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Fiduciary-Republican Property

From the Ancient Dominium to Modern Constitutionalism

Bru Laín

Abstract: Can property ownership be essentially equated with the absolute and individual right to exclude others from a resource? By critically assessing this question, this article reconstructs the republican conception of property, explaining the way it was formerly shaped by the ancient natural law, and then by the Lockean tradition. Both intellectual and conceptual influences molded modern republican's property conception as a kind of fiduciary relationship, namely, as an institutional and juridical agreement between a trustor or principal and its trustees or agents with overlapped and interdependent interests, necessities, and rights. This view differs from the so-called "classical liberal property" commonly understood as an absolute dominium relying on an individual and exclusivist right enabling their holder to freely alienate and freely accumulate material things. The article concludes by suggesting that important legal areas of our contemporary market societies are certainly established in accordance with this republican-fiduciary conception of property rights.

Keywords: dominium, fiduciary, freedom, natural rights, property rights, republicanism, trusteeship.

Property ownership is nothing but a historical form of social regulation, that is, a social and legal institution comprising a bulk of agents and their interrelated rights and duties regarding material or immaterial things that a society values.[1] In other words, it constitutes a set of powers, privileges, rights, and duties whose allocation, content and meaning varies and evolves according to historical, legal, and political contexts. Therefore, when tackling the question of property ownership, one must also consider which are these effective rights and duties, how they are allocated, and consequently, which is the political regime conforming to those rights and duties and distributing them along their holders.

The mainstream political philosophy tends to neglect the historically indexed character of certain political concepts whose meanings have consequently been obscured.[2] This article discusses one of these inherited concepts—property—when it is essentially equated with the idea of the absolute and individual right to exclude others from a thing, which is usually seen as the backbone of the idea of the "classical liberal property." In contrast with this

commonly accepted assumption, this article firstly reconstructs the republican conception of property rights to secondly suggest to what extent do contemporary societies might have inherited it.

In order to do so, the first section briefly discusses that, due to overemphasizing their exclusive and absolute character, the mainstream political philosophy likely fails to offer a proper picture of the real existing property rights. The second section depicts the modern republican conception of property rights along three subsections. The first assesses how this conception was historically attached to the idea of inalienability of natural human freedom. The second defends how John Locke's theory might be seen as a renewal of this ancient natural law tradition and as profoundly influential by the emergence of the modern republican thought, in particular the North American one. The third subsection synthesizes this Lockean influence into American republicanism by analyzing the concepts of political sovereign and fiduciary property right by highlighting how they were normatively and institutionally similarly constructed. Property, it is argued, was understood as a sort of legal and political relationship involving a principal or trustor—the sovereign, the people—and its agent(s) or trustee(s)—private as well as public owners. In conclusion, this republican-fiduciary framework might still be identified within contemporary market societies' understanding of property and economic rights.

From the Absolute Dominium to Classical Liberal Property?

As it is widely acknowledged, the emergence of the modern world is commonly equated with what Crawford B. Macpherson called "possessive individualism"[3] according to which, private property rights and their correlated political safeguards would have been the historical vectors of the emergence of the modern market societies. Although Macpherson came from the neo-Marxist tradition, the idea that the modern world pivoted around a sort of "possessive individualism" backed by individual and exclusive property rights penetrated most of contemporary political philosophy.[4] Most contemporary political theory has tended to subsume this notion under the heading of "classical liberal property",[5] which is to say, the absolute and exclusive individual right over resources or social assets. This definition is commonplace in legal and philosophical literature where the English jurist Sir William Blackstone is commonly quoted. Property, he stated in 1765, is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe".[6] By identifying property as a despotic dominion and stressing the right to exclude, "Blackstone struck a central nerve in modern discussions of property".[7]

The transition from this notion of *dominium* to the classical liberal property rights crystallized in Europe and the colonial world with the *Code Napoléon* of 1804 which, on Blackstonian grounds, reinforced the radical idea of property as an absolute and exclusive right by defining it as "the right to

enjoy and to dispose of things in the most absolute manner" (art. 544). Although modern political liberalism is likely to accept that "some regulation in property rights is a necessary feature of their continued existence in society",[8] Blackstone's framework remains absolute influential in neoclassical economics and, it would seem, in today's economic liberalism. Indeed, it was Frederick Hayek who similarly defined property as those "ranges of objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded".[9] According to this framework, classical liberal property would entail two different rights: that of using a resource (*ius utendi*) and hence of obtaining its benefits (*ius fruendi*), and that to dispose of it (*ius abutendi*) along with the ability to alienate it (*ius alienandi*).[10] By overemphasizing these two rights, most of political philosophy and history of economic thought have tended a-critically to assume the idea that the property owner's right to exclude others is "universally held to be a fundamental element of the property right".[11] No doubt, the idea that property is a subjective and nearly absolute right controls the way in which much of modern law and politics understand this institution.[12]

Contesting this assumption, other authors have argued that real-world legal doctrines contain very few plausible instances of property rights as an exclusive and despotic dominion, and hence that the absolute right-to-exclude approach should be rejected as too limiting.[13] Insofar as property ownership has been always limited and restricted to the way in which the owner might use a resource, it can be concluded that private property can hardly be categorized as an absolute right, principally because it has had to coexist with other rights, among them freedom and political sovereign. Nevertheless, although it is recognized that legal doctrines are richer and much more complex, the notion of "exclusive and despotic dominion" was the bedrock of mainstream legal theory and economic history since the second half of the nineteenth century and still endures as a core tenet of present-day academic wisdom on the matter. This leads to a methodological conclusion: the analysis of the inherited political and philosophical traditions necessarily requires critical study of widely accepted interpretative patterns, since the meaning of concepts like property or sovereignty is always historically indexed.[14] Consequently, the hypothesis behind this article is that, in order to understand what property really means, at least in Western societies, one is required to critically assess these commonplace concepts and try to reconstruct their conceptual and political history. In doing so, the republican tradition of thought and its contemporary juridical legacy is worth considering.

Republican Property (or Property Rights before Liberalism)

The core of the republican conception of property is that it is understood as the means for securing the necessary material independence to protect the individual from despotic or arbitrary interference while enabling him to

act as they please. Dispossession, therefore, makes one unfree. That is why Aristotle did undoubtedly consider the wageworker—a dispossessed individual who, precisely because of that, needs to sell his or her labor force—an unfree individual. No doubt, "the mechanic artisan is under a sort of limited slavery".15 Two thousand years later, pretty the same idea resonated within the English radicalism. "The man that cannot live upon his own", said James Harrington in 1656 in a clear Aristotelian-republican style, "must be a servant, but [he] that can live upon his own may be a freeman".[16] To the extent that property secures material independence, it acts as a guarantee of political freedom. Republican property can then be equated with the material conditions of freedom understood as non-domination, or the absence of the mere possibility of arbitrary interference. In other words, one just can be considered free in republican terms if one is able:

> to act under one's own initiative instead of merely reacting to the deeds of others, benevolent though they might be. To be free, in other words, is to be free of necessity. . . . To depend on another person, whether tyrant or patron, master or benefactor, is to be unfree to that extent. [The] free man must be economically independent, so that he does not rely on others for his livelihood and is not obliged either to ask for or to accept favours. . . . [T]he secure ownership of property, and especially of landed property, is essential to the enjoyment of freedom.[17]

The constitutionalist William H. Simon underpins this definition: "The critical norm of republican political economy is propertied independence— civic competence grounded in ownership".[18] Achievement of a free society would therefore require eradicating both those socioeconomic conditions that make a citizen arbitrarily susceptible to interference by another or others, and those that allow another person(s) to possess the power (the resources) to exert such domination. This highly demanding normative-institutional requirement of republican freedom was famously stated by Rousseau in his *Social Contract*, according to which "no citizen should be rich enough to be able to buy another, and none so poor that he has to sell himself".[19] Hence, property should be seen as the mainstay of republican freedom. Of course, what property actually is (that is, material independence) with regard to this function of assuring political freedom does not exclusively refer to material resources or assets, but it also included political rights. Consequently, it does not take a static, materialistic historical form. Rather, like societies, it undergoes historical, conceptual, and legal transformation.

Inalienable Natural Freedom

The modern idea of political freedom as an inalienable right came from the distinction between ancient Roman natural law (according to which all human beings are born free) and Roman *ius gentium* (regulating war, international law, and slavery, which determinates that voluntary servitude—con

tracts agreed upon by free citizens entailing a relationship of slavery—were considered illicit). During the late-medieval period and the early Enlightenment, republican thinkers like *Marsilio Da Padova* and Machiavelli did not appeal to natural law philosophy. Neither did Rousseau draw on it.20 Nevertheless, this did not retain him of defending, in an undoubtedly republican style, the inalienability of human freedom. "The goods I alienate", he defended in the *On the Origin and the Foundations of Inequality Among Men*,

> become something altogether foreign to me, and their abuse is a matter of indifference to me . . . every man can dispose of what he possesses as he pleases: but the same does not hold for the essential Gifts of Nature, such as life and freedom, which everyone is permitted to enjoy and of which it is at least doubtful that one has the Right to divest oneself; in depriving oneself of the one, one debases one's being; In depriving oneself of the other one annihilates it as much as in one lies; and as no temporal good can compensate for life or freedom, it would be an offense against both Nature and reason to renounce them at any price whatsoever.[21]

Before Rousseau, the ancient philosophy of natural law was molded into the modern conception of natural rights through an historical "unforeseen contingency"[22]—that is, the crucial debate about the rights of American Indians initiated by Spanish thinkers such as Bartolomé de las Casas and Francisco de Vitoria from the Salamanca School. The supposedly idea of an unrestricted natural *dominium* over external things and over people was challenged by Las Casas who defended that liberty was a right instilled in man from the beginning, thus implying the inclusion of all individuals—Indians too—under the heading of natural rights of freedom, happiness, self-defense, and setting up governments by consent. Furthermore, following Justinian's *Digestum*, Vitoria argued that *ius* did not mean *dominium*: those who enjoy legitimate use have a *ius*—the positive right to use or usufruct—but that does not necessarily mean absolute *domini*—a natural unfettered right to dispose of external things at will.[23] "Liberty", he synthesized, "cannot rightfully be traded for all the gold in the world".[24]

This *iusnatural* conception of the inalienability of human freedom was revived two hundred years later as one of the Enlightenment's backbone features during the American and the French revolutions.[25] In 1776, for example, the famous Preamble of the *Declaration of Independence* written by Thomas Jefferson, clearly stated that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness".[26] In 1793, the idea was similarly reprised and included in Article 18 of the *Déclaration des Droits de l'Homme et du Citoyen* written by Maximilien Robespierre, who defended that: "Every man can contract his services and his time, but he cannot sell himself nor be sold: his person is not an alienable property. The law knows of no such thing as the status of servant".[27] Just four years later, in 1797, Immanuel Kant also used a distinctive republican, Vitorian terminology to

similarly arguing that "a man can be his own master (*sui iuris*) but cannot be the owner *of himself* (*sui dominus*) (cannot dispose of himself as he pleases) — still less can he dispose of other men as he pleases— since he is accountable to the humanity in his own person".[28]

Although an exhaustive list of examples cannot be offered here, thinkers and activists so different like the English *dissenters* Richard Overton or John Lilburne, revolutionaries like Thomas Paine, Thomas Jefferson and Maximilien Robespierre, or the same Immanuel Kant, all presented similar arguments for the inalienability of the natural right of life, freedom, and the pursuit of happiness. According to them, political freedom cannot be alienated since it is, in itself, a "constitutive right"[29] of the citizenry, and hence of civil society or of "the humanity" in Kantian terms.[30] However, what particularly of the natural right to life—or to self-preservation—, that is, the right to procure the means of subsistence? Indeed, should not this right to appropriate those necessary material resources to keep alive be necessarily preceded and justified by a natural right to self-ownership? As long as political freedom cannot be alienated, neither can be so the material resources securing it. This first normative republican mandate could therefore be called the *anti-alienation proviso*. When addressing this question, however, one must pay attention to another, so far unmentioned thinker, John Locke.

The Right of Self-Ownership Revisited

Much of contemporary history of political thought tends to accept an interpretation of classical liberal property based on a supposedly Lockean right of self-ownership from which modern individual and exclusive property rights would emerge. However, another alternative interpretation may be of use here.[31] Locke formulated his theory of property and legitimate appropriation of external resources in keeping with the classical conception of an inalienable natural right of life and freedom. Hence, his theory "was received positively by *opponents* of the status quo",[32] mostly because it could be used to defend the natural rights of the poor against landowners.[33] By assuming *prima facie* that "nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another",[34] the *Second Treatise*'s famous proviso assumes that private "appropriation of any parcel of land" must not be of "prejudice to any other man, since there was still enough, and as good left".[35]

Nevertheless, as Jordi Mundó points out,[36] the novelty of Locke's theory with regard to the tradition of natural law and what most influenced modern republican thought, was that the early natural law backing the individual in-alienable duty of self-preservation attained a collective dimension, namely the "preservation of mankind",[37] according to which the world must belong to "Men in common".[38] In doing so, he was adding this new collective duty to the ancient notion of the natural duty of individual(istic) self-preservation.

This is also the reason why, while defending private property based on one's work as the means of securing the self-preservation and liberty, his theory also required observation of the same right for all humankind. "The state of nature", Locke claimed, "has a law of nature to govern it, which obligates every one".[39] Accordingly, the positive right of appropriation cannot be naturally unlimited because, "the same Law of Nature, that does by this means give us Property, does also bound that Property too".[40] As noted earlier, there cannot exist a natural *dominium* over one's own self (nobody can alienate one's own freedom), nor even over material things (nobody can engage in unlimited appropriation of material resources).

Consequently, a second *anti-accumulation proviso* might be identified here, this time stipulating that "nobody should be in a social position which allows accumulation of more goods and possessions than what can be used before spoiling".[41] This succinct republican reasoning is worth highlighting here: insofar political freedom cannot be alienated (anti-alienation proviso), neither can be its necessary material conditions, namely property understood as material independence (*anti-accumulation proviso*).[42] In sum, not only did Locke's interpretation endow the natural right (and duty) of self-preservation with a collective dimension but, with the inclusion of his theory of appropriation by means of one's own labor, it also modified the natural liberty justification of colonialism, which stated that the world belongs to no-one (*res nullius*) and therefore is available for free appropriation.[43]

The predominant interpretation of "classical liberal property"—and hence most of our inherited intellectual tradition on the Lockean idea of self-ownership—are quite a long way from the foregoing interpretation. Despite it is true that Locke claimed that "every Man has a Property in his Own Person",[44] by "property" he not only referred to external or material resources but also to men's "lives, liberties, and estates", or anything he would "call by the general name property".[45] So, when using the term *dominium*, Locke was referring indiscriminately to self-ownership and self-mastery. As for possession of material resources, his theory required self-mastery because only the man who is his own master can lawfully possess resources. Once again, in keeping with the Roman legal tradition, Lockean self-ownership and self-mastery could only be enjoyed by those coming under the heading of *sui iuris*, by contrast with *alieni iuris*—women, slaves, minors and servants—denied civil rights (including that of ownership) who were civilly and legally dependent upon the former. This meant that Locke's concept of self-ownership cannot be detached from his notion of (unalienable) political sovereignty.

Political Sovereignty, Fiduciary Property Rights, and the Early American Republicanism

For this republican Locke, natural political sovereignty must be found in each individual. Accordingly, life, liberty and all those material resources

necessary to secure the preservation of this person and humankind cannot be alienated. Since natural liberty and political sovereignty cannot be alienated, the government—the monarch or the legislative body—can only be lawfully constituted on the basis of voluntary delegation by citizens in an expression of trust which, by definition, is always limited and revocable. Whenever a representative—understood as a trustee—threatens the citizens' natural right to life, liberty, or consent by becoming a despot, the citizens—the trustors—can reclaim their sovereignty, by force if necessary. Locke expresses this as follows:

> Though in a constituted commonwealth . . . acting according to its own nature, that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate; yet the legislative being only a *fiduciary power to act for certain ends*, there remains still in the people *a supreme power to remove or alter the legislative, when they find* the legislative act *contrary to the trust reposed in them* . . . or no man, or society of men, having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another [. . .] they will always have a right to preserve, what they have not a power to part with.[46]

In respecting the fiduciary tradition of freedom and political sovereignty and by defending these natural rights from such "arbitrary dominion" as a monarch's absolutism, Locke was not only renewing the classical natural law tradition by laying the foundations for justifying right of revolution, but he also was linking it with the earlier English radicalism, as well as with modern republican thought. He was also about to influence one of the most important historical events that was yet to come, the American Revolution, especially with regard to its republican conception of political sovereignty and property rights. For Locke, not only the political sovereign—whose position was founded on the inalienability of human freedom as previously described—has fiduciary status, but property rights, should also be understood in these terms. In short: property rights, like political sovereignty, are normative and institutionally built upon the assumption of a *fideicommissum* or a trusteeship between the principal or trustor (the people) and its agent(s) or trustee(s).[47]

For Locke, as previously explained, individuals only have a natural right over those material resources necessary to secure their own preservation, but due to the anti-alienation and anti-accumulation proviso, they do not enjoy this natural right over those resources beyond these ends, which become public property. This is because private property rights must be considered as a *fiduicia*, which is, by definition, neither absolute nor exclusive but revocable since it must always serve the public-sovereign interest. In brief, Locke's basic fiduciary idea of private property rights, which was to be inherited and reshaped by modern republicanism, might be synthetized as follows:

> The property of any basic resource or asset (especially land) is public, and what we call private property is in fact nothing but a private appropriation of the resource in question as a public *fideicomissus* in a Principal/Agent relationship: the private owner (as well as the enfranchised common owner) is merely a trustee of public or sovereign property. The sovereign (the Monarch or the People) is the Principal (the "trustor") and the proprietor is the Agent (the "trustee") in the fiduciary social relationship called property.[48]

This *ius naturale* and fiduciary Lockean rationale behind political freedom and property rights was certainly "fundamental to and part of the preservation of liberty and personal freedom in the United States."[49] And it was so, in particular, in the case of the Jeffersonian republicanism.[50] On the one hand, Thomas Jefferson also upheld common ownership: "The earth is given as a common stock for man to labour & live on", wrote to Reverend James Madison, in 28 October 1795. Consequently, he followed by endorsing the first republican anti-alienation proviso when criticizing the increasing commodification and land-ownership polarization: "Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right".[51] Lockean framework is also found in the American and Jeffersonian republicanism in the fact that the latter did also reject the existence of a natural or exclusive right over material things. Although backed by the natural right to life, property rights are always civil, positive rights. In a letter to Isaac McPherson on August 13, 1813, Jefferson left no doubt about it:

> no individual has, of natural right, a separate property in an acre of land, for instance. By a universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it, but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society.[52]

Hence, private owner is nothing but an usufructuary, a trustee of the "common" property. This fiduciary rationale, Jefferson stated, was probably "the law of every people on earth at some period of their history". In accordance:

> No nation has a separate property in lands been yielded to individuals. He who plants a field keeps possession till he has gathered the produce, after which one has as good a right as another to occupy it. . . . Till then the property is in the body of the nation, and they, *or their chief as their trustee*, must grant them to individuals, and determine the conditions of the grant.[53]

How, then, is the "body of the nation" or the principal to "determine the conditions of the grant?" In other words, what institutional arrangement should this *fideicommissum* or trusteeship adopt? According to Jeffersonian republicanism, there are three institutional forms through which the principal can be organized in order to allocate property rights entitlements: "This may be done by themselves, assembled collectively, or by *their legislature,*

to whom they may have delegated sovereign authority; and if they are allotted in neither of these ways, each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title".[54]

Therefore, property rights can be jointly and lawfully managed through "a collective assembly" or, what seems more feasible to him, through a sort of trusteeship or *fideicommissum*, that is, a "legislature with delegated sovereign authority". If these two institutional solutions are not available, individuals may then resort to the classical natural right of self-preservation, as Locke already contemplated, and provide by themselves what they need. Beyond this individual solution, however, the private owner exercises his property rights in accordance with the social law and, consequently, he or she cannot enjoy *natural dominium*, since he or she is enjoying these property rights on behalf of the sovereign or principal as its trustee or agent. Moreover, note that "the legal fiduciary traces back to Roman times",[55] and it was subsequently used not only by Jefferson but also by other Founders who were also imbued by the classical culture. It was precisely Benjamin Franklin who, in 1783, would similarly state that:

> all property that is necessary to a man is his natural right, which none can justly deprive him of; but all property superfluous to such purposes is the property of the public, who, by their laws, have created it, and who may therefore by other laws dispose of it, whenever the welfare of the public shall demand such disposition. He that does not like civil society on these terms, let him retire and live among savages. . . . All property . . . seems to me the creature of public convention. Hence the public has the right of regulating descents . . . and all other Conveyances of Property, and even of limiting the Quantity and the Uses of it.[56]

For Franklin, as Locke and Jefferson proposed, enforceable property rights cannot exist before the public has created them. So, anyone who does not observe this norm is excluding himself or herself from the principal-agent trusteeship and then, as a "savage", is placed outside the social agreement and the civic law, among which, that of property rights. Similarly to Locke, for Franklin, Jefferson and the rest of modern republicanism, there is an individual right to appropriation, "but there is an important limitation to these rights", since no individual can use them "to obstruct others in their equal enjoyment".[57] Private property rights, therefore, would constitute an act of private appropriation of a resource by means of a public *fideicommissum*, shaped by a fiduciary relationship between the principal (the sovereign, the people who always retain the right of alienation) and its agents (the government or the private owner, who only manage/use it as usufruct). The private owner therefore would merely be a trustee or would have usufruct of the principal's property.[58]

In keeping with the foregoing, republican property could be distinguished from classical liberal property and its assumption of absolute and

exclusive dominium by means of two features. First, its anti-alienation proviso limits the control of property ownership to the citizens by securing their self-preservation as well as that of the civic community as generally granting the material means to secure the freedom as non-domination. Second, its anti-accumulation proviso sets limits to the wealth-inequality nexus among those citizens. Both restraints would "encourage the owner to view her interest as a stake in a particular long-term relationship".[59] Hence, republican property does not only serve as the material guarantee of freedom as non-domination, but it also promotes civic engagement in a long-term relationship called *res publicae* or commonwealth.

Of course, although the idea of inalienability of human freedom and political sovereignty is always present in the background, the particular institutional and legal design that the fiduciary arrangement concerning republican private property might adopt will always depend on each economic and legal scenario.[60] In this regard, the North American republican notion that links fiduciary relationship with natural freedom, political sovereignty, and private property, allows not only adequate conceptual analysis of the historical evolution of property rights and its normative implications, but it also sheds light on the ways in which they have been legally and politically instituted in most of contemporary market societies.

Conclusions: An Enduring Republican Legacy?

It has been largely discussed whether republican thought has influenced subsequent liberal, market societies and, if so, to what extent did it do so.[61] Although this article's main goal is not to delve into this particular question, we find appropriate for further discussions to suggest the three main dimensions where the previously explained republican rationale may be still influential in contemporary market societies.

First, the Jeffersonian idea that the "earth is given as a common stock for man to labour & live on" and therefore, that the public has the right to regulate it as to secure the Lockean "preservation of mankind", it is still traceable in the "social function clause" of property in the Latin American and European tradition as well as in the "eminent domain" in the North American one. On the one hand, Latin American legal systems may reflect this logic, for example, in cases such as the revolutionary article 27 of the Mexican constitution of 1917, the article 58 of the Colombia's of the 1886 latterly reinterpreted in the 1936 democratic one, or more recently, the article 5, section XXIII of the Brazil's carta magna of the 1988 stablished after the military dictatorship of 1964–1985. On the other hand, it is also easily identifiable in European constitutionalism in places such as the Weimar and the Austrian constitutions of 1919 or the Spanish republican constitution of 1931, the article 42 of the German constitution of the 1949, or the Portuguese one ratified in 1976 after the Carnation revolution.[62] After all, "the

notion that property ownership has an inherent social obligation is not controversial in American law"[63] nor in most Western countries. Hence, this republican conception "is neither as anomalous nor as implausible as the dominant mainstream conceptions of property often suggest".[64]

There is also a second, important set of constitutional rights through which mainstream political philosophy and the common liberal reasoning tends to impose both the aforementioned alienation and accumulation restraints, and to justify them as republicanism would do. They may be the rights associated to the concept of citizenship. Although the contemporary idea of republican independence as non-domination might significantly differ from that based on land ownership, "the basic idea is still there—that property nurtures the independence necessary for political participation".[65] Understood as the minimal entitlement rights that the political community should entail (the right to freely remain in the country and to possess a particular nationality, the right to be assisted by the laws, or the right to freely vote, for example), these rights might be also understood as constitutive rights because, like the natural right to life, liberty and political sovereignty, they cannot be alienated by nobody nor even by oneself. No free citizen can give away or sell his or her life or freedom precisely because political citizenry is not—and should not be—a commodity.

Linked to this, there exist a third, final way the republican-fiduciary conception of property rights is likely to be embedded in contemporary legal regimes, which has become a justification for distributive and economic rights. It has been said that all people should have a voice in the political order. Nevertheless, "to acquire that voice they need a secure baseline of property—and if necessary, this baseline must be secured by redistribution".[66] One might identify here a primordial set of republican-rooted rights associated with the minimal economic entitlements required for political freedom to become feasible—beyond being merely formally and isonomically possible. The rights of free labor enshrined in many contemporary legal codes might be understood in these terms. Since in most countries land is no longer available to be individually allocated as a mean for securing material independence and thereby freedom, the right of free labor has adopted some of the former land ownership restrictions. It might be seen when the law imposes alienation restraints that limit a person's powers "of direct coercion to his or her own labor, and that also limit a person's (employer's) powers of direct coercion over another person (employee)".[67] In this regard, the famous International Labor Organization's maxim "labor is not a commodity", might be likely seen as an illustrative example of this enduring republican-fiduciary rationale within our contemporary market societies.

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Notes

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2. For a persuasive assessment of such an historical-indexed character of certain political concepts, particularly those of freedom and political sovereignty, see Jordi Mundó, "La constitución fiduciaria de la libertad política (Por qué son importantes las coyunturas interpretativas en la filosofía política)" [The fiduciary constitution of political freedom. (Why interpretative conjunctures are important in political philosophy)], *Isegoría. Revista de Filosofía Moral y Política* 57 (2017): 433–454, doi: 10.3989/isegoria.2017.057.02.
3. Crawford B. Macpherson, *The Political Theory of Possessive Individualism: From Hobbes to Locke* (Oxford: Oxford University Press, 1962).
4. Reinforcing this view, the famous idea of the "tragedy of the commons" would become referential, according to which the modern world's main feature would has been the inevitable replacement of the economically and socially "inefficient" common ownership of property by an exclusive and individual private property regime. See Garrett Hardin, "The Tragedy of the Commons," *Science* 162 (1968): 1243–1248. For a critic on Macpherson's "possessive individuals" as the main pillar of the liberal property rights and market societies, see Jordi Mundó, "De la retórica absolutista de la propiedad al sentido común de la propiedad limitada" [From the absolutist rhetoric of ownership to the common sense of limited ownership], *Sin Permiso* 16 (2018): 35–63; as well as: Mundó, "La constitución fiduciaria".
5. Thomas W. Merrill, "Classical Liberal Property and the Question of Institutional Choice," *The Journal of Legal Studies* 50, no. 2 (2021): 9–25, doi: 10.1086/704894; Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985); and Margaret Jane Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings," *Columbia Law Review* 88, no. 8 (1988): 1667–1696, doi: 10.2307/1122597.
6. William Blackstone, *Commentaries on the Laws of England* (Philadelphia: West Publishing Company, 1897), 167.

7. Carol Rose, "Canons of Property Talk, or, Blackstone's Anxiety," *The Yale Law Journal* 108, no. 3 (1998): 605, doi: 10.2307/797498. Despite Blackstone's definition became referential for contemporary scholars, it receives severe criticism accusing it of being a "vague notion" detached from any "strict analysis of the subject". See David B. Schorr, "How Blackstone Became a Blackstonian", *Theoretical Inquiries in Law* 10, no. 1 (2008): 123, doi: 10.2202/1565-3404.1210.
8. John Sheehan and Garrick Small, "Towards a Definition of Property Rights" (lecture delivered at Pacific Rim Real Estate Society conference, Christchurch: New Zealand, 2002: 1). Economic liberal thought would see such regulations as a externally imposed restrictions, and consequently as a reduction of individual, absolute right to dispose a thing. The German jurist Max Kaser succinctly referred to this. Classical-liberal concept of property, he stated, "is indeed susceptible to restriction but is in no way initially restricted" (Max Kaser, "The Concept of Roman Ownership", *THRHR* 27 (1964): 5–19. Contrary to such an assumption, and as it will be shown, republicanism would rather see these regulations or restrictions as an internal constitutive factor of the very property rights legal institution. For a further debate on this, see Bru Laín, "Implicaciones y alcance del debate acerca de los bienes communes y las(s) propiedade(s)" [Implications and scope of the debate about the commons and of property(ies)], in *Ni público, ni privado, ¿sino común?*, ed. Bru Laín (Manresa: Bellaterra, 2023): 23–42.
9. Friedrich Hayek, *Law, Legislation and Liberty* (London: Routledge, 1982), 107.
10. Some authors talk about the three qualities of any property right: "1. a management power, 2. an ability to receive income or benefits, 3. an ability to sell or alienate the interest" (Sheehan and Small, "Towards a Definition", 16). Others synthetize this by pointing out that "Modern Capitalist-Liberal property seems to include two rights: 1) to freely dispose of the thing (capacity of accumulate and of alienate); 2) to freely use the thing and to receive its outcomes" (Kevin Gray and Susan F. Gray, "The Idea of Property in Land," in *Land Law: Themes and perspectives*, ed. Susan Bright and John K. Dewar [Oxford: OUP, 1998], 15–51, here 18).
11. Along this line, it is defended that, "property at its core entails the right to exclude others from some discrete thing" (Merrill and Smith, *Property: Principles and Policies* [New York: Foundation Press, 2007]). To the influential, libertarian Richard Epstein, the right to exclusion is somehow naturally "implicit in the basic conception of private property" (Epstein, *Takings*, 63). In accordance, governments would fail in protecting private property when other configurations of the bundle of rights are enforced and therefore other type of property rights are defined. Professor Jan Laitos also describes the right to exclude as one of those "rights valued so highly, that the abolishment will result in the offending law being declared unconstitutional" (quoted in David Callies and David Breemer, "The Right to Exclude Others from Private Property: A Fundamental Constitutional Right," *Washington University Journal of Law & Policy* 3 (2000): 39–59, here 40). Paradoxically, Karl Marx would have also contributed to underpin this "exclusionist" view as follows: "Landed property presupposes that certain persons enjoy the monopoly of disposing of particular portions of the globe as exclusive spheres of their private will to the exclusion of all others" (Marx, *Capital*, Vol. III, London: Penguin Books, 1981), 752. To delve into the discussion of how Marx understood the question of

property, as well as the relationship between republicanism and Socialism in this regard, see Bru Laín and Egdar Manjarín, "Private, Public, and Common. Republican and Socialist Blueprints", *Theoria* 171, vol. 69, no. 2 (2022): 49–73.

12. Sheila R. Foster and Daniel Bonilla, "The Social Function of Property: A Comparative Perspective," *Fordham Law Review* 80 (2011): 1003–1015, here 1003.
13. Among those rejecting such a view, see for example: Carol Rose, "Romans, Roads, and Romantic Creators: Traditions of Public Property in The Information Age," *Law and Contemporary Problems* 66 (2003): 89–110; as well as Robert R. Gordon, "Paradoxical Property," in *Early Modern Conceptions of Property*, ed. John Brewer and Susan Staves (London: Routledge, 1995): 95–110; as well as Andries Johannes Van der Walt and Duard G. Kleyn "Duplex dominium: The History and Significance of the Concept of Divided Ownership" in *Essays on the History of Law*, ed. D. P. Visser (Cape Town: Juta, 1989): 213–260.
14. Mundó, "The fiduciary constitution," 434.
15. Aristotle, *Politics*, trans. H. Rackham (London: William Heineman, 1959), 1260b.
16. James Harrington, *The Commonwealth of Oceana and A System of Politics*, ed. John G. A. Pocock (Cambridge: Cambridge University Press, 1992), 269.
17. Eric MacGilvray, *The Invention of Market Freedom* (Cambridge: Cambridge University Press, 2011), 28.
18. William H. Simon, "Social-Republican Property", *University of California Law Review* 38, (1991): 1335–1415, here 1340.
19. Jean-Jacques Rousseau, *The Social Contract*, trans. Christopher Betts (Oxford: Oxford University Press, 1994), 87.
20. To debate why modern republican thinkers like *Marsilio Da Padova*, Machiavelli or Rousseau were not so much attracted by the natural rights philosophy being much more concerned about "real politics" issues such as the modern constitutionalism, democracy regimes and so on, see Antoni Domènech, "Prólogo," in *La ciudad en llamas: La vigencia del republicanismo comercial en Adam Smith* [The burning city: The validity of comercial republicanism in Adam Smith], David Casassas (Barcelona: Montesinos, 2010), 44. To discuss why neo-republicans such as J. G. A. Pocock, Quentin Skinner or Philip Pettit among others, did also disregard natural rights, see David Guerrero and Julio Martínez-Cava, "Between Tyranny and Self-Interest. Why Neo-republicanism Disregards Natural Rights," *Theoria* 171, vol. 69, no. 2 (2022): 140–171, doi:10.3167/th.2022.6917108.
21. Rousseau, *The Social Contract*, 179.
22. Brian Tierney, "The Idea of Natural-Rights and Persistence," *Northwestern University Journal of International Human Rights* 2, no. 1 (2004), 10.
23. Ibid., 11. As Anthony Pagden noted, Vitoria's theory was "the first to claim that the affair of the Indies . . . was a question neither of the limits of papal jurisdiction, nor of Roman Law, but of the law of nature . . . and that the issue was consequently one . . . of natural rights." (Anthony Pagden, "Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians," in *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1987), 79–98, here 80.
24. Cited by Richard Tuck, *Natural Rights Theories: Their Origin and Development* (New York: Cambridge University Press, 1979), 79.

25. Chester J. Antieau, "Natural Rights and the Founding Fathers: The Virginians," *Washington and Lee Law Review* 17, no. 1 (1960): 43–79.
26. Thomas Jefferson, *The Works of Thomas Jefferson*, ed. Paul Leicester Ford (New York and London: G. P. Putnam's Sons & The Knickbocker Press, Vol. IX, 1904), 35.
27. Frank Maloy Anderson (ed.), *The Constitutions and Other Select Documents Illustrative of the History of France 1789–1901* (Minneapolis: H. W. Wilson, 1904), 172.
28. Immanuel Kant, *Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 90. For a republican interpretation of Kant's work, see María Julia Bertomeu, "Kant: una concepción republicana de la justicia pública" [Kant: a republican conception of public justice], *Las Torres de Luca* 7, no. 13 (2018): 109–126, as well as "De la apropiación privada a la adquisición común originaria del suelo: Un cambio metodológico 'menor' con consecuencias políticas revolucionarias" [From private appropriation to the common acquisition of land: A 'minor' methodological change with revolutionary political consequences], *Isegoría. Revista de Filosofía Moral y Política* 30 (2004): 127–134, doi: 10.3989/isegoria.2004.i30.479.
29. In order to debate the differences between "constitutive" and "instrumental" rights, see María Julia Bertomeu and Antoni Domènech, "El republicanismo y la crisis del rawlsismo metodológico (Nota sobre método y sustancia normativa en el debate republicano)" [Republicanism and the crisis of Methodological Rawlsism. (A note on the method and the substance in the republican debate)], *Isegoría. Revista de Filosofía Moral y Política* 33, (2005): 51–75, doi: 10.3989/isegoria.2005.i33.418.
30. For further readings on the inalienability of human freedom, see Antoni Domènech, *El eclipse de la fraternidad: Una revisión republicana de la tradición socialista* [The eclipse of fraternity: A republican revisión of the socialist tradition] (Barcelona: Crítica, 2004); Jordi Mundó, "Autopropiedad, derechos y libertad (¿debería estar permitido que uno pudiera tratarse a sí mismo como a un esclavo?)" [Self-ownership, rights and freedom (should one be allowed to treat oneself as a slave?)], in *Republicanismo y Democracia*, ed. María Julia Bertomeu, Antoni Domènech and Andrés de Francisco (Buenos Aires: Miño y Dávila, 2005), 187–208; and Florence Gauthier, *Triomphe et mort du droit naturel en Révolution (1789, 1795, 1802)* [Triumph and death of natural law in revolution (1789, 1795, 1802)] (Paris: PUF, 1992).
31. To discuss this "Lockean right to self-ownership", see James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1982); Neal Wood, *The Politics of Locke's Philosophy: A Social Study of "An Essay Concerning Human Understanding"* (Berkeley: University of California Press, 1983); Jordi Mundó, "Political Freedom in Lockes's Republicanism," in *Cultures des républicanismes. Pratiques-Représentations-Concepts de la Révolution à aujourd'hui*, ed. Yannick Bosc (Paris: Édicions Kimé, 2015), 103–117, and Jordi Mundó, "Locke's property in historical perspective: natural law and the shaping of modern political common sense", *Analele Universitatii din Craiova-Seria Filosofie* 40, no. 2 (2017): 19–40. This section mostly drawn on Mundó's works.
32. Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge: Cambridge University Press, 2007), 147.
33. Mundó, "From the absolutist rhetoric".

34. John Locke, "The Second Treatise of Government," in *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven, CT: Yale University Press, 2003), 159.
35. Ibid., 114.
36. Mundó, "Political Freedom in Lockes's Republicanism."
37. Locke, "The Second Treatise," 160.
38. Ibid., 111.
39. Ibid., 102.
40. Ibid., 113.
41. Antoni Domènech and María Julia Bertomeu, "Property, Freedom and Money: Modern Capitalism Reassessed," *European Journal of Social Theory* 19, no. 2 (2015): 245–263, here 251, doi: 10.1177/1368431015600.
42. For a more precise justification of these two Lockean "provisos", see the "alienation" and "accumulation restraints" as a core features of social-republican property. Indeed, as William H. Simon argues, "Social-republican property can be distinguished from the more conventional notion of capital ownership by two features: first, transfer or alienation restraints that confine control of the property to active or potentially active participants in a community constituted by the property, and second, accumulation restraints designed to limit inequality among members of such a community" (Simon, "Social-Republican Property," 1341). For a modern, conceptual reconstruction of these republican restrains on property rights, see Jordi Mundó, "La propiedad como problema político no resuelto" [*Property as an unresolved political problem*], in *Ni público, ni privado, ¿sino común?*, ed. Bru Laín (Manresa: Bellaterra, 2023): 93–120.
43. Under the European and English colonialism, the ancient Roman law based on the *ius gentium* was used to claim rights over Indians' lands. Like the expansion of the Roman Empire, Western colons appropriated Indians' lands by considering them as *res nullius*, that is, lands that by their nonexclusive nature have not been appropriated by anyone. Fort further reading, see Andrew Fitzmaurice, "Sovereign Trusteeship and Empire," *Theoretical Inquiries in Law* 16, no. 2 (2015): 447–471, doi: 10.1515/til-2015-108; and Sankar Muthu, *Enlightenment against Empire* (Princeton, NJ: Princeton University Press, 2003).
44. Locke, "The Second Treatise," 111.
45. Ibid., 155.
46. Ibid., 166 (emphasis added).
47. Bru Laín, "Del derecho natural al pacto fiduciario: gobierno y propiedad en la economía política republicana" [From natural law to the fiduciary agreement: government and ownership in the republican political economy], *Isegoría. Revista de Filosofía Moral y Política* 62, (2020): 9–34, doi: 10.3989/isegoria.2020.062.01; as well as Bru Laín, "Ni absoluta, ni exclusiva: Una reconstrucción de la concepción de la propiedad republicano-jeffersoniana" [Neither absolute nor exclusive: A reconstruction of the republican-Jeffersonian conception of property], *Daimon. Revista Internacional de Filosofía* 81, 99–114, doi: 10.6018/daimon.428761. For a modern socialist interpretation of such a republican-fiduciary rationale, see Bru Laín and Edgar Manjarín, "Private, Public and Common."
48. Domènech and Bertomeu, "Property, Freedom and Money," 6.

49. Callies and Breemer, "The Right to Exclude Others From a Thing," 39.
50. Jeffersonian republicanism regarding property rights remains a controversial scholarly discussion. In contrast with the non-absolute and non-exclusivist view this article defends, see, for example, Allan Greer, "Owning Bodies, Owning Lands. Property Formation in the Early Plantation Colonies," *Historical Reflections* 50, no. 1, (2024): 22–32, doi: 10.3167/hrrh.2024.500102.
51. Jefferson, *The Works of*. Vol. VIII: 196.
52. Thomas Jefferson, *Jefferson: Political Writings*, ed. Joyce Appleby and Terrence Ball (Cambridge: Cambridge University Press, 1990), 580.
53. Thomas Jefferson, "The Proceedings of the Government of the United States in Maintaining the Public Right to the Beach of the Mississippi, Adjacent to New Orleans Against the Intrusion of Edward Livingston," *The American Law Journal* 5, (1814): 31 (emphasis added).
54. Jefferson, *The Works of*. Vol. II, 85 (emphasis added). Again, Jefferson is reasoning—although implicitly—according to the classical Roman law formula of *usucapio*. In this regard, see Peter Birks, "The Roman Law Concept of Dominium and the Idea of Absolute Ownership", *Acta Juridica* 1 (1985): 1–37.
55. Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011), 30.
56. Benjamin Franklin, *The Works of Benjamin Franklin*, ed. John Bigelow (New York: G. P. Putnam's Sons, Vol. X, 1904), 232.
57. Jefferson, "The Proceedings," 61.
58. Other thinkers of that period also endorsed the very same idea of property rights as a usufruct or fiduciary arrangement. It was precisely in his *Dissertation on First Principles of Government* that Thomas Paine highlighted that, since the right to property is a *fideicommissum* conceded by the current society, "our ancestors, like ourselves, were but tenants for life in the great freehold of rights. The fee-absolute was not in them, it is not in us, it belongs to the whole family of man through all ages. If we think otherwise than this, we think either as slaves or as tyrants. As slaves, if we think that any former generation had a right to bind us; as tyrants, if we think that we have authority to bind the generations that are to follow" (Thomas Paine, *The Complete Writings of Thomas Paine*, ed. Philip S. Foner [New York: The Citadel Press, 1945], Vol. II, 575). For further readings on the Paine's influence in the American and the revolutionary French republicanism, see respectively: Yannick Bosc, *La terreur des droits de l'homme : le républicanisme de Thomas Paine et le moment thermidorien* [The terror of human rights: Thomas Paine's republicanism and the Thermidorian moment] (Paris: Éditions Kimé, 2016), and Yannick Bosc, "Thomas Paine as a Theorist of the Right to Existence," *Journal of Early American History* 6, no. 2–3, (2016): 113–123, doi: 10.1163/18770703-00603002.
59. Simon, "Social-Republican Property," 1341.
60. In North America, this historical configuration was particularly controversial. While it was true that the discourse and the conception of natural rights and the inalienability of natural freedom and sovereignty was particularly relevant during the early period, it is also true that it remained mostly circumscribed to the rhetoric discussion and had no transcended to the real political arena as it

did in the French case. Precisely because of that, the American and Jeffersonian republicanism's defense of natural freedom and sovereignty may have coexisted with a conceptual and factual contradiction that their French, plebeian colleagues would have never accepted: the slavery system. For a systematic discussion of the slavery conception of American Republicanism, see Elisabeth Fox-Genovese and Eugene D Genovese, *The Mind of the Master Class: History and Faith in the Southern Slaveholders' Worldview* (New York: Cambridge University Press, 2005). In the particular discussion of the Jefferson's republicanism, see Richard K. Matthews, *The Radical Politics of Thomas Jefferson* (Lawrence: University Press of Kansas, 1984), as well as Ari Helo and Peter Onuf, "Jefferson, Morality, and the Problem of Slavery," *The William and Mary Quarterly* 60, no. 3 (2003): 583–614. For a further debate on the differences and similitudes between the French and the American early republican thought, see Laín, "Del derecho natural al pacto fiduciario".

61. In this regard, two references are worth pointing out: the previously mentioned Domènech's *El eclipse*, as well as Alex Gourevitch, *From Slavery to the Cooperative Commonwealth. Labor and Republican Liberty in the Nineteenth Century* (Cambridge: Cambridge University Press, 2014).
62. For a further exploration of the social function of property and its traceable fiduciary-republican rationale in Latin America, see Flávia Santinoni Vera, "The Social Function of Property Rights in Brazil" (lecture at Latin American and Caribbean Law and Economics Association (2006); Thomas T. Ankerson and Thomas Ruppert, "Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America," *Tulane Environmental Law Journal* 19, no. 1 (2006): 69–120; Daniel Bonilla, "Liberalism and Property in Colombia: Property as a Right and Property as a Social Function," *Fordham Law Review* 80 (2011): 1135–1170; as well as Matthew C. Mirow, "Origins of the Social Function of Property in Chile," *Fordham Law Review* 80 (2011): 1183–1217. For its influence in the European's and the US' constitutionalism, see Gregory S Alexander, "The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence," *Journal of Legal Education* 58, no. 1 (2008): 147–155; and Rebecca Lubens, "The Social Obligation of Property Ownership. A Comparison of German and U.S. Law," *Arizona Journal of International & Comparative Law* 24, no. 2 (2007): 389–449.
63. Lubens, "The Social Obligation," 390.
64. Simon, "Social-Republican Property," 1412.
65. Carol Rose, "Property as the Keystone Right?" *Notre Dame Law Review* 71, n. 3 (1996): 347.
66. Ibid., 347.
67. Simon, "Social-Republican Property," 1352.