

SUBSIDIARITY AND THE STRUCTURE OF PROPERTY LAW

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Abstract

This article provides an account of the structure of property law based on the principle of subsidiarity. That principle holds that more centralized organizations, including governments, should fulfill a subsidiary role in relation to the individuals and groups of which they are comprised. While subsidiarity has been highly influential in the areas of public law, constitutional law, and international law, its relevance to property law has been underappreciated. Property rights distribute decision-making authority over resources to non-state parties. This promotes a number of interrelated goods associated with subsidiarity, including: the qualitatively distinct contributions made by individuals and groups to the common good, the instrumental benefits of decentralized decision-making, the intrinsic benefits of involvement in actions and decisions affecting oneself, and the development of virtues. However, the principle of subsidiarity also suggests important roles for public authorities, including assuring an appropriate distribution of resources in society and intervening where the private authority of owners fails to uphold the common good. In this respect, subsidiarity offers a distinctive understanding of the divide between public and private law. Private law doctrine appropriately provides owners with a significant sphere of presumptive authority, yet this is subject to broad powers of public authorities to alter the baseline where in their judgment the common good requires it. This article argues that the concept of subsidiarity can help to bridge the divide between progressive property theory and theoretical approaches that emphasize the authority of owners. It can also contribute to an understanding of the concept of property, public access rights to private property, property-based community governance, and legal protections for property rights.

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INTRODUCTION

Subsidiarity is a modern concept with an ancient lineage. The basic idea is that larger, more centralized organizations should fulfill a subsidiary function in relation to the individuals and smaller groups of which they are comprised.¹ A larger organization should refrain from absorbing its smaller units or abrogating to itself the functions they can perform.² At the same time, however, the larger organization should provide help (ie. *subsidium*),³ performing those functions that the smaller-scale units are unable to do themselves, and stepping in when needed, such as where the activities of

¹ Pope Pius XI, “Quadragesimo Anno” (15 May 1931) at para 79, online: *The Holy See* <https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html>; NW Barber, *The Principles of Constitutionalism* (New York: Oxford University Press, 2018) at 200–01.

² Patrick McKinley Brennan, “Subsidiarity in the Tradition of Catholic Social Doctrine” in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Dordrecht: Springer, 2014) 29 at 35.

³ John Finnis, “Subsidiarity’s Roots and History: Some Observations” (2016) 61:1 *Am J Juris* 133 at 134–35; Charlton T Lewis & Charles Short, *A Latin Dictionary* (Oxford: Clarendon Press, 1879) *sub verbo* “subsidium”, available at <<https://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059>>.

smaller units impose harms or otherwise fail to uphold the common good.⁴ While the ideas underlying the concept of subsidiarity were implicit in the work of Thomas Aquinas and, to a lesser extent, Aristotle, the concept in its modern form was first given expression in a series of papal encyclicals beginning in the late 19th century.⁵ From there, subsidiarity (in somewhat modified form),⁶ came to be adopted as part of the law of the European Union.⁷ It has since become an influential principle in international law and constitutional law, particularly in the context of federal states, and in public law more broadly.⁸ However, the relevance of the concept of subsidiarity to private law, especially property law, has been greatly underappreciated. This paper is about the ways in which subsidiarity can help to explain, and justify, the structure of modern property systems.

While the principle of subsidiarity had long been implicit in Western legal and political thought, it was only given definitive expression in the 19th century, in response to emerging issues of the time.⁹ Beginning with the French Revolution, political upheavals brought to the fore ideologies that focused on the relationship between state and the individual, with little place for intermediate groups like the family, the church, and other associations.¹⁰

⁴ Brennan, *supra* note 2 at 35

⁵ Pope Leo XIII, “*Rerum Novarum*” (15 May 1891) online: *The Holy See* <https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html>; Pope Pius XI, *supra* note 1; Pope John Paul II, “*Centesimus Annus*” (1 May 1991) online: *The Holy See* <https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html>; Finnis, *supra* note 3; Nicholas Aroney, “Subsidiarity in the Writings of Aristotle and Aquinas” in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Dordrecht: Springer, 2014) 9.

⁶ Barber, *supra* note 1 at 189–90.

⁷ EC, *Treaty on European Union*, 1992 OJ C 191/1, art 3b [*Maastricht Treaty*]; EC, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 2007 OJ C 306/1, art 5 [*Treaty of Lisbon*]. See also *European Convention on Human Rights* (1950), as amended by the provisions of Protocol No 15, CETS No 213, Preamble & Protocol 16.

⁸ Barber, *supra* note 1; 114957 *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 [*Spraytech*]; Robert K Vischer, “Subsidiarity as a Principle of Governance: Beyond Devolution” (2001) 35:1 *Ind L Rev* 103 at 108–26; Paolo G Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law” (2003) 97:1 *Am J Int'l L* 38; James L Huffman, “Making Environmental Regulation More Adaptive Through Decentralization: The Case for Subsidiarity” (2004) 52:5 *U Kan L Rev* 1377; Dwight Newman, “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011) 74:1 *Sask L Rev* 21; Gabriél A Moens, “The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?” (2015) 41:1 *J Legis* 65; *R v Secretary of State Health; ex parte British American Tobacco (Investments) Ltd*, C-491/01, [2002] ECR I-11453 [*R v Secretary of State Health*].

⁹ Brennan, *supra* note 2 at 35–36.

¹⁰ Aroney, *supra* note 5 at 23; Brennan, *supra* note 2 at 43.

There is a strain within liberal thought, for instance, that regards intermediate groups as sources of disorder or oppression for the individual.¹¹ The *Declaration of the Rights of Man* reflects this suspicion towards non-state groups in proclaiming: “The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.”¹² In other words, local authority is not presumed; it must be affirmatively delegated from the centre. Modern states, especially those motivated by a comprehensive vision of the good society, face a temptation to absorb the functions of smaller associations, and individuals, in pursuit of their objectives. Subsidiarity responds to this tendency by counseling restraint.

Government action is not the only threat to community and local decision-making. Capitalist economies can also work to erode associations and community life, leaving the individual vulnerable to domination by both large employers and the state – a set of circumstances that, according to the papal encyclicals on subsidiarity, can be ameliorated by emergence of trade unions and similar associations.¹³ By the late nineteenth century, community life and local decision-making were thus seen to be under threat on multiple fronts, from both government and big business. These trends motivated the Church to expound upon the importance of subsidiarity (though the Church’s own institutional interests in the face of a growing state sector may also have been a factor).¹⁴

Despite some degree of dissonance on the part of the Church,¹⁵ its elaboration of the principle of subsidiarity proved prescient. The totalitarian regimes of the 20th century went to previously unprecedented lengths in conscripting the individual to serve the ends of the state, in undermining local

¹¹ Thomas Hobbes, *Leviathan* (London: Penguin Classics, 2017) (1651) at bk II, chs 22, 29, cited in Aroney, *supra* note 5 at 23; Jean-Jacques Rousseau, *The Social Contract*, (London: Penguin Classics, 2003) (1762) at bk II, ch 3, cited in Brennan, *supra* note 2 at 43.

¹² France, *Declaration of the Rights of Man*, art 3 (1789), cited in Brennan, *supra* note 2 at 36.

¹³ Pope Leo XIII, *supra* note 5 at paras 48–49. See generally, Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd ed (Boston: Beacon Press, 2001).

¹⁴ Pope Leo XIII, *supra* note 5 especially at 51–57.

¹⁵ It is worth noting that while the Catholic Church was alert to the threat of centralization and the erosion of community and family life in some contexts, it was blind to it in others. At the same time as it was outlining the principle of subsidiarity, the Church was an active participant in state-run residential schools for North American Indigenous children, which undermined and displaced the connections of family and local community in pursuit of the state-imposed goal of cultural assimilation. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal: McGill-Queen’s University Press, 2015) especially at 25–47.

decision-making, and in attempting to dissolve the bonds of family and community.¹⁶ The confiscation or reallocation of property interests featured prominently in these regimes' plans for re-ordering society, with the catastrophic attempts to collectivize agriculture in the Soviet Union and China providing the most salient examples.¹⁷

The experience of 20th century totalitarianism helped to underscore the significance of subsidiarity in constitutional law and international law.¹⁸ Subsidiarity was expressly incorporated into both the Maastricht and Lisbon Treaties setting out the constitutional structure of the European Union, and there is now a large body of scholarship and doctrine on the topic in the context of public law and international law.¹⁹ Yet the insights that led to the development of subsidiarity apply with equal force to the private authority of property owners. Indeed, in modern societies, property rights are arguably the most significant means through which decision-making authority is distributed to non-state parties, including individuals, families, businesses, charities, and community associations. The papal encyclicals from which the modern doctrine of subsidiarity emerged did not restrict the scope of the principle to delimiting the authority of different levels of government. On the contrary, the encyclicals on subsidiarity were deeply concerned with the proper delimitation of both public and private forms of authority, including

¹⁶ See e.g., Dong Guoqiang & Andrew G Walder, *A Decade of Upheaval: The Cultural Revolution in Rural China* (Princeton: Princeton University Press, 2021); Robert C Tucker, *Stalin in Power: The Revolution from Above, 1928-1941* (New York: WW Norton, 1990).

¹⁷ In both the Soviet Union and China, the collectivization of agriculture led to millions of deaths, primarily from famine. See Robert C Ellickson, "Property in Land" (1993) 102:6 Yale LJ 1315 at 1318, citing Robert Conquest, *The Harvest Of Sorrow: Soviet Collectivization And The Terror-Famine* (Oxford: Oxford University Press, 1986) at 306; Tucker, *supra* note 16 at 639 n 68; Dmitri Volkogonov, *Stalin: Triumph And Tragedy*, 1st American ed by Harold Shukman, translated by Harold Shukman (New York: Grove Press, 1991) at 524; Nicholas R Lardy, "The Chinese Economy Under Stress, 1958-1965" in Roderick MacFarquhar & John K Fairbank, eds, *The Cambridge History Of China*, vol 14 (Cambridge: Cambridge University Press, 1987) 360 at 370; Justin Yifu Lin, "Collectivization and China's Agricultural Crisis in 1959-1961" (1990) 98:6 J Pol Econ 1228 at 1229. Tragically, there have been numerous other cases in which particular ethnic groups or social classes, and their property interests, have been targeted by totalitarian regimes seeking to re-order society. See e.g., Gotz Aly, *Hitler's Beneficiaries: The Plunder, Racial War, and the Nazi Welfare State* (New York: Metropolitan Books, 2007); Theara Thun & Duong Keo, "Ethnic Vietnamese and the Khmer Rouge: The Genocide and Race Debate" (2021) 53:3 Critical Asian Studies 325.

¹⁸ Pope John Paul II, *supra* note 5 at para. 19.

¹⁹ *Maastricht Treaty*, *supra* note 7, art 3b; *Treaty of Lisbon*, *supra* note 7, art 5; Barber, *supra* note 1, ch 7; *Spraytech*, *supra* note 8; Vischer, *supra* note 8; Carozza, *supra* note 8; Huffman, *supra* note 8; Newman, *supra* note 8; Moens, *supra* note 8, *R v Secretary of State Health*, *supra* note 8; Michael Plaxton, "Subsidiarity and the Criminal Jury" (2022) 67:1 Am J Juris 33.

in particular the authority of property owners.²⁰

Apart from its intellectual origins, there are also other reasons to believe that the concept of subsidiarity can make an important contribution to ongoing debates in property theory. This paper will argue that subsidiarity can shed light on one of the central points of disagreement in property theory today, namely the divide between approaches that prioritize the decision-making authority of owners, on the one hand, and those that emphasize the limits of that authority and the obligations of owners, on the other.²¹

The leading accounts that prioritize owner authority are those based on either Kantian understandings of individual autonomy and independence,²² or an economic analysis of information costs.²³ Despite their divergent

²⁰ Pope Pius XI, *supra* note 1 at paras 44–68; Pope John Paul II, *supra* note 5 at paras 6, 10–13, 41–43; Pope Leo XIII, *supra* note 5 at paras 4–5, 8, 11, 13, 15, 20, 22, 38.

²¹ Others identify the key divide somewhat differently, as between progressive property and “information theorists”. See Jane B Baron, “The Contested Commitments of Property” (2009) 61:4 *Hastings LJ* 917; Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge: Cambridge University Press) at 2–3 [Walsh, *Property Rights and Social Justice*]. In my view, there is enough of an affinity between Kantian accounts and economic accounts grounded in information costs to group them together, since they both tend to emphasize the authority of owners. For economic accounts grounded in information costs, see Thomas W Merrill & Henry E Smith, “The Morality of Property” (2007) 48:5 *Wm & Mary L Rev* 1849 at 1850 [Merrill & Smith, “The Morality of Property”]; Henry E Smith, “Property as the Law of Things” (2012) 125:7 *Harv L Rev* 1691; Thomas W Merrill & Henry E Smith, “What Happened to Property in Law and Economics?” (2001) 111:2 *Yale LJ* 357 at 387 [Merrill & Smith, “What Happened to Property?”]. For Kantian autonomy-based arguments, see Arthur Ripstein, “Beyond the Harm Principle” (2006) 34:3 *Phil & Pub Affs* 215; Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) at 86, 91 [Ripstein, *Force and Freedom*]; Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58:3 *U Toronto LJ* 275 at 312–15 [Katz, “Exclusion and Exclusivity”]. For accounts that argue for a more limited conception of owner authority, see Hanoch Dagan, *A Liberal Theory of Property* (Cambridge: Cambridge University Press, 2021); Gregory S Alexander, Eduardo M Peñalver, Joseph William Singer & Laura S Underkuffler, “A Statement of Progressive Property” (2009) 94:4 *Cornell L Rev* 743; Gregory S Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2018) [Alexander, *Property and Human Flourishing*]; Gregory S Alexander, “The Social Obligation Norm in American Property Law” (2009) 94:4 *Cornell L Rev* 745 [Alexander, “The Social Obligation Norm”]; Gregory S Alexander & Eduardo M Peñalver, “Properties of Community” (2009) 10:1 *Theoretical Inq L* 127; Eduardo M Peñalver, “Land Virtues” (2009) 94:4 *Cornell L Rev* 821; Joseph William Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000) [Singer, *Entitlement*]; Joseph William Singer, “Democratic Estates: Property Law in a Free and Democratic Society” (2009) 94:4 *Cornell L Rev* 1009 [Singer, “Democratic Estates”].

²² Ripstein, “Beyond the Harm Principle”, *ibid*; Ripstein, *Force and Freedom*, *ibid*. But see Dagan, *A Liberal Theory of Property*, *ibid* for a contrasting liberal account.

²³ Merrill & Smith, “The Morality of Property”, *supra* note 21; Smith, “Property as the Law of Things”, *supra* note 21; Merrill & Smith, “What Happened to Property?”, *supra* note

normative starting points, these approaches converge on an understanding of property doctrine that emphasizes the rights and discretionary powers of owners, especially the right to exclude. For Kantians, owner authority is a bulwark of individual independence, while for the information economists it helps to minimize the costs associated with resource-based decision-making and coordination. On the other side of the divide, an array of competing approaches challenge the centrality of owner authority in understanding property. Some of these approaches share aspects of the same underlying premises as the Kantian and economic works prioritizing owner authority. For instance, Hanoch Dagan's liberal theory of property, like Kantian accounts, proceeds from an understanding of individual autonomy as a primary value. However, his work understands autonomy in terms of a broad interest in self-determination or self-authorship, rather than independence. This leads to arguments for limits on owner authority rooted, in part, in the countervailing self-determination interests of non-owners.²⁴ There are likewise economic approaches that challenge the view that robust owner authority is necessarily aligned with economic efficiency, for instance due to the transaction costs generated by owners' power to veto projects involving their resources.²⁵

While some accounts that take a more limited view of owner authority are based on liberal or economic principles, others proceed from different sets of normative premises. Many of these fall under the banner of "progressive property theory". Progressive property theory tends to emphasize limits on owner authority and the social obligations of owners, including obligations to provide for access and use of property by non-owners.²⁶ Progressive property theory is closely associated with Aristotelian approaches that recognize the pluralistic sources of human flourishing and property's connection to the development of virtue. While not all progressive property theorists adopt an Aristotelian approach, influential works by Gregory Alexander and Eduardo Peñalver, among others, argue for a progressive reconceptualization of property based on ideas of virtue and human flourishing.

Progressive property works drawing on the Aristotelian tradition reflect valuable insights regarding the pluralistic sources of human flourishing and the networks of mutual reliance within which owners operate. However,

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²⁴ Dagan, *A Liberal Theory of Property*, *supra* note 21 at 68-75, 118-42.

²⁵ Eric A Posner & E Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton: Princeton University Press, 2018) at 30-79.

²⁶ See e.g., Alexander, *Property and Human Flourishing*, *supra* note 21 at 39-74, 169-208; Joseph William Singer, "The Reliance Interest in Property" (1988) 40:3 *Stan L Rev* 611.

theorists working from this perspective generally struggle to explain the content and limits of owners' authority, including in particular which limits or obligations should be built into private-law property doctrine and which are best left to public-law regulatory measures.²⁷ More fundamentally, by failing to provide a convincing account of the scope of the presumptive authority of owners, these theories tend to neglect one of the defining features of property. I will argue that the concept of subsidiarity can provide an answer to the question of the proper scope and limits of owner authority, from within a broadly Aristotelian tradition that emphasizes the pluralistic sources of human flourishing and the social embeddedness of human beings. While subsidiarity does provide a basis for a degree of presumptive decision-making authority for owners, that authority is limited by the recognition of a need to permit more centralized interventions, including by courts and governments, where owner authority is exercised in ways inconsistent with the common good.

A subsidiarity-based approach to property recognizes the ways in which decentralized decision-making about resources can contribute to human flourishing, not only by helping to generate material means to securing human goods such as life, health, knowledge, practical reasoning, play, aesthetic experience, and sociability, but also through the inherent value of meaningful involvement in actions and decisions affecting oneself, the distinctive contributions that individuals, families, and associations can make to the common good, and the development of virtues such as prudence, industry and generosity. These considerations provide a basis for private law doctrine to uphold the presumptive authority of property owners except in clear instances of harm or abuse of rights, such as those recognized by tort law and equity.

At the same time, however, these same considerations point to important functions for public authorities. Firstly, public authorities should generally seek to ensure a distribution of resources in society such that the property system actually does meaningfully decentralize decision-making and makes the institution of ownership accessible. Secondly, public authorities should be empowered to impose regulatory restrictions on owner authority based on context-specific determinations of the demands of the common good. From the perspective of the concept of subsidiarity, it is important that these measures are understood as a separate, public-law body of restrictions layered on top of the presumptive private-law authority of owners. The public-private distinction in property law structures decision-making about owner authority in a way that reflects the values of subsidiarity: Owners are *presumptively*

²⁷ Rachael Walsh, "Property, Human Flourishing and St. Thomas Aquinas: Assessing a Contemporary Revival" (2018) 31:1 Can JL & Jur 197 at 212–19 [Walsh, "Property, Human Flourishing and St Thomas Aquinas"].

competent to pursue their projects *unless* there has been a specific determination by public authorities to limit owner authority in order to uphold the common good. By contrast, an approach that builds general owner obligations into the concept of property from the outset would flatten the public-private distinction, and provide for discretionary judicial oversight of owner decision-making by default. In so doing, such an approach would fail to give due consideration to the presumptive capacity of owners to contribute to the common good in their own way.

This article proceeds in four parts. Part I outlines the origins and content of the concept of subsidiarity. Part II provides an argument for how subsidiarity can explain and justify the basic structure of a modern property system, including the authority of owners and the public-private distinction in how property is conceived and regulated. This section uses the law in common law provinces of Canada as the primary source of examples, though the arguments should also resonate in other property systems. Part III addresses Aristotelian property theory and how the concept of subsidiarity can contribute to an understanding of the authority of owners within that tradition. Finally, Part IV argues that subsidiarity can inform our understanding of doctrinal features of property law, including the agenda-setting authority of owners and the right to exclude, public access rights to private property, the scope and limits of property-based systems of community governance such as condominiums and homeowners' associations, and common-law and constitutional protections for property rights.

I. THE CONCEPT OF SUBSIDIARITY

The concept of subsidiarity was given its canonical formulation (so to speak) in Pope Pius XI's 1931 encyclical *Quadragesimo Anno*:

As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the

body social, and never destroy and absorb them.

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function,” the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.²⁸

As has been observed, this description contains both negative and positive elements.²⁹ States and higher-level organizations should not absorb the functions that smaller entities can perform. At the same time, though, states should step in to intervene and render assistance when doing so is necessary to uphold the common good.

Quadragesimo Anno was itself a reflection on an earlier encyclical issued forty years prior, Pope Leo XIII’s 1891 *Rerum Novarum*.³⁰ That earlier document, which focused on the condition of workers and the relationship between capital, labour and the state, enunciated principles similar to Pius XI’s later description of subsidiarity, albeit without naming the concept.³¹ *Rerum Novarum*, in turn, owed a great deal to the work of the 19th century Jesuit theologian Luigi Taparelli, who derived the principles of what would later be called subsidiarity from the writings of Thomas Aquinas.³²

Something like subsidiarity is indeed implicit in Aquinas’s work, and to a lesser extent that of Aristotle, on which much of Aquinas’s thought was based. It has been observed that the beginnings of subsidiarity as a concept can be traced to Aristotle’s rejection of Plato’s communism, to his understanding of humanity’s social nature, and to the distinction between practical reasonableness (*phronesis*) and technical ability (*techne*), the former of which requires meaningful scope of action for individuals.³³ Aquinas extended these insights in ways that came closer to the modern understanding

²⁸ Pope Pius XI, *supra* note 1 at paras 79–80.

²⁹ Brennan, *supra* note 2 at 35.

³⁰ Pope Leo XIII, *supra* note 5.

³¹ *Ibid*, especially at paras 50–57.

³² Finnis, *supra* note 3 at 139–40.

³³ Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011) at 144–45, 197; Aristotle, *Nicomachean Ethics*, at 6.4: 1140b3–6; see also 2.4: 1105a32, cited in Finnis, *supra* note 3 at 135.

of subsidiarity. Unlike Aristotle, who identified the common good with the *polis*, Aquinas's understanding allowed for the distinct contributions that individuals, families, and associations can make to the common good.³⁴ On this approach, the role of the state is to secure the political conditions necessary for the pursuit of the common good, rather than to directly secure it in a self-sufficient manner.³⁵

An understanding of the distinctive social roles of non-state associations remained latent in Western thought in the centuries after Aquinas, particularly in light of the place of the Church and its many distinct religious orders, which existed alongside emerging secular states.³⁶ By the 19th century, however, intellectual and social trends had emerged that challenged the place of non-state entities, especially the Church. Both liberal individualism and socialism were preoccupied with the relationship between the individual and the state, and were often hostile to the demands of intermediate entities. Moreover, the emergence of large-scale industry gave rise to new concentrations of centralized power, often disconnecting workers from their families and communities. It was in this context that Taparelli and later Leo XIII gave express articulation of the ideas that would come to be known as subsidiarity.³⁷

The Catholic understanding of subsidiarity that emerged in the 19th century was grounded in broader vision of human nature and flourishing. While ultimately based on theological commitments and the need for individuals to orient themselves towards the divine, the vision also recognized the distinctive and irreducible ways in which different individuals, institutions, and associations can contribute to the common good in the material world. The functions of the family, for instance, are distinct from those of the state, and families are capable of contributing to human flourishing in ways the state cannot replicate.³⁸ Not only is the state likely to be less effective in fulfilling the goods of family life, but in seeking to absorb these functions it would deny members of the family the intrinsic benefits of active participation in the family, including the exercise of practical reason and the development of virtues. Analogous claims can be made with respect to the functions of other associations and indeed, at the most granular level,

³⁴ Aroney, *supra* note 5 at 13–18, 20, citing St. Thomas Aquinas, *Summa Theologiae* (1265–1268, 1271–1283) at I, 96.4; I-II, 61.5, 72.4, 95.4 [Aquinas, *Summa Theologiae*]; St. Thomas Aquinas, *De Regno ad regem Cypr*i (1267) at I.1.3 [4], I.13.2 [94]; St. Thomas Aquinas, *Summa contra Gentiles* (1259–1265) at III.85.11.

³⁵ Aroney, *supra* note 5 at 24, citing John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998) at 236.

³⁶ Brennan, *supra* note 2 at 35–36.

³⁷ *Ibid* at 31–33.

³⁸ *Ibid* at 37.

an individual's ability to direct the course of her own life.³⁹

The classic papal encyclicals on subsidiarity were deeply concerned with the proper division between the private sphere of individuals, families, businesses, charities, churches, and other associations, on the one hand, and the public sphere belonging to the state, on the other. The encyclicals address the place of private property rights at some length, noting the need to temper the private authority of owners through both targeted state interventions and associations like labour unions.⁴⁰ By the late 20th century, the concept of subsidiarity had become a central feature of Catholic social thought and part of the Church's response to communist and other totalitarian regimes. This is emphasized perhaps most clearly in Pope John Paul II's 1991 *Centesimus Annus*, written on the 100th anniversary of *Rerum Novarum*, which aimed to refute communist ideology while expounding on principles of social and economic justice.⁴¹

At around the same time as the publication of *Centesimus Annus*, the concept of subsidiarity began to exercise significant influence in secular legal thought. The principal impetus for this was the incorporation of subsidiarity into the 1992 Maastricht Treaty, which provided the foundation for the European Union's governance structures. Subsidiarity also featured prominently in the 2007 Lisbon Treaty, which succeeded the Maastricht Treaty. Subsidiarity is referenced in several EU treaty provisions, most notably art. 5, which provides in part: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."⁴² Subsidiarity has also become influential in other areas of international law, as well as in constitutional law, environmental law, and public law more broadly.⁴³

The conception of subsidiarity relied upon in EU law and in public law scholarship and jurisprudence often differs in important respects from how subsidiarity is understood in Catholic social thought.⁴⁴ Perhaps understandably, secular conceptions of subsidiarity are generally

³⁹ Finnis, *Natural Law and Natural Rights*, *supra* note 3, at 88–9, 146.

⁴⁰ Pope Pius XI, *supra* note 1, at paras 35, 44–68; Pope John Paul II, *supra* note 5 at paras 6–7, 10–13, 15, 19, 35, 41–43; Pope Leo XIII, *supra* note 5, at paras 4–5, 8, 11–15, 20, 22, 38, 49.

⁴¹ Pope John Paul II, *supra* note 5 at para 19.

⁴² *Treaty of Lisbon*, *supra* note 7, art 5.

⁴³ Barber, *supra* note 1, ch 7; *Spraytech*, *supra* note 8; Vischer, *supra* note 8; Carozza, *supra* note 8; Huffman, *supra* note 8; Newman, *supra* note 8; Moens, *supra* note 8; *R v Secretary of State Health*, *supra* note 8.

⁴⁴ Barber, *supra* note 1 at 188.

disconnected from the deeper social ontology of Catholic social thought. Rather than being grounded in the distinctive functions of groups and the contributions that they can make to the common good, these conceptions are more often justified and framed either in instrumental terms, or in terms of a simple default preference for smaller entities.⁴⁵ Article 5 of the Lisbon Treaty is an instructive example. It essentially holds that action by the member states is to be favoured unless the objectives of a given plan of action are better achieved centrally by the EU. The analysis will often hinge on the presence or absence of significant externalities. If a policy significantly affects those outside the local jurisdiction, then those effects may not be properly accounted for in local decision-making, which could justify more centralized intervention. This essentially instrumental approach to subsidiarity takes the policy objective of the state as a given, and then asks whether it is better achieved centrally. It does not necessarily consider, for instance, the distinctive functions and ways of contributing to the common good that different levels of association have to offer.

Despite the origins of the concept of subsidiarity in encyclicals dealing with the proper role of the public and private spheres, there has been relatively little scholarship exploring the relevance of the concept to property law. Aquinas's brief discussion of the justification of property provides some of the ingredients for a fuller understanding of property grounded in subsidiarity, but his approach is open to significant differences in interpretation.⁴⁶ The papal encyclicals dealing with subsidiarity discuss property at some length, but generally rely upon conventional justifications for property, including a Lockean natural right based on labour, and the function of property rights in aligning incentives to produce and improve resources.⁴⁷ John Finnis, in his *Natural Law and Natural Rights*, does connect subsidiarity to a justification for private property rights.⁴⁸ However, like the papal encyclicals, his justification ultimately relies on more conventional ideas, specifically 1) property's role in aligning incentives, leading to greater productivity, and 2) property's capacity to provide for personal autonomy and associated benefits, such as opportunities to develop practical reason.⁴⁹ Finnis's argument does not address the ways in which property rights create a platform for decentralized associations to make distinctive contributions to

⁴⁵ *Ibid* at 188–205.

⁴⁶ Walsh, "Property, Human Flourishing and St Thomas Aquinas" *supra* note 27 at 211–22.

⁴⁷ Pope Pius XI, *supra* note 1 at paras 44–68; Pope John Paul II, *supra* note 5 at paras 6, 10–13, 41–43; Pope Leo XIII, *supra* note 5 at paras 5, 7–10, 47.

⁴⁸ *Supra* note 33 at 165–73.

⁴⁹ *Ibid*. For an understanding of property grounded in its connection to practical reason, see Adam J. MacLeod, *Property and Practical Reason* (Cambridge: Cambridge University Press, 2015).

the common good, nor does it engage at any length with property law doctrine or the divide between private law and public law.

Subsidiarity has the potential to contribute to an argument for property rights that is grounded in the pluralistic sources of human flourishing. However, it is important to be clear about the precise understanding of the concept that is being adopted. A shallower, instrumental, conception of subsidiarity is unlikely to provide such insights. On a purely instrumental conception of subsidiarity, deference to the authority of owners would be justified, except in cases where a more centralized decision-maker could achieve a given policy objective more effectively. Such an approach might, for instance, simply replicate what economic analysis tells us about incentives and externalities generated by property owners. In order to generate novel insights grounded in the pluralistic sources of human flourishing, subsidiarity must also be understood in broader terms than simply a preference for individual autonomy, all things being equal.

At the same time, however, it is not necessary to import the theistic foundations of subsidiarity from Catholic social thought. A rich and pluralistic conception of subsidiarity can be defended on secular grounds based on four interrelated components: 1) the qualitatively distinct contributions that individuals and groups are able to make to the common good; 2) the instrumental benefits of distributed decision-making authority, including both in channeling incentives and allowing for decisions that draw upon local knowledge; 3) the intrinsic benefits of involvement in meaningful action and in decisions affecting oneself; and 4) the development of virtues through individual action and actions taken in association with others. Each of these four components can be understood as contributing to human goods necessary for human flourishing, including life, health, knowledge, practical reasoning, play, aesthetic experience, and sociability.⁵⁰ A state that fails to give due regard to subsidiarity will have a tendency to absorb the functions of smaller units, including private associations, families, and individuals, ultimately undermining these important conditions for human flourishing.

II. THE SUBSIDIARITY OF PROPERTY LAW

As previously mentioned, the concept of subsidiarity has both negative and positive aspects. First, centralized authorities, including governments, should not absorb the functions that smaller entities can perform. Second, those centralized authorities should step in to intervene and render assistance when doing so is necessary to uphold the common good. Both the negative and positive aspects of subsidiarity are reflected in the concept of property,

⁵⁰ Finnis, *Natural Law and Natural Rights*, *supra* note 33 at 85–90; Alexander, *Property and Human Flourishing*, *supra* note 21 at 7.

and in how it interacts with public-law regulatory regimes. This section outlines a justification for the structure of property law, beginning with the negative aspect and the scope of owner authority, and then proceeding to consider the positive aspect and centralized interventions, including those that restrict owner authority. Ultimately, I argue that a conception of property informed by the principle of subsidiarity can promote the common good of the community by securing the conditions for human flourishing.

A. The Negative Aspect: Decentralization and the Common Good

The negative aspect of subsidiarity explains and justifies fundamental features of property systems, including in particular the presumptive agenda-setting authority of owners.⁵¹ In modern societies, property rights are likely the most significant legal mechanism through which decision-making authority over resources is distributed among private actors, including individuals, families, businesses, charities, and other associations. By providing for presumptive deference to the actions and decisions of owners, property systems create a platform for action and decision-making by private parties. In so doing, they serve each of the four interrelated justifications for subsidiarity outlined in the previous section.

First, private property rights create space for the qualitatively distinct contributions that individuals and groups are able to make to the common good.⁵² The distinctive functions of the family, for example, are facilitated by a family's property interest in the family home. Regardless of whether the interest in question is based on ownership or a lease, exclusive agenda-setting authority within the home allows the activities of the home to be ordered according to the goods of family life, as understood and applied within a particular family. In a household with children, for example, the family's property interest allows for a multitude of choices and actions, from the allocation of bedrooms and the setting of bedtimes, to the establishment of a private sphere of interaction that facilitates the passing on of language, culture, and values, ideally in a loving and supportive environment. While the state can, and sometimes must, intervene in family life, it cannot fully replace the distinctive goods possible within that sphere.⁵³ Similarly, particular businesses, charities, and other associations use their property

⁵¹ Katz, "Exclusion and Exclusivity", *supra* note 21.

⁵² Brennan, *supra* note 2 at 36–39, citing Pope Pius XI, "Devini Redemptoris" (19 March 1937) online: *The Holy See* <https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19370319_divini-redemptoris.html>.

⁵³ For instance, intervention through the property system may be necessary to protect the interests of non-owner family members who are sheltered in a family home. See, e.g., *Family Property Act*, RSA 2000, c F-4.7, ss 19–30.

interests to pursue distinctive aspects of the common good, as do individuals. The functions of the local coffee shop are distinct from those of the McDonald's.⁵⁴ Those of a literacy charity are distinct from those of a community association for members of a particular ethnic group. The diverse contributions of private actors, taken cumulatively, are likely to far exceed the capacity of any centralized authority.⁵⁵

Second, distributed property rights provide significant instrumental benefits. Those benefits include promoting social order and generating wealth that in turn contributes to human goods, including life, health, knowledge, practical reasoning, play, aesthetic experience, and sociability. There are three main ways in which private property rights secure such instrumental benefits. The most familiar arguments relate to the incentive effects of internalizing the benefits and costs relating to an object of property. Property rights incentivize an owner to use a resource productively, and to improve it, because the owner will receive the gains due to the use or improvement. One will be more likely to sow today if one can reap in the future. Similarly, an owner will avoid the misuse of a resource if the costs of misuse will be borne by the owner. One may be less likely to put too many sheep in one's own privately owned pasture (or in a well-managed commons exclusive to members of a particular community)⁵⁶ than in an open-access pasture.⁵⁷

At least as important as the internalization of costs and benefits, however, is the way in which private property rights channel widely dispersed local knowledge into decisions about resources.⁵⁸ The owner of a physical resource

⁵⁴ Among the many differences, the McDonald's is more likely to serve as a gathering place for those who have nowhere else to go, see Chris Arnade, "McDonald's: You Can Sneer, but It's the Glue That Holds Communities Together" (8 June 2016) online: *The Guardian* <<https://www.theguardian.com/business/2016/jun/08/mcdonalds-community-centers-us-physical-social-networks>>.

⁵⁵ This is a point emphasized repeatedly by FA Hayek. See FA Hayek, "The Use of Knowledge in Society" (1945) 35:4 *Am Econ Rev* 519 [Hayek, "Use of Knowledge"]; Friedrich A Hayek, *Law, Legislation and Liberty*, vol 1 (London: Routledge, 1982) at 85–88, 106–10 [Hayek, *LLL Vol 1*]; FA Hayek, "Socialist Calculation: The Competitive 'Solution'" (1940) 7:26 *Economica* 125, at 141, 144 [Hayek, "Socialist Calculation"]; FA Hayek, *The Fatal Conceit*, ed by WW Bartley, III (Chicago: Chicago University Press, 1988) at 29–37, 76–78 [Hayek, *The Fatal Conceit*].

⁵⁶ Ellickson, "Property in Land", *supra* note 17 at 1346–52; Elinor Ostrom, *Governing the Commons*, Canto Classics ed (Cambridge: Cambridge Classics, 2015) at 101–02; Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991) at 177–78 (explaining the significance of "close-knit groups" to the development of effective norms, including norms governing a commons).

⁵⁷ Richard Posner, *Economic Analysis of Law*, 8th ed (Boston: Aspen, 2011) at 40–41; FH Knight, "Some Fallacies in the Interpretation of Social Cost" (1924) 38:4 *QJ Econ* 582; Garrett Hardin, "The Tragedy of the Commons" (1968) 162:3859 *Sci* 1243.

⁵⁸ See Malcolm Lavoie, "Property and Local Knowledge" (2021) 70:4 *Cath U L Rev* 637 (2021); Hayek, "Use of Knowledge", *supra* note 55; Hayek, *LLL Vol 1*, *supra* note 55

is empowered to act upon local knowledge about the resource that only he may have. Particularly when combined with the information signals that emerge spontaneously through a market-based pricing mechanism, the privileged epistemic position of owners often allows them to make better-informed decisions than a central planner could.⁵⁹ An owner may be aware of a ready supply of tin, for instance, and bring it to market in response to an increase in price.⁶⁰ Together, the twin mechanisms of channeling incentives and channeling information often allow property systems to achieve higher levels of economic productivity than would be possible under other resource management regimes. This increased wealth can in turn contribute to human flourishing through a variety of human goods that need not be expressed in terms of a single welfare function, including life, health, knowledge, practical reasoning, play, aesthetic experience, and sociability. While it may be suggested that the local knowledge argument for property has been undermined by the increasingly sophisticated analysis of large data sets by large organizations, a consideration of the limits of data analysis suggests that local decision-making will remain important into the future with respect to many physical resources.⁶¹

Besides wealth-generation, there are also other instrumental benefits of property that could be posited. Property rights could contribute to public order, for instance, by making resource conflicts less likely. Interestingly, Aquinas relies on versions of each of these arguments in his defence of private property, essentially defending property in terms of incentives to work and produce, the coordination of activities through property rights

at 85–88, 106–10; Hayek, “Socialist Calculation”, *supra* note 55 at 141, 144; Hayek, *The Fatal Conceit*, *supra* note 55 at 29–37, 76–78; Harold Demsetz, “The Exchange and Enforcement of Property Rights” (1964) 7 *JL & Econ* 11 at 16–17; Todd J Zywicki & Anthony B Sanders, “Posner, Hayek, and the Economic Analysis of Law” (2008) 93:2 *Iowa L Rev* 559 at 573–74; Ellickson, *supra* note 17 at 1331 (noting that because owners of small parcels are likely to have better knowledge of their land than others, negotiations between neighbors over a matter affecting both parcels will take place between well-informed parties).

⁵⁹ See Hayek, “Use of Knowledge”, *ibid.*

⁶⁰ *Ibid* at 526.

⁶¹ Many of the decisions faced by owners deal with context-specific questions for which relevant data does not exist. Moreover, the complexity and changing nature of social, economic, and environmental conditions means that data, which is inevitably backward-looking, may not be able to displace the current knowledge held by parties on the ground. While data analysis has undoubtedly displaced local knowledge in some fields, including large segments of the retail market, the local knowledge of physical resources held by owners remains relevant in many other domains. See generally Lavoie, “Property and Local Knowledge”, *supra* note 58 at 651–3, responding to Richard A. Epstein, “The Uses and Limits of Local Knowledge: A Cautionary Note on Hayek” (2005) 1 *NYU JL & Liberty* 205 at 206–07.

allocation, and the promotion of public order.⁶² By contrast, Finnis's more recent natural-law-based account refers only to the incentive effects of property rights in discussing instrumental benefits.⁶³ The broader account is to be preferred, particularly in light of the ways in which Aquinas's understanding of the coordination benefits of property has been supplemented by more recent scholarship underscoring the importance of knowledge and information to economic decision-making.⁶⁴ Property does not merely serve to promote productive activity under conditions of limited altruism, in which individuals are unwilling to work for the benefit of others.⁶⁵ Property rights would arguably be necessary even in a society composed entirely of selfless and public-spirited individuals, in light of the finitude of human nature and the dispersed nature of local knowledge.⁶⁶

The third justification for subsidiarity relates to the intrinsic benefits of meaningful participation in actions and decisions affecting oneself.⁶⁷ In distributing decision-making authority over resources, property systems allow individuals to direct their own lives, and to engage in activities that are intrinsically valuable, apart from their consequences. Even if a central planner could direct activities in such a way as to achieve better outcomes, something valuable would be lost if an individual were reduced to "a cog in big wheels turned by others", to use Finnis's memorable phrasing.⁶⁸ The good life requires more than the passive receipt of benefits secured by others; it necessarily involves deciding and doing.⁶⁹ Many intrinsically valuable actions and decisions involve physical things, and one's scope of action is enhanced by property rights in those things.

Private property rights afford a scope of personal autonomy that would be difficult to achieve in the absence of such rights.⁷⁰ Directing the course of one's own life is itself arguably intrinsically valuable. Moreover, particular activities are sometimes pursued primarily for their intrinsic value, rather than for the consequences that follow from them. Often these activities involve association and collaboration with others. For instance, a Muslim

⁶² Mary L Hirschfeld, *Aquinas and the Market: Toward a Humane Economy* (Cambridge, MA: Harvard University Press, 2018) at 164, quoting Aquinas, *Summa Theologiae*, *supra* note 34 at II-II, 66.2.

⁶³ Finnis, *Natural Law and Natural Rights*, *supra* note 33 at 170.

⁶⁴ Lavoie, *supra* note 58; Hayek, "Use of Knowledge", *supra* note 55; Hayek, *LLL Vol 1*, *supra* note 55 at 85-88, 106-10; Hayek, "Socialist Calculation", *supra* note 55 at 141, 144; Hayek, *The Fatal Conceit*, *supra* note 55 at 29-37, 76-78; Demsetz, *supra* note 58 at 16-17; Zywicki & Sanders, *supra* note 58 at 573-74; Ellickson, *supra* note 17 at 1331.

⁶⁵ *Contra* Finnis, *Natural Law and Natural Rights*, *supra* note 33 at 170.

⁶⁶ Hirschfeld, *supra* note 62, at 165-67; Lavoie, *supra* note 58 at 653-57.

⁶⁷ Finnis, *Natural Law and Natural Rights*, *supra* note 33 at 144-47.

⁶⁸ *Ibid* at 147.

⁶⁹ *Ibid*.

⁷⁰ Ripstein, *Force and Freedom*, *supra* note 21 at 91-94.

community might buy land to build a mosque. The mosque might have a variety of incidental benefits, like generating funds for charitable activities or providing a sense of belonging to members of the community. Yet the project is pursued not principally for those ancillary benefits, but rather on the understanding that there is an intrinsic value to religious worship and thus to acquiring, building, and operating an appropriate site for such activities. Other kinds of activity also fit this mold, including, for instance, acts of generosity such as gift-giving among friends and family members. Economic arguments about the deadweight loss of Christmas gift-giving famously, and somewhat amusingly, fail to grasp the idea that gift-giving is valued for reasons apart from the value of the gifts themselves.⁷¹ Distributed property interests provide a means by which individuals can realize the intrinsic benefits of acting and choosing, both in the general sense of directing their own lives, and in terms of specific activities that are valuable in and of themselves.

While property rights can undoubtedly provide owners with intrinsic benefits of meaningful participation in decisions, they can also potentially undermine some of those same interests for non-owners, especially where ownership is unduly concentrated. This may occur, for instance, in an employment context, where the employer's ownership of the firm's productive assets can potentially enable subordination of employees.⁷² These types of circumstances may justify centralized intervention to limit the presumptive authority of owners, as discussed in greater detail in the next subsection.

The fourth justification for subsidiarity is that it allows for the development of virtues through individual action and actions taken in association with others. On this understanding, an individual's character and predispositions are treated not as fixed or exogenous, but rather as features that are formed by the institutions with which one interacts. By being involved meaningfully in decisions and actions affecting oneself, including in relation to resources, one is given opportunities to develop virtues. Among the virtues that property regimes can encourage are prudence, industry, and generosity.⁷³

Property owners have the opportunity to exercise practical reason in their decision-making about resources, which in turn allows them to develop the

⁷¹ Joel Waldfoegel, "The Deadweight Loss of Christmas" (1993) 83:5 Am Econ Rev 1328, criticized by Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Farrar, Straus, and Giroux, 2012) at 99–104.

⁷² See Dagan, *A Liberal Theory of Property*, *supra* note 21 at 179–209.

⁷³ Aquinas, *Summa Theologiae*, *supra* note 34, at II-II, 66; W Borman, "Aquinas and Private Property" (14 June 2017) online: *The Josias* <<https://thejosias.com/2017/06/14/thomism-and-private-property/>>; Peñalver, *supra* note 21 at 877–80; MacLeod, *supra* note 49 at 28–32.

virtue of practical wisdom or prudence.⁷⁴ Having authority over a resource also gives one an opportunity to become industrious, and at the same time, the right to reap the benefits of productive labour structures incentives in such a way as to actively promote the development of this trait.⁷⁵ Similarly, ownership of resources provides an opportunity to become generous through allocation decisions, including those grounded in reciprocal obligations to other members of a society. Undue centralization of resource-based decision-making would deprive individuals of important opportunities for the cultivation of these and other virtues.

Admittedly, in some institutional settings, the strength of virtue-based arguments may be somewhat attenuated, such as with respect to property held by large corporations with a distinction between beneficial ownership by shareholders and control by management. In these settings, property virtues can potentially be undermined, for instance through management incentives to maximize short-term share price at the expense of longer-term shareholder and public interests. However, even within a publicly traded corporation, corporate property can sometimes provide a platform for the development of virtues, including industry, prudence, and even generosity (for instance through corporate philanthropic initiatives). Moreover, these institutional settings may appropriately be the subject of legislative interventions seeking to address problems like short-termism among management.

Accordingly, the negative aspect of subsidiarity with respect to property can be defended in terms of virtue, in addition to arguments based on the qualitatively distinct contributions of subsidiary units, the instrumental benefit of property rights in securing prosperity and order, and the intrinsic value in being involved in decision-making about resources.

The concept of subsidiarity provides a basis for defending a conception of property with the presumptive decision-making authority of owners at the core. In this respect, it fits with how the concept of property is commonly understood. Agenda-setting by owners is the default rule; limits on that authority are the exception.⁷⁶ Currently, the leading arguments for deference to the decision-making authority of owners are grounded in economic insights or Kantian conceptions of autonomy. The negative dimension of subsidiarity shows how presumptive owner authority can also be defended based on broadly Aristotelian or virtue ethics grounds. Yet as discussed above, the concept of subsidiarity has both negative and positive aspects. In its negative aspect, it restricts government entities from absorbing the functions of subsidiary units. In its positive aspect, it provides that government should step in to intervene and render assistance when doing so

⁷⁴ MacLeod, *supra* note 49.

⁷⁵ Peñalver, *supra* note 21 at 877–80.

⁷⁶ Katz, “Exclusion and Exclusivity”, *supra* note 21.

is necessary to uphold the common good. This positive aspect of subsidiarity has a number of implications for property law, discussed in the next subsection.

B. The Positive Aspect: State Intervention and the Public-Private Divide

Making determinations as to when government intervention in the property system is necessary presents significant challenges. There are a multitude of ways in which an owner's actions could undermine the common good, from instances of physical harm to the person or property of others, to abuse of rights or the subordination of non-owners, to cases of injustice in the distribution of resources, to instances of more subtle effects on others, such as increased traffic in a neighborhood, failing to uphold a desired aesthetic, or contributing to cumulative effects of environmental pollutants. Many of these issues are context-specific, requiring both an assessment of the facts surrounding a particular exercise of owner authority, as well as the local circumstances, values, and priorities of a given community. Moreover, the specific types of intervention that are warranted will also vary with the circumstances. In some cases, the centralized authority can address the shortcomings in the private ordering by providing direct aid to individuals or groups, for instance by providing resources to civil society organizations seeking to address social issues. In other cases, restrictions on owner authority will be necessary, for instance in order to address harms imposed on non-owners.

There are undoubtedly risks to being both under- and over-inclusive with respect to interventions that limit the authority of owners. An under-inclusive approach might fail to curb clear harms and injustices. However, an over-inclusive approach risks unnecessarily absorbing the functions of property owners. A heavy-handed intervention might deprive owners of the ability to make distinctive contributions to the common good, including in ways that address the very concerns that motivate the state intervention in the first place. The contributions that individuals and private associations may be capable of making are often unknowable in advance, due to the dispersed nature of knowledge relevant to resources. For instance, a restriction preventing any commercial development in a residential area might help to limit traffic and ensure use compatibility, but by limiting private initiative it could also preclude the development of a thriving mixed-use neighborhood.⁷⁷

The context-specific nature of interventions limiting owner authority means that it would be difficult to set out a single set of principles for when such interventions are justified. However, existing property systems,

⁷⁷ See Jonathan Levine, *Zoned Out: Regulation, Markets, and Choices in Transportation and Metropolitan Land Use* (Washington: RFF Press, 2006).

including the Canadian common law provinces that provide most of the examples in what follows, do provide a structure for decision-making about interventions that essentially aligns with the idea of subsidiarity. That decision-making structure is closely tied to the distinction between private law and public law. Private law provides the baseline or default framework for owner decision-making. Public-law regulatory measures, almost always based ultimately on a statute passed by the legislature, are then layered on top of the private law baseline. These public-law measures derogate from the baseline, reflecting the multitude of different, context-specific ways in which interventions could be seen to be necessary by legislators or delegated decision-makers.

Property law establishes the baseline for resource-based decision-making, including through a fairly well-defined and standardized set of presumptive incidents of ownership.⁷⁸ Those incidents include: the right to exclude, the right to determine the use, the right to the income, the right to the capital, and the power to alienate.⁷⁹ Private law doctrines do establish exceptions to these presumptive rights of an owner, but typically only in relatively clear cases where a failure to impose limits would harm others. For instance, tort law restricts an owner's ability to engage in actions that could directly or foreseeably injure the person or property of others, including through the torts of negligence and nuisance. Equity intervenes in other cases, including instances of abuse of rights, opportunism, and error. While private law undoubtedly does include doctrines that limit the presumptive rights of owners, these doctrines generally involve clear cases of injury to a defined set of parties. Private law, at least as conventionally conceived, generally does not limit an owner's rights on the basis of an open-ended weighing of the owner's interests against the public interest.⁸⁰

Yet it would be quite wrong to conclude that public interest considerations are never relevant at all to the scope of an owner's rights. Such considerations are very much a part of modern property systems, but they are typically conceived and implemented through a decision structure that involves the interplay between private and public law. Private law doctrine sets out a broad conception of the authority of owners, but it is subject to being limited, potentially quite drastically, by public authorities acting pursuant to a statute passed by the legislature. The common law generally

⁷⁸ Tony Honoré, "Ownership" in *Making Law Bind: Essays Legal And Philosophical* (Oxford: Clarendon Press, 1987) 161.

⁷⁹ *Ibid*; Thomas W Merrill, "Property and the Right to Exclude" (1998) 77:4 Neb L Rev 730.

⁸⁰ JW Neyers & Jordan Diacur, "What (Is) a Nuisance" (2012) 90:1 Can Bar Rev 215 at 231–34; Donal Nolan, "'A Tort against Land': Private Nuisance as a Property Tort" in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart, 2011) 459 at 487.

requires that government actions that infringe property rights must be authorized by a statute.⁸¹ For the most part, legislatures have broad discretion in the considerations they can take into account in deciding to limit an owner's authority. However, importantly, such limits do require an affirmative decision to intervene through legislation, following a process that encourages some level of deliberation by legislators. The legislature is thus able to exercise its judgment in determining that intervention is needed in a particular context in order to uphold the common good. In the absence of an affirmative decision to intervene, an owner's authority, as broadly conceptualized by private law, prevails.⁸²

The two-stage decision-making structure established through the relationship between private and public law reflects the idea of subsidiarity. There is a presumption in favour of the capacity of owners to contribute to the common good in their own way and against centralized oversight of their sphere of authority. At the same time, legislatures have a relatively free hand to impose restrictions that derogate from this baseline, in light of the manifold ways in which intervention may be found to be necessary to uphold the common good in particular contexts.

This decision-making structure is reflected in foundational features of modern legal systems. For instance, as previously mentioned, the common law generally holds that agents of the government do not have special authority to deprive property owners of their rights, unless that authority is grounded in a statute passed by the legislature.⁸³ Moreover, in interpreting statutes, courts have generally held that ambiguities should be interpreted in a manner that favours the property owner.⁸⁴ In order to deprive an owner of her rights, the legislature must not only speak; it must speak clearly. This requirement for clarity reinforces the deliberative functions of the legislative process. When a deprivation of rights is made explicit in legislation, it is more likely that legislators will be aware of it and consider whether it is justified in order to uphold the common good.⁸⁵

⁸¹ *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36, para 21 [Annapolis]; *Western Counties v Windsor and Annapolis* (1882), 7 AC 178 at 188 (PC) [Western Counties]; *BC Medical Association et al v The Queen in Right of British Columbia et al* (1984), 15 DLR (4th) 568 at 572, 58 BCLR 361 (CA) [BC Medical Association]; Paul A Warchuk, "Rethinking Compensation for Expropriation" (2015) 48:2 UBC L Rev 655 at 660–62. There is a narrow exception to the requirement for statutory authorization that applies in cases relating to the defence of the realm. See *The King's Prerogative in Saltpetre* (1606), 12 Co Rep 12, 77 ER 1294; *Burmah Oil Co Ltd v Lord Advocate*, [1965] AC 75, [1964] 2 All ER 348 (HL) [Burmah Oil Co Ltd].

⁸² See generally *Entick v Carrington*, [1765] 95 ER 807, [1975] EWHC KB J98 (KB).

⁸³ *Ibid*; *Western Counties*, *supra* note 81 at 188; *BC Medical Association*, *supra* note 81; Warchuk, *supra* note 81 at 660–62.

⁸⁴ *Western Counties*, *ibid* at 188; *BC Medical Association*, *ibid* at 572.

⁸⁵ Gérard V La Forest, "The Canadian Charter of Rights and Freedoms: An Overview"

A similar decision-making structure applies in civilian jurisdictions as well. Article 544 of the French Civil Code, for instance, provides: “Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.”⁸⁶ On the one hand, the provision sets out a capacious understanding of the authority of an owner. On the other hand, it makes clear that that authority is subject to the power of the legislature to take affirmative steps to intervene and derogate from the private law baseline.

Legislative interventions take many forms, reflecting the wide-ranging considerations weighed by legislators, but three forms of intervention in particular are worthy of mention: taxation, regulation of uses, and expropriation. Taxation derogates from the private law baseline by reallocating the benefits of ownership. Presumptively, in the absence a legislative intervention, an owner is entitled to the capital value and the income from property interests.⁸⁷ Yet considerations grounded in the common good of the community can justify decisions to derogate from this baseline. First of all, the public interest may justify policy measures that limit inequality. Indeed, justifications for property that are grounded in subsidiarity arguably require some attention to the distribution of property rights. The benefits of subsidiarity are only fully attained when the property system distributes ownership powers broadly within society. Undue concentration of rights within a narrow ownership class is its own form of centralization, contrary to the principle of subsidiarity.⁸⁸

In addition to considerations grounded in the overall distribution of resources in society, there are many other considerations that may motivate interventions through the tax system. The need to pay for government services is obviously a major factor. There may also be a role for taxation in reinforcing moral obligations to the poor, by setting a minimum level of contribution through taxation while also allowing owners the legal capacity to choose whether to make additional contributions to the community (even if such additional contributions of resources, beyond what one needs for oneself and one’s family, are understood as a moral imperative).⁸⁹ The

(1983) 61:1 Can Bar Rev 19 at 20; *Belfast Corporation v OD Cars Ltd*, (1960) AC 490 at 523 (HL) (Lord Radcliffe) [*Belfast Corporation*]; Abbe R Gluck, “What 30 Years of Chevron Teach Us about the Rest of Statutory Interpretation” (2014) 83:2 Fordham L Rev 607 at 625; Thomas Albert Cromwell, Siena Anstis & Thomas Touchie, “Revisiting The Role of Presumptions of Legislative Intent in Statutory Interpretation” (2017) 95:2 Can Bar Rev 297 at 316.

⁸⁶ Art 544 C civ.

⁸⁷ Honoré, *supra* note 78 at 169–71.

⁸⁸ Finnis, *Natural Law and Natural Rights*, *supra* note 33 at 169–77; Lavoie, *supra* note 58 at 660–63.

⁸⁹ Hirschfeld, *supra* note 61 at 166–80.

considerations that motivate taxation must of course be weighed against other factors, including effects of taxation on economic productivity. The task of setting rates of taxation involves discretionary political judgment and accordingly, all modern legal systems give significant deference to legislators in setting these rates. It is noteworthy, however, that constitutional norms in common law jurisdictions insist that taxation measures must be authorized by legislation. In some Westminster constitutional systems, including Canada, there are also other requirements, including that taxation measures must be recommended by the cabinet, and must originate in the lower, elected house of the legislature.⁹⁰ Such procedural requirements help ensure that taxation measures that reallocate property rights have been deliberated upon and found to be in the public interest by the elected representatives of the people.⁹¹

Legislation can also authorize public-law restrictions on the use of objects of property, both directly through the provisions of a statute and indirectly through powers delegated by statute to public agencies. These restrictions pursue diverse objectives. Criminal prohibitions, for instance, might reflect a legislative judgment that certain kinds of use are inherently immoral. In other cases, use restrictions could reflect a perceived need to address harms that are more subtle or diffuse than those addressed by tort law or principles of equity.

Take, for instance, a municipal bylaw requiring that a liquor store cannot be located less than 100 meters from a school.⁹² The arguments in favour of such a provision might be that liquor stores could attract patrons likely to disturb or at least distract school children, or that a liquor store could potentially normalize or encourage liquor consumption among young people. As high turnover businesses, liquor stores may also attract more vehicle traffic than other kinds of businesses, including perhaps a disproportionate number of impaired drivers. These effects are quite unlikely to meet the common law threshold for nuisance.⁹³ And yet public authorities might reasonably conclude that intervention is justified, especially if the bylaw leaves potential liquor retailers with sufficient alternative sites for their businesses.

Apart from moral considerations and harms to third parties, use restrictions can also serve a coordination function. For instance, a

⁹⁰ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 53–54; Sir Malcolm Jack & Richard Reid, *Financial Privilege: The Undoubted and Sole Right of the Commons?* (London: The Constitution Society, 2016) at 11–15, 32.

⁹¹ Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal: McGill-Queen's University Press, 2007) at 59–60.

⁹² City of Edmonton, bylaw 17836, *A Bylaw to amend Bylaw 12800, as amended, The Edmonton Zoning Bylaw* (12 December 2016), s 1(a)(4).

⁹³ *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at para 19; *Restatement (Second) of Torts* § 822 (1979).

municipality might seek to channel dense housing developments into areas within walking distance of a planned subway station, limiting other kinds of development in the area. These kinds of restrictions would clearly involve a weighing of different considerations specific to particular contexts. It is important, however, that all such restrictions require affirmative action by public authorities who determine that the private law baseline requires modification.

Legislation can also authorize the expropriation of property interests. Across modern legal systems, compensation for expropriation is either the entrenched norm or an outright constitutional requirement.⁹⁴ Apart from requirements for compensation, however, the legislature's power to authorize an expropriation is generally quite broad.⁹⁵ However, as Tony Honoré once observed, the unrestrained use of expropriation powers would be inconsistent with the concept of ownership as we know it.⁹⁶ If expropriation were so widespread that owners lived perpetually under the threat of the loss of their interests, the security essential to ownership would be undermined. Expropriation, even expropriation with compensation, has to be exceptional in order for property to fulfill its functions. That said, the grounds on which a public authority may determine that an expropriation is justified are broad and allow context-specific factors to be accounted for. Ultimately, the decision to expropriate involves a political judgment that weighs the impact of the intervention on the property system against potential benefits.

As with other types of interventions, state actors may exercise their judgment with respect to expropriation well or poorly. However, the structure of the decision process reflects the values of subsidiarity. It is a basic principle of the common law that the power to expropriate must be derived from a statute (apart from a narrow exception relating to actions taken in defence of the realm).⁹⁷ Where the power to expropriate has been delegated,

⁹⁴ US Const Amend 5. In Canada, there is no such constitutional requirement, but there is a presumptive right to compensation, which is reinforced by statutes dealing with expropriation. See *Annapolis*, *supra* note 81 at para 21; *Expropriation Act*, RSA 2000, c E-13, s 42(1).

⁹⁵ In some jurisdictions, the constitution requires that the expropriation of property must be related to a public purpose or public utility. Such restrictions nevertheless still leave the legislature with broad discretion to make determinations as to when an expropriation is required to serve a public purpose. For instance, the Fifth Amendment of the US Constitution requires that a taking must be for "public use", a requirement that has been interpreted broadly. See *Kelo v City of New London*, 545 US 469 (2005).

⁹⁶ Honoré, *supra* note 78 at 171.

⁹⁷ *Annapolis*, *supra* note 81 para 21; *Western Counties*, *supra* note 81 at 188; *BC Medical Association*, *supra* note 81 at 572; Warchuk, *supra* note 81 at 660–62. There is a narrow exception to the requirement for statutory authorization that applies in cases relating to the defence of the realm. See *The King's Prerogative in Saltpetre*, *supra* note 81; *Burmah Oil Co Ltd*, *supra* note 81.

the delegated agency must make a determination that expropriation is required in a particular context, and it must actively initiate the process for expropriation. In other words, expropriation is an exceptional process that deviates from the norm of security of tenure. It provides an avenue for intervention where the decentralized authority of owners is unable to effectively provide for the common good, for instance if land needs to be assembled for a linear transportation corridor.

While legal doctrine may not significantly restrict legislatures in the scope or purposes of their interventions in the property system, the principle of subsidiarity does impose constraints as a matter of political morality. There are some types of intervention that would go so far as to be incompatible with subsidiarity. For instance, the large-scale confiscation of property interests across a significant portion of the economy, or a significant portion of the occupied land base on a jurisdiction, would be fundamentally at odds with a commitment to subsidiarity through property rights. The large-scale collectivization of agriculture, for instance, would be incompatible with subsidiarity, though more incremental attempts to broaden the ownership base through agricultural land reform could more readily be reconciled with the principle. Similarly, reforms to legal doctrine that fundamentally deprive owners of the power to set the agenda for their resources would undermine the capacity of property institutions to promote the values of subsidiarity. Even if there are no constitutional impediments to such measures being adopted by the legislature, such a revolutionary reconceptualization of property would arguably be inconsistent with subsidiarity as a political and moral principle.

At the same time, policies leading a very high concentration of private ownership and the emergence of a large class of absentee landlords would also arguably violate subsidiarity as a political and moral principle. Such trends would mean centralization of decision-making, not in the hands of the state but rather in the hands of private capital, contrary to the negative aspect of subsidiarity.⁹⁸ A range of policies could potentially be used to counter such trends, including competition policy and policies that encourage homeownership. In order to adequately serve this function, competition law might have to be reconceived in order to focus not just on efficient consumer prices but also on the political implications of industrial ownership concentration.⁹⁹ With respect to housing, more robust policies may be needed to counter the trend toward ownership by large investment funds.¹⁰⁰ Again,

⁹⁸ See generally Katharina Pistor, *The Code of Capital* (Princeton: Princeton University Press, 2019) at 23-46.

⁹⁹ See Lina M Khan, "Amazon's Antitrust Paradox (2017) 126:3 Yale LJ 710 at 739-44.

¹⁰⁰ See Jessica A Shoemaker, "Papering over Place: When Land Becomes Asset Class" in *Research Agenda in Property Law* (B Akkermans, ed) (Cheltenham, UK: Edward Elgar,

while such policies are not mandated as a matter of law, subsidiarity would require the government's attention to these issues as a matter of political morality.

The circumstances in which interventions are justified in moral terms are sensitive to context, including new and emerging policy challenges. The issue of climate change provides an instructive example. Owners may fail to fully account for the cumulative external effects of carbon-emitting activities, giving rise to a new impetus for centralized interventions to account for such decision failures. However, even in cases like this where owner authority needs to be curbed in the public interest, subsidiarity would still tend to favour approaches that restrict owner authority only to the extent necessary. Carbon pricing is one example of a policy that accounts for the external effects while leaving the ultimate decision-making in the hands of the owner, in contrast to approaches that more fully absorb an owner's decision-making authority by directing a singular course of action.

It is worth noting the institutional division of labour involved in establishing public-law regulations that derogate from the private law authority of owners. With few exceptions, the authority for these measures must ultimately be derived from the legislature. Even in cases involving delegated authority, there has to have been a positive determination by legislators that the regulatory powers in question are justified. The legislature, in turn, has a great degree of flexibility in tailoring measures to the specific needs that emerge. It can create general measures for the whole jurisdiction or narrow measures that only apply in particular times, places, or circumstances. Alternatively, it can delegate powers to specialized agencies to address particular issues or to local authorities to set rules for particular communities. This level of flexibility and ability to tailor interventions far exceeds the capacity of the judicial branch to adapt the basic rules of the common law to particular contexts. Changes to common law doctrines, for instance, are typically general in nature, and are meant to be changed infrequently. Accordingly, public-law regulations are generally better suited to limiting interventions to the times and places when they are needed. Changing a common law doctrine to limit owner authority in response to an issue that only exists in one locality, for instance, risks being over-inclusive and unnecessarily absorbing the functions of property owners.

The conception of the divide between private law and public law set out above is contestable on normative grounds. Those adopting a Kantian liberal approach might view the broad and open-ended grounds for public-law intervention as a potential threat to individual independence.¹⁰¹ By contrast, those proceeding on the grounds of a robust liberal commitment to individual

forthcoming).

¹⁰¹ See, eg, Ripstein, *Force and Freedom*, *supra* note 21.

self-authorship might favour more limits on owner authority within private law doctrine in order to facilitate just interpersonal relations, in light of the potential effects of owner decisions on the self-authorship of non-owners.¹⁰²

The fact that the subsidiarity-based account yields a distinctive view of the public-private divide is largely due to the fact that its underlying premises are distinct from liberal accounts. Neither individual independence nor self-authorship is the overriding value on the approach defended in this article. Rather, the approach outlined here is ultimately based on property's connection to the pluralistic sources of human flourishing. Accordingly, state interventions that limit individual independence may be justified on grounds not related to securing the conditions for independence, in contrast with the Kantian view.¹⁰³ At the same time, the subsidiarity-based account's presumption in favour of owner authority as a matter of private law is potentially more robust than a liberal defending property on grounds of self-authorship would support.¹⁰⁴ This partly reflects the fact that the justification for owner authority on the subsidiarity-based account does not presume self-regarding decision-making by owners that will inevitably conflict with the flourishing of non-owners. Virtuous owners are understood to be capable of making their own distinctive contributions *to the common good*, and not just to their own individual interests. The private-law presumption in favour of owner authority is meant to give owners space for their distinctive contributions, even if owner decision-making could potentially result in limits on the broadly conceived autonomy interests of others. Importantly, however, the private law baseline is subject to legislative interventions if owner authority fails to provide conditions for human flourishing in particular contexts.

III. PROGRESSIVE PROPERTY THEORY AND THE FLATTENING OF THE PUBLIC-PRIVATE DIVIDE

Property theory today is divided between two broad sets of approaches. The first emphasizes the scope of owner authority, on the basis of individual autonomy or economic efficiency with a particular emphasis on information costs.¹⁰⁵ The second set of approaches tends to emphasize limits on owner

¹⁰² See, eg, Dagan, *A Liberal Theory of Property*, *supra* note 21.

¹⁰³ See Ripstein, *Force and Freedom*, *supra* note 21 at 194-8.

¹⁰⁴ See Dagan, *A Liberal Theory of Property*, *supra* note 21 at 114-42.

¹⁰⁵ For economic accounts grounded in information costs, see Merrill & Smith, "The Morality of Property", *supra* note 21 at 1850; Smith, "Property as the Law of Things", *supra* note 21; Merrill & Smith, "What Happened to Property?", *supra* note 21 at 387. For autonomy-based arguments, see Ripstein, "Beyond the Harm Principle", *supra* note 21; Ripstein, *Force and Freedom*, *supra* note 21 at 91; Katz, "Exclusion and Exclusivity", *supra* note 21 at 312-15. For progressive property accounts, see Alexander et al, *supra* note 21;

authority and the obligations of owners. Those in the latter camp reflect a diverse range of perspectives, including liberal, economic, egalitarian, and democratic approaches. However, some of the most prominent works arguing for limits on owner authority are grounded in Aristotelian ideas that recognize the plural and incommensurable nature of the goods that contribute to human flourishing.¹⁰⁶ Indeed, the Aristotelian approach to property has been closely connected to the progressive property movement, which seeks to redefine property in ways that prioritize the social obligations of owners. Given that the subsidiarity-based approach to property also has its origins in Aristotelian conceptions of human flourishing, it arguably has certain insights to offer Aristotelian progressive property thought, particularly with respect to the scope of owner authority and the interplay between private law and public law.

Progressive Aristotelian approaches to property reflect important insights about the sources of human flourishing, the social embeddedness of owners, and the need for limits on owner autonomy. Yet much of the scholarship in this tradition fails to adequately reconcile the progressive vision with the concept of property as it is understood in existing legal doctrine, especially as it relates to the authority of owners.¹⁰⁷ Works tend either not to provide detailed guidance on the specific limits of an owner's authority, or they endorse open-ended judicial oversight of owner decision-making that is radically at odds with more conventional understandings of property that take presumptive owner authority as fundamental to the concept.¹⁰⁸

In a recent article, Rachael Walsh reflects on the different means which could be adopted to achieve progressive objectives in property law, including both requirements built into private law doctrine and public law regulatory

Alexander, *Property and Human Flourishing*, *supra* note 21; Alexander, "The Social Obligation Norm", *supra* note 21; Alexander & Peñalver, *supra* note 21; Peñalver, *supra* note 21; Singer, *Entitlement*, *supra* note 21; Singer, "Democratic Estates", *supra* note 21.

¹⁰⁶ Alexander, *Property and Human Flourishing*, *supra* note 21, at 3–36; Alexander, "The Social Obligation Norm", *supra* note 21 at 760–73; Peñalver, *supra* note 21 at 864–76.

¹⁰⁷ See works arguing for the centrality of an owner's right to exclude or to set the agenda for a resource to the concept of property. Katz, "Exclusion and Exclusivity", *supra* note 21; Merrill, *supra* note 79; JE Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) at 68-104 (arguing that the right to property should be understood as a right to exclusive use).

¹⁰⁸ Peñalver, *supra* note 21 at 874 (indicating that the scope of limits on owner authority presents a "difficult puzzle that goes to the very heart of the proper division of labor between the community and private landowners."); Alexander, *Property and Human Flourishing*, *supra* note 21 at 191–208 (setting out a general approach to non-owner access rights that involves balancing incommensurable human goods). Contrast with descriptive accounts that argue that owner authority is central to property as a concept. Katz, "Exclusion and Exclusivity", *ibid*; Merrill, *ibid*; Penner, *ibid*.

measures.¹⁰⁹ For instance, she astutely notes that public law measures can be more narrowly tailored to specific circumstances than changes to basic private law doctrine.¹¹⁰ She also claims that private law measures pursuing progressive property objectives may give owners more leeway in the first instance to determine how best to fulfill those progressive objectives.¹¹¹ That may be true in some cases, but if owners are exercising their private law rights subject to open-ended judicial oversight based on progressive principles, then one may doubt how much authority they really have. Such oversight may very well absorb the functions of owners into the centralized decision-making of judges. In any event, Walsh's article is notable for the fact that it reflects seriously on different alternative approaches for implementing progressive objectives relating to property, considering both private law and public law alternatives. Much of the scholarship in Aristotelian progressive property theory either does not engage with these doctrinal details, or else simply assumes that progressive property means a redefinition of private law concepts to include greater judicial oversight of owner decision-making, typically on the basis of multi-factor balancing tests.¹¹²

Gregory Alexander's recent book, *Property and Human Flourishing*, provides an instructive example. Alexander seeks to provide an account of property that is grounded in a pluralistic conception of human flourishing, specifically one based on the capabilities approach of Amartya Sen and Martha Nussbaum.¹¹³ He argues that on this approach, owners have an obligation to provide others with the resources necessary to develop their capabilities.¹¹⁴ This obligation falls on particular owners to the extent that there is an appropriate connection between the obligation proposed and the public values that underlie the system property rights.¹¹⁵

On the specific issue of the right to exclude, Alexander provides more detail, endorsing the balancing of incommensurable human goods in determining when to make an exception to an owner's right to exclude.¹¹⁶ When implemented through judicial decisions, this generally takes the form

¹⁰⁹ Walsh, "Property, Human Flourishing and St Thomas Aquinas", *supra* note 27 at 212–19.

¹¹⁰ *Ibid* at 217–18.

¹¹¹ *Ibid*.

¹¹² There are other exceptions among non-Aristotelian progressive property theory. Joseph Singer's work is attentive of the potential for public law interventions, alongside arguments for the reconceptualization of private law doctrines. See, eg, Singer, "The Reliance Interest in Property", *supra* note 26. While the article proposes some significant changes to how property is understood at common law, it also considers the potential for state action to address problems such as those presented by plant closings.

¹¹³ Alexander, *Property and Human Flourishing*, *supra* note 21 at 3–36.

¹¹⁴ *Ibid* at 73.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid* at 191–208.

of multi-factor balancing tests. For instance, Alexander sets out the factors found by the New Jersey Supreme Court to be relevant to determining what rights of access should exist with respect to dry-sand beaches. Those factors are: (1) the location of the dry-sand area in relation to the foreshore; (2) the extent and availability of publicly owned sand area; (3) the nature and extent of the public demand; and (4) the usage of the upland sand land by the owner.¹¹⁷ On this approach, the public values that underlie the property system as a whole feed directly into how private rights are conceived and defined by the judiciary.¹¹⁸

Determining access rights at a granular level using multi-factor balancing tests has the potential to generate significant information costs, both for owners and parties interested in accessing the land.¹¹⁹ It could also pose a challenge to the Kantian autonomy interests of owners.¹²⁰ Yet it is not just from an economic or Kantian perspective that this approach can be critiqued. This approach is also contrary to the values of subsidiarity, as understood from within the same broadly Aristotelian tradition in which Alexander situates his work. The presumptive decision-making authority of the owner is subjected to an open-ended and discretionary balancing of interests overseen by judges. If adopted more widely, beyond the specific case of dry-sand beaches, this type of approach has the potential to absorb private decision-making into a singular conception of the common good overseen by courts. In this respect, it is arguably at odds with how property is conventionally understood. Dry-sand beaches do not have to be privately owned, and it remains open to the legislature to expropriate them if it determines that to be in the public interest. However, there is no principled reason to limit the balancing approach to just dry-sand beaches. Extending discretionary judicial oversight of the use of a potentially broad and amorphous set of privately owned resources has the potential to undermine the values of subsidiarity within the property system.

While standards-based reasoning can, over time, yield a certain degree of

¹¹⁷ *Matthews v Bay Head Improvement Association*, 471 A (2d) 355 (NJ), cert denied, 469 US 821 (1984), cited by Alexander, *Property and Human Flourishing*, *supra* note 21 at 180.

¹¹⁸ Alexander, *Property and Human Flourishing*, *supra* note 21 at 62–67. For a critique of an approach that incorporates the systemic values of property law into the granular level of particular doctrines, see Henry E Smith, “Mind the Gap: The Indirect Relation between Ends and Means in American Property Law” (2009) 94:4 Cornell L Rev 959. See also Eric R Claeys, “Virtue and Rights in American Property Law” (2009) 94:4 Cornell L Rev 889.

¹¹⁹ On the tradeoffs between “exclusion” and “governance” as resource management strategies, see Henry E Smith, “Exclusion Versus Governance: Two Strategies for Delineating Property Rights” (2002) 31:S2 J Legal Stud S453. But see Alexander, *Property and Human Flourishing*, *supra* note 21 at 182–91.

¹²⁰ On the connection between the right to exclude and individual independence, see Arthur Ripstein, “Beyond the Harm Principle”, *supra* note 21.

guidance to owners, as case-by-case determinations show how general principles apply in concrete cases, the subsidiarity-based critique of the progressive approach is not primarily based on legal clarity or information costs. Rather, it is a question of who decides. A recognition of presumptive owner decision-making authority is based on the capacity of a dispersed pool of owners to make their own distinctive contributions to the common good. Broad, open-ended judicial oversight of those decisions challenges the presumption of owner capacity, limiting owner authority to decisions that are approved of by centralized authorities, especially courts. This discretionary oversight is troubling because it is likely to include matters on which the owner is better placed to make a decision than the courts or government agency, rather than being limited to specific categories of cases where the presumption of owner capacity has been rebutted.

It may be suggested that progressive accounts generally do allow owners to make decisions in the first instance, subject to possible challenge by non-owners. It is only when decisions are challenged that courts' failure to uphold the presumptive authority of owners becomes relevant. Yet owners' decisions are made in the shadow of the formal law as applied by courts. Even in cases where a decision is not actually challenged, the mere fact that the decision could *potentially* be challenged is likely to result in a constraining effect on owners eager to avoid litigation. Accordingly, the law as applied to disputes between owners and non-owners has important ramifications for many owner decisions, even those that are not ultimately challenged.

Gregory Alexander's recent book, like other works in the progressive property theory, is grounded in a rich conception of human flourishing, and yet it lacks a persuasive account of a core feature of property rights, namely the presumptive authority of owners.¹²¹ Kantian and efficiency-based accounts, although built on narrower grounds, have to date been much better able to account for the presumptive authority of owners that is commonly taken to be a core conceptual feature of property.¹²² The concept of subsidiarity provides a potential bridge between these competing approaches in property theory, and a way for Aristotelian property theory to better account for the authority of owners within a broader normative framework.

While some Aristotelian progressive property works do reference subsidiarity, it is generally in the form of a shallow version of the concept, based on the relative effectiveness of small versus large entities in achieving posited objectives.¹²³ For instance, if an owner might be more effective in

¹²¹ Alexander, *Property and Human Flourishing*, *supra* note 21.

¹²² Katz, "Exclusion and Exclusivity", *supra* note 21; Merrill, *supra* note 79; Penner, *supra* note 107 at 68-104.

¹²³ See, e.g., Alexander, "The Social Obligation Norm", *supra* note 21 at 790; Alexander & Peñalver, *supra* note 21 at 148-49.

achieving a particular objective, that could be a factor to consider in weighing the scope of ownership rights in particular cases. By contrast, as I have argued above, a richer conception of subsidiarity based on distinct elements of human flourishing points in the direction of presumptive owner authority as a private law baseline, combined with wide-ranging powers for the public authorities to take positive steps to intervene where in their judgment the common good requires it.

If taken seriously, these insights have at least two implications for Aristotelian progressive property theory: 1) Theorists in this tradition should look beyond attempts to define the concept of property and should focus more on the power of public authorities to regulate property in the public interest; and 2) within the realm of private law, theorists should seek to identify clearly defined triggers that, in particular cases, justify shifting from the baseline presumption of owner authority to an analysis based on a broader set of considerations.¹²⁴

First, the public law/private law divide provides for a decision structure with respect to property that reconciles owner authority with the need for context-specific interventions to uphold the common good.¹²⁵ Flattening the conceptual distinction between private law rights and public law regulatory authority is simply not necessary to incorporate progressive values into a property system, yet it does have the potential to absorb the decision-making authority exercised by owners. While much of progressive property law scholarship has focused on the need to redefine baseline conceptions of property, the regulatory authority of public bodies is a promising and arguably underdeveloped area of focus for progressive property scholars.¹²⁶

Second, within the realm of private law, subsidiarity suggests the importance of primary and secondary orders of decision-making, along the

¹²⁴ Compare the approach to the distinction between law and equity set out in Henry E Smith, “Equity as Meta-Law” (2021) 130:5 Yale LJ 1050.

¹²⁵ The idea of a conceptual divide between public law and private law was challenged by the realist and critical precursors to progressive property theory. See, e.g., Morris Cohen, “Property and Sovereignty” (1927) 13:1 Cornell L Rev 8; Robert Hale, “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) 38:3 Pol SC Q 470; Duncan Kennedy, “Stages of the Decline of the Public/Private Distinction” (1982) 130:6 U Pa L Rev 1349. But see Samuel Beswick, “The Decline of the Fish/Mammal Distinction” (2017) 165 U Pa L Rev Online 91.

¹²⁶ Rachael Walsh’s recent book considering the constitutional dimensions of property from a progressive perspective exemplifies an approach that focuses on the regulatory authority of public authorities. See Walsh, *Property Rights and Social Justice*, *supra* note 21. Although not based on Aristotelian principles, much of Joseph Singer’s work is also attentive of the potential of public law interventions, in addition to the reconceptualization of private law doctrine. See, eg, Singer, “The Reliance Interest in Property”, *supra* note 26; Joseph William Singer, “No Right to Exclude: Public Accommodations and Private Property” (1996) 90:4 Nw U L Rev 1283 [Singer, “No Right to Exclude”].

lines suggested by Henry Smith's work on equity.¹²⁷ The first order recognizes the presumptive authority of owners with respect to their resources. However, in certain defined sets of circumstances, there may be triggers that allow for a broader set of considerations to be accounted for. These triggers include those associated with equity, such as instances of bad faith.¹²⁸ However, there are other kinds of triggers that private law doctrine employs. Direct or foreseeable injury to the person or property of another, for instance, is typically a prerequisite for tort liability.¹²⁹ Rather than seeking to directly balance public values against private decision-making in the baseline conception of property, progressive approaches should look to develop defined categories where the authority of owners is especially likely to be ineffective at upholding the common good.

For instance, with respect to the right to exclude, it would be better to develop general categorical exceptions rather than subjecting every exercise of the right to discretionary balancing. Common law exceptions to the right to exclude, such as those traditionally applicable to innkeepers and common carriers, might be reasonably extended by analogy to internet platforms, to give one possible example.¹³⁰ One starts with a presumptive right held by the owner, and it is only where a particular trigger is found that one moves to

¹²⁷ Smith, "Equity as Meta-Law", *supra* note 124.

¹²⁸ *Ibid* at 1084–90.

¹²⁹ See generally *Overseas Tankship (UK) Ltd v The Miller Steamship Co*, [1967] AC 617, [1966] UKPC 10; *Palsgraf v Long Island Railroad Co*, 248 NY 339, 162 NE 99 (1928); *Restatement (Third) of Torts: Phys & Emot Harm* § 7 (2010) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.")

¹³⁰ *Biden v Knight First Amendment Institute*, 141 S Ct 1220 (Thomas J, concurring). Thomas J's concurring opinion sets out the analogy between common carriers and innkeepers, on the one hand, and internet platforms, on the other, but suggests it is for the legislature, rather than the courts, to reform the law. For a critique of this analogy, see Sarah S Seo, "Failed Analogies: Justice Thomas's Concurrence in *Biden v. Knight First Amendment Institute*" (2022) 32:4 Fordham Intell Prop Media & Ent LJ 1070. In a well-known article on public accommodations, Joseph Singer argued for a public right of access, at common law, for all businesses open to the public. Such a right could only be revoked on reasonable grounds, as determined by a court. While such a general right is arguably too broad in scope to fully respect the principle of subsidiarity as defended in this article, it does rely on the relatively well-defined trigger of a general invitation to the public to enter the business premises. See Singer, "No Right to Exclude", *supra* note 126. Some of Singer's other work also relies on open-ended judicial discretion in overseeing the decision-making of owners. For instance, in his impressive work on reliance interest in property, Singer argues that owners should not be able to revoke access rights to others who have relied on such access where such a limit is "necessary to achieve justice". See Singer, "The Reliance Interest in Property", *supra* note 26. This similarly relies on the relatively well-defined trigger of access that has been relied upon, but it is arguably so broad that it could absorb the decision-making functions of owners even in cases where doing so is not necessary to secure conditions for human flourishing.

another level of analysis taking other factors into account. The categorical approach helps to avoid the absorption of private decision-making except in cases where that is likely to be necessary for the common good.

IV. SUBSIDIARITY AND PROPERTY DOCTRINE

Understanding property in terms of subsidiarity has a number of potential implications for property law doctrine. These implications relate to: 1) the significance of owners' agenda-setting authority and right to exclude; 2) the extent of public access rights to public property; 3) the scope and limits of property-based community governance, including through condominium boards and homeowners' associations; and 4) the proper approach to common law and constitutional protections against infringement of property rights by governments.

A. Agenda-Setting and the Right to Exclude

A subsidiarity-based approach to property puts an owner's agenda-setting authority at the core of the concept of ownership.¹³¹ As outlined above, property is understood to promote human flourishing by allowing for qualitatively distinct contributions to the common good; by promoting order and prosperity that contributes to human goods, including life, health, knowledge, practical reasoning, play, aesthetic experience, and sociability; by recognizing the intrinsic value of participating in actions and decisions affecting oneself; and by promoting the development of virtue. The authority to set the agenda for a resource is vital to each of these components. Owners are able to make their distinctive contributions because they are empowered to set the agenda for a resource. The decentralization of decision-making through owners' agenda-setting authority promotes prosperity, including by allowing for decisions that channel local knowledge. Similarly, the intrinsic benefits of meaningful action and decision-making are made possible by agenda-setting authority, as is the development of virtue. Property would not be able to secure the benefits of subsidiarity without an owner's agenda-setting authority. Accordingly, agenda-setting authority may be understood as a conceptually necessary feature of property when it is understood in terms of subsidiarity.

While perhaps not absolutely necessary to each of the subsidiarity-based arguments, the right to exclude may be understood to be practically necessary

¹³¹ On agenda-setting authority, see generally Katz, "Exclusion and Exclusivity", *supra* note 21. On the relationship between local knowledge, the right to exclude, and the right to set the agenda, see Samuel Teunissen, "Good Fences Make Good Neighbours: Local Knowledge and the Right to Exclude" [unpublished].

for property to achieve its subsidiarity-based benefits in most settings. For instance, it may be possible, in theory, for property to provide room for qualitatively distinct contributions of owners without a right to exclude. In practice, however, the right to exclude is often an important means by which property owners are able to protect their capacity to make distinctive contributions. Similarly, property's ability to provide the intrinsic benefits of meaningful decisions and actions, and to promote the development of virtues, is often facilitated by the right to exclude, though it may not be strictly necessary in all cases. It is with respect to some of the arguments for the promotion of prosperity and order that the right to exclude comes closest to a conceptual necessity. Internalizing the costs and benefits of resources is difficult to achieve without a right to exclude interlopers. Similarly, the right to exclude is probably vital to property's function in limiting conflicts over resources. Accordingly, subsidiarity suggests that the right to exclude is vitally significant to the concept of property, even if it may not always be strictly necessary.

The subsidiarity-based account therefore suggests that that the concept of property has a conceptual core, including owners' agenda-setting authority and, in most cases, the right to exclude.¹³² Accordingly, this approach to property arguably entails a rejection of a purely nominalist account of property as a contingent set of sticks in a bundle. Importantly, however, while agenda-setting authority and the right to exclude are foundational to the concept of property, they are not absolute. There are some exceptions built into the concept of property at private law, including in cases of necessity. Moreover, on a subsidiarity-based account, the private sphere of ownership is subject to regulation, modification, and even extinguishment by the separate public sphere, which is empowered to derogate from the private law baseline where the public interest so demands.¹³³

B. Public Access to Private Property

A subsidiarity-based account of property and human flourishing suggests an approach to public rights of access to private property that distinguishes it from most progressive property law scholarship. One of the hallmarks of progressive property theory is the view that the scope of the right to exclude within private law should be narrowed, particularly for spaces customarily

¹³² For an overview of competing accounts of property's conceptual core, see Merrill, *supra* note 79.

¹³³ Compare the somewhat different accounts of the distinct public and private spheres offered by: Larissa Katz, "Property's Sovereignty" (2017) 18:2 *Theoretical Inq L* 299; and Arthur Ripstein, "Property and Sovereignty: How to Tell the Difference" (2017) 18:2 *Theoretical Inq L* 243.

open to the public. Yet the account set out above suggests that pluralistic accounts of human flourishing do not necessarily entail a narrowing of the presumptive right to exclude. On the contrary, a broadly applicable presumptive right to exclude can help maintain the capacity of owners to make distinctive decisions and contributions to the common good, subject to context-specific interventions by public authorities.

Consider the case of *Harrison v Carswell*, a staple of Canadian property law pedagogy. In that case, a Winnipeg mall owner sought to exclude from its exterior property a woman who was picketing one of the mall's businesses. Justice Dickson's majority opinion upheld the mall owner's common law right to exclude, regardless of whether the mall owner had a reasonable justification for excluding the picketer.¹³⁴ By contrast, Chief Justice Laskin's dissenting opinion would have restricted an owner's authority to exclude from spaces customarily open to the public, except in cases of misbehavior or unlawful activity.¹³⁵

The majority opinion in *Harrison v Carswell* upheld the right to exclude based on the common law understanding of trespass.¹³⁶ Yet it is important to recall that the common law only sets the presumptive private law baseline, subject to possible legislative intervention. For instance, human rights legislation modifies the baseline, precluding discriminatory exclusion from most places customarily open to the public.¹³⁷ It is noteworthy that the Manitoba legislature actually *did* intervene following the decision in *Harrison v Carswell*, limiting the right to exclude vis-à-vis picketers on exterior private property that is customarily open to the public.¹³⁸ The Manitoba legislative intervention appears to have responded to the particular issues of the case, including the perceived need for picketers to have opportunities to express their views in a meaningful way. It is worth emphasizing that the Manitoba legislative intervention is much more narrowly tailored than the change to the common law proposed by Chief Justice Laskin. The legislative change applies only to picketing and related expressive activities on outdoor property, and does not have the same potential to be extended by analogy to any and all spaces customarily open to the public. By leaving the matter to the legislature, the majority created the conditions for a more targeted intervention than would have been likely to emerge through a change to the common law.

By considering *Harrison v Carswell* and the subsequent legislative

¹³⁴ *Harrison v Carswell* (1975), [1976] 2 SCR 200 at 212–20, 62 DLR (3d) 68.

¹³⁵ *Ibid* at 202–12.

¹³⁶ The case actually involved the application of trespass legislation, but the legislation in question adopted the approach to trespass liability used in the common law tort of trespass.

¹³⁷ *The Human Rights Code*, CCSM c H175, s 13(1).

¹³⁸ *The Petty Trespasses Act*, CCSM c P50, s 4.

amendments together, one can see how the dynamic relationship between the private law baseline and public law regulatory measures can facilitate progressive change while adhering to principles of subsidiarity. The progressive objective of public access for picketing was ultimately achieved through a targeted legislative intervention, without the potential for an unnecessary narrowing of owners' right to exclude in other contexts. While the majority opinion in *Harrison v Carswell* is most often associated with economic or autonomy-based perspectives on property, the concept of subsidiarity suggests an alternative understanding, namely that the decision upheld the presumptive authority of owners to control access to their resources, subject to context-specific exceptions authorized by the legislature.

The potential for an unnecessary narrowing of an owner's right to exclude has sometimes manifested itself in the case law of other jurisdictions that are held up as exemplars of progressive approach to property. Consider, for instance, a casino's right to exclude patrons for counting cards. Somewhat remarkably, the exclusion of card counters has been successfully challenged in New Jersey, where courts have adopted broad public rights of access to private property generally open to the public.¹³⁹ Apparently, counting cards is not technically against the rules in most casinos, though it has the potential to undermine the enterprise of casino gaming (a point that is likely to be more salient for casino owners than for reviewing courts).¹⁴⁰ This very narrow issue reflects a larger point, namely that business owners are often better placed than distant courts to determine what types of conduct are consistent with particular activities in particular contexts. A broad power to review the reasonableness of exclusion decisions, beyond specific grounds such as discrimination, has the potential to absorb the decision-making authority of owners beyond what is actually necessary for the common good. Indeed, it is hard to argue that any important societal interest is served by granting card counters a right of access to casinos. Even the (possibly dubious)

¹³⁹ *Uston v Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 375 (1982) (holding that a casino did not have a right to exclude a patron for counting cards.) The case is cited with approval by Alexander, *Property and Human Flourishing*, *supra* note 21 at 179-80. See also *Sky City Auckland Ltd v Wu*, [2002] 3 NZLR 621 (CA) (Blanchard and Anderson JJ) (a card counting case indicating a favourable view of the argument that a public right of access extends to casinos at common law, though concluding that the case should be decided on the basis of a statutory provision permitting exclusion).

¹⁴⁰ See Smith, "Mind the Gap", *supra* note 118 at 984-5. An effective card counter can consistently beat the house in blackjack. If casinos are required to permit card counting, they may have to take counter-measures that have a negative impact on the gaming experience of other players, such as frequently shuffling the deck. Arguably, a casino is better placed than a reviewing court to weigh the costs of counter-measures against the costs of seeking to exclude card counters.

entertainment benefits of gambling would seem to be better achieved by deferring to casinos' exclusion decisions in such cases.

C. Property-Based Community Governance

The subsidiarity-based account of property recognizes a property system's ability to decentralize decision-making and action with respect to resources. This decentralization empowers not only individuals, but also groups, including families, businesses, and charities. In some cases, parties may seek to associate through a combination of individual and collective property interests in land, creating a common interest community subject to property-based governance. Examples include condominiums and homeowners' associations. Since these types of communities can fulfill many of the same functions as local governments, including service delivery and land-use planning, they raise questions regarding the proper scope of private, property-based governance authority. Generally speaking, the principle of subsidiarity suggests a permissive approach towards such property-based community governance, subject to certain caveats. Common interest communities can provide for distinctive ways of living, while involving owners in collective decision-making to a degree seldom possible within municipal governments. Even if some of their functions can also be fulfilled by municipalities, subsidiarity cautions against absorbing those functions unless doing so is necessary to uphold the common good.

This permissive approach to property-based community governance suggests, for instance, that the categorical rule against positive covenants running with the land ought to be relaxed.¹⁴¹ Positive obligations can serve to reinforce community governance in important ways, notably by ensuring owners contribute to shared facilities as well as to the maintenance and improvement of their own properties. Positive covenants would still have to satisfy other requirements for running with the land, including "touch and concern" requirements, and they would be subject to public regulation, modification, and extinguishment where they cease to serve a valid purpose. Relaxing the rule against positive covenants would affirm the presumptive capacity of common interest communities to engage in a range of collective activities, even though some of these may overlap with the functions of local governments.

Despite the presumptively permissive approach suggested by the principle of subsidiarity, there are appropriate limits on the scope of property-based community governance—some inherent in property law doctrine and

¹⁴¹ *Rhone v Stephens*, [1994] 2 All ER 65, [1994] 2 AC 310; *Durham Condominium Corp No 123 v Amberwood Investments Ltd* (2002), 58 OR 3d 481, 211 DLR (4th) 1 (ONCA).

others contingent on the judgment of public authorities. Some types of rules are understood to be *prima facie* harmful to the public interest, and thus beyond the authority of private community associations. The clearest examples are rules that unreasonably restrain alienation or that discriminate based on certain characteristics of owners. A condominium board or homeowners' association is generally unable to place restrictions on interests that, either directly or indirectly, unreasonably restrain the owner's ability to transfer her interest.¹⁴² Restraints on alienation imposed by local communities could have cumulative effects on the property system, preventing access to resources by those who value them, and thus undermining both prosperity and the accessibility of property. Measures that discriminate on the basis of race, religion, gender, or other analogous grounds are also generally held to be contrary to public policy and thus unenforceable.¹⁴³ These measures violate fundamental normative commitments of a community, and could also have deleterious effects on accessibility and the efficient transfer of resources.

Even in cases where community-based regulation is not precluded by property law doctrine, it remains subject to the overriding authority of the legislature and of public bodies exercising delegated authority. For instance, a neighborhood might be subject to a restrictive covenant limiting development to detached, single-family homes. Such restrictions are generally understood to be presumptively permissible, reflecting one choice people could make about the type of community they wish to live in. However, whether such restrictions are compatible with the common good in a given set of circumstances is a contingent matter of practical and political judgment, depending on factors that include the supply and demand for housing in a given locality, along with the distributional effects of housing scarcity. If there is a housing shortage, a legislature, or a municipality authorized to do so by the legislature, could appropriately override the covenant and permit denser forms of development.¹⁴⁴

Public and private land-use planning authority can be mutually reinforcing in useful ways. Public authorities can rely on private planning to provide a greater range of community options than public land-use planning creates. Moreover, public authorities may be more comfortable permitting a wide range of private planning authority if they know that they have the power to intervene in particular cases where that authority is used in ways

¹⁴² *Restatement (Third) of Property (Servitudes)* § 3.4 (2000); Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Carswell, 2018) at 303–09.

¹⁴³ *Restatement (Third) of Property (Servitudes)* § 3.1 (2000); Ziff, *ibid*, at 292–98; Yi-Seng Kiang, “Judicial Enforcement of Restrictive Covenants in the United States” (1949) 24:1 Wash L Rev 1.

¹⁴⁴ See e.g., *Howse v Calgary (City)*, 2022 ABQB 551.

that are contrary to the public interest.

D. Common Law and Constitutional Protections for Property

Finally, subsidiarity can contribute to a proper understanding of both common law doctrines and constitutional provisions that protect property rights from being infringed by government entities. Common law protections for property are not constitutionally entrenched. Accordingly, they cannot be used to override the clearly expressed intentions of the legislature. However, they do create presumptions and structure decision-making in ways that can be favorable to the authority of property owners. A number of different doctrines are relevant. For instance, under Canadian common law, government entities are presumptively bound by the ordinary rules of property law, and may only infringe property rights where a specific legal exception exists, or where they have been authorized by legislation.¹⁴⁵ Expropriation must be authorized by statute, apart from the narrow exception relating to the defence of the realm.¹⁴⁶ Moreover, in interpreting legislation, there is a presumption against expropriation or interference with vested rights.¹⁴⁷ There is also a presumption against an *uncompensated* expropriation.¹⁴⁸ Taxation measures must also be authorized by legislation, and in some jurisdictions, including Canada, this type of legislation comes with the added procedural requirement that it must be introduced by the cabinet in the lower, elected house of the legislature.¹⁴⁹

On the one hand, these common law doctrines work to create added security for the presumptive authority of owners against government interference. In this respect, they promote the negative function of subsidiarity by protecting the authority of private owners from being absorbed by the state. On the other hand, they allow for rights to be regulated, modified, expropriated, or even extinguished if the legislature judges that to be in the public interest and takes active steps to authorize such an outcome. By requiring the legislature to speak clearly and follow defined procedures, these doctrines promote legislative deliberation on whether interference with property rights is justified.¹⁵⁰ An explicit authorization for expropriation, for instance, is more likely to be noticed and deliberated upon by legislators than

¹⁴⁵ *Entick v Carrington*, *supra* note 82; *Western Counties* *supra* note 81 at 188; *BC Medical Association*, *supra* note 81 at 572; Warchuk, *supra* note 81 at 660–62.

¹⁴⁶ *Annapolis*, *supra* note 81 at para 21; *Burmah Oil Co Ltd*, *supra* note 81.

¹⁴⁷ *Western Counties*, *supra* note 81 at 188.

¹⁴⁸ *Attorney-General v De Keyser's Royal Hotel*, [1920] AC 508 at 542 (Lord Atkinson), 576, 579 (Lord Parmoor), [1920] UKHL 1.

¹⁴⁹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 53–54; Jack & Reid, *supra* note 87 at 11–15, 32.

¹⁵⁰ *La Forest*, *supra* note 85 at 20; *Belfast Corporation*, *supra* note 85 at 523.

an ambiguous or implicit one. Ultimately, however, the declared will of the legislature prevails, reflecting its power to intervene in the property system where the common good is understood to require it.

The most common forms of constitutional protections for property that exist in other jurisdictions can also be understood in light of the principle of subsidiarity.¹⁵¹ A requirement that governments must pay just compensation when expropriating property provides an obvious form of security for owners, while not actually preventing public authorities from expropriating where doing so is found to be in the public interest. Indeed, the compensation requirement could be understood to fulfill a deliberative function, prompting public authorities to consider whether the public benefit from the expropriation is worth the cost to the public treasury.¹⁵² A compensation requirement could have distributive implications, ensuring that wealthy property owners are compensated for acts of expropriation. However, compensation requirements for expropriation still generally leave governments with a free hand in designing their taxation regimes, which could be structured in a progressive manner. Accordingly, the fact that outright expropriations must come with compensation does not significantly impair governments' ability to redistribute resources.

Procedural protections for property, and even "substantive" due process requirements, do not significantly impinge on legislative choice regarding objectives to pursue, though they do limit the means that can be adopted. In the US, the Fifth Amendment's requirement that takings must be for a "public purpose" could be understood to limit legislative objectives. However, it has so far been interpreted in a manner quite deferential to legislative determinations of the public interest.¹⁵³ Accordingly, while these forms of constitutional protection do provide some added security to owners, they do not significantly deprive the legislature of its fundamental powers to intervene in the property system in pursuit of the common good.

Subsidiarity suggests that protections against expropriation, whether they are based on the common law or a constitutional provision, should generally also apply to instances of constructive takings. A constructive taking occurs where government action, typically in the form of a regulation, is understood to be tantamount to an expropriation even though there is no formal transfer of title to the government. Where, for example, an owner has been deprived of all reasonable uses of property due to government regulations, the result is similar in relevant ways to a formal expropriation: the public authority has

¹⁵¹ US Const Amend 5.

¹⁵² Malcolm Lavoie, "Canadian Common Law and Civil Law Approaches to Constructive Takings: A Comparative Economic Perspective" (2011) 42:2 *Ottawa L Rev* 229 at 249.

¹⁵³ See *Kelo v City of New London*, *supra* note 95.

absorbed the role and function of the private owner in order to fulfill a purpose chosen by the public authority. Whatever safeguards are appropriate for a formal expropriation are typically found to apply equally to constructive takings, whether those safeguards include merely a presumptive right to compensation at common law, as in Canada, or a constitutionally guaranteed right to compensation, as in the United States.¹⁵⁴

The Supreme Court of Canada's recent decision in *Annapolis Group Inc. v. Halifax Regional Municipality* is entirely consistent with this approach. The decision affirmed the existing test for a constructive taking, requiring: 1) state acquisition of a beneficial interest in the property or flowing from it, and 2) the removal of all reasonable uses of the property by the state. However, the majority held that the "beneficial interest" requirement should be understood broadly, to mean simply an advantage.¹⁵⁵ This approach contrasts with the dissenting opinion, which would have understood beneficial interest to mean a proprietary interest.¹⁵⁶ The majority's broader view of the scope of compensation reflects the idea that from the point of view of an owner whose interest has been subsumed by state regulation, the specific conceptual nature of the benefit accruing to the state is not morally relevant. Whether the state receives a proprietary interest or some other kind of advantage, the effective result is the same: the owner has been fundamentally deprived of her interest in the pursuit of a state objective. In other words, the functions of the owner have been absorbed for purposes determined by the state, bringing the case within the ambit of the same principles that justify compensation for a formal expropriation.

CONCLUSION

In this article, I have argued that the concept of subsidiarity can contribute to an understanding of the basic structure of property law that is grounded in the pluralistic sources of human flourishing and that respects the social embeddedness of owners. Subsidiarity provides a compelling account of both the presumptive authority of owners and the power of public authorities to limit that authority based on an exercise of political judgment. Accordingly, a subsidiarity-based account of property fits the broad contours of existing property systems, shedding light on the essential features of the concept of property, public access rights to private property, the place of property-based community governance, and the proper scope of legal protections for property rights. As I have argued, an understanding of the relationship

¹⁵⁴ *Annapolis*, *supra* note 81 at para 21; *Lucas v South Carolina Coastal Council*, 505 U.S. 1003 (1992).

¹⁵⁵ *Annapolis*, *supra* note 81 at para 25.

¹⁵⁶ *Ibid* at para 85.

between property and subsidiarity has the potential to bridge the divide between accounts of property that emphasize owner authority and those that emphasize social obligations. Key to these insights is the distinction between private law and public law, a fundamental conceptual feature of existing legal systems and one that subsidiarity suggests new ways of understanding.