

Property and Political Power *Neo-feudal Entanglements*

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12.1 Introduction

Over the course of the twentieth century, many philosophers have argued in favor of a liberal–egalitarian accommodation of capitalism, in which the liberty of the market is to be combined with an egalitarian distribution of property. We can see this accommodation as a position between “pure capitalism” on the one hand and a socialist overthrow of capitalism on the other hand. In the words of Gerald Gaus, a pure capitalist system is based on “maximally extensive feasible property rights” (Gaus 2010). Property here refers to private property. In the classical liberal tradition, the protection of private property rights has been defended as the basis for a flourishing capitalist economy. Theorists of positive freedom, among others, have been prominent in arguing for the liberal–egalitarian accommodation. They have argued that an egalitarian distribution of private property is necessary to give every citizen equal positive freedom. To lead an autonomous life, every citizen needs control over some private property. Call this the “positive freedom argument” for liberal egalitarianism.¹

The liberal–egalitarian accommodation to capitalism has come under threat in the last decades, as documented by a renewed widening of inequalities in wealth and income (Piketty 2014; Atkinson 2015). In this chapter, I will argue that this predicament requires us to look at one important precondition of the positive freedom argument. This precondition I call the

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¹ While I do think this is the most convincing argument, I acknowledge also arguments from negative or republican freedom could be used to defend the “liberal–egalitarian accommodation.” To the extent that this is so, the remainder of the chapter is also of interest to those who are more convinced by these arguments. Personally, I believe that republicans implicitly accept, or should accept, a positive view of freedom (Claassen 2018a: 226–229; Claassen and Herzog 2019).

depoliticization of private property. Private property is conceived as a purely private phenomenon, which has no effect on the exercise of political power. As long as the liberal–egalitarian accommodation works, this precondition is easily taken for granted. However, whether this precondition is met is a contingent matter; and perhaps it can never be fully achieved. Whatever of that, in today’s world, it is seriously eroded. Defenders of the positive freedom argument, therefore, need to turn their attention to the problem posed by the relation between private property and political power.

After presenting the positive freedom argument (Section 12.2), the remainder of the chapter takes up this challenge. To start up the discussion, I first present Rafe Blaufarb’s account of the history of the French Revolution’s attempt to abolish feudalism. He shows how the disentanglement of private property and political power was central to that revolution. This disentanglement itself can be defended normatively in terms of the ideal of (individual and collective) positive freedom. However, as Jeffrey Winters argues, this disentanglement has failed. His research shows that liberal–democratic societies in name are oligarchies in reality. In democratic oligarchies, oligarchs refrain from protecting their property rights themselves, and rely on the impersonal structure of the bureaucratic state instead (Section 12.3). Building on these accounts, I then propose a reorientation of the positive freedom argument, in three respects. Key to this reorientation is the introduction of a conception of property as “discretionary property,” which gives its holders what I call “investment autonomy.” Only discretionary property can be used as capital, which can be invested to give its owner political power (Section 12.4). Where this happens, we face neo-feudal entanglements under the cloak of overtly liberal–democratic structures of government; or a *re-politicization of private property*. I give two examples of such contemporary neo-feudal analogs of feudal structures: that of oppressive labor relations and lobbying activities (Section 12.5). Section 12.6 concludes.

12.2 Property in the Positive Freedom Tradition: The Liberal–Egalitarian Accommodation

In this section, I will give a reconstruction of the positive freedom argument in favor of liberal egalitarianism.² This argument can be summarized as an

² I generalize here about the tradition of positive freedom, which contains authors who have, as far as they considered property, come to a variety of positions (Reeve 1986: 107–108). My reconstruction here is based on positive freedom authors like T. H. Green ([1931] 1999: 168–169), Macpherson (1973), Christman (1994: 167), and Gewirth (1996: 173). Although less clearly in the positive

answer to three questions, all relating to property: first, what is property? Second, which form should property take? Third, who should hold how much property?³

(1) The definition of property. In the property literature, one definitional question is about whether property should be seen as a “right to a thing” or as a “right against other persons.” The positive freedom argument combines both and defines property as a right against others with respect to a thing. Property is not simply a thing, although we sometimes speak this way when saying “This house is my property.” Nor does property simply refer to a relation between a person and the object of property. Crucially, property denotes a triadic relation, where the authority of the holder of property over the object is secured against claims of others to the same thing. Moreover, this “thing” can be highly intangible, such as a share in a company or an intellectual property right (Cohen 1927: 12; Macpherson 1973: 127; Christman 1994: 16). Lawyers define the substance of this authority by distinguishing a bundle of rights, the so-called incidents of property, such as the right to use, manage, and destroy the object, the right to enjoy the income, the right to alienate, etc. (Honoré 1987).

Property rights generate two types of power for the owner, which are both, like property itself, private powers, situated in the private sphere. On the one hand, an owner has a power-to: a power to do things with the object as she likes, such as to consume it or sell it. This power is purely personal, only relating the object to its owner. On the other hand, an owner also has a power-over: a power over others, to the extent that they lack the powers-to that the owner has with respect to the object. The authority of the owner is defined by the fact that he/she can enjoy the object to the *exclusion* of others. This second power is social, in that it gives the owner power over the behavior of others, who are to refrain from interfering with her enjoyment of the object. Still, this social dimension is situated in the private sphere, between citizens. Neither of these powers is public, or political.

(2) The form of property. The second question is: which forms should property take? Usually, private property (held by individuals), public

freedom camp, many writers on property also put such a similar argument forward (e.g., Munzer 1990: 90–98; Lomasky 1987: 120; Waldron 1988: 295). See also the writings on property-owning democracy, quoted in-text. For my version of this argument, see (Claassen 2015). In the legal literature, one can think of positive freedom-inspired authors like Alexander (2009), and Dagan and Dorfman (2017).

³ See (Claassen 2018b) for an overview of these questions, with two additional dimensions of property which I leave out of consideration here: who is the legitimate subject of property? Which are the legitimate objects of property claims?

property (held by the state), and common property (held by groups of citizens) are seen as the main alternatives. The positive freedom argument focuses on private property.⁴ However, positive freedom is exactly defined (as self-mastery, self-determination, or autonomy), the argument always has the same instrumental structure. A certain measure of control over a domain of private affairs is a necessary condition for the capacity to lead an autonomous life. Take, for example, Joseph Raz's conception of autonomy, which consists of the three components of (1) independence, (2) inner mental abilities, and (3) an adequate range of options (Raz 1986). Property gives one independence, since one does not have to ask permission from others for making a certain move with respect to one's property holdings. Jeremy Waldron has put this with exemplary clarity where he states:

The element of exclusive use which property rights involve is often justified on the basis of its connection with freedom and privacy. If every resource is publicly controlled or in principle available for use by all on equal terms (...) the use of material resources by an individual will in every case count as an other-regarding action (...). And since every action involves the use of some material resources (if only the land to stand on to perform it), it would follow that individuals were answerable to others for each and every action they performed. This, it may be argued, would be intolerable: such complete answerability would be morally exhausting and individually debilitating. (Waldron 1988: 295)

Property also gives one an adequate range of options, to the extent that the domain of one's property holdings is sufficiently large. The domain in which one can make independent decisions also allows one to make choices of one's own with respect to several dimensions of a good life: one's housing, clothes, food choices, etc. Most controversially, property also helps with the development of one's inner reflexive abilities, the abilities, in Rawls's terminology, to formulate and revise a life plan. These capacities for autonomous deliberation are key to the positive freedom tradition. Thus, John Christman argued:

The material conditions of one's life have a direct effect on the opportunities and options which, in turn, constrain the development of one's tastes and character. If there is no television around me, for example, or if the books I can read are all Zane Grey Westerns, then these conditions will affect directly the values and attitudes that I will come to have. One's

⁴ In this focus, the positive freedom tradition does not diverge from the rest of political philosophy, which overwhelmingly focuses on the justification of private property.

immediate environment, of course, had the most direct effect on this process, but other conditions of one's life, such as social arrangements, leisure activities, work setting, and access to political life, will all play a basic role in the lifestyle that one must adopt as one's own. What is necessary for minimal autonomy, then, is that individuals have a degree of control over, or approval of, the general aspects of these material conditions. (Christman 1994: 167)

Christman continues the argument by saying that this in turn will involve some property over some objects. Like Waldron, however, Christman also accepts that for some objects, full property rights may not be necessary (e.g., one may also rent one's apartment), while for other material conditions access to publicly owned facilities may be enough (e.g., health care and educational facilities). In the end, what is important is having "control rights," which he defines as that part of the bundle of rights which allows a person to "manipulate, develop, perhaps destroy, and consume" (Christman 1994: 167) resources.⁵ While these are not full liberal ownership rights, they still are rights to a set of exclusive, unconditional controls granted to the individual: she does not need the permission of others to exercise these rights. This is true as much for her right to get medical treatment as for her right to a private living space. Control rights in Christman's theory stand in contrast to income rights, which he defines as the rights to alienate or make productive use of one's resources (Christman 1994: 128). These latter rights are exercised in a social context (most often that of the market), and here one cannot assume such a direct link between autonomy and control. Hence, Christman argues, for these rights separate principles of distributive justice are justified.⁶

(3) The distribution of property. The third question is: how should property be distributed? Who should hold how much property? Positive freedom is an egalitarian political ideal: it requires a political structure guaranteeing the basic conditions of positive freedom to all citizens. This equality of positive freedom requires that all citizens do not just have a formal right to own whatever property they are able to acquire, but an actual bundle of some property holdings (wealth). With "some" property, I refer to a threshold level of property; a sufficientarian, not a perfectly equal distribution of property. Whether the threshold level should be very minimal or rather generous can be debated. In contrast to this, some

⁵ Christman largely follows Reich in conceptualizing these welfare rights as "new property rights." See Christman (1994: 172) and Reich (1964).

⁶ For a criticism of the distinction, see Attas (2006).

egalitarians defend narrowing the *range* between the wealthiest and the poorest as a precondition for positive freedom (either in addition to a threshold or as a self-standing principle). However, I think this does not necessarily follow from the argument so far. Positive freedom (e.g., as characterized by Raz's three dimensions of autonomy) requires a personal domain of control that is *sufficiently* large, not necessarily equally large as one's neighbors.

In theory, a sufficientarian distribution of property can be the outcome of a market economy in which all individuals trade freely (perhaps supplemented with voluntary philanthropic activities). However, very often market economies lead to unequal outcomes, so that active government intervention is needed as a correction to achieve this aim. Property egalitarianism can be implemented through welfare state mechanisms, such as public delivery of essential services (health, education) and the tax-and-transfer system. It can also be implemented through a program of "property-owning democracy," in addition to welfare state measures (Rawls 2001; O'Neill and Williamson 2012; Thomas 2017). Either way, the distributive role of government is legitimate because the "income rights" part of the property bundle has – as we saw – a less direct connection to positive freedom, compared to the "control rights" part. To fund access for all to control rights over some objects, everyone's income rights need to be relativized. Positive freedom defenders hence need to balance their commitment to an egalitarian demand for redistributing property with other prerequisites of positive freedom, such as, most notably, the economic freedoms (like the freedom of contract), which underlie a market economy.

In conclusion, the positive freedom tradition defends a powerful philosophical argument for the liberal–egalitarian accommodation to capitalism. Like classical liberals, positive freedom defenders endorse a private property-based market economy, protected by government. Unlike them, they also endorse government-enforced measures to distribute property (more) equally than the market would. Let's now turn to the tacit precondition of this argument, the depoliticization of property.

12.3 Back to History: The Great, but Fragile Demarcation

The revolutions of the eighteenth century have been decisive moments in the establishment of liberal–democratic regimes in the Western world. They are also revolutions in the history of property. I take my lead from two books, which provide contrasting but ultimately complementary

perspectives on the problem of property, in the context of discussing the French Revolution and the American Revolution, respectively. Blaufarb in his *The Great Demarcation* (2016) argues that the French revolutionaries attempted to break the feudal entanglements of private property and political power and establish a “great demarcation” between both. Winters, in his *Oligarchy* (2011), shows how the American revolutionaries were trying to shelter the property holdings of the wealthiest from popular control. He argues that the great demarcation in reality was meant to provide a cloak for the continued political power of property. On closer inspection, it turns out to be a very fragile demarcation.

Blaufarb’s book is a close study of a decisive moment in the French Revolution and its aftermath.⁷ The moment was the so-called Décret du 4 août, adopted by the revolutionary *Assemblée Nationale* in the night of August 4, 1789. Just a few weeks after the downfall of the Bastille, and under pressure from peasant riots all over France, the Assemblée in this decree solemnly declared that it “hereby completely abolishes the feudal system” (article 1). The nineteen articles of the decree dictate the abolishment of personal serfdom, Church and noble privileges, manorial courts, ground rents, and other feudal practices. Blaufarb argues in his book that this historical event should be understood as a constitutional moment; not, or not just, a socio-economic moment in a bourgeois revolution (as Marxist scholars have argued). He details the juridical debates in the decades before the Revolution, and how the decree builds on these debates and decides the matter on behalf of the anti-feudal side in the debate.

What was at stake, Blaufarb argues, was a rearrangement of the relation between private property and political power. The feudal regime blurred the relation between them, from both sides of the divide. In the “private” sphere, property often gave rise to political power. Landholding – which was the predominant form of holding property – followed the rules of the tenurial system. Landed property, the so-called fiefs – were divided in a hierarchical chain all the way up from the Crown, through several layers of Lords, to simple tenants at the bottom. Each of them was subordinated to the higher strata, through bonds that were not simply proprietary, but enmeshed with personal dependencies. Subordinates had to swear loyalty to their lords (the *seigneurs*), perform menial tasks, pay dues, and be subjected to their civil and criminal jurisdiction (Blaufarb 2016: 4).

⁷ The analogy with feudalism is something one rarely encounters in contemporary political philosophy. An exception, which inspired my own approach, is Freeman (2001).

On the other hand, in the “public” sphere, political power under the *Ancien Régime* was treated as a piece of private property, in the form of the so-called *offices vénales*. These were a creation of the monarchy from the sixteenth century onwards, which, under fiscal stress, had started to sell public offices in the bureaucracy, courts, and military for money. A true market for these offices arose, they could be bought and sold, given as part of a dowry, used as collateral on a loan, etc. (Blaufarb 2016: 2). Sovereignty was thus fractured and divided into countless pieces held by private persons as their property. Of course, the King himself also held his public power as personal property, although he could not sell this office, but only bequest it to his heirs. The venal offices can be seen as a radical extension of this personifying logic all across the public sphere.⁸

The revolutionaries wanted to do away with this state of affairs and create a great demarcation, Blaufarb argues. The realm of private property should be purged from elements of political power, while at the same time the pieces of the realm of public power should be reassembled into one unified, truly public power. For what reason? As Blaufarb points out, the underlying motive of the revolutionaries was to create a domain of free and equal citizenship on the one hand, and a domain of popular sovereignty on the other hand (Blaufarb 2016: 13). Here things become interesting for the tradition of positive freedom. These twin ideals are, in contemporary terminology, those of individual and collective positive freedom.

Isaiah Berlin famously discussed both of these forms of positive freedom, without at all times making a sound distinction between them (Berlin 2002; see also Macpherson 1973: 109). However, both are important for the set-up of a modern, post-feudal society which the French revolutionaries had in mind. On the one hand, in the private sphere, people could become independent citizens, being freed from relations of subordination to others through their possession of individual, absolute property rights. On the other hand, by having a public sphere of unified sovereign power, purified of private interests, citizens could collectively exercise power over themselves. Put differently, the *ontological* split between a pure private and a pure public domain is a necessary condition for the realization of the two *normative* ideals which the revolutionaries allocated to these spheres: individual and collective positive freedom. Blaufarb’s historical narrative suggests that the fates of individual freedom

⁸ In addition to privately held office, the public sphere was affected by property in another way. The Crown was an important landowner itself, owning countless royal domains. Blaufarb in the final parts of his book discusses how difficult it was to get rid of these domains.

and collective freedom hang in the balance together. If the revolutionaries were right, then realizing these normative ideals requires a specific institutional program of purification, of making sure political power was not tainted with proprietarian elements and vice versa. Such a constitutional relation between property and power is the precondition of the liberal-egalitarian accommodation.⁹

Although this ontological split is a necessary condition, however, it may not be a *sufficient* condition. Blaufarb himself suggests as much, with respect to the public sphere. For within a few years after the French Revolution, Napoleon's dictatorship showed that the newly formed unified sovereign power, taken out of the hands of feudal lords, could also be used for authoritarian purposes (Blaufarb 2016: 11). I would add that the same is true on the other side of the divide, where the purification of property from feudal rights and obligations does not guarantee equal freedom for all.¹⁰ The risk is that under the cover of an overtly liberal-democratic regime, private property continues to (1) exercise political power itself (in the private sphere) and (2) influence political decision-making (in the public sphere). To understand our contemporary problems in maintaining the demarcation of property and political power, I will now turn to Winters's work, which provides a comparative study of different political regimes, modern and premodern, under the perspective of wealth-holding.

Oligarchs are defined by Winters as "actors who command and control massive concentrations of material resources that can be deployed to defend or enhance their personal wealth and exclusive position" (Winters 2011: 6). Oligarchy refers to the "politics of wealth" by oligarchs, and Winters describes this politics as one of "wealth defense": the use of resources for protecting (1) existing property holdings (this Winters calls "property defense") as well as (2) the income streams deriving from them ("income defense") (Winters 2011: 6–7). Winters explains how oligarchs can pursue wealth defense either by ruling themselves directly, like warlords, sultans, or dictators, or by defending their wealth indirectly, in a situation where others rule. His conviction is that all existing and past

⁹ In contemporary theories of justice, this theme of "sphere separation" has been stressed by Walzer (1983).

¹⁰ Blaufarb's book catalogs in great detail the problems the revolutionaries encountered in the years after 1879 to actually make the Great Demarcation work. It turned out to be a juridical quagmire to resolve the competing claims of lords and tenants, and to purify the public domain from proprietary influences (I will come back to these matters in Section 12.5).

societies are to some extent oligarchies. The difference is that in modern democratic societies, wealth defense is pursued indirectly.

From this perspective, the revolutions of the eighteenth century can be interpreted as a transition from one form of oligarchy to another. Oligarchies and democracies are not mutually exclusive regime types, and oligarchy persists under conditions of democratic decision-making. To explain why this transition can be advantageous to oligarchs, Winters stresses what he sees as an essential link between property and violence (Winters 2011: 21). Large wealth inequalities always cause social conflict. Hence wealth needs to be protected, ultimately by force. When oligarchs rule directly, they have to hire others to protect their wealth. When they accept a democratic state, they surrender political authority to an impersonal government and disarm. In exchange, they get secured property rights. It is now the state who – largely at the expense of the (upper-) middle classes who pay the lion's share of taxes – protects everyone's property rights, including those of the oligarchs (Winters 2011: 24). Their property defense thus guaranteed, oligarchs can focus on income defense. This can be described as an implicit bargain. On noneconomic issues, the public can decide freely, and oligarchs may differ in their political views as well. However, on issues linked to the protection of wealth, on which oligarchs agree, democracy must bow to their interests. In Winters's words, "democracy and oligarchy can coexist indefinitely as long as the unpropertied classes do not use their expanded political participation to encroach upon the material power and prerogatives of the wealthiest" (Winters 2011: 11).

Of course, this strategy has its preconditions; and ideology is an important one. Theories of democracy and property together need to legitimize this bargain. Under the guise of "equality" and "the rule of law," everyone's property is protected against assaults. The fact that this is more advantageous to those who own a lot cannot be read from the face of the law. Winters notes how across different sorts of regimes from antiquity to today large-scale redistribution has most of the time successfully been constructed as illegitimate.¹¹ One particularly influential argument was raised in the context of the eighteenth century American adoption of the US Constitution, also in 1789. In the years before, the newly independent country suffered a severe economic recession as a backlash of the war with England. Rich American landholders had lent to the state governments to

¹¹ The rare moments of such ideological justifications broke down, oligarchs fell back on a violent defense of their property claims (Winters 2011: 21, 25).

sponsor the war and also financed mortgages for farmers on a large scale. To protect their interests, they pushed the government to tax the general population to pay off their debts to them; while at the same time they used the court system to push farmers to pay off their mortgages. This led to fierce struggles, judicial and violent, between debtors and creditors, which played out differently in different states (Winters 2017: 178–184).

In this setting, a decisive theoretical argument was made by James Madison, Alexander Hamilton, and others, which echoed earlier statements of the problem of oligarchy by Aristotle, Montesquieu, and others (Winters 2017: 176–177). This argument was that the rich formed a minority, which, like all minorities in a democracy, needed to be protected against the tyranny of the majority. The Founding Fathers believed that there will always be rich and poor classes in a free country; inequality is the price of freedom. To obtain a stable democracy, the interests of both classes have to be protected, and this requires in particular a defense of the wealth of the rich (Winters 2017: 184–186). This argument is widespread in the history of political philosophy. It is not only found in Aristotle and other prerevolution writings, but also, strikingly, in John Stuart Mill's mid-nineteenth century liberalism. When discussing the class interests of “manual laborers” and “employers of labor,” Mill explicitly defended that “these two classes (. . .) should be, in the arrangements of the representative system, equally balanced, each influencing about an equal number of votes in Parliament” (Mill 1991: 300).¹²

The practical effect was that a constitution was passed which in several respects protected the interests of the rich in the defense of their wealth. It put the right to print money and the right to pass bankruptcy laws in the hands of the federal government, thus putting these weapons beyond the reach of the states. It created a Senate with a limited membership, in which the interests of large landholders would be represented. Finally, a powerful Supreme Court was created, not directly accountable to the people. Its power to constitutionally protect the rich would appear over time, up until today's *Citizens United* ruling (Winters 2017: 187). On top of this, Winters recounts, has come the twentieth-century development of what he calls an “Income Defense Industry”: the army of professional lawyers, consultants, bankers, and others who help wealthy clients to escape taxation and pursue other means to protect their income (Winters 2011: chapter 5). We may add to this the property qualifications which, until

¹² The reverse claims in the history of philosophy, emphasizing the danger the rich pose to political stability, are given by Machiavelli, Jefferson, and Tocqueville (Winters 2011: 29–30).

the twentieth century, were imposed on the eligibility to vote, which prove how resistant the thought was, even in a modern context, that property is a prerequisite for exercising political power.

What should we take away from all of this? Whereas the French Revolution, in Blaufarb's rendering, provided the blueprint for a modern, liberal state in which private property and public power are neatly separated, the American Revolution, in Winters's account, shows how beneath the surface a structure is created which serves the interests of those holding property. Both accounts supplement each other. The Revolutions provide us with a normative blueprint of liberal democracy and at the same time open up the question of whether this Great Demarcation isn't a Fragile Demarcation, which can never be realized, given the interests of the wealthy. The philosophical question is how to conceptualize this conundrum. If, as Winters suggests, ideology plays a role here, what are the obstacles in our *theories* of property which make it so difficult in practice to withhold political power from private property?

12.4 Discretionary Property and the Autonomy to Invest in Political Rule

The problem of private property's political power suggests a threefold reorientation, compared to the standard argument, presented in Section 12.2. In this section, I will outline this program of reorientation, with a focus on one of the three elements: the conception of property itself.

(I) Collective positive freedom. Today, discussions of positive freedom are almost invariably about individual positive freedom. The collective concept is most often set apart, when discussed at all (Christman 1991). This does not mean that there is no attention to the social constitution of individual positive freedom; indeed the extent to which one can only be free as an individual under the right social condition is very much a part of the debate (see "Introduction" to this volume). Still, this is different from a focus on collective positive freedom.¹³ The relative neglect of collective freedom is also apparent in the property literature, although there are exceptions (Macpherson 1973; Gould 1988). The standard argument described in Section 12.2 is focused on connecting

¹³ Democratic theory is all about collective freedom and here there are discussions about the relation between both types of freedom. Is there an intrinsic argument for democracy, from the point of view of individual freedom? Or is there an instrumental link, in the sense that more democracy enhances respect for individual freedoms? (Claassen 2018a: chapter 7). Are private and public autonomy "co-original," as Habermas has suggested? (Habermas 1996).

the constitutive elements of individual positive freedom to private property. What the historical account developed earlier suggests is that collective positive freedom is a precondition to having individual positive freedom. For without a domain of collective freedom, in which political power is exercised impartially, sheltered from the undermining influence of private property, no domain of individual freedom can be guaranteed (in addition, this may also require a reevaluation of collective, either common or public, forms of property, as conditions for both individual and collective freedom itself, see (Claassen 2018a: 178–185)).

(2) The conception of property. Second, a reconceptualization of the conception of property itself is necessary, showing how and under which conditions property can become a source of political power under ostensibly liberal regimes.¹⁴ As we saw in Section 12.2, property rights give owners two kinds of private power (control over objects, control in the sense of exclusion of others). What does it mean to say that property is, or generates, *political* power? The locus classicus for the claim that property is a form of political power is Morris Cohen's "Property and Sovereignty," where he argued that "dominion over things is also imperium over our fellow human beings" (Cohen 1927: 13). In his view, property amounts to the exercise of "political sovereignty." In defense of this claim, Cohen makes a comparison between feudal lords and modern captains of industry. In his view, both had the power to "command the services of large numbers who are not economically dependent," and both had the power to "determine what we may buy and use." These phenomena give an illustration of property's political power, indeed. However, what is lacking is a property-theoretical explanation of how this comes about.

The first step to such an explanation is to make a distinction between property that is used as capital and property that is not used as capital. The history of conceptualizing capital is split between one tradition which sees capital in materialist terms and another one in process terms. According to the former, capital is a stock of material objects, such as factories and machineries, which can be used to generate new wealth when mixed with land and labor. Capital in this sense refers to "capital goods," which are to

¹⁴ Despite the fact that the political effects of wealth-holding have recently got some more attention in political philosophy, work on this remains scarce. From a liberal perspective, see Christiano (2010, 2012), J. Green (2016), and Robeyns (2017). The literature on property-owning democracy, despite being focused on the undermining of democracy ('the fair value of the political liberties') by inequalities in property (Rawls 2001: 139), does not address the problem in property-theoretic terms (O'Neill and Williamson 2012; Thomas 2017). Neo-republicans come closer to the issue as I conceive it here (e.g., McCormick 2006, 2011; Rahman 2017; Thompson 2018).

be distinguished from consumer goods, since the former, but not the latter are a means of production. The alternative tradition holds that capital is an investment fund. As Jonathan Levy states: “Capital is property capitalized – a legal asset assigned a pecuniary value in expectation of a likely future pecuniary income” (Levy 2017: 494).¹⁵ In this view, anything can become capital when it is assigned a pecuniary value in search of future profits. Land and labor (slaves!) have certainly functioned as capital in the past, as have machines and financial assets. Capital is property invested in an uncertain future (Beckert 2016: 201). I will here follow this process definition of capital.

This definition, with its reference to the future income, zooms in on one of the two parts in the bundle of property rights which Christman distinguished. When owners start using their assets not for personal use, but for generating income in the future, they exercise a specific part of their property rights: their income rights. The political power of property arises only in this context. It is not because others are excluded from simultaneous access to the objects that I own (my nonpolitical power), but because I make use of my property to generate income, that I can wield political power. Put differently, property as an object of control is different from property as a resource mobilized for investment. Thus, for a different (but complementary) reason than Christman’s, I would endorse a development of property theory in which these two parts of the property bundle are radically separated. Their impact is different; hence the analysis must be different.¹⁶

Not all property, however, can be converted into capital. The next step, I propose, is to introduce a concept of “discretionary property.” We can think of this on an analogy with Robert Goodin’s concept of “discretionary time,” which is the time available for use after one has spent time on generating a socially accepted standard of living. Such discretionary time generates “temporal autonomy” (Goodin et al. 2008). Similarly, it is a prerequisite for capital investment to have property discretionarily available, i.e., property not needed to cover one’s basic living expenses. Let the latter level be indicated by a socially accepted standard-of-living, and discretionary property defines whatever property holdings one has above this line. Having property available above the standard-of-living as

¹⁵ This follows an institutionalist tradition that includes Veblen and Commons. I encountered the reference to Levy in Pistor (2019: 12), who makes use of the same tradition.

¹⁶ A closely related distinction is the one between “personal property” and property in “the means of production.” However, that distinction has physicalist overtones; as if some types of objects essentially are one or the other. It is the type of use made of property that is crucial.

discretionary property, gives its holder “investment autonomy,” i.e., the ability to transform one’s property holdings into capital. This gives discretionary property a different, political potential, which nondiscretionary property does not have. This potential is concealed on the surface. Just as time as an abstract quality always looks the same, the visible money and material goods held by two persons do not show by themselves how they are discretionary resources for the one, but not for the other person. When we pierce through this illusion, we realize that both types of property require a differential treatment. Inequalities between individuals in terms of investment autonomy are at the source of their differential ability to exercise political power.

(3) **Equality in distribution.** Third and finally, this necessitates a reorientation in the positive freedom defenders’ take on inequality. The analysis in Section 12.2 earlier revealed the need for a sufficiently large domain of control to become positively free. This can roughly be equated with the level of the standard of living just mentioned. The argument here suggests going beyond this requirement, and mandates an egalitarian range: a maximum ratio of the highest to the lowest wealth holdings. The reason for this is that inequalities in investment autonomy can be converted (if the analysis in the following section is convincing) into differences in political power. These differences, when too large, undermine the liberal dichotomy, the Great Demarcation between private property and public power, to which defenders of positive freedom should remain wedded. To put this bluntly, imagine a two-person world in which the standard of living is at 10. Now imagine person A holding resources at level 11, person B at a much higher level, say 40. While both can access a private domain of control, B can invest resources into private and public means of buying political power, while A cannot. In the end, B will come to dominate A. Hence, a much further going equalization of control over resources between the A’s and B’s of this world is needed, although it is difficult to say how much exactly (Claassen 2018a: 185–191).

In this section, I have proposed a reorientation of the positive freedom theorist’s argument about property, in several respects. Discretionary property, available as capital freed up for investment, can in principle be used to generate political power, also under liberal-democratic conditions. But *how* does that happen? This will be the topic of the final section.

12.5 From Feudalism to Neo-feudal Entanglements

Several authors have proposed theoretical models for understanding the links between private property and political power (Lindblom 2001;

McCormick 2006; Christiano 2012). Most of these accounts only look at the public sphere (the political arena), i.e., one of the two sides of the Great Demarcation. I propose we need a unified account of the emergence of political power on *both sides* of the divide. These are complicated empirical processes. For example, on the public side, we have to look at lobbying, campaign finance, threats of relocation, funding of think tanks and media outlets, etc. Nonetheless, I think it is fruitful to systematize these phenomena as a matter of property theory.¹⁷ To make this plausible, I will in this section once more return to the birthplace of the Great Demarcation, and argue that contemporary “neo-feudal” entanglements of private property with political power can be seen as close cousins of the original feudal entanglements. I use two examples, one on the private side, and the other on the public side of the private/public divide.

As mentioned earlier, with the official abolishment of the feudal order, the great demarcation was not yet established. A key debate in the years after 1789 turned on the compensation measures that, many believed, were required to implement a non-feudal order. For the Decree of August 4 required every landowner to be bought out by the tenant who wanted to acquire his land in full ownership. Some opposed this, but the revolutionary Assemblée initially held on to the position that the creation of absolute ownership rights without compensation would be an unjust expropriation of the lords, whose collecting of feudal dues provided their main source of revenue. However, this position provoked a strong backlash from peasants and their spokesman in the Assemblée, who complained that the right to become full owner would be meaningless, because almost nobody could pay the nationally determined rate of compensation, which was meant to reflect the full price of land had it been on an open market (Blaufarb 2016: 72).

To complicate matters, the legislation dealing with these procedures made a distinction between two types of lord–tenant relation: those which were based on contract and those which were based on force and domination. Feudal dues were considered to be contractual, unless proven otherwise, and hence apt for compensation (Blaufarb 2016: 70–71). As the Revolution progressed, the opposition against this system increased, and in 1793 it was overturned by an approach that presumed that all

¹⁷ For an account that shows more systematically how this political power of capital is shaped in a variety of legal dimensions (see Pistor 2019). Also see theories of “extractive power” (Thompson 2018; building on Macpherson 1973), “value extraction” (Mazzucato 2018), and “rent-seeking” (Stiglitz 2012: 119–127) in the economy.

feudal contracts were invalid, because tainted by histories of domination (Blaufarb 2016: 82). This reversal of the burden of proof was fiercely opposed by those defending the lords' interests, as an illicit form of expropriation.¹⁸ This shows that already at that time, there was an acute awareness that the feudal property relations represented an ambiguous legacy: sometimes lord–tenant relations could be based on legitimate exchanges of promises, but other times they could be cover-ups for illegitimate exercises of power. It also shows that there is no politically neutral approach to solving such property disputes. Each of the approaches chosen over time has its own political winners and losers.

A very similar ambiguity holds for the current-day labor contract. Is it an expression of voluntary will or a source of oppression? All sides of the debate today grant that labor contracts – as much as the feudal land contracts – create a relation of authority. This insight is the starting point of the economic theory of the firm, which argues that firms come into existence because it is more efficient to create relations of authority between employers and employees than have spot-market contracts between them for every separate act of production (Coase 1937; Singer 2018). However, many economists hold that employment contracts are voluntarily undertaken, which renders the submission to authority unproblematic. This is attacked by critics. For example, Elizabeth Anderson criticized two economists holding this point of view as follows:

Alchian and Demsetz appear to be claiming that wherever individuals are free to exit a relationship, authority cannot exist within it. This is like saying that Mussolini was not a dictator, because Italians could emigrate. . . . Perhaps the thought is that where consent mediates the relationship between parties, the relationship cannot be one of subordination. That would be a surprise to the entire social contract tradition, which is precisely about how people can consent to government. (Anderson 2017: 55)

Such an insistence on the continuing fact that the labor relationship is a hierarchical one is a prerequisite for the argument which many Marxists have made, and which Anderson subsequently also makes, that workers most of the time face very high exit costs, and thus should be understood as facing a contract which is more coercive than voluntary (Anderson

¹⁸ The search for ending the divided domain, and creating absolute property rights, may seem to reveal a wish to do away with any bundle-splitting; making any tenant-relation impossible. However, I read the history as focusing on creating *just* property rights, i.e., non-affected with political rights/duties, which can include freely contracted forms of fragmentation of property rights.

2017: 56). To the extent that this is true,¹⁹ labor relations are exercises of *political* power in the private sphere, just as much as feudal land contracts were. They give employers regulatory capacity with respect to many aspects of their workers' lives, which workers cannot (easily) escape. The contractual nature of the labor contract conceals this continuity with the *Ancien Régime*.

Let's now turn to the public sphere. Interestingly, venal offices were already contested during the *Ancien Régime*. For example, Rousseau condemned the phenomenon in his *Discourse on Political Economy*, saying "venality [is] pushed to such excess that reputation is reckoned in cash, and the virtues themselves are sold for money" (Rousseau 1997: 19). Interestingly, such a suspicion of venality had already led one of the most famous lawyers during the *Ancien Régime*, Charles Loyseau, to create a new doctrine, in which the property in the office is split. The officeholder, who has bought the office from the state, should be understood as having a right "in" an office but not "to" that office, Loyseau claimed. He has a merely usufructuary right while the state retained the property right to the office (Kaiser 1994: 306). This is quite a remarkable construction, resembling the idea of contemporary democratic theories that office holding is the only temporary grant of power that always remains tied to a giver (the state itself). The latter retains this power and will give it to others at some future point in time. The distinction gives a flavor of legitimacy to venality by suggesting that the property right remains where it belongs, in public hands. Of course, this construction could not save these offices from critique. Even if offices are merely usufructuary rights both under feudal and democratic regimes, the meritocratic nature of gaining political power through elections is different from the commercial nature of buying and selling offices. Nonetheless, the discussion shows how subtle the understanding of these offices can be.

A not-so-different thing is going on when rich individuals or corporations buy political power by donating to politicians. Here too, the suggestion is that political power truly remains in the hands of politicians, despite receiving donations from private individuals. In this area, and also in the area of lobbying, explicit contracts (*quid pro quos*) are condemned as instances of corruption. However, despite this danger of corruption, the practices themselves are allowed, albeit to different degrees in different

¹⁹ This extent is variable, even under a capitalist economy, depending on the exit options welfare states give to workers. Welfare states can de-commodify labor, i.e., decrease this dependency, by providing alternative sources of income (Esping-Andersen 1990).

countries. The rationale for this is that democracies rely on input from private parties (both financial and in-kind) to the political process. In a democracy, groups of citizens are allowed political participation, and hence need to be able to fund their political activities. All of this should be different once one of them gains office, however; from that moment onwards, past influences should not play any role. Hence the liberal-democratic system puts private parties and political actors in a fundamentally ambiguous situation to each other. Campaign donations may have been made out of genuine enthusiasm for a candidate, without expecting a return. They may also have been made with the implicit expectation of a return. If the labor contract is an *incomplete* contract, this is an *implicit* contract. In both cases, political power can nest in the structure undercover, without revealing its true nature.

Both before and after the Great Demarcation, theorists wrestled with these boundary-crossings between property and political power. From feudal land to modern labor, from venal office to lobbying, the entanglements remain, albeit now concealed under the official private/public distinction which prohibits the influence of private property on political power.

12.6 Conclusion

This chapter has argued that defenders of egalitarian property arrangements (among whom, many defenders of positive freedom) have to pay more attention to the great but fragile demarcation on which their argument for such arrangements relies. The demarcation is built on a purification of private and public spheres which is constantly undermined. Capitalist legal-political arrangements themselves leave space for such undermining dynamics, where discretionary property is invested in political rule. We are left with Winters's sobering assessment, that the transition to liberal-democratic societies may well have been a cost-reducing device for oligarchs searching to protect their property. The big question for defenders of positive freedom is to see how this liberal order can be made truly egalitarian. This would require a fortifying of the great but fragile demarcation. This chapter has analyzed that problem is some depth. However, this opens up many competing ways to deal with the problem, which need to be addressed in future research.