Chapter 4: Evidence Provided by Propertarians to Support the Appropriation Hypothesis

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Chapter 3 showed how the propertarian argument to establish ethical limits on government powers to tax, regulate, and redistribute private property depends on the empirical claim(s) we call the “appropriation hypothesis”—private property develops naturally, and collective, public, or government-owned property rights do not. This chapter assesses the evidence that propertarians have put forward to support that hypothesis.

Very few propertarians discussed in the last two chapters cite any evidence at all. Most propertarians seem to believe either that the appropriation hypothesis is obviously true or that their theory somehow rules out the very possibility of the peoples’ ownership of partial or full property rights in their territory. And that very ambiguity probably helps protect the hypothesis for more serious scrutiny. If evidence points against the hypothesis, imagine the argument as a priori; if the a priori argument seems weak; imagine the necessarily empirical premises are obviously true.

Even many critics of propertarianism accept this view. Consider three examples.

First, both Michael Otsuka’s and Hillel Steiner’s “left-libertarian” reconstructions of property theory take the existing mythos as representing something real. They write as if private property rights stem from some kind of appropriation and government territorial rights derive from some kind of contract.

Second, Cara Nine uses “a collectivist Lockean theory of territorial rights,” but she assumes a dichotomy between the territorial rights held by governments and the property rights held by private entities, each of which are created by different kinds of appropriative acts. She does not consider the possibility collectives holding full property rights in their territory.

Third, Leif Wenar writes:

Suppose libertarians could prove that durable, unqualified private property rights could be created through ‘original acquisition’ [appropriation] of unowned resources in a state of nature. Such a proof would cast serious doubt on the legitimacy of the modern state.

Wenar follows with a worthwhile attack on the normative claim he describes, but his statement concedes the supposed truth of the extensive empirical premises that connect the normative principle of appropriation to doubt about the legitimacy of government. Wenar assumes if private property could be created through appropriation, it was created through appropriation, and that it was created and held by private entities like partnerships and corporations rather than by collectives, peoples, or governments. Like
many of the “libertarians” he criticizes, he simply seems to believe those empirical premises are obviously true.

What reason is there to think the appropriation hypothesis is obviously true? It deals with events that took place long ago and with people who live in very different circumstances than we do. What gives a claim about such distant events so much credibility that it appears obvious? Perhaps the credibility of the appropriation hypothesis comes merely from how long and regularly it has been repeated. So many propertarians have asserted it for so long that one might be tempted to think that someone along the line must have confirmed it at some point.

The claim’s credibility-by-repetition results more from ignoring skepticism than from the existence of any widespread consensus. Conflicting hypotheses, as old as the appropriation hypothesis, are still used in philosophy, and some of them are much closer to the evidence-based story we present in Chapter 5.

Chapter 2 mentioned Hobbes’s claim, “All private estates of land proceed originally from the arbitrary distribution of the sovereign.” He seemed to believe this claim was an obvious truth. Thomas Jefferson shared this point of view, writing, “Stable ownership is the gift of social law, and is given late in the progress of society,” and he backed up his assertion with some casual observations of Native American property institutions. Thomas Paine and followers such as Henry George went even further along these lines. Although not an account of “appropriation,” as Chapter 5 will show, these narratives are a much more accurate accounts of the origin of private property than any appropriation story.

Marx and Engels actually read early anthropological and archaeological accounts of people in nonstate societies, especially Lewis Henry Morgan, before coming to the conclusion that the earliest property was held in the form of primitive communism. In 1913, L. T. Hobhouse took a similar viewpoint as Marx and Engels. He referred to a significant amount of anthropological evidence to argue that landownership in hunting societies and small-scale agricultural societies tends to rest in the community not in the individual. At least this claim has received some attention as an empirical issue, with some propertarians defending their viewpoint against it.

The errors we find below can’t be blamed entirely on the absence of good evidence at any given time. Although undoubtedly a lot of bad evidence has circulated widely on this issue, better evidence has been available for a very long time in anthropology and history. The errors discussed below stem largely from people who (consciously or unconsciously) cherry-picked the evidence to find what they wanted to find.

But even in the absence of evidence, the mere coexistence of conflicting, conceptually plausible claims implies that none of those claims can stand on the contention that it is somehow obvious. At least a few propertarians have responded by providing evidence in favor of the appropriation hypothesis. This chapter reviews the evidence, revealing that very few propertarians offer any evidence at all and those who do offer evidence provide only very cursory inconclusive evidence. Most probably, they cannot see the need for a more careful examination of the evidence because they are so convinced themselves about the obviousness of their claims and because they receive so few challenges on this issue from their critics in the field.
1. Typically short treatment

It’s hard to find propertarians who consider the possibility of collective or government appropriation seriously. The number of propertarians who provide little or no evidence for their empirical premises is staggering. This number includes people whose claims are explicitly empirical. Nozick cites no evidence at all of his presumed connection between an appropriation principle and specifically private, individual ownership.\(^{11}\) Narveson cites no evidence at all to support his claims that virtually all “first-comers” think of themselves as establishing private property.\(^{12}\) Kirzner dodges the question entirely despite recognizing its importance.\(^{13}\)

Bruno Leoni disparages people who claim “the origin of private property is simply violence” or “all the land on earth was originally common to all men,” but he cites no evidence to the contrary.\(^{14}\)

Epstein cites no evidence to support his extremely far-reaching claim, “first possession … enjoyed in all past times the status of a legal rule,”\(^{15}\) and the evidence he cites for related claims seldom if ever go back further or more widely in history than Roman law, and even this extremely narrow historical view does not always fulfill is expectations of specifically private appropriation.\(^{16}\)

Hans-Hermann Hoppe claims to have “the Ultimate Justification of the Ethics of Private Property,” which is essentially a proviso-less version of Lockean appropriation theory in which owners are presumed to have some tie to appropriation and propertyless people and collectives are presumed to be late-comers.\(^{17}\) In another work, he cites several sources to support the claim that the first monarchies were preceded by a group of private landowners.

Hoppe badly misinterprets the one source of his that we have so far been able to access. He cites Marvin Harris to support the idea that elite “big men” existed prior to the first monarchies.\(^{18}\) but he fails to note that Harris’s “big men” were not the owners the land Hoppe’s original monarch usurped. They were—at best—administrators of communal land. Harris writes, “Earth, water, plants, and game were communally owned. Every man and woman held title to an equal share of nature. Neither rent, taxes, nor tribute kept people from doing what they wanted to do.”\(^{19}\) Hoppe is probably right that the first monarchies usurped power from these “big men,” but if so, they usurped common land from collectives.

As mentioned in Chapter 2, Rothbard supports the supposed connection between homesteading theory and the rejection of state ownership with the assertion that it’s difficult to see the morality of depriving “the pioneer, the homesteader, the first user and transformer of this land … in favor of people who have nothing to do with the land.”\(^{20}\)

How do we know collective ownership amounts to depriving the first user? It’s not obvious that collectives had nothing to do with the enormous irrigation projects that made farming possible in Neolithic Egypt and Mesopotamia (as in alternative appropriation story 2). Even if individuals led such projects, it is not obvious that they would set themselves up as mere owners rather than monarchs of appropriated land (as in alternative appropriation story 1), a position they would be at liberty to establish under Rothbard’s anarcho-capitalism.

Rothbard seems to have confused the appropriation myth for an obvious empirical truth. Although he cites empirical support for other claims,\(^{21}\) he cites little or no evidence for his hypotheses that property actually comes into existence through individual homesteading and that it actually precedes collective claims over territory.
One source Rothbard cites for related empirical issues does provide some support for these claims. It is not an empirical work, but a property rights treatise by Friedrich Hayek, discussed in the following section.

2. Friedrich Hayek and his anthropological sources

Although Hayek is not committed to a natural rights justification of private property, he explicitly asserts the appropriation hypothesis:

[T]he erroneous idea that property had at some late stage been ‘invented’ and that before that there had existed an early state of primitive communism … has been completely refuted by anthropological research. There can be no question now that the recognition of property preceded the rise of even the most primitive cultures … [I]t is as well demonstrated a scientific truth as any we have attained in this field.22

This clear, empirical assertion of the appropriation hypothesis holds a special place in this debate because the few people cite any support at all for the appropriation hypothesis tend to cite this passage as their sole or principle support.23 Yet, few of them examine Hayek’s support. Let’s take a look.

Hayek cites only three sources to support this sweeping claim—A. I. Hallowell, H. I. Hogbin, and Bronislaw Malinowski. A closer look at these sources shows that they neither individually nor collectively support Hayek’s sweeping statement or any other version of the appropriation hypothesis.

Hallowell, Hogbin, and Malinowski were all interested in dispelling the idea of a “primitive communism.”24 But Hayek’s inference seems to be: not primitive communism, therefore primitive capitalism with strongly individualist and unequal private property rights. None of his anthropological sources make that inference. In fact, they all argue against the validity of any such dichotomy.

Hallowell writes that “property rights of some kind are … universal,”25 but he also warns that there is a “false antithesis” between “simple alternatives as individual versus communistic ownership.”26 He cites one study showing that individual hunters or nuclear families of the Labrador Peninsula held property rights in hunting grounds. This observation was a bit of an anomaly because although it is common for hunter-gatherers to exert territorial ownership, it is a system of collective ownership with rights relating to group, clan, extended family, and so on.

Subsequent studies of the beaver hunters of the Labrador Peninsula have explained this anomaly showing that these unusually individualistic property rights were established during the early colonial period by a group decision, and not by individual appropriation. Before European demand threatened the beaver population, these groups had treated all the hunting territory as common. When the indigenous population realized that the beaver population was being depleted, they decided, as a group, to divide the right to hunt beaver for sale. No individuals appropriated these territories, and the group did not create individual land ownership for anyone. Individuals retained a collective right to hunt for food anywhere. They could even kill a beaver for food in someone else’s designated area as long as they left the pelt for the person granted the right to it by the group.27

Therefore, Hayek treats an anomalous observation as the general case and reads far more into the observation than it is capable of demonstrating. The partially exclusive
territorial hunting rights observed on the Labrador Peninsula have little resemblance to the full liberal, individualistic landownership rights that Hayek and the people who cite this passage portray as “natural.” With the level of rights retained by the group as a people, it is hard to see how the institution of hunting rights on the Labrador Peninsula could have developed into the individualistic property rights Hayek defends had it not been for the subsequent aggressive interference of European individuals and governments.

Hayek’s second source, Hogbin, finds extended families owning land and property jointly in the smallest-scale societies. In a slightly larger-scale chiefdom in Tonga, he finds:

The whole of the archipelago was theoretically conceived as belonging to the Tui Tonga [the paramount chief] who reserved certain districts for his own use and allotted the rest among the great chiefs. They in return paid tribute twice a year.\(^{28}\)

This combination makes the Tui Tonga both owner and monarch of the territory—the very combination that propertarian theory supposedly rules out. As Chapter 5 shows, both family-based and most chief-based systems guarantee access to land for everyone by right of group membership rather than to an exclusive group of appropriators. It is difficult to use the principles of propertarian theory to determine the extent to which the Tui Tonga was a private owner or a public monarch, because he inherited a very old title in a society without written records in a very different cultural context than the one propertarians claim to be “natural.” To try to force an interpretation that makes the Tui Tonga one or the other is to assume the validity of the dichotomy that Hayek’s sources warned against. Similarly it’s impossible to portray the lesser chiefs as original appropriators because their claim to land came from service to the paramount chief.

Whether propertarian principles classify tribute to the Tui Tonga as legitimate “rent” or as illegitimate “taxes” depends not on which side of the public-private dichotomy it falls, but on the origin of the chief’s claim. The lack of a historical record of the origin of the Tui Tonga’s claims means that one cannot say anything about the propertarian legitimacy of his tribute without assuming the truth or falsity of the hypothesis that Hayek’s investigation of the Tui Tonga was supposed to inform.

Hayek’s third and principle source is also Hogbin’s principle source: Malinowski, who, although interested in refuting the idea of primitive communism, puts greater stress on the complexity of native property rights than Hayek admits.\(^{29}\) According to Malinowski, “Land tenure cannot be defined or described without an exhaustive knowledge of the economic life of the natives.”\(^{30}\) He warns, “any description of a savage institution in terms such as ‘communism’, ‘capitalism’ … borrowed from present-day economic conditions or political controversy, cannot but be misleading,”\(^{31}\) and “It is especially a grave error to use the word ownership with the very definite connotation given to it in our own society.”\(^{32}\)

In light of these statements by Malinowski, we can say that Hayek makes the error his principal source warns against when Hayek writes, “the recognition of property preceded the rise of even the most primitive cultures.”\(^{33}\)

Malinowski writes, “In the Trobriands … the chief claims all the soil of his district as his.” Malinowski shows that the chief’s claim does not amount to full ownership, but he also shows, “The claim is not idle.” The chief receives tribute, some of which he employs for defense and “for the benefit of the community.”\(^{34}\) Malinowski
describes Trobriand chiefs in ways that make people interpreting the evidence in Western cultural terms recognize chiefs as both owners and governors of their land.\textsuperscript{35}

The chiefs’ ownership creates difficulties for the appropriation hypothesis because it would be very hard for propertarians to classify chiefs as proto-businessmen. Of course, they are not proto anything. They are people with a position well-known to their society with no necessary equivalent in other societies.

Even taking Hayek’s use the chiefs to represent people relatively close to original appropriation, they don’t back his case very well. If Hayek takes Trobriand chiefs as appropriators, he must accept that the power of ownership is quickly combined with the power of sovereignty. Such an observation seems to support alternative hypothetical history 1 or 2 above rather than the smallholder in the Lockean story required by the appropriation hypothesis.

One could argue that these chiefs usurped power from earlier private smallholders, but one could just as well argue that chiefs usurped power from earlier collectivists. Evidence for that usurpation and/or a legitimate assumption of power is what Hayek’s citation of these sources was meant to show. If Hayek does not intend readers to take chiefs to represent early landowners, why does he cite these sources at all?

Malinowski does describe inter-community markets, but finds something very different from the type of ownership we would expect if the appropriation hypothesis were true. The markets were regulated by chiefs. Participation in them was strictly limited. And the goods the men allowed to participate could buy are things, “of which he enjoys a temporary possession, and which he keeps in trust for a time.”\textsuperscript{36}

Malinowski deserves some blame for Hayek’s misreading. Chris Hann observes that, although Malinowski exposed the false antithesis of the individual-versus-communal dichotomy, he was “so preoccupied with the need to emphasize the individualistic character of Trobriand life that the very dualism he condemned intruded continuously into this analysis.”\textsuperscript{37} In a passage cited by Hayek, Malinowski writes, “private property appears very definitely on primitive levels,”\textsuperscript{38} his reasoning in this section makes property appear very individualistic. But Malinowski was trying to dispel the myth of primitive communism, in which people erroneously supposed no one owned anything at all in small-scale societies.

Furthermore, this passage is not from any of Malinowski’s primary research but from a political treatise he wrote near the end of his life. This passage contains no citations to primary research. It makes only an a priori argument that individuals must have established individual property on the supposition that individuals need secure property rights. This passage does not make clear the complex property ownership that Malinowski stresses in his empirical works on small-scale societies,\textsuperscript{39} and neither does it provide the empirical evidence for the “demonstrated scientific truth,” Hayek claims to have found in Malinowski, Hogbin, or Hallowell.

3. Historical investigations of anarcho-capitalist institutions

Many propertarians, especially of the anarcho-capitalist tradition, have done excellent empirical-historical work on the question of whether private property can exist without government. Unfortunately, most of this work does not bear on the questions of whether private property existed before government or whether private property is more likely to develop without right violations than government-owned
property,\textsuperscript{40} and so it has limited value as an inquiry into the truth or falsity of the appropriation hypothesis.

However, work along these lines by Bruce L. Benson is relevant to our question. He writes, “private property rights are a common characteristic of primitive societies.”\textsuperscript{41} Here, he cites only the passage from Hayek discussed above, but making similar claims, he cites four relevant primary sources: Leopold Pospisil, Walter Goldschmidt, Robert Redfield, and A. E. Hoebel.\textsuperscript{42}

Benson’s sources do not support the appropriation hypothesis. Pospisil and Goldschmidt do find evidence of individualistic land ownership among the Kapauku Paupans and native groups of northwestern California, respectively. But neither of them views it as a common characteristic among small-scale societies. Pospisil writes that ownership is a bundle of rights, that the rights in the bundle differ from society to society, and that “Among the Kapuku the owner’s rights to land and water differ from one terrain to another.”\textsuperscript{43} Goldschmidt writes that private land rights in northwestern California are so atypical that the natives of that area are, “Like no other hunting-gathering people of which I have knowledge (and very few primitive peoples generally).”\textsuperscript{44}

Benson’s focus on these two atypical groups seems to be an example of cherry picking. And even viewed in isolation, they are not as convincing as Benson suggests. Many Native Californians groups had powerful elites (or “chiefs”) who “owned” land in ways similar the Trobriand chiefs, discussed above.

Redfield makes generalizations about “primitive law,” writing, “The materials cited here have included many instances where the wrongs righted are wrongs against kinship groups, the claims are pressed by kinship groups, and the liability of the individual is to his kinship group.” He concludes that “primitive society” should be regarded as “an aggregation of families rather than of individuals.”\textsuperscript{45} The families in question are extended kinship groups rather than nuclear families. As Chapter 5 shows, these kinship groups are the closest thing stateless societies have to governing bodies.

It is plausible to think that such kinship groups might grow into small states as in alternative hypothetical history 2. If property begins as the possession of a kinship collective, one should reject the appropriation hypothesis in the absence of evidence that property then goes through a period of individualization before the first states appear. One could argue that these kinship groups usurped their claims from earlier individual holders, but once again that would be to assume the truth of hypothesis for which Benson’s citations were supposed to provide evidence. Confirming or rejecting a hypothesis requires evidence.

Hoebel examines law-like norms in pre-state societies and archaic states at varying levels of complexity, finding very different property rights than Benson suggests. According to Hoebel, individual ownership, as we understand it, is only one of many different kinds. In a nomadic society in the American Great Plains, he finds, “All land is public property.”\textsuperscript{46} In a nomadic society in the North American Arctic he finds, “All natural resources are free or common good,” and, “Private property is subject to use claims by others than its owners.”\textsuperscript{47}

Hoebel finds the following laws in a small-scale settled community in the Philippines:

The bilateral kinship group is the primary social and legal unit, consisting of the dead, the living, and the yet unborn. … An individual’s responsibility to his kinship group takes precedence over any self-interest. … The kinship group
shall control all basic capital goods. … Individual possession of rice lands and ritual heirlooms is limited to trust administration on behalf of the kin group.\textsuperscript{48}

Hoebel draws from Malinowski’s observations of Trobriand chiefdoms, writing, “The village belongs to a matrilineal subclan. Surrounding the village are the lands belonging to the subclan.”\textsuperscript{49} In an archaic state in West Africa, Hoebel finds, “Basic property belongs to the ancestors. … Basic property is only administered in trust by its temporary possessors. … A headman or chief is the carnal viceroy of the ancestors of the kingship group he governs.”\textsuperscript{50} Again, these elites are managers of a system of collective ownership with land access rights guaranteed through membership in a moiety or sodality. This system is not primitive communism, but it is very far from the individual-appropriation-based sole proprietorship that Benson seems to want to see in it.

Hoebel summarizes his findings:

All legal systems give cognizance to the existence of rights to private property in some goods; but among primitives land is legally treated as belonging directly or ultimately to the tribe or the kinship group; it is rarely sustained legally as an object of private property.\textsuperscript{51}

That is, Benson’s principle source, contradicts Benson’s central claim, “private property rights are a common characteristic of primitive societies.”\textsuperscript{52} If Hoebel is not saying the very opposite; he is at least saying something very different.

4. Empirical natural property rights or property instincts

One propertarian theorist, John Hasnas calls for an investigation of “a theory of empirical natural rights,”\textsuperscript{53} by which he means that a natural rights theory of property should be based on an investigation of what kinds of property rights actually develop in the absence of obviously aggressive behavior. This project is exactly what our analysis in Chapters 2 and 3 suggests propertarians ought to be doing.

Several propertarians are doing work along these lines, although they are not necessarily inspired by Hasnas’s call, and few use his terminology. The people involved tend to have a mix of approaches: some treat propertarian principles as immutable and look to see how they are applied; others attempt to discover what principles potential appropriators see themselves to be applying.

Hasnas’s article is not heavily empirical. It is more of a theoretical discussion of how such empirical research could be approached. It is oriented toward explaining and justifying the methodology with only a cursory empirical analysis. Hence, he titles his article “toward a theory of empirical natural rights” (emphasis added) without claiming to have developed a full-blown theory.\textsuperscript{54} Hasnas does not investigate original appropriation, but looks for historical situations that might approximate the state of nature—situations in which government or higher authority is absent or relatively distant. This method has several limitations. For example, most of his examples involve people already well acculturated to Western property institutions, and it assumes situations he picks out are representative of worldwide tendencies in the development of property rights,\textsuperscript{55} when as chapter 5 shows, people so acculturated are significantly out-of-the-ordinary from a worldwide historical (and prehistorical) perspective.
Even with this preliminary investigation, Hasnas finds significant differences between “empirical natural rights” and the institutions that appear obvious to propertarians imagining acts of appropriation. Although he claims that his empirical natural rights tend to be a “good approximation” of Lockean or Nozickian property rights, he finds that they are not nearly as strict, writing,

[I]n contrast to the more philosophically pleasing conception of the traditional right to property, the empirical right is a highly flexible, exception-laden one that invests individuals with the exclusive use and control of objects only to the extent that doing so facilitates a more peaceful life in society. Individual empirical natural rights, then, are . . . fuzzy-edged entities.  

Authors making similar efforts include Jeffrey Evans Stake, who describes his effort as the search for a property “instinct.” Whether Stake is propertarianism or not, his article is cited by propertarians, and his observations of a provisional instinct include first possession and many of the incidents of full liberal ownership including alienability, exchange, inheritance, and so on. However, his observations fall far short of the ability to show an instinct for any particular property institution.

His animal examples seem cherry picked. None of them come from herding animals or our closest evolutionary relatives, who mostly live in foraging groups. They tend to come almost entirely from very distant evolutionary relatives of humans such as birds, spiders, and butterflies. Animal examples of a property instinct mostly involve a greater willingness to fight on the part of the defense than on the part of the invader, but this inference has obvious difficulties. The preference for defense might be an example of status quo bias rather than an instinct for proprietorship. And the existence of regularly observable physical fights between rival claimants implies that any “right” this instinct might be taken to imply is not well recognized in butterfly society.

Stake’s human examples are all from Western culture, involving the behavior of people acting within the established property rights system. He makes no effort to discuss humans and animals who live with very different property rights conventions. As examples of first possession, he mentions the following two examples, “Historically, first discovery gave nations rights in foreign lands. The common law of property in England and the US has, as one of its cornerstones, the notion that the first person to possess a thing owns it.”

The first of these examples, if it implies anything about an instinct, implies one for government-owned property, the convention that propertarian theory supposedly rules out. Both examples ignore, as Chapter 5 demonstrates, that in these national and conventional legal systems, “first” possessions very often, if not most often, involved dispossessing peoples who practiced more collectivist landholding institutions before colonialist states arrived to proclaim one of their members “first possessor.” If there is evidence of an instinct in Stake’s review of human history, it is an instinct for some kind of property convention, but certainly not one that implies a propertarian instinct for significant moral limits on government powers to tax, regulate, and redistribute property.

Thomas Mayor dubs hunter-gatherers, “The Original Libertarians,” in an empirical investigation, he describes as follows.

What version of political economy—collectivist or individualistic—is more consistent with man’s basic nature? Does man naturally respect an individual’s right to the products of his own efforts, or does he believe that others have a
higher claim on those products? … philosophers and political theorists have given different answers to these questions, but almost always without significant supporting evidence. I argue here that such evidence does exist and may in fact be obtained by applying basic principles of evolutionary biology to the voluminous ethnographic literature available in the field of anthropology.61

So much is wrong with Mayor’s statement that we will only scratch the surface here, but he comes up again in later chapters. His search for “man’s basic nature” and his presumption that people in small-scale societies somehow represent this nature or any notion of a “primitive condition” are many decades behind the times.62 These erroneous efforts were discarded by anthropologists in the mid-twentieth century. And any such effort uses evidence subtly but importantly differently than we do. We’re not looking for basic human nature. We’re looking for whether people who perform the appropriative acts (as propertarians define them) tend to establish the types of individualistic property rights propertarians claim all people naturally do or whether it is common for some people performing the designated appropriate acts exercise the rights propertarian theory grants them to establish other kinds of property rights regimes.

Mayer does a reasonably good survey of anthropological evidence despite the discredited presumptions he imposes on it. Focusing on band societies, he recognizes that “no property rights typically exist in the natural resources the band uses,” and that those who have more tools or food are often pressured to share their surplus with others. He stresses the reciprocal nature of this sharing but views this reciprocity more individualistically than most anthropologists (see Chapter 5). Mayor does not look at the establishment of the primary institution that propertarianism defends—permanent private property rights in land and all the things humans make out of it, and he admits that the establishment of that institution was not consistent with the exercise of freedom.63

David Schmidtz makes a slightly more theoretical effort, carrying on Harold Demsetz’s theoretical effort to explain why property rights develop. Schmidtz connects this positive theory both with ethics and with the argument that private property can and does develop to solve coordination problems and regulate access to resources. However, Schmidtz readily admits that many historic examples involve communal and overlapping rights, which are very different from the institutions propertarian theory is meant to justify. He also admits that the most desirable mix of private and public property depends on the particulars of changing social and technological circumstances.64 This inference seems to imply the abandonment of any natural rights argument for private property.

William H. Riker and Itai Sened criticize the use of this kind of reasoning to support propertarianism, arguing that although private property is capable of performing these functions, it seldom arises spontaneously to do so. Instead, they observe governments taking a pervasive role in granting property rights. They conclude, “Locke’s description is, in fact, exactly backward. He argued that possessors create government to protect their assets. Conversely, our theory, supported by our evidence … holds that governments create rights to solve problems of scarcity.”65

This empirical natural rights approach is an interesting avenue that should be pushed much farther, but what has been found so far tends to undercut rather than bolster the natural rights justification of private property.
This chapter examined evidence provided by several propertarians in support of the appropriation hypothesis, finding the following pattern:

- Most propertarians who cite evidence don’t cite very much of it.
- If a more thorough historical-empirical investigation supporting the appropriation hypothesis exists, it has escaped the notice of the prominent propertarian theorists cited in this book.
- In many cases, the anthropological sources propertarians cite undercut rather than support the appropriation hypothesis, showing that flexible, exception-laden, overlapping, and partly collectivist property rights regimes are far more common than the institutional structure propertarians present as natural.
- Propertarians tend to play up the aspects of their empirical sources that support their expectations and play down the aspects that contradict their expectations.

It’s easy for non-propertarians to see confirmation bias in these efforts. Most propertarian investigations of the history of property rights are cursory glances that stop when the authors find what they want to find.

This chapter is not yet enough to falsify the appropriation hypothesis. It demonstrates only that propertarians rely on poorly elaborated and poorly supported empirical claims. Without clearer use of, and better evidence for, their empirical premises, propertarians have so far failed to provide reason to accept their conclusions, but a more thorough historical-empirical investigation is needed to confirm or reject the hypothesis.

Propertarians could—and probably should—view Chapter 5 as a more thorough investigation of “empirical natural rights,” along the lines of Hansas and the other authors discussed in the previous section. But, unfortunately for propertarians, our results further contradict their expectations—the fuzzy-edged, flexible, exception-laden, overlapping, and partly collectivist nature of property rights become only more apparent as we look in more diverse cultural and historical contexts, free from the aggression of private-property-promoting governments.

Of course, we, the authors of this book, are as vulnerable to confirmation bias as anyone else. We ask readers to take a careful look at the evidence we provide and any gaps they might find in it. If nothing else, we are confident that our investigation is far more thorough than any cited by the leading propertarians discussed in this book.

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6 Thomas Jefferson, The Writings of Thomas Jefferson, vol. 3 (Washington: Thomas Jefferson Memorial Association, 1905); Thomas E. Skidmore, The Rights of Man to Property! (New York: Alexander Ming, Jr., 1829), 73. He was perhaps a little too ready to use Native Americans as proxies for people in long past times, but at least he referred to evidence.
7 {Paine, 2012 #262}; {George, 1976 #90}
10 The danger of unconscious cherry-picking affects everyone—including the authors of this book. We appalled anyone who can find better evidence and expose any errors that might have found their way into this book.
16 For example, "...the Romans...began their discussion of property with the assertion that by the natural law, the air, running water, the sea, and consequently the seashore were things that were 'common to all.'", Simple Rules for a Complex World (Cambridge, MA: Harvard University Press, 1995), 67.
21 The Ethics of Liberty.178; 178n3; 178n4
23 Ibid. 108.
25 Hallowell.35, emphasis added.
26 Ibid. 125.
28 Hogbin.94-97, 239.
29 Hayek., 108; Malinowski. "Introduction."; Freedom and Civilization. Hallowell and Hogbin, above, partly base their analysis on Malinowski’s primary research.
33 Hayek. 108.
34 Malinowski, "Introduction." xlii.
35 Argonauts of the Western Pacific. 65.
36 Ibid., 94.
38 Malinowski, Freedom and Civilization. 132-133.
39 "Introduction." XVii-Lxii: Freedom and Civilization.128-133. It is much clearer, however, in his introduction to Hogbin, which Hayek also cites.
institutions is best. Instead, it asks how we could justify any institution that recognizes the right to exclude.”


47 Ibid., 69-70.

48 Ibid., 104.

49 Ibid., 192.

50 Ibid., 253.

51 Ibid., 286-287.


54 Ibid.

55 Ibid.

56 Ibid., 136-137.


58 Ibid., 1764.

59 Ibid., 1764-67.

60 Ibid., 1764.


62 Ibid., 485

63 Ibid., 491, 493-494.

64 Schmidtz.