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***Nationbuilding 101: Reductionism in  
Property, Liberty, and Corporate Governance***

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CORPORATE GOVERNANCE

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**Abstract:**

Nationbuilders in less developed countries need to understand how Western legal systems with "property" at their center have materially accounted for Western prosperity and liberty, but legal definitions of property are so abstruse that explication of this vital concept is made difficult. This paper finds an historical definitional essence to property in the right to exclude and maintains that liberty and property both share this essential meaning. The problems of corporate governance are then placed in the context of the exclusionary concept of property/liberty.

**Keywords:** property, property rights, development and property, liberty, and corporate governance.

## NATIONBUILDING 101: REDUCTIONISM IN PROPERTY, LIBERTY, AND CORPORATE GOVERNANCE

Without straining the biosphere nor credulity, it is perfectly possible for each person to have as full a measure of property as Bill Gates has,<sup>1</sup> and having property, one also enjoys liberty, for properly understood, the two terms are virtually synonymous.<sup>2</sup> Indeed, James Madison, fourth American president and secretary to the Constitutional Convention, wrote an essay for the *Boston Gazette* in which he asserted that Americans have a “very dear” property in their liberty.<sup>3</sup> Property is the hub of Western legal systems and the foundation of the modern private market,<sup>4</sup> and the problems of corporate governance that beset not only Russia’s emerging economy but also the economies of advanced nations everywhere are little more than enforcement challenges to an effective property system. Nationbuilders who would grasp the essential basis of Western prosperity and freedom can do no better than begin with a reductive focus on property.

By training, scholars and practitioners who labor in the vineyards of the common law tend to be splitters rather than lumpers. Instead of unifying legal doctrines to promote conceptual understanding, they divide them into exceptions and distinctions, separating contract from property, tort from contract, criminal law from civil law, public regulation from private law, and substance from procedure. What is cohesive about the volumes of common law particularities is lost in a tangled labyrinth of cases that lawyers have argued — and judges, decided — by distinguishing holdings from dicta and one holding from another in ways often achieving a triumph of result at the expense of clarity of form.<sup>5</sup> How confusing this all must be when nationbuilders attempt to understand what is important about the rule of law, and no wonder that restraint is counseled to

nationbuilders in less developed countries lest they attempt wholesale importation of Western legal systems to secure a framework for their own regulation.<sup>6</sup>

At the same time there is growing apprehension that something in the interstices of Western legal systems in both common and civil law is materially responsible for the prosperity of Western nations,<sup>7</sup> which in terms not only of general per capita income but also of per capita income of their poor, creates wonder and envy worldwide. For both humanitarian and practical political reasons, no more burning issue exists in the international community than how to help the world's impoverished nations along a peaceful path toward prosperity, but if this path insofar as we best know entails the inculcation of Western legal concepts, then which specific concepts need inculcating and why these particular concepts assume great importance. I argue that reductionism is in order, the reducing of quite complex legal doctrines and rules to an essential principle that societies which wish can embrace with some certainty that it carries the maximum potential for producing the greatest wealth of nations. "Property" is that essential principle necessary for generating the likelihood for prosperity, and this essay asserts that prosperity within the recognized constraints of a strong property system also supports liberty and advances the possibility for sustainable peace.

The first section of the essay begins with a discussion of the human plight of limited resources, followed by a development of how Western nations have addressed that plight and becomes prosperous through the incentive of property, which is defined as a legal exclusion over resources, a definition that is at odds with the deconstructed legal view of property as a bundle of rights. The equal property right of others limits an owner's use of her resources, and the resources protected by property are traditionally

subject to eminent domain and taxation. Acknowledging the difficulties inherent in how nationbuilders determine who owns initial acquisitions of natural resources like land, the section still emphasizes that property's success as a wealth generator depends on its strong enforcement, broad applicability, and general stability. The section concludes with a story about human nature that argues why the institution of property may naturally foster production of greater new resources than systems based on compulsory sharing with strangers.<sup>8</sup>

Section two maintains the close semantic connection between the right of property and the right of liberty, a connection widely recognized during the American colonial period and embodied in the U.S. Constitution. It continues the reductive theme by explaining that both property and liberty are exclusionary terms applying to the protection of one's resources, including the most basic facultative resources of self, and suggesting that property is best grasped as a civil right like freedom of speech or religion.<sup>9</sup> The third section ties in the important issue of corporate governance to the project of reductionism and maintains that the implementation and enforcement of a strong property system is necessary both to protect owners from managers and to secure the resources of the public and of other members of society from the power of large business organizations,<sup>10</sup> while at the same time the system enables the relatively unrestrained use of private resources — subject only to the equal property right of others — that characterizes the framework for maximum new resource generation. It also explains how environmental protection, employment discrimination prohibitions, and worker health and safety regulation fit within the property framework.

As broad social prosperity creates perhaps the most substantial likelihood for sustainable world peace, an understanding of the mechanism for prosperity ought to demand the closest attention and debate, and the essay concludes by reaffirming that the reduction of that mechanism to the legal institution of property furthers this debate of utmost importance. Before continuing, I must confess one caveat: in no measure does the essay attempt to engage in philosophizing to justify property as a right, or unequal resource accumulation as a result, being content merely to assert that property is in fact the necessary foundation for maximum resource production and leaving to nationbuilders the decision whether or not and to what extent to institutionalize property.

## PROPERTY AND ITS IMPORTANCE

### *Poverty, Prosperity, and Limited Resources*

Poverty is widespread throughout the world.<sup>11</sup> Almost a quarter-million children die weekly of poverty-related disease and malnutrition,<sup>12</sup> and the hopelessness and despair that accompany poverty is accounted a major impetus to war and terrorism.<sup>13</sup> At the same time, prosperity exists among a minority of the world's nations,<sup>14</sup> creating a tremendous income disparity between the world's poorest and richest, with the people of Bangladesh living on a fifth of the per capital income of those in China,<sup>15</sup> which have only a forty-fifth the per capita income of the United States population.<sup>16</sup> The discord, jealousy, and suffering inherent where there are vast national disparities of resources makes imperative an understanding of how such disparities have arisen and how poverty can be ameliorated.

A variety of explanations have attempted to account for national disparities in wealth. One that has not withstood the test of time is dependency theory, which holds that exploitation makes some countries prosperous, while leaving others poor.<sup>17</sup> Whatever the abuses of colonialism or capitalism to indigenous populations, they do not seem to account for why some colonial nations grew wealthy and others did not, nor why the formerly enslaved in some countries eventually prospered while in others those who had been neither enslaved nor colonized remained poor.<sup>18</sup> Nor do better educational systems, greater natural resources, ideal population densities, or superior personal values materially account for why some nations develop and grow rich and others do not.<sup>19</sup> Analysis suggests that “the large differences in per capita income across countries cannot be explained by differences in access to the world’s stock of productive knowledge or to its capital markets, by differences in the ratio of population to land or natural resources, or by differences in the quality of marketable human capital or personal culture.”<sup>20</sup>

Mexico and the United States both enjoy fertile, mineral-rich land masses with similar population densities, yet one is relatively poor while the other is quite prosperous.<sup>21</sup> East and West Germany, formerly politically separate but joined by common culture and highly educated populations, nevertheless presented during their years of separation stark contrast in per capita income, as does North and South Korea today.<sup>22</sup> With the world’s oldest and most populous social culture, China possesses only a small fraction of the Gross National Income (hereinafter GNI) of the United States, a country barely 200 years old.<sup>23</sup> Defeated nations left with devastated resource bases and

infrastructures at the end of World War II now rank among the world's wealthiest while nations untouched by that war remain mired in historic poverty.<sup>24</sup>

Anthropologist Jared Diamond maintains that the broad, relatively unobstructed land mass of Europe permitted the rapid diffusion of new agricultural techniques from Southwest Asia and that abundant agricultural production accounts for the subsequent specialization and organization of knowledge that enabled Western prosperity to dominate the world technologically and militarily.<sup>25</sup> Although sufficient food does enable specialization and organization, agricultural techniques and fertile land are not in themselves materially adequate incentive to ensure maximum food development and production.<sup>26</sup> They do not explain Japan's prosperous economy in spite of its comparatively weak agriculture,<sup>27</sup> nor do they account for the countries of Europe and Asia that have had agricultural techniques and fertile lands available for centuries but nonetheless remain poor.<sup>28</sup>

For much of the past fifty years, the world's wealthiest countries, primarily identified as "the West," have approached less-developed countries as though the answer to weak economies lay in various technical and financial aid grants.<sup>29</sup> This model for assisting wealth production proceeds from the assumption that modern Western economies are founded on an infrastructure of roads, dams, and energy facilities<sup>30</sup> and that grants, loans, and technical expertise from the West to provide these advantages should catalyze less developed populations in creating sounder economies.<sup>31</sup> Alleviation of sickness, hunger, and illiteracy through various forms of aid also fits this model, and, of course, such alleviation often indicates humanitarian impulse while at the same time it fosters a healthier, more nourished, better-educated human economic resource.

Unfortunately, much of this foreign aid has disappeared through corruption or was misapplied or failed in any event to stimulate the development of organic, prosperous economies. Even large aid projects involving dam construction and road building create only short-term job opportunities, and infrastructure when completed and technology when introduced often by themselves fail to give adequate incentive for investment and risk taking necessary for sustained new resource production and healthy economies. Humanitarian aid is vital but in the absence of a growing economic self-sufficiency, humanitarian aid is a temporary answer to world poverty. After fifty years, aid programs have failed to reach the roots of poverty in much of the world,<sup>32</sup> and the result: disillusionment, discontent, despair, domestic revolution, and recently, international terrorism.

Privatization of economies through the marketplace has recently been pushed as an alternative to aid programs or at least a supplement priming economic growth and ending the poverty of nations.<sup>33</sup> This view sees state planning of resource production as primarily responsible for stagnant, poor economies and the lack of general productivity in communist and socialist nations as inducing the decline of state planning worldwide in the last years of the twentieth century. Free populations to pursue their own economic ends and the private market will emerge, capitalism will coalesce, and a growing prosperity will inevitably follow. In spite of the flexibility and responsiveness of the private market in guiding resource flows, privatization alone or in combination even with substantial foreign aid does not seem adequate to create vibrant economies.<sup>34</sup> Following the collapse of the Soviet Union and privatization in substantial sectors of the Russian

economy, gross domestic product declined forty percent in the ensuing seven years while corruption, violence, fraud, and theft flourished.<sup>35</sup>

In part, views concerning the causes of poverty and the achievement of prosperity are shaped by the perception that we live in a world of limited resources,<sup>36</sup> but although in some sense the resources of the world are finite, in important ways they are infinite and to argue the contrary is to miss the importance of human effort and ingenuity as the resource par excellence. For instance, land is limited in its physical dimension, but the uses of land are virtually without limit and each use is a resource requiring human effort. By itself land produces little to sustain human wants and needs, saving only a few fruits, nuts and berries, the occasional edible creature, and trees for firewood and construction, but even these resources must be picked, hunted, and chopped, i.e., to realized them requires application of the further resources of human effort and knowledge. Likewise, to develop the materials under the earth — various minerals that are often regarded as limited — requires locating, drilling, pumping, mining, and quarrying for them to be of any use as resources and these steps are usually only the initial ones in creating further resources. At each stage the process is dependant on human effort and ingenuity.

The achievements of the Information Age<sup>37</sup>, which encompass not only computers and the Internet, but also technological innovations generally, including agricultural advances from the plow to genetically modified foodstuffs, derive not from anything that is limited but from human effort in the organization, development, and diffusion of knowledge resources. Resources — defined as anything humans may need or want — are primarily limited in a moment of time, not over the long span, and their existence both at any single moment and over time depends on the effort and ingenuity of

people. Economies are not most productively constituted as lifeboats requiring equitable division of ever dwindling physical resources but as cornucopias whose plenty is induced primarily by the application of unlimited human resources.<sup>38</sup> From these simplistic but accurate observations derives a truism: if the social goal is to maximize production of any given resource, society must provide the greatest incentive to stimulating the human efforts (and ingenuity) that are necessary to producing that resource. The issue becomes to identify and institutionalize that greatest incentive.

### *Incentive and Property*

The way to institutionalize incentive and create the maximum condition for national prosperity begins with the recognition that before it is possible to understand and predict resource flows in an economy, one must know how the law assigns rights within the economy.<sup>39</sup> The legal system, its implementation and enforcement, furnishes the maximum incentive to human effort required to create modern private markets, engender capital formation, and facilitate trade, but not just any kind of legal system will prompt economic prosperity. It must be a proper — or property-based — legal system.<sup>40</sup> Only the strong, legal right of property creates potential for the maximum prosperity of nations and materially explains to nationbuilders in less-developed countries the economic success of the West. Before examining the evidence for this assertion, it will be necessary to establish a meaning for the term “property.”

#### 1. Property as the Right of Exclusion

Many political and legal commentators find the term “property” almost incomprehensible.<sup>41</sup> *The Encyclopedia of the Social Sciences* calls it “a euphonious collection of letters which serves as a general term,”<sup>42</sup> and a prominent legal scholar

remarks: “The paradigm of a Sanskrit verb of a thousand forms could not approach in diversities the phases of that concept in any single time and place.”<sup>43</sup> Yet from the time of Aristotle, “property” has been associated with the incentive to produce new resources.<sup>44</sup> Over and over commentators have observed that property gives an incentive to the inculcation of resources that other ways of approaching resource development do not.<sup>45</sup> This repeated assertion suggests — for these commentators at least— some essence that flows from the understanding of property that is continuous through history and may provide to nationbuilders a focus for construction of an economy with the potential for maximum resource development.

That essential understanding, however, is not easily found in the usual dictionary definition of property as “things that are owned.”<sup>46</sup> In fact this definition may be responsible for much of the belief that property has no singular meaning.<sup>47</sup> In Roman civil law property related only to tangible things,<sup>48</sup> but in common law, perhaps dating to the recognition of the lease right in English feudal land practices, property also applied to things intangible.<sup>49</sup> It is also true that in common and civil law new tangible and intangible things came to be protected by property. For instance Mozart and Beethoven had no property in the copying of their music<sup>50</sup> whereas today 2 Live Crew and the estate of Roy Orbison do have a property in theirs.<sup>51</sup> If property is *whatever* things that are owned, and the things that are owned are subject to change and do change, then the concept is a shifting one from which nationbuilders can take little guidance.

On the other hand, if the emphasis of property is not on things (or resources), but on ownership, then the essential meaning of property relates to a right rather than to things, and if the right can be elucidated, nationbuilders can grasp the asserted basis for

why some nations have a pronounced lead over others in resource production. The difficulty is that much legal analysis of property/ownership regards it as a bunch of “stick-like rights” rather than as a single right.<sup>52</sup> Whatever the analytical virtues of the rights-splitting approach to common law legal scholarship, it is misleading to those seeking what in Western property law provides the greatest incentive to resource production. The essence of property over time has not been that it is a bunch of sticklike, mostly positive rights but that it is a single right: the right to exclude.<sup>53</sup> Property is the legal right enforced by the state that permits the owner of a resource to prevent others from interfering with it.<sup>54</sup>

If an owner of a resource (one who has a property in it) can legally exclude others from it, the owner can possess it, control it, consume it, destroy it, or exchange it.<sup>55</sup> The single negative right of exclusion unifies the disparate positive rights of property, which can now be thought of ways of using a resource, i.e., one can use it for personal possession, use it for consumption, use it in exchange for other resources, or use it as a gift. The single negative right of exclusion captures the right to exercise all of the positive uses of a resource,<sup>56</sup> and if the state limits or prohibits some particular use of a resource, it does not mean that no property exists in that resource — or that a new or different *kind* of property exists — for the property is not the resource but the right. For example, if the state prohibits patients who buy prescription drugs from reselling or transferring them, it does not mean that these owners have no property in the drugs. The right of exclusion still applies to keep others from interfering with the owners’ consumption or destruction of the drugs; the state has simply removed the right as it would allow the owners to exclude the state itself from interfering with the sale or other

transfer of prescription products. Likewise, in an important sense one has property in one's body in the right to exclude others from interfering with it, which ownership allows the positive sale of replaceable body parts like blood or hair but not of irreplaceable body organs like kidneys and corneas. However, the exclusive owner does control whether or not to pass ownership of a kidney or cornea by gift. The point is not to advocate the selling of body organs but to explain the nature of property as the right of exclusion, which right does *not change in meaning* (only in *application*) when society forbids or limits a certain type of resource development, e.g., marketplace trade in kidneys and corneas.<sup>57</sup>

The sociologist Emile Durkheim sought a cross-cultural criterion for the definition of property and concluded that it was the right of exclusion: “[P]roperty is the right of a given individual to exclude other individuals and collective entities from the usage of a given thing.”<sup>58</sup> Authorities from the U.S. Supreme Court<sup>59</sup> to William Blackstone,<sup>60</sup> Oliver Wendell Holmes, Jr.,<sup>61</sup> and Thomas Hobbes<sup>62</sup> have asserted that the essence of property is the right of exclusion. Even if property also connotes things that are owned or a bundle of separable positive rights, its essential meaning understood through Western history is that an owner can exclude others from interfering with owned resources.<sup>63</sup> As Professor Merrill maintains: “Give someone the right to exclude others from valued resources . . . and you give them property. Deny someone the exclusion right and they do not have property.”<sup>64</sup> Thus, when commentators observe that “property” provides maximum incentive for resource development, they may be taken as referring to the legal right to exclude others from interfering with one's resources, which right was protected and enforced through the early common law action for trespass.<sup>65</sup>

2. The Incentive of Property and the Evidence Linking Property and Prosperity

The law of property is the deep foundation of the modern private market.<sup>66</sup> The right of exclusion gives incentive to exchanges in the creation, production, and distribution of resources to such a degree that without it private trade is reduced to face-to-face barter or trade with trusted friends and relatives.<sup>67</sup> Without knowing who owns what, moving resources from those who have them to those who want and need them the most becomes excessively costly. In his Nobel laureate address, economist Ronald Coase asserted that the legal system “has a profound effect on the working of the economic system and may in certain respects be said to control it.”<sup>68</sup> Not any kind of legal system, however, engenders the greatest resource production but only “an appropriate system of property rights” does.<sup>69</sup>

If no private legal ownership exists, people have to guard the resources they control from strangers, and in such an instance the weaker always have resources subject to the predations of the more powerful.<sup>70</sup> Without the right of property, no laws against theft and robbery protect one’s possession of resources. No tort laws provide compensation for wrongful injury to one’s resources. No laws of contract ensure that executory agreements for the transfer of owned resources can be enforced. In the absence of the property right, both the raising of capital for resource development (borrowing for the conduct of business) and the private division and subdivision of resources become extremely difficult.<sup>71</sup> It is no exaggeration to state, along with economist Hernando de Soto, that “[t]he hidden architecture of sustainable development is the law [of property].”<sup>72</sup> The incentive that the law of property stimulates has enabled Western prosperity in resourceful productions ranging from agriculture to silicon chips.

The empirical evidence connecting the institution of property to national prosperity begins with the recognition that the Western nations — and a few Pacific Rim countries — have both the world’s highest per capita incomes and the world’s strongest exclusionary property systems.<sup>73</sup> Although the connection could be coincidental, no feasible alternative explanation for such linking exists except that strong property gives maximum incentive for the activities that create new resources. Conversely, it is likely that the world’s least prosperous nations remain so because they lack adequate property law and its enforcement. A 2002 study of “economic freedom,” which is acknowledged to be “an evaluation of property rights, broadly conceived,”<sup>74</sup> concluded that nations with “very high protection” of property average \$23,769 per capita in 1999 purchasing power parity.<sup>75</sup> Nations with “high protection” of property average \$13,027 per capita; then, “moderate protection,” \$4,963; “low protection,” \$3,010; “very low protection,” \$2,651.<sup>76</sup> A study of property-strong versus property-weak countries from 1975 – 1995 found that countries which strengthened the property right the most during that period registered a 2.7% annual GNP growth, whereas those nations where the property right weakened most significantly averaged 0.6% annual GNP declines.<sup>77</sup> An analysis in 1989 of all studies then available concluded that strong-property nations grew at three times the annual rate and were two and a half times more efficient than weak-property nations.<sup>78</sup>

In explaining why “capitalism triumphs in the West and fails everywhere else,”<sup>79</sup> de Soto asserts that the signal difference — especially in the inventions and applications of technology — between the highly developed and prosperous Western countries and the less prosperous and less developed remainder of the world is that the Western countries

have possessed relatively strong property systems for at least two-to-three hundred years longer than the rest of the world.<sup>80</sup> Even if the nations of the world started several hundred years ago at income parity, the property-weak countries would fall behind quickly if the property-strong countries grew only at a rate of two percent greater per year. Allowing for disruptions of war and the changing of regimes, one can still see that compounding a two-percent annual advantage over a couple hundred years could easily account for the ten-fold income disparity that exists today between many property-strong and property-weak countries.<sup>81</sup>

Consider that the income disparity also translates to disparity in technology attainment, infrastructure development, and food, housing, education and health resource availability. For nationbuilders the lesson seems clear: institute a strong property in any resource to give incentive to its maximum production; to lower production of a resource, reduce the incentive to develop by weakening or eliminating the property right in it through taxation or prohibition.

### *Other Property Issues*

Several other issues key to nationbuilders' understanding of property deserve brief treatment. Each issue warrants volumes of discussion, but in the spirit of reductionism, the treatment here simply places the issue in the context of the exclusionary right.

#### 1. Property and Resource Acquisition

In strong-property nations, how resources are acquired determines whether or not the state recognizes them as property. To be considered subject to the right of property resources cannot be acquired by coercion, theft, or fraud.<sup>82</sup> The law recognizes a variety

of ways of legally acquiring resources in a property system, including exchange (contract), gift, accession, confusion, and first possession, but robbers, thieves, and defrauders do not own what they acquire and cannot take the resources of others without suffering the likelihood of criminal and civil consequences intended to protect lawfully recognized owners.<sup>83</sup>

Although the institution of a property system is of vital importance in nationbuilding, how resources are acquired in the first instance can be problematic during the creation of the system. In some countries lacking effective property systems, a relatively few individuals or families have come to control much of the land and its resources. What happens to these vast holdings as nations institute effective property systems is not certain. Whether these holdings are formalized and protected by the property right or whether some type of redistributive land reform takes place before formalization occurs, economic disruption is likely to result.<sup>84</sup> It is in the amelioration of this disruption that the international community can appropriately assist with various forms of aid, but always such assistance should be linked to the strengthening and stability of a broad-based property system if the goal is to maximize the future potential for resource development and production.

When governments rather than powerful families control the resources of a country, a property system can be instituted through sale of the resources, a lottery distribution, a free distribution to all citizens, or some type of claiming system such as homesteading. In the United States, the surveying and distribution of public lands through sale helped hundreds of thousands of citizens to acquire millions of acres of land,<sup>85</sup> which have remained within the property system ever since. On the other hand, the

Dawes Act,<sup>86</sup> which failed to give Native Americans full property in certain reservation lands, thwarted existing tribal property systems, and created a federal trust on remaining lands that has seriously failed its purpose,<sup>87</sup> hardly provides a model for implementing an effective property system.

One suggestion for nationbuilders attempting to place resource acquisition and development under a property system is to build the system from the bottom up rather than the top down. In so doing, primary concern should be focused on ensuring that the vast majority of the people have their resources protected by property.<sup>88</sup> As has been observed, one of the greatest virtues of an equally implemented exclusionary right is that it benefits the poor as much as the wealthy,<sup>89</sup> who unlike the poor can protect their resources by force. Building a property system from the bottom up also recognizes that freeing the poor from unnecessary regulatory shackles which may keep them from exercising the resource they acquire by original possession — the resource in themselves — is important to unleashing the incentive of property.

The studies of Hernando de Soto indicate that one way to formalize property in less-developed countries from the bottom up is to allow people to acquire land ownership through local consensus.<sup>90</sup> Land is a basic building block in a private market economy, yet without a formal property recognition, one's land cannot be resourcefully leveraged or capitalized since no lender is likely to extend credit secured by the land unless the borrower is an owner formally recognized by the state.<sup>91</sup> De Soto recommends that local consensus works effectively in establishing the boundaries for formal property recognition.<sup>92</sup> That local consensus exists suggests that in many parts of the world a de

facto property right is already present whose prosperity-creating incentive can then be unleashed through a state-recognized de jure right.

2. Property and the Equal Rights of Others

Property is an exclusionary right that under the rule of law applies equally to the resource acquisitions and aggregations of the wealthy and the poor alike. Property is like a blanket that covers everyone, allowing each person to acquire, create, and use resources in ways that produce the greatest potential for resource maximization. However, property does permit some persons to accumulate resources that others do not have, and since by definition “resources” are what others may need or want, there is some justification for the familiar argument that if X has something in limited quantity that others need or want X has a type of power over them since she can bend them to her will so they can get what they need from her.<sup>93</sup> Of course they have a similar “power” over her in a property system due to the resources they own, but since property permits unequal accumulations of resources, X may have greater “power” than they. They may need what she has more than she needs what they have. Still, in the sense that property is a blanket, everyone enjoys an equal right to exclude, and thus Bill Gates has no more or less property than anyone else in the resources he owns.

Importantly, the equal exclusionary right that each person enjoys means that an owner’s use of resources has meaningful limits.<sup>94</sup> Although Blackstone asserted that property was a right of “absolute dominion,” he also recognized that an owner’s “free use, enjoyment, and disposal” of resources was subject to “the laws of the land.”<sup>95</sup> In *Entick v. Carrington*, Lord Chancellor Pratt wrote that the right of property “is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged

by some public law for the good of the whole.”<sup>96</sup> These statements may be taken to recognize the legitimacy of taxation of one’s resources,<sup>97</sup> but they also acknowledge that one owner cannot use resources in certain ways so as to interfere with another owner’s use of resources.<sup>98</sup> Property has no purpose outside of community, meaning that Robinson Crusoe had no need to worry about whether the fruit he picked or the animals he trapped belonged to someone else, and the implication of this is that the very definition of property contains a limit of resource use: in a strong property system, one’s exclusionary right is always limited by the equal right of others to their resources.

Thus, property can be seen as the hub of Western legal systems and the law of contract and the law of tort as spokes radiating from the hub and establishing limitations protecting the equal property right of others. Contract law sets forth equally enforceable conditions concerning consequences of the breach of an agreement to transfer resources.<sup>99</sup> Tort law and much criminal law establish limits on what one can do with resources that are consonant with the equal limitations placed on others, and it provides various compensatory and punitive measures for one’s violation of these limitations.<sup>100</sup> Under this analysis, most all other areas of the law can also be reduced to spokes connected to the hub of property.<sup>101</sup>

### 3. Property Enforcement

The concept of property also includes its adequate enforcement.<sup>102</sup> Without the enforcement necessary to implement a property system, a nation will not be creating conditions conducive to maximum prosperity.<sup>103</sup> In much of Western political theory the ultimate justification of the state is to legalize civilly and formally the right of property,<sup>104</sup> but to stimulate the incentive that induces the greatest wealth of nations, the state must

also enforce contracts and ensure that corruption, fraud, theft, and coercion not make owners spend their efforts, ingenuity, time, and money defending valuable resources instead of freely using these resources to create, produce, and exchange new resources. Honest police, ethical lawyers, and impartial judges (or other dispute resolvers) are necessary to accomplish enforcement, and nationbuilders *cannot* claim to have implemented a strong property system without such enforcement.<sup>105</sup>

Prompt foreign assistance targeted at eliminating corruption and focusing on law enforcement might have prevented the economic debacle following the collapse of the former Soviet Union. Rapid but incomplete market privatization coupled with scanty and ambiguous property law in the absence of adequate law enforcement materially caused the Russian economy to decline following the Soviet Union's demise.<sup>106</sup> On the other hand, in China the move from almost total state planning to partial property and contract recognition accompanied by the training of new judges and lawyers has provided the conditions for much new economic growth in that country.<sup>107</sup>

*Property and the Story of Evolved Human Behavior*

The framers of the United States Constitution were largely Lockean in their view that "property" was something "natural" to human beings,<sup>108</sup> which was associated with the belief that God had given people dominion over nature and over themselves. This dominion is represented by the concept of "property," which means in this usage as in other historical usages, the right to exclude others.<sup>109</sup> Although the *application* of property to various resources has differed down through history, the view that property is a natural right, the protection for which civil government was established, continues to this very day and is often viewed as a moral right.<sup>110</sup> Around the time of the American

Revolution, it was even called a “sacred” right,<sup>111</sup> and the American colonies invoked its natural authority in contending that the British had no right to tax them without representation.<sup>112</sup>

Other thinkers and political theorists have argued that although property in no way has the imprimatur of divine providence, it is still the basis for the civil state, and its justification is the “common good.” Thus, utilitarian thinker Jeremy Bentham termed property “the noblest triumph,”<sup>113</sup> and both natural law and utilitarian theorists have recognized the incentive engendered by the exclusionary right as fostering social prosperity. Whether “property” itself is a natural or purely civil institution, there seems to be something in its legal recognition that people respond to with greater resource production than when resources are state managed or communal.

Nationbuilders from other cultures may reject notions that the efficacy of a property system is based on God’s ordinance and may disagree with the ambiguous concept of the “common good.” Why then does there seem to be such a profound relation between a right to exclude others from infringing on the results of our resourceful efforts and the greatest wealth of nations? Economists argue that we act rationally in our “self interest,”<sup>114</sup> but that is not an explanation of *why* the right of property engenders such resource production. It is only a description of behavior.

An explanation, however, exists that, while controversial, fits much of an important new understanding of human behavior: evolutionary psychology. Although this explanation of evolved behavior is unnecessary to appreciating the fact that the exclusionary right in fact seems to engender the condition for maximum resource production, it does tell a story that helps illuminate what it means to say that we act out of

self-interest,<sup>115</sup> and it suggests why it is difficult to educate or otherwise persuade people voluntarily to share substantial resources according to the needs of strangers. The story begins with the assertion that basic human behaviors are evolved characteristics, much like an upright posture or the possession of language capacity are evolved characteristics, and that these behaviors have been selected for because our ancestors who practiced them survived and passed on the genes which emphasized such successful behaviors in the first instance.<sup>116</sup> Those who did not practice such behaviors are not our ancestors, i.e., they died out and did not pass on their genes.<sup>117</sup>

Although evolutionary psychology has difficulty relating evolved human behavior as an explanation for highly specific human actions, such as driving on the right (or left) side of the highway, the human concern with resource acquisition, the reluctance to surrender large portions of what one has acquired simply to meet the needs of strangers, and the initiative-dampening effect of coercing acquired resources from people (through taxation or otherwise) are very general, not specific, behavioral tendencies.<sup>118</sup> They seem related to the fact that human children mature very slowly and require inordinate resource investment in contrast to the young of other species and that parental caregivers, as a part of the procreation of their genes, cannot afford to surrender too many limited resources to strangers that their offspring may need, else the offspring may not survive.<sup>119</sup> Females as the primary caregivers tend to look carefully before mating for males who are both able and willing to help provide resources to raise offspring,<sup>120</sup> whereas males tend to be assertive in acquiring and displaying resources in order to convince females of their mating worthiness.<sup>121</sup>

This story about human behavior is made more complex in that human resource behaviors evolved during the 98 or 99 percent of our existence as a species that was spent in small bands of hunter-gatherers whose “economies” resembled that of the lifeboat rather than the cornucopia.<sup>122</sup> Members of these bands shared extensively with each other,<sup>123</sup> but the bands were quite small and the members were considerably interrelated. In sharing with their relatives, they were literally perpetuating their own genes,<sup>124</sup> held also by their relatives, and in any event they were avoiding conflict with people on whom they depended for cooperative enterprises like hunting and fighting. They may have shared with the occasional stranger, but if they shared too many of their lifeboat resources with strangers, they had not enough for themselves and their offspring. Those with the inclination for excessive sharing died out.

In contemporary society, the behaviors evolved for small hunter-gatherer bands still prevail in modern humans.<sup>125</sup> The concern about acquiring more resources, the attractiveness for mating of those who have large resource holdings, and the reluctance to share a very significant portion of personal resources with strangers are all still deeply embedded in human behavior.<sup>126</sup> Perhaps, most importantly, foreknowledge of the coerced taking of the resources one produces still depresses human initiative to maximize resourceful effort since the resources so produced are not perceived to benefit the individual nor her family or relatives.<sup>127</sup> We do not appreciate consciously how deeply inclined we are toward these self-interested (and offspring-interested) behaviors, but inclined we are.

The point of this story is that “property” is the legal institution that accommodates our evolved hunter-gatherer behaviors in modern mega-societies of strangers and gives

maximum incentive to resourceful productions because this right allows us to exclude others from what we acquire so we can direct it toward our own survival and the survival of our offspring and relatives. Since people in strong property nations live not in lifeboat economies but in cornucopia economies that allow them to produce far more than they or their families can consume, they specialize and trade for mutual advantage in the market. As the supplies of resources increase, competition arises, and the prices of resources decrease. People can acquire more while spending less, and prosperity flowers.<sup>128</sup>

The story of evolved resource behavior contains no moral justification for selfishness, legal recognition of gender differences, or oppression of strangers or the poor. It merely emphasizes that to educate, cajole, and coerce people to produce according to their abilities and to share according to the needs of strangers does not create the potential for resource-maximizing economies. Nationbuilders may preach sharing and study creative ways of taxing cornucopia resources so as to minimize the perception of resource coercion, *but* they must also enforce a strong property system that accommodates rather intractable human behavior in order to grow the greatest wealth of nations. Thus, the case for property “is borne of human nature, not seventeenth century philosophy.”<sup>129</sup>

## LIBERTY

One commentator worries that the West has forgotten the connection between property and prosperity.<sup>130</sup> Numerous recent references urging nationbuilders to frame their economies with a strong property system suggest that the memory was not forgotten but merely repressed and that once again it is emerging into consciousness.<sup>131</sup> On the other hand the connection between property and liberty is still deeply buried for most, but

in the spirit of reductionism, this memory, too, needs refreshing. Nationbuilders should want to know of the similarity of these concepts in history so they can help construct free as well as prosperous societies.

Although the Greeks and other ancients may have enjoyed considerable freedoms, they lacked the grasp of a term equivalent to “liberty.”<sup>132</sup> In Western history one of its earlier accounts of liberty appears in the enumerations of the Charter of Liberties, better known as the Magna Carta or Great Charter.<sup>133</sup> Central to the Charter of Liberties and the next 800 years of constitutional liberty in England and its colonies is the 1215 version of due process: “No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we [the King, the State] will not set forth against him, nor send against him, unless by the lawful judgment of his peers.”<sup>134</sup> Note that the liberty an owner has from being arbitrarily deprived of a right to land (freehold) is given equal significance with the liberty not to be arbitrarily arrested and imprisoned.

By 1225, the Charter of Liberties had added to its enumerations a provision that foreshadows modern protections against uncompensated takings: “No Sheriff or Baliff of ours, or any other, shall take the horses or carts of any man to make carriage, except he pay the old price limited, that is to say, for carriage with two horse x.d. a day; for three horse xiv.d. a day.”<sup>135</sup> To secure the citizenry against arbitrary state takings by requiring compensation deserves the name “liberty” just as to free people to use their resources by allowing them legally to exclude others from interfering with those resources warrants the name “property.” Both terms express the right of exclusion against the state, and although liberty today generally refers to the right of private persons to exclude the state from interfering with resourceful faculties such as speech and freedom of movement, and

property is usually used in reference to exclusive non-facultative resources, the two are virtual synonyms in their exclusionary connotation. Further, if the resources of the self, including speech, movement, and free direction of effort, are considered the basis of non-facultative resource creation, then the liberty right to direct the resources of self and the property right to direct non-facultative resources become inextricably related. What must be remembered is that outside of the economic lifeboat (where the main issue is resource division) people generate additional, prosperity-engendering resources through their efforts, and although raw materials are important to resource generation, they do not by themselves often represent consumable resources. They become consumable or useful resources only after the application of human faculties, the liberty and property of which give greatest incentive to resourceful production.

That liberty and property are interconnected is suggested not only by the Charter of Liberties but also throughout English constitutionalism. Five-hundred years after the Charter of Liberties, Blackstone in his famous *Commentaries* on the common law identified three “absolute” rights “inherent in every Englishman.”<sup>136</sup> They were (1) “personal security,” or “a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation,”<sup>137</sup> (2) “personal liberty,” or “the power of loco-motion, of changing situation, of removing one’s person to whatsoever place one’s inclination may direct; without imprisonment or restraint,”<sup>138</sup> and (3) property.<sup>139</sup> The resemblance of these rights to the familiar triune “life, liberty, and property” is a strong one, but Blackstone adds that these rights “are usually summed up in one general application and denominated *the natural liberty* of mankind.”<sup>140</sup> That property is a subset of natural liberty is unmistakably asserted.

Not long after Blackstone wrote, James Madison turned around this assertion and maintained that liberty is a form of property. Acknowledging that in its “particular application,” property refers the dominion that one “claims and exercises over the external things of the world, in exclusion of every other individual,”<sup>141</sup> Madison also argued that “[i]n its larger and juster meaning” property includes one’s “opinions and the free communication of them,” the “profession and practice” of one’s religion, the “free use” of one’s “faculties and free choice of the objects on which to employ them,” and “*the safety and liberty*” of one’s person.<sup>142</sup> Defining property as Madison does as a right “in exclusion of every other individual”<sup>143</sup> leaves little semantic difference between property and liberty.

Legal historian John Phillip Reid has made the broad claim that “[t]here may have been no eighteenth-century educated American who did not associate defense of liberty with defense of property.”<sup>144</sup> Again, Professor Reid: “Today we think of their emphasis upon property as a defense of the material and tend to forget how much the concept of liberty in the seventeenth and eighteenth centuries depended upon property . . . . [I]t is sometimes forgotten that liberty itself was spoken of and thought of as a property.”<sup>145</sup> As a colonial American wrote in 1768: “Liberty and Property are not only join’d in common discourse, but are in their own natures so nearly ally’d, that we cannot be said to possess the one without the other.”<sup>146</sup> Securing “the blessings of liberty to ourselves and our posterity”<sup>147</sup> was, after all, primarily about ensuring that the state would not be able to take without consent or compensation what belonged to the citizens, including their facultative freedoms, and along with Madison, they believed that even as one “is said to have a right to his property, he may be equally said to have a property in his rights.”<sup>148</sup>

Both the genesis of the American Revolution and of the Constitution lie in that which is similar in both liberty and property.

Conceptually, the near indistinguishability of the rights of liberty and property is found in the works of John Locke, and repeatedly in his *Second Treatise on Government*, which may have had greater philosophical impact on the American Revolution than any other political work.<sup>149</sup> Locke asserts that one has a property in the facultative rights to oneself.<sup>150</sup> This concept of self ownership equates property and liberty, for both terms refer to one's right to exclude the state and others from facultative and non-facultative resources alike.

Currently, it may be fashionable to separate the concepts of liberty and property, but the entire legal basis for colonial America's argument against the British state was that the most basic exclusionary principle of English constitutionalism and common law — that of liberty/property — was being taken from the colonists by taxation without due process representation.<sup>151</sup> The Lord Mayor of London acknowledged that “if we can tax the Americans without their consent [i.e., their representation in Parliament], they have no property, nothing they can call their own,”<sup>152</sup> and this deprivation was the taking of liberty itself. For nationbuilders who wish to grasp what about the underpinnings of prosperity and freedom in the United States is most essential, the key is to appreciate the interconnected meaning of liberty and property as the general right to exclude the state and others from the broadest range of resources, with self ownership as the generative basis for maximum production of new and additional resources.

That not everyone was free to enjoy the right of exclusion is not an indictment of the importance of liberty and property in colonial America or sixteenth and seventeenth

century Great Britain. That women had no right to vote and had a limited property right and that Africans were enslaved in the New World and had the self-ownership right enjoyed by others stripped from them does not contradict the premise that the exclusionary right is the hallmark both of freedom and prosperity. However, it does show the horrendous consequences of failing to extend liberty and property to all persons within the jurisdiction of the state, and it illustrates that the ideals of liberty and property fall short of perfect accomplishment in even the freest and most prosperous nations.

The lesson for nationbuilders is that it is not enough to proclaim the words “liberty” and “property” but that the exclusionary right underlying these terms must be equally and generally applied under the rule of law and that the resources to which it applies must be specified in the widest terms. Moreover, the more resources to which liberty/property applies, the stronger the system and the freer and more prosperous the citizenry. The caveat is always that the price of such a system is eternal vigilance and that although it may be easy to say the words “liberty” and “property,” it can be difficult to enforce them in practice with regard to the equal exclusionary right of others.<sup>153</sup>

The final section considers how those who run giant businesses can ignore the equal exclusionary right of others. The issues of corporate governance are pressing, and they illustrate well the difficulties of implementing the enforcement of a strong system of liberty/property (hereinafter, “property”) in order to create freedom, prosperity, and peace.

## CORPORATE GOVERNANCE

Specifically, corporate governance refers to the legal relationship among the owners of a business organization and between them and the managerial agents who run

it.<sup>154</sup> In a broader sense, corporate governance relates to the general limits that society places (or should place) on economic actors, the very biggest of which are transnational corporations. Whether in its specific or broad sense, the issues of corporate governance can be reduced to the exclusionary right — the property right — as it is limited by the equal right of others. The operation of a strong property system does not free economic actors to do anything they wish but rather it protects the resources of the weaker against the predations of the more powerful. It secures the equal right of all.

*The Specific Sense of Corporate Governance and Property*

Some of the very worst abuses of corporate governance in the specific sense can today be found in Russia where “strong man” domination of the formerly communist manufacturing sector of the economy prevails. Former Soviet managers often continue to control companies without any nod to their new outside owners; accounting procedures are weak and firm decisionmaking lacks minimal transparency; and extremely low market values of company stocks reflect investor conviction that corruption, mismanagement, fraud, and theft are the norm.<sup>155</sup> Merrit Fox and Michael Heller assert that many Russian managers “refuse to register share purchases by outsiders, refuse to recognize board directors properly elected by outside shareholders, dilute stock in ways that freeze out outsiders by issuing shares to insiders for inadequate consideration, or engage in false bankruptcies that wipe out shareholders’ interests.”<sup>156</sup> One manager installed guards to keep shareholders out of a gypsum plant and ignored dozens of court decisions against him over several years.<sup>157</sup>

This list of corporate governance horrors can be reduced to the egregious failure to institute, implement, and enforce a strong property system. For a private market to

function, the state must enable business owners to exclude others from interfering with business resources, and “others” certainly include the fiduciary agents (company managers) employed by the owners. In part, the sad lack of corporate governance in Russia is attributable to IMF economists who encouraged Russia in the months following the Soviet Union’s collapse toward market fundamentalism,<sup>158</sup> the belief that privatization itself can alleviate the inadequacies of state planning and set a developing country on the road to economic growth. A more measured, bottom-up approach like that China is taking, which allows the development of smaller private companies within a growing commercial law framework,<sup>159</sup> would have worked better for Russia. However, by 1997, when Federal Reserve chair Alan Greenspan described “the rule of law,” “property,” “contract,” and “judicial review and determination” as “the essential infrastructure of a market economy,”<sup>160</sup> it was too late for Russia. The average per capita income had declined dramatically below even Soviet days.<sup>161</sup>

To inculcate the values of fiduciary obligation into business managers requires not only that corporate governance laws exist but that education and social culture support the right of property. When American settlers traveled the Overland Trail westward, and were often beyond the law’s enforcement by any jurisdiction, the respect for the property right was still such that “the concept of private property remained largely inviolable, even when conditions were trying and people desperate.”<sup>162</sup> In circumstances of dire need, travelers continued to contract for others’ resources, rather than stealing them,<sup>163</sup> and there were virtually no recorded instances of forceful taking of what one had that another wanted or needed.<sup>164</sup> However, in the new century, when some do not recognize the rule of law and legal systems as foundational to the study of business,<sup>165</sup>

the problems of corporate governance in the United States is on the rise. Scandals at Enron, WorldCom, Tyco, Adelphia, ImClone, Quest, and Global Crossing all represent corruption and fraud in business managers' acquiring the resources of their companies' investor-owners, corporate-governance failures that reflect not only weak laws guaranteeing the equal rights of others but also the absence of the values that respected the right to exclude on the Overland Trail. Adequate corporate governance requires both laws that secure the property right of business owners against their managerial agents and the social commitment to the values of property that is ideally supported by an educated understanding of the property system.<sup>166</sup>

The intent of this essay is not to articulate the rules necessary for adequate corporate governance, which in any event may vary from culture to culture, but to place corporate governance within the property right of exclusion, which the essay argues is necessary to attain the maximum potential for resource development. As the next section contends, the broader sense of corporate governance as regulating the relationship between economic actors, especially the more substantial ones, and society also is contained within the appreciation of a property system.

#### *The Broad Sense of Corporate Governance and Property*

A whole host of groups comprise the anti-globalization movement that demonstrates at the meetings of the World Trade Organization. Environmental groups, labor unions, and various groups concerned about the environment and the health, safety, and wages of workers in less developed nations make up the bulk of demonstrators,<sup>167</sup> and their concerns can be met through adequate implementation of a single concept: property. Further, since the issues that concern the anti-globalization movement are

generally those that involve the potentially adverse affects that large businesses may have on the resources of those who live in lesser-developed countries, the broad sense of corporate governance is implicated. The following two sections reduce these corporate governance issues to a debate over property, and who should be able to exclude whom from what. The discussion will not resolve the debate but rather focus it.

1. The Right to Pollute as an Object of Property

Environmentalists (and some labor unionists) fear that businesses are leaving the United States and other Western nations who have relatively comprehensive environmental protection laws and moving to less developed countries who have little or no environmental protection.<sup>168</sup> What they do not usually grasp is that the issues raised in such moves are better framed not only by appeals to vanishing rainforests and atmospheric warming but also by assertions of corporate governance failure and the need for strong property systems. When companies flee environmental protection laws and seek out countries with inadequate environmental regulation, they threaten resources like the air and water that are common to all and thus they violate the equal right of all to use these resources. This right can be conceptually reduced to a property right, and the implementation of an equal right to exclude is central to a strong property system.

Admittedly, even in the West, it is not usual to think of private persons as owning the air and water, but broadly speaking, they do inasmuch as they can legally exclude others from certain interferences with these resources, and they have a right to enjoin or seek remedy against those who injure these resources. Just as private co-owners of land (tenants in common) can sue other co-owners who injure (lay waste) to the common resource,<sup>169</sup> so also when private persons are able to exclude others from injuring a right

that each has to unpolluted air and water, an exercise of property takes place. That what constitutes an infringement on one's ownership of air and water has to be defined by law — and since courts will usually lack the expertise to set such environmental standards, they will need setting by public legislative or administrative action — is not significant. Courts can and already do interpret and apply such standards when disputes arise.

In the United States, any citizen whose interest is directly affected can sue to enforce Clean Air Act and Clean Water Act standards.<sup>170</sup> This standing to sue is a recognition of property in the sense asserted here because it is the right to exclude others from interfering with one's resource. That many of the other traditional incidents of ownership are not associated with the property indicated by the Clean Air Act and the Clean Water Act may concern common law legal scholars, but the right of exclusion is the sine qua non of property, and environmental laws do allow for citizens to exclude companies or others from injuring the air and water, as measured by the rules set by the Environmental Protection Agency. Environmentalists demonstrating at the World Bank meeting, and nationbuilders in developing countries, should realize that both the maintenance of clean air and water as well as of long-term sustainable prosperity involving their use are managed most productively by formalizing as much of the world's resources as possible into an exclusionary property system.<sup>171</sup>

Consider what might happen if the right to pollute the world's air and water resources were truly brought within the property system. For instance, if everyone on earth legally owned proportionate shares to pollute the world's air and water,<sup>172</sup> these shares could be sold to those who need to pollute according to safe standards for total pollution amount set by international treaty. If sixty billion pounds of a certain

atmospheric pollutant is the level considered safe to emit on an annual basis, then each person in the world could have a property in ten pounds of this pollutant. To reduce transaction costs, individuals might not have to trade their individual shares, rather the appropriate international agency (United Nations?) could auction off periodically these rights to polluters, and the proceeds could be distributed to the countries of the world on a population-proportionate basis. One approach could be to agree by international treaty to specify the use of such funds for national investment purposes like education, health, disaster relief, and infrastructure. Eventually and ideally, each individual might personally receive her share from the pollution auction, or get a tax credit. The point is not that such a property creation is likely in the current economic and political climate but that environmental corporate governance concerns can be reduced for debate to issues of property, which, as has been previously asserted, is the central hub of Western legal systems.<sup>173</sup>

## 2. Worker Health, Safety, and Non-Discrimination as Objects of Property

The most economically basic resource that people have is the one that they have in themselves, i.e., their potential for effort and ingenuity, supported by their physical integrity, a resource historically protected by the right to exclude others.<sup>174</sup> When workers have their health impaired because of poor working conditions or their personal safety abridged by employment-related injury, the property in their most essential resource is infringed. In property-strong countries, health and safety statutes and systems of tort and worker's compensation help secure the resources that workers own in themselves, but in property-weak nations unhealthy and dangerous working conditions can imperil both the personal and economic futures of their populations. Thus, corporate

governance laws that limit uninhibited business activity around the globe seem appropriate on both health and safety grounds and are fully consonant with the regime of property.

Companies may respond that even as a property system allows them to take risks with their resources, it also holds them to losses when poor choices are made and that the same risks and losses are inherent in employment. As long as employers and employees risk their resources voluntarily, the state should not skew the voluntary exchange of resources, which produces the greatest social prosperity. Although efficiency is indeed defined by the voluntary exchange of resources in a strong property system, market imperfections such as transaction costs that defeat compensation when an employer has caused injury to an employee (e.g., the lack of a tort system) and asymmetries of information between contracting parties in the employment context (e.g., workers not understanding health and safety risks)<sup>175</sup> make market fundamentalism a less compelling social option than adequate corporate governance in all countries of the world. In poor, property-weak countries the absence of an adequate tort system and/or safety and health statutes and the lack of established contract law with doctrines of duress, incapacity, undue influence, mistake, and unconscionability weaken the merits of the voluntary-exchange argument when balanced against the need to strengthen the equal right of others through broad corporate governance.

Whether domestically or internationally instituted, corporate governance to prohibit invidious discrimination against qualified workers due to race, gender, age, and other inherent characteristics can also be couched in property-related terms. The main issue is where does the state assign the right of property.<sup>176</sup> Does it recognize the

property of the employer to exclude others from interfering with the employer's free use of resources in the choice to hire and fire on any basis, including various discriminations based on inherent racial or other characteristics, or does it acknowledge the property right of the employee and job applicant to exclude the employer from discriminating based on such characteristics, effectively recognizing certain non-discrimination as an individual resource. In analyzing these questions in the context of property, recall that property is a right of exclusion, not tangible or intangible things, and that the state should assign, or not assign, the exclusionary right to a resource according to whether it wishes to produce more or less of the resource. Recognizing an exclusionary right of discrimination in the employer gives incentive to discriminate and in all reasonable likelihood will lead to greater discrimination from employers who desire to discriminate than when the job-applicant or employee can legally exclude the employer from discriminating, in which case more non-discrimination will probably be generated.<sup>177</sup>

Although it is not usual to think of discrimination and non-discrimination as objects of the property right, neither was it common at one time to consider the copying of literary and musical works or the protection of inventions, trade secrets, and business goodwill as the objects of property.<sup>178</sup> In terms of corporate governance, however, the reduction of the relationship of business managers to business owners and the relationship of business enterprises both to employees and society generally as concerning where the exclusionary property right lies is illuminating. Some managers will likely always misappropriate the resources of corporate owners, and globalization and anti-globalization forces may never entirely come to agreement, but in order to

understand the maximum potential for prosperity, the term that frames the debate should be “property,” the right to exclude others from limited resources.

### CONCLUSION

Property is not found in the informal tenets of Western culture nor does it derive from the genes of our hunter-gatherer ancestors, although it may be an expression of both. Rather, it is a formal, constitutive principle of political, legal, and economic life that seems to accommodate the resource-oriented behaviors of nations of strangers in a way that encourages people to become more prosperous and to feel freer than either the state- planning system of socialist coercion or the market fundamentalism of economic laissez-faire theory. At its heart property is the legally-instituted right to exclude others, including the state (but with the support of the state) from resources that are originally owned (one’s faculties), or are acquired without force, fraud, or theft.

Since property is a way of ordering resources in *community*, the individual’s exclusionary right in a strong system is always limited by the equal exclusionary right of others. This limitation is the same one that limits liberty, for property and liberty are merely two sides of the same coin; it is a limitation which emphasizes that an adequate property system in its very meaning does not allow the few to use their resources to abuse the many. And although property/liberty may answer the question of how to produce a prosperous, free community, it does not address how society should morally respond to the individually poor, infirm, and unfortunate among us. An appreciation, however, of the natural incentives to production that the institution of property maximally encourages does tell us that if the state excessively coerces resources from those who have to meet the needs or wants of others who lack (or the state cannot effectively prevent private

persons from coercing the resources of others), both prosperity and freedom are weakened.

As a formal legal institution rather than a moral imperative, property does not specify the scope of resources to which it should (or should not) apply. The right to exclude is merely a neutral principle that powers resource increase by protecting the expression of natural tendencies of resource creation, acquisition, and display connected to mating and child care, connected so that to deprive persons of the increase from these tendencies can significantly depress incentive to resourceful activity in ways that neither education nor coercion can effectively overcome in a society. All societies apply private exclusion to at least some resources, but the issues of which resources property should protect and how deeply to tax private resources to provide a common infrastructure and to assist those in exigent need without killing the goose that lays the golden wealth of nations still remains unresolved. That the legal institution of a strong, well-enforced property system, however, supports both freedom in the facultative resources of the person and national abundance from the marketplace exchanges of non-facultative resources seems significantly settled. For nationbuilders concerned with a prosperity and liberty that nurture the hope for sustainable peace, this reductionism is the beginning.

## ENDNOTES

<sup>1</sup> Property is a legal right like freedom of speech rather than a collection of things or resources; thus in the United States everyone has equal property just as they have equal freedom of speech. *See infra* notes 52-64 and accompanying text.

<sup>2</sup> *See infra* notes 135-151 and accompanying text.

<sup>3</sup> Quoted in JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 101 (Gaillard Hunt ed., 1906).

<sup>4</sup> *See infra* note 66. *See generally*, O. Lee REED, *LAW, THE RULE OF LAW, AND PROPERTY: A FOUNDATION FOR THE PRIVATE MARKET AND BUSINESS STUDY*, 38 AM. BUS. L.J. 441 (2001).

<sup>5</sup> *See, e.g.*, Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1042 (1999) (observing that “legal thinkers have learned to treat standard law talk dismissively” and that even contending parties in jurisprudential debates agree “on the inefficiency of conventional legal reasoning”). Legal thinkers, too, sometimes muddy the waters of understanding, often in order to promote their implicit policy goals. Nowhere in law is this more evident than in the literature of property that seeks to deconstruct that term’s core into mere legal relations of power over limited resources, which deconstruction can then provide a basis for democratically redistributing such resources in a more socially equal fashion. This literature asserts that in the last couple of centuries what it means to have property has been essentially redefined. *See e.g.*, Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980). To the contrary, the position of this essay is that the central appreciation of property has always been that one can exclude others from limited resources. The application of property to intangible resources like trade secrets and good will as well as tangible resources like land and the family jewels reflects only a developing economy and the slow accretion of case law interpretation, rather than, according to Vandavelde, that “the meaning of the term ‘property’ has changed radically.” *Id.* at 325.

<sup>6</sup> *See* Amy Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998). Related to the cautioning of restraint in the adopting of Western legal systems is the implication that these systems are idiosyncratic to Western culture and values and thus may not be appropriate for people from non-Western cultures. *Id.* I do not deny the important role of culture in framing economic development, because culture matters tremendously. *See, e.g.*, CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison and Samuel P. Huntington eds., 2000). Rather, I maintain that whatever the cultural differences among countries, an effective property system, broadly defined, is a material requirement for the maximum conditions of Western-style prosperity and freedom. Worldwide, poor nations lack strong property systems and prosperous nations have them. *See infra* notes 73-81 and accompanying text.

<sup>7</sup> *See infra* notes 73-81 and accompanying text.

<sup>8</sup> *See infra* notes 116-128 and accompanying text.

<sup>9</sup> *See infra* notes 52-64 and accompanying text.

<sup>10</sup> *See infra* notes 154-178 and accompanying text.

<sup>11</sup> According to the World Bank in 2000, fifty-four countries of the world had per capita Gross National Income (hereinafter, GNI) of less than two dollars a day. WORLD DEVELOPMENT INDICATORS 18-20 (World Bank, 2000). At least seven countries where figures were unavailable likely also fell below two dollars a day. *Id.*

<sup>12</sup> It is estimated that children suffer 30,000 such deaths every day; over 200,000 a week, or more than ten million annually, die from largely preventable causes. *Soundbites*, *New Scientist*, July 27, 2002 (citing the *UN Human Development Report* that “[e]very day more than 30,000 children die of preventable diseases”).

<sup>13</sup> *E.g.*, Allan Gerson, *Peace Building: The Private Sector’s Role*, 95 A.J.I.L. 102 (2001) (“[T]oday there is new agreement about one basic point: the scourge of intrastate war will not be contained unless the vicious cycle of poverty, economic injury, and political grievance is broken.”); David Hendee, *Expert: Hunger Feeds Desperation, Terrorism*, *Omaha World-Herald*, B6, Oct. 12, 2002 (quoting Per Pinstrup-Anderson, the director-general of the International Food Policy Research Institute that the “underlying causes of terrorism” are “poverty, hunger and hopelessness”); Alan Wechsler, *New Era, New Battles for*

*McGovern*, Times Union, B4, Oct. 8, 2002 (quoting George McGovern: “The basic cause of the spread of terrorism in the world is misery and poverty and hunger.”). *Cf. World Bank*, M2 Presswire, July 9, 2001 available in LEXIS, News Group (quoting World Bank President James D. Wolfensohn: “Only with poverty reduction will peace be possible: an unequal planet will be a planet of war and violence. What we are discussing ... is the basis of peace itself.”).

<sup>14</sup> In 2000, nineteen nations had per capita GNI of \$20,000 or more. WORLD DEVELOPMENT INDICATORS, *supra* note 11.

<sup>15</sup> In 2000, China had \$840 of GNI per capita; Bangladesh had \$370. WORLD DEVELOPMENT INDICATORS, *supra* note 11, at 18. Twenty-nine countries had GNI per capita lower than that of Bangladesh. *Id.* at 18-20.

<sup>16</sup> The United States had a 2000 per capita GNI of \$34,100. WORLD DEVELOPMENT INDICATORS, *supra* note 11, at 20. Three countries had higher per capita GNI. *Id.* at 18-20.

<sup>17</sup> Such exploitation includes removal of resources from the developing nations through outsider investment and trade even after the end of colonial domination. *E.g., see generally* S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J. L. ECON. & ORG. 205 (1995).

<sup>18</sup> For example, African-Americans, who were enslaved in the United States until 1863 and who continue to be discriminated against in many of the private economic opportunities afforded by the marketplace, but who live in a relatively strong property system, had in 1997 a per capita income of \$12,351. *Number of African Americans in Poverty Declines While Income Rises*, Census Bureau Reports. Press release available at <http://www.census.gov/Press-Release/cb98-176.html> (visited Oct. 21, 2002). On the other hand, Russians, who have been neither colonized nor enslaved (except by communism), but who live under a weak property system, had in 2000 a per capita GNI of \$1,660. WORLD DEVELOPMENT INDICATORS, *supra* note 11, at 20.

<sup>19</sup> *See generally*, Mancur Olson, Jr., *Distinguished Lecture on Economics in Government*, 10 J. ECONOMIC PERSPECTIVES 3 (No. 2, 1996).

<sup>20</sup> *Id.* at 19.

<sup>21</sup> The United States 2000 GNI per capita was almost seven times that of Mexico. WORLD DEVELOPMENT INDICATORS, *supra* note 11, at 19-20.

<sup>22</sup> South Korea’s 2000 GNI income per capita was \$8,910. WORLD DEVELOPMENT INDICATORS, *supra* note 11, at 19. North Korea’s was not available but could only be a small fraction of South Korea’s.

<sup>23</sup> *See supra* notes 15-16.

<sup>24</sup> For example, Germany, Austria, Italy, and Japan are all among the world’s wealthiest nations in GNI per capita annual income whereas many countries of South America and Africa were almost untouched by WWII yet still remain impoverished. WORLD DEVELOPMENT INDICATORS, *supra* note 11, at 18-20.

<sup>25</sup> *See generally*, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES (1999). *E.g., id.* at 92 (maintaining that “the availability of domestic plants and animals ultimately explains why empires, literacy, and steel weapons developed earliest in Eurasia and later, or not at all, on other continents.”). Availability of these items was related to the long, relatively uninterrupted, east-west axis of Eurasia, which made the spread of agriculture go faster than elsewhere, and around “[t] hat faster spread of Eurasian agriculture” ... “turned the fortunes of history.” *Id.* At 191.

<sup>26</sup> Professor Diamond’s thesis is a powerful one, but the development of the West into its vast position of economic superiority in the last several hundred years in a very basic way required the recognition and institution of a strong formal property system supported by the beliefs in the system. *See generally*, Douglass C. North, *Why Some Countries Are Rich and Some Are Poor*, 77 CHI-KENT. L. REV. 319 (2001) (stating that property rights enforced under the rule of law and coupled with the informal beliefs in the system is what produces the incentives that make a country rich).

<sup>27</sup> What explains Japan’s current position of prosperity in the world is its strong property system, which changed from a “feudal regime” at the end of World War II. Testimony of Hernando de Soto, *Economic Development and Integration as a Catalyst for Peace*, Hearing of the House International Relations Committee, July 24, 2002 (available in LEXIS, News Group File).

<sup>28</sup> Consider for instance the relative poverty of Albania, Kyrgyzstan, and Ukraine. WORLD DEVELOPMENT INDICATORS, *supra* note 11. China and Russia have somewhat higher per capita GNI, but could also be placed in this group when contrasted with the considerably more prosperous populations of much of Europe. *Id.*

<sup>29</sup> WILLIAM EASTERLY, THE ELUSIVE QUEST FOR GROWTH 25-44 (2002) (chronicling the direction of foreign aid for the last 50 years). See also, Richard A. Slaughter, *Poor Kyrgyzstan*, Nat'l Interest, Summer, 2002, available in LEXIS, News Group File.

<sup>30</sup> Slaughter, *id.* ("There are four principal arrows in the ['international foreign aid,] quiver: privatization, loans, direct grants and technical assistance.").

<sup>31</sup> EASTERLY, *supra* note at 29, (stating that the "idea that aid-financed investment in dams, roads, and machines would yield growth goes back a long way").

<sup>32</sup> EASTERLY, *supra* note at 29, (asserting that the "aid-financed investment fetish has led us astray for growth for fifty years"). *Contra* Gregg Easterbrook, *Safe Deposit, The Case for Foreign Aid*, New Republic, July 29, 2002, available in LEXIS, News Group File (acknowledging that although 1.2 billion people in the world still live on a dollar or less per day in spite of the trillion dollars spent on foreign aid since World War II, there have been some improvements in living standards among the world's poor).

<sup>33</sup> The emphasis on rapid privatization is also termed "market fundamentalism."

<sup>34</sup> Instead, privatization alone creates a host of corporate governance problems. *E.g.*, JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 220 (2002). ("Privatization without necessary institutional infrastructure in the transition countries led to asset stripping rather than wealth creation . . . . By contrast, privatization accompanied by regulation, corporate restructuring, and strong corporate governance has led to higher growth.").

<sup>35</sup> According to a United Nations report, the Russian Federation's gross domestic product (equivalent to GNI) fell by forty-one percent between 1990 and 1997. *Cited in* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL 215 (2000). As for corruption, see Michael McFaul, *Russia's Stalled Democracy*, WORLD AND I, Mar. 1, 2000, available in LEXIS, News Group File (stating that "crime and corruption [in Russia] . . . are still rampant").

<sup>36</sup> *E.g.*, *Conference to Focus on Vital Forestry Issues*, Western Morning News, Aug. 27, 2002, available in LEXIS, News Group File (comment of the conference committee chair of the National Forestry Conference urging "the construction industry to buy British timber instead of other products which use up Earth's limited resources"); *Failure Is Not an Option*, The Japan Times, Aug. 31, 2002, available in LEXIS, News Group File (stating that "the World Summit on Sustainable Development . . . is a touchstone that indicates how serious the international community is about reconciling its needs with the world's limited resources"); William R. Hawkins, *Outside View: Dangers of a Zero-Sum World*, UPI, Sept. 3, 2002, available in LEXIS, News Group File (asserting that "dangerous are the implications of a world with limited resources").

<sup>37</sup> Many may associate the Information Age with computers, or at least with the development of the printing press, but I move its beginnings back at least to the development of agriculture, which led to the specialization of function, enhancement of trade, development of writing, and, in general, to human material progress. From this perspective, material growth is always based on the incentive — best captured in the interstices of formal property — to create and implement new information about the world.

<sup>38</sup> That plenty is induced primarily by human effort is what Locke meant when he said that of the resources "useful to the life of man . . . ninety-nine hundredths are wholly to be put on the account of labour." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 385, 387 (P. Laslett ed., 1967) (1690). From this view (which is the most accurate one), Thorsten Veblen was wrong in asserting: "The accumulation of wealth at the upper end of the pecuniary scale implies privation at the lower end of the scale." DINESH DOUZA, THE VIRTUE OF PROSPERITY 72 (2000) (quoting Veblen and concluding: "Traditionally the debate about inequality has been conducted as if the acquisition of wealth were a zero-sum game.").

For nationbuilders the difference between the image of resources as deriving from a cornucopia rather than a lifeboat is vital to the understanding of property as stimulating maximum resource potential. At the same time the cornucopia image does not deny that oil may be a limited resource and that the atmosphere, waterways, and oceans cannot forever withstand the assault of unbridled pollution. It does suggest that the

solution to limited natural resources is not lifeboat equalitarian rationing but cornucopia proprietarian effort and innovation that could, for instance, create a viable property system out of the commons of atmosphere and water which might benefit the people of all nations. *See infra* notes 171-72 and accompanying text.

<sup>39</sup> In other words, before economists can make predictions about a market economy, they must know under what conditions one can own the resources transferable in that economy. *See* Ronald H. Coase, *The Institutional Structure of Production*, in NOBEL LECTURES IN ECONOMIC SCIENCE 11, 17 (Torsten Perrson ed., 1997) (maintaining that “what are traded on the market are not, as is often supposed by economists, physical entities but the rights to perform certain actions and the rights which individuals possess [i.e., property] are established by the legal system”).

<sup>40</sup> *Cf.* HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 178 (1989) (“Contrary to the belief widespread in Latin America, the economic importance of property rights is not that they provide assets which benefit their holders exclusively, but that they give their owners sufficient incentive to add value to their resources by investing, innovating or pooling them productively for the prosperity and progress of the entire community.”).

<sup>41</sup> For example, the *Restatement of Property* does not define a singular meaning of the term but, rather, explains it as Hohfeldian rights, powers, and duties, an approach difficult for law students to grasp and virtually useless to nationbuilders. *See* RESTATEMENT (THIRD) OF PROPERTY (2000). Common also to law professors, the *Restatement’s* approach leads nationbuilders to such unhelpful conclusions as “[o]wnership is best described in terms of the complex relationships established by the legal rules amongst various participants.” CURTIS J. BERGER & JOAN C. WILLIAMS, *PROPERTY, LAND OWNERSHIP AND USE* 15 (4<sup>th</sup> edition, 1997).

<sup>42</sup> 11 *Encyclopedia of the Social Sciences* 528 (1937), *quoted in* J. GORDON HYLTON et al., *PROPERTY LAW AND THE PUBLIC INTEREST* 68 (1998). *Compare* J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 1 (1997) (stating that many commentators consider property “a bundle of other concepts, a mere chimera of an entity” and “a quivering, wavering, normative phantasm”).

<sup>43</sup> Francis S. Phillbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 696 (1983). *See also* Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69 (J. Roland Pennock & John W. Chapman eds., 1980) (arguing that “property” refers to so many different rights that the term contains little specific meaning).

<sup>44</sup> Aristotle wrote: “Property should be ... as a general rule, private; for when everyone has a distinct interest, men ... will make more progress, because everyone will be attending to his own business.” *Politics*, in 9 *GREAT BOOKS OF THE WESTERN WORLD* 458 (Robert Maynard Hutchins ed., 1952).

<sup>45</sup> Some select examples of this common assertion include CHANCELLOR SIR JOHN FORTESQUE, *DE LAUDIBUS LEGUM ANGLIAE* 143 (Francis Gregor trans., Robert Clarke & Co. 1874) (circa 1464-70) (the Lord Chief Justice and Chancellor under Henry VI asserting that because in England “every inhabitant is at his liberty fully to use and enjoy whatever his farm produceth,” including the improvements “of those he retains in his service ...: hence it is, that the inhabitants are rich in gold, silver, and in all the necessities and conveniences of life”); ARTHUR TWINING HADLEY, *ECONOMICS* 2 (1897) (stating that the property right “is the chief modern motive to labor, to care, and to avoidance of waste and destruction”); RICHARD SCHLATTER, *PRIVATE PROPERTY, THE HISTORY OF AN IDEA* 242 (1951) (quoting David Hume that “whatever is produced or improved by a man’s art or industry ought, for ever, to be secured to him, in order to give encouragement to such useful habits and accomplishments”); SCHLATTER, *id* at 246 (quoting Jeremy Bentham “that in order to incite men to work the law ought to secure to each man the results of his industry.”); Adam Smith, *THE WEALTH OF NATIONS* 592 (Edwin Canan ed., Modern Library 1994) (1776):

That security which the laws in Great Britain give to every man that he shall enjoy the fruits of his own labour is alone sufficient to make any country flourish .... The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle that it is alone, and without any assistance ... capable

of carrying on society to wealth and prosperity ....

Frederic Bastiat, *Property and the Law*, in CLASSICAL FOUNDATIONS OF LIBERTY AND PROPERTY 191, 193 (Richard A. Epstein ed., 2000) (stating that one “will not perform any labor if he is not *sure* of applying the fruit of his labors to the satisfaction of his wants”). Compare UNITED STATES CONSTITUTION, Art. 1, § 8 (authorizing Congress to secure “to Authors and Inventors the exclusive Right [i.e., property] to their respective Writings and Discoveries” in order “[t]o promote [give incentive to] the Progress of Science and useful Arts”).

<sup>46</sup> Gray, *supra* note 42, at 69. Compare James Grunebaum, *property*, THE OXFORD COMPANION TO PHILOSOPHY 723 (Ted Honderich ed., 1995) (defining property as “what is owned”).

<sup>47</sup> Nationbuilders should appreciate that the meaning of property has a common essence and not believe that the incentive property produces is based somehow on a concept without fixed meaning; however, if they confuse property with the things or resources to which it applies, they cannot grasp its fixed meaning. Consider when Henry Maine writes of “new forms of property” and “forms of propriety right distinctly new.” SIR HENRY SUMNER MAINE, ANCIENT LAW 244 (reprinted, Dorset Press 1986) (1861). If he intends that property is somehow mutating from an exclusionary right to something else, then the meaning of property itself is changing, but if he intends only that the exclusionary right is being *applied* to new or different things, the *meaning* of property has not changed, rather it is merely likely that as the economy develops, disputed instances arise concerning who owns what new intangible resource and courts are called upon to determine how property applies. In any event, this process is gradual, operates primarily on the cusp of economic development, and should not be taken as effecting dramatic upheaval in the general understanding of property.

<sup>48</sup> PETER STEIN & JOHN SHAND, LEGAL VALUES IN WESTERN SOCIETY 216 (1974) (explaining that because of the Roman view, civil law countries even today tend “to identify ownership with the thing owned”). In spite of the civil law’s orientation, all civil law countries today recognize the right to exclude in relation to contract rights and various forms of financial instruments, and thus they recognize property in intangible things according to the most essential meaning of property. Even when “property” is used to mean “things,” it is not synonymous with every kind of thing but only with things that are owned, making “ownership,” not “things,” the semantic essence of “property.”

<sup>49</sup> Alan Macfarlane, *The Mystery of Property: Inheritance and Industrialization in England and Japan*, in PROPERTY RELATIONS, RENEWING THE ANTHROPOLOGICAL TRADITION 104 (C.M. Hann ed., 1998) (asserting that feudal lawyers saw that the rights to a thing “were almost infinitely expandable”). Like many others, Macfarlane equates property with a singular thing. A better view recognizes property as a singular exclusionary *right* and the resources of an object being “infinitely expandable,” with each new resource also being protected by the state-instituted property right that allows owners to exclude others from that resource. But Macfarlane is correct that feudal lawyers applied property not just to the land itself but also to various possible uses of the land, which I regard as “resources” of the land. Remember that in this essay the point is not to explain the perplexities of common-law or civil-law property language to nationbuilders but to give them a basic appreciation of what it is about Western legal systems that explains the maximum condition for resource generation.

<sup>50</sup> Mozart, for example, died financially strapped and in spite of his continuing reputation had to be buried in a pauper’s grave, in part because his music lacked “the protection of any form of copyright law ....” THE LAROUSSE ENCYCLOPEDIA OF MUSIC 242 (Geoffrey Hindley ed., World Pub. Co. 1971). Most classical composers earned their livings primarily by charging audiences for performances of their work, and/or they enjoyed patronage.

<sup>51</sup> The reference is to *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (determining that the court of appeals erred in presumptively concluding that 2 Live Crew had infringed on Roy Orbison’s copyright of “Oh, Pretty Woman”).

<sup>52</sup> Legal scholars often think of property “in terms of bundles of rights, obligations and interpersonal relationships” that “have nothing in common except they are exercised by persons and enforced by the State.” STEIN & SHAND, *supra* note 47, at 216. Accord BURGER & WILLIAMS, *supra* note 41, at 4, (stating that lawyers and judges are “near unanimous” on the bundle-of-rights concept of property). The mostly positive rights in the bundle include the rights to possess, to use, to manage, to generate income, to consume or destroy, to alienate, and to transmit through devise and bequeath. See A.M. Honore,

*Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 113 (A.G. Guest ed., First Series, 1961). I maintain that these various “rights” are themselves resourceful uses that can be split off from a larger resource and become protected by property, such as when a lessee possesses and can exclude others from land although the lessor retains a reversionary property in it.

<sup>53</sup> PENNER, *supra* note 42, at 72 (stating that the “exclusion thesis is a statement of the driving analysis of property in legal systems”). See generally Thomas W. Merrill, *Property and the Right to Exclude*, NEB. L. REV. 730 (1998). Professor Merrill develops further the right to exclude as encompassing the essence of property in *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000), although he also illustrates the difficulty of interpreting property through its exclusionary meaning as a substantive due process right when it is not clear that the state has previously acknowledged a specific resource (e.g., contract rights) as property. This difficulty, which relates to the fact that property does not really apply to a resource until the court or legislature specifies that it does in spite of the judicial propensity to “discover” rather than “apply” property in actual constitutional cases, need not concern nationbuilders in developing countries who seek a reductionary understanding of Western law as an engine for prosperity and liberty.

<sup>54</sup> A more complete definition: *Property is the right of persons to exclude others, including the state, from any resource originally possessed or acquired without force, theft, or fraud, which right is limited by the equal right of others.* Taxation and eminent domain, of course, also limit the right of property, but they are external limitations and are not part of the definition. On the other hand, that the right to exclude others from interfering with what one does with resources is subject to the equal right of others (e.g., X cannot by right drive her car on Y’s land when Y may wish to exclude her from doing so) is integral to the meaning of property, as is regulation (e.g., environmental rules) that protects the equal rights of others.

<sup>55</sup> Merrill, *Property and the Right to Exclude*, *supra* note 53, at 740 (asserting that “if one starts with the right to exclude, it is possible to derive most of the attributes commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusive right”).

<sup>56</sup> Thus, “[t]he right to possess ... may be understood ... simply as the right to exclude others from the use or other benefits of the thing.” LAWRENCE C. BECKER, PROPERTY RIGHTS, PHILOSOPHIC FOUNDATIONS 18 (1977); PENNER, *supra* note 42, at 74 (maintaining that “the owner’s power to share and even transfer his property is part and parcel of the right of exclusive use.”); DE SOTO, *supra* note 40, at 159 (stating that property permits owners to exclude others from interfering with the enjoyment, disposition, and use of something). Cf. WILLIAM MARKBY, ELEMENTS OF LAW 157 (6<sup>th</sup> edition, 1905) (asserting that “[t]he owner of land has not one right to walk upon it, and another right to till it; the owner of a piece of furniture has not one right to repair it, and another right to sell it: all the various rights which an owner has over a thing are conceived as merged in one general right of ownership”).

<sup>57</sup> Contrast MARGARET JANE RADIN, CONTESTING COMMODITIES (1996) (advocating that the state not institute property in body parts) with Lori B. Andrews, *My Body, My Property*, 16 HASTINGS CENTER REP. 28 (Oct. 1986) (urging recognition of property in one’s body). I do not advocate for or against property in particular resources, but do strenuously observe that if nationbuilders wish to increase maximally some resource in quantity or amount, they should institute a strong property in it.

<sup>58</sup> EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 142 (Cornelia Brookfield trans., 1957).

<sup>59</sup> E.g., *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 673 (1999) (stating that “[t]he hallmark of a protected property interest is the right to exclude others”).

<sup>60</sup> IV BLACKSTONE’S COMMENTARIES 1 (St. George Tucker ed., reprinted Augustus M. Kelly 1969) (1803) (defining property as being “in total exclusion of the right of any other individual in the universe”).

<sup>61</sup> *International News Service v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., concurring) (asserting that “[p]roperty depends upon exclusion by law from interference ...”). See also *id.* at 250 (Brandeis, J., dissenting) (explaining that “[a]n essential element of individual property is the legal right to exclude others from enjoying it”).

<sup>62</sup> THOMAS HOBBS, LEVIATHAN 297 (C.B. Macpherson ed., reprinted Penguin Classics 1985) (1651) (stating that “[t]he Propriety [property] which a subject hath in his hands, consisteth in a right to exclude all other subjects from the use of them”).

<sup>63</sup> Important to the understanding of nationbuilders is that even though in contemporary times the state may tax land to support public education, or that even though in feudal times land ownership had certain duties

of military service and support attached to it, “property” has not changed its essential meaning as the right to exclude. However, as the state increases taxation on a resource or levies heavier duties against it, the property right weakens in regard to that resource (or the resource shrinks), and at some point the incentive to initiate further resource development is also weakened.

<sup>64</sup> Merrill, *Property and the Right to Exclude*, *supra* note 53, at 730. Cf. A. JAMES CASNER, *et al*, CASES AND TEXTS ON PROPERTY 4 (4<sup>TH</sup> edition, 2000) (stating that

“[w] herever and whenever property rights have arisen, one of their central features is a right to exclude others”). A short explanation is warranted here concerning how the exclusionary right applies to property’s familiar division into “private,” “public,” and “common” usages. Private property is the exclusionary right persons have in their resources; it represents the dominant usage of “property” and provides the primary connotation that nationbuilders need to grasp. Public property is the exclusionary right that the state exercises over resources, and the state certainly excludes private citizens from many uses of the resources it holds. “Common property” as it refers to resources like the atmosphere or oceans is largely a misnomer due to the fact that one cannot usually exclude others from using these resources; more accurately, the reference is to common “resources,” thus avoiding the confusion of property with resources. However, as suggested, *infra*, notes 169-73 and accompanying text, if the state were to recognize everyone’s right to exclude others from polluting common resources, it would be appropriate to term this right as “property,” even as co-owners of land have the right to exclude each other from wasting its resources.

<sup>65</sup> Trespass is the “fertile mother of actions.” F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 48 (A.H. Chaytor & W.J. Whittaker eds., 1963) (1909). It is the basis of modern tort law. William J. Bowman & Patrick F. Hofer, *The Fallacy of Personal Injury Liability Coverage for Environmental Claims*, 12 VA. ENVTL. L.J. 393, 411 (1993) (explaining that “to examine the history of trespass is to explore the history of all torts, for it evolved into the forms of redress for all civil wrongs.... Trespass to land was but one of these wrongs.”). Trespass recognizes a sphere of private resources related not only to land and other non-facultative resources but also to the faculties and body of an owner who can exclude others from interfering with (trespassing on) this sphere.

<sup>66</sup> ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 8 (1933) (stating that “[p] rivate enterprise, which has molded economic life since the close of the middle ages, has been rooted in the institution of private property”); FRANCIS FUKUYAMA, *TRUST, THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (describing property as an “indispensable” institution “for creating a modern market-oriented economic system”); Alan Greenspan, *infra* note 160 and accompanying text (describing property as an “essential infrastructure of a market economy”). See generally, Reed, *supra* note 4.

<sup>67</sup> In other words, “without the right institutional environment [i.e., property and contract], a country will be restricted to trades that are self enforcing.” MANCUR OLSON, *POWER AND PROSPERITY* 185 (2000).

<sup>68</sup> Ronald H. Coase, *The Institutional Structure of Production*, in *NOBEL LECTURES IN ECONOMIC SCIENCE* 11, 17 (Torsten Persson ed., 1997).

<sup>69</sup> *Id.*

<sup>70</sup> This includes the power of the state, which is always greater than the power of the individual.

<sup>71</sup> Reed, *supra* note 4, at 451-52 (discussing how property creates security for capital borrowing and investment, provides incentive to improve resources, and identifies and protects resources than can be used then for further resource development). See generally, DE SOTO, *supra* note 35.

<sup>72</sup> *Making Sustainable Development Work*, FDCH Fed. Dept. & Agency Docs., July 12, 2002, available in LEXIS, News Group File (quoted by Sec. of State Colin Powell).

<sup>73</sup> The converse is also true: countries with no formal property systems are the poorest in the world. The empirical studies that justify these statements are found *infra*, notes 74-78.

<sup>74</sup> GERALD P. O’DRISCOLL, JR., *et al.*, 2002 INDEX OF ECONOMIC FREEDOM 37 (2002)

<sup>75</sup> *Id.* at 40.

<sup>76</sup> *Id.* at 40.

<sup>77</sup> JAMES GWARTNEY, et al., *ECONOMIC FREEDOM OF THE WORLD: 1975-1995* (1996).

<sup>78</sup> Gerald W. Sully, *The Institutional Framework and Economic Development*, 96 J. POL. ECON. 952 (1989).

<sup>79</sup> The quoted phrase is the subtitle to DE SOTO, *supra* note 35.

<sup>80</sup> DE SOTO, *supra* note 35, at 177 (asserting that the “importance of property rights has been emphasized by various economic historians who believe that the boom in technological innovation in the West, and the massive investment that made it possible, began only at the end of the eighteenth century, when property rights were perfected and made independent of politics”). Thus, for at least two hundred years, property has been “the most important legal conception” in Western culture. TONY HONORE, *MAKING LAW BIND* 161 (1987). Yet unfortunately “today, few are aware of the tremendous edge that formal property systems have given Western societies.” DE SOTO, *supra* note 35, at 224-25.

<sup>81</sup> The figures cited *supra*, notes 74-75 and accompanying text are the basis for this approximate figure. The per capita income differences between the very wealthiest, strong-property nations and the very poorest, weak-property nations can vary from 10 to 100 fold. *Cf.* WORLD DEVELOPMENT INDICATORS, *supra* note 11.

<sup>82</sup> *Cf.* JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 370 (Donald Winch ed., Penguin Classics 1988) (1848) (“According to the fundamental idea of property, indeed, nothing ought to be treated as such, which has been acquired by force or fraud, or appropriation in ignorance of a prior title vested in some other person . . .”). That one cannot acquire resources “dishonestly” and then have them protected by the property right is part of ensuring this right in others. *Compare* MARKBY, *supra* note 56. (“It [that one is ‘the absolute and exclusive owner’] does not mean that he may exercise his ownership in accordance with his uncontrolled fancy. . . . I cannot exercise my rights in such a way to infringe the law or the rights of others.”).

<sup>83</sup> Since property organizes social order in relation to the distribution and production of resources, it necessarily is sensitive to the community’s interest that one not become an owner through coercion, theft, or fraud and thus violate the equal property right of others. Criminal and tort law are spokes radiating from the central conceptual hub of property in Western legal systems, spokes that generally serve to enforce the equal property right of others or else compensate for its infringement.

<sup>84</sup> Note that the initial assignment of the property right to X or Y is not dictated by some inevitable arrangement, and the argument can be made that vast resource holdings acquired outside of a formal property system are not protected from redistribution, *but* once the assignment is recognized within a formal property system that protects the equal exclusionary right of all persons, reassignment will be strongly resisted and if it occurs may produce substantial weakening of incentive because of the uncertainty felt concerning the further reallocation of resources. Facing uncertainty about where the right of property lies — or is likely to lie in the future — people will tend to keep their assets concealable and easily movable. They will also be unlikely to risk them in fixed locations in ways productive of resource growth.

<sup>85</sup> The basic act was the Homestead Act. 43 U.S.C. §§ 161-64 (enacted) (partially repealed by the Federal Land Policy and Management Act of 1976, Title VII, § 702, 90 Stat. 2744, 2787).

<sup>86</sup> General Allotment (Dawes) Act, ch. 119, § 1, 24 Stat. 388 (1887). 25 U.S.C. § 331-358 (2002) (331-333 repealed).

<sup>87</sup> *See generally* Kenneth H. Bobroff, *Retelling Allotment: Indian Property and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

<sup>88</sup> In other words, the state should focus on the broad enforcement of the property right, such that common citizens feel secure in their persons and possessions and have recourse for resource infringement and injury. However, when the focus is on privatizing large industrial and mining enterprises, getting ownership adequately into the hands of outsiders who can prevent insider corruption and looting can be difficult. *See, generally*, ROMAN FRYDMAN AND ANDRZEJ RAPACZYNSKI, *PRIVATIZATION IN EASTERN EUROPE: IS THE STATE WITHERING AWAY?* (1994) (chronicling the experiences of a Polish economist and lawyer in helping privatize state enterprises through a voucher system). On Russia’s attempts to privatize industry, which has led to a corporate governance crisis in ownership, *see* FOX & HELLER, *infra* note 155.

<sup>89</sup> *E.g.*, TOM BETHELL, *THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES* 202 (1998) (observing that “if property laws are applied equally they will work above all to the advantage of the

poor”). Thus, the United States may still have poor individuals, but it hardly has the level of poverty that exists in most areas of the world.

<sup>90</sup> Local consensus does not mean informal ownership; rather, it refers to *how* formal ownership protected by the state should be determined, namely, by local agreement that is then recognized by the state. It is a way of “adapting the law to the social and economic needs of the majority of the population.” DE SOTO, *supra* note 35, at 106. In this way law is “made to serve popular capital formation and economic growth.” *Id.* Another example of a bottom-up, property-based approach to economic development involves the micro-lending activities of the Grameen Bank, which provides unsecured business loans to the poor in the developing world. See MUHAMEED YUNUS, *BANKER TO THE POOR, MICRO-LENDING AND THE BATTLE AGAINST WORLD POVERTY* (1999).

<sup>91</sup> DE SOTO, *supra* note 35, at 60 (“Without the tools of formal property, it is hard to see how assets could be used for everything they accomplish in the West. How else could financial organizations identify trustworthy borrowers on a massive scale?”).

<sup>92</sup> De Soto is referring to property determination by local consensus when he describes informal resource boundaries as marked by barking dogs. DE SOTO, *supra* note 35, at 162 (“Any government that is serious about reengineering the ruling informal agreements into one national formal property social contract needs to listen to its barking dogs. To integrate all forms of property into a unified system, governments must find out how and why local conventions work and how strong they actually are.”). *Id.* at 168 (“What governments in developing countries have to do is listen to the barking dogs in their own communities and find out what their law should say.”).

<sup>93</sup> JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 260 (1990) (asserting that “the myth of property is pernicious because it hides a structure of power and insulates it from democratic debate”); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) (stating that if “somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power limited but real to make him do what I want”); Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, in *NOMOS XXII: PROPERTY* 3, 5 (J. Roland Pennock & John W. Chapman eds., 1980) (stating that “ownership of Wildfell Hall [Blackacre], it often seems, is a form of power that allows us to exploit other people”).

The focus on property as power has a strong Marxian flavor. Sheldon S. Wolin, *On Reading Marx Politically*, in *MARXISM: NOMOS XXVI* 79, 89 (J. Roland Pennock & John W. Chapman eds., 1983) (noting the “persistence with which he [Marx] judged each theory according to the standard of power”). Ultimately, power is not an analytically useful concept in contrasting property versus redistributionist resource systems. In any society whoever controls vast resources has “power” in the sense of the citations of note 93, and this especially includes the state, which has power over both those from whom it takes resources and those to whom resources are redistributed and who must obey the state in order to obtain further resources. In fact, in a strong property society there will be more needed resources available privately to everybody than in a redistributionist society, and this in a real sense reduces the power that the state is capable of exercising over one. Since people on average tend to be much more prosperous in a strong property society that has many sources for inexpensive resources available, private individuals also generally do not have undue power over others on account of unequal resources. 99.9 percent of the population in the United States can say “fie on you Bill Gates” without concern that the world’s richest man can exercise any power at all over them.

<sup>94</sup> Further, these limits are part of the definition of property. If the rich can use their resources to injure or coerce the resources of the poor, it indicates a weak property system, usually one lacking an adequate enforcement of the property right. E.g., Felix S. Cohen, *Dialogues on Private Property*, 9 RUTGERS L. REV. 357, 362 (1954) (stating that “if any property owner could really do anything he pleases with his own property, the rights of all of his neighbors would be undermined... In fact private property as we know it is always subject to limitations based on the rights of other individuals in the universe.”).

<sup>95</sup> II BLACKSTONE’S COMMENTARIES, *supra* note 60, at 138.

<sup>96</sup> *Entick v. Carrington*, 19 Howells St. Trials 1029, 1066 (1765).

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<sup>97</sup> Taxation is necessary even under the strongest of property systems for public goods like roads and military defenses that resource exchanges among individuals do not generate well because of excessive transaction costs, “free riders,” and “last-holder” problems. Adequate humanitarian assistance also requires taxation.

<sup>98</sup> It is vital to emphasize to nationbuilders that perhaps the most important and least recognized features of a strong property system is that it respects the equal property rights of others. Without such respect, engendered by the state through impartial, timely enforcement of the exclusive rights of all citizens, property cannot create the kind of prosperity and liberty that exist in Western nations.

<sup>99</sup> Without contract the promise to transfer resources in the future would be meaningless, and Professor Nichols identifies the recognition of contract law as the most salient characteristic of an economy that is ready for international trade. Philip M. Nichols, *A Legal Theory of Emerging Economies*, 39 VA. J. INT’L L. 229 (1999). Underlying contract, however, must be the fact that the contracting parties have the legal right to exclude others from the resources which are the object of the contract. That legal right is property.

<sup>100</sup> Note that to achieve desirable reductionism, no distinction is made here between legal wrongs to one’s person and legal wrongs to one’s land or widgets, nor to civil or criminal responses to these wrongs. In all instances one has the right to exclude others from interfering with one’s resources broadly defined; i.e., one has property.

<sup>101</sup> Nationbuilders should keep in mind that the issue is always who can exclude whom, from what, and when.

<sup>102</sup> Thus, “there is a consensus that property cannot exist without some institutional structure that stands ready to support it.” Merrill, *supra* note 53, at 733. Blackstone agrees. II BLACKSTONE’S COMMENTARIES, *supra* note 60, at 141 (“Since the law is in England the supreme arbiter of every man’s life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein.”).

<sup>103</sup> The concept of “maximum prosperity” can be extended to include not only the generation of resources that are typically generated in the marketplace but also the maximum encouragement of the facultative resources of the self, the condition traditionally associated with “liberty.”

<sup>104</sup> For example, in the American experience consider James Madison’s assertion about the broad sense of property: “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals as that which the term particularly expresses.” MADISON, *supra* note 3, at 102. Compare the views of Gouverneur Morris: “It was only for the sake of property that men gave up the greater freedom of the state of nature and submitted themselves to the constraints of society and government.” *Quoted in* NEDELSKY, *supra* note 93, at 68. Nor should these views be considered held only by Locke and his adherents, but rather, in Samuel Adams’ words, property is “an essential, unalterable right in nature, engrafted into the British constitution as a fundamental law, and ever held sacred and irrevocable by the subjects within the realm . . . .” *Quoted in* ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791* 254 (1991). Also it is not only the broad sense of property as applied to life and liberty that makes it central to the civil state. As John Davies, the British attorney general of Ireland in the early 1600s, maintained: “The first and principal cause of making kings was to maintain property and contracts, and traffic and commerce among men.” *Quoted in* JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, THE AUTHORITY OF RIGHTS* 33 (1986).

<sup>105</sup> The formal rules of a property system are easily asserted by the state. The difficulty lies in the system’s fair enforcement, and for this reason nationbuilders need to educate the social importance of the property system at all levels of society. *Cf.* DE SOTO, *supra* note 35, at 223 (urging that “we must make represented systems [like property] simpler and more transparent and work hard to make people understand them”).

<sup>106</sup> *See infra* note 158 and accompanying text. *See also* DE SOTO, *supra* note 35, at 215 (citing that the gross domestic product of Russia declined 41 percent from 1990 to 1997).

<sup>107</sup> *See, e.g., Testimony of Minxin Pei before the House International Relations Committee, FDCH Congressional Testimony, April 30, 1998, available in NEXIS, News Group File* (stating that the development of the legal system “has become one of the most important institutional changes in China since the late 1970s”). Unfortunately, China’s property system is still quite weak and corruption in both the

political and economic spheres is prevalent. See JULIA KWONG, *THE POLITICAL ECONOMY OF CORRUPTION IN CHINA* (1997).

<sup>108</sup> E.g., see the statement of Samuel Adams, *supra* note 104.

<sup>109</sup> In other words, whatever the historical usage of the term “property,” at some level that usage meant one could exclude others—including the state—from a resource, and only inasmuch as one could legally exclude others do we have the essential meaning of property. That over the centuries new resources (e.g., trade secrets and business goodwill) came to be protected by property does not reflect change in the term’s core meaning, only the specific resources to which property applies have changed.

<sup>110</sup> For the proposition that property is a moral right, see generally, ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); MURRAY ROTHBARD, *THE ETHICS OF LIBERTY* (1982). Note that this essay is not asserting property as a moral right. It merely argues to nationbuilders that a strong property system produces the maximum potential for national prosperity and personal liberty.

<sup>111</sup> E.g., the statement of Samuel Adams, *supra* note 104. Only a few years later, Alexander Hamilton maintained that “a principle cause of the Union” was to protect “the sacred rights of private property.” Quoted in Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WISC. L. REV. 1135, 1142. Accord Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1 (stating that “no taxation without representation” is “fundamentally about taking property without consent”).

<sup>112</sup> REID, *supra* note 104, at 40 (asserting that property encompassed “the entire American constitutional case against parliamentary taxation”); SCHLATTER, *supra* note 45, at 188. (“Behind the slogan, ‘no taxation without representation,’ stood the Lockean theory of property.”).

<sup>113</sup> Jeremy Bentham, *Principles of the Civil Code*, in *PROPERTY, MAINSTREAM AND CRITICAL POSITIONS* 39, 53 (C.B. Macpherson ed., Basil Blackwell 1978) (1692).

<sup>114</sup> This view is basic to Adam Smith, who saw the competitive self-interests of sellers in the marketplace as an “invisible hand” guiding the best goods at the lowest prices to buyers.

<sup>115</sup> I am calling what follows a “story” because there is no current way to prove it through scientific experiment. Nonetheless, the “story” is consistent with the evidence we do know.

<sup>116</sup> Textbooks asserting that basic human behaviors reflect evolutionary development include DAVID M. BUSS, *EVOLUTIONARY PSYCHOLOGY: THE NEW SCIENCE OF THE MIND* (1999); JOHN CARTWRIGHT, *EVOLUTION AND HUMAN BEHAVIOR* (2000); and STEVEN J.C. GAULIN and DONALD H. MCBURNEY, *PSYCHOLOGY, AN EVOLUTIONARY APPROACH* (2001). The hypothesis is that our basic human behaviors today reflect what served us well in small group hunter-gatherer living. E.g., GAULIN & MCBURNEY, *id* at 90 (“To put it plainly, our psychological adaptations are those of Pleistocene hunter-gatherers.”). The use of evolutionary psychology to illuminate problems of law and jurisprudence has already begun. See, e.g., JOHN H. BECKSTROM, *EVOLUTIONARY JURISPRUDENCE: PROSPECTS AND LIMITATIONS ON THE USE OF MODERN DARWINISM THROUGHOUT THE LEGAL PROCESS* (1989); MARGARET GRUDER, *LAW AND THE MIND: BIOLOGICAL ORIGINS OF HUMAN BEHAVIOR* (1991); Owen D. Jones, *Law and Evolutionary Biology: Obstacles and Opportunities*, 10 J. CONTEMP. HEALTH L. & POL’Y 265 (1994). The Society for Evolutionary Analysis in Law holds regular academic conferences and maintains a website with a source bibliography at [www.sealsite.org](http://www.sealsite.org).

<sup>117</sup> E.g., David M. Buss, *Sex Differences in Human Mate Preferences: Evolutionary Hypotheses Tested in 37 Cultures*, 12 BEHAVIORAL & BRAIN SCIENCES 1 (1989) (asserting that “[i]ndividuals lacking favored [mating] characteristics tend to become no one’s ancestors”). Cf. RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 117 (1998) (“Where resources are scarce, disinterested generosity is not a viable strategy for survival...[T]he pure altruist keeps a smaller and smaller share of the world’s stock, until the retained share is insufficient to allow for survival or reproduction of its own kind.”).

<sup>118</sup> The point is that these general behaviors are basic to individual survival and procreation and that when suppressed they negatively affect the direction of additional resourceful effort.

<sup>119</sup> Note that the death of offspring is by far the most significant limitation on passing one’s genes to the future, the death of related kin being the other limitation. The concept of the “selfish gene” that shapes

human behavior to perpetuate its future provides the principal basis for evolutionary psychology. An extensive discussion is found in CARTWRIGHT, *supra* note 116, at 57-90.

<sup>120</sup> *E.g.*, BUSS, *supra* note 116, at 104 (“The evolution of female preference for males offering resources may be the most ancient and pervasive basis for female choice in the animal kingdom.”). Buss applies this conclusion to humans based on his study of over 10,000 individuals in thirty-seven cultures. *Id* at 108-09.

<sup>121</sup> DAVID P. BARISH and JUDITH EVE LIPTON, THE MYTH OF MONOGAMY: FIDELITY AND INFIDELITY IN ANIMALS AND PEOPLE 132 (2001) (“Men ...accumulate property [resources] — as well as prestige and power of other sorts — so as to attract women.”); *E.g.*, DAVID M. BUSS, THE EVOLUTION OF DESIRE 47 (1994) (“Men strive to control resources and exclude other men from resources to fulfill women’s mating preferences. In human evolutionary history, men who fail to accumulate resources failed to attract mates.”). Resources are thus vital to both genders, not only for self-survival but for the mating process that leads to procreation and passes the genes from one generation to the next. *Cf.* RICHARD PIPES, PROPERTY AND FREEDOM 71 (1999) (maintaining that “the leading causes of human acquisitiveness [are] the need of territory and of objects with which to sustain oneself and to procreate”).

<sup>122</sup> PIPES, *id* at 86. Larger forms of human social organization such as the tribe, city state, and nation did not begin to coalesce until the advent of agriculture approximately 10,000 years ago. Nigel Nicholson, *Evolutionary Psychology, Toward a New View of Human Nature*, 50 HUM. REL. 1053, 1060 (1997). The territories that hunter-gatherers controlled were like lifeboats in the sense of having limited, non-agricultural, food resources, and the various bands were likely zealous in protecting “their” territorial resources from the predations of strangers. The implication is that during virtually all of human development, strong behaviors of acquiring and defending resources made one more likely to pass genes to subsequent generations, behaviors that are still with us. Sharing behavior is perhaps also part of our behavioral heritage, but its beneficiaries are usually our immediate associates, especially our relatives, and extensive sharing is not common with strangers, even our fellow countrymen. Compassionate sharing should certainly be encouraged and taught both through the educational system and moral exhortation, but it is likely that only coercion could induce people to part with even half of their disposable incomes to alleviate the suffering of the 30,000 children worldwide who die daily from largely preventable disease and hunger. *See supra* note 12. Those individuals who act with continuous compassion throughout their lives to relieve the suffering of general humanity are usually rare enough to be accorded sainthood. *Cf.* EDWARD O. WILSON: CONSILIENCE: THE UNITY OF KNOWLEDGE 277 (1998) (stating that “true compassion is a commodity in chronically short supply”).

<sup>123</sup> The considerable extent of sharing in small-group societies is frequently discussed in PROPERTY RELATIONS, RENEWING THE ANTHROPOLOGICAL TRADITION (C. M. Hann ed., 1998). Professor Epstein believes that self-interested resource behavior can lead to cooperation and reciprocal sharing. EPSTEIN, *supra* note 117, at 18:

The theory of individual self-interest is not only a theory of conflict and competition; it is one of cooperation as well. The organism that goes it alone has no allies to fall back upon when things go bad, and is blocked from engaging in any projects that require the coordination of two or more actors. The logic of self-interest does not, cannot, ignore the gains from cooperation in order to maximize only those gains from competition and aggression.

The theory of individual self-interest is similar to —although not exactly the same as—the story about why sexual selection pressures have evolved behavior that make it difficult for humans to share a significantly large percentage of their resources with strangers.

<sup>124</sup> The primary cite for kinship effects on social behavior like sharing is W. D. Hamilton, *The Genetical Evolution of Social Behavior*, 7 THEORETICAL BEHAVIOR 1 (1964). *See generally supra* note 116.

<sup>125</sup> *Cf.* EPSTEIN, *supra* note 117, at 17. (“Only the most naïve form of human exceptionalism could lead us to believe that [evolutionary] forces that operate on all living creatures, from single-cell organisms to primates, cease as if by magic to exert their influence on human beings. Traits that natural selection has molded for eons do not disappear without a trace ....”). Further, humans tend not to be conscious of how

their behavior is shaped by the adaptation of their genes to evolutionary forces. Douglas A. Terry, *Don't Forget About Reciprocal Altruism: A Critical Review of the Evolutionary Jurisprudence Movement* 34 CONN. L. REV. 477, 479 (2002). Thus, that we are not consciously aware, for instance, of how we have been shaped to work harder for ourselves and our families than for others makes it even more difficult for us to suppress this evolutionary propensity and to share according to the needs of the larger society because it seems to go against the very nature of ourselves.

<sup>126</sup> Of course, merely that individual behavior is natural does not mean that society should encourage it, and there may be behaviors that are “deeply embedded” in human nature which we do *not* wish to encourage, such as the violent expression of anger and jealousy. If acquisitiveness is such a behavior, why not just teach people to suppress acquisitiveness like we teach them to suppress the expression of anger and jealousy? The problem is that in suppressing acquisitiveness connected to resource development and production (which is most acquisitiveness not connected with robbery and theft) we reduce the incentive to develop and produce in the first instance, a side effect not present when we teach people to manage their socially negative emotions. Suppressing acquisitiveness also does not encourage additional voluntary sharing with strangers; more likely it lessens sharing as the potential for acquiring new resources is reduced.

<sup>127</sup> This point is critical to the understanding of why if a nation wishes to produce more of a resource, it should establish a property in the resource. The reason is that through exchange, greater production of resources makes for a more prosperous society as additional goods (and services) become available and competition lowers prices.

<sup>128</sup> A market for the efficient exchange of resources will emerge organically from a strong property system, although the reverse is not true, indicating that property is fundamental for a prosperity-maximizing private market. See Greenspan, *infra* note 160 and accompanying text.

<sup>129</sup> Bethell, *supra* note 89, at 8. Cf. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 315 (Martin E. Marty, ed., Penguin Bks. 1982) (1902) (asserting that “the instinct of ownership is fundamental in man’s nature”). In pursuing the aim of a reductionary effort of moderate length, I will not attempt here to answer all of the objections that may be raised to this story of human nature and its implications for the legal institution of property. Suffice it to say that I believe the story holds as true for a shareholder’s ownership of a few shares of stock in Nike as for her ownership of her toothbrush or her personal photographs.

<sup>130</sup> DE SOTO, *supra* note 35, at 8 (asserting “that Westerners take this mechanism [property] so completely for granted that they have lost all awareness of its existence”). De Soto expresses concern that “there always remains the possibility that the West might damage the source of its own strength” by forgetting the necessary legal basis for its prosperity. *Id.*

<sup>131</sup> For a series of cites to this effect quoting or referencing presidents, foreign ministers, treasury secretaries, the G-7 finance ministers, the Managing Director of the International Monetary Fund, the Secretary General of the United Nations, numerous journalists, and others, see Reed, *supra* note 4, at notes 1-10 and accompanying text. A slightly optimistic fact suggesting that property systems worldwide are strengthening is that the proportion of those living in global poverty dropped from 29 percent to 23 percent during the 1990s. *Statistical Snapshot of a World Divided by Poverty*, Irish Times, July 24, 2002 (available in LEXIS, News Group File) (citing the United Nations report *Human Development*).

<sup>132</sup> ISIAH BERLIN, FOUR ESSAYS ON LIBERTY xli (1969) (noting that whereas the Greeks may have enjoyed “a great measure of what we should today call individual liberty, ... that the notion had not explicitly emerged, and was therefore not central to Greek culture”).

<sup>133</sup> One of the best accounts of property’s relation to the Charter of Liberties is BERNARD H. SIEGAN, PROPERTY RIGHTS, FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT (2001). Although the discussion that follows in this essay centers on the common law tradition, note that in the civil law tradition, property and liberty were also spoken of in the same terms. For instance, the Austrian Civil Code stated that “property is the liberty to do with the substances and uses of a thing according to one’s wants and desires and to exclude every other person therefrom.” Quoted in RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 105 (1914); FREDERIC BASTIAT, SELECTED ESSAYS ON POLITICAL ECONOMY 109-110 (Seymour Cain trans., *Foundation for Economic Education* 1964) (a French political economist maintaining in 1848 that “[p]roperty, the right to enjoy the

fruits of one's labor, the right to work, to exercise one's faculties, according to one's own understanding, without the state intervening otherwise than by its protective action —this is what is meant by liberty"); Jean Baechler, *Liberty, Property, and Equality* (John W. Chapman trans.) in NOMOS XXII: PROPERTY 269, 287 (J. Roland Pennock & John W. Chapman eds., 1980) (a French political theorist maintaining that "[l]iberty and property form an indissoluble unity in society and politics").

<sup>134</sup> Quoted *id.* at 7.

<sup>135</sup> Quoted *id.* at 11.

<sup>136</sup> BLACKSTONE'S COMMENTARIES, *supra* note 59, at 138.

<sup>137</sup> *Id.* at 129.

<sup>138</sup> *Id.* at 134.

<sup>139</sup> *Id.* at 138.

<sup>140</sup> *Id.* at 125 (emphasis added).

<sup>141</sup> *Supra* note 3.

<sup>142</sup> *Supra* note 3 (emphasis added).

<sup>143</sup> *Supra* note 3.

<sup>144</sup> REID, *supra* note 104, at 33.

<sup>145</sup> JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, THE AUTHORITY TO TAX 27 (1987). Another view connecting liberty and property, which is examined at length in GREGORY S. ALEXANDER, COMMODITY & PROPRIETY (1997), maintains that property is necessary to liberty because it enables individuals to hold resources apart from state control and thus be independent of the state, a condition that facilitates "liberty." In a somewhat different vein, Professor Reid is suggesting that many colonists regarded liberty and property as semantically co-extensive so that one could say that she had a property in resources or a liberty in resources rather interchangeably. My reductionary assertion concurs with the latter view, recognizing that although liberty and property have been often used as different terms, even in colonial times, they have a deep identity in their exclusionary nature, and the distinction between the facultative resources of the person and the non-facultative resources developed or acquired through the productions of the facultative resources is not significant when attempting to explain Western freedom and prosperity to nationbuilders. Cf. JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 21-22 (1939) (asserting that "the meaning of property" is "the liberty of expected activity in acquiring, using and disposing of things" and stating that property and liberty are united "in an identical concept"); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 63 (1996) (quoting Trenchard and Gordon from *Cato's Letters*, one of the most popular and respected sources of ideas during the colonial era: "By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruits of his Labour, Art, and Industry ...").

<sup>146</sup> Quoted in REID, *supra* note 104, at 33.

<sup>147</sup> UNITED STATES CONSTITUTION, PREAMBLE.

<sup>148</sup> MADISON, *supra* note 3.

<sup>149</sup> Behind some of the most important issues of the Revolution, like taxation without representation, "stood the Lockean theory of property." SCHLATTER, *supra* note 112 at 188. The *Second Treatise* contained Locke's most developed thoughts on property. It is also undeniable that Blackstone and his *Commentaries* played an important role in the legal and philosophical education of those who dominated the Revolutionary Era, but Blackstone, too, was influenced by Locke. GOTTFRIED DIETZE, IN DEFENSE OF PROPERTY 27 (1963) (stating that Locke's ideas "were assumed by the outstanding commentator on English law, Blackstone").

<sup>150</sup> For example, Locke asserted that one was "a proprietor of his own person." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 27 (C.B. Macpherson ed., Hackett Pub. Co., Inc. 1980) (1690). Before Locke, Hobbes asserted self-ownership in similar fashion. THOMAS HOBBS, LEVIATHAN 382 (C.B. Macpherson ed., reprinted Penguin Classics 1985) (1651) ("Of things held in Propriety, those that are dearest to a man are his own life ..."). In America, Madison wrote that one has a "property in the free use of his faculties." MADISON, *supra* note 3. Jefferson approvingly translated a French thinker with an almost identical view.

COUNT DESTUTT TRACY, *A TREATISE ON POLITICAL ECONOMY* 53 (Thomas Jefferson trans., reprint Augustus M. Kelly 1970) (1817) (maintaining that persons “have each one the inalienable, incommutable, and inevitable property, in their individuality and its faculties . . .”).

Owning oneself and having the free use of one’s faculties is for practical purposes difficult to distinguish from liberty, and “it is sometimes said that the idea of self-ownership stands at the heart of all liberalism.” JONATHAN WOLFE, ROBERT NOZICK: *PROPERTY, JUSTICE AND THE MINIMAL STATE* 8 (1991). However, my view of property should not be taken merely as embracing “the natural-rights individualist theory” of liberalism. *Id.* at 4. My view of self-ownership is based on the difficulty of distinguishing property and liberty given that it is in large measure the exercise of one’s facultative resources that develops and produces non-facultative resources so that the latter become extensions of one’s self and one’s faculties in a very real way. The distinction between property and liberty blurs because it is the free expression of one’s faculties — not just the presence of raw materials — that produces new resources.

<sup>151</sup> It was not that the colonists objected to the idea of taxation, only that it take place without their consent, which is a due process concept dating back to the Charter of Liberties. See SIEGAN, *supra* note 133.

<sup>152</sup> Quoted in REID, *supra* note 104, at 45.

<sup>153</sup> This difficulty covers everything from the democratic propensity to vote ourselves the resources owned by others (through taxation or otherwise) to slavery and the legal oppression of women. Probably, the most thoughtful consideration of this problem in the era of the Constitution’s framing comes from Madison’s famous tenth *Federalist* essay. ALEXANDER HAMILTON, et al., *THE FEDERALIST* 129 (Benjamin Fletcher Wright ed., 1961).

<sup>154</sup> STIGLITZ, *supra* note 34, at 264, n.1 (2002) (“defining “corporate governance” as “the laws that determine the rights of shareholders, including minority shareholders.”).

<sup>155</sup> See generally, Merritt B. Fox & Michael A. Heller, *Corporate Governance Lessons from Russian Enterprise Fiascoes*, 75 N.Y.U. L. REV. 1720 (2000). These problems are extreme examples of problems common to large, private business entities worldwide where owners hold passive interests controlled by managers (agents). See DOUGLAS M. BRANSON, *CORPORATE GOVERNANCE* 324 (1993).

<sup>156</sup> Fox & Heller, *id.* at 1741.

<sup>157</sup> Fox & Heller, *id.* at 1742.

<sup>158</sup> STIGLITZ, *supra* note 34, at 157 (stating that “[t]he IMF told Russia to privatize as fast as possible; how privatization was done was viewed as secondary”).

<sup>159</sup> For the shape and general development of the Chinese legal system, see Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369 (2002). For the legal reforms in China that “lay the legal foundations of a market-economy,” see Minxin Pei, *Is China Democratizing?*, Foreign Affairs (Jan., 1998), available in LEXIS, News Group File. Note the 387 percent increase in commercial litigation cases between 1986 to 1996 and the growth of “a relatively strong sense of rights, especially property rights.” *Id.* In a 1993 poll of over 5000 respondents in China, 78 percent agreed with the statement, “Private property is sacred and must not be violated.” *Id.* A slightly different view of property in China, but one which emphasizes the importance of bottom-up legal and economic development is Harry Williams, *Property Rights and Legal Reform in Township and Village Enterprises in China*, 2 ASIAN-PACIFIC L. & POL’Y J. 227 (2001).

<sup>160</sup> *Text of Greenspan Speech to Woodrow Wilson Center Award Dinner*, Bloomberg News, June 6, 1997 (available in LEXIS, News File Group.)

<sup>161</sup> That after the fall of the Soviet Union, the Russian economy suffered a precipitous decline, see DE SOTO, *supra* note 35. A slower, bottom-up approach, beginning with a secure property in small land ownership and basic entrepreneurial activities like retail sales and progressing only over a ten-to-fifteen year period toward privatization of large state-controlled manufacturing and mining might have allowed time for Russians to adapt to a regime of property under the rule of law.

<sup>162</sup> JOHN PHILLIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* 359 (1997).

<sup>163</sup> Of the importance of contract in conveying property resources, see, e.g., *id.* at 84 and 116. As to the relative absence of theft see *id.* at 338 (“Rarely do we encounter emigrants [on the overland trail] saying

that because the property of others had been lost, destroyed, or exhausted, their own property might be stolen.”). Furthermore, “people on the overland trail expected that their lost or strayed property would be returned.” *Id.* at 259.

<sup>164</sup> Only one account “has been discovered of emigrants threatening to kill for property.” *Id.* at 346. Professor Reid identified just four reports of threats being made to obtain an owner’s resources. *Id.* at 346. In fact, “[i]f a group of men were starving they might have no recourse except to kill a horse, but the owner, not the majority, made the decision. No custom of the trail or general expectation nullified the exclusiveness of personal rights.” *Id.* at 352-53.

<sup>165</sup> See Reed, *supra* note 4, at mm.11-12 and accompanying text.

<sup>166</sup> *Id.*

<sup>167</sup> Robert J. S. Ross and Anita Chan, *From North-South to South-South*, FOREIGN AFFAIRS 8 (Sept.-Oct., 2002) (identifying groups concerned with environmental and labor issues as picketing the World Trade Organization).

<sup>168</sup> The fear is grounded both in concern about the environment and workers in developing countries and in concern about maintaining jobs in the developed nations. See, e.g., Rowan Callick, *Sweatshops as Steps in Right Direction*, Australian Financial Rev., Aug. 3, 2002 (available in LEXIS, News Group File). Companies that seek out and locate in the country that controls their various activities the least are said to engage in “regulatory arbitrage.” Douglas M. Branson, *Fundamental Themes in Business Law Education, Teaching Comparative Corporate Governance*, 34 GA. L. REV. 669, 678 (2000). Professor Branson explains:

A multinational may locate activities in nation-states in which regulation poses little or no obstacle to the corporation’s activities. For example, the multinational may locate a polluting facility in a former Soviet republic in which environmental law enforcement is not only lax but nonexistent. The same multinational might locate a “knockoff” manufacturing facility in a nation with a large market for the product and little or no protection for intellectual property, such as the People’s Republic of China (PRC). With labor intensive manufacturing the multinationals may seek out a developing nation eager for employment at any cost and locate a facility there.

*Id.*

<sup>169</sup> E.g., A. JAMES CASNER, AMERICAN LAW OF PROPERTY § 20.23 (1952) (stating that holders of concurrent property interests, which include tenants in common, are liable to their co-tenants for waste).

<sup>170</sup> 33 USC § 1365 (2002) (Clean Water Act section stating that “any citizen may commence a civil action on his own behalf ... against any person ... who is alleged to be in violation of ... an affluent standard or limitation under this Act ...”). The similar Clean Air Act section is 42 USC § 7604 (2002).

<sup>171</sup> What is being suggested here is that everyone have a property interest in environmental resources to an extent defined by law and thus be able to bring action to exclude others from interfering with these resources in ways that directly, materially, and adversely affect human health. Compare this suggestion to stakeholder approaches to corporate governance discussed in Sanford M. Jacoby, *Corporate Governance in Comparative Perspective: Prospects for Convergence*, 22 COMP. LAB. L. & POL’Y J. 5 (2000). The advantage to protecting the environment or other “stakeholder” interests through property is that this approach focuses the resolution of resource issues through the single legal concept that is the hub of Western legal systems. There becomes no need to balance environmental stakeholder interests against corporate property interests. Both interests are property interests, and the issue for resolution is whether the resource use of one owner (the polluter) interferes with the equal resource right (e.g., breathing clean air) of another owner. A tort law variation of this property approach simply acknowledges the property interest of people in themselves and recognizes polluter-caused environmental health threats as violating that right and causing injury, thus entitling those injured to compensation and/or injunction.

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<sup>172</sup> Although this property assignment is unlikely in the near future, it is not administratively far-fetched, and already a less comprehensive variation of it — emissions trading — is taking place. The Clean Air Act Amendments of 1990 recognized such trading in sulfur dioxide. 42 U.S.C. § 7407 (1994). For discussion of emissions trading, see GARY C. BRYNER, *NEW TOOLS FOR IMPROVING GOVERNMENT REGULATION: AN ASSESSMENT OF EMISSIONS TRADING AND OTHER MARKET-BASED REGULATORY TOOLS* (1999); *EMISSIONS TRADING: ENVIRONMENTAL POLICY'S NEW APPROACH* (Richard F. Kosobad ed., 2000). In October, 2002, the European Parliament approved a greenhouse gas emissions trading policy to achieve reductions required under the Kyoto Protocol. *Octane Week*, Oct. 14, 2002 (available in LEXIS, News Group File).

<sup>173</sup> *Supra*, notes 99-101 and accompanying text. See also *Reed*, *supra* note 4, at nn. 42-56 and accompanying text. Unfortunately, not all of the environmental problems of the developing world derive from lack of adequate corporate governance. For example, the absence of basic sanitation is a major environmental problem with over 90 percent of the sewage generated being discharged with no treatment, a result estimated to account for 80 percent of all illnesses in the developing world. William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 COLUM. J. ENVTL. L. 17 (2000).

<sup>174</sup> Of course, the common law divides the right of exclusion into the rights to exclude others from injuring one's person (including one's health) and from injuring one's "property" (external or non-facultative resources). See generally I BLACKSTONE'S COMMENTARIES and II BLACKSTONE'S COMMENTARIES, *supra* note 60. Nationbuilders striving to understand what about Western legal systems catalyzed great production of resources need not follow the convoluted forms of action following historically from this division. Like Madison, *supra* note 3, they may conceptualize the right of exclusion as applying both to one's person (originally possessed facultative resources) and one's external, non-facultative resource acquired without coercion, theft, or fraud as "property." In this context, a worker's health is a resource that is within the exclusive private sphere of what is "proper" to a person, i.e., what one has "property" in.

<sup>175</sup> It cannot be overemphasized that the advocacy of property as a national wealth-maximizing institution is not an apology for international laissez-faire corporate buccaneerism, environmental degradation, nor worker abuse. Not market fundamentalism but the rule of law is basic to a strong property system.

<sup>176</sup> This statement acknowledges that for property to exist the state must specify which resources property protects, especially as to intangible resources. The property in trade secrets, invention, and pollution emission exist only as the state recognizes these things as resources it wishes to encourage through the incentive of exclusionary right. In the West the assignment of property to protect various new resources is puzzling or controversial only because most resources, especially tangible resources, have been so long protected by property that we forget that the law must initially recognize who gets what, and thus the current assignments seem "natural."

<sup>177</sup> Like freedom of speech, property is a right, the right to exclude others from resources limited at any moment of time. Treating race, gender, or age as an originally possessed resource that one can exclude others from interfering with by employment discrimination is not illogical if what nationbuilders wish to do is give incentive for more employment non-discrimination.

<sup>178</sup> See Vandevelde, *supra* note 5.

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