

UC Irvine

UC Irvine Previously Published Works

Title

Forget Locke? From Proprietor to Risk-Bearer in New Logics of Finance

Permalink

<https://escholarship.org/uc/item/4vh0f6j7>

Journal

Public Culture, 11(2)

ISSN

0899-2363

Author

Maurer, Bill


Publication Date

1999-05-01

DOI

10.1215/08992363-11-2-365

Peer reviewed

 Copyright © 1999 by Duke University Press. All rights reserved. This work may be used, with this header included, for noncommercial purposes within a subscribed institution. No copies of this work may be distributed electronically outside of the subscribed institution, in whole or in part, without express written permission from the JHU Press. This revolutionary publishing model depends on mutual trust between user and publisher.

Public Culture 11.2 (1999) 365-385

Forget Locke? From Proprietor to Risk-Bearer in New Logics of Finance

Bill Maurer *

Recent debates on globalization are frequently thin with details of the mechanisms that facilitate the flow of capital across borders. What on-the-ground, back-office practices constitute and expedite those flows? What cultural logics are embedded in those practices? How can examining the shop floors, as it were, of global capital movement point toward new analyses of globalization? Such questions require a consideration of the practices of securitization and securities clearance.

Given the globalization of U.S. techniques for the handling of securities, a shift in the discourse and practice of securities clearance and settlement in the United States has meant a tandem shift in the markets of the world. To describe this watershed in its most schematic and legal-jargon-laden form, a discourse of property rights and a practice of negotiability has in the late twentieth century shifted to a discourse of risk and practices of insurance and private justice.

It is salient that securities lawyers today seem to echo late-nineteenth-century laissez-faire advocates who sought to define property as not physical objects but bundles of rights based on market value. The similarity, however, extends only up to a point: Whereas late-nineteenth-century lawyers challenged physicalist definitions of property by asserting the rights of individual or corporate owners, late-twentieth-century **[End Page 365]** lawyers, first, seek the abandonment of the property construct itself because they believe it places needless restrictions on securities transfer and capitalist expansion and, second, redefine the subject of property not as the bearer of rights but as a risk profile subject to the disciplinary practice of insurance. At stake is not merely a new definition of property but a new definition of personhood and a new form of governmentality. Rights and property give way to risk and insurance. This shift, I believe, has profound implications. ¹

To understand the shift from rights to risk, it is useful to examine oscillations in the history of property, such as those between the canonical notions of property elaborated by Locke's *Second Treatise* and Hegel's *Philosophy of Right*; the nineteenth-century rejection of physicalist notions of property; the early-twentieth-century "realist" conceptions of property that undermined the nineteenth-century critique and set the stage for the modern system of securities trading based on paper shares; and the late-twentieth-century calls for the abandonment of the property construct altogether. Corresponding to these oscillations are shifts in governmentality, regimes of rule, and definitions of political subjecthood. ² Something is indeed new in contemporary capitalism, but it does not concern only the speed or volume of capital flows. At stake is redefinition of the core constructs of capitalism itself.

Securitization and securities clearance allow the convertibility of objects of property into objects of capital and back again. Such convertibility is integral to capital mobility. Briefly, securitization and securities clearance involve a set of technical and procedural norms that make possible equivalencies among objects of property by rendering these objects into the same kind of thing--abstractions of value embodied in imaginary shares. Although the extrapolation of shares from physical or intangible objects may not seem like a big deal, the technical and procedural norms involved in securitization are not simple matters. For example, the World Bank reports that a main difficulty of financing businesses in so-

called transitioning economies stems from international lenders' unwillingness to accept certain kinds of collateral from potential borrowers--specifically, "movable" property held by the prospective borrower (things like factory machinery [End Page 366] or inventories). "Rather," the Bank writes, "lenders require that the moveable property be placed under their direct control--as if they were valuables in a bank vault or goods in a bonded warehouse," ³ as if a farmer would give a bank his cows as collateral, and the bank would put the cows in its own corral somewhere. The World Bank asks, "Why is real estate or merchandise in a vault acceptable as collateral, but not livestock, machinery, and inventories?" To solve the problem, the Bank proposes the development of legal regimes that permit the "creation of security interests for any person over any thing," ⁴ so that lenders could simply hold securitized interests in movable property against borrowers' loans instead of warehousing the property itself. Securitization, thus, is not obvious or self-evident; it often must be imposed.

What is securities clearance? Briefly, securities clearance is the process by which orders for stocks are matched to issuing parties. Assume a person wishes to purchase 1,000 shares of IBM stock and that another has 1,000 shares to sell. The first person's broker places an order for the shares through a national clearing system, which locates the seller and matches the order to the seller's account with her broker. Essentially, *securities clearance* is the process that ensures that buyers and sellers can "meet" each other, make promises to trade securities, and, finally, carry out those promises. Securities clearance is the space of "the market," the imaginary meeting ground of contemporary capitalism. *Securities settlement* is the process by which property interests in a set of securities are transferred from one legal person to another. As a securities lawyer puts it, "Clearance and settlement comprise the process whereby securities market participants consummate their agreements to buy and sell securities. . . . The buyer pays the seller, and the seller 'delivers' (transfers a property interest in) the securities." ⁵

Contemporary securities clearance hinges on the principle of "negotiability" of paper shares. The fact that shares have been pieces of paper leads to troubling distinctions in the law of negotiability between the symbolic and the real, distinctions contemporary securities lawyers seek to move beyond. A negotiable instrument is any instrument that can be transferred to another party by "endorsement" or "delivery": by either signing it over (a "symbolic" transfer) or actually moving it (a "physical" transfer) to the other party. Because of the reliance on negotiability as a means of transferring property rights in securities, and in spite [End Page 367] of new technologies that seem to render paper securities obsolete, a reification of the security has come about: The security has become an "it" to be transferred or endorsed, and securities clearance has henceforth come to imply a physical thing, the paper stock certificate. Contemporary securities lawyers decry this reification and argue for a system of totally paperless trading. But to understand the reification of the security and current arguments to deconstruct it, we must go back to conceptualizations of property that set the stage for the legal apparatus that securities lawyers now seek to undo.

Canonical Definitions, Capitalist Reformulations

The concept of property has undergone a number of shifts from the seventeenth century to the present. Originally meant in its sense of a quality, characteristic, or aspect, *property* came to refer to physically tangible things, objects of ownership, early on in the history of industrialization in Europe and the United States. It did so alongside classic Enlightenment conceptualizations of person, identity, and freedom; the rise of modern capitalism; and a classical liberal form of governmentality based on democratic rule by independent proprietors. ⁶ Central to both property and governance at the time of John Locke was a clear separation of subjects of property from objects of property. Locke's famous definition of property as that with which humans have mixed their labor became the root of canonical definitions and secured for property, for a time, its object-status. For Locke, the act of adding labor to raw nature created private property, removing objects of nature from the "commons" granted by God to all men. ⁷ Since every man, ⁸ according to Locke, was deemed to have an inalienable "*Property in his own Person*," and labor capacity constitutes part of that property, when man infuses raw nature with labor he adds to it a piece of himself. ⁹

G. W. F. Hegel's notion of property, too, hinged on "things-in-themselves" into which human beings poured their will, as an expression and extension of spirit into matter. For Hegel, in contrast to Locke, human will is not actually present in [End Page 368] property. Rather, property is only intelligible with "reference to the will which shaped" it. ¹⁰ It remains a thing-in-itself, but one in which others are compelled to recognize the person's will and, hence, the person as a free subject. ¹¹ At issue here are

the limits of liberal governance and a politics of recognition; Hegel is profoundly concerned with the limits of the franchise and the extension of freedom in a way that Locke clearly was not.

As Hegel states, "When I give form to something, its determinate character receives an *independently [für sich] existing [bestehende]* externality and ceases to be limited to my presence in *this* time and space and to my present knowledge and volition." ¹² For Hegel, alienation is possible because "I may abandon as ownerless anything belonging to me or make it over to the will of someone else as his possession--but only in so far as the thing [*Sache*] is *external in nature*." ¹³ We see here an expression of the principle of negotiability: I turn the things animated by my will over to another, but only if they remain things external to my will; personality, for instance, is not alienable, as it is not external. ¹⁴ We also see a clear expression of the principle that property is a thing, an object demarcated from a willing subject whose freedom as subject is made manifest in the things of property. Marx later took Hegel's conception of the presence of will in property to argue that alienation of property diminished human species-being, taking from humans their own spirit through the fetishism that located that spirit in the thing and gave the thing the character of a being with will while rendering humans spiritless objects. ¹⁵ By the late nineteenth century, however, the critique of property as a thing found expression in very unlikely quarters. **[End Page 369]**

As legal historian Morton J. Horwitz demonstrates, property law in the late nineteenth century moved away from the conception of property as a thing (whether a Hegelian thing or a Lockean thing) and toward the conception of property as a "characteristic," specifically, a "right" that a person could hold "in" a thing. This movement was contemporaneous with the consolidation of the corporate form, which rendered the traditional notion of property (still overwhelmingly "derived from ideas about landed property") ¹⁶ insufficient for a vast array of new kinds of ownership. Horwitz documents a gradual abstraction of the concept of property in terms of market value. John Lewis's (1888) *Treatise on the Law of Eminent Domain in the United States* is an example. Observing the huge array of property interests made possible by modern industry, Lewis argued, "We must . . . look beyond the thing itself, beyond the mere corporeal object, for the true idea of property. . . . The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights." ¹⁷ Thus, property should include "every valuable *interest* which can be enjoyed as property and recognized as such." ¹⁸ Horwitz comments, "This abstraction of the conception of property made sense as new varieties of legal interests, different from land, began increasingly to force themselves on the attention of courts," and late-nineteenth-century jurists turned to "market value" as the measure of what was now seen as immaterial property. ¹⁹ Horwitz summarizes, in a passage instructive for the late-twentieth-century dematerialization of negotiable paper certificates:

The gradual collapse of a physicalist definition of property after 1870 revived all of the contradictions that had been barely suppressed in traditional doctrine. For as the definition of property right became divorced from concrete physical objects with bright-line boundaries and came to turn more and more on abstract ideas of individual expectations of market values, the very conception of property became infinitely expandable. The result was that during the 1880s and 1890s a variety of new property interests for the first time received recognition by American courts. These property interests were endowed with what, by traditional standards, can only be called extravagantly expanded prerogatives. During this period, **[End Page 370]** American courts came as close as they had ever had to saying that one had a property right in an unchanging world. ²⁰

The expansion and dephysicalization of the concept of property fit well with laissez-faire economics of the time, which raised capital for enterprise through the promise of return and the illusion that expected market values would ultimately be realized--Horwitz's "right in an unchanging world" of predictable outcomes and expected returns. ²¹ This concept of property also corresponded to a form of governmentality intricately interconnected to the politics of the corporate form. Lockean possessive individualism was still the order of the day, but joint stock corporations took on for themselves the character of the possessive individual in the form of legally endorsed corporate personhood. As an entity that "owned," the corporation was endowed with a will and agency--the subject-status formerly afforded to human subjects alone.

The invention of the joint stock corporation, whose ownership was divided into intangible property interests or shares, troubled many early-twentieth-century commentators who believed that stocks

jeopardized the capitalist system by separating *ownership* (founded in stocks) from *control and management* (founded in corporate executives' power and privilege) of corporations. Horwitz argues that the separation of ownership from control, "more than any other development . . . became the catalyst for the legal realist reconceptualization of private property rights." ²² By the early twentieth century, conceptualist definitions of property began to feel the sting of the realist critique in the courts and, arguably, in popular imagination in the United States.

Adolph A. Berle and Gardiner C. Means, whose 1932 classic, *The Modern Corporation and Private Property*, rearticulated realist and physicalist conceptions of property, argued that stocks in companies fundamentally changed the nature of property and wealth and had the potential to destroy private enterprise, individual initiative, the profit motive, and competition. In their beautifully quotable statement of the contradiction that joint stock corporations pose for the **[End Page 371]** logic of capitalism, Berle and Means maintained that stockholders, the "true" owners of the means of production, have been reduced by the institution of corporate shares to the status of laborers: "The property owner who invests in a modern corporation so far surrenders his wealth to those in control of the corporation that he has exchanged the position of independent owner for one in which he may become merely the recipient of the wages of capital." ²³

For Berle and Means, this transformation of "independent proprietors" into dependent "wage earners" was revolutionary, as revolutionary as the transition from feudalism to capitalism. It had the potential to destroy capitalism by rendering obsolete the ethic and imperative of rational self-interest guiding capitalist development. In the classic formulation of capitalist markets and self-interest, developed variously by the canonical Enlightenment authors like Adam Smith and John Locke, independent proprietors, who dispose of their property as they see fit to increase their private gain, introduce the productive powers into the economy necessary for capitalist markets to function and sustain themselves. The "traditional logic of profits" holds that the possibility of profit "act[s] as an inducement to the individual to risk his wealth in enterprise, and . . . act[s] as a spur, driving him to exercise his utmost skill in making his enterprise possible." ²⁴ In the modern joint stock corporation, however, the "two functions of risk and control are, in the main, performed by two different groups of people": the stockholders assume all of the risk, and the managers assume all of the control. ²⁵ To whom should corporate profits go? In the traditional logic of profits, profits should go to those who make the decisions about efficient management, as an "inducement" to spur them on. ²⁶ Again, Berle and Means write, "The corporation would thus be operated financially in the interests of control, the stockholders becoming merely the recipients of the wages of capital." ²⁷ The "individual initiative" of proprietors-turned-wage-earners thus "disappears," and the system "necessarily impl[ies] not individualism but cooperation and the acceptance of authority almost to the point of autocracy." ²⁸ Competition is evaporated, as well, for rather than a market consisting of millions of participants, each a proprietor, the capitalist system held captive by modern corporations is a market of few, highly centralized, participants. Here, the authors cite **[End Page 372]** Adam Smith, who passionately argued against the issuance of shares in corporations: "The directors of [stock corporations] . . . being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it." ²⁹

Berle and Means were influential--"causative," Berle later claimed ³⁰ --in the crafting and passage of major investment regulations in the United States during the 1930s and in the wake of the crash of 1929. To attempt to reduce the possibilities of managerial abuse of shareholders' property, the U.S. Congress enacted the Glass-Steagall Act of 1933 and the Securities Exchange Acts of 1933 and 1934. The former regulated the banking industry and mandated a clear separation of commercial from investment banking to protect ordinary depositors' money from risky commercial investments. The Securities Exchange Acts regulated the issuance of securities to protect investors from "blue sky" stocks (stocks as worthless as a piece of the blue sky) and regulated the exchange of securities by creating the Securities Exchange Commission (SEC). ³¹ These New Deal efforts at the regulation of the finance industry were a kind of Band-Aid solution to the problem identified by Berle and Means. The "problem" of the separation of ownership from control was not solved, only deferred.

But by the time *The Modern Corporation and Private Property* was revised and reissued in 1967, Berle's views had changed and the stage was being set for discussions among securities lawyers that would

culminate in the late-1960s paperwork crunch. The criticisms of the transformation of ownership into wage earning are absent from the preface to the 1967 edition. In their place is a call for a kind of social welfare system that will ensure that all Americans own stocks, for "a wide distribution of stockholding is a way to give all Americans a kind of annual wage." ³² Berle's only worry is that, in this new land of plenty where everyone benefits from corporate successes, people will get "bored," and so we will need more poets, artists, and teachers! ³³ This is a far cry indeed from Berle and **[End Page 373]** Means's ominous concluding paragraph in the original text: "The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming an aspect of economic statesmanship." ³⁴

The Paperwork Crunch: Shredding the Certificate

What might account for Berle's change of heart? The nature of the paper stock certificate may hold the answer. Paper shares *did* serve to alleviate a fundamental tension for the buyers and sellers of shares in publicly owned corporations. They contributed to the success of the securities industry--and thus to the success of U.S. corporate growth, which relied and still relies on the issuance of shares to the public in order to generate capital for productive enterprise--by creating the illusion that people who own shares actually own companies. The stock certificate had been, in part, a solution to the unease caused by the dephysicalization of property; it was an object understood to "stand for" an interest in a corporation, an entity held to be, at least to a certain extent, a physical object. ³⁵ As Richard Smith, Commissioner of the SEC in the 1970s, put it, the stock certificate "has been the most seeable device in the successful separation of ownership from management that has occurred in American industry over the last century." ³⁶ Today, "seeability" lives on in imaging software that allows brokers and clients to see images of paper certificates on their computer screens and thereby "verify" ownership. To finance industry workers, seeability is "a big pain in the butt," as one put it to me, because it slows down processing and encourages clients to "ask stupid questions"--namely, the question of what exactly they own when they own securities. But it is the seeability of paper shares that now troubles many industry specialists.

Their concerns began in the late 1960s and early 1970s as the volume of trading increased dramatically because of the expansion of overseas investment markets. **[End Page 374]** SEC Commissioner Smith delivered speeches in 1970 and 1971 before the American Bankers Association in which he argued that securities clearance based on paper certificates was too slow for contemporary capitalism. He went further and argued that negotiability itself was inefficient, and he proposed alternatives to the paper-based clearance process. Recent commentators have taken up Smith's call; they argue for the complete dematerialization of shares and the abolishment of negotiability along with the conceptualization of security interests as "property." It is important to note that Smith's calls for reform in the early 1970s coincided with dramatic transformations in the world's financial systems. In 1970, Smith was concerned with the paperwork crunch that had been brought on simply by the volume of increasing investment. In 1971, however, his concerns were part of broader worries over the end of the Bretton Woods system of currency controls and the transformation in global capitalism that some label "flexible accumulation." ³⁷

Smith began by emphasizing the importance of the physicality of the paper share to public confidence in the market, which ensures continued public investment and, thus, the capital necessary for productive enterprise. The paper share, since it is seeable, is "what the public has relied upon to evidence their share in an industrial growth physically remote from the individual investor." ³⁸ Paper shares have also facilitated "market liquidity" since their negotiability allows them to be traded and sold easily. ³⁹ But liquidity demands that trades be effected in a timely manner. Trades must be confirmed (cleared) and settled (consummated) efficiently for markets to be truly "liquid."

By the late 1960s, Smith maintained, the physicality of the share itself caused a paperwork crunch that choked market liquidity. Physical shares had to be endorsed and/or physically relocated to satisfy negotiability and legal transfer, and increasing trading volume meant that more and more trades failed to settle by their SEC-mandated time limits. It is difficult, today, to capture the significance of the physical process of transferring negotiable instruments. Imagine bundles of stock certificates being signed over to other parties and physically relocated to vaults all over New York's financial district. With so much paper being moved, SEC time limits for the settlement of a trade actually increased **[End Page 375]** over the course of the century, from two days after the trade was cleared (T+2) before 1946 to five days after the

trade was cleared (T+5) in 1968.

A temporary solution to the increasing time to settlement and a positive development, in Smith's eyes, was the process of "netting." Netting is based on the kind of corporate centralization that Berle and Means (and Adam Smith before them) decried. On any given trading day, a few major brokerage houses and investment corporations are likely to do the bulk of their trading with each other. Rather than requiring the negotiable transfer of each and every share traded during the day, netting permits a simple bookkeeping calculation at the end of the day to settle accounts. For instance, if Company A sells 1,000 shares to Company B at 9:00 a.m., and Company B sells 250 to Company A at 2:00 p.m., and later at 3:00 p.m. Company A sells 500 back to Company B, no trades are actually confirmed until the end of the day, when a back-office accountant simply calculates the net gain and loss of shares between firms and confirms the trades of the difference (in this case, A's balance is marked down by 1,250 shares, and B's balance is marked up by the same number). Netting at first allowed a simple onetime transfer of physical shares from firm to firm, and thus served to reduce their mobility. ⁴⁰ Smith noted that since netting was a bookkeeping operation, it could also allow for the near complete "immobilization" of shares: Why even bother physically transferring the shares if the ledger marks indicating transfer in ownership are in order? ⁴¹ In 1970, Smith argued for the creation of a central depository for *all* corporate shares, so that paper certificates (still required under the principle of negotiability) could be permanently immobilized, kept in one place forever, their changes in ownership recorded in the central depository accountant's ledger. ⁴²

Sixteen months later, in his next speech before the American Bankers Association, Smith was in high panic. During those months, trading volume had fallen off dramatically, and the country was in the midst of a financial crisis. The crisis was caused, in part, by Eurodollars, or deposits in U.S. dollars held in banks outside the United States. As the number of Eurodollars came to equal the number of dollars in circulation in the United States, investors feared a run on the U.S. dollar; holders of Eurodollars might seek to cash them in for the gold that still backed them. President Nixon responded by "closing the gold window." The dollar ceased to be convertible into gold, and the Bretton Woods system of fixed **[End Page 376]** exchange rates ended. ⁴³ The end of Bretton Woods opened currency markets to speculative trading and resulted in a boom in new kinds of financial instruments and investment entities (further contributing to the paperwork problem), yet at the same time caused a crisis in confidence (leading to a decrease in trading volume). Nixon signed the Securities Investor Protection Act, which created the Securities Investor Protection Corporation (SIPC) to allay the fears of small investors by insuring investments up to \$50,000 (as the Federal Deposit Insurance Corporation [FDIC] had done for bank deposits). He also created the Banking and Securities Industry Committee (BASIC) to come up with solutions to the paperwork problem.

But for Richard Smith, any solutions short of abolishing the paper certificate only deferred the inevitable problem that would recur with rising investment. Immobilized shares and book-entry settlement still required mounds and mounds of paper, which had to be endorsed over to new owners, and this still had the potential to cause "failed trades," or trades which would fail to settle because, by the time T+5 came around, issuing or purchasing companies might have gone out of business, been bought out by other companies, and so forth. Because of this, he called for the complete abolishment of the physical share and, with it, the abolishment of the principle of negotiability. Smith argued that "the reification of the corporate interest into a certificate and the numerous controls and procedures that have attached themselves to this now valuable piece of paper" had led to the paperwork crunch and furthermore that "until the physical act of delivering the certificate can be dispensed with, the system must inevitably strain under sustained volume. The twentieth and nineteenth centuries cannot exist at the same time." ⁴⁴ Smith continues: "The only final solution to this constant threat, this Damocles sword hanging over the growth of our markets, is the rapid, systematic elimination of the stock certificate for publicly traded securities, or at least the elimination of its negotiability. . . . The stock certificate is not a thing-in-itself having some independent metaphysical existence, except such as man's laws have cloaked it with." ⁴⁵

Of course, this is where I, the anthropologist violating disciplinary turf by reading *Business Lawyer*, choked on my critique. Berle and Means seemed simple enough. In spite of their apparent anticorporate thrust, Berle and Mean's criticism of the joint stock corporation was not an all-out analysis of the structuring **[End Page 377]** inequalities and dialectics of capitalism but a critique founded on the image of the independent proprietor--the ultimate symbol of Lockean political economic order. As did Locke, Berle and Means envisioned a functioning capitalist society based on proprietors who invest the things of nature with labor and capital and thereby make them their own, to trade on markets in the interest of self-interests. ⁴⁶ The things they produce and thereby own are, for Locke, relatively unproblematic.

But Smith's proposal is different. Explicitly invoking the language of the critique of political economy, Smith challenges the thing-in-itselfness of modern property. Hegel maintained that property could only consist of "things external by nature" to the person, which the person, by investing will into them, could claim to own. ⁴⁷ The object of property was of necessity a thing-in-itself. It is this metaphysics that Marx famously contests in his critique of the commodity form. Yet here the commodity form is unmasked by none other than one of the leading figures in its perpetuation.

There is a wonderful irony to Smith's presumed historiography, as well, in his claim that a "twentieth-century" economy cannot abide by "nineteenth-century" settlement procedures. In a sense, Smith's critique of the metaphysics of property coincides with the late-nineteenth-century dephysicalization and expansion of property discussed by Horwitz. Smith's claim echoes the conceptualists' apparent reassertion of properties as aspects or qualities with market value bearing no necessary relationship to things-in-themselves. Smith is also probably closer to Hegel than to Locke in that the market value of dephysicalized property seems more in line with Hegel's notion of human will infusing and thereby creating property: In creating property, "man" has breathed life into "things," and the value of those things is a measure of the life-giving breath, not the thing itself; although for Hegel, the externality of the thing was necessary for humans' mutual recognition of their wills in things and hence their independent freedom. For Smith, in contrast, the externality of the thing (the paper certificate) served to "reify" (Marx would say fetishize) the certificate. Both Marx and Smith called for the destruction of this metaphysics; Marx, to end capitalism; Smith, to "free" capitalism from fetishized objects he believed were hindering its progress.

Smith's vision of totally paperless trading did not materialize rapidly, however. The Banking and Securities Industry Committee's solutions, which came into effect in the mid- to late 1970s, included the creation of a central computerized clearance system called the National Securities Clearing Corporation (NSCC) [End Page 378] and a central certificate depository called the Depository Trust Company (DTC) to reduce the movement of shares as much as possible through book-entry settlement procedures. The NSCC would ensure that trades clear, and the DTC would ensure that they settle by signing certificates over to new ownership in its books. As the NSCC Web page proudly explains, "Only a few decades ago, clearance and settlement was a colorful but cumbersome process, prone to risk and error. Instead of data flashing through computer networks, flocks of messengers scurried through Wall Street clutching bags of checks and securities." ⁴⁸ Smith's proposal to abolish negotiability seemed no longer relevant because the new system worked and worked well. The creation of a national clearinghouse for securities and a national centralized depository for paper shares rather nicely kept the Damocles sword from falling, at least until the crash of 1987.

Abolishing Negotiability and the Property Construct: Toward a Politics of Risk

During the 1980s and 1990s, many of the protections against fraud created in New Deal legislation were eroded, abolished, or rendered irrelevant by new financial institutions and arrangements. For example, deregulation in the 1980s expanded consumer finance markets through mutual funds and retirement accounts as alternatives to bank deposits, and credit cards as alternatives to cash. The result has been the decline of banks as financial institutions and the rise of nonbank financial entities for consumers' everyday financial needs. ⁴⁹ More recently, new legislation has created alternatives to the meticulously detailed prospectus--the chief protection against "blue sky" investments. Deregulation has also encouraged financial companies to develop incredibly complicated financial instruments such as derivatives ("futures" and "options": assets whose value depends on other assets or, most often, on assets removed in time--bets on future bets) and complex mutual fund portfolios that take advantage of such new financial instruments. ⁵⁰

New financial instruments, and the crash of 1987, have generated a renaissance [End Page 379] of the rhetoric and thinking of Richard Smith in two distinct literatures: in writings by securities lawyers seeking to avoid another crash by abolishing negotiability and revising Section 8 of the Uniform Commercial Code (UCC), which governs the trading of securities, and in writings by international organizations charged with developing "markets" and market mechanisms in the Third and former Second Worlds (such as the Group of Thirty, a "private sector group concerned with the working of the International Financial System," and the Organization for Economic Cooperation and Development [OECD]). ⁵¹ For the remainder of this essay, I will focus on Charles Mooney's and James Stevens Rogers's commentaries on the possibilities for the reconfiguration--and abolishment--of negotiability and the property construct in securities law, which have been influential in both of the aforementioned domains.

Mooney, a law professor at the University of Pennsylvania and the American Bar Association Liaison-Advisor to the Permanent Editorial Board for the Uniform Commercial Code, as well as a onetime member of the Group of Thirty, has written the most extensive commentary to date on the negotiability of paper certificates, including provisions for the redrafting of the UCC. ⁵² Since my intent is not to provide an exercise in legal engineering, I will not dwell on the specific provisions here. I will simply note Mooney's characterization of the "problem" facing securities settlement and clearance and give a quick sketch of his "solution."

Mooney makes the important observation that, in a system of "continuous net settlement" (similar to the example of Company A and Company B mentioned earlier, except involving many more companies and a round-the-clock accounting of net gains and losses) the securities held at any given time by any legal person constitute what is known as a fungible bulk and cannot be seen as discrete entities. What is a fungible bulk? The term derives from the property law of bulk commodities like grain. Suppose two individuals jointly own the contents of a grain silo, each holding a 50 percent interest. The two have a falling out and separate the grain fifty-fifty. Individual A has another silo full of grain and pours his share into **[End Page 380]** his own silo. Individual B, subsequently, discovers that Individual A actually made off with 65 percent of the grain and demands the return of the stolen grain. Assuming A is a decent sort, A decides to return the excess 15 percent of the original grain to B. But how is A to do this? The grain he took from B is hopelessly intermingled with his own grain. How would A be able to tell which individual kernels were his and which were B's? Property law provides a solution: The grain is considered to be a "fungible bulk" in which it is not the individual kernels that are the object of property but any combination of kernels that add up to the proper proportion of the original total. The object of property is a bulk, and, since any individual piece of the bulk can replace any other piece, it is fungible.

Securities in a multilateral netting system, Mooney demonstrates, are effectively a fungible bulk. If A sells B 1,000 shares of IBM stock, and A already owns 2,000 shares, and then for whatever reason the trade is found to have been illegal or invalid, and A has to return 1,000 shares, it does not matter which individual shares A returns to B so long as the number equals 1,000. This hypothetical example is hopelessly simple compared to the actual kinds of cases possible with modern securities transfer. However, James Stevens Rogers, taking his cue from Mooney, remarks that in spite of the conceptualization of securities as a fungible bulk, it is easy to see the shares lost by A and the shares gained by B as the "same thing." ⁵³ Yet, Rogers argues, they are not. He continues:

In the end, then, the problem with the present structure of the law of securities transfers may be that the concept of transferring items of property just does not fit. It is entirely unnecessary to describe the result of the Jones-Smith transaction as a "transfer" to Smith of the same 100 shares that Jones formerly owned. A far more accurate description would be to say that the Jones-Smith transaction was the efficient cause of the extinguishment of Jones's rights against the issuer and creation of a new package of rights in favor of Smith. That the two packages of rights are economically equivalent does not mean that they are the same. Indeed, it makes no more sense to say that the 100 shares Smith now owns are the same ones that Jones used to own than it does to say that the four tally marks on Barney's ledger in the blackboard hypothetical are the same tally marks that formerly were on Oswald's ledger. ⁵⁴

Rogers goes further and maintains that using ledger marks to reference immobilized shares allows one to dispense with the pieces of paper and the principle of **[End Page 381]** negotiability altogether. Why not eliminate paper shares and just use ledger ticks? "It would . . . be ironic," he concludes, "to attempt to preserve the concept of negotiability once we dispense with the physical tokens." ⁵⁵

But how, then, to settle competing claims or sort out failed trades, if the physical tokens (paper certificates) have been dispensed with? Mooney provides a solution by coupling the realization that securities constitute fungible bulks with another: that the kinds of relationships involved in securities trading between individual investors, firms, and banks constitute incredibly complex chains of fiduciary obligations, and that it is the character of these relationships (and not the character of property interests held in stocks) that truly determines interests in the fungible bulks of shares being exchanged. Because securities trading is a process in time (often very rapid time) and because in the course of a day parties to these relationships can come into and go out of existence with relative rapidity (in buyouts, bankruptcies, and the like), the chains of fiduciary obligations have the potential to come undone and cause what the literature terms "systemic risk": the possibility that the whole system, based on future

obligations to settle trades promised during the course of the trading day, will collapse. ⁵⁶

In a world of fungible bulks and complicated intermediary relationships among persons and firms, how does one settle the competing claims that will occur when an intermediary fails and causes a chain reaction of failed trades? Mooney's solution is ingenious and forms the basis of the shift in discourse and practice that I identified at the start of this essay. Relying on the fact that "lower-tier intermediaries" (individual shareholders) are protected by the Securities Investor Protection Act (and are protected now at up to \$500,000), Mooney proposes that adjudicators to competing claims during instances of failed intermediaries favor "higher-tier" claims (those of institutions like brokerage firms) over those of lower-tier intermediaries. Let insurance handle the small investor, and let private mediation handle the large investor. ⁵⁷

Conclusion: From Rights to Risks

Three points deserve mention. First, Mooney's proposal is fascinating when viewed in terms of the history of property. Mooney essentially exposes the fallacy of the Lockean and Hegelian vision of property--that property consists of a [End Page 382] relationship between a person and the thing into which the person pours its labor and/or will--by highlighting the *relationships among persons* that go into constituting the supposed objects of property. This echoes Marx's critique that private property is constituted by social relationships and not by a thing-in-itself. Mooney summarizes his proposal for "a new model for dealing with transfer and pledge of interests in fungible bulks of securities controlled by intermediaries" thus: "A new model would focus on the relationships of claimants to intermediaries rather than property law constructs. . . . A new model is illustrated by a proposed priority rule for resolving different-tier claims: 'upper-tier priority.' Claimants against a securities intermediary could look only to that intermediary for satisfaction. . . . Lower-tier claimants . . . generally would have no senior claims to securities or other rights against upper-tier intermediaries." ⁵⁸

It seems clear that this is a system that favors large over small investors. It also seems to resonate with the late-nineteenth-century conceptualist dispersion of property into networks of contracts. Yet again, and this is the second point, Mooney stresses the importance of the SIPA:

An upper-tier priority rule would neither pit the rich against the poor nor the large and sophisticated against the small and unsophisticated. Pursuant to the Securities Investor Protection Act (SIPA), nonfinancial institution customers of insolvent securities broker-dealers generally are protected against losses up to \$500,000 per customer by the Securities Investor Protection Corporation (SIPC). . . . Modern securities markets have moved so far beyond the movement of pieces of negotiable paper that the property law construct is inadequate and unworkable. Whatever rules might emerge, there is a need to push the legal regime "beyond negotiability" and, perhaps, "beyond property." ⁵⁹

The upshot of Mooney's proposal is the following: Upper-tier intermediaries will settle conflicting claims to securities in the event of an intermediary failure with reference to a system of upper-tier priority, whereby the higher rungs of the ladder of intermediary relationships will be given preference over the lower rungs. They will be able to settle such claims by a simple calculation of their "tier" relative to other intermediaries and, through a kind of private justice system, adjudicate any further conflicts that may arise. Lower-tier intermediaries--including those, like individual investors, who can't really be said to mediate anything, being the "bottom" of the chain of fiduciary relationships--will rely on a [End Page 383] national system of insurance to protect them from intermediary failures. Being thus insured is a far cry from earning the "wages of capital." The notion of insurance seems to resonate with the nineteenth-century "right to an unchanging world" but with a difference: Insurance implies risk, the chance that the world might, indeed, change, and that some persons need protection from those potential changes. Mooney's proposal, thus, also enshrines a system of *statuses* which determines whether one is an object of insurance practices who needs "protection" or a party to private mediations who needs "freedom."

The system of statuses, coupled with the reliance on insurance, leads me to the third point. Rogers's proposal to eliminate negotiability and paper certificates puts him in line with Richard Smith and the nineteenth-century conceptualists. What makes Mooney's proposals different from these, however, is that his dematerialization of property leads him to reject the property construct altogether and favor instead a construct of "risk." If we can abolish negotiability, why not abolish property, too? If one were to follow Mooney's proposals, property itself would be irrelevant. Lower-tier intermediaries are protected by a

system of national insurance. If they "lose" their property, they in reality lose nothing since the market value of their loss will be returned to them by SIPA. Higher-tier intermediaries protect and increase their wealth through private agreements with each other. This wealth constitutes their "property," of course, but not in a form recognizable to either conceptualist or realist legal definitions of the concept.

These shifts in discourse, from Locke and Hegel to Berle and Means to Mooney, represent shifts in forms of governmentality. Under the logic of property interests in shares, shareholders are rendered a society of independent proprietors, each investing his or her capital and receiving the benefits of that investment as a spur to further capitalist development. Berle and Means worried, in 1932, that the model no longer fit and that shareholding capitalists had been transformed into wage earners. But, by 1967, their argument that shareholders earn only the "wages of capital" was transformed into a positive statement about the possible disbursement and democratization of American productivity across the populace--everyone should be entitled to a share in the nation's growth. This idea resonates with Keynesian welfare-statism, a form of governmentality that posits relationships between individual citizens and the state different from those envisioned by Locke's and Hegel's civil societies of independent proprietors.

Mooney's proposal represents a further shift, toward what has been called the "risk society," a system of governmentality that calculates and then disburses not the national product but the national risk across the population in order to defer **[End Page 384]** capitalist crises, and also in order to regulate populations. ⁶⁰ The property/market value equation promoted by laissez-faire capitalists in the late nineteenth century is, in Mooney's proposal, replaced by a conception of "risk." At the same time, Mooney's proposal represents a privatization of justice: Higher-tier intermediaries rely on a kind of *lex mercatoria* to settle their disputes outside of the formal political sphere, while common shareholders, lacking access to this zone of intermediation, fall back on "insurance." ⁶¹

This essay has traced oscillations between the Enlightenment conception of property as a thing, the late-nineteenth-century conception of property as a market value with expectation of future returns, the rephysicalization of property represented in the paper stock certificate, and the expansive fungibility of the paper share in its transformations from certificate to ledger-tick to traces of ledger-ticks. With investment entities like futures and options, the property interest does not precede the share in time but follows it; it is a trace of a future, not a past. Traces of the future help manage risk and control the unpredictability of temporality. The Lockean and Hegelian subject of property takes a back seat to a system of statuses based on one's investment in that temporality, as ownership itself evaporates into risk profiles. And political community? The right to an unchanging world of the late nineteenth century is superseded by a probabilistic guarantee that, should all else fail, those statuses are insured. Whether or not they will endure is an open question.

Bill Maurer teaches anthropology at the University of California, Irvine. His recent publications include *Recharting the Caribbean: Land, Law and Citizenship in the British Virgin Islands* (University of Michigan Press, 1997).

Notes

*My thanks to Eve Darian-Smith, Deborah Heath, Peter Hegarty, Marcia Klotz, Diane Nelson, Kirsty Munro, Tom Boellstorff, Katherine Verdery, Robert McCarthy, and the editors of *Public Culture*. I owe a special debt to Richard Perry for encouraging me to pursue the line of thinking represented in this essay, for generously suggesting sources, and for engaging in innumerable discussions on the topic; the essay could not have been completed without him.

1. These implications move beyond the realm of property; for instance, one might draw an analogy between the shift identified in this essay and the shift from nineteenth-century sciences of sex to late-twentieth-century Centers for Disease Control risk profiles.

2. I use these concepts in the sense outlined by Michel Foucault in "Governmentality," in *The Foucault Effect: Studies in Governmentality: With Two Lectures by and an Interview with Michel Foucault*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), 87-104.

3. World Bank, *From Plan to Market: World Bank Development Report* (Oxford: Oxford University Press, 1996), 89.

4. World Bank, *From Plan to Market*, 89.

5. Charles Mooney, "Property, Credit and Regulation Meet Information Technology: Clearance and Settlement in the Securities Markets," *Law and Contemporary Problems* 55 (1992): 131.
6. C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).
7. John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Mentor, 1960), sec. 27, 329.
8. And Locke did mean men; see chapters 6 and 7 of the second treatise in Locke, *Two Treatises*; see also Carole Pateman, *The Sexual Contract* (Stanford, Calif.: Stanford University Press, 1988). In keeping with Locke's gendering of the subject of property, I will retain gendered pronouns when writing of Locke's property-owner.
9. Locke, *Two Treatises*, sec. 27, 328 (original emphasis).
10. Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 365.
11. On property, person, and the politics of recognition in Hegel, see Seyla Benhabib, "Obligation, Contract and Exchange: On the Significance of Hegel's Abstract Right," in *The State and Civil Society: Studies in Hegel's Political Philosophy*, ed. Z. A. Pelczynski (Cambridge: Cambridge University Press, 1984); Alan Patten, "Hegel's Justification of Private Property," *History of Political Thought* 16 (1995): 576-600; and Peter Stillman, "Property, Freedom, and Individuality in Hegel's and Marx's Political Thought," in *NOMOS XXII: Property*, ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1980), 130-67.
12. G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), sec. 56, 85 (original emphasis).
13. Hegel, *Elements of the Philosophy of Right*, sec. 65, 95 (original emphasis).
14. On extensions of the inalienable rights of personality derived from Hegel into a domain of market inalienability to further a Hegelian conception of human flourishing, see Margaret Radin, "Market Inalienability," *Harvard Law Review* 100 (1987): 1849-1937.
15. Karl Marx, *Capital: A Critique of Political Economy*, trans. Ben Fowkes (New York: Vintage Books, 1977), chap. 1, sec. 4, 163-77.
16. Morton J. Horwitz, *The Transformation of American Law, 1870-1960* (Oxford: Oxford University Press, 1992), 145.
17. John Lewis, *A Treatise on the Law of Eminent Domain in the United States* (New York: Collaghan, 1888), 42-43 (original emphases).
18. *Old Colony and F.R.R.R. v. County of Plymouth*, 80 Mass. (14 Gray) 155, 161 (1859), quoted in Horwitz, *Transformation of American Law*, 147.
19. Horwitz, *Transformation of American Law*, 148.
20. Horwitz, *Transformation of American Law*, 151.
21. Interestingly, John Maynard Keynes similarly critiques the myth of a predictable world in his *Treatise on Probability* (London: Macmillan, 1957). Keynes carried the critique into his economics when he stated that investment ultimately relies on a "convention," which rests on the assumption that "the existing state of affairs will continue indefinitely" (Keynes, *The General Theory of Employment, Interest and Money* [San Diego, Calif.: Harcourt Brace, 1964], 152). This assumption, Keynes sought to demonstrate, is a false one and leads to a fetishization of liquidity; see Bill Maurer, "Redecorating the International Economy: Keynes, Grant, and the Queering of Bretton Woods" (paper presented at the Center for Lesbian and Gay Studies, City University of New York, April 1998).
22. Horwitz, *Transformation of American Law*, 167.
23. Adolph A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Commerce Clearing House, 1932), 5.

24. Berle and Means, *Modern Corporation*, 300.
25. Berle and Means, *Modern Corporation*, 300.
26. Berle and Means, *Modern Corporation*, 302.
27. Berle and Means, *Modern Corporation*, 302.
28. Berle and Means, *Modern Corporation*, 306, 307.
29. Quoted in Berle and Means, *Modern Corporation*, 304.
30. Adolph Berle, "Property, Production and Revolution: A Preface to the Revised Edition" in Adolph A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property*, rev. ed. (New York: Harcourt, Brace and World, 1967), vii-xxvii.
31. Homer V. Cherrington, *The Investor and the Securities Act* (1942; reprint, New York: Da Capo Press, 1973).
32. Berle and Means, *Modern Corporation*, rev. ed., xxiii.
33. Berle and Means, *Modern Corporation*, rev. ed., xxvii.
34. Berle and Means, *Modern Corporation*, 313.
35. Richard Perry (personal communication) pointed out a parallel here to the earlier substitution of "symbolic" paper money for the "real" worth of precious metals and concomitant worries over the function of the state as an endorser of currency. See Walter Benn Michaels, *The Gold Standard and the Logic of Naturalism* (Berkeley: University of California Press, 1987), and Patrick Brantlinger, *Fictions of State: Culture and Credit in Britain, 1694-1994* (Ithaca, N.Y.: Cornell University Press, 1996).
36. Richard B. Smith, "A Piece of Paper," *Business Lawyer* 25 (1970): 923.
37. See David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Oxford: Basil Blackwell, 1989); Susan Strange, *Casino Capitalism* (Oxford: Basil Blackwell, 1986); and Eric Helleiner, *States and the Reemergence of Global Finance: >From Bretton Woods to the 1990s* (Ithaca, N.Y.: Cornell University Press, 1994).
38. Smith, "Piece of Paper," 923.
39. See Keynes, *General Theory of Employment*, chap. 12, for a critique of the "fetish of liquidity."
40. Smith, "Piece of Paper," 927.
41. Smith, "Piece of Paper," 927.
42. Smith, "Piece of Paper," 928.
43. See Strange, *Casino Capitalism*; see also Andrew Leyshon and Nigel Thrift, *Money/Space: Geographies of Monetary Transformation* (London: Routledge, 1997).
44. Richard B. Smith, "A Piece of Paper Revisited," *Business Lawyer* 26 (1971): 1774-75.
45. Smith, "Paper Revisited," 1775.
46. See Macpherson, *Political Theory of Possessive Individualism*.
47. Hegel, *Elements of the Philosophy of Right*, sec. 65, 95
48. NSCC, "The Clearance and Settlement Process," <http://www.nsc.com/about/clearance.html> (page visited 26 May 1998).
49. See John P. Caskey, *Fringe Banking: Check-Cashing Outlets, Pawnshops, and the Poor* (New York: Russell Sage Foundation, 1994).

50. See Philippe Jorion, with the assistance of Robert Roper, *Big Bets Gone Bad: Derivatives and Bankruptcy in Orange County* (San Diego, Calif.: Academic Press, 1995); Dimitris Chorafas and Heinrich Steinmann, *Off-Balance Sheet Financial Instruments: Maximizing Profitability and Managing Risk in Financial Services* (Chicago: Irwin Professional Publishers, 1994); and Strange, *Casino Capitalism*.

51. See Group of Thirty, *Clearance and Settlement Systems in the World's Securities Market* (London: Group of Thirty, 1989), and Organization for Economic Cooperation and Development, *Systemic Risks in Securities Markets* (Paris: OECD, 1991). I will not review here the 1977 and 1992 changes to Articles 8 and 9 of the Uniform Commercial Code, which simplified the immobilization of paper shares; see Jeanne L. Schroeder and David G. Carlson, "Security Interests under Article 8 of the Uniform Commercial Code," *Cardozo Law Review* 12 (1990): 557-679.

52. And, to his peers, the most "brilliant" (Schroeder and Carlson, "Securities Interests," 563): Charles Mooney, "Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries," *Cardozo Law Review* 12 (1990): 305-427.

53. James Steven Rogers, "Negotiability, Property, and Identity," *Cardozo Law Review* 12 (1990): 506.

54. Rogers, "Negotiability, Property, and Identity," 506.

55. Rogers, "Negotiability, Property, and Identity," 508.

56. See OECD, *Systemic Risks*.

57. Mooney, "Beyond Negotiability," 312.

58. Mooney, "Beyond Negotiability," 312.

59. Mooney, "Beyond Negotiability," 313.

60. See Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992); see also Jonathan Simon, "The Ideological Effects of Actuarial Practice," *Law and Society Review* 22 (1988): 771-800.

61. On the logics of risk and insurance as forms of governing populations and techniques for governing the self, see Daniel Defert, "'Popular Life' and Insurance Technology," and Francois Ewald, "Insurance and Risk," both in Burchell et al., *Foucault Effect*, 211-33 and 197-210; D. Knights and T. Vurdubakis, "Calculations of Risk: Towards an Understanding of Insurance as a Moral and Political Technology," *Accounting, Organizations and Society* 18 (1993): 729-64; and Nikolas Rose, "Governing by Numbers: Figuring out Democracy," *Accounting, Organizations and Society* 16 (1991): 673-92. In general, the work of the so-called Critical Accounting Movement, represented in the pages of the journal *Accounting, Organizations and Society*, is most helpful here.



http://muse.jhu.edu/journals/public_culture/v011/11.2maurer.html