University of St. Thomas Journal of Law and Public Policy

Volume 16
Issue 1 *The Return of Public Goods*

Article 11

March 2023

The Problem of Property: Looking Back to the 'Dark Ages' to Get Through the Dark Ages

Lucas Clover Alcolea

THE PROBLEM OF PROPERTY: LOOKING BACK TO THE 'DARK AGES' TO GET THROUGH THE DARK AGES

LUCAS CLOVER ALCOLEA*

I. INTRODUCTION

Covid-19 changed many things, and challenged many of our deepest assumptions, but one thing it did not change is the immense gap between the 'haves' and the 'have nots' that exists in the world today.[1] In fact, studies show that the gap between the wealthiest and the poorest members of society has grown even larger as a result of the pandemic.[2] In that sense, one can

*Lecturer, Faculty of Law, University of Otago. This paper was presented at the St. Thomas Journal of Law & Public Policy Fall Symposium on 'Revitalizing Public Goods.' The author would like to thank all the members of the St. Thomas Journal of Law and Public Policy and Professor Charles J. Reid, Jr. for organizing such a stimulating symposium as well as for their helpful comments on his work. Additionally, he would like to thank all his fellow presenters for their unique and thought-provoking presentations. Lastly, he would like to thank his friends, family, the good Lord and the Holy Family without which this work would not have been possible.

[1] BRIAN KEELEY, INCOME INEQUALITY: THE GAP BETWEEN RICH AND POOR (OECD Publ'g 2015); JULIANA MENASCE HOROWITZ, RUTH IGIELNIK & RAKESH KOCHHAR, MOST AMERICANS SAY THERE IS TOO MUCH ECONOMIC INEQUALITY IN THE U.S., BUT FEWER THAN HALF CALL IT A TOP PRIORITY 52 (Pew Rsch. Ctr. 2020); *5 Shocking Facts About Extreme Global Inequality and How To Even It Up,* OXFAM INT'L (2020), https://www.oxfam.org/en/5-shocking-facts-about-extreme-global-inequality-and-how-even-it.

[2] Nikolay Angelov & Daniel Waldenström, *Income Inequality During the Covid-19 Pandemic*, VOXEU.ORG (Aug. 13, 2021), https://voxeu.org/article/income-inequality-during-covid-19-pandemic; Chuck Collins, *Updates: Billionaire Wealth, U.S. Job Losses and Pandemic Profiteers*, INEQUALITY.ORG (Oct. 18, 2021), https://inequality.org/great-divide/updates-billionaire-pandemic/.

speak of a sort of 'neo-feudalism,'[3] or oligarchy, where the clerisy and the oligarchs have been left mostly unaffected by the pandemic while the 'serfs' have had their lives turned upside down. That is, assuming that they still have any lives at all. It might be asked, "But what does all of this have to do with property? I see mentions of wealth, but none of property." The answer of course is that wealth, at least material wealth, is nothing more and nothing less than owning property. The rich own more, the poor own less (or even nothing). In consequence, if we are going to tackle the problem of wealth inequality, we must address the cause and not the symptom: Property. The west, and the U.S. in particular, has an absolute—some would say sacred—view of property. If I own something, you don't, you don't have any right to that at all, and I can have as much of that something as I want. How many people think like that today? Judging by the statistics and the real possibility of the emergence of 'trillionaires,' more than a few.[4]

The issue is that this view is not only false, and contrary to centuries of western ideas about property, but also dangerous. There can be no absolute right over, or absolute ownership of property because human beings are not absolute. We are merely mortal and whatever we own we must, sooner or later, and whether by our own choice or Death's, leave to someone else. This harsh but undeniable truth was reflected in the greater fluidity of the concept of property and ownership during the medieval and renaissance periods. Moreover, much of this more fluid and limited understanding of ownership and property is reflected in the most feudal aspect of contemporary common law legal systems, land, or real estate law. This article aims to explore what

---

[3] Robert Kuttner & Katherine V. Stone, *The Rise of Neo-Feudalism*, AM. PROSPECT (Apr. 20, 2020), https://prospect.org/economy/rise-of-neo-feudalism/; Joel Kotkin, *The Coronavirus Is Also Spreading A Dark New Era of Neo-Feudalism*, DAILY BEAST (May 25, 2020), https://www.thedailybeast.com/the-coronavirus-is-also-spreading-a-dark-new-era-of-neo-feudalism; Jodi Dean, *Communism or Neo-Feudalism?*, 42 NEW POL. SCI. 1 (2020).

[4] *Jeff Bezos Could Be World's First Trillionaire By 2026. Ambani, Jack Ma to follow - World's First Trillionaire?* ECON. TIMES (May 18, 2020), https://economictimes.indiatimes.com/news/company/corporate-trends/jeff-bezos-could-be-worlds-first-trillionaire-by-2026-ambani-jack-ma-to-follow/worlds-first-trillionaire/slideshow/75801789.cms; Tyler Sonnemaker, *Jeff Bezos On Track to Become Trillionaire By 2026 - Despite an Economy-Killing Pandemic and Losing $38 Billion In His Recent Divorce*, BUS. INSIDER (May 14, 2020), https://www.businessinsider.com/jeff-bezos-on-track-to-become-trillionaire-by-2026-2020-5.

we can learn from this maligned period of history, and how we can rediscover fundamental truths about our contemporary legal systems, in order to improve our own and avoid a 'neo-feudalism' in the early decades of the twenty-first Century.

To achieve these aims, this article will be split into four parts. The first will discuss the concept of property, including the justification for private property, in medieval and renaissance scholastic thought. The second will analyze how this more nuanced view of property and ownership is reflected in the feudal underpinning of modern land law in common law legal systems. The third will discuss certain modern controversies about private property and analyze them in the light of the scholastic and feudal view of property law outlined in the preceding two sections. The fourth section will summarize the preceding sections and conclude with some thoughts about the future.

II. THE CONCEPT OF PROPERTY IN MEDIEVAL AND RENAISSANCE SCHOLASTIC THOUGHT

It is fair to say that "For most contemporaries, private property is so unquestionable a principle that the idea of probing its validity or inquiring into its foundation seems sacrilegious"[5] but despite this it remains the case that "it is surprisingly difficult to justify it."[6] Indeed, it is for this reason that many patristic writings were extremely critical of private property[7] and it is therefore no surprise that one of the first questions Scholastic theologians tackled when discussing private property was: Why does private property exist? In fact, the Scholastics went one step further and asked whether it was licit for man to possess external things in the first place. Thomas Aquinas answered this question stating that "God has sovereign dominion over all things: and He, according to His providence, directed certain things to the sustenance of man's body. For this reason, man has a natural dominion over things, as regards the power to make use of them."[8]

---

[5] Pascal Massie, *Ethics of Property, Ethics of Poverty*, 12.1 ST. ANSELM J. 38, 38 (2016).

[6] *Id.*

[7] Hermann Chroust & Robert J. Affeldt, *The Problem of Private Property According to St. Thomas Aquinas*, 34 MARQ. L. REV. 151, 182 (1951).

[8] II:II Q. 66 a. 1 THOMAS AQUINAS, THE SUMMA THEOLOGIAE OF ST. THOMAS AQUINAS (2nd ed. 1920).

It is notable that even at this early stage, the Scholastics emphasized that this possession was not absolute with Aquinas stating that "The rich man is reproved for deeming external things to belong to him principally, as though he had not received them from another, namely from God."[9] Bonaventure has a different emphasis but answers in a similar way stating that—

> [A]nything required for sustaining natural life becomes the share of the person who is in extreme need of it, even though it may belong to someone else. It is impossible to renounce this form of common possession since it flows from the law naturally imprinted upon the human person, for that person is the image of God and the most honorable creature, for whose sake all the things of the world were made.[10]

The next concern of the Scholastics was why private property existed; was it a result of the fall or had it always existed (and could thereby claim to be instituted by God). The Scholastics concluded that private property did not always exist but was a result of the fall. For example, John Duns Scotus states: "The first conclusion is this: 'In the state of innocence neither divine nor natural law provided for distinct ownership of property; on the contrary everything was common'. Proof is found in [Gratian's] Decrees [dist. 8, ch. 1]: 'By the law of nature all things are common to all…'"[11]

This was also the view of Pope John XXII and William of Ockham. Indeed, the latter even went as far as denying that there was a common ownership, as opposed to mere use, prior to the fall.[12] Later Scholastics also approved of this view, for example, we find Suarez stating that "in the former [the incorrupt state], the natural law demanded for example, the liberty of all men, common ownership, and the like; whereas, in the corrupted state, it demands servitude, division of property, &c., a conclusion which may be

---

[9] *Id.*

[10] BONAVENTURE, DEFENSE OF THE MENDICANTS 297 (Jose de Vink & Robert J. Karris trans., Franciscan Inst. Publ'n, 2010).

[11] JOHN DUNS SCOTUS & ALLAN BERNARD WOLTER, JOHN DUNS SCOTUS' POLITICAL AND ECONOMIC PHILOSOPHY 31 (St. Bonaventure, N.Y.: Franciscan Inst., 2001).

[12] WILLIAM OF OCKHAM, A TRANSLATION OF WILLIAM OF OCKHAM'S WORK OF NINETY DAYS 318–23 (Lewiston, N.Y.: E. Mellon Press, 2001).

gathered from the Digest…and also from the Institutes."[13] Domingo de Soto similarly states "In the same way that possession in common of all things conformed to the state of innocence…as shown by natural law… Division of property conforms to the corrupted nature [of man]."[14] One can therefore speak of a "common…view that private property is a dubious product of the fall"[15] and an allowance to man's weakness as a result of original sin. Scholastic theologians did not therefore regard private property as an inherent good as, perhaps, some people do today but rather as a necessary evil.

The Scholastics also discussed how this division of property took place. St. Thomas deals with the topic fairly perfunctorily stating that "the division of possessions is not according to the natural law, but rather arose from human agreement."[16] Scotus, however, goes into more detail stating that "The first division of ownership could have been just by reason of some just positive law passed by the father or the regent ruling justly or by a community ruling or regulating justly, and this is probably how it was done."[17] He goes on to give the example of Noah as well as Abraham and Lot, before finishing that "This law, I say, was or could have been that anything unclaimed would go to the first occupant, and then they split up and fanned out over the face of the earth, one occupying this area, another that."[18] De Soto is more nuanced but states that—

> The first division of exterior things was done by the Ius Gentium, even if afterwards many other [divisions] were added by the civil law…and if you ask who was the first to make a division, there are some who say that it was Adam…[subsequently] each person took

---

[13] FRANCISCO SUAREZ & THOMAS PINK, SELECTIONS FROM THREE WORKS: A TREATISE ON LAWS AND GOD THE LAWGIVER; A DEFENSE OF THE CATHOLIC AND APOSTOLIC FAITH; A WORK ON THE THREE THEOLOGICAL VIRTUES: FAITH, HOPE, AND CHARITY 249 (Thomas Pink ed., Gwladys L. Williams et al. trans., Liberty Fund, 2015).

[14] DOMINGO DE SOTO, DE LA JUSTICIA Y DEL DERECHO: TOMO SEGUNDO, LIBROS III Y IV 296 (1968) (author's free translation).

[15] Brad Littlejohn, *Aquinas and Legal Realism: The Roots of Private Property,* POL. THEOLOGY NETWORK (2014), https://politicaltheology.com/aquinas-and-legal-realism-the-roots-of-private-property/.

[16] II:II Q.66 a. 2 AQUINAS, *supra* note 8.

[17] DUNS SCOTUS, *supra* note 11, at 35.

[18] *Id.*

> possession of lands and increased his riches, guided solely by reason, with the result that those things that were owned passed into the ownership of those who first occupied them and the rest respected this.[19]

The next key issue which has to be discussed is, given that private property was a result of the fall and was introduced by man: Why should private property exist? Again, we can turn to Duns Scotus on this point—

> First of all, communality of all property would have militated against the peaceful life. For the evil and covetous person would take more than needed and, to do so, would also use violence against others who wished to use these common goods for their own needs, as we read of Nimrod…Secondly, the original law would also have failed to ensure the necessary sustenance of mankind, for those stronger and more belligerent would have deprived the others of necessities.[20]

Thomas Aquinas has a slightly different focus but largely agrees with Scotus and states that it—

> . . . is necessary to human life for three reasons. First because every man is more careful to procure what is for himself alone than that which is common to many or to all: since each one would shirk the labor and leave to another that which concerns the community…secondly, because human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminably. Thirdly, because a more peaceful state is ensured to man if each one is contented with his own. Hence it is to be observed that quarrels arise more frequently when there is no division of the things possessed.[21]

The later Scholastic, Domingo de Soto, continues in this vein but discusses the matter in much greater depth. He states that private property conformed to man's fallen nature because without it, barring a miracle, the

---

[19] DOMINGO DE SOTO, DE LA JUSTICIA Y DEL DERECHO: TOMO PRIMERO, LIBROS I Y II 298 (1967) (Author's free translation).

[20] DUNS SCOTUS, *supra* note 11, at 31.

[21] II:II q.66 a.2 AQUINAS, *supra* note 8.

human race would have gone extinct.[22] He notes that there are three ways ownership could be in common:

I. Land could be divided but the fruits common;
II. Land could be common, but the fruits divided; or
III. Both land and the fruits could be common.

In the first case, there was a possibility of discord because the work of the owner and the person receiving its benefits was not equal. In the second case, individuals would not work as hard for the common good as for their own and all would therefore suffer. As De Soto memorably puts it "If you wished for land to be common, man would take from this a reason for laziness and weakness as there is no comparison between the burning love a man has for his own things and how lazy and weak he is for things held in common."[23] He goes to illustrate this by saying "In the same way so much greater the number of servants, so much worse is the service, because everyone hopes that someone else will do what needs to be done."[24] As a result, the division of the fruits would lead to jealousy and a similar problem would occur if both land and fruits were held in common as one would take "as many fruits as was possible, something that everyone else would also do, give the love for riches of man. This would inevitably disturb peace and tranquility between citizens."[25]

Although each writer emphasizes slightly different points, their message and conclusions remain the same: man's fallen nature is not apt for common ownership whether because of laziness or greed. The former point has also been emphasized by writers on the Soviet Union which point to the immense loss of life due to famines caused by collectivization policies,[26] and an even greater death toll occurred in China as a result of Mao Zedong's 'great leap forward' policies.[27] The truth of the latter can be demonstrated by

---

[22] SOTO, *supra* note 14, at 296.

[23] *Id.* at 297.

[24] *Id.*

[25] *Id.*

[26] Massimo Livi-Bacci, *On the Human Costs of Collectivization in the Soviet Union*, 19 POPULATION & DEV. REV. 743–66 (Dec. 1993).

[27] Justin Yifu Lin, *Collectivization and China's Agricultural Crisis in 1959-1961*, 98 J. POL. ECON. 1228–52 (1990); Vaclav Smil, *China's Great Famine: 40 Years Later*, 319 BRITISH MED. J. 1619–21 (1999).

the existence of widespread corruption in the Soviet Union[28] as well as the numerous recent Chinese corruption scandals.[29]

Having explained the creation and necessity of private property, it is also important to discuss what exactly was understood by the term 'private property' in scholastic thought. First, as a foundational point, there is the concept of 'dominion.' Aquinas explained that—

> External things can be considered in two ways. First, as regards their nature, and this is not subject to the power of man, but only to the power of God Whose mere will all things obey. Secondly, as regards their use, and in this way, man has a natural dominion over external things, because, by his reason and will, he is able to use them for his own profit…[30]

What Aquinas means by this, is that whilst man can use external things, he cannot control a things nature, for example, as noted by Francisco de Vitoria in his commentary on this passage, "man does not have the power to make it so that water does not heat up."[31] In a philosophical sense then, Man's dominion, or ownership, over external things only extend to their use.

---

[28] James Heinzen, *Unveiling a Bribery Culture in the Soviet Union,* YALE UNIV. PRESS BLOG (Dec. 21, 2016), http://blog.yalebooks.com/2016/12/21/unveiling-the-bribery-culture-of-the-soviet-union/; James Heinzen, *The Art Of The Bribe: Corruption, Law, and Everyday Practice In The Late Stalinist USSR*, FACTORY & MANAGER IN THE USSR 30 (1957); John M. Kramer, *Political Corruption in the U. S. S. R.*, 30 W. POL. Q. 213–24 (1977); Rudy Maxa, *USSR Corruption: An Insider's View*, WASH. POST (Oct. 24, 1982), https://www.washingtonpost.com/archive/lifestyle/magazine/1982/10/24/ussr-corruption-an-insiders-view/a9aa8a7a-2442-4e88-8004-4cd1567c8362/.

[29] *Corruption Scandal Embroils 57 Officials, Employees In Chinese State-Owned Steel Plant*, GLOB. TIMES (May 19, 2021), https://www.globaltimes.cn/page/202105/1223869.shtml; Emily Feng, *How China's Massive Corruption Crackdown Snares Entrepreneurs Across The Country*, NPR (Mar. 4, 2021), https://www.npr.org/2021/03/04/947943087/how-chinas-massive-corruption-crackdown-snares-entrepreneurs-across-the-country.

[30] II:II Q.66 a. 1 AQUINAS, *supra* note 8.

[31] JOSÉ LUIS CENDEJAS BUENO & MARÍA ALFÉREZ SÁNCHEZ, FRANCISCO DE VITORIA SOBRE JUSTICIA, DOMINIO Y ECONOMÍA: EDICIÓN Y CONTEXTO DOCTRINAL DE LA CUESTIÓN SOBRE EL HURTO Y LA RAPINA 210 (2020) (author's free translation).

Secondly, ownership (or dominion) can be distinguished from other forms of possessing private property. For example, "Dominion is a power over the nature of a thing; but use and usufruct only include power over its qualities and accidents. I say over the nature of the thing…because the owner can consume it (if it's consumable) …donate or sell it…and even kill it, as happens with animals."[32] However, usufruct—

> . . . is the right of making use and enjoying the things of others while respecting their being or substance. Because he who has a usufruct in the country, or of an orchard, can not just eat of its fruits but also sell them or even rent the field to another.[33]

By contrast, a mere user "only has the right to eat the fruits, or to feed his animals with them, but not to dispose of them in any other way."[34] Bonaventure similarly speaks of "ownership, possession, usufruct, and simple use."[35] Similarly William of Ockham states that "'Lordship is a principal human power of laying claim to a temporal thing in court, and of treating it in any way permitted by natural law.'"[36] This can be distinguished from—

> . . . bare use and usufruct and from every other right held from a principal lord, and also from the power of an agent, who has power to lay claim to something in another's name. Thus, although one who has bare use and usufruct has power to lay claim to the thing and also to defend it, yet he had that power from another who granted him the use or usufruct, keeping the first to himself without acquiring a new right.[37]

Thirdly, and lastly, ownership can be defined as "the authority and right which one has over any thing to make use it of it for their own benefit in any way permitted by the law."[38] It can therefore be distinguished from the right merely to make use of a thing or usufruct because "he who has only the use and usufruct, does not have his own authority, rather he depends on the

---

[32] SOTO, *supra* note 19, at 281.

[33] *Id.*

[34] *Id.*

[35] BONAVENTURE, *supra* note 10, at 307.

[36] WILLIAM, *supra* note 12, at 70.

[37] *Id.* at 67.

[38] SOTO, *supra* note 19, at 280.

true owners or the judge who permits it."[39] As already noted in the definition, this dominion or authority might be limited by the law for a just reason. De Soto gives the example of minors stating that "A minor has dominion of his goods before the age determined by law, but he does not have the power to freely dispose of them, given that he cannot donate the goods nor sell them, because the law prohibits their waste."[40]

At this stage, it is important to note that despite the scholastic's universal agreement regarding the need for private property and their definition of dominion as having full power over a thing, this power was not absolute. This followed from the fact that private property was merely a necessary evil and could therefore lead to significant societal problems of its own. The most obvious of these is the one that we face in the world today, the rich (and I define this term broadly) take too much and leave the poor with little or nothing. Thomas Aquinas addressed this point when he states:

> A man would not act unlawfully if by going beforehand to [a] play he prepared the way for others: but he acts unlawfully if by so doing he hinders others from going. On like manner a rich man does not act unlawfully if he anticipates someone in taking possession of something which at first was common property, and gives others a share: but he sins if he excludes others indiscriminately from using it. Hence Basil says… 'Why are you rich while another is poor, unless it be that you may have the merit of a good stewardship, and he the reward of patience?'[41]

De Soto similarly states that:

> Although it is convenient that riches, by which is meant property and dominion, are possessed particularly [i.e. not in common], with the end that each one may know by justice what is his and what belongs to others, nevertheless, given that mercy and liberality should be common, in the sense that whoever has to spare, shares it with those in need, and those in need are thankful to those who share. By this means the union between men is more easily forged even than if all

[39] *Id.*

[40] *Id.*

[41] II:II q.66 a.2 AQUINAS, *supra* note 8.

> things were held in common. From here is derived the axiom: Between friends all things are in common.[42]

It is clear from the above that private property is not given to man merely for him to hoard it and buy beachfront condos, Ferraris, and the like. Rather, he is to share his wealth with those in need a la Thomas Wayne. To quote a passage with which the above authors would certainly have been familiar, "And unto whomsoever much is given, of him much shall be required: and to whom they have committed much, of him they will demand the more."[43] In other words, wealth is a responsibility and an opportunity to practice virtue: Wealth should not be an opportunity for indolence, greed, or conflict. If it were otherwise, private property would lead to the same ills as ownership in common. The point is further elaborated by Aquinas when he states that—

> The division and appropriation of things which are based on human law, do not preclude the fact that man's needs have to be remedied by these very things. Hence whatever certain people have in superabundance is due, by natural law, to the purpose of succoring the poor…Since, however, there are many who are in need, while it is impossible for all to be succored by means of the same thing, each one is entrusted with the stewardship of his own things, so that out of them he may come to the aid of those who are in need.[44]

Aquinas goes further and notes that—

> if the need be so manifest and urgent, that it is evident that the present need must be remedied by whatever means be at hand (for instance when a person is in some imminent danger, and there is no other possible remedy), then it is lawful for a man to succor his own need by means of another's property, by taking it either openly or secretly: nor is this properly speaking theft or robbery.[45]

The right of private property must therefore yield to the absolute necessity of another person "by reason of his right to live."[46] As Scotus says:

---

[42] SOTO, *supra* note 14, at 297.

[43] *Luke* 12:48.

[44] II:II Q. 66 a.7 AQUINAS, *supra* note 8.

[45] *Id.*; BONAVENTURE, *supra* note 10, at 297.

[46] DUNS SCOTUS, *supra* note 11, at 77.

"The right to provide what is needed to sustain one's nature is a way conceded to everybody in extreme necessity."[47] Similarly, Suarez states that when interpreting the law against theft as not prohibiting a person in extreme necessity taking from another the necessities of life—

> [T]his is not epiekeia [equity] but rather a strict interpretation of the law in question. For it prohibits only theft, that is, the taking of another's property when the owner is reasonably unwilling, or the taking of that which is another's property in so far as relates to ownership and to use; whereas the taking of another person's property in cases of extreme necessity is not a matter having to do with what is absolutely another's possession, since with respect to such a time all things are common property, nor is it a case in which the owner is reasonably unwilling.[48]

It also follows that private property rights can be overridden by the state when needed and Suarez makes this point when discussing the twofold common good enjoyed by the State saying that—

> In a direct sense, however, it is a private good, since it is immediately subordinated to the dominion and advantage of a private individual. Yet it is also said to be a common good; either because the state has a certain higher right over the private goods of individuals, so that it may make use of these goods when it needs them, or also because the good of each individual, when that does not rebound to the injury of others, is to the advantage of the entire community, for the very reason that the individual is a part of the community. Thus the civil laws… declare it be expedient for the state that the citizens should be rich and that no one should abuse his possessions.[49]

In the same vein, Domingo de Soto states that—

> The head of state, as the custodian of society, can oblige citizens to contribute whenever there is need, in the same way that as the administrator of justice he can deprive owners of the goods that they have, or declare others inapt to receive them to punish their crimes.[50]

---

[47] *Id*.

[48] SUAREZ & PINK, *supra* note 13, at 366–67.

[49] *Id.* at 108.

[50] SOTO, *supra* note 14, at 310.

Scotus similarly justifies the civil law institution of prescription as justified even though it deprives a person of their property.[51] It is important to note that we are not here discussing an instance of "Your rights end where my rights begin," rather it is an inherent limitation in the concept of ownership. In other words, the right of ownership does not include the right to exclude a person who is in dire necessity and requires part of your overabundance of goods, or the need for the state to act in the public interest, nor does it include the right to use your possessions in a way contrary to the common good. Vitoria goes further and bluntly states that—

> Nobody owns things in such a way that he will never have to share them at some point. That is to say, man should not own external things as if they were his but rather as if they were common, in such a way that one can easily share them to meet other's needs.[52]

However, it is not entirely clear whether a person who takes another's property in dire need might in certain circumstances be bound to make restitution. Vitoria denies it stating that—

> The most common opinion states the opposite, this is what Saint Thomas appears to say, he says that all things are common in extreme necessity. If they are common, I have the right to them. I believe that the true opinion is that someone who needs to take something from a rich person, even if he subsequently achieves better fortune, is not obliged to return it, even if he obtains it by their authority… I deny it, because the thing is already mine in that instant. And even if you say that giving me a loan is helping me, I say that giving me money or something in this way does not sin so heavily, but nevertheless sins and makes my situation worse giving me a loan, because that thing belongs to a person in extreme necessity.[53]

One last issue that is worth exploring the Scholastic's view on, is that of the continued existence of common property. This is best dealt with by the later scholastics, for example, De Soto states—

---

[51] DUNS SCOTUS, *supra* note 11, at 37–39.

[52] CENDEJAS BUENO & ALFÉREZ SÁNCHEZ, *supra* note 31, at 211 (Author's free translation).

[53] *Id.* at 233–34.

> By natural law many things continued being in common, whose ownership could not be divided by the Ius Gentium, for example, [public] place[s], as Aristotle affirmed, or to put it another way, the city, the roads etc… The same occurred with other things such as the air, water, the coasts, ports, fish, wild beasts, birds etc. Because by natural law and by permission of the Ius Gentium the right of people to fish or to hunt were common, even if later civil law, not so much by justice but out of arbitrariness and custom prohibited it.[54]

Suarez similarly states—

> This positive precept [to own property in common] is even now in existence with regard to those things which are common, and for so long as they are not in any way divided; for no one may be prohibited from the common use of such things, generally speaking – apart, that is, from cases involving special necessity or a just cause.[55]

Similarly, Vitoria states—

> [T]he jurist's determination that by natural law running water and the open sea, rivers, and ports are the common property of all, and by the law of nations (ius gentium) ships from any country may lawfully put in anywhere…; by this token these things are clearly public property from which no one may lawfully be barred.[56]

To conclude the scholastic teaching regarding property can be summed up in seven main points:

I. God has endowed man with the right to possess, use and own external goods but ultimate dominion over creation remains with him.
II. Private property is not an absolute good, but a concession to man's weakness as a result of the fall.
III. Private property is necessary given the fallen nature of man as common property will inevitably induce laziness, greed, and conflict between men.

---

[54] SOTO, *supra* note 19, at 298.

[55] SUAREZ & PINK, *supra* note 13, at 318.

[56] FRANCISCO DE. VITORIA, POLITICAL WRITINGS 279 (1991).

IV. Private property is intended not just for the personal benefit of those who hold it but also to foster fraternal links between men given that 'between friends all is in common'.
V. The right of private property has to give way to the extreme necessity of another, although in some circumstances they may be bound to make restitution to the owner at a later date and must also give way before the common good.
VI. The division of common property into private property occurred through the actions of men and was not divinely instituted (although John XXII famously disagreed with this), whether by the *Ius Gentium*, civil laws, or a combination of the two.
VII. Certain property remained, and certain authors say should remain, in common ownership even after the institution of private property.

III. LAND LAW AND THE FEUDAL SYSTEM

The aim of this section is firstly to briefly introduce the feudal system and its effect on land, or real property, law and secondly to discuss how modern land law embodies (whether by design or otherwise) many of the doctrines developed by the scholastics. As the subject of land law is a vast one, this section will only look at three specific ways in which land law embodies scholastic thought:

I. Firstly, it will discuss the common laws unique use of time to measure and divide rights over land.
II. Secondly, it will discuss the complex feudal doctrine of 'Escheat.'
III. Thirdly, it will discuss the feudal doctrine of 'Eminent Domain.'

A. An Introduction to the Feudal System

The history of the feudal system is well known, as stated by Blackstone "The constitution of feuds had its original from the military policy of the northern or Celtic nations…who, all migrating from the same officina gentium…poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman Empire."[57] The system worked as follows "large districts or parcels of land were allotted by the conquering general to the superior offices of the army, and by them dealt out again in

[57] SIR WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 45 (11th ed. 1791).

smaller parcels or allotments to the inferior officers and most deserving soldiers."[58] Key to the system was—

> the condition annexed to them…that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the…oath of fealty: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.[59]

The system can be seen as improving fraternal ties between men, this being one of the grounds on which the scholastic's justified private property, given that "Allotments, thus acquired, mutually engaged such as accepted them to defend them: and as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions."[60]

The obligation of mutual defense would obviously lead to chaos if it was done in a disordered way, and thus

> government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command, of his immediate benefactor or superior; and so upwards to the prince or general himself.[61]

This is a simplification and the system varied significantly over time, for example, the way that land was parceled out in Anglo-Saxon England[62] was very different to the way it was parceled out in Anglo-Norman England.[63] Indeed, it is probably the case that the Feudal system did not exist in full rigor in England until after the conquest of William the Conqueror.[64] This was not

---

[58] *Id.*

[59] *Id.* at 46.

[60] *Id.*

[61] *Id.*

[62] JOHN H. BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, VOL. 2 at 93–149 (Oxford Univ. Press, 2004), https://hdl.handle.net/2027/heb.07841.

[63] *Id.* at 333–76.

[64] BLACKSTONE, *supra* note 57, at 48.

just due to "the importation of Norman ideas. Rather the very process of conquest and settlement had an effect. The distribution of land emphasised lordship, including the ultimate royal lordship, and dependent tenure, even if some men might see their lands gained through their own efforts rather than through a lord's grant."[65]

A key difference between Anglo-Saxon and Anglo-Norman land law, which has been of central importance in the development of common law land law, is the virtual suppression of the idea of 'allodial land.' This was land which was "held in absolute ownership, not in dependence upon any other body or person in whom the proprietary rights were supposed to reside or to whom the possessor of the land was bound to render service."[66] Anglo-Norman law, however, did not have such a concept but rather created the idea of feudal tenure which held that "all lands were originally granted out by the sovereign, and therefore holden, either mediately or immediately of the crown."[67] Over time allodial land was converted into feudal land,[68] not necessarily because this was forced on the allodial land owner but because "in those troubled times it often became a necessity for the poor alodial holder to enter into the train of retainers of a powerful lord in order to obtain protection."[69]

Aside from the oath of fealty discussed above, holders of land also had to make homage to the lord. This has been discussed by some authors as having a quasi-religious dimension[70] and in practical terms is described by Blackstone as the land holder—

> Openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sate before him; and there professing, that 'he did become his man, from that

---

[65] BAKER, *supra* note 62, at 333.

[66] KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY WITH ORIGINAL AUTHORITIES 4 at 13 (Oxford: Clarendon Press, 1892).

[67] BLACKSTONE, *supra* note 57, at 52.

[68] *Id.* at 48–52.; DIGBY, *supra* note 66, at 25.

[69] DIGBY, *supra* note 66, at 25.

[70] *See* JOHN HUDSON, LAND, LAW, AND LORDSHIP IN ANGLO-NORMAN ENGLAND 16 (Oxford: Clarendon Press, 1997).

> day forth, of life and limb and early honour:' and then he received a kiss from his lord.[71]

Homage was the way in which "the bond between lord and vassal was most clearly expressed."[72]

The next issue to be considered was what service the land holder would have to perform for the lord, although originally this was "only twofold; to follow, or do suit to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field"[73] it inevitably evolved over time. Blackstone holds that the various services developed into two main categories and two further sub-categories:

I. Free services, which were those that suited the character of a soldier or a freeman to perform.
II. Base services, which were fit only for peasants and those of a servile station to perform. This could include carrying out human excrement, gardening and so on.
III. Certain services, that is to say, that there was a fixed number or amount as regards the services. For example, to pay a particular amount of rent or to plough for a certain number of days (this would be a base service).
IV. Uncertain services, these depended on unknown contingencies. For example, to do military service in person or pay a fine (a free service) or to do whatever the lord commanded (a base service).[74]

These various combinations of services evolved into four types of tenure:

I. Knight-service, the most honorable but also the most onerous form of tenure. The primary service was originally that a knight would have to attend on his lord for wars[75] but over the years so many other services and restrictions were added to it that Blackstone does not shrink from calling it a complicated and extensive slavery.[76] It was abolished by King James II in 1660.[77]

---

[71] BLACKSTONE, *supra* note 57, at 53–54.
[72] HUDSON, *supra* note 70, at 16.
[73] BLACKSTONE, *supra* note 57, at 54.
[74] *Id.* at 60–61.
[75] *Id.* at 62.
[76] *Id.* at 76.
[77] *Id.* at 76–77; TENURES ABOLITION ACT 1660, IV (Eng.).

II. Socage, which is defined by Blackstone as "a tenure by any certain and determinate service."[78] As can be guessed from the above, socage was divided into 'free socage' "where the services are not only certain, but honourable,"[79] and 'villein-socage' "where the services, though certain, are of a baser nature."[80] Free and common socage is the only form of tenure which any new tenures of land by the Crown could be post 1660.[81] It is also the only form of tenure which exists in the U.S.,[82] with the exception of some states where legislation has proclaimed that all land is allodial land.[83]

III. Copyhold, which arose effectively from prescribed rights that villeins obtained against the lords of manors.[84] As described by Kerr serfs—

> . . . were permitted to retain their possessions on performing the ancient services; but, by doing fealty, the nature of their possession was, in construction of the feudal law, altered for the better…the acquiescence of the lord, in suffering the descendants of such persons to possess the land, in the court of years, altered the pretensions of the tenant in opposition to the absolute right of the lord; till at length this forbearance grew into a permanent and legal interest, which in after-times was called copyhold tenure.[85]

IV. Villein-socage, which was similar to copyhold in that holders of this form of tenure could not alienate or transfer their land but had to surrender it to the lord so that it could be granted out again. It "par[took] of the baseness of villenage in the nature of its services, and the freedom of socage in [its] certainty."[86]

---

[78] BLACKSTONE, *supra* note 57, at 79.

[79] *Id.*

[80] *Id.*

[81] TENURES ABOLITION ACT 1660 (Eng.), *supra* note 77, at IV.

[82] JAMES M. KERR, A TREATISE ON THE LAW OF REAL PROPERTY 194 (N.Y. Albany: Banks & Bros., 1895).

[83] *Id.* at 195; John V. Orth, *Escheat: Is the State the Last Heir?* 13 GREEN BAG 73, 77 (2009).

[84] BLACKSTONE, *supra* note 57, at 97.

[85] KERR, *supra* note 82, at 182–83.

[86] BLACKSTONE, *supra* note 57, at 99.

Another significant complication added to the feudal system is what were known as 'feudal incidents,' these were effectively other obligations attached to tenure.[87] These differed substantially depending on the type of tenure held but included homage and fealty, already discussed above, as well as:

I. Aids. These were "sums payable to lords at irregular intervals to help the lord out of some financial emergency, and in origin symbolize the 'stand or fall together' relationship of lord and man."[88]
II. Relief and Primer Seisin. The former was "the sum paid to the lord by a tenant who inherited his holding from an ancestor" whilst the latter was the lords right to certain profits or other sums from the land until this was paid.[89]
III. Wardship and Marriage. The former was "the lord's right to have the custody of the lands or person of an heir who inherited before attaining his majority" whilst the latter was the additional right to "sell the marriage of the ward."[90]
IV. Escheat and Forfeiture. The former could be divided into two categories, the first occurred when a tenant died without heirs in which case "the land [went] back to the lord from whom it is held"[91] whilst the second occurred when the tenant committed a felony and "when felony involved a breach of the tenant's obligation to serve his lord faithfully it was reasonable that the land should be forfeit to the lord."[92] The latter occurred when a person became a traitor and in this situation his land and goods were forfeited to the crown.[93]

Further complexity was introduced into the feudal system by the practice of sub-infeudation whereby "inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves… proceeding downwards in infinitum."[94] The more subinfeudation occurred

---

[87] Susan Reynolds, *Tenure and Property In Medieval England*, 88 HIST. RSCH. 563, 566 (2015); A. W. B. SIMPSON, A HISTORY OF THE LAND LAW 7 (2 ed., Oxford Univ. Press, 1986).

[88] SIMPSON, *supra* note 87, at 16.

[89] *Id.* at 17.

[90] *Id.* at 18.

[91] *Id.* at 19.

[92] *Id*.

[93] *Id.* at 20.

[94] BLACKSTONE, *supra* note 57, at 91.

the greater the distance between an individual tenant and the ultimate lord, such as the king or prince. This practice was abolished by the statute *Quia Emptores* in 1290 as it divested lords of their right to feudal incidents[95] although not as regards knight-tenure where some subinfeudations continued to exist,[96] but its existence demonstrates the extent to which the feudal system could multiply personal rights and obligations between individuals as regards possession of land.

It can be seen at this stage that although the system might have begun as "a plan of simplicity and liberty, equally beneficial to both lord and tenant,"[97] and indeed it is important to emphasize that feudal incidents were strictly regulated and could be to the benefit of the land holder,[98] over time the system was perverted into one from which the "most refined and oppressive consequences were drawn."[99]

One last crucial development of the feudal system was the doctrine of estates, Blackstone states that "An estate in lands, tenements, and hereditaments, signifies such interest as the tenant has therein: so that if a man grants all his estate in Dale to A, and his heirs, every thing that he can possibly grant shall pass thereby."[100] The idea is a logical outgrowth of the fact that tenants and lords, except the king, did not actually own the land they were merely tenants with the king being the ultimate owner. It is for this reason that "the medieval lawyers never spoke of a person owning an estate in lands…Freeholders are all tenants, so they [merely] hold the Manor of Dale (or whatever the property is called)."[101] Indeed, it is notable that—

> [L]awyers never adopted the premise that the King owned all the land; such a dogma is of very modern appearance. It was sufficient for them to note that the king was lord, ultimately, of all the tenants in the realm and that as lord he had many rights common to other lords (e.g. rights to escheats) and some peculiar to his position as supreme lord (e.g. rights to forfeitures).[102]

---

[95] QUIA EMPTORES 1290 (Eng.).

[96] KERR, *supra* note 82, at 187.

[97] BLACKSTONE, *supra* note 57, at 58.

[98] *See generally* SIMPSON, *supra* note 87, at I.

[99] *See generally id.* at I.

[100] BLACKSTONE, *supra* note 57, at 103.

[101] SIMPSON, *supra* note 87, at 88.

[102] *Id.* at 47.

Arguably then one could state that under the feudal system no one, not even the King, actually owned anything they merely had various rights over or in land relating in one way or another to its use.

Blackstone states that estates may be considered in three ways "first, with regard to the quantity of interest which the tenant has in the tenement: secondly, with regard to the time at which that quantity of interest is to be enjoyed: and, thirdly, with regard to the number and connections of the tenants."[103] As regards the first point, Blackstone states that "the quantity of interest which the tenant has in the tenement…is measured by its duration and extent."[104] There are various rights which one might have including:

- The right of possession for an uncertain period, for example during his life or the life of another,
- A right of possession which ends when he dies or passes to his descendants,
- A right of possession which lasts for a set period of time, or
- A right of possession which lasts forever "being vested in him and his representatives forever."[105]

This leads to the great divisions of estates, which remains to this day (albeit much simplified):[106] freehold, and estates less than freehold. This sounds simple but unfortunately it was anything but, the endless proliferation of and complications surrounding estates led to their brutal simplification in the English land law reforms of 1925.[107] The simplest category was the 'fee simple' this was a person who "hath lands, tenements, or hereditaments, to hold and his heirs forever: generally, absolutely, and simply; without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law."[108] This is one of only two types of estate which are allowed to take effect at law, as opposed to equity, by the (English) Law of Property Act 1925.[109] It is also important to note that numerous inferior estates can be carved out of the Fee Simple but the estate will survive such

---

[103] BLACKSTONE, *supra* note 57, at 103.

[104] *Id.*

[105] *Id.*

[106] *See generally* ELIZABETH COOKE, LAND LAW 3 (3 ed. Oxford Univ. Press, 2020).

[107] *See generally id.* at 3.

[108] BLACKSTONE, *supra* note 57, at 104.

[109] LAW OF PROPERTY ACT 1925, 1 (U.K.).

mutilation, for example, "if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall again hold it in fee-simple."[110]

The next type of estates were those which "are clogged and confined [one might justly say confused] with conditions or qualifications of any sort."[111] These were divided into three categories by Blackstone:

I. Qualified, or base fees;
II. Conditional fees; and
III. Fees-tail.

The first type of fee is one where there is a condition attached to it and it has to be determined whether that condition is finished or not. Blackstone gives the example of a situation where there is "a grant to A. and his heirs, tenants of the manor of Dale; in this instance, whenever the heirs of A. case to be tenants of that manor, the grant is entirely defeated."[112]

The second type of fee is where a fee was granted only to some specific heirs, for example, "the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or only to the heirs-male of his body, in exclusion both of collaterals and lineal females also."[113]

The third type of fee evolved from the second, and an act of parliament, so that

> the done no longer had a conditional fee-simple, which became absolute and at his own disposal the instant any issue was born; but [judges] divided the estate into two parts, leaving in the done a new kind of particular estate, which they denominated a fee-tail; and investing in the donor the ultimate fee-simple of the land, expectant on the failure of issue, which expectant estate is what we now call a reversion.[114]

Unfortunately, and as promised, the complication continues so that estates in fee-tail can be further divided into either general or special estates. The first

---

[110] BLACKSTONE, *supra* note 57, at 107.
[111] *Id.* at 109.
[112] *Id.*
[113] *Id.* at 110.
[114] *Id.* at 111.

is where "how often soever such done in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail."[115] The second is where the estate can only go to certain heirs of the done, for example, "where lands and tenements are given to a man and the heirs of his body, on Mary his now wife to be begotten: here no issue can inherit but such special issue as is engendered between them two; not such as the husband may have by another wife."[116]

There are also Freeholds which cannot be inherited however, that is to say, which are only for life.[117] In this case—

> Such estates…will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies…[for example] if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice.[118]

The next category of estates is that of those that are less than freehold, Blackstone divides these into three categories:

I. Estates for years (the last of the two types of estate which survives, at law, the English Law of Property Act 1925),[119]
II. Estates at will, and
III. Estates by sufferance.

The first of these is "a contract for the possession of lands or tenements for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enter thereon."[120] It is what we would now simply call 'leasehold.'[121]

The second of these "is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force

---

[115] *Id.* at 113.

[116] SIR WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 114 (11th ed. 1791).

[117] *Id.* at 120.

[118] *Id.* at 121.

[119] LAW OF PROPERTY ACT 1925 (U.K.), *supra* note 109, at 1.

[120] BLACKSTONE, *supra* note 57, at 140.

[121] GREAT BRITAIN LAW COMMISSION, LEASEHOLD HOME OWNERSHIP: BUYING YOUR FREEHOLD OR EXTENDING YOUR LEASE, 6 (Law Comm. 2020).

of this lease obtains possession."[122] Although the estate may be determined, that is to say terminated, at any time by either the landlord or tenant there are some restrictions on this. For example, if the tenant sows his land and the lease is determined before the crops are ripe, he shall have the right to enter and collect the crops.[123]

The third of these—

> . . . is where one comes into possession of land by lawful title; but keeps it afterwards without any title at all. As if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate.[124]

Holders of such an estate have virtually no rights and not only can they be ejected by the landlord, but they also have to account for their use of the land.[125]

A last point to make about feudal land law is that older common ownership systems of land holding survived, and continue to survive, the feudal system in England and Wales. This was the, appropriately named, concept of the 'commons.' Pollock described them as "Open and common lands, over which many persons have rights of putting so many beasts to graze, of cutting turf, and underwood for the use of their habitations, and the like, according to the custom of the country and place."[126] Blackstone address matters from a different tack, and discusses commons as a form of 'incorporeal hereditament' which he defines as "a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same."[127] Blackstone describes four types of commons:

I. Common of pasture, "a right of feeding one's beasts on another's land,"[128]
II. Common of piscary, "a liberty of fishing in another man's water,"[129]

---

[122] BLACKSTONE, *supra* note 57, at 145.
[123] *Id.* at 146.
[124] *Id.* at 150.
[125] *Id.* at 151.
[126] FREDERICK POLLOCK, THE LAND LAWS 5 (London Macmillan 1883).
[127] BLACKSTONE, *supra* note 57, at 20.
[128] *Id.* at 32.
[129] *Id.* at 34.

III. Common of turbary, "a liberty of digging turf upon another's ground,"[130]

IV. Common of estovers, "a liberty of taking necessary wood, for the use of furniture of a house or farm, from off another's estate."[131]

The above are all examples of what modern common law lawyers would call 'Profits à Prendre'[132] and it would therefore seem that Blackstone is using the word in a different sense than we would today or than Pollock does at points in his work (although, as will be seen below, Pollock also speaks of commons as a right separately from commons as land), although he is clearly familiar with the existence of land called 'commons.'[133] It may be that over time the use of the right over common by many people over a particular piece of land led to it being called, for example, 'Wimbledon Common' or 'Wandsworth Common' and thus the land took on the character of the right which certain individuals had over it.

Pollock argues, convincingly, that this common land consists of the remnants of the old common land which had not been divided into parcels of land by the sovereign. He states that—

> The people who exercise rights of common exercise them by a title which, if we could only trace it all the way back, is far more ancient than the lord's. Their rights are those which belonged to the members of the village community long before manors and lords of the manor were heard of… Such arrangements are relics of the time when separate ownership of land was in its infancy.[134]

He goes on to note that, "there is no doubt that much of [the common land] went on being occupied and used in the old fashion down to our own time.[135]

Pollock gives as another example of common land village greens which "not having been allotted by the township when the township was a reality, and having escaped wholly or in part from the encroachment of the

---

[130] *Id.*

[131] *Id.* at 35.

[132] THE LAW REFORM COMMISSION, REPORT ON THE ACQUISITION OF EASEMENTS AND PROFITS A PRENDRE BY PRESCRIPTION, 1.05 (Dec. 2002).

[133] BLACKSTONE, *supra* note 57, at 318.

[134] POLLOCK, *supra* note 126, at 6.

[135] *Id.* at 36.

lord or his agents, they remain open for common enjoyment."[136] In conclusion, "The old common land, then, is represented on the one hand by such remnants of the common system of cultivation as now exist in England, or lately existed; on the other hand, by rights of common and the like."[137] Much of this is of purely historical interest given that the vast majority of this land was enclosed, passed into private ownership, by a number of 'enclosure acts' from the sixteenth to the early twentieth centuries.[138]

However, there are still some commons in England and Wales today,[139] and the relatively recent 'right to roam' created in England and Wales can, in some sense, be seen as a vindication of the right of commons and an amelioration of the effect of the enclosure acts. Equally, the related right of 'ways' or "the right of going over another man's ground"[140] has fared significantly better than the right of commons with over 140,000 miles of public footpaths in England and Wales today,[141] although they too seem to be under threat.[142] In any event, the survival of common land in the feudal period conforms with the scholastics view that certain things should remain in common ownership including "[public] place[s], as Aristotle affirmed…the city, the roads etc.… [and] other things such as the air, water, the coasts, ports, fish, wild beasts, birds etc."[143] The matter will be addressed further in the third part of this work in the context of 'the right to exclude' but at this point, it is appropriate to conclude this (not so) brief exposition of

---

[136] SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 39 (2nd ed. 1898).

[137] *Id.* at 42.

[138] J. R. Wordie, *The Chronology of English Enclosure, 1500-1914 in* 36 ECON. HIST. REV. 483 (1983); Jerome Blum, *English Parliamentary Enclosure,* 53 J. MOD. HIST. 447 (1981); Frank A. Sharman, *An Introduction to the Enclosure Acts*, 10 J. LEGAL HIST. 45–70 (1989).

[139] Chris Short, *The Traditional Commons of England and Wales in the Twenty-First Century: Meeting New and Old Challenges*, 2 INT'L J. COMMONS 192–221 (2008).

[140] BLACKSTONE, *supra* note 57, at 419.

[141] UK Footpaths, Bridleways and Byways maps, FootPathMap.co.uk, https://footpathmap.co.uk/ (last visited Sept. 26, 2021).

[142] *Are Britain's Footpaths in Slow Decay?*, BBC NEWS (July 15, 2015) https://www.bbc.com/news/magazine-33523320.

[143] SOTO, *supra* note 19, at 298.

feudal land law and turn towards some of the unique aspects of common law property law which are influenced by feudalism.

B. The Use of Time to Measure and Divide Legal Rights in and Over Land

The common law has long had a unique way of viewing land ownership which includes a so called 'fourth dimension', that of time.[144] It was famously stated in the Sixteenth century Walsingham's Case that "the land itself is one thing, and the estate in land is another thing, for an estate is a time in the land, or land for a time, and there are diversities of estate, which are no more than diversities of time."[145] The court goes on to note that "he who has a fee-simple in land has a time in the land without end, or the land for the time without end, and he who has land in tail has a time in the land or the land for time as long as he has issues of his body, and he who has an estate in land for life has no time in it longer than for his own life, and so of him who has an estate in land for the life of another, or for years."[146] The idea of dividing estates by time would appear to be a very ancient one in English law which some writers arguing that it pre-dated even the Normans with Digby stating that—

> Anglo-Saxon customary law contributed certain other principles of permanent influence, modified more or less by the changes consequent upon the Consequent, to the conception of the rights of private property in land. Of these the principal is (1) the conception of the duration of an interest in lands.[147]

However, it would appear that the actual word 'estates' was not used until the Thirteenth century,[148] but regardless of when exactly rights in land began to be measured by time: it is clear that this was from an extremely early period in the development of English law.

---

[144] LAND LAW: THEMES AND PERSPECTIVES 12 (Susan. Bright & John. Dewar eds., 1998).

[145] Walsingham's Case [1573] EWHC KB J99, (1573).

[146] *Id.*

[147] DIGBY, *supra* note 66, at 21.

[148] SIMPSON, *supra* note 87, at 85–88.

It might be said that 'This is all very interesting, but why does it matter?' The answer to that question is twofold, the theoretical consequences and the practical consequences.

The theoretical consequences revolve around the question of 'What is Property?' And 'What is ownership?' As discussed above the scholastics discussed ownership and possession of land in terms of its use, private ownership of land was permissible as man had to use it in order to sustain himself and because it benefitted the community as a whole. Arguably, this emphasis on 'use of land' and a sort of 'special possession' which constituted ownership is reflected in the common law. This is because of the division in the common law between the land itself and rights in or over it, all of which are rights to use the land for a certain period of time and for certain or all purposes. There is therefore no bright line between ownership and use, indeed it would be make sense to talk about 'rights of use' rather than 'rights of ownership.'[149]

In other words, just as under the feudal law one could argue that no one (not even the Crown) truly owned the land, one can (dependent on local legislation) continue to make that argument today. This brings us back to De Soto's definition of ownership as "the authority and right which one has over any thing to make use of it for their own benefit in any way permitted by the law."[150] It is hard to see how any sensible definition of ownership could fail to include, whether implicitly or explicitly, the temporal restrictions on the concept given that "Man's days are as grass, as the flower of the field so shall he flourish,"[151] and it is Man which possesses things in this world. The mortal nature of man must therefore be incorporated into man's rights in or over land, given that the land will likely be there long after him: indeed, as Crowfoot said—

> Our land is more valuable than your money. It will last forever. It will not even perish by the flames of fire. As long as the sun shines and the waters flow, this land will be here to give life to men and animals. We cannot sell the lives of men and animals; therefore we

[149] See generally the pioneering article by Lynton K. Caldwell, *Rights of Ownership or Rights of Use? - The Need for a New Conceptual Basis for Land Use Policy*, 15 WILLIAM & MARY L. REV. 759 (1974).

[150] SOTO, *supra* note 19, at 280.

[151] *Psalms* 102:15.

> cannot sell this land. It was put here for us by the Great Spirit and we cannot sell it because it does not belong to us.

In many respects, much the same could be said of the feudal and scholastic conception of land, although we can sell rights over or in land: the land itself did not come from us, but from God, and was given to us in order for us to sustain and build ourselves up. In that sense, a proper understanding of the limited nature of man's rights over land offers an opportunity for reconciliation between common law ideas of property and indigenous ideas regarding property. That is something that is likely to be of interest to those jurisdictions which continue to struggle with the issue.[152]

Another theoretical impact of the division of land rights by time is the strengthening of ties between lord and landholder, and thus the general ties of fraternity between man as the scholastics would put it. The evisceration of feudal law over time means that this is no longer the case, however, and (speaking about Western Europe's last remaining feudal jurisdiction, before it abolished the feudal system, Scotland) a leading Scots legal academic stated that—

> To the notary of the time of Charlemagne, to the author of the Books of the Feus… the current Scottish system would appear not feudal but anti-feudal. Heritable proprietors are no longer bound to appear in arms at the summons of their superior, nor to attend to his courts and to submit to his judgments in legal disputes, nor do unmarried owners find themselves faced with the choice either to accept the wife selected for them by their lord or pay compensation if they are so ungrateful as to refuse.[153]

In England, and legal systems descended from her, this has long been the case due to the Tenures Abolition Act of 1660 as discussed above.

A last theoretical impact of the division of rights over or in land by time is the issue of the fair division of property. If land was permitted to be

---

[152] Mick Strack, *Rethinking Property Rights in New Zealand*, *in* FIG WORKING WEEK 16 (2004); Paerau Warbrick, *Commentary: A Cause for Nervousness: The Proposed Māori Land Reforms in New Zealand*, 12 ALTERNATIVE: INT'L J. INDIGENOUS PEOPLES 369–79 (2016); Leon Terrill & Sasha Boutilier, *Indigenous Land Tenure Reform, Self- Determination, And Economic Development: Comparing Canada And Australia*, 45 U. W. AUSTRALIA L. REV. 37 (2019).

[153] KENNETH G. C REID, THE ABOLITION OF FEUDAL TENURE IN SCOTLAND 5 (2003).

held by individuals indefinitely, without any restrictions whatsoever, then whoever seized land first could hold it forever and bar others from taking part of what was originally commonly owned. This takes us back to Aquinas's comments on the rich man barring the way of others discussed above. This limitation takes on a greater or lesser importance depending on the type of right that one has over or in land, hence leaseholders are most heavily restricted by time, as indirectly are conditional, qualified and fees in tail whereas fee's simple are little affected by it.

The practical impact of the division of rights over and in land by time is the difference between freehold and leasehold, or rather between freehold and lease for a specific number of years. In 2019-2020 there were over 4.5 million leasehold dwellings in England,[154] and of those many are held for only 99 or 125 years.[155] The system is also widely used in the Australian Capital Territory,[156] Singapore,[157] Hong Kong,[158] and exists in the U.S.[159] and

---

[154] Leasehold Dwellings, 2019 to 2020, GOV.UK , https://www.gov.uk/government/statistics/leasehold-dwellings-2019-to-2020/leasehold-dwellings-2019-to-2020 (last visited Sept. 21, 2021).

[155] When you buy a London flat, you're not really becoming an owner, NEW STATESMAN (Aug. 22, 2013), https://www.newstatesman.com/politics/2013/08/when-you-buy-london-flat-youre-not-really-becoming-owner.

[156] *Bills Digest 138 1998-99 Australian Capital Territory (Planning and Land Management) Amendment Bill 1999*, (Austl.) https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd9899/99bd138.

[157] Kok, Xinghui, *Are Singapore's 99-Year Leases and Falling Prices for Older Flats About to Become an Election Issue?*, S. CHINA MORNING POST (Mar. 2, 2020), https://www.scmp.com/week-asia/economics/article/3052963/are-singapores-99-year-leases-and-falling-property-prices-about; Do I Really Own my HDB Flat?, GOV.SG, http://www.gov.sg/article/do-i-really-own-my-hdb-flat (last visited Sept. 21, 2021).

[158] Land Tenure System and Land Policy in Hong Kong, LANDS DEP'T, https://www.landsd.gov.hk/en/resources/land-info-stat/land-tenure-system-land-policy.html (last visited Sept. 21, 2021); *Attention Needed on 2047 Land Lease Issue*, JONES LANG LESALLE (Oct. 7, 2020), https://www.jll.com.hk/en/trends-and-insights/cities/attention-needed-on-2047-land-lease-issue.

[159] Elizabeth Kolbert, *Indians Bill New York Town As Its 99-Year Leases Expire*, N.Y. TIMES (June 11, 1990) https://www.nytimes.com/1990/06/11/nyregion/indians-bill-new-york-town-as-its-

Canada[160] among other jurisdictions. In consequence, "a leasehold is therefore often referred to as a wasting asset: while it may increase in value… its value tends to fall over time as its length (the 'unexpired term') reduces."[161] Additionally, leaseholders might, among other things, have restrictions on the alterations they can make to their home without paying fees to the landlord. They may also have to pay service charges to their landlords and can immediately terminate a lease if the leaseholder breaches a term of the lease.[162] This is particularly problematic where, for example, it is discovered that the building is no longer up to fire safety standards due to unsafe cladding, or other issues, in the building with each leaseholder potentially liable for tens of thousands of pounds of remedial work.[163]

Another issue is that of 'ground rent,' even though the leaseholder has bought the lease he still has to pay rent to the landlord as a condition of his lease. The concept is not unique to England and Wales but also applies, in a modified form, in several U.S. states,[164] and refers to what was "traditionally a nominal sum or a peppercorn. A recent phenomenon has been the imposition of a ground rent that escalates during the term, at a rate far beyond that of inflation and rendering the long lease unmarketable -or ruinous- part way through its term."[165] The latter is very much an English problem.

99-year-leases-expire.html; Benny L. Kass, *Beware the Catch in the "Leasehold" Contract*, WASH. POST (Feb. 22, 2003) https://www.washingtonpost.com/archive/realestate/2003/02/22/beware-the-catch-in-the-leasehold-contract/c4380552-7ef9-4dcf-8a67-20ac6a066cd2/.

[160] Office of Housing and Construction Standards, *Long Term Residential Leases,* PROVINCE BRITISH COLUMBIA (Can.) https://www2.gov.bc.ca/gov/content/housing-tenancy/real-estate-bc/buying-selling/long-term-residential-leases.

[161] GREAT BRITAIN LAW COMMISSION, *supra* note 121, at 6.

[162] *Id.* at 10–11.

[163] Wendy Wilson, *Leasehold High Rise Blocks: Who Pays for Fire Safety Work?,* HOUSE COMMONS LIBR. (2021), https://commonslibrary.parliament.uk/research-briefings/cbp-8244/; *No Guarantees for Leaseholders Over Cladding Removal Costs*, BBC NEWS (Nov. 24, 2020), https://www.bbc.com/news/uk-politics-55046465.

[164] Frank A. Kaufman, *The Maryland Ground Rent - Mysterious but Beneficial,* 5 MD. L. REV. 1, 73 (1940).

[165] COOKE, *supra* note 106, at 187.

All of the above has led to significant efforts to reform leaseholder law in England and Wales,[166] with the result that many of leaseholds biggest disadvantages will fall away. For example, leaseholders will be able to extend their lease for up to 990 years at zero ground rent and the process of extending a lease or buying the freehold will be made significantly easier. Additionally, the Leasehold Reform (Ground Rent) Bill will only allow landlords in residential long leases to charge a peppercorn rent.[167] In many respects, though these reforms do not go far enough as freeholders will still have considerable control over what leaseholders can or can't do with their property and leasehold will still depreciate. In consequence, it is arguable that there is simply no justification for long leases to exist at all and they should simply be abolished.[168]

On the other hand, the system is essential in jurisdictions such as Singapore and Hong Kong where land is at a premium and efficient use of land is necessary for the common good. Indeed, the consistent failure to build homes in the U.K. at an acceptable rate[169] and high levels of immigration[170] mean that this argument may even have some force in the home of the common law. In that regard leasehold also accords with the definition of ownership over land being concomitant with a right to use it, if someone has the right to use land for the entirety of their lifetime (and some time afterwards): what more do they need? In any event, it is not necessary to take a position on the matter for the purposes of this paper, it suffices to point out the significant differences that exist between freehold and leasehold.

---

[166] Leasehold Reform in England and Wales: What's Happening and When?, HOUSE COMMONS LIBR. (2021), https://commonslibrary.parliament.uk/leasehold-reform-in-england-and-wales.

[167] LEASEHOLD REFORM (GROUND RENT) BILL, 1–6 (U.K.).

[168] Ben Mayfield & Lu Xu, *It's Time We Let the Feudal Leftover of Leasehold Ownership Expire*, THE CONVERSATION, http://theconversation.com/its-time-we-let-the-feudal-leftover-of-leasehold-ownership-expire-90406 (last visited Sept. 21, 2021).

[169] Cassie Barton & Wendy Wilson, *Tackling the Under-Supply of Housing in England*, HOUSE OF COMMONS LIBR. (2021), https://commonslibrary.parliament.uk/research-briefings/cbp-7671/.

[170] Migration Statistics Quarterly Report: August 2020, OFFICE FOR NATIONAL STATISTICS, https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/august2020.

In conclusion, although there are several theoretical effects of the division of rights over or in land by time the one that is most relevant today is the reality that no one really owns land they merely own a right to use it for a certain period of time. In terms of practical effects, the primary one is the difference between freehold and leasehold: other discrete, and indirect differences, will be discussed below in relation to the concept of escheat.

C. Escheat

Escheat is a specific feudal incident, or obligation, whereby "If a tenant dies without heirs… the land comes back to the lord from whom it is held."[171] According to Blackstone, the word—

> . . . is originally French or Norman, in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee.[172]

Ironically, the application of Escheat in this situation was abolished in England and Wales by section 46 of the Administration of Estates Act 1925. Similar legislation was passed much earlier in Australia,[173] and just over 40 years later in New Zealand,[174] but the principle does still exist in Canada at the federal level[175] and in Ontario,[176] as well as in a great number of U.S. states.[177] Indeed, even in England and Wales Escheat continues to exist in certain bankruptcy and insolvency situations[178] so that it is not strictly speaking dead in the jurisdiction which gave birth to it, as some authors have stated.[179] In many jurisdictions then, Escheat is not merely of historical

---

[171] SIMPSON, *supra* note 87, at 19.

[172] BLACKSTONE, *supra* note 57, at 582.

[173] SAMANTHA J. HEPBURN, 44 PRINCIPLES OF PROPERTY LAW (2nd ed. 2001).

[174] ADMINISTRATION ACT 1969, 76 (N.Z.).

[175] ESCHEATS ACT 1985 (Can.).

[176] ESCHEATS ACT 2015 (Can.).

[177] *See generally* Orth, *supra* note 83.

[178] Charles Harpum, *Does Feudalism Have a Role in 21st Century Land Law?*, 2000 AC 21–25, 23 (2012).

[179] Orth, *supra* note 83, at 77.

interest but has great practical interest and it remains of significant theoretical interest even in those jurisdictions where it has been abolished.

The theoretical interest of Escheat can be explained about what the fact that land held by someone who dies with no heirs reverts to the crown, or the state, means for land ownership generally. The point is neatly explained in the Nebraska case of *In re O'Connor's Estate*[180] where the Court states:

> In both England and the United States now, by escheat is meant the lapsing or reverting to the crown or the estate as the original and the ultimate proprietor of real estate… Clearly the theory of the law in the United States, then, is that first and originally the state was the proprietor of all real property and last and ultimately will be its proprietor, and what is commonly termed ownership is in fact but tenancy, whose continuance is contingent upon legally recognized rights of tenure, transfer, and of succession in use and occupancy. When this tenancy expires or is exhausted by reason of the failure of the state or law to recognize any person or persons in whom such tenancy can be continued, then the real estate reverts to and falls back upon its original and ultima proprietor, or, in other words, escheats to the state.[181]

Now it must be noted that, as discussed above, in reality feudal lawyers and those involved in the legal system would not have considered the Crown to actually own land: instead, the Crown merely had a pre-eminent right over or in land. In that regard, one can make mention of Suarez's discussion regarding the opinion that "the state has a certain higher right over the private goods of individuals"[182] and note that this is certainly true in common law legal systems. Escheat therefore dovetails nicely with the reality that an individual's right of private property is limited and subject to the greater right which the state exercises over property "for the common good."[183] This is even clearer with regards to the doctrine of eminent domain which will be discussed later.

It is important to contrast the doctrine of escheat with that of bona vacantia as the latter doctrine has supplanted escheat in several

---

[180] In re O'Connor's Estate, 126 Neb. 182 (1934).

[181] *Id.* at 184.

[182] SUAREZ & PINK, *supra* note 13, at 108.

[183] *Id.*

jurisdictions.[184] Whereas escheat is a folding in of an individual's lesser right over property into the Crown, or State's, greater right over property, "Bona Vacantia effectively means that the Crown acquires a new title rather than resuming control over property it had always owned."[185] In practice, it would also seem to be the case that land which vests in the crown as a result of Bona Vacantia instead of via escheat burdens the Crown with significantly greater obligations.[186] Despite these differences, Bona Vacantia is a corollary of the Crown, or State's, pre-eminent rights over land (or in many cases property generally). For example, in explaining the Crown's right to game animals Blackstone states that—

> . . . upon the Norman conquest, a new doctrine took place; and the right of pursuing and taking all beasts of chase or venary… was then held to belong to the king, or to such only as were authorized under him. And this, as well upon the principles of the feudal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures at his pleasure: as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are bona vacantia, and, having no other owner, belong to the king by his prerogative. As therefore the former reason was held to vest in the king a right to pursue and take them anywhere; the latter was supposed to give the king, and such as he should authorize, a sole and exclusive right.[187]

In this sense, whether one talks of Bona Vacantia or escheat both, albeit in different ways, refer back to the Crown or State's pre-eminent rights over property. Indeed, the importance of escheat lies not so much in the doctrine itself but rather what it points to: The Crown or State's radical title over all land. This concept has survived even in those jurisdictions where escheat has been abolished, for example in Australia it has been stated that "The radical title held by the Crown is based upon the premise that the

---

[184] Orth, *supra* note 83, at 77; HEPBURN, *supra* note 173, at 44.

[185] HEPBURN, *supra* note 173, at 44.

[186] Harpum, *supra* note 178, at 23.

[187] BLACKSTONE, *supra* note 57, at 721. Note the similarities in De Soto's treatment of the matter, especially regarding the right to hunt wild animals. SOTO, *supra* note 19, at 298.

sovereign, supreme lord is the ultimate possessor of all lands [N.B – possessor not owner]… it confers upon the Crown the right to issue tenurial grants and to remain absolute owner of unalienated lands."[188] Radical title has been similarly described in England and Wales with Gray and Gray stating that:

> The radical title is simply a brute emanation of the sovereign power acquired through physical conquest. It denotes the political authority of the Crown both to grant interest in the land to be held of the Crown and also to prescribe the residue of unalienated land as the sovereign's beneficial demesne.[189]

Radical title is also important as it agrees with the scholastics view that private property is an invention of, and supported by, positive human laws. Indeed, it even supports Dun Scotus's narrower view that "The first division of ownership could have been just by reason of some just positive law passed by the father or the regent ruling justly or by a community ruling or regulating justly, and this is probably how it was done."[190] In the feudal system this is exactly how property is divided, the Crown, usually in time immemorial, parceled out land and this was subsequently packaged and repackaged in numerous different ways over the centuries until it reached its current owner. Escheat is just one particular incident of this whereby a right over or in land passes back to he who granted it, the Crown, in certain circumstances.

D. Eminent Domain

Eminent domain is defined by one of the current leading U.S. treatises as "the power of the sovereign to take property for 'public use' without the owners' consent."[191] Early U.S. cases similarly define it as "The right belonging to the society, or to the sovereign, of disposing in cases of necessity, and for the public safety, of all the wealth contained in the state, is called the 'eminent domain'"[192] or "the highest and most exact idea of property, [which] remains in the government, or in the aggregate body of the

---

[188] HEPBURN, *supra* note 173, at 45.

[189] LAND LAW, *supra* note 144, at 11.

[190] DUNS SCOTUS, *supra* note 11, at 35.

[191] § 1.11 PHILIP NICHOLS, NICHOLS ON EMINENT DOMAIN (2013) https://advance.lexis.com/api/toc/source/MTA1MTc0Mg?origination=lawcc.

[192] Jones v. Walker, 13 F. Cas. 1059, 29–30 (1832).

people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the Constitution and laws of the State, whenever the public interest requires it."[193] Early cases note that it can be exercised not just where absolute necessity is implicated but also where it is merely expedient to seize the property in question, with one case stating that "This right of resumption may be exercised, not only where the safety, but also where the interest, or even the expediency, of the State is concerned; as, where the land of the individual is wanted for a road, canal, or other public improvement."[194]

The right is mentioned by Blackstone, almost as a qualification to his hyperbolic statements concerning private property rights, where he states that:

> So, great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce…. Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.[195]

[193] Beekman v. Saratoga & S.R. Co., 3 Paige Ch. 45, 73 (1831).

[194] *Id*.

[195] BLACKSTONE, *supra* note 57, at 107.

In some jurisdictions eminent domain is known as 'resumption' as in the case of Australia[196] and Hong Kong,[197] whilst in England and Wales,[198] Ireland,[199] and many other common law jurisdictions it is simply known as 'compulsory acquisition' or 'compulsory purchase.' Each of these terms hides slightly different realities behind them, the term 'eminent domain' focuses on the superiority of the State, or sovereign's, right over land. On the other hand, the term 'resumption' focuses on the process by which the State takes back land over which it has exercised 'eminent domain.' Given that all property is held from the sovereign once it is acquired via eminent domain it is effectively folded back into the sovereign's pre-eminent right over land who "simply took back full rights and control it."[200] This is also alluded to by the Beekman case quoted above which talks about the government or public having the right "to resume the possession of the property."[201]

The term 'compulsory acquisition' or 'compulsory purchase' is more complicated in that it not only refers to the fact that the taking of the property was against the will of its previous 'owner', but also because it marks a break from reliance on feudal concepts.[202] Whereas in the U.S. and other jurisdictions much is made of the sovereign's radical title over land, in England and Wales reliance is placed more on the supremacy of parliament. Compulsory Purchase is therefore not seen as an exercise of the Crown, or government's, prerogatives rights but rather of legislative fiat. As noted by an early American commentator on the subject "the absolutism of the Crown has given way to the absolutism of Parliament."[203] It is undoubtedly ironic that in an actual monarchy like England and Wales reference is made to the legislature rather than the Crown when discussing compulsory acquisition of land, whilst in a republic like the U.S. when discussing eminent domain

---

[196] *See generally* W. D. Duncan, *Acquisition of the Fee Simple in Queensland and Natural Justice*, 9 U. QUEENSLAND L.J. 66–75 (1975); Alan W. Williams, *Colonial Origins of Land Acquisition Law in New South Wales and Queensland*, 10 J. LEGAL HIST. 352–64 (1989).

[197] LANDS RESUMPTION ORDINANCE.

[198] MICHAEL BARNES, THE LAW OF COMPULSORY PURCHASE AND COMP. (2014).

[199] COMPULSORY ACQUISITION OF LAND (2017).

[200] Duncan, *supra* note 196, at 66.

[201] Beekman, 3 Paige Ch. at 73.

[202] *See generally* William D. McNulty, *The Power of "Compulsory Purchase" under the Law of England*, 21 YALE L. J. 639 (1912).

[203] *Id.* at 640.

reference is made to the former prerogatives of the Crown now exercised by the State.

Unfortunately, the compulsory purchase system in England has led to a sort of intellectual sterility regarding the nature of compulsorily purchased rights, one could say that as a result of parliamentary supremacy it is generally believed that 'Londinium locuta est, causa finite est' and thus there is no point examining the matter. However, in reality there are several questions to be asked: For example, does the state acquire a freehold over compulsorily acquired land and then transfer the freehold to itself or those developing the site? This would seem a bit ridiculous as the State could hardly hold land from itself, at least in those situations where are not discussing sub-divisions of the State (e.g., local councils) but parts of the national government (e.g., the Ministry of Defense). If it is true that the State cannot be its own 'tenant,' then it would seem that even in England and Wales the language of 'resumption' is more accurate than 'compulsory purchase'. In that sense even in England and Wales where the doctrine of eminent domain has been largely supplanted by the statutory scheme,[204] the feudal system still influences (at least the theory of) compulsory purchase.

In any event, this branch of law has been significantly more developed in the United States than in almost any other country and it is therefore clear that to understand it we must primarily focus on U.S. jurisprudence. Although several justifications for eminent domain have been advanced,[205] the one that is most appropriate for our purposes is the view that "eminent domain is a remnant of the ancient law of feudal tenure. In course of time the power to revoke the grants of lands was whittled away. The people still own the land with a power to take it back upon payment of just compensation if the taking back is for the use of the people."[206] This view is supported by the fact that the concept of resumption, whereby the Crown cancelled grants of land and took back possession of it, did operate in English history on several infamous occasions.[207] Moreover, Australia represents a

---

[204] BARNES, *supra* note 198, at 3.

[205] § 1.13 NICHOLS, *supra* note 191.

[206] Matter of New York City Hous. Auth. v. Muller, 155 Misc. 681, 681 (1935).

[207] B. P. Wolffe, *Acts of Resumption in the Lancastrian Parliaments 1399-1456*, 73 ENG. HIST. REV. 583–613 (1958); Frances Nolan, *'The Cat's Paw': Helen Arthur, the Act of Resumption and The Popish Pretenders to the Forfeited Estates in Ireland, 1700–03*, 42 IRISH HIST. STUD. 225–43 (2018); MATTHEW HALE & BLACKERBY

compressed example of the whittling away of the right to cancel land grants given that attempts to cancel grants made out by the local authorities, on behalf of the Crown, were resisted until the authorities began to accept that they should pay compensation for resuming possession over land.[208]

In addition, one can also mention the various Homesteads Acts as further evidence of the State's pre-eminent role in creating rights over or in Land in the United States. These Acts provided that "land was to be given to anyone willing to endure the hardships of frontier life"[209] and "required residing on the land, usually for five years; developing irrigation systems; constructing buildings; planting trees; and plowing a specified portion of the claim." [210] The Acts were remarkably successful in their aim of turning formerly common land (or property) into private land (or property), indeed "Over the 77-year period [the Homestead] Act was in full effect… three million people applied for homesteads and almost 1.5 million households were given title to 246 million acres of land… This represents a remarkable transfer of wealth and assets. Overall, approximately 20% of public land was given away to homesteaders…. [it is] estimate[d] that 46 million U.S. adults are descendants of homesteaders."[211] In consequence, in the United States one does not have to go back centuries or even to 'time immemorial' to discuss when the sovereign originally granted out land: one can find evidence of this practice in relatively recent times. It need not be said that if one goes back further, to the foundations of what was to become the United States, here again we see rights over or in land being handed out by the State to private parties.[212]

FAIRFAX, A TREATISE OF THE JUST INT. OF THE KINGS OF ENG., IN THEIR FREE DISPOSING POWER, AND THE VALIDITY OF THEIR GRANTS MADE TO ANY OF THEIR SUBJECTS. AND THE HIST. OF ACTS OF RESUMPTION, AND HOW THEY HAVE BEEN GAIN'D. WRITTEN AT THE REQUEST OF A PERSON OF HONOUR' IN THE YEAR 1657, BY A PERSON LEARN'D IN THE LAWS, SUPPOS'D MY LORD CHIEF JUSTICE HALES. TO WHICH IS ADDED, A PREFATORY DISCOURSE IN ANSWER TO A DISCOURSE ON GRANTS AND RESUMPTIONS, AND ANOTHER OF THE EXORBITANT GRANTS OF W. III (1703).

[208] Williams, *supra* note 196.

[209] Terry L. Anderson & Peter J. Hill, *The Race for Property Rights*, 33 J. LAW & ECON. 177–97, 185 (1990).

[210] *Id*.

[211] *Trina R. Williams Shanks, The Homestead Act of the Nineteenth Century and its Influence on Rural Lands*, CSD WORKING PAPER, 3 (2005).

[212] DAVID A THOMAS, HIST. OF AM. LAND LAW 9–11 (2013).

Despite the clear support for the feudal theory behind eminent domain in the U.S., it has been the subject of trenchant criticism[213] and the leading treatise on the topic states that "it is now generally considered that the power of eminent domain is not a property right, or an exercise by the state of an ultimate ownership *in* the soil, but that it is a power based upon the sovereignty of the state."[214] However, it is worth noting that the Sovereign's claim to property under the feudal system was exactly based on his sovereignty, even if this was understood via the lens of property law. The criticisms of the feudal theory behind eminent domain therefore seem to be based on a misunderstanding of the feudal system itself and it is submitted that the feudal justification for eminent domain remains the most convincing.

In any event, eminent domain (or whatever other name one might ascribe to the process of the State acquiring rights over land against the previous rightsholder's will), is a clear instance of the common good prevailing over the individual good. In this sense, eminent domain is an even more obvious example than escheat of what Suarez refers to as 'the higher right of the state' over private property and it also accords with Domingo de Soto's statement that "The head of state, as the custodian of society, can oblige citizens to contribute whenever there is need, in the same way that as the administrator of justice he can deprive owners of the goods that they have, or declare others inapt to receive them to punish their crimes."[215] The reason that an individual's private right of ownership must yield to a public need is because, as Suarez states, "the individual is a part of the community"[216] and whatever is done will therefore also be to his benefit, even if only indirectly. Eminent domain is also a clear example of private property being, as held by the scholastics, only a result of positive human law i.e., private property rights can be suspended as and when needed by the State. As with escheat, but a fortiori, eminent domain also supports Scotus's view that common property was first divided into private property by the state.

It should be noted that Eminent domain has led to interminable debates about, inter alia, what constitutes property, what constitutes public use, and what constitutes a 'taking.' If this article was to discuss those issues it would not be an article but rather a multi-volume treatise that would take up, at least, a bookshelf or two. Instead, this article merely aims to lay out

---

[213] § 1.13 NICHOLS, *supra* note 191.

[214] *Id.*

[215] SOTO, *supra* note 14, at 310.

[216] SUAREZ & PINK, *supra* note 13, at 108.

the connection between eminent domain, the feudal system, and scholastic philosophy regarding property law: it will leave attempts to cut through the thick jungle undergrowth of eminent domain controversies to more adventurous scholars. At this stage, the author hopes that the article has achieved its modest aim and will therefore turn to analyzing modern controversies regarding property.

IV. MODERN PROPERTY CONTROVERSIES

This section aims to discuss two of the most prominent controversies regarding property and analyze them in the light of the principles discussed in the last two chapters, and in particular against the idea of 'revitalizing the public (or common) good.'

A. Ownership and the Right to Exclude

The right to exclude others from property we own is "universally held to be a fundamental element of the property right"[217] and "one of the most treasured strands in an owner's bundle of property rights."[218] Indeed, some scholars go further and argue that

> the right to exclude others is more than just 'one of the most essential' constituents of property – it is the sine qua non. Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give *them* property. Deny someone the exclusion right and they do not have property.[219]

This view is of venerable heritage and stems from Blackstone's view of ownership as "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."[220] It goes without saying that whilst the right to exclude is a fundamental part of ownership from both a feudal and scholastic point of view. If it were not, private property would be but a variant of common property with all its concomitant disadvantages; an absolutist view of the right to exclude is destructive of any idea of the

---

[217] Kaiser Aetna v. United States, 444 U.S. 164, 179–180 (1979).

[218] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 436 (1982).

[219] Thomas W Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730.

[220] BLACKSTONE, *supra* note 57, at 2.

common good or private property or of all things (and property) being in common between friends. The problem is clearly illustrated in the Supreme Court's recent decision in *Cedar Point Nursery v. Victoria Hassid.*[221]

Cedar Point Nursery concerned a California regulation which "grants labor organizations a 'right to take access to an agricultural employer's property in order to solicit support for unionization."[222] The regulation "mandates that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year"[223] with the limitation that:

> Two organizers per work crew (plus one additional organizer for every 15 workers over 30 workers in a crew) may enter the employer's property for up to one hour before work, one hour during the lunch break, and one hour after work… Organizers may not engage in disruptive conduct, but are otherwise free to meet and talk with employees as they wish.[224]

It is worth noting that this would seem to be a classic case of a relatively limited interference with the right to private property in order to further the common (or public) good. Indeed, the dissent noted that "Many [elected representatives] may well have believed that union organizing brings with it 'benefits', including community health and educational benefits, higher standards of living and… labor peace."[225]

The central issue in the case was whether the California regulation amounted to a physical taking of property, which would result in "a clear and a categorical obligation to provide the owner with just compensation,"[226] or merely a use restriction, in which case "a different standard applies" where compensation would only be payable if it went too far and amounted to a taking.[227] The majority noted that "government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation."[228] In consequence, the Court held that:

---

[221] Cedar Point Nursery v. Hassid, 141 S.Ct. 2063 (2021).

[222] *Id.* at 2066.

[223] *Id*.

[224] *Id.* at 2069.

[225] *Id*. at 2089.

[226] *Id*. at 2071.

[227] Cedar Point Nursery v. Hassid, 141 S.Ct. 2063, 2071–72 (2021).

[228] *Id.* at 2074.

> The government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property to literally 'take access,' as the regulation provides… It is therefore a per se physical taking."[229]

The Court rejected the argument that the limited nature of the access right meant that it was not a physical taking arguing that this was "to use words in a manner that deprives them of all their ordinary meaning."[230]

The Court's ruling could, if applied literally, have enormous ramifications leading to a situation where the United States became a patchwork quilt of miniature, or on occasion not so miniature, fiefs and a land of 80 million absolute monarchs.[231] This is not at all practical given that, as noted by the dissent,

> We live together in communities… Modern life in these communities requires different kinds of regulation. Some, perhaps many, forms of regulation require access to private property (for government officials or others) for different reasons and for varying periods of time… it is impractical to compensate every property owner for any brief use of their land.[232]

The Court tried to limit the effects of its ruling in three main ways:

I. Firstly, the Court stated that "our holding does nothing to efface the distinction between trespass and takings, isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts than appropriations of a property right."[233]
II. Secondly,

---

[229] *Id*.

[230] *Id.* at 2075.

[231] *Number of Owner Occupied Homes in the U.S. 1975-2021*, STATISTA (Oct. 5, 2021), https://www.statista.com/statistics/187576/housing-units-occupied-by-owner-in-the-us-since-1975/.

[232] Cedar Point Nursery v. Hassid, 141 S.Ct. 2063, at 2087.

[233] *Id.* at 2078.

> [M]any government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights… for example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place.[234]

III. Thirdly,

> [T]he government may require property owners to cede a right of access as a condition of receiving certain benefits without causing a taking, in Nollan, we held that 'a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute taking.[235]

Leaving aside the first point as we are not here concerned with 'isolated physical invasions,' it is notable that neither the second nor the third limitation set out by the court is convincing. Addressing the second point first, it is absurd to claim that a government-authorized physical invasion for purpose X is permitted but a government authorized physical invasion for purpose Y is not permitted merely because X is a longstanding purpose and Y is not. It does not seem rational to freeze the governments right to authorize physical invasions in time in this manner, particularly given that property is a rapidly evolving concept. This is indeed one of the criticisms made by the dissent of the majority's decision when they ask "Do only those exceptions that existed in, say, 1789 count? Should courts apply those privileges as they existed at that time, when there were no union organizers? Or do we bring some exceptions (but not others) up to date, e.g., a necessity exception for preserving animal habitats?"[236] As for the third point, given that private property is itself a purely human invention and that land in the U.S. is, in most states, held mediately from the State, it's not entirely clear why the government cannot require private property owner's to cede certain limited rights in order to receive (or rather retain) the benefit of private property.

---

[234] *Id.* at 2079.

[235] *Id*.

[236] *Id.* at 2089.

Cedar Point certainly provides much support for the absolutist view regarding the right to exclude and is a perfect example of how not to revitalize the common good. However, as with the absolutist view of the right to exclude, it is a fundamentally flawed decision. Firstly, as discussed above the common law long recognized other individuals' rights of access over another's land for a wide range of purposes and even Blackstone, with his absolutist view of property, discusses these.[237] These rights were discussed in the Amicus Brief of Legal Historians in the *Cedar Point* case,[238] and were not only retained but, in some cases, actually expanded by the early American colonies.[239] It is true that these rights were unfortunately curtailed by later legislation,[240] but they still exist in some form in at least some states,[241] and the right to exclude cannot therefore be understood in the absolute way that the Court appears to do. Indeed, as discussed above, even the Court itself admits that the right to exclude cannot be absolute even if it does so in a somewhat contradictory fashion.

Ironically, one might well ask whether the Court's striking down of union organizers' right to enter onto land for certain purposes itself constitutes a taking of property given some of the more flexible definitions of ownership that have developed over the years.[242] Going further back into the mists of time, one could also make a very cogent argument that the California regulation created a new form of 'common' (as Pollock and Blackstone would say), or at least an 'incorporeal hereditament' exercisable by union organizers. In any event, one does not have to look to the past to find support for the view that rights of access on others' land are a form of regulation rather than a 'taking' but can instead look to the modern 'right to roam' legislation in the U.K.

---

[237] BLACKSTONE, *supra* note 57 at 20–41.

[238] Brief for Legal Historians as Amici Curiae Supporting Respondents, Cedar Point v. Hassid 141 S.Ct. 2063 (2021).

[239] *Id.* at 13–24.

[240] Ken Ilgunas, *This Is Our Country. Let's Walk It.*, N.Y TIMES (April 23, 2016), https://www.nytimes.com/2016/04/24/opinion/sunday/this-is-our-country-lets-walk-it.html; Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 667, 686 (2011).

[241] Peter H. Kenlan, *Maine's Open Lands: Public Use of Private Land, the Right to Roam and the Right to Exclude*, 68 ME. L. REV. 185, 194–95 (2016).

[242] STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 43–44, 63–69 (2011).

Right to roam legislation in England and Wales can be seen as linked to the loss of the commons as "the battle over the loss of a common right to ramble never ended"[243] even after the enclosure acts. Although a Commons preservation society was founded in 1870, the issue was still not resolved in the 1930's given that "in 1932, a large group of ramblers from Manchester trespassed on private land on Kinder Scout, a windswept plateau containing the highest point in the celebrated Peak District."[244] This eventually led to legislation in the late 1940's mapping out all public rights of way,[245] but one could still not talk of a 'right to roam' at this stage. It was only in the new millennium with the Countryside and Rights of Way Act 2000 that "the public [gained] the right to wander over registered 'common land' and lands classified as 'open country,' consisting of mountain, moorland, heath and downland." This right differed from the previous right of ways, or public footpaths, because "wanders are not restricted to any particular right-of-way on these lands."[246]

To be sure there are restrictions on this right so that a rambler cannot damage gates, bring animals other than a dog, commit criminal offences, light fires and so on,[247] but the right is still a significant inroad into the right of property owners of affected land to exclude individuals from their land. As long as a member of the public enters the land "for the purposes of open-air recreation"[248] and complies with the requirement of the Act, he has the right to wander across privately owned land. In fact, the Act makes it an offence to "place or maintain – (a) on or near any access land, or (b) on or near a way leading to any access land, a notice containing any false or misleading information likely to deter the public from exercising the right conferred by section 2(1)."[249] Scottish legislation passed several years later, the Land Reform Scotland Act 2003, goes even further and allows access to almost all land and inland water in Scotland "(a) for recreational purposes; (b) for the purposes of carrying on a relevant educational activity; or (c)for the purposes of carrying on, commercially or for profit, an activity which the

---

[243] Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L ENVTL. L. REV. 375, 402 (2006).

[244] *Id*.

[245] *Id.* at 403.

[246] *Id.* at 407.

[247] Countryside and Rights of Way Act of 2000, c. 37, sch. 2.

[248] *Id.* at 2.

[249] *Id.* at 14.

person exercising the right could carry on otherwise than commercially or for profit."[250]

Both Acts are clearly incompatible with an absolutist view of the right to exclude and requires holders of that view to draw the absurd conclusion that owners of, in England, affected land or, in Scotland, almost all landowners, no longer have any property rights over their land. In other words, the view that the right to exclude is an integral part of ownership cannot be taken any further than saying that "the right to exclude some people from land for certain purposes" is an inherent part of the concept of having ownership rights in or over land. It is important not to take this too far, however, as then one would be guilty of the same mistake that property absolutists are but in the opposite direction. For example, one could not sensibly speak of 'ownership' over a house if you were required to permit all and sundry to enter your house whenever they wanted whether you liked it or not. Some degree of excluding others from property must therefore be part of the concept of ownership, but this could probably be better dealt with under the old idea of exercising control over a thing. This is because ownership consists of "the authority and right which one has over any thing to make use it of it for their own benefit in any way permitted by the law."[251] One could not sensibly claim to be able to use a house for one's benefit, including the right to sell, modify, or rent it, if anyone whatsoever could enter it whenever they liked.

In conclusion, a proper understanding of the feudal law which underlies most modern land law, as well as the scholastic understanding of property and developments in other legal systems, suggest that the current emphasis on an absolute 'right to exclude' in the context of ownership over land is not healthy or justifiable. In this regard 'revitalizing the public good' would consist of implementing suggestions for restoring the right to roam in the U.S.,[252] and this is certainly something which the theoretical framework regarding property put forth by this paper could do. However, one must be realistic and accept that it would require a significant *Volte face* by the Supreme Court of its takings jurisprudence for this to be realistic and any reform could therefore be many decades away. Be that as it may, such reform is undoubtedly necessary and could go some way in restoring the fraternal

---

[250] Land Reform (Scotland) Act 2003, (ASP 2) § 1, sch. 2.

[251] SOTO, *supra* note 19, at 280.

[252] KEN ILGUNAS, THIS LAND IS OUR LAND: HOW WE LOST THE RIGHT TO ROAM AND HOW TO TAKE IT BACK (2018).

bonds among men which are the mark of any true commonwealth, which is after all what the United States of America aims to be.

B. PLANNING LAW AND OWNERSHIP: RIGHTS OF USE OR RIGHTS OF OWNERSHIP?

One of the greatest challenges for an absolutist view of ownership is posed by the modern system of planning law, or government regulation over property, which has significantly undermined (and indeed rendered ridiculous) the traditional view of ownership as "the sole despotic dominion a person has over a thing to the exclusion of anyone else in the universe." The Supreme Court has itself rendered several important decisions upholding planning law decisions that seriously impacted a landowner's rights. One of the most extreme examples is that found in the case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency.*[253] In that case, there were two moratoria issued by the Tahoe Regional Planning Agency from August 24, 1981 until April 25, 1984 and "as a result of these two directives, virtually all development on a substantial portion of the property subject to TRPA's jurisdiction was prohibited for a period of 32 months."[254]

The primary issue in the case was whether "the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period."[255] The Court noted that:

> [T]he text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose… But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.[256]

It went on to state that "Land-use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely

---

[253] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

[254] *Id.* at 306.

[255] *Id.* at 320.

[256] *Id.* at 321–22.

unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford."[257]

Ultimately, the Court rejected the argument that the moratoria amounted to a taking stating that:

> [T]he ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a Penn Central inquiry into all of the relevant circumstances in particular cases. From that perspective, the extreme categorical rule that any deprivation of economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.[258]

The Court therefore concluded that:

> [P]etitioners' proposed rule is simply 'too blunt an instrument' for identifying those cases… We conclude, therefore, that the interest in 'fairness and justice' will be best served by relying on the familiar Penn Central approach when deciding cases like this, rather than by attempting to craft a new categorical rule.[259]

Another example can be found in the California Supreme Court case of *California Building Industry Assn v. City of San Jose,*[260] which was denied certiorari by the United States Supreme Court.[261] That case concerned an "inclusionary zoning" or "inclusionary housing program"[262] which " 'require or encourage developers to set aside a certain percentage of housing units in new or rehabilitated projects for low and moderate-income residents…' "[263] The plaintiff objected to a San Jose ordinance which "require[d] all new residential projects of 20 or more units to sell at least 15 percent of the for-

---

[257] *Id.* at 324.

[258] *Id.* at 334–35.

[259] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 342 (2002).

[260] California Building Industry Assn. v. City of San Jose, 61 Cal. 4th 435 (2015).

[261] California Building Industry Association v. City of San Jose, 136 S.Ct. 928 (2016).

[262] California Building Industry Assn. v. City of San Jose, 61 Cal. 4th 435, at 441.

[263] *Id*.

sale units at a price that is affordable to low- or moderate-income households"[264] arguing that it was taking of their property rights. The Court rejected this argument holding that:

> [T]here is no exaction – the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process… [The] condition does not require the developer to dedicate any portion of its property to the public or to pay any money to the public. Instead, like many other land use regulations, [the] condition simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale.[265]

Although the case was a less serious interference with the right of ownership than in *Tahoe* it is clear that in both cases the owner could not sensibly speak of having a 'sole and despotic dominion' over their property. In *Tahoe,* the property owner could not develop their property at all for almost three years, whilst in *California Building* the property owners' right to sell their property was significantly restricted. However, both cases represent only the most obvious regulatory interference with the right of ownership: in reality, absolute ownership has died a death of a thousand cuts due to individually minor but cumulatively serious "statutory planning control[s]."[266] These controls mean that a landowner "has little or no automatic entitlement to alter 'his' land, develop or extend it, change its use, paint it whatever colour he likes, still less to destroy it if he so chooses… His proud claim of 'property' is in reality immensely fragile."[267] Two key examples of such restrictions are: (i) building codes and, (ii) aesthetic and historic preservation regulations.

The first type of control aims "to ensure that buildings are safe, sanitary, and increasingly, convenient and efficient"[268] and "are primarily derived from structural safety standards and… generally enforced against new construction."[269] However, "most codes also require existing structures

---

[264] *Id.* at 442.

[265] *Id.* at 460.

[266] LAND LAW, *supra* note 144, at 36.

[267] *Id*.

[268] JULIAN CONRAD JUERGENSMEYER, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 277 (3rd ed. 2013).

[269] *Id*.

that are being remodeled to include certain improvements."[270] There are also "electrical codes, fire codes, mechanical codes, plumbing codes and others."[271] These codes go into minute detail about almost every conceivable issue, for example, section 1011.2 of the New York State Building Code 2020 provides that:

> The required capacity of stairways shall be determined as specified in Section 1005.1, but the minimum width shall be not less than 44 inches (1118 mm). See Section 1009.3 for accessible means of egress stairways.
>
> Exceptions:
>
> Stairways serving an occupant load of less than 50 shall have a width of not less than 36 inches (914 mm).
>
> Spiral stairways as provided for in Section 1011.10.
>
> Where an incline platform lift or stairway chairlift is installed on stairways serving occupancies in Group R-3, or within dwelling units in occupancies in Group R-2, a clear passage width not less than 20 inches (508 mm) shall be provided. Where the seat and platform can be folded when not in use, the distance shall be measured from the folded position.[272]

This is one of, literally, thousands of sections many of which address issues in almost obsessive detail and all of which have to be complied with by property owners covered by the Code. In the case of the New York Fire Code, Executive Law § 382 provides that:

> **Any person, having been served, either personally or by registered or certified mail, with an order to remedy any condition found to exist in, on, or about any building in violation of the uniform fire prevention and building code, who shall fail to comply with such order within the time fixed by the regulations promulgated by the secretary pursuant to subdivision one of section three hundred eighty-one of this article**, such time period to be stated in the order, and **any owner,**

---

[270] *Id*.

[271] *Id*.

[272] 2020 BUILDING CODE OF NEW YORK STATE § 1011.2.

> **builder, architect, tenant, contractor, subcontractor, construction superintendent or their agents or any other person taking part or assisting in the construction of any building who shall knowingly violate any of the applicable provisions of the uniform** code or any lawful order of a local government, a county or the secretary made thereunder regarding standards for construction, maintenance, or fire protection equipment and systems, **shall be punishable by a fine of not more than one thousand dollars per day of violation, or imprisonment not exceeding one year, or both.**[273]

Again, it is important to emphasize that this one of hundreds (or more likely thousands) of such provisions which exist in the United States today: who, having read these provisions, can sensibly continue to insist that ownership is equivalent to 'a sole and despotic dominion over a thing to the exclusion of the rights of anyone else in the entire universe'? It is simply impossible to maintain such an absolutist view of property having read even just one of the many building codes applicable in but one of the fifty states.

The second type of restriction consists of aesthetic and historical preservation controls, the former "attempts to preserve or improve the beauty of an area"[274] while the latter are regulations that "encourage or require the preservation of buildings and areas with historical… importance."[275] A good example of an aesthetic preservation control can be found in the Colorado Supreme Court case of *Landmark Land Company v. City and Country of Denver,*[276] in that case, the legislation at issue concerned "mountain view protection"[277] which effectively meant that the appellants attempt to construct a building which would obstruct that view was prohibited.[278] The Court held that:

> It has been well established that protection of aesthetics is a legitimate function of a legislature… Especially in the context of Denver – a city whose civic identity is associated with its connection

---

[273] NEW YORK FIRE CODE, EXECUTIVE LAW § 382 (emphasis added).

[274] JUERGENSMEYER, *supra* note 268, at 513.

[275] *Id.* at 527.

[276] Landmark Land Co. v. City and County of Denver, 728 P.2d 1281 (1986).

[277] *Id.* at 1282.

[278] *Id.* at 1282–87.

> with the mountains – preservation of the view of the mountains from a city park is within the city's police power.[279]

An example of a historical preservation control can be found in the famous U.S. Supreme Court case of *Penn Central Transportation v. New York City*[280] which concerned New York City Regulations where certain buildings could be designated as landmarks by a Landmarks Preservation Commission after an extensive consultation and objection process, and "[f]inal designation as a landmark result[ed] in restrictions upon the property owner's options concerning use of the landmark site."[281] This included the imposition of "a duty upon the owner to keep the exterior features of the building 'in good repair'"[282] and a requirement that:

> the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site".[283] The issue before the Court was "whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has 'taken' its owners' property in violation of the Fifth and Fourteenth Amendments.[284]

The Court held that the regulation did not amount to a 'taking' as "The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."[285]

The net result of all the above restrictions is that the theory of ownership equaling 'sole despotic dominion' must surely lie in tatters. It is simply not a credible explanation of how the law works, how it has ever worked (as our exploration of feudal law has shown) or how it should work (as the Scholastics explain). This in turn has led to:

---

[279] *Id.* at 1286.

[280] Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[281] *Id.* at 112.

[282] *Id.* at 111.

[283] *Id.* at 112.

[284] *Id.* at 107.

[285] *Id.* at 138.

> some American commentators… predict[ing] a wholesale reconstruction or reinterpretation of 'property' in terms of 'socially derived' privileges of use. 'Property' becomes not a summation of individualised power over scarce resources, but an allocative mechanism for promoting the efficient or ecologically prudent utilisation of such resources. So analysed, this community-oriented approach to 'property' in land plays a quite obviously pivotal role in the advancement of our environmental welfare.[286]

It is submitted that this view, and some of the governmental regulations it is based on, go too far, and undermine the concept of private property in a socially destructive manner.

Private property is not merely a socially derived right but is a natural right which is a corollary from man's duty and right of self-preservation as discussed above, man requires private property to provide for himself and propagate the human species given the disadvantages of common property in the context of man's fallen nature. In consequence, whilst a view of ownership as 'sole despotic dominion' is inaccurate and harmful a view that ownership is a mere socially derived privilege is equally pernicious. Indeed, legislation intended to have a good end may wreak serious hardship in numerous individual cases. For example, in the U.K. following the Grenfell Tower tragedy, where a fire killed seventy-two individuals in a matter of hours,[287] government regulation has required buildings made of a particular type of cladding to be re-cladded at considerable cost to individual tenants.[288] The result of this is that thousands of individuals are stuck in worthless homes unable to sell or mortgage them and potentially on the hook for repair fees that they cannot possibly meet.[289] Worse still, tenants may be required to pay thousands of pounds each in fees for a 'waking watch' in case there is a fire[290]

---

[286] LAND LAW, *supra* note 144, at 36.

[287] *Grenfell Tower: What Happened*, BBC NEWS (Oct. 29, 2019), https://www.bbc.com/news/uk-40301289.

[288] *Grenfell: Survivors Condemn New Fire Safety Laws*, BBC NEWS (Apr. 29, 2021) https://www.bbc.com/news/uk-politics-56924131.

[289] *Id*.; Ian Aikman, *Revealed: The Five Costs the Cladding Crisis is Piling on Homeowners*, WHICH? NEWS (Mar. 12, 2021), https://www.which.co.uk/news/2021/03/revealed-the-five-major-costs-the-cladding-crisis-is-piling-on-homeowners/.

[290] Aikman, *supra* note 288.

and failure to pay such fees could, as discussed above in the context of leasehold issues, lead to eviction.

The net result of the above is that individuals are potentially rendered homeless, or at the very least left with worthless property, for an indeterminate period due to government regulations ostensibly for the common good. Such regulation is a self-evident and grave breach of the natural right to property as it seriously affects an individual's ability to provide for themselves and preserve their lives. It therefore reveals the problematic consequences of viewing property merely as a socially acquired right and of Kafkaesque government regulations which lose sight of the sole thing that can ultimately justify it, or indeed any law, that it advances the common good.[291]

Another infamous example is the situation which arose in 1990 when Mother Theresa's order of nuns hoped to build a homeless shelter in the Bronx, the proposal would have cost the city nothing but the building code required that they include an elevator which would have required them "to pump in an additional estimated $25,000 to $150,000."[292] This was on top of $100,000 to repair fire damage, and several hundred thousand dollars for other repairs.[293] The net result was that the plan was abandoned, the situation was therefore as good an example as any of the maxim "the perfect is the enemy of the good."

The conclusion is that the various restrictions on ownership cut both ways, although they disprove the idea that ownership is a 'sole despotic dominion over a thing' they also undermine the natural right to property which man has been endowed with and can cause more harm than good. In some respects, the restrictions discussed in this section could seriously be argued to be much worse than feudal incidents which led to the feudal system becoming a scheme from which the "most refined and oppressive consequences were drawn."[294] Moreover, such regulations risk being "acts of violence rather than laws; because as Augustine says… 'a law that is not just,

---

[291] I:II Q.90 a. 2 AQUINAS, *supra* note 8.

[292] Sam Roberts, *Metro Matters; Fight City Hall? Nope, Not Even Mother Teresa*, N.Y. TIMES (Sept. 17, 1990), https://www.nytimes.com/1990/09/17/nyregion/metro-matters-fight-city-hall-nope-not-even-mother-teresa.html.

[293] *Id.*

[294] BLACKSTONE, *supra* note 57, at 58; *see generally* SIMPSON, *supra* note 87, at I.

seems to be no law at all."[295] In order for such regulations over private property to be just they should stick to the *via media* neither downgrading the right of property from a natural right to a mere social right nor upgrading it to the realm of despotic dominion, rather they must consider that "private property is necessary to human life."[296] Moreover, they must also never lose sight of the fact that "the good of each individual, when that does not rebound to the injury of others, is to the advantage of the entire community"[297] so that when it is strictly necessary they may regulate the right of ownership but should not do so in a way that by diminishing rights of individual ownership excessively they ultimately end up diminishing the good of the community as a whole.

V. CONCLUSION

Private property has always been, and probably always will be, a problem and even a scandal but it is a natural right that is, in most circumstances, necessary for human life and beneficial for human society as a whole. However, ownership over land has never been as simple as the layman nowadays believes and just as during the feudal period it was subject to a whole host of obligations and qualifications it is subject today to seemingly endless reams of planning regulations. Moreover, ownership over land can at any moment be terminated for the common good (almost always with the payment of compensation) as a result of the doctrine of 'eminent domain' and other similar doctrines throughout the commonwealth. These doctrines not only had their parallels in feudal times but, to a greater or a lesser extent, evolved from feudal doctrines and further support the view that rights over land are, have been, and always will be qualified rights. All of this means that it can justly be said that "there is nothing which so generally strikes the imagination, and engages the affections of mankind, as [property law]."[298]

Moreover, when one considers how to 'revitalize public goods' there can, counterintuitively, be no better place to start than the quintessentially private good of ownership over land. This is because ownership over land must surely have been the earliest form of private property, as discussed by the Scholastic's it is a *sine qua non* in most circumstances for man to be able

---

[295] I:II Q.96 a.4 AQUINAS, *supra* note 8.

[296] II:II q.66 a.2 *Id.*

[297] SUAREZ & PINK, *supra* note 13, at 108.

[298] BLACKSTONE, *supra* note 57, at 2.

to survive and propagate itself, and thus by being a private good common to all the members of society it becomes a public good. As noted by Suarez the individual good rebounds to the common good and it is for this reason that "the civil laws… declare it be expedient for the state that the citizens should be rich."[299] Unfortunately the view of private property, and in particular ownership of land, as a public good has come under attack in modern times (and indeed for many centuries) both because of the noxious view that ownership over land consists in having 'sole and despotic dominion' over it and because of the equally false view that there is something inherently wrong in privately owning land at all.

This paper has attempted to rebut both views and fairly present ownership over land in its theoretical and historical context, the reader may judge the extent to which it has, or has not, been successful. In any event, it is to be hoped that the paper spurs further discussion about not only the inherent limitations in and necessity of ownership over or in land but also about the feudal underpinnings of modern land law, and the truly far-sighted insights which the Scholastics had into the problem of property.

[299] SUAREZ & PINK, *supra* note 13, at 108.