

INTRODUCTION

Property, Governance, and a Plan for the Book

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Imagine this scenario. A woman leaves her corporate job to open her dream bakery. She quits to enroll in pastry school. She takes out traditional loans yet also turns to GoFundMe, an online, crowdsourced fundraising platform, for assistance. There, she knows strangers can contribute to her online campaign for books and other school supplies. Upon graduation, she decides to start her own business but cannot immediately afford a storefront with kitchen equipment, so she rents space from a local corporation that makes a business of such ventures. She is there daily with other chefs preparing food for delivery. She then opens her virtual storefront, turning toward a free website hosting service. She does not need to pay a fee to use their templates to create a business website.

The orders come pouring in once her website goes live and word of mouth spreads. She expands to create an Instagram feed, a social media application focused on sharing photos. She posts pictures daily of her latest creations to increase business so she can finally buy a storefront. To deliver her baked goods, she relies on ride-sharing services such as Uber and Lyft. She has both apps for busy times so she can find the best price for her rides. Her own car is too old to travel the distances her customers require. Each day, she takes the rides at least fifty miles back and forth, all while still baking on her own without an assistant.

Where does property fit in? In our all-too-real example, there is a mix of real and social property—all of which come with different social contracts. When our fictional baker takes an Uber to her delivery, no taxes are going toward driving on those roads as would happen if she rode in a taxicab. Who pays for repairs? Is there a commons problem emerging with overuse? If someone contributes to her GoFundMe account, do they expect a portion of her royalties—or at least free cupcakes? If something happens in the kitchen, who is responsible? When she posts photos and someone takes them for their own blog, have they violated her intellectual property even with proper photo credit?

In today's ever-connected, fast-paced society, we see these tensions regularly. Our book uses property as a lens through which to explore these changing relationships via our understanding of governance across disciplines. Practically, we see policy disagreements based on social aspects of property—environmental protection, (de)regulation of industry, and health insurance, to name a few. Governance is indeed a cross-cutting construct influential across intellectual and practical discussions, but we borrow here a broad definition from the public administration literature given that discipline's ability to undergird most of the chapters within the volume. We use the term *governance* to show the interconnectedness between actors in our social, economic, political, and governmental systems. Governance implies a networked relationship rather than a hierarchical one, though there is no agreed-upon definition of the term (Keefer, 2004). In governance scenarios, state and nonstate actors assume equal footing in deliberative spaces to arrive, ideally, at a consensus-based decision. Now, we see perversions of this ideal regularly, and many of the chapters herein illustrate the tension between public-private interactions. Governance and property are inextricably linked given the theoretical foundations of self versus other inherent within philosophical and practical debates about the individual's role in society and rights to ownership.

We need to be clear up front: our book is not a legal text dedicated to the nuances of admittedly complex property law. That is for other volumes. Instead, we take a purposefully interdisciplinary approach to show how one concept—property—manifests in daily governance issues. By governance, we mean a shift from top-down, government-led policies and practices to a system that, ideally, embraces collaboration, dialogue, and the commons. In systems practicing good governance, there is shared discussion among stakeholders who set the rules and evaluate processes along the way (Bovaird & Loffler, 2003). As some of the chapters show, we see breakdowns in governance processes in favor of top-down policy provision and implementation.

All of the writing involves a mix of public, nonprofit, legal, and corporate actors struggling with some aspect of property as a concrete thing or abstract concept. The authors in this volume show not the limits of property but instead its power across disciplines in theory and practice.

WHY A BOOK ON PROPERTY AND GOVERNANCE?

There exist myriad books on the varied aspects of property, so why do we need another volume? Property is its own wide-ranging area of expertise, especially in law schools. But changing theories of property influence law school curriculum. For example, a recent legal studies text cites five alternative theories of property

and four key debates (Alexander & Penalver, 2012). Books also exist that delve into nuanced aspects of property, such as intellectual property. Again, we emphasize the importance of those volumes, but our goal is to take property out of its traditional legal home into one that is more recognizable in daily life. Reflection on property regimes is integral to political philosophy, and ethicists, biologists, and legal experts continue to weigh in on the issues raised by efforts to patent life forms, either in whole or part. Historical studies of property and its significance abound, and much of history can be reduced to claims to property and disputes thereof. Women and slaves were once widely considered property, but are no longer so (in some regions of the world anyway). Children are, strictly speaking, no longer considered property, although their legal status remains different in many respects from that of normal adults.

The distinctiveness of the present volume is twofold. First, it is a uniquely interdisciplinary volume in an area where research across disciplines is sorely needed. No one field owns the study of property, and real progress in reflecting and understanding the significance of property for the past, present, and future increasingly requires knowledge of multiple areas of inquiry. Understanding the history of property requires some foundation in economics and economic systems, as well as the philosophical distinctions that explicitly or implicitly impact the decision making of historical actors in their context. Second, the chapters that jointly comprise the volume collectively raise issues of the various meanings of property and the ways these meanings become concretized in the intersection of economics and governance. The embodiment of meanings of property is a clear concern of both the historical chapters comprising the first half of the volume and the policy and theoretical chapters of the second half.

THE CHANGING FACE OF PROPERTY

This book is timely—yet can stand the test of time—given the contemporary discussions surrounding the expansion of property rights, rules, and regulations. In one example, the election of Donald Trump as U.S. president presented a tangled ethical web related to his global properties. As one news article describes, the Trump name on buildings throughout the world could cause extra security concerns and even make the properties terrorist targets (Crowley, 2016).

In another example, many readers are familiar with the sharing/gig economy mentioned at the outset of this introduction. Services such as Airbnb, Lyft, and Uber fall under this umbrella. People have created enterprises that circumvent traditional economic practices within this model. Uber and Lyft are ride-sharing applications that go around the heavily regulated taxi companies, while Airbnb

does the same for hotels. Another aspect of the sharing economy is temporary workspaces. Startups might not need full office spaces—or cannot afford them—so they enter into basically rental agreements akin to gym memberships (Broderick & Kuschel, 2016), as our baker did in the opening scenario. The person occupying the space is not listed as a tenant usually but as a member, thus lessening the property rights and even privacy rights they have related to the shared space. Regarding privacy rights, shared spaces mean no doors and no protection for potentially sensitive information. One slip, and a breach could be potentially disastrous.

Ongoing developments in science and technology constitute one obvious driver of changes in the conception of property, and the history of technology in particular is deeply intertwined with evolving definitions of intellectual property and patent systems. Although intellectual property as a concept has roots in the ancient period (Moore, 2001), legal protections of intellectual property (Queen Elizabeth I in England in the early seventeenth century) are now a crucial modern phenomenon, and the protection of intellectual property enshrined in the first article of the U.S. Constitution is a remarkable exemplification of this fact. The Constitution's phrasing is itself indicative of another important dimension, since its protection of intellectual property conceptualizes such property as a right, but one that exists only for a limited duration and with a particular justification: the "progress of science and useful arts." From the outset, arguments concerning the status of intellectual property have attempted to balance the rights of creators, which inherently limit access to creators' inventions, and the rights and the needs of the community, for whom the inventions hold promise for improving their quality of life. Achieving this balance has become increasingly difficult as new technologies have made some forms of intellectual property such as music and software exceedingly cheap to reproduce and share (Banner, 2011; Lessig, 2006; Moore, 2001). Advances in biotechnology raise a different kind of issue: To what extent can living things, including their genes, be patented, and is this even a wise practice to pursue (Andrée, 2007; Koepsell, 2015)?

While science and technology constitute one driver of changing conceptions of property, it is important to acknowledge distinctly social ones as well. Indeed, the economic shifts that accompanied the transition to the early modern period and laid the groundwork for the emergence of capitalism, however much they may be explained by other factors, were associated with large-scale shifts in society and institutions. The emergence of joint stock companies and the genres of documentation that gradually developed to support the new world of commerce (Poovey, 2008) had little initially to do with science and technology and much to do with the shifts in first British and eventually European and American society. In these developments, the contingent discovery and exploration of vast lands

beyond the confines of Europe played no small role. And while it is easy to focus on the significant responses, highlighting for instance the need to balance risk and profit (Bernstein, 1998), it is important to acknowledge the more subtle impacts, including exposure to an American frontier for which British property laws were less than optimally suited to its Native American inhabitants.

As three of the chapters in our volume testify, issues of environmental protection raise their own set of property and ownership dilemmas, and it is no accident that the most famous example of free riders exploiting a public good—the tragedy of the commons—concerns the way environmental goods such as clean air and water are subject to exploitation (Hardin, 1968). This may seem paradoxical at first, since ownership of land is considered the paradigmatic form of property, and it is the primary referent for Locke's (2003) influential labor theory of property ownership. But while we often think of land under our feet having a sort of permanence immune to change, this is far from true, as all landscapes change over time, usually very slowly, but, as in cases of massive erosion from hurricane landfall, sometimes quite suddenly, with deep implications for those who thought their property permanent.

Although advances in science and technology provide some of the most obvious examples changing conceptions of property, they are not the only ones, and motivations for reconceptualizing property can arise from basic societal shifts as individuals and communities react to and interpret their immediate environment. The emergence of new forms of property coinciding with the rise of capitalism in the early modern period provides one obvious example, giving way to the corporation, stocks, tradable public debt futures, and more.

Another source of property's changing conceptions can be found in the European encounter with what they considered to be the American frontier. Europeans arriving in the New World brought with them legal frameworks of ownership that did not always apply equally well to a frontier whose property boundaries were still being determined and where traditional solutions to European problems did not always apply. The idea that property rights, empirically speaking, are not just one thing but really a "bundle of sticks" that can be arranged in different ways depending on need and context becomes more than apparent as we contemplate the sweep of history and the shifting demands placed on us by technology and societal change.

At the end of the day, we are interested in not only how the bundle of sticks we call property rights were arranged in societies past but also how they ought to be arranged now and in the future. The concept of property is inherently connected to questions of justice and fairness, and the most influential conceptions of property, such as those put forth by John Locke and Karl Marx, are deeply tied to

specific ethical justifications. While such justifications have been and continue to be societally impactful, questions remain concerning the arguments supporting them. Indeed, the divide between the two major works of late-twentieth-century American political philosophy—John Rawls’s *A Theory of Justice* (1971) and Robert Nozick’s *Anarchy, State, and Utopia* (1974)—can be understood in no small way as a divide over the fundamentals of property rights and the extent to which the Lockean paradigm should remain dominant. Forty years of subsequent debate have not settled the matter, prompting a search for new avenues of conceptualization and justification. In this volume, Peterson applies in a preliminary way the capabilities approach of Amartya Sen (1999; 2009) and Martha Nussbaum (2000; 2007; 2011) to the subject of intellectual property, and in the conclusion we return to the capabilities approach as a way of thinking about property as a natural versus constructed phenomenon. Their work helps us to think about property regimes not only in terms of exclusive rights to be protected but also in terms of human goods and conceptions of well-being. While the Lockean paradigm can and should remain an important conversation partner as we reason through particular conceptualizations of the bundle of sticks that constitutes property rights, the limitations of the paradigm—manifest in its near-exclusive focus on historical justification and the ease with which Locke’s important provisos are forgotten or pushed aside—become apparent. Ongoing changes in society and technology and the relation of both to the natural environment dictate, we suggest, exploration of alternative philosophical frameworks.

ORGANIZATION OF THE VOLUME

We chose to divide the book into two broad sections: historical explorations of property rights, and contemporary views of property issues. As noted above, we interpret the word *property* broadly to showcase the different ways in which the concept drives our everyday interpretations of the world.

In the first section, authors capture the roots of some of property’s more lasting features. Our historical survey begins with the role of conceptions of property in the development of modern economic systems, and in chapter 1, Ann Davis places one particular innovation in the conception of property, the corporation, at the heart of a narrative that begins with the Italian city-states of late medieval/early Renaissance period and extends to the formation and flourishing of capital markets in the modern period. To understand this innovation and the other innovations associated with it—joint stocks, banking systems, and national debt—Davis uses Searle’s conception of status function declarations. On this account,

economic systems and institutions are real precisely because we declare them to be real, with the result that, while common coinage reserves the term *real property* to tangible assets such as land, stocks, futures, and options are not less real, however ephemeral they may otherwise appear.

The grounds of judicial reasons constitute a basic issue for the determination of legal property rights, and in chapter 2, R. Ben Brown examines this issue as it emerges in the context of competing rights claims by landowners and the owners of animal stock. The issue of what to do when roaming stock (one form of property) damaged land or crop (another form of property) was a common one on the American frontier, and Brown demonstrates how contrasting rulings appealed either to principles of common law or to more relevant American practice and legislative act. At heart, Brown argues, is the question of the priority of an abstract conception of law versus that of democratic will, and Brown shows how deeply embedded commitments to legal genres end up privileging the former over the latter.

A central contemporary issue of property law concerns the ability of government to expropriate or otherwise regulate or modify land privately owned. With chapter 3, Jill Fraley clarifies the history of one particular form of such action, the taking of private land for use as public roads, examining in particular the seeming contrast between British and early American legal traditions. Although the British had developed a tradition of strong protection of private property that aimed to avoid unnecessary taking by constructing roads on “wasteland,” American law and politics has appeared to be more willing to take land in such instances. As Fraley argues, however, the contrast may be more apparent than real, since such cases of American takings tended either (1) to involve land that had been vested but not cultivated or (2) to fall within the common understanding in the American context that grants of land that included wastelands did not calculate the wastelands as part of the value of the land and, importantly, it was expected that roads would eventually be built there, following the British custom. Partly behind this American understanding can be seen, Fraley argues, the Lockean labor theory of value, which implied a duty to cultivate land at least in part, and which treated unimproved land as also unowned, a way of thinking that proved important in colonial context and which worked to the significant detriment to the land’s native inhabitants.

While Fraley’s chapter addresses one of the central issues involving the most paradigmatic form of property—land—Tyson Leuchter in chapter 4 draws attention to the turns of fortune of the Paris stockbroker Vincent Perdonnet and his effort to recoup substantial losses from Comte Forbin-Janson after investing on

his behalf. The dispute between Perdonnet and Forbin-Janson eventually worked its way to France's highest court, and, as Leuchter explains, the central question between them concerned whether or not futures contracts properly constitute property or are merely fictions with no legal status. The debate reveals the shifting norms and conceptions of property in postrevolutionary France, shifts that retain considerable importance for understanding today's highly financialized economy.

While Section One of our text approaches basic questions of property historically, Section Two provides a cross-section of contemporary issues emerging as a result of contemporary institutionalizations of property. In chapter 5, Donald Richards considers the impact of property regimes on proposals for climate mitigation. Central to Richards's account is the distinction between environmental and ecological economics. While environmental economics understands the natural environment as merely one exchangeable resource among others, Richards favors the ecological economics argument that we should understand the human economy as a subset of the natural ecology, rather than the other way around. Richards charts the course of events following the Kyoto Accord, and notes how different property regimes associated with each approach impacts what we think of as a satisfactory basis for international agreement. Whereas environmental economics would favor a system that treats carbon emissions and stock as private property to be managed through a potentially intractable international cap and trade system, an approach based on ecological economics would favor one that treats the environment as common property that is the possession of all humankind. This approach, Richards argues, could draw stronger involvement from less developed countries, since such a common property approach would necessarily take into account the size of relative populations and the burdens each must bear.

Karen Consalo in chapter 6 shifts the level of analysis from the "meta-commons" of the atmosphere to the slippery issue of water rights. Consalo provides a useful overview of the factors leading to contemporary patterns of water rights in U.S. law, highlighting in particular the distinctive approaches taken in the American West, where "first in time, first in line" became the basis for a legal framework that inadequately addresses issues of overuse, and the East Coast approach to riparian rights that inadequately addresses pollution issues. As Consalo notes, neither of these approaches engages the water needs of nonhuman organisms, and she charts the development of Earth Jurisprudence as one approach that may more adequately address these issues.

While Richards analyzes issues of climate and property and Consalo provides an overview of basic issues of property and water rights, Chad McGuire in chapter 7 brings these considerations together as he analyzes the issue of coastal property

rights in the face of rising sea levels caused by climate change. In doing so, McGuire contrasts a Lockean natural rights approach associated with the Fifth Amendment of the U.S. Constitution with a “modern” approach associated with the Tenth Amendment that aims to balance competing interests in the interest of maximizing outcomes according to contemporary norms. McGuire argues that the unprecedented nature of the sea level rise caused by climate change will necessitate a modern approach as governments find themselves forced to act in order to preserve the public good.

Chapter 8 from Staci Zavattaro takes property in the linguistic sense and uses it as a metaphor to explore developments in place branding. Her chapter is theoretical, showing the sociorelational side of property and how it matters for people and their place. For people, a place becomes part of them. People take a sense of pride in their community or *not*. Both matter for the success of place making, crime rates, economic increases, and social safety. Zavattaro argues this process of developing a place-based identity as personal property involves the interaction of borders as social constructions, as well as place cultures, and the interaction of individualism and geographic collectivism.

In chapter 9, Gregory Peterson shifts the focus to another contemporary governance issue: intellectual property. He explores the topic using an international lens, with a case study of South African pharmaceutical companies battling for rights to produce and sell drug treatments. His chapter is philosophical in nature, highlighting what he terms the State of Plenty. In this state, there is enough of everything to go around, potentially avoiding large-scale commons conflicts known to modern society. Peterson provides us with what is essentially a thought experiment to shift our focus from property as singular to property as communal and mutually beneficial.

Finally in chapter 10, Timothy Ravich details the emergence of property rights related to drones. The air is commonly seen as a public highway above five hundred feet, but below that the air becomes a bit thicker. With drones, anyone can fly them anywhere without regard to these airspace rights. As Ravich explains, law enforcement agencies, in one example, could take advantage of this legal imperfection to conduct unwanted aerial searches, thus violating constitutional protections. He deftly details how laws, rules, and regulations related to drones need to catch up to common practices, given the problems the devices can be and are causing.

With the variety of topics, we know the volume will have wide appeal to readers generally interested in the topic. We envision the volume spurring deep discussions in legal seminars and undergraduate courses alike. Instructors could also pick and choose chapters to share with students based on the course content

and subject area. The chapter on drones, for example, would work well for public policy classes, while the chapter on branding could work in an urban planning context. We hope all readers will find value in the volume given their particular interests.

FINAL REMARKS

We hope this book spurs ideas in readers related to how property surrounds them each day. We see it in what we know as our own—our house, car, office, clothes, food. We also see it in what is someone else’s—their house, their car, their office, their clothes, their food. That is, personal possession and the right to exclude from one’s “own” seem to be the most salient aspects of property in our daily lives. What is not so evident is the social acceptance of this definition, without which even “real” property would not exist. Common decency dictates what is socially acceptable to do related to property, but if common decency always prevailed we would not need this volume or the myriad others on the topic. To us, the many books about property from a variety of disciplinary lenses, including ours, are necessary given the ever-changing property landscape.

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