

Colonies of the Twenty-First Century:

An Essay on Property Rhetoric and Natural Resource Ownership

By Jill M. Fraley

Legal property is a broad, abstract concept, with limitless practical and theoretical definitions encompassing everything from family farms to long-term leaseholds, individual freedoms to a favorite red sweater, song lyrics to life estates, complex condominium arrangements to corporate holdings. The political rhetoric of property, on the other hand, speaks simply: “[I]n general political rhetoric these very different sources promiscuously intermingle, tending to converge however sloppily in the modal form of property as absolute individual right.”¹ To speak of property then is to speak of individual control—both unlimited and limited in scope, unbounded but only within rigidly defined boundaries. The political rhetoric and imaging of property is powerful. Joseph Singer, in one of his persuasive examinations of property rights, has illuminated the power of this rhetoric, explaining that the rhetoric “exerts substantial determinative force in adjudicating and developing the rules of property law.”²

This essay examines how the political rhetoric of property has shaped, in sometimes surprising and inconsistent ways, our understandings of natural resource ownership and appropriate taxation of the mining industry. By comparing other systems of natural resource ownership within established democracies, this essay endeavors to demonstrate how our limited rhetoric has unreasonably predestined our options. By discussing the socially and physically destructive example of mountain top removal mining in Appalachia, I draw attention to how the powerful rhetoric of individual, absolute ownership insulates mining companies from taking on any real share of the social costs. Drawing on the work of Bentham, Waldron, Radin and others, I argue that Appalachia, due to the developing on a strong regional identity—one often now recognized as an ethnicity—offers an excellent entre into meditations on the fairness of existing taxation schemes, which have drawn so strongly on the political rhetoric of property.

¹ Robert Gordon, *Paradoxical Property*, in *Early Modern Conceptions of Property* 95, 95 (John Brewer and Susan Staves eds. 1995).

² Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in *Property and Values: Alternatives to Public and Private Ownership* 3, 3 (Charles Geisler & Gail Daneker eds., 2000).

I. The Political Rhetoric of Property

Property rhetoric has, despite centuries of opportunities for proliferating iterations, adopted the pattern of a stone cast into water. Ripples follow upon ripples, yet the shape of the form remains unchanged, being only repetitions centered on a single event. For all the iterations, “[t]he image underlying ownership is absolute power of the owners within rigidly defined spatial boundaries.”³ The image emerges at the point of a triadic understanding: 1) a single, individual and identifiable owner, 2) absolute and unshared control of the given region/object, and 3) a known and non-porous set of boundaries. The image produces then, only two possible understandings of ownership: public and private. The public-private dichotomy of land ownership is as pervasive as the image from which it is derived. As Charles Geisler observed, “It is rare a map of the United States that does not perpetuate the illusion that the continent is divided into two categories of land ownership, public and private.”⁴

This modal image and the accompanying rhetoric have been soundly criticized. Numerous thinkers have explained how the image sorely fails to accurately describe the property regime of either our present or our past.⁵ Singer has explained how the public-private property dichotomy—itsself a result of the modal rhetoric—fails to consider the many hybridities of ownership.⁶ Singer employs the example of recent statutes requiring corporate property owners to consider not just the shareholders (“owners” of the property) in decision-making, but also other stakeholders, including employees and even communities themselves.⁷ Singer’s example deeply violates the integrity of the political image of property with no individual owner, but rather diffuse shareholders; no absolute power in the owners, but rather power divided across a number of different groups; and even boundaries that are more imaginary than rigid since the real claims are on the continued operation of the company more than a particular factory or industrial lot. Absolute control over property, in particular, is more myth than reality. Property rights of the land owner are frequently limited in numerous ways based either specific interests of the public, or more generally limited based on ideas of the common good.⁸ Singer offers the example of public accommodations laws, which limit the absolute power of property owners by requiring the owners to the public at large and preventing exclusions of customers based on our

³ Joseph William Singer, Property and Social Relations: From Title to Entitlement, in Property and Values: Alternatives to Public and Private Ownership 3, 4 (Charles Geisler & Gail Daneker eds., 2000).

⁴ Charles Geisler, Property and Pluralism, in Property and Values: Alternatives to Public and Private Ownership 65, 65 (Charles Geisler & Gail Daneker eds., 2000).

⁵ On the practical front, many non-academic members of the community are agreeing that the modal model and consequent division into public and private is not accurate or helpful in determining our propertied future. See, e.g., Charles Geisler, Introduction, in Property and Values: Alternatives to Public and Private Ownership xiii, xiii (Charles Geisler & Gail Daneker eds., 2000).

⁶ For a discussion of criticisms, see Joseph William Singer, Property and Social Relations: From Title to Entitlement, in Property and Values: Alternatives to Public and Private Ownership 3, 4-5 (Charles Geisler & Gail Daneker eds., 2000).

⁷ Joseph William Singer, Property and Social Relations: From Title to Entitlement, in Property and Values: Alternatives to Public and Private Ownership 3, 5 (Charles Geisler & Gail Daneker eds., 2000).

⁸ Joseph William Singer, Property and Social Relations: From Title to Entitlement, in Property and Values: Alternatives to Public and Private Ownership 3, 6 (Charles Geisler & Gail Daneker eds., 2000).

protected classes.⁹ Particularly in the case of corporate businesses, it is not at all difficult to imagine the many ways that the image of absolute, single ownership of boundaries is inaccurate.

With these examples providing insights, however, consider even a simple example of home ownership. Hypothetically, Maria Davis buys a house in Winchester. Being a young lawyer at a large firm, she has saved \$35,000 for a down payment. Maria's lovely little cottage costs \$165,000. Maria takes out a mortgage to pay for the house. The mortgage company has an ownership interest in the property until Maria pays off the mortgage. Yet, there are even other limits to Maria's absolute control of her property. Maria does not live in a sub-division or planned development, but she does live within the town lines. She is subject to regulations. For example, she cannot allow the grass in her lawn exceed six inches in height. (When she goes on vacation to Europe and forgets this she is fined \$65.00.) When the economic crunch hits and Maria's law firm begins cutting associates, she decides to limit her monthly expenses. She decides to get a roommate. It turns out that she is unable to rent a room out in Winchester without purchasing a business license from the town. When she does rent out the room, she is limited by the non-discriminatory housing regulations. So much for absolute control of even a small house, owned in fee simple by a single owner.

Nor is Maria's example only an illustration of modern limits on an owner's absolute control over property. Notably, complex property relationships and full ranges of hybrids falling between public and private emerged many centuries ago; hence, it is not that the modal rhetoric *became* inaccurate, but rather that it *never was* accurate.¹⁰ At a conceptual level, our ideas of land ownership are "muddy and impure."¹¹ As a result, our historical property arrangements are filled with examples of intermeshing public and private ownership interests.¹² Indeed, even the term "property," as Laura Underkuffler has argued, historically included broad and multiple interpretations of different ideas of ownership, including associations with individual rights.¹³

The complexity of our actual property arrangements has led Singer to conclude that "These models are not merely variants on the basic title or full ownership theory. Many of them are such departures from the basic model of a single owner with consolidated rights that use of that *basic model is essentially misleading as a conceptual baseline* from which to understand and critically analyze legal rules regarding that form of social relationship."¹⁴ While agreeing with Singer regarding the conceptual failings of the model, I suggest that the model is a source of other significant problems as well due to the powerful political rhetoric of property—a rhetoric able to limit our political and legal imaginations as we deal with evolving issues such as climate change

⁹ *Id.*

¹⁰ At the same time, there are many examples of how blends of the public and private are increasing within our modern property arrangements. See, e.g., Charles Geisler, Introduction, in *Property and Values: Alternatives to Public and Private Ownership* xiii, xiv (Charles Geisler & Gail Daneker eds., 2000).

¹¹ Charles Geisler, *Property and Pluralism*, in *Property and Values: Alternatives to Public and Private Ownership* 65, 65 (Charles Geisler & Gail Daneker eds., 2000).

¹² For a discussion of some of those examples of past and present public-private hybrids, see Charles Geisler, *Property and Pluralism*, in *Property and Values: Alternatives to Public and Private Ownership* 65, 69- 71 (Charles Geisler & Gail Daneker eds., 2000); Henry George, *Progress and Poverty* 368-369 (1929).

¹³ Laura S. Underkuffler, *On Property: An Essay*, 100 *Yale L.J.* 127 (1990).

¹⁴ Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in *Property and Values: Alternatives to Public and Private Ownership* 3, 9 (Charles Geisler & Gail Daneker eds., 2000)(emphasis added).

and new mining techniques, and one, specifically, which has skewed our perception of natural resources and their appropriate taxation.

Property rhetoric is filled with powerful, traditional images that have solidified in the public consciousness.¹⁵ As Blackstone said, “There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.”¹⁶ Our ideology tends to “convey an image of property as a source of security whose sacredness acts as a barrier even to the power of the state.”¹⁷ As Henry George explained, the rhetoric of private property as an institution in particular, has been merged with the idea of civilization itself.¹⁸ To understand the power of this rhetoric, we must first acknowledge that there is little truth to the old school yard taunt, “Sticks and Stones may break my bones, but words will never hurt me.” Property, as an abstract concept, relies heavily on words to generate what we understand as the “sticks” in our metaphorical bundle of rights.¹⁹ Rhetorical devices, particularly through metaphors and images, are central to our human ability to convey meaning—and thereby to organize power and manipulate social relationships surrounding property.²⁰ As Carol Rose writes in *Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership*, “metaphors can change minds.”²¹ And in the context of property, history overflows with examples of how language itself has been implicated in the process of colonization.²²

The power of property rhetoric is more than sufficient to cause problems in our political decision-making, particularly when the rhetorical model is not accurate to the realities of either our concepts or our practices. Jeremy Waldron has illustrated the political power of property rhetoric in his essay on the moral resilience of property.²³ As Waldron explains, property is so morally resilient as an institution, that even when the institution itself has been discredited, it will continue to have moral force with the public.²⁴ Thus, in an example Waldron gives, even if the existing property regime is deemed unjust, the public will still largely find that a person has committed theft when he took the property defined under the regime.²⁵ In seeking to understand this normative resilience of property, Waldron concludes that “there seems to be something particular about property that lends it extra resilience in a way that is not associated with all legal institutions or all the normative judgments that they generate.”²⁶ The rhetoric of property appears to be somewhat uniquely endowed with psychological ramifications—many of which are associated with the modal idea of private, absolute ownership by the single owner.

¹⁵ See, e.g., Joseph William Singer, Property and Social Relations: From Title to Entitlement, in *Property and Values: Alternatives to Public and Private Ownership* 3, 5 (Charles Geisler & Gail Daneker eds., 2000); Laura S. Underkuffler, On Property: An Essay, 100 Yale L.J. 127 (1990).

¹⁶ 2 W. Blackstone, Commentaries at 2.

¹⁷ Jennifer Nedelsky, Law, Boundaries, and

¹⁸ Henry George, Progress and Poverty 368 (Shalkenbach Foundation 1929) (1878).

¹⁹ For an argument generally on the power of language in property, see Mark A. Clawson, Prescription Adrift in a Sea of Servitudes: Postmodernism and the Lost Grant, 43 Duke L.J. 845, 846 (1994).

²⁰ Trevor J. Barnes & James S. Duncan, Writing Worlds in Writing Worlds: Discourse, Text and Metaphor in the Representation of Landscape 3 (Trevor J. Barnes & James S. Duncan, eds. 1992).

²¹ Carol M. Rose, Property & Persuasion: Essays on the History, Theory and Rhetoric of Ownership 6 (1994).

²² See, e.g., Paul Carter, *The Road to Botany Bay* (1989).

²³ Jeremy Waldron, Property, Honesty, and Normative Resilience, in *New Essays in the Legal and Political Theory of Property* 10, 10 (Stephen R. Munzer, ed. 2001).

²⁴ *Id.* at 12-13.

²⁵ *Id.*

²⁶ *Id.* at 21.

Drawing on the understandings of both Jeremy Waldron and Carol Rose of the psychological power of property rhetoric—and particularly as carried over into the political—I suggest that the modal rhetoric of property has unreasonably influenced our public decision making. In particular, I offer the case of the destructive removal of natural resources by corporations, with only very limited taxation on those minerals—even when they are drawn from public lands.

II. Natural Resource Ownership in America & the Provoking Example of Appalachia

In American culture, a sudden abundance is referred to as “striking it rich.” The phrase harkens to the discovery of natural resource wealth that may be hidden under the land—from the man who draws back his pick and strikes to reveal a vein of gold in the rock to Jed Clampett of the “Beverly Hillbillies” firing his shotgun into the ground and allowing the oil to rush to the surface. Rather than being offended by these images of random luck resulting in millions for a single person—deserving or not—we adopt them as a part of the American life. Drawing on our ideas of absolute control over a property—and extending them to whatever happens to lie under it—we accept this vision of natural resource possession. The vision is, of course, wildly tolerant of allowing Luck a central role in the social division of property.

Simultaneously, we remain unhappy with the outcomes. The gods do not seem to allow luck to settle matters in ways that satisfy our sense of fairness and just deserts. We struggle to adjust the consequences, to create social safety nets, to develop the institutions of the welfare state, to protect the old, the sick, the young, those we think never had a “fair go” at life. Most people are willing to allow others to suffer the consequences of their own bad decisions (drugs, alcoholism), but we make at least some effort to fight the consequences of how luck sharply expands and contracts the choices someone has in life (by being born Paris Hilton or the child of drug addicts).²⁷ Yet, we rarely stop to ask ourselves if our form of capitalism—vesting natural resource wealth in the private property owner—makes Luck a fickle, old world god (hence the capitalization).

But occasionally, we are given an impetus to re-examine—an example of how our system has divided wealth in ways that seem so blatantly unfair that it would be reasonable to spend time re-examining. Currently, one of those opportunities is presented by Appalachia. Appalachia remains desperately impoverished, yet continues to supply an enormous part of the nation’s energy through coal, while simultaneously being rapidly destroyed by Mountain Top Removal mining practices.

Appalachia has been so consistently impoverished despite the extraction of enormous natural resource reserves that it has been described as an “internal colony” of the United States.²⁸ Helen

²⁷ Daniel Markovitz, *How Much Redistribution Should There Be?*, 112 *Yale L. J.* 2291, 2294 (2003) (arguing that egalitarians implicitly accept the goal as ‘eliminating luck’s differential effects on persons’ futures while leaving persons fully to bear the consequences of their (morally responsible) choices’).

²⁸ Helen Lewis, “Fatalism or the Coal Industry? Contrasting Views of the Appalachian Problems,” *Mountain Life and Work* 46 (December 1970) 4-15.

Lewis developed this model, relying on Immanuel Wallerstein,²⁹ in an attempt to explain why Appalachia's economy does not experience poverty relief, change or development. Lewis ultimately concluded that poverty relief was not working in Appalachia because the region remained trapped in a colonial-style economy, serving the country as a whole while suffering the costs of natural resource extraction locally. Wallerstein's theory of racialization and subordination of a "conquered" colonial population³⁰ may also be applied in some respects to Appalachia—which has suffered a striking increase in negative stereotypes³¹ that have mirrored the increased production in resources to feed the majority population's energy needs. When applied to Appalachia, Wallerstein's theories mesh well with David Robertson's study of how mining has created a stigma for local regions. According to Robertson, local mining regions suffer not only poverty and environmental degradation, but also are "burdened by misperception."³²

The colonial economy model may or may not be the best understanding of the Appalachian economy as a whole—and indeed a number of prominent Appalachian scholars have specifically rejected the colonial economy model as the best complete explanation.³³ But setting aside the question of whether a colonial economy model is a fully accurate picture of economics in the Appalachian Mountains, the argument still raises fascinating questions. Why have there been generations of persistent poverty while families live on top of and within arguably the greatest natural resource treasure in America? Appalachia has coal, oil, timber, and natural gas. Barbara Kingsolver, scientist and noted author, a Kentucky native, also argues that the mountains contain the greatest bio-diversity in North America. But these natural resources are almost completely claimed by persons who have never set foot in the mountains—specifically in the hands of corporations known for burning down court houses and forging deeds throughout the mining boom era and into the mid-twentieth century.³⁴ Some counties are owned as much as 90% by outsiders.³⁵

²⁹ See Immanuel Wallerstein, *The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis*, in *Introduction to the Sociology of Developing Societies* 29 (Hamza Alavi & Teodor Shanin eds., 1982).

³⁰ Immanuel Wallerstein, *Culture as the Ideological Battleground of the Modern World-System*, in *Global Culture, Nationalism, Globalization and Modernity*, 31-55 (Mike Featherstone ed., 1990).

³¹ Anthony Harkins. *Hillbilly: The Cultural History of an American Icon* (2004).

³² David Robertson, *Hard as the Rock Itself: Place and Identity in the American Mining Town* 1-2 (2006).

³³ Dwight B. Billings, Katherine Blee, *The Road to Poverty: The Making of Wealth and Hardship in Appalachia* (2000). In *The Road to Poverty*, Dwight Billings and Katherine Blee provide a case study of one of the poorest communities in Appalachia, a remote Kentucky county. Billings and Blee examine records from the 1850s forward and conclude that the colonial economy model does not sufficiently address other influences on the local economy, primarily the continuing patriarchal structure, actions of state and local agencies in development and the prevalence of agriculture as a way of life. While Billings and Blee make a number of significant points about the complexity of factors that influence continuing poverty in Appalachia, their repudiation of the colonial economy model is not satisfying in this reader's eyes.

³⁴ Mining industry, "Iied to farmers, burned out those who refused to sign, forged Xs on deeds wholesale, claiming extensive mountain illiteracy. Or courthouses burned down mysteriously, and a new deed showed up a few months later proving new ownership. Or men were jailed on trumped up charges and ordered to put up their mineral rights as bond." A short list of illegal practices, discussed in more detail in *Back Talk from Appalachia* (Dwight B. Billings, Gurney Norman & Katherine Ledford, eds. 1999).

³⁵ Appalachian Land Ownership Task, Force. *Who owns Appalachia? : Landownership and its Impact* (1983).

According to statistics from the U.S. Bureau of Economic Analysis, Floyd County, Kentucky produced \$90 million in coal during 2003. In Floyd County during that year the median income for a household was \$25,600 and the poverty rate was 24.1%.³⁶ This was more than double the national poverty rate of 12.5% for 2003.³⁷ It's strangely difficult to get solid numbers on how much money is derived from the sale of Appalachian coal. In 2003 Appalachia produced 376,775,000 short tons of coal.³⁸ Prices, depending on whether or not the sale was directly to an end user, vary from \$26 to \$60.³⁹ That yields somewhere between \$9.7 Billion and \$22.6 Billion in 2003 for coal production from the Appalachian region. And the market is expanding. Massey Energy Co, the largest single operator in the region has just announced a planned expansion of 25% capacity by 2010; for the foreseeable future Massey intends to open a new mine in Appalachia every 17 days.⁴⁰ Additionally, in line with the demand, the benchmark grade of coal, marked by Appalachian coal has jumped from \$40 per ton in 2007 to \$90 per ton by April 2008.⁴¹ Thus, Appalachian production already valued at nearly \$23 Billion will double this year alone—with further increases expected within the next decade. The substantial growth of the market is almost assured in light of limited availability of secure access to oil as an energy source and the political endorsement of “clean coal” as America’s new energy source. But, let’s not forget in all this talk about riches that our real topic here is poverty.

Shortly after the chartering of the Tennessee Valley Authority by Congress and President Roosevelt on May 18, 1933, the first chairman of the TVA, Arthur E. Morgan gave a series of lectures about the conditions in the region and the plans of the TVA. In these lectures, which became a series of publications in social science journals, Morgan described Appalachia as “an exploited community.”⁴² He described the problem of a colonial economy, specifically, that “coal has been largely a matter of something to ship out of the country, leaving no production behind.”⁴³ He cited the problems of external land ownership, saying “That country [the Tennessee Valley Region, which significantly overlaps with Appalachia], has been owned to a considerable extent in large units, especially the raw materials, the timber, and the mines. It has been looked upon not as a country to be built but a country to be exploited.”⁴⁴ Additionally, the mineral wealth of Appalachia was being removed using local workers who faced dangerous jobs for inhuman wages, and without payments to the local community for the mineral wealth extracted from the land. Coal was “shipped out with very little margin to the person who did the work.”⁴⁵ Morgan summed it up succinctly; the real problem for Appalachia was that “[t]he region exports money.”⁴⁶

³⁶ U.S. Bureau of Economic Analysis, <http://www.bea.gov>. last checked May 2, 2008.

³⁷ http://www.census.gov/Press-Release/www/releases/archives/income_wealth/002484.html. U.S. Census.

³⁸ Energy Information Administration, Office of Energy Statistics, U.S. Government. http://www.eia.doe.gov/cneaf/coal/page/coal_production_review.pdf.

³⁹ Id. See also <http://www.eia.doe.gov/cneaf/coal/page/acr/table34.html>.

⁴⁰ Kentucky.com magazine, <http://www.kentucky.com/347/index.xml>.

⁴¹ Kentucky.com Magazine, <http://www.kentucky.com/347/index.xml>.

⁴² Arthur E. Morgan, Purposes and Methods of the Tennessee Valley Authority, *Annals of the American Academy of Political and Social Science*, Mar. 1934 at 53 [Hereinafter Purposes and Methods].

⁴³ Morgan, *supra* note 40, at 53.

⁴⁴ *Id.* at 53.

⁴⁵ *Id.* at 53.

⁴⁶ *Id.* at 53.

Morgan responded to the crises he saw by concluding that, “We are taking the position that unless there is some necessary element of service rendered, foreign ownership is destructive to a community and its elimination is a sound element in social and economic planning.”⁴⁷ Early policy thought in the TVA was far more progressive than one might have imagined. Morgan was willing to consider changes to our understanding of the property system to support the community good. He argued, “Finally the laws of land ownership should be changed so that men shall not be allowed to own and occupy land unless they will manage it in the interest of a permanent agriculture. Such a legal change would constitute one element of a social revolution.”⁴⁸ Unfortunately, Morgan was unable to wrangle the political power necessary to make such changes. Still, Morgan’s words, particularly as head of a major federal agency, are telling as we consider our existing property schemes.

In a more modern counterpart to Morgan’s comments, Al Smith, Federal Co-Chairman of the Appalachian Regional Commission published this letter in the New York Times:

This clarification is important because the public should know: (1) how little ‘special help’ actually has been made available to Appalachia and (2) what a relatively small share of all Federal spending this area traditionally receives. Federal records show that in 1965 Federal per capita expenditures in Appalachia were only 60 percent of those for the rest of the U.S. Today, Appalachia’s share is still below 80 percent. This, in my opinion, is shortsighted treatment for a region that produces nearly 60 percent of the nation’s coal, often at heavy cost to human and environmental resources.⁴⁹

Like Morgan, Smith was frustrated by the sacrifices of Appalachia for the nation.

Morgan’s words remind us that whether or not the colonial economy model explains poverty in Appalachia completely, or describes the economy in full, the model does offer some notable comparisons. In a number of ways, Appalachia does resemble a colonial economy: The local land and natural resources are claimed entirely by a non-resident population, generally located some distance away. The primary “business” of the region is the export of raw materials: coal, oil, natural gas, and timber. Products are almost completely raw exports—there is no local development or industrialization that produces finished goods. Moreover, there is a history of exploitation of the local population for labor. Appalachia has a long history of suffering negligent mining practices yielding black lung disease and collapses of mine tunnels, not to mention company towns and deeply unsettling wars between organizing miners and coal company officers over such topics as labor unions, sanitary working and living conditions, health and injury benefits and living wages.

With such a strong comparison to the many horrors of colonial practices, it is difficult to associate the markers of justice and fairness with this property regime. I suggest that one of the reasons we have been willing to accept this situation is because of the strength of our absolute

⁴⁷ *Id.* at 53.

⁴⁸ Arthur E. Morgan, *The Tennessee Valley Authority*, *The Scientific Monthly*, Jan. 1934 at 69.

⁴⁹ Letter to the Editor by Al Smith, Federal Co-Chairman of Appalachian Regional Commission. Oct 15, 1981. *New York Times* Page 26, A.

ownership model in the public consciousness. Because we have idealized absolute ownership and control over property, we have been unwilling to examine closely the fairness of the resulting distributions of wealth from natural resources.

III. Worst Case Scenarios, or China Buys Australia

One way to engage questions of justice surrounding natural resource distribution and property regimes is to consider how well those regimes “sit with us” morally in an extreme situation. Let’s return to our friend, Maria Davis, who has just bought her lovely circa 1800’s cottage, sitting on two acres at the edge of Winchester city limits. Imagine with me that Maria is babysitting her sister’s two most-horrible felines while the sister is on her honeymoon. One of the cats, naturally, chooses to climb through a cabinet passage surrounding an old chimney and promptly disappear somewhere in the cellar, which appears to pre-date the house by even a century or two. While searching desperately in cracks and corners for “that damned cat,” Maria falls into an old well shaft and lands in a scene from the film *National Treasure*—she is surrounded by two acres worth of the missing history, jewels, and so forth, of the world. Luck have it, the two acres happen to map precisely to Maria’s property boundaries. Imagining not just money, but thousands of cultural treasures akin to the Rosetta Stone, is the treasure all Maria’s to hoard? I suggest that this hypothetical is unsettling to our public sense of absolute property ownership—that we are unlikely to allow Maria to keep the National Treasure, and more likely to begin various sorts of legal wriggling where we claim that those treasures somehow still belong to the governments of their countries of origin, etc., etc. The reality is that we are uncomfortable that this is not a *public* treasure.⁵⁰

Luckily for my purposes, a real life scenario has recently emerged, presenting some public misgivings on the subject of absolute private ownership. The example comes from Australia, where the extraction of natural resources is a major industry. In particular, coal is Australia’s largest commodity export.⁵¹ For the 2006-2007 fiscal year coal exports were valued at \$22.5 billion Australian dollars (which is nearly the same in U.S. dollars with the current exchange rate of nearly .90 to 1.0).⁵² This value was slightly down from the previous year’s \$24.5 billion figure.⁵³ At \$22.5 billion, coal makes up 19% of Australia’s annual exports of commodities.⁵⁴ Indeed, these figures put Australia at the top of the list of coal exporters in the world—from 2003 forward Australia has been the world’s number one exporter of coal.⁵⁵ Australia alone holds

⁵⁰ In the film *National Treasure*, the discoverers of the treasure only keep a small revenue percentage for themselves (1%), which does not feel unsettling. But notably, those discoverers of treasure, unlike Maria, had dedicated substantial life’s work and study to finding the lost treasure—in Lockean terms, they had mixed their labor with the property, and perhaps alleviated our concerns for justice (at least in 1%).

⁵¹ Australian Coal Association. Visited <http://www.australiancoal.com.au/exports.htm> on April 27, 2008.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ IEA Key World Energy Statistics - 2004 and 2005 editions.

60% of the total trade of the world's market in metallurgical coal.⁵⁶ The vast majority of these coal exports will go to Asian countries, with Japan topping the list.⁵⁷ China falls fifth in the list of coal purchasers, but China's greater interest in Australia's natural resources is in iron ore, not coal.

Australia's export market, while dominated by coal, is certainly not limited to its coal reserves. Notably, however, Australia's exports are overwhelmingly raw natural resources. The top five export commodities for Australia are, in order of importance: coal, oil, iron ore, gold and alumina.⁵⁸ These top five exports of raw natural resources generated approximately \$64 billion Australian dollars in 2005.⁵⁹ For the 2004-2005 year, these top five exports composed approximately half of Australia's entire commodity export.⁶⁰ In a very significant way, Australia depends on natural resources for its current economic climate.

Around 2007-2008, China began, through state enterprise corporations, to make a serious bid to acquire interests in the major companies which possess substantial natural resources deposits in Australia. The Australian government, whose approval would be required, immediately began stalling. No one was excited to sell Australia's natural resources to China when it came to selling the actual legal interests as opposed to the extracted product.

One reason may be that Australia would be losing natural resources to an outside government for prices potentially set *by* that outside government. If China can purchase a corporation with rights to natural resource deposits in Australia, then in effect, China can buy Australia. The situation suggests a new tint of colonial enterprises. If China claims property rights to natural resources in Australia, uses local labor to extract the minerals, and then provides those resources virtually solely to itself with no substantial money coming into Australia, the situation begins to sound quite colonial.

While there are reasons for concern over China's purchase interests, there are also reasons to believe that Australia's situation is different from the colonial Appalachia situation in the United States. While this situation might well be disastrous in America, it may be feasible in Australia because Australia has a different approach to property rights to natural resource reserves. Australia understands the ownership of subsoil natural resources to vest with the sovereign.⁶¹ The sovereign then may choose to grant mining or exploratory licenses to individuals or corporations. The basic idea is that while the state owns the natural resources, it is not economically efficient for the state to remove the resources and therefore the state may choose to license private parties to carry out this project, exacting a fee for the licensing procedures which accounts for the state's ownership of the materials. Ironically, the origin of the Australian rule is found within a common law approach to the process of colonization itself, which held that the ownership of natural resources below ground vested in the crown.⁶²

⁵⁶ Australian Coal Association. Visited <http://www.australiancoal.com.au/exports.htm>

⁵⁷ Australian Coal Association. Visited <http://www.australiancoal.com.au/exports.htm>

⁵⁸ Australian Coal Association. Visited <http://www.australiancoal.com.au/exports.htm>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ McRae, *Aboriginal Legal Issues* (1991).

⁶² See B.A. Keon-Cohen, *Aboriginal Land Rights in Australia: Beyond the Legislative Limits?*, in *Legislation and Society in Australia* 382, 385 (Roman Tomasic ed. 1979).

Additionally, unlike Appalachians who lack a substantial method of controlling the land they live upon, Australia is slowly developing a stronger native land claim mechanism, which can limit mining, even by a company owned by China. But first, a bit of history of Aboriginal land claims in Australia is necessary in order to make this point. Aboriginals first sought control over native lands (and mining activities upon them) in *Milirrpum v. Nabalco Party Ltd.*, decided in 1970.⁶³ The court held that no title existed under common law. The implication of *Milirrpum* then was that any aboriginal rights to land would have to be granted by statutory law created in the Commonwealth. Fortunately, shortly thereafter the Woodward Commission Report was created, advocating for title to be re-vested in Aboriginals through a system of land trusts and councils. While the Report sought increased control of native lands by Aboriginals, the Report did not advocate giving Aboriginals control over mining. Rather, the Report proposed a consultation process, stating that Aboriginals should have a veto power over mining in only extraordinary circumstances.⁶⁴ The first such statutory scheme was created shortly thereafter, allowing Aboriginal groups to negotiate in a consultation and participation procedure before mining companies were permitted to mine upon ancestral lands.⁶⁵ This scheme is the Aboriginal Land Rights Act of 1976. A brief description of the act follows here:

The purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976* were to grant traditional Aboriginal land to Aboriginal people in the Northern Territory; to recognize traditional Aboriginal interests in, and relationships to land; and to provide Aboriginal people with effective control over activities on their land. The ALRA establishes Land Councils to operate as representative bodies. They are made up of elected Aboriginal people. There are currently 4 Land Councils in the Northern Territory. The Land Councils determine policy and assist Aboriginal people in claiming and managing their land, in protecting sacred sites and in the management of income received under the ALRA.⁶⁶

Because these rights were statutory creations, not a part of the common law, and due to the strong sense of federalism in Australia, which gave local state control over natural resources, it remained up to the individual states to determine Aboriginal land rights. Thus, consultation procedures and land rights for Aboriginals vary from state to state. Additionally, sites designated as parks or heritage sites may receive additional protections, which again vary within the Commonwealth.⁶⁷

However, Australian states are now substantially limited in their ability to be creatively stingy in their statutory schemes to cover native lands and mining. In 1992 the High Court decided *Mabo*

⁶³ *Milirrpum v. Nabalco Party Ltd.*, 17 F.L.R. 141 (1970).

⁶⁴ See B.A. Keon-Cohen, *Aboriginal Land Rights in Australia: Beyond the Legislative Limits?*, in *Legislation and Society in Australia* 382, 392 (Roman Tomasic ed. 1979).

⁶⁵ See, e.g., *Aboriginal Land Rights (Northern Territory) Act (1976)*.

⁶⁶ Anne Perroult, Kirk Herbertson, Owen J. Lynch, "Partnerships for Success in Protected Areas: The Public Interest and Local Community and Rights to Prior Informed Consent (PIC)," 19 *Geo. Int'l Envtl. L. rev.* 475, 538-39 (2007).

⁶⁷ See Ben Boer & Graeme Wiffen, *Heritage Law in Australia* 63-89 (2006).

v. State of Queensland, which held invalid the *terra nullis* theory of claiming “unused” native lands through colonization and settlement.⁶⁸ The famous *Mabo* decision recognized a way for Aboriginals to claim native title. Notably, the *Mabo* decision cited international obligations and tied Australia’s granting of native title rights to its obligations to its indigenous people as enforced by the international community. The *Mabo* decision has resulted in the Native Title Act of 1993, creating a statutory framework for native title rights and claims to different categories of land. The system of negotiation regarding mineral rights remains in place. While the system isn’t perfect to be sure, when compared with Appalachians and Native Americans who have no control on mining in the lands surrounding them in the Appalachian Mountains, the Australian system is positively progressive.

Finally, while China’s purchase has some strangely colonial undertones, there is evidence of local compensation that may be sufficient. As one writer recently put it “the tremendous amount of money currently brought to Australia by mining companies cannot be underrepresented, whether through jobs, taxes, or other means.”⁶⁹ Wages are extremely high with mining attracting persons from other job sectors. Unionization is strong, protecting wages and benefits. 86.5% of mines in Australia are closed shop unionized.⁷⁰ Moreover, through the government’s operation of a theory of sovereign possession of natural resources, community income can be managed through tax and licensing schemes. Indeed, the capacity to do so is limited only the market tolerance (for a smaller profit range for the corporations), and specifically not by constitutional-style property rights objections to levies.

When a comparison is made, both Appalachia and Australia have economies overloaded with the extraction industries—the removal of raw natural resources without substantial improvement upon them. Both economies are principally export economies, using only a limited portion of the natural resources for their own internal use, while the remainder goes to sustain an outside population’s level of development and energy needs. For Australia this means substantial exports to Asia, particularly Japan for Coal and China for iron ore. For Appalachia, the model is one of “internal colonization” with resources going to the remainder of the United States. Both economies are substantially dependent upon the sale of raw goods to sustain economic viability—particularly in certain regions of Appalachia and Western Australia.

There is, however, a remarkable difference in the two economies. While Appalachia is crippled by poverty—indeed poverty that greatly overlaps the most resource-rich areas—Australia is not. Census figures show that Australia’s poverty rate is very similar to the national rate in the United States (13% compared to 12.5%). The poverty rate in Australia does not map with natural resource-rich areas, as it does in Appalachia. Indeed, most of Australia’s mines are located away from settlements with labor forces moving to the area solely to support the mine’s on-going work. While Aboriginal communities in Australia do deal with a significant problem in poverty, there is no correlation between Aboriginal community poverty and mining development, as there is in Appalachia between indigenous and quasi-indigenous poverty and mining development.

⁶⁸ *Mabo v. State of Queensland*, 107 A.L.R. 1, 21-22 (1992).

⁶⁹ Matthew C. Miller, *An Australian Nunavut? A Comparison of Inuit and Aboriginal Rights Movements in Canada and Australia*, 12 *Emory Int’l L. Rev.* 1175, 1212 (1998).

⁷⁰ Benjamin Aaron, *Union Security in Australia and the United States*, 6 *Comp. Lab. L.* 415 (1984).

With two such similar economic patterns, and two very different results in poverty circumstances, the Australia-Appalachia comparison provides an opportunity for important insights. The primary difference between the two regions is a matter of law, or one might say, cultural philosophy. In Australia natural resources are regarded as the property of the sovereign. The property of the sovereign is, in effect, the joint property of the whole people of Australia, who as a group are entitled to their bounty and burdened with the role of protection and allocations to future generations. There is no sense of an individual entitlement to natural resources because they happen to exist beneath a particular piece of land that the person claims. There is no sense of a “lottery” or risk-heavy system in which persons purchase property with the hope of exploration to discover vast mineral wealth beneath the surface—allowing some to become suddenly rich, while a nearby neighbor runs his fingers through the valueless sand.

With natural resources vesting in the sovereign, the community, through its legal representatives, chooses the use of natural resources and allocates the funds resulting from their extraction. In Australia, corporations obtain licenses for exploration for minerals and licenses for extraction of minerals; significant royalties are charged upon the removed resources. The result is a substantial tax base that supports the Australian people as a whole—not just individual land owners or a few mining officials and heavy equipment operators. Lands with ancestral, indigenous ties are specifically protected through the Native Title Act, which allows indigenous people to claim particular areas as sacred and to otherwise negotiate benefits (jobs, educational funding, community works, etc.) from mining on or near ancestral lands.

The Australian system is a protective mechanism that prevents a few individuals or corporations from hoarding natural resources and accumulating benefits from the homeland while others nearby lack even basic sustenance, as is the case in Appalachia. The removal of natural resources inevitably affects natural ecosystems, destroys carbon-absorbing greenery, uses or pollutes fresh water supplies, and pollutes through dust and chemical releases. Indeed, history is full of the stories of extraction of natural resources rendering entire ecosystems defunct and vast areas completely uninhabitable. Australia’s own mining expeditions left Nauru 75% uninhabitable, resulting in a claim by the residents of the island against Australia in the International Court of Justice.⁷¹ Those losses fall to the community as a whole, not to individual land owners—and so should the natural wealth.

While the Australian approach is far from perfect, and remains faulty particularly in showing full respect for native title rights, Australia provides one of a number of examples of democracies which have embraced a model of property rights that distributes natural wealth to the public. (For example, Brazil and the Philippines share Australia’s model of ownership vesting in the sovereign.⁷²) Despite the prevalence of such models in other democracies, Americans have remained reluctant to engage questions about the justice of our own property system, even in considering not a change in land ownership per se, but at least a more fair system of taxation on extracted natural resources.

⁷¹ See G. F. Maggio, *Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources*, 4 *Buff. Env'tl. L.J.* 161, 194-195 (1997) citing *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, 1992 ICJ Reports 240; Order of 25 June 1993, 1993 ICJ Reports 316; Order of 13 September 1993, 1993 ICJ Reports 322.

⁷² Karen E. Bravo, “Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia,” 30 *Colum. J. L. & Soc. Probs.* 529, 584 n. 312 (1997).

IV. Opening the Door to Considering Other Mining Taxation Schemes in the U.S.

In the U.S. we have allowed our very powerful rhetoric of absolute ownership to lead us to embrace a Luck model of natural resources—despite the fact that in extreme cases we would be unlikely to support application of the rule, and despite Appalachia’s wrenching example of the injustices that result. The same rhetoric of property ownership has led us to see property in terms of the individual versus the state,⁷³ or the individual versus the collective.⁷⁴ In this imaginary scheme, “individual property rights stand as the last bastion against a meddlesome state...a perspective... that impedes social change.”⁷⁵ Such idealization of property in political rhetoric has insulated mining corporations from appropriate taxations on their natural resource holdings and on the extracted minerals. As Jeremy Bentham explained, when we believe we own the whole of something, it is very difficult psychologically to embark upon the task of convincing us to share part of it with someone else; while if we were only given our “share” to begin with, it is psychologically much easier to allow the remainder to go to other people.⁷⁶ In light of continuing poverty in areas rich in natural resources, and our unwillingness to accept our property regimes when they are considered in the difficult cases, I suggest that our taxation practices, specifically in the area of mining, have been unjust, setting taxes too low based on idealizations of absolute ownership power, and valuing the corporation’s absolute claim over the well-being of the public and the community.

A number of theorists, including the proponent of the colonial economy model of Appalachia, would argue that this is why poverty relief measures have failed in many areas of the U.S.: because we cannot deal with the question of poverty without also dealing with the question of land. Charles Geisler, noted property theorist, has argued the same, claiming that “land cannot be removed from the question of poverty.”⁷⁷ Holding no punches, Henry George, explained the connection between land and poverty:

Vice and misery, poverty and pauperism, are not the legitimate results of increase of population and industrial development; they only follow increase of population and industrial development because land is treated as private property -- they are the direct

⁷³ See Charles Geisler, Property and Pluralism, in Property and Values: Alternatives to Public and Private Ownership 65, 65 (Charles Geisler & Gail Daneker eds., 2000).

⁷⁴ Laura Underkuffler, in her article On Property: An Essay, 100 Yale L.J. 127 (1990), specifically argues against this idea of property as representing the individual versus the collective, at least in historic circumstances.

⁷⁵ D.W. Blomley, as quoted in Charles Geisler, Property and Pluralism, in Property and Values: Alternatives to Public and Private Ownership 65, 65 (Charles Geisler & Gail Daneker eds., 2000).

⁷⁶ Jeremy Bentham, "Supply Without Burthen," in Jeremy Bentham's Economic Writings, ed. W. Stark (London: George Allen and Unwin, 1952), vol. 1, p. 291. at 23.

⁷⁷ Charles Geisler, Property and Pluralism, in Property and Values: Alternatives to Public and Private Ownership 65, 65 (Charles Geisler & Gail Daneker eds., 2000).

and necessary results of the violation of the supreme law of justice, involved in giving to some men the exclusive possession of that which nature provides for all men.⁷⁸

In considering the problems of poverty, George specifically argues the instance of mining. He explains in detail a historical example in the U.S. of a more progressive vision of natural resource ownership:

[In] San Francisco... it was by common consent declared that this gold-bearing land should remain common property, of which no one might take more than he could reasonably use, or hold for a longer time than he continued to use it. This perception of natural justice was acquiesced in by the General Government and the courts [in this institution called "placer mining"], title to the land remained in the government, and no individual could acquire more than a possessory claim. The miners in each district fixed the amount of ground an individual could take and the amount of work that must be done to constitute use. If this work were not done, anyone could relocate the ground. Thus, no one was allowed to forestall or to lock up natural resources. Labor was acknowledged as the creator of wealth, was given a free field, and secured in its reward. The device would not have assured complete equality of rights under the conditions that in most countries prevail; but under the conditions that there and then existed—a sparse population, an unexplored country, and an occupation, in its nature a lottery, it secured substantial justice... One man might strike an enormously rich deposit, and others might vainly prospect for months and years, but all had an equal chance.⁷⁹

George continues on to detail a short history of placer mining rights, calling attention to similar regimes at different times in Australia, British Columbia, and South Africa.⁸⁰

One might compare with George's stories another told by Charles Geisler, also on the theme of mining:

One of numerous examples cited is American Barrick, a mining company that stated the following in its 1993 annual report: "Throughout its first decade [American Barrick] has pursued its founding goal: to create wealth for its shareholders by focusing on the gold business and restricting its operations to North America. This goal has been accomplished through entrepreneurial management, conservative financial strategies, efficient mining operations, and a clear focus on profitability." What the company's annual report did not state is that American Barrick recently acquired title to 1,949 acres of public land in Nevada at \$5 an acre where it plans to mine gold worth an estimated \$10 billion. It will pay no royalties on the mineral, it will extract the gold using a leach

⁷⁸ Henry George, *Progress and Poverty* 341 (1929).

⁷⁹ *Id.* at 386.

⁸⁰ *Id.* at 386-87.

technology pioneered by the Bureau of Mines, it will receive favorable treatment under the tax code, and it will be exempt from major environmental legislation—an indirect subsidy of considerable value.⁸¹

In response to the problematic situation raised by Geisler, one might turn back to Henry George, who has been favorably cited by Geisler.⁸² George did not favor private property schemes,⁸³ but he preferred tax-based remedies for the problem as opposed to changes in land ownership itself.⁸⁴ George’s approach centers on a deconstruction of the unspecific and unhelpful term “profits.” Rather than speaking of profits from land, George sought to specifically consider how natural resources, capital, and labor worked together to produce wealth—wealth that could be divided specifically into the three categories of rent, wages, and interest. George then focused on rent—the aspect tied to ownership or control of the land.

Rent, George explained, was “determined by the excess of its produce over that which the same application can secure from the least productive land use.”⁸⁵ He noted specifically that the concept did, in his vision, apply to natural resources, including mining operations.⁸⁶ The problem he sought to address was that “The ownership of a natural agent of production will give the power of appropriating so much of the wealth produced by the exertion of labor and capital upon it as exceeds the return which the same application of labor and capital could secure in the least productive occupation in which they freely engage.”⁸⁷ George proposed a very specific solution to address poverty: to tax and to tax solely on land values.⁸⁸ George concluded, “It is not necessary to confiscate land,” but at the same time he believed it was “necessary to confiscate rent.”⁸⁹

Drawing on George’s idea of isolating the portion of wealth created by the land itself for taxation, I suggest that George’s ideas are particularly applicable to addressing our problem of unreasonably low taxation on mining corporation—and that we might be particularly pushed towards such reforms by the example of Australian crown ownership models, which result in more significant taxation (and poverty alleviation).

⁸¹ Charles Geisler, Property and Pluralism, in *Property and Values: Alternatives to Public and Private Ownership* 65, 69 (Charles Geisler & Gail Daneker eds., 2000).

⁸² See *Property and Values: Alternatives to Public and Private Ownership* (Charles Geisler & Gail Daneker eds., 2000).

⁸³ Henry George, *Progress and Poverty* 338-339 (1929).

⁸⁴ *Id.* at 405.

⁸⁵ *Id.* at 168.

⁸⁶ *Id.* at 168.

⁸⁷ *Id.* at 169.

⁸⁸ *Id.* at 406.

⁸⁹ *Id.* at 405.

V. The Objection to Changes in Property Regimes

With property regimes—and accompanying images and rhetoric—so well-formed and powerful in the American consciousness, resistance must be expected to even slight changes in those regimes. Even Henry George, who was so convinced of the injustice of private property institutions that he compared their evils to those of “human chattels,”⁹⁰ was still unwilling to change land titles.⁹¹ George’s reasoning was specifically based on the unwillingness of society to change property arrangements, particularly in light of strong rhetorical ideals.⁹² Similarly, Jeremy Waldron examined a number of early property theorists’ understandings, concluding that there is overall strong resistance to changing existing property regimes—but at the same time noting that when the opportunities arise, we should—carefully—seize them.⁹³ In a parallel argument, Edward Price suggested that the variable at issue in preventing change may be land physically as much as “property” (more conceptually) with land as a “carrier of attitudes...a potential keeper of the social and economic milieu that went with its original granting and a conservative force as a vested interest...”⁹⁴ As Price aptly notes, the land will absorb and continue to reflect physical patterns of ownership—from fences to houses.⁹⁵ In short there are many reasons to resist changes to property possessions and titles, but at the same time this does not leave us without options for progressive changes to unjust allocations of natural resource wealth (or excuse us from the moral consequences of our existing injustices).⁹⁶ Indeed, it leaves us back with Henry George’s suggestion: taxation. As McCaffery notes, tax structures naturally fit with questions about property regime fairness because tax structures are already moral tools put in place to address questions of public/private sharing.⁹⁷ Arguing that our property systems should not—and historically were not meant to—tolerate waste by an owner, McCaffery’s ideas lend themselves to supporting taxation renovations for such enterprises as Mountain Top Removal mining in Appalachia.⁹⁸

⁹⁰ Henry George, *Progress and Poverty* 347 (1929).

⁹¹ *Id.* at 405.

⁹² *See e.g., id.* at 368.

⁹³ Jeremy Waldron, *Property, Honesty, and Normative Resilience*, in *New Essays in the Legal and Political Theory of Property* 10, 21-26 (Stephen R. Munzer, ed. 2001).

⁹⁴ Edward T. Price, *Dividing the Land: Early American Beginnings of Our Private Property Mosaic* 5 (1995).

⁹⁵ *Id.* at 3.

⁹⁶ Such injustices are large enough by many accounts to undermine democracy itself. *See, e.g.,* Samuel Bowles & Herbert Gintis, *Democracy and Capitalism: Property, Community, and the Contradictions of Modern Social Thought* (1986).

⁹⁷ Edward J. McCaffery, *Must We Have the Right to Waste?*, in *New Essays in the Legal and Political Theory of Property* 76 (Stephen R. Munzer, ed. 2001).

⁹⁸ *Id.*

VI. Overcoming the Objection in Appalachia: The Appalachians' Claim to the Mountains

While taxation, as proposed by George and McCaffery, may be a full answer to the problem of conservative tendencies facing property regime reform, there is also another answer that may be applied specifically in the case of the heart wrenching destruction that continues in Appalachia through Mountain Top Removal Mining. The argument I offer here is an ironic twist on an argument repeated often, from Bentham to Radin and Waldon. Historically, numerous thinkers have argued that one of the reasons to be conservative in re-organizing property regimes is because personal identity is often tied up in property itself.⁹⁹ For Margaret Radin, the emotional and identity ties of possession run so deep as to merge person and property, such that respect for the person demands at least caution with the property.¹⁰⁰ Bentham states the argument both strongly and eloquently:

Everything which I possess, or to which I have a title, I consider in my own mind as destined always to belong to me. I make it the basis of my expectations, and of the hopes of those dependent upon me; and I form my plan of life accordingly. Every part of my property may have, in my estimation, besides its intrinsic value, a value of affection - as an inheritance from my ancestors, as the reward of my own labor, or as the future I dependence of my children. Everything about it represents to my eye that part of myself which I have put into it - those cares, that industry, that economy which denied itself present pleasures to make provision for the future. Thus our property becomes a part of our being, and cannot be torn from us without rending us to the quick.¹⁰¹

The arguments span far beyond law and legal philosophy. Doreen Massey, noted geographer, has argued that identity is constructed of both “place” and class.¹⁰² Simon Schama has argued for the power of landscape in myth and memory, and particularly for the role of landscape in the creation of political identity.¹⁰³ Similarly, Denis Cosgrove has in a series of books and articles detailed the relationship between social identity formation and symbolic landscape, including large natural features.¹⁰⁴ Anthony Smith has argued the same in the context of national identity, particularly noting the importance of ties of a group to a land across generations,¹⁰⁵ while Wendy Joy Darby brought a specific examination of the principles to the example of England,¹⁰⁶ and Kenneth Robert Olwig added a comparative view across nationalities, aligning community with

⁹⁹ For an excellent summary of a few of these arguments, see Jeremy Waldron, *Property, Honesty, and Normative Resilience*, in *New Essays in the Legal and Political Theory of Property* 10, 10 (Stephen R. Munzer, ed. 2001).

¹⁰⁰ Margaret Jane Radin, "Property and Personhood," reprinted in her collection *Reinterpreting Property* (Chicago: University of Chicago Press, 1993), 35, 36.

¹⁰¹ Bentham, "Security and Equality of Property," at 54.

¹⁰² Doreen Massey, *Space, Place, and Gender* 137 (1994).

¹⁰³ Simon Schama, *Landscape and Memory* 15 (1995).

¹⁰⁴ Denis E. Cosgrove, *Social Formation and Symbolic Landscape* (1984).

¹⁰⁵ Anthony D. Smith, *National Identity* 5 (1991).

¹⁰⁶ Wendy Joy Darby, *Landscape and Identity: Geographies of Nation and Class in England* (2000).

landscape and political identity.¹⁰⁷ There is ample agreement across fields that the meanings and values of land are socially constructed—that even natural resources themselves are only valuable in certain contexts.

Acknowledging the important connection between person and property, between community and land, particularly in the context of a historic connection across many generations, I argue that in the case of Appalachia, rather than protecting ensconced property regimes, this should weigh in favor of reform—at least in the form of taxation of mining interests. Appalachia has developed a strong consciousness over the centuries of American history—indeed so substantially that legal changes are now supporting the development of the identity. For example, numerous institutions now recognize “Appalachian” as an ethnicity for purposes of scholarships, affirmative action, and preferential minority business status.¹⁰⁸ The first laws have been passed protecting Appalachians from discrimination outside Appalachia.¹⁰⁹ These are, of course, in response to significant documentation of discrimination against Appalachians, based on the pervasive cultural stereotypes held outside the region.¹¹⁰ Support for Appalachian ethnicity also exists on the academic side, with “many scholars believ[ing] that Appalachians are a homogenous ethnic group.”¹¹¹ In short, there is ample evidence of a strong, historical identity and one that is specifically built around not only land, but around a particular feature of the landscape—the Appalachian Mountain Range.

With Mountain Top Removal mining threatening to wipe entire sections of the range to flat moonscape, I would argue that the identity-land connection accepted by so many legal scholars as a reason to be conservative in making changes to land regimes, in fact weighs in favor of change in Appalachia—in favor of the environmental and taxation changes that are necessary to protect the Appalachian Mountain range from destruction. With nearly 320,000 acres of Kentucky strip-mined in the last thirty years, the threat isn’t idle.¹¹²

¹⁰⁷ Kenneth Robert Olwig, *Landscape, Nature and the Body Politic* (2002).

¹⁰⁸ For example, Ohio state university is categorizing Appalachians as a minority, and giving tuition discounts.. WSAZ Channel 3, Nov. 28, 2006 Special Report.

¹⁰⁹ *See, e.g.*, Cincinnati City Ordinance no 79-1991. Section 1: “The City of Cincinnati will not unlawfully discriminate against any person in any terms or conditions of employment based on classification factors such as race, color, sex, handicap, religion... Appalachian regional ancestry.

¹¹⁰ For a discussion of some of the most obvious examples of discrimination, *see* Lewis M. Killian “The Adjustment of Southern White Migrants to Northern Urban Norms” in *Social Forces* 32:66-69 (1953).

¹¹¹ Phillip J. Obermiller, *The Question of Appalachian Ethnicity*, in *The Invisible Minority* 9, 9 (William W. Philliber & Clyde B. McCoy, eds. 1981). Obermiller cites a number of scholars, including Ann Orloy, managing editor of the *Harvard Encyclopedia of American Ethnic Groups*, who he says, “never doubted that we should regard the Appalachians as an ethnic group.”

¹¹² Lucy Flood, *Appalachia Extinct*, in *Silas House, Missing Mountains: We Went to the Mountaintop But It Wasn’t There* 9, 9 (2005).

VII. Conclusion

Numerous scholars have discussed how “property” as a concept in fact represents neither a physical reality nor a legal scheme, as much as a set of social relations.¹¹³ Rarely, however, have legal scholars moved their writings into meditations on the problem of what precisely is implied by understanding property as social relations.¹¹⁴ The problem of Appalachian identity, and particularly the context of natural resource wealth combined with intractable local poverty, offers an opportunity to move deeper into the question of why it matters to understand property as social relations: In a very practical sense—the sense where there are the physicalities of both hunger and mountains standing for generations—property must be understood as an arrangement of social relations because our property laws are capable of generating a “social geometry of power.”¹¹⁵ Property divisions will mold social relationships, pitting the mining company against a community when waste runoff goes into school grounds, and generating a sense in that community of a failure of law when that company is vindicated in court. Power has distinctly spatial properties—and perhaps this is the reason why Foucault was so fascinated by geography.¹¹⁶ Power is, unavoidably, exercised by the state and by property owners in ways that are spatial—and so then the patterns of resistance and domination will also be spatial.¹¹⁷ Spatial inequalities will result, particularly in the form of poverty. And the instance of Appalachia offers us the opportunity to examine how property can be understood as a set of social relations generating a unique spatial inequality: billions of dollars of natural resources underneath people who have lived there for generations and who struggle to afford fresh fruit.

¹¹³ For a discussion of a variety of social relations approaches, *see* Stephen R. Munzer, *Property as Social Relations*, in *New Essays in the Legal and Political Theory of Property* (Stephen R. Munzer, ed. 2001).

¹¹⁴ *Id.* at 73-74.

¹¹⁵ Doreen Massey, *Space, Place, and Gender* 3 (1994).

¹¹⁶ For a discussion of Foucault’s *Geography* in detail, *see* Chris Philo, *Foucault’s Geography*, in *Thinking Space* (Mike Crang & Nigel Thrift, eds. 2001).

¹¹⁷ Joanne P. Sharp, Paul Routledge, Chris Philo & Ronan Paddison, *Entanglements of Power: Geographies of Domination/Resistance*, in *Entanglements of Power* (Joanne P. Sharp, Paul Routledge, Chris Philo & Ronan Paddison, eds. 2000).