COMMODITY'S PROPRIETY

CAROL M. ROSE*

I have known Greg Alexander for a very long time. Indeed, except for members of his family, I may have known Greg longer than anyone else at this conference celebrating Greg and his work. Since the beginning of this long friendship, we have had three notable encounters, and I would like to begin this Comment with those.

The first encounter was at the University of Chicago Law School in the early 1970s. I was a student there at the time, and Greg was a Bigelow Fellow, one of the Law School's much-sought-after year-long positions as legal writing instructors. I was already in my second year by then, so there was no chance that I would have had Greg as my Bigelow teacher, but somehow Greg and I and a fellow student and good friend, Martha Fineman, all gravitated together. Martha is now a very distinguished legal academic, holding a Woodruff Chair at Emory University School of Law. But even back then, both she and Greg were determined to go into law teaching. I, on the other hand, was not. I had just jettisoned a history teaching career to go to law school, and I had resolved to steer clear of anything like an academic career. But under Greg's and Martha's influence, I weakened. In that sense, Greg's and Martha's long-ago example explains why I now have the opportunity to say anything at all about Greg's voluminous academic work.

So that was the first encounter. I think I was invited to speak at this conference in Greg's honor for a specific reason, one that brings up the second encounter. This second encounter was not in person, but rather in our overlapping writings: it has to do with all that palaver about "proprietarianism."

Here is why: in the early 1990s, a little over a decade after I became a law teacher, I published a contribution to a symposium in a philosophy journal called *Nomos*.[1] In that piece, I engaged in a

* Ashby Lohse Professor of Water and Natural Resource Law, University of Arizona Rogers College of Law (emer.); Gordon Bradford Tweedy Professor of Law and Organization (emer.), Yale Law School; JD Univ. of Chicago, 1977; PhD Cornell Univ., 1970.

1. Carol M. Rose, *Property as Wealth, Property as Propriety*, 33 NOMOS 223 (1991) [hereinafter Rose, *Wealth / Propriety*] (reproduced with slight changes *in* CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 49 (1994)).

critique of an argument by a philosophically trained law professor, Stephen Munzer, in which he recounted a set of values implicit in property "takings" jurisprudence. He described those values as pluralistic.[2] My response (which I confess was a bit provocative) was that, no, they are not pluralistic. They are all reducible to one, and that one is what Munzer identified as "preference satisfaction," or wealth maximization, if one prefers that designation. But, I argued, there is a contrasting source of values in property that can produce a genuinely pluralistic characteristic of takings jurisprudence. That other source comes from a much older tradition about property, which I called *proprietarian*—that is, property as linked to *propriety*.

The encounter with Greg was this: you might recognize a very similarly named dichotomy in one of Greg's best-known books, *Commodity and Propriety*,[3] and also in one of his well-known articles.[4] Greg said that he got the "propriety" or "proprietarianism" designation from my commentary,[5] while the contrasting characteristic, which I had I called preference satisfaction or wealth maximization, is pretty much what Greg designated as "commodity."

But there is a catch: Greg's version of property as propriety was rather different from mine, despite the name they share. In Greg's version, proprietarianism, in various guises, defined property as the material basis for a well-ordered society. My view was that yes, that is true in a very general way, but that the term defined a historical understanding of property that was much more specific about the way that property is supposed to relate to political and social order.

The view of property in the late medieval and early modern era in Europe, and then the early colonies, unlike the post-Enlightenment version we see today, did not associate property with wealth maximization or preference satisfaction or commodification. Instead, property was considered to uphold a vision of a hierarchical social order in which each member was to play a distinct role in maintaining that order, and he or she (but mostly he in those days) was supposed to have property holdings of a type and quantity appropriate—that

2. Stephen Munzer, *Compensation and Government Takings of Private Property*, 33 NOMOS 195 (1991).

3. GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970 (1998) [hereinafter ALEXANDER, COMMODITY & PROPRIETY].

4. Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667 (1998).

5. ALEXANDER, COMMODITY & PROPRIETY, *supra* note 3, at 1.

is, *proper*—to that role.[6] The king, as head of the so-called body politic, held royal domains that in theory served as an endowment to pay for the ruler's duties of directing and administering government generally. The nobility held large landed properties corresponding to their roles as effective co-rulers with the king; these aristocrats were charged with governing and taking responsibility for the persons living on their expansive landed endowments, and with raising men and equipment from those lands when needed for war. The merchants and manufacturers belonged to guilds, which had monopoly endowments in shoemaking, baking, barrel making and so on; their endowments of exclusive guild privileges were effectively property holdings that enabled them to keep good order in their respective trades.[7]

In sum, in the proprietarian order, any kind of authority had corresponding types of property that enabled the exercise of that authority. This same proprietarian idea (however much corrupted) later extended to the East India Company's monopoly over the trade in India's goods, as well as William Penn's proprietary charter over Pennsylvania. In each case, at least as an ideal, the proprietor had a role to play in the body politic, and a corresponding endowment of property to secure sufficient funds and authority to govern appropriately.[8] That was the case even in the somewhat flattened version of classical republicanism that rings through so many of the writings of the early American republic. Here, the ideal citizen was an independent-minded (male) yeoman farmer, whose modest landholding property enabled him to exercise his own unbiased judgment in the political life of the larger community; he acted simultaneously to keep good order in his household, leading and directing all its members, including women, children, and farmhands.[9]

Thus, my understanding of proprietarianism differed substantially from Greg's. It was a kind of historical ideological throwback, in which property was a key part of a static and hierarchical social order. Above all, the proprietarian version of property was profoundly out

6. Rose, *Wealth/Propriety*, *supra* note 1, at 232–37 and sources cited therein.

7. *Id.* at 232–33.

8. *Id.* at 234.

9. *Id.* at 235–37; *see also* Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Antifederalism from the Attack on Monarchism to Modern Localism*, 84 NW. U. L. REV. 74, 90–92 (1989) (discussing the yeoman ideal in Antifederalist writings).

of step with a modern, dynamic version—the version in which property aims to incentivize productive effort and acts as the cornerstone of trade, and hence of commercial wealth-creation.

Given my view of proprietarianism, I also had to take some issue with Greg's view that proprietarianism has been in a serious dialectic with the commoditizing or wealth-maximizing version of property throughout the history of the United States. I saw proprietarianism—as I understood it—as already falling apart by the eighteenth century, undermined by its own monopolistic, rigid, and sometimes corrupt practices. Those practices were already under attack in the American colonies, the most notorious example being the Boston Tea Party, with its theatrical assault on the trading monopoly of the British East India Company.[10] If my version of proprietarianism appeared anywhere in the United States in later years, it was in the pro-slavery writings that Greg so ably describes.[11] Those writings came close to denying any kind of dialectic with market capitalism, as Greg observes.[12] Their authors certainly stressed the importance of hierarchy, defended by a kind of let's-pretend paternalistic duty of those with authority to care for those under their rule.[13] It's not, of course, as if the actual practice of slavery had much resonance with an old-fashioned proprietarian ideal. In her 2021 book, *Credit Nation*,[14] Claire Priest amplifies Greg's description when she shows how thoroughly slave holders' actual practices aligned with the commodity side of property. They were leaders in commercial innovation, including raising money by mortgaging their slaves. One might add that in this cold-eyed perspective, a slave was a perfect candidate to act as security for a loan: the slave was a valuable piece of marketable property, easily moveable, and quickly saleable upon foreclosure in an established set of commercial institutions.[15]

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10. Steven G. Calabresi & Larissa C . Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983, 1007–08 (2013); Carol M. Rose, *A Glimpse of Early Modern Governance in Claire Priest's* Credit Nation, 33 YALE J. L. & HUMAN. 288, 292–93 (2022).

11. ALEXANDER, COMMODITY & PROPRIETY, *supra* note 3, at 211–40.

12. *Id.* at 237–40.

13. *Id.* at 234–37.

14. CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND LEGAL INSTITUTIONS IN EARLY AMERICA (2021).

15. *Id.* at 74–77; ALEXANDER, COMMODITY & PROPRIETY, *supra* note 3, at 233.

In sum, then, I did not see proprietarianism as taking part in a robust dialect with the overwhelmingly dynamic modern version of property as commodity. Instead, with the telling and unutterably sad exception of pro-slavery apologetics, I saw proprietarianism as a set of ideas that practically disappeared in a tide of commerce, enterprise, and Horatio Alger stories. The one lasting remnant is the one that Greg rightly observes: the view that property carries social obligation. But this proprietarian remnant floats unmoored from its historical trappings of hierarchical order and noblesse oblige—trappings that once supported its ideological weight.

But enough of my differences with Greg over the meaning of proprietarianism in property. There is still a third encounter—another place where Greg's and my paths have met. That is in our diverging views on property's role as a social and political institution.

In Greg's more recent work, his version of proprietarianism—so much more benign than my own—has morphed into a touchstone of the progressive property movement. Here Greg argues that property is a social institution, and that private property can serve public values, and especially progressive social values.[16] And here too, I find myself agreeing in some parts and diverging in others.

I certainly agree with Greg that property is a social institution. In fact, I have expended rather a lot of verbiage trying to convince people of a point that Greg makes: that a property regime can only succeed if people follow an implicit social contract to recognize the property of others.[17] In the simplest version, we leave other people's stuff alone and resist the temptation to grab it and run away, even in circumstances where we easily could do so.

I agree with Greg on another important point too: that property can serve public values. But I do not see that service in the same way that he does. Greg describes property as serving public ends directly through a social obligation norm, in which people sacrifice their individual property for public ends, including and especially in equalizing wealth. I think that description has some resonance,

16. *See, e.g.*, Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257 (2014); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 795 (2009).

17. *See, e.g.*, Carol M. Rose, *Psychologies of Property*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 272, 278–88 (James Penner & Henry Smith eds., 2013) (arguing for the central importance of non-owners' recognition of other's property).

but that it misses an important point: that property does indeed make important public contributions, but that it operates largely *indirectly*, not directly. Moreover, in my view, it is the *commodity* version of property that lifts most of the weight in serving public values, not the social obligation version.

Let me explain: take a crass commodity view of property and its benefits, or perhaps in this crass context I could even say payoffs. That view would look something like this: the main functions of a property regime are to induce people to produce more stuff that people want and then trade it around in market deals. Now, what would those functions do for public values?

Well, the answer is, quite a lot, but *indirectly*.

First, a functioning property regime lets us identify who has what, so that people do not waste resources on zero-sum bickering, fighting, and grabbing, but trade instead for mutual benefit.

Second, if property is reasonably secure, then property together with trade can increase the wealth not only of individuals but of the entire society. To be sure, some get richer than others, but the whole society has more goods and services available, so that prices diminish for things that people want. And among other things, people individually and collectively have more resources to address public needs, including the alleviation of poverty.

Third, a wealthier society is better able to defend itself than a poor one, all other things being equal. This is what Alexander Hamilton was after: a strong commercial empire for the sake of defense against what were then much more powerful nations.[18] After all, John Locke had said more than a century earlier that the Prince who is so "wise and godlike" as to establish liberty and encourage industrious efforts "will quickly be too hard for his neighbors."[19]

Aside from these fairly conventional points about the benefits of property, there are several more that are somewhat less hard-edged:

Fourth, property and trade soften manners, as Montesquieu and other Enlightenment thinkers argued, undoubtedly comparing "gentle commerce" to the haughty attitudes of aristocrats and their

18. THE FEDERALIST NO. 16 (Alexander Hamilton).

19. John Locke, *Second Treatise*, *in* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 316 ¶ 42 (Peter Laslett ed., Cambridge Univ. Press 1967).

touchiness about honor.[20] Marx later made some sarcastic remarks about "doux commerce,"[21] but the arguments for commerce had a point. Merchants do not fight duels; the very notion is laughable. Merchants have to pay attention to other people and to what those other people want, so that they can produce or procure things for them and then make deals. Then too, along the course of meeting potential trading partners, they may expand their ideas about and interest in other kinds of people.[22]

Fifth, property is a school for understanding what *rights* mean. One learns about property from very basic materials from childhood on, from very ordinary items like whose doll or bicycle is whose. That graphic quality can lend itself to more expansive conceptions, and into an understanding that you yourself as well as others have entitlements, even in the face of disagreement.

Sixth, and relatedly, property and trade teach a simplified but very powerful version of morality. You have to deal with others on the basis of voluntary transactions. You may be able to get away with force and fraud for one-shot transactions or even for dealings that last a short while, but you will not last in a world of markets. To keep your commercial contacts, you have to deal with others honestly, treating your counterparties with dignity and in a trustworthy way.

Seventh, property and trade give people practice in finding areas of overlapping interests and in reaching agreements about those matters, while putting aside disagreements over other matters that are not relevant. Those are practices that people need to run a democracy, and it is hard to avoid thinking that we do not have enough of them in the present moment.

So, in sum, all these are ways that the commodified version of private property serves public values. The point is that this service is *indirect*, not direct in the sense of Person A giving up some property directly to Persons XYZ in service to the public. But indirect service too can have impressive results.

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20. ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 10–12, 58–63 (3d ed., 2013) (1977).

21. *Id.* at 62.

22. *See* Carol M. Rose, *Property as the Keystone Right?,* 71 MINN. L. REV. 329, 352–53 (1996) (describing "gentle commerce" ideas, including the view that commercial relations founded modern philanthropy).

I do not want to say that the commodity versions of property and trade offer a perfect solution to public issues. They do not. The study of externalities is now well developed, and property and trade can have plenty of externalities. We need some constraints on property and commerce in order to address environmental protections and the provision of public goods, and in this I agree with Greg. I agree with him too that there is a powerful case for demanding some contributions of private wealth toward public goods, even if involuntary, if for no other reason than to reassure those who give voluntarily that they are not being suckered into paying alone. Finally, I agree with Greg too that our current institutions for property are not doing enough to promote equal opportunity, although this may be because monopoly is creeping in—a development much feared even by that early touchstone writer on modern capitalism, Adam Smith.[23]

Moreover, even when property institutions *could* work as they should, in fact they do not, at least not all the time. I have done considerable research on the history and practice of racially restrictive covenants in the United States—covenants aimed chiefly at barring African Americans and sometimes Asians from owning or renting homes in white neighborhoods. These covenants are now well out of legal enforceability, and good riddance. But in studying them, it became clear to me that U.S. courts could easily have curbed these pernicious arrangements from the start, simply through the private law of real estate covenants. But they didn't. Instead, for decades, the courts and other major players in government and the real estate industry manipulated property doctrines to support racial covenants. All of which is to say that property institutions, like any other legal institutions, can certainly influence behavior for the good, but this is not a sure thing, and institutions too require vigilance and correction.

In conclusion, when I read Greg's fine writings, I am tempted to think that he has a love-hate relationship with our favorite subject, property. He roundly criticizes the dominant commodity version, but he loves the concept of property so much that he finds other versions of property that do more for what he thinks property should do. In one of those other versions, he traces a modern social obligation

23. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 471 [ch. IV, at 43] (R.H. Campbell & A.S. Skinner eds., Oxford University Press 1976) (1776).

component of property to earlier ideas of property as propriety. But my own take on that earlier proprietarianism was that it was a key component of a hierarchical and static world view, in which any reference to social obligation aimed to keep everyone firmly in place. Greg's more recent progressive property analyses again link property directly to social obligation, and again in contrast to property's commodity or wealth-maximizing characteristics. But here too, my view diverges; I am much more convinced than Greg is that what he eschews as property as commodity actually can do a great deal for social values—but indirectly. Greg certainly has a point when he argues that the commodity version of property requires a leavening of social obligation, although I would caution that this leavening not be relied upon so much as to seriously undercut the important social contributions that the commodity idea of property makes.

Finally, perhaps it is not surprising that Greg's and my views on property sometimes go in different directions. One possible reason goes back to that first encounter that we had at the University of Chicago Law School. I was merely a student then, and more ready than Greg to sip the Chicago school's Law and Economics Kool-Aid; after all, he was an instructor and had already completed a law degree at another fine law school (Northwestern), and so had more inoculation derived from other approaches. But whatever the origins of our differences, as time has gone on, I flatter myself to think that we have learned from each other in a property dialect of our own. It is a dialectic that I can only hope that Greg treasures as much as I do.