps to guard (Lee), make possible (Hayek), keep safe (Madison) the assertion of a separate right—freedom of the press.

Lest the reader conclude that the claim that property is integral to the protection of other rights is simply a hypothetical academic exercise, one only has to observe modern totalitarian regimes and how they operate. One of the inevitable steps they take in order to stifle criticism of their cruel, destructive rule is to severely restrict access by news media to pieces of property which are instrumental to publishing. In other words, theses regimes mute free speech and press by restricting property while giving lip-service to expressive rights.

We know that in the old Soviet Union under Brezhnev, there were restrictions imposed by the Communist regime on the importation and purchase of all typewriters, all carbon paper, and all copying machines. These potential "instruments of protest," so to speak, had to be registered with the government. (Swiss Review of World Affairs, p.19) Decades before that, the KGB required "proprietors of offices and stores...to provide local KGB branches with sheets of paper showing examples of the font of every typewriter they had. These sheets enabled the KGB...to determine the origin of any typed text" that was critical of the government and then to prosecute the offenders. (Mikoyan, p.3)

In like manner types of artistic expression have been suppressed by totalitarian regimes. Under communist rule in Burma, General Ne Win, in an effort to stamp out Western-style music and make certain that artistic expression occurred only "within the accepted limits of the 'Burmese Way to Socialism,'" prohibited all export and import licenses pertaining to music. One

Rangoon music producer zeros in on how this was done: "[W]e could not import musical instruments, recording equipment, long-play discs or even music magazines." Precisely! These property items were necessary to freedom of expression and when they were prohibited, musical liberty was curtailed. (Zaw, p. 41)

These are but two examples that could be multiplied many times over by the unrelenting depredations carried out by state socialist regimes in the 20th and 21st centuries whose intentions, at root, were to put into practice the aims of Marx and Engels proclaimed in Chapter 2 of the Communist Manifesto of 1848. "**Abolition of private property**." By doing so, such governments swept wide with the anti-property broom catching a host of other rights—press, speech, expression, assembly, religious liberty.

As Max Eastman, a former Communist who lived for a time in the Soviet Union, wrote as a converted supporter of property and liberty: "It seems obvious to me now—though I have been slow, I must say, in coming to the conclusion—that the institution of private property is one of the main things that have given man that limited amount of free and equalness [sic] that Marx hoped to render infinite by abolishing this institution...It never occurred to him, looking forward...these other freedoms might disappear with the abolition of the free market." (Eastman, p. 39)

Returning to our original question: "**What is the relationship between private property and enjoying liberty?**

The ownership of private property gives the proprietor an independence memorably expressed by J. Hector St. John de Crevecoeur in his "Letters from an American farmer, 1782." "In the instant I enter my own land, the bright idea of property, of exclusive right, of independence exalt my mind...this formerly rude soil has been converted by my father into a

pleasant farm, and in return it has established all of our rights; on it is founded our rank, our freedom, our power as citizens, our importance as inhabitants of such a district." (Crevecoeur p. 2)

The independence that Crevocoeur experienced is most assuredly, economic. The property owner has protected economic resources which he can use. If the owner experiences financial reverses, he has a stock of assets upon which he could draw. Of course, in 18th century America property was largely agricultural, but inhabitants also were "artisans, or shop owners, writers or inventors, and merchants or financiers, in a thriving colonial economy" so their property interests were not limited to land. (Larkin p. 5-6) However, the effects of property ownership are broader than that. Owning property created a citizenry whose members could express views that might be unpopular but which, nevertheless, represented an informed point of view. Property owners, in other words, were politically independent and not beholden to those in power whose views might differ from theirs. Finally, to understand Crevecoeur's exuberance, his Letter should be understood as a paean to the joy property brings much like that which Aristotle recognized. Ownership offers a unique kind of happiness, a distinct kind of pleasure, experienced alone by being an owner.

III. What is private property's significance for producing economic prosperity and how does its absence, in the form of non-ownership systems, contribute to poverty?

Having explained what property is, how it has been defended and also how it is integral to the protection of other rights, this paper now turns to the question of how a private property system contributes to **prosperity.** Following that, we look at non-ownership systems and the dire economic results produced under such systems.

A. Property and Economic Progress.

A system of private ownership produces economic prosperity. It could be defended alone based upon the economic well-being that it provides for those who live under it. The argument from the results or consequences of private property is often disparaged as not being a moral argument. Yet, if one system repeatedly yields significantly better material benefits to substantial numbers of citizens while non-ownership systems produce stagnation, slow economic development, and a low quality of life, then are not the opponents of property required to refute its superior performance before advocating its abolition or severe restriction?

Let's begin with the evidence of the superiority of systems that respect freedom and protect property. Over the past 35 years, researchers have tried to measure the disparity between free and open societies which subscribe to the rule of law, private property and freedom of markets and those which did not possess those characteristics. Beginning with studies in the late 1980s, such as one by Gerald Scully, the results have shown that open private property based economies grew at three times the rate and were two and a half times as efficient as economies where freedoms were abridged. (Scully, pp. 661-662) More recent indexes show the same pattern.

The Heritage Foundation Index of Economic Freedom is another attempt at measuring the consequences of free, property-protected countries. It covers 186 countries and is carefully constructed using 12 indices of economic freedom including "property rights" but also "tax burden," "monetary freedom," and "trade freedom." The 2019 Index considers 35 countries in the two top categories, "free" and "mostly free." Countries in that group, for example, are Hong Kong, Singapore, New Zealand, Switzerland, the United Kingdom, Canada, Ireland, the United States, Denmark, Sweden, Japan, South Korea and many others. Unfortunately, most of the remaining countries of the world (151) fall in the categories "mostly unfree" or even in the

bottom category called “repressed,” which predictably includes North Korea, Venezuela, Cuba, Zimbabwe, Sudan, Liberia, Chad and others. (Heritage, pp. 1-4)

The disparate impact on economic well-being between people in economies rated “free” or “mostly free” is startling. People in these top two categories “enjoy incomes that are more than twice the average levels in all other countries and more than six times higher than the incomes in the ‘repressed’ economies.” (Heritage p. 2)

Another major index, the International Property Rights Index (IPRI), has been developed by the Property Rights Alliance, an organization based in Washington D.C. dedicated to the promotion of property rights around the world. It has three components to its index: Legal and Political Environment, Physical Property Rights, and Intellectual Property Rights. The IPRI ranks 129 countries worldwide depending upon how consistently they protect private property—realty, personal property and intellectual. (Property Rights Alliance, IPRI Report 1-14 by Country) Predictably there is a great deal of similarity between the results of the IPRI and the Heritage Freedom Index. The two indexes contain many duplications in their top most and lowest tiers.

The findings on the disparity between average per capita income of citizens living in countries rated as strong on property rights (the IPRI’s top quintile) and its bottom quintile of countries where property rights are poorly protected, produces the same striking differences as the Heritage index, but even more pronounced. The average income of the people in the top quintile is 16 times that of the bottom group. Another way of saying that is that the high pro-property economies versus the low pro-property economies produce many times more income for their members than regimes that do not value property rights. The actual figures show an average per capita income for citizens in the top quintile countries of $57,343 and a meager

$3,648 for those living in countries who appear in the lowest quintile. (Property Rights Alliance, IPRI, Executive Summary, p. 10)

Another telling way to measure the prosperity of countries which promote and protect freedom and private property is to look at world migration patterns. The figures show the rational calculations of migrants as they seek countries where freedom and property protection produce opportunity and prosperity. Over 20% of the world's migrants consider their most desired destination to be the United States. Canada and Germany are the next most popular, together accounting for nearly more than 12%. So together, almost a third of immigrants favor countries that the two indices we have consulted consider relatively free and favorable to the protection of property. (*The Economist (3),* p. 4)

Though migrants favor countries where they can expect maximum freedom and property protection, they may be forced to choose less satisfactory countries which, nevertheless, improve their lot but whose policies are not ideal. The migrants from Venezuela, now over 4,000,000, are a case in point. "Los caminantes," which means in English "the walkers," have fled the disastrous socialist regime of Nicholas Maduro where the government refused to protect elementary property rights and fundamental freedoms. (*The Economist (1)* p. 33) Venezuela is rated in the repressed category by the Heritage Freedom index and 127th out of 129 in the International Property Rights index. Besides the failure to protect physical property and business property against the onerous reach of the socialist state, persons who had little physical property were also savaged by the run-away inflation of the Maduro regime wiping out their savings and earnings. Inflation is a cruel tax on poor citizens who must hold and use the depreciating currency, in this case the Bolivar. These severe Venezuelan inflation rates—a high during

February, 2019 of an annual rate of 344,509 % but "leveling off" in September 2019 to an annual rate of 39,113%, destroy monetary assets, that is, property in money! (Trading Economics, p.1)

Another important and beneficial comparison that the IPRI offers concerns the relationship between the protection of private property and the presence of corruption by governmental officials. The IPRI data show a strong negative correlation (0.934) between the corruption index and private property index. This means that as private property protection increases, the likelihood of corruption decreases and vice versa. Why? Because if less and less control over property is in the hands of government functionaries, the less likely the incidence of opportunities for corruption will occur. (Property Rights Alliance, IPIR Executive Summary, p. 8)

The evidence in favor of free societies and the protection of private property is remarkable. What produces such energy and prosperity?

(1) Private property and the promise of reaping the immediate fruits of one's labor unleash greater energy, effort, ingenuity and incentive from the owners of property. Pope Leo XIII captures it well: "...men always work harder and more readily when they work on that which belongs to them..." (Pope Leo XIII, New Catholic World, p. 156) This is one of the fundamental principles of human nature.

(2) The prospect of transferring what one has produced either by sale or bequest encourages efforts to better maintain and improve property, reducing the likelihood of deterioration. The owner anticipates the gain from an eventual sale, or the joy of presenting a material legacy to an heir.

(3) Private property in production goods (business investments) makes owners attentive to the needs of potential customers/purchasers. Private business owners must serve the consumer who is, after all, "sovereign" if they want to stay in business.

B. Non-Ownership Systems and their Discontents

On the side of private ownership systems are (a) convincing legal, moral, and religious defenses, (b) the monumental evidence of beneficial economic results, and (c) the operation of principles of human nature which are self-evident to all but the most ideologically blinded. Nevertheless, non-ownership systems—customary communalism and state socialism—still remain in place in much of the world today. What are the characteristics of these non-ownership systems and how do they impact countries in which they operate?

1. Customary Communalism as a Non-ownership System.

Under the legal theory of customary communal systems, there are no individual owners with fully constituted exclusive rights to use and benefit from property. (Gwartney, p. 29) When "property" is common or communal the property "belongs" to all the community members who have undivided non-exclusive interests in it. Put in technical language, customary land tenure is "based on the concept of group ownership of absolute rights in the land, with individuals acquiring usufructuary rights." (Maduekwe, p. 4) The term "usufructuary" means that individuals are not full-fledged owners but do have a limited right to occupy and use the land. No member of the group can lawfully keep another from use of the property. Neither can it be sold, but in some cases a limited right to use could be passed on to heirs for family use.

There is one very important note concerning customary land tenure generally. An "owner-occupier of land under customary law, in order to secure a loan," may make a pledge of the land to a creditor, for example, to secure a loan made by the creditor. However, if the debtor-pledgor

"is unable to pay the debt, the pledgee [creditor] has no power to sell the pledged land and any such sale will be void." (Maduekwe p. 9) This means that the land cannot effectively be used to secure a debt as land under Anglo-American law could be. Harkening back to Honore's bundle of rights theory of ownership, the most basic rights in that bundle—to sell, transfer by gift and will, to pledge as security—are not recognized under traditional communal arrangements. There is no ownership as Anglo-American law understands ownership, therefore, the designation as a "non-ownership system."

The world today and in the recent past offers various examples of customary land tenure arrangements (communalism) that illustrate the theoretical description above. Researchers, Otto and Stahl, briefly describe the history of east African land tenure this way: "Land was owned in common by the clan, lineage or the like, while heads of households had the right to use the pieces of land allotted to them and dispose of its product." (Otto, pp. 135-136) "European land laws were introduced during the colonial period, but did not completely displace indigenous traditions." (Otto, p. 136) After independence customary arrangements remained.

If one moves from East to the West African country of Nigeria in the mid-1980s, one finds a similar pattern. Except for land in and around Lagos, the capital, to which private title could be obtained because British colonial rule had established western-type ownership there, "...there is no such thing as private sector ownership of farmland." (Harman, p. 35) Why? As correspondent Nicholas Harman explains, the British colonial policy was to allow natives to retain their traditional communal land law (tribal and village "ownership") in most of Nigeria with few minor exceptions. At independence the system was not changed. When Harman reported 25 years later, communal arrangements still were the common type of rural land tenure. What has been described in theory above played out in practice. An individual Nigerian wishing

to purchase a piece of land on which to do his farming would have to begin by negotiating with the communal owners, the village leaders and councils. He would have to get further approval from the state governor. At either level, he could be refused. Even if successful he only received a "certificate of occupancy" which could be revoked any time. (Harman, p. 35) At best, the "property right" was and is a precarious, virtually revocable short-term lease. What incentive is there under such a land tenure system for a robust private sector in agriculture to develop. Why should a farmer invest in the land and attempt to improve it beyond subsistence if it cannot be sold or used as security for a loan? At best, his investment (fertilizer, land clearing, rotation) will be limited to a term short enough to benefit him alone rather than long-term gains.

Very little has changed for Nigeria today. According to the IPRI which, as mentioned above, measures the degree to which a country protects private property, Nigeria comes in with a ranking of 122 out of 129 countries worldwide; in other words, nearly at the bottom. (Property Rights Alliance, IPRI, Exect. Summary p. 3) The Heritage Foundation index of Freedom puts Nigeria in the "repressed category." The results are disheartening. At the time of independence Nigeria enjoyed "a sturdy economy and an agricultural sector that produced enough to feed the nation." (David Lamb, p. 301.) The continued existence of customary communal property is, however, an important factor, but not the only one, in explaining why Nigeria, today, is a net importer of food to the tune of $22 billion annually! (Charleston Chronicle, p. 2)

Customary communal arrangements are not limited to Africa. A similar arrangement plagued Latin America. Mexico is a good example. In 1915 as part of the Mexican Revolution, the Agrarian Law was passed. It recognized communal land tenures called "ejidos." They worked almost like the African communalism described above. The ejido was the larger communal plot for the village with individual plots assigned for the use of what were called ejidatarios.

(Schumacher, pp. 5-9) These were individuals with use rights on the plot assigned but not full legally-recognized ownership. They cannot sell the parcels, mortgage them or give them away, but whatever interest they have can be inherited. If an ejidatario abandons his plot, he loses it. (Powelson, p. 35) Since the early 1990s there have been movements to dismantle the ejido system; nevertheless, 498 million acres of Mexican farmland remains under this kind of land tenure. (Schumacher, p.13)

Economic science tells us that there are certain negative effects from such communal arrangements. When compared to full-fledged private ownership, the energy, effort and general productivity is diminished because the communal occupier has a much weaker guarantee that any effort he makes to improve or make more productive the property will inure to his benefit. He has no indisputable individual right to decide to sell his parcel. This means that he cannot with certainty plan to sell his parcel and purchase a better piece or shift out of farming altogether with the proceeds of the sale of the parcel. In reality he cannot use his property as security for a loan from an investor because of the legal restrictions on customary ownership. Even his right to transfer at death is precarious. Couple property insecurity with government crop-price controls, difficulties getting seed and fertilizer from what are often state-run monopolies (*The Economist (2)*, p. 44), and you have a recipe for low agricultural productivity.

2. A Case Study of the Creation of New Property Rights—Squatters Become Owners.

The positive fruits of creation of private property ownership where virtually none existed is well illustrated by the case of land squatters on the outskirts of Buenos Aires, Argentina. This case has received considerable attention from researchers and commentators. The story is a simple one. Various squatters, that is persons who occupy land but without having any right to be there (almost like communal dwellers), gradually settled on wasteland outside of urban Buenos

Aires. They thought it was unoccupied government owned land, but actually it was owned by various private persons who apparently paid little attention to the interlopers because the land was not worth much. The occupiers built make shift dwellings there over the years and created what can only be described as a neighborhood. (Galiani, p. 701)

In 1984, the Provincial government expropriated the land from the original owners, offering them compensation and, at the same time, proposed a process to existing squatters by which they would have an opportunity to obtain legally recognized titles to the plots they possessed. Though one cannot endorse such expropriation, that action created a kind of "experiment" much like a natural scientist would set up to test a hypothesis. The reason? Some of the original landowners opposed the expropriation by legal means, fighting it in the courts. However, others simply accepted the compensation, giving up their land to the squatters who then sought and obtained legal titles. Consequently, a portion of the occupying squatters became land title holders while others, because of the legal opposition of original owners, did not. This set up a kind of classic social science "experiment." The titled and untitled households were similar in income, wealth, and social status but differed, for all intents and purposes, only as to whether or not they had a title to their parcel. Over the next years, researchers collected data about the economic conduct of the "newly minted" owners with titles compared to their neighbors who only had weak possessory claims to their plots. The study, done by Galiani and Schargrodsky is detailed and technical, but the clearest finding was that "moving a poor household from" being an untitled household "to full-fledged property rights substantially improves housing quality." (Galiani, p. 708)

How in particular is housing improved according to the study? The study found that the quality of the dwellings of those who gained title improved in several ways. The proportion of

titled houses with good quality walls improved by 40%. The increase in good quality roofs increased by 47%. The "constructed surface" on the parcel went up by 12%. This would give increased enclosed and protected room to the households. The number of titled houses with concrete sidewalks increased by 16%. "Relative to the baseline average sample value, the estimated effect represents an overall housing improvement of 37% associated with titling." (p. 707) The authors note that this phenomenon results from several factors. Primarily, however, titles give the owner security against losing the improvements, citing the well-known work of Harold Demsetz who found that individuals under-invest if others may seize the fruits of their investment.

Of course, another obvious benefit of a title holder is that the title makes the transfer of the property by sale or bequest much easier and more secure, therefore giving the owner an additional incentive to make improvements. The authors also note that a title gives the owner the prospect of using his property as collateral to obtain a mortgage loan, and their findings call the access "statistically significant" although only 4% of families studied obtain mortgages. (pp. 710-711)

Academic researchers talk about "under-investment" and "investment effects" and "transferability." One of the residents, who now had a land title, Lidia Salvi Rojas, explained to *Wall Street Journal* reporter Matt Moffett how she reacted to becoming an owner of private property. Moffett reports that she and her husband went to work "to transform her hut into a decent house." They cleared out "muck" and "garbage" from the plot, brought in good "topsoil." They "replaced fiberboard walls with brick and the corrugated roof with a slab." The put a "satellite dish on the roof and security grill work on the doors and windows." They put in a cement sidewalk. Mrs. Rojas says: "I didn't mind the work because it was my own property."

That sums it up in a single phrase—**it was my own property**." (Moffett, p. 5 Chicago Tribune Reprint of Wall St. Journal Article)

3. State Socialism as the Destructive Culmination of Non-Ownership Systems.

These feeble ownership systems have ill effects on those who live under them. However, the type of non-ownership system that is the most destructive of economic well-being and liberty is **state socialism** after the Marxian model.

Marx and Engels boldly called for an end to private property. As they said: "In a sense, the theory of the Communists may be summed up in the single phrase: Abolition of private property." (Communist Manifesto, II) However, Marx and Engels claimed to be seeking abolition of only what they called "bourgeois property," not all property. The Manifesto claimed that the property of the "petty artisan and of the small peasant" did not have to be abolished. Only modern bourgeois property, that which exploits "wage-labor," would be the target of state mandated socialism. Marx was aiming, he said, at the bourgeoisie, "the middle-class owner of property." These persons must, indeed, "be swept out of the way and made impossible." (Marx, Manifesto. II Proletarians and Communists)

State socialism on the Marxian model became a reality in 1917 with the Bolshevik takeover of the Russian Revolution. In a short time, the Vladimir Lenin began issuing decrees aimed particularly at property which is not surprising. Confiscation Decree on Land of October 1917 abolished private property in the form of land. The nationalized land was said to become the possession of "all the people." (Communist regimes thereafter in Cuba, China and Vietnam, followed the same pattern, abolishing property in land as well as other private property.) Lenin followed with various decrees in late 1917—authorizing house searches, (Johnson, p. 65) and even confiscating warm blankets and clothing from "each rich apartment in Petrograd."

(Volkogonov) “For the time being it was only warm clothing, soon everything that could be taken would be.” The middle class, the bourgeoisie, that Marx had said would be “swept away” were experiencing the unrelenting use of force and expropriation against them. Lenin continued by subjecting all industry to worker control and nationalizing all factories. “All payments of interest and dividends” were stopped. (Johnson p. 65)

Although Lenin seized all property—industrial firms, other businesses, banks—this part of the paper will concentrate on the agricultural sector only. In his writing on the “Socialization of the Land, Lenin said that his aim was “to develop a collective system of agriculture” and the “expense of individual holdings.” The peasants, which Lenin called “Kulaks,” resisted. These were actually hardworking farmers who were effective producers and did not want to give up control of the land that Lenin had promised them. (Johnson, pp. 92-93)

“By the spring of 1921...Lenin’s whole economic policy, such as it was, lay in manifest ruin.” (Johnson, p. 93) It took him just four years to wreck the Russian economy. He retreated to what he called it his NEP (New Economic Planning) which was in reality “surrender to the peasants and the return to a market system based on barter” since the paper rouble’s value had been destroyed by profligate paper money printing. (Johnson, p. 93)

Two things are worthy of note. Property rights were destroyed only to be retained grudgingly, in part for a **short** time under Lenin. The bourgeoisie, the middle class, had their property taken and the peasant farmers would soon find themselves in the ruthless hands of the next Communist dictator, Joseph Stalin, who would force them into collective farms. Note well that it is the middle class, the very artisans, farm workers and decent citizens who Marx promised would not be touched by the abolition of property, who are the very people from whom property was taken. Lenin confirmed this view when he refused to exempt from property

confiscation what he called the "small commodity producers." This referred to peasant farmers who held small amounts of land. Lenin regarded them as creating a "petty-bourgeois atmosphere." (CQ Researcher, p. 4) This became typical of the claims of the state socialists elsewhere. The initial rhetoric of state socialism focuses on attacking and promising to seize large business enterprises, but in practice socialism's reach is much broader, seizing property from middle-sized enterprises and then even smaller ones as well as the individual property of all citizens.

Joseph Stalin came to power at the death of Lenin in 1924. The New Economic Planning which, as mentioned above, was really a retreat from total state socialism, continued moving the country temporarily back toward a kind of economic normality. However, that did not last for long. In 1927, the grain harvest was poor. Consequently, Stalin sent "30,000 armed party workers in the countryside" to requisition grain. (Johnson, p. 268) This in turn led the peasants to "sowing less" making "the 1928 harvest...even worse." (Johnson p. 269)

In 1929, Stalin decided to collectivize agriculture by force. "Without warning, Stalin called for an all-out offensive against the kulak." (Johnson p. 271) Kulaks were not a class, but simply those farmers most resistant to losing their land and being forced on to state farms or collective farms. Historian Paul Johnson calls the forced collectivization and its results "a calamity." "According to one scholarly estimate...between 10 and 11 million [peasants] were transported to north European Russia, to Siberia and Central Asia; of these one third went into concentration camps, a third into internal exile, and a third were executed or died in transit." (Johnson, 217) "The peasants who remained were stripped of their property, however small, and herded into the 'grain factories." (Johnson p. 272) In summary then, by start of the 1930s, property rights in what became the Soviet Union were essentially limited to some personal items.

"After three decades of collectivization, Soviet agriculture has been unable to match that of more advanced countries...In the 1960s, the Soviet government was still struggling to regain the dietary levels of 1913 and 1928." This is the assessment of a Soviet expert in 1962. (Abramovitch, p. 357) The only salvation for collectivist agriculture has been euphemistically called a dual-system of production, better known as **private plots.** Actually, private plots on which Soviet citizens could produce farm products for their own consumption and for resale, had been tolerated since the 1930s. By the 1950s and 1960s the portion of food produced on these private islands in a socialist sea was amazing as well as embarrassing to Soviet authorities. By 1964 these plots, "covering only 3.3 per cent of the total arable land of the Soviet Union" were estimated to "turn out 47 per cent of total Soviet meat production, more than 50 per cent of all milk production, 50 per cent of all vegetables, 70 per cent of all potatoes and 82 per cent of total Soviet egg production." (CQ Researcher, p. 6) The productivity of the private plots is a fitting reminder of how private ownership harnesses human energy and ingenuity to the task of overcoming scarcity of economic goods.

The production level of Soviet agriculture did not make the USSR self-sustaining moving into the 1970s and 1980s. During the 1970s, for example, the Soviet regime "relied heavily on imports of foreign agricultural products just to maintain previous levels of food consumption" mostly the U.S. and Canada. (CIA, p. 1) The CIA report continues downplaying the repeated and favorite Soviet claims that bad weather produced low crop production. Instead the report says "inefficiency, poor management, and other factors unrelated to climate have contributed to the slowdown in production growth." (CIA, p. 5) Repeatedly the CIA report mentions that "farmers were left with little incentive to maintain or increase efficiency..." (p. 6) "Inadequate incentives" (p. 8) or the need for "effective incentives" (p. 16) are pointed to again and again. The essential

problem is that the system of production, machinery supplying, provision of fertilizer and transport arrangement for crops, are all governed by central planning. The CIA report complains that until Soviet leaders realize the need for what the report calls "better coordination between participants in the food production process" more investment will not improve results. Put more candidly, the CIA report said that inefficiency and low-productivity would continue to be the hallmark of Soviet agriculture. Of course, little changed before the end of the old Soviet Union in 1989.

IV. What Has Happened to Diminish Private Property's Earlier and Vigorous Defense? Is Our Commitment to Private Property on the Road to Being Restored?

A. Property Rights Under Attack

One commentator has written that since the New Deal "the Supreme Court has permitted the government to regulate private property for reasons and in ways that would have astonished the Framers." (Larkin, p. 11) The New Deal case of *Wickard v. Filburn* (1942) supports that statement. There a farmer was prohibited from growing grain on his own fields to feed to his own cattle because it might potentially undermine a federal program intended to stabilize the price of wheat.

What in essence occurred as a result of this decision is that though the farmer remained a title holder, that is, he still had a deed to his property, some of the key rights in his bundle of rights were taken away from him. He retained possession, but his rights to use, manage and benefit from the income of his farm was severely curtailed. Government through its regulation and control usurped the farmer's rights—use, income and management—while leaving him with a mere skeleton of property ownership he once enjoyed.

This case, and a variety of others that follow, dealing with 'regulatory takings" and "eminent domain" actions are certainly part of the basis for the United States being only 12th on

the International Property Rights Index for 2019 and 12th in the Heritage Foundation Freedom Index, both mentioned earlier. In the Heritage Index, the U.S. falls into the "mostly free category" which is lower than the "free category". In accompanying commentary provided by those constructing the Index the writers say that in the U.S. **"property rights are guaranteed but protection has been uneven."**

There are two areas in particular where the protection of property rights have been diminished by post-New Deal courts. **The first is in the use and abuse of eminent domain powers and the second is in regulatory takings.**

1. Eminent Domain and the Attack on Private Property.

Eminent domain is that power of the government to take private property on those occasions when the property is needed for a "public use." Of course, the government which seizes the property must pay "just compensation" for it. Both the Fifth Amendment and the Fourteenth Amendment use similar language here although the Fifth is more specific in its demand that "just compensation" be paid if private property is taken. A common example of the exercise of that power would be the construction of a public highway. That project would ordinarily be considered to be furthering a public use, even though the parties might have to litigate the amount of compensation that was just.

Increasingly, in the post-WWII era, governments increased their use of the eminent domain power for projects which raised questions about what the phrase "for public use" included. The Supreme Court's decision in one of those cases, *Berman v. Parker (1954),* indicated that "public use" should be expanded to mean <u>any public purpose</u>. That case was about a Washington D.C. urban renewal program intended to take down "blighted" property (in this case a building owned by Berman) in order for beautification and redevelopment to occur.

Berman objected to the fact that his private property, which was in good condition and an operating department store, would eventually be handed over to another private owner, namely, a developer. This, said Berman, did not constitute a public use. The Court, however, disagreed giving wide and almost unbounded power to the government to use eminent domain. Justice Douglas writing said: "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." (*Berman,* p. 33) The Court went on to say that the eminent domain power was just a means available to exercise that power. "Thereafter, courts routinely deferred to legislatures and planning commissions in eminent domain actions to uphold virtually any use of eminent domain, even for private development." (Levy, p. 157)

Fifty years and many eminent domain takings later in 2005, the Institute for Justice and a courageous woman named Susette Kelo brought the scandal of the abuse of eminent domain power once again to the Court's attention. New London, Connecticut, spurred on by a state grant, decided to "revitalize" the Ft. Trumbull neighborhood of that coastal town. They were encouraged by Pfizer, the huge drug company, since a portion of the newly rejuvenated site would be used by them. According to accounts, Pfizer wanted the Trumbull neighborhood to be leveled and replaced with an upscale development that would include a five-star luxury hotel, top-tier condos, and office space for Pfizer suppliers, workers, and visitors. (Sparks (2), p. 1) Attorney Scott Bullock, a Grove City College graduate and an attorney for the Institute for Justice, pursued the case for Ms. Kelo.

Her contention was that when the government takes property by eminent domain, the seizure must be for a "public use." Ms. Kelo was being offered compensation by New London but her assertion was that in taking her property, and giving it to another private party for

development, this was no longer a public use. New London officials argued that greater tax revenues would be produced by the revitalization and, therefore, some public good was done by the restructuring of the Fort Trumbull area. Kelo and the Institute for Justice pointed to such a position as ominous for all homeowners, since local governments could almost always imagine a "higher use" to which individual residential property could be put. (Sparks, p. 1)

Unfortunately, the Supreme Court found in favor of New London and against Kelo. The opinion enshrined language from an earlier case, *Hawaii Housing Authority v. Midkiff*. As the opinion said that the "Court long ago rejected any literal requirement that condemned property be put into use for the general public..." (Hawaii Housing Authority v. Midkiff, 467 US 229, p. 244 (1984) That rejection of the literal requirement was a rejection of what the framers undoubtedly intended by "public use." Taking private property to build a road, for example, would produce a highway available to the general public. By contrast, the new development planned for Ft. Trumbull would be for private residential and commercial use and not remotely similar to a road or bridge. Nevertheless, the Court chose a very expansive meaning for public use, one which was basically not a limit at all on the government's power to seize private property for any purpose it desires. Despite the loss in the Court, the case produced a firestorm of protest across the country, leading over 40 states to more tightly control eminent domain abuse. (Jacobs, p. 18)

Three things are worthy of note. It is often local governments, not the federal government, which initiate the taking of their own citizen's property by this route. Secondly, the process frequently begins, as in this case, with a state government development grant. Thirdly, private businesses like Pfizer seek to take advantage of cities which find themselves in an economic malaise, as was true of New London. Pfizer received special tax forgiveness during the

dispute. Ironically, in the end, Pfizer decided to move its research jobs and installation elsewhere. (Sparks, 1)

2. Regulatory Takings Decreasing a Bundle of Rights.

The second area in which property rights have been compromised is what are called "regulatory takings." In short, a regulatory taking occurs when private owners retain title to their property but governmental regulations imposed upon them prevent them from using the property in the way they had intended, often destroying its value. We live today in a "regulatory state" meaning we are subject to governments—local, state and federal—which largely do their business and impose their will upon the citizenry by regulations. As John Cochrane, Hoover Institution, puts it: "The erosion of the rule of law is all around us. I see it most clearly in the explosion of the administrative regulatory state. Most of the laws we face are not in fact laws written by a legislature...they are regulations promulgated by agencies." (Cochrane, p. 61) "Were these even rules one could read and comply with, the situation wouldn't be so bad. But...the rules are so vague and complex that nobody knows what they really mean...On top of the laws, rules and judicial interpretations, now agencies write 'guidance letters' to state their interpretation of a rule, and these letters become law themselves." (Cochrane p. 62)

With the growth of the regulatory state—meaning federal and state agencies—the impact on private property rights has been substantial. Part of the problem stems from Court decisions made at the end of the New Deal era. In the *Carolene Products* case, 304 US 144 (1938) the Court took the position that when it comes to economic regulation the "legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transaction is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within

the knowledge and experience of the legislators." (p. 152) (emphasis added) This standard of review, known as the "rational basis test" was so patently easy for regulators to meet that it virtually guaranteed freedom from judicial interference. All that a regulator had to show was that the regulation was somehow rationally related to an end that the government thought necessary.

With this kind of blank judicial check in hand, the state and federal governments often became so bold in their regulatory frenzy that they produced factual scenarios that even the Courts could no longer ignore. So began a re-invigoration of judicial scrutiny of regulations that had so commonly diminished the bundle of rights held by a property holder that the regulations virtually took the property of the owner without compensating him.

B. Do we see a Revival of Property Rights in Some Case Law Today?

Starting in 1987, the Supreme Court of the United States began a process of issuing decisions which raised questions about what had been what one commentator correctly called its previous "hands off philosophy regarding governmental regulations..." and their impact on private property. (Mangini, p. 208) This paper now focuses on several key cases which have become part of a slow march away from judicial deference to regulators who impact private property.

The first case is ***Nollan v. California Coastal Commission*** **(1987).** The Nollans leased a beachfront cottage with an option to purchase. The dwelling was a small run-down property and the Nollans applied to the California Coastal Commission for a coastal development permit to erect a new three-bedroom house and demolish the bungalow. The Commission agreed to approve the new building but attached a condition that the Nollans would agree to grant a public easement over their property to the beach beyond. (p. 827) The Nollans objected and the case found its way to the U.S. Supreme Court.

The Nollans claimed that the easement requirement was a "taking" of their property and therefore required California to pay them compensation. The Californian Commission responded that the easement requirement was just "a restriction on use," as Justice Brennan contended, not a taking. (p. 831) The Court found for the Nollans, Justice Scalia writing. In his opinion Justice Scalia maintained that the condition attached did not involve a substantial governmental interest—the visibility of the beach, overcoming the psychological barrier that members of the public might have to using a beach where there are private beachfront developments or relieving beach congestion. There was not a clear connection between the easement requirement and the desired result. Therefore, the uncompensated exaction of an easement is not a valid land use regulation but comes close to being "an out-an-out plan of extortion." (p. 837) As Scalia concluded, if California "wants an easement across the Nollan's property it must pay for it." (p. 842)

Five years later the Court took up a case involving yet another coastal commission and its regulations imposed upon another beachfront property owner. In ***Lucas v. South Carolina Coastal Council*** (1992) the facts were even more favorable to the landowner. David Lucas bought two lots on a South Carolina barrier island, the Isle of Palms for $975,000 in 1986. His plan was to construct single-family homes on the lots. In 1988, South Carolina enacted legislation, the Coastal Zone Management Act, which had the effect of prohibiting him from building homes on the lots. At the time of purchase, Lucas was not obligated to obtain a permit from the South Carolina Coastal Council. (Lucas v. South Carolina Coastal Council. (p. 1008) Lucas filed suit in the South Carolina Courts arguing that under the Fifth and Fourteenth Amendments to the U.S. Constitution, his property was made valueless by the action of the Coastal Council, and that amounted to a taking of his property for which, at the very least, he

was entitled to just compensation from South Carolina. (p. 1009) South Carolina countered with its claim that it was simply carrying out its police powers to protect a public resource in the form of beaches and dunes and, therefore, it did not have to pay compensation. Further, it said that property owners take their land subject to an "implied limitation" that the state may "subsequently eliminate all economically valuable use." (p. 1028)

The Court referred to Justice Holmes famous maxim, announced in *Pennsylvania Coal Co. v. Mahon* that: "...while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." (p. 1014) Justice Scalia writing concluded: "...there are good reasons for our frequently expressed belief that, when the owner of real property is called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." (p. 1019) South Carolina, according to Professor William Fischel, purchased the lots to settle the matter and sold them to a developer refusing to take a lower offer than the developer from a preservationist. (Fischel, p. 61)

The third Supreme Court case which reveals the Justices new interest in reigning in regulatory takings was ***Dolan v. City of Tigard (1994)***. Florence Dolan, an elderly widow, was the owner of a plumbing and electrical supply store in the downtown business district of the Oregon city of Tigard. She wished to expand the size of her store; the city, however, would only grant the approval to build if she agreed to dedicate approximately 10% of her property for use as a green-space along a creek on the edge of her property and for a public pedestrian/bicycle pathway. (p. 379-380) Mrs. Dolan refused, arguing that the requirements that the city was insisting upon had no relationship to the proposed business expansion. Therefore, the city was

taking her property without compensation in violation of the Fifth and Fourteenth Amendments of the Constitution. (p. 382)

After various appeals through Oregon courts, the U.S. Supreme Court heard her case and found in favor of Mrs. Dolan. It ruled that regulatory conditions, in this case the green-space and bike path dedication, must be roughly proportional to the claimed harmful effects caused by the property owners proposal to expand her business. (p. 391) In this case, the Court found that the city had failed to provide evidence of that proportionality in at least two respects. It did not show why actually deeding the green space to the city would provide better protection for flood control when the owner had already agreed not to build on the space. (p. 393) Secondly, it saw no or little evidence of the relation of the required bike path to her business expansion, even though the city claimed such a path could possibly lessen congestion and give patrons another route to her store. (pp. 395-396) Once again, the Court helped protect citizens against regulators who had overreached by attaching various unrelated requirements to building permits.

In 2015, the Court, in a completely different kind of "takings" case, struck an important blow for private property. This time it was <u>not</u> for real estate protection but for personal property, that is tangible moveable property, namely raisins, that is dried grapes. In this case, Laura and Marvin Horne were raisin farmers and the case was **Horne v. Department of Agriculture.** Early one morning in 2002, a truck appeared at their business and the drivers demanded 47% of their raisin crop. The truck was sent by the federal government and those demanding Horne's raisin drop claimed to be operating under a "marketing order" which was part of a system first put in place in 1937 as part of FDR's effort to shore up agricultural prices. Amazingly, this system was still in effect. The Hornes refused to turn over the raisins and the case finally landed in the U.S. Supreme Court. (Sparks (1) p. 1)

Under the Agricultural Marketing Act of 1937, the Secretary of Agriculture could issue marketing orders to stabilize market prices for certain agricultural products including raisins. As a result, raisin producers could be forced to relinquish a portion of what they produced to the government without receiving any compensation. The plan was that the government would keep these reserve raisins off the domestic market—a reduction in supply—to help shore up prices. Of course, this whole system was intended to help farmers in the midst of the Great Depression when farm prices had fallen steeply. However, the Hornes wanted no part of it and claimed in their lawsuit that their property was being taken without just compensation. (Sparks (1), p. 2)

The Supreme Court agreed. The Fifth Amendment requires that property cannot be taken by the government for public use without the original owner being properly compensated. The Court stated that the raisin reserve requirement imposed by the Raisin Committee (part of the Department of Agriculture's administrative apparatus) is a clear physical taking. Actual raisins are transferred from the growers to the government. The Court said this was a true taking because the title to the physical raisins passed to the federal government's Raisin Committee which could then decide how to dispose of them. The Court refused to be convinced by the government's arguments that the takings clause did not apply to personal as opposed to real property. Moreover, the fact that at times the Raisin Committee managed to export the seized raisins and the growers might receive a residual payment did not constitute just compensation. It was too contingent and indeterminate. This is just another example of how U.S. citizens are subjected to a bevy of similar, antiquated and unnecessary regulations. (Sparks (1), pp. 1-2)

In 2017 in the case of ***Murr v. Wisconsin***, the Court seemed to take a step backward on property rights protection. The Murrs owned two lots, referred to as Lots E and F along the St. Croix River in Troy, Wisconsin. They received them from their parents who had purchased them

as separate lots in the l960s but had transferred them to the Murrs in two separate transactions, one in 1994 and the other in 1995. State and local regulations prevented the sale of a lot unless it had at least one acre of land suitable for development. Although the lots were over one acre in size, their topography was such that they had less than one acre suitable for development. When the Murrs decided to sell off lot E they found that the regulation in effect prevented the sale as a separate unit, so that the Murrs "could only sell or build on the single combined lot." (p. 1337) The Murrs filed suit, claiming that the regulations constituted a taking of Lot E because it deprived them of virtually all the use of it. The case worked its way to the U.S. Supreme Court. There, with eight Justices participating, due to the death of Antonin Scalia, the Court decided, 5-3 that the regulations did not amount to a taking. The Court's majority believed that it should view the two parcels as one unit, harkening back to language in an earlier case which says that the courts must consider the "parcel as a whole." Once that was determined, the Court's majority proposed a complicated multi-factor balancing test to determine the outcome, including restrictions on the land use in place when the lot was purchased, other regulations, physical characteristics, surrounding human and ecological environment, whether the regulations actually adds value by increasing privacy, expanding recreational space or preserving natural beauty. (pp. 1945-1946) One commentator exclaims that this list of factors is a "recipe for confusion, uncertainty, and constant litigation." (Somin, p. 4)

The minority, with Chief Justice Roberts writing, proposes a simple approach based upon the reality of the established boundaries of the property. Roberts says that he would "stick with our traditional approach: state law defines the boundaries of distinct parcels of land, and those boundaries should determine the 'private property' at issue in the regulatory takings cases...those boundaries, in all but the most exceptional circumstances, determine the parcel at issue." (pp.

1950 and 1953) Using this “property lines” approach would mean that the property which is adversely affected by the regulatory provision would be Lot E. Because under the regulations it could not be sold separately, there was a complete taking which, therefore, calls for just compensation in all likelihood. If, instead, as the majority opinion maintains, this is really a single property consisting of E and F, then the loss of value to E, produced by the regulation, will not completely destroy the value of the merged single unit (E & F) and therefore, might well not be a taking.

Though this opinion was a setback for property rights, it may only be a temporary one. The Court has now changed significantly in its makeup. Justice Kennedy has retired and been replaced by Justice Kavanaugh and Justice Scalia’s replacement, Justice Gorsuch, who did not participate in the case, will be able to do so. In addition, the death of Justice Ruth Bader Ginsburg and her replacement by Justice Amy Coney Barrett makes it likely that should a similar case be presented, the vote in favor of the Chief Justice's position would likely be 6-3, although no similar case is currently on the docket.

The most recent case in the pro-private property line is ***Knick v. Township of Scott* (2018)**. There the Court reversed a case which prevented citizens who were claiming that their property had been taken to get into Federal Court. Rose Mary Knick lived on a farm in the Township of Scott, Pennsylvania. The Township passed an ordinance requiring that all cemeteries within the township had to provide public access to the general public during daylight hours. Ms. Knick had a small family cemetery on her 90-acre property which a local official determined contained gravestones and, therefore, was subject to the ordinance. (Apparently some neighbors believed their relatives were buried there). Ms. Knick was threatened with fines of $600 per day if she did not comply by opening her property to the general public.

Ms. Knick brought a state law action for declaratory relief and an injunction against enforcement of the ordinance saying that the Township of Scott had taken her property. However, she did not bring what is called an inverse condemnation proceeding which means that she did not seek just compensation for the taking. (Knick, pp. 2-4 slip opinion in *Knick v. Township of Scott*)

Ms. Knick now encountered a dilemma which property owners had faced since a 1985 case called *Williamson County Regional Planning Commission v. Hamilton Bank* (1985) was decided. It stated that a litigant could not file a federal claim until she had first obtained a final decision on compensation from a state court. However, due to another decision, *Sam Remo Hotel v. City and County of San Francisco* 545 US 323 (2005), a final decision from a state court in a case where a litigant claims her property had been taken precludes a suit in Federal Court from hearing the "takings" claim because the Federal Court must give full faith a credit to that state court decision. Confusing. Yes indeed.

Therefore, the Supreme Court in *Knick* overturned *Williamson County.* Therefore, litigants can take their cases to Federal Court without first seeking a state court determination of their takings claim for just compensation. This is a boon for private property litigants and long overdue.

Conclusion: Private property rights are rightly and morally defended (1) by those who want to protect other non-property rights, (2) by those who value the human ingenuity and energy released by the prospect of ownership, and (3) by the proven deleterious effects on human well-being and advancement when private property is forsaken and replaced by oppressive non-ownership systems of human organization.

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