

The Public Nature of Private Property

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Abstract

American legal academics describe private property as a set of private rights. However, liberal ideas of private control poorly describe legal practices, and thus the bundle of rights is a misleading metaphor for private property. Indeed, social theorists have long understood that property is not the ownership of a thing or a set of individual rights, but a set of social agreements about what ownership entails. In the late twentieth and early twenty-first century, constituents have expected governments to protect the value in their properties, not just their control over the resources. Property rules involve government intimately not only in creating value but also in determining who deserves which valuable resources.

THE EMERGENCE AND EXPANSION OF PRIVATE PROPERTY AS A LIBERAL IDEAL

When American legal academics describe private property, they present a liberal notion of property as a set of private rights. One of the first things professors of law teach students in property classes is that legally, property is not an object one owns. Rather, it is a bundle of rights that can be split among many individuals or entities. These include rights to use, exclude others from using, and transfer property. When government protects private property in this way, it protects individual control over property; those with property rights can do what they wish, as long as they do not interfere with others' similar interests. By this definition, government seems no more than an arbiter of agreements and conflicts among private parties, and thus the conception of property as a set of rights comports well with a liberal or libertarian notion of a restrained government. [See Radin (1993) for discussion of how theories of government ally with positions on property.]

Although concerns for the public good undergird political theorists and economists' celebratory writing about private property, many of these scholars also describe the essential tenet of private property to be protection of private entities' control over resources. Classical and contemporary theorists

have argued that private initiative leads to public welfare. John Locke contended that the protection of private control over land benefitted the public, for with security that one could reap the fruits of one's harvest, men would labor to plow, seed, and nurture their crops, and communities would benefit from agricultural production. For Jeremy Bentham and other utilitarians, the distribution of power to private parties to use and transfer their control over resources allows for efficient coordination, and thus much greater overall welfare than any centralized mechanism of control could. Contemporary libertarians and law-and-economics scholars revere private rights as the best solution to problems of coordination, such as of potential overuse of land for cattle grazing or urban development (Ellickson, 1991; Epstein, 1985). Economists such as Hernando de Soto (2000) endorse private property as the key to economic development in countries that have lagged behind more advanced capitalist democracies.

Like private property's defenders, critics who attack it as damaging to the public good describe the institution itself as protection for private control over resources. Karl Marx and Ben Fowkes (1977 [1887]) and Max Weber, Guenther Roth, and Claus Wittich (1978) harshly criticized the English government's violent expropriation of common lands, once accessible to serfs, to transfer control to a few aristocratic recipients of private titles. They lambasted the resulting inequalities in wealth accumulation as inimical to the public good. Marx, of course, went further to argue that private property in an industrial era led to the exploitation of laborers and that only the abolition of private property and the treatment of property as public would end such oppression. Alexis de Tocqueville and Henry Reeve (1835) condemned the US government in the nineteenth century for unabashedly rewarding private land speculation during westward expansion. Thorstein Veblen (1945 [1923]) similarly faulted private property for allowing a class of investors in early twentieth century American cities to extract rent from poor tenants. Karl Polanyi (1944) also presented private property as the antithesis of the public good. He interpreted the history of capitalism as a "double movement" between private accumulation supported by the institution of private property and public goods created by government's social regulatory policies. Polanyi extended Marx's critique of private property as the "commodification" of goods such as land and labor, goods that have important social values other than their market price. Private property, he argued, devalued and corrupted the social values in those goods. David Harvey (1982) and John Logan and Harvey Molotch (1987) brought this critique of commodification into the present with their attacks on post-1970s governments' unsavory alliances with private developers and disrespect for the poor, who cannot possibly hope to own property in areas that benefit from rising real estate prices. Thus, despite starkly

different normative positions on how and whether private property serves public goods, defenders and critics share an understanding of what private property actually is: protection of private control over scarce resources.

As privatization has proliferated across the globe, this liberal institution seems to have become hegemonic. From its inception, the notion of private property as a set of individual rights seemed foundational to liberal, capitalist democracies. As western European nations transitioned from feudalism to capitalism, they transferred the control of land from the crown to private parties. In the late twentieth and twenty-first centuries, as eastern European countries abandoned socialism, they have adopted private property rules to govern land, utilities, and oil. At the same time, Latin American countries have converted communal and national ownership of these resources to private ownership. Private property is expanding even in the most advanced capitalist countries, such as the United States, where publicly owned highways, prisons, and schools are being transferred to private ownership and previously un-owned knowledge is becoming intellectual property. These changes suggest a centuries-long shift from public, common, or government-owned property to private property, and thus a transfer of control from governments to private entities.

However, liberal ideas of private control poorly describe legal practices, and thus the bundle of rights is a misleading metaphor for private property. To be sure, in the American tradition called *civic republicanism*, political and legal theorists have long proclaimed that private property creates and enforces community responsibilities and entitlements (Lynd 1987). Most recently, law professors calling themselves scholars of “progressive property” draw attention to their analyses of how American legal doctrine requires greater demands on government than the ideas of an owner’s control or private rights suggest (Alexander, Peñalver, Singer, & Underkuffler, 2009; Singer, 2000; Underkuffler, 1996). Indeed, the aforementioned observations, defenses, and critiques of private property shed inordinate focus on ownership, leading to inaccurate assumptions that when it protects *private* property (as opposed to managing public property), government is responsible for no more than protecting the private owner’s control. When sociologists and others observe property as practiced, it becomes clear that the word “private” in private property hides governments’ intimate and varied involvement in creating and maintaining the institution. The idea of rights has perpetuated misunderstandings about the real-life institution of private property.

IN PRACTICE, PRIVATE PROPERTY IS “PRIVATE” IN NAME ONLY

Private property can often appear to exist without much state support, deceiving observers into believing that government action is extremely

limited. In reality, however, states are intimately involved in and essential to making and maintaining private property. Karl Marx and Max Weber drew attention to how essential government coercion was to the transformation of communal to private property, and historians of the early United States have documented the enormous colonial and then federal military and administrative resources dedicated to settlement and propertization. Recently, governments transitioning from socialism to capitalism or formalizing private property rights in effect create private property (de Soto, 2000; Verdery, 2003). Even today's governments in advanced capitalist countries dedicate significant executive and judicial resources to the tracking of property interests, dispute settlement, and regulatory enforcement, and legislative resources to the creation of those regulations. In addition, even the most libertarian advocates for limited government confess that to make private property viable, governments need to do more than protect private control. For example, libertarian-leaning legal scholar Robert Ellickson (1993) admits that cities with private real estate require government-built infrastructure for utilities, sidewalks, and street lights. Infrastructure is necessary for private owners' enjoyment of their properties but impractical for those owners to provide on their own.

Moreover, private property constantly changes, and the state articulates and enforces those changes. For instance, in different times and places, states allow different objects to be owned. Less than two centuries ago, it was widely accepted in much of the United States that people could be owned as property, as slaves, or as wives. Now, such a notion is practically unimaginable, but conflicts rage over whether human organs, humans (through surrogacy and adoption), pharmaceuticals, music, and software can be owned, and if so, what ownership entails (Peñalver and Katyal, 2010; Radin, 1996). Beyond what resources can be property, states also change what entities or individuals they allow to own property, what uses they allow and prohibit, how they enforce property rules, and how transfers can be made (Carruthers and Ariovich, 2004). Meanings of private property are always multiple, contested (Blomley, 2003), and changing (Carruthers and Ariovich, 2004).

In many contexts, in fact, the line between public and private property is extremely blurry. For the eighteenth century New York City government, managing the property it owned, just as a fully private owner might have, was one of its primary activities (Hartog, 1983). Historian Samuel Bass Warner (1987) characterized nineteenth century Philadelphia as "the private city" because of government's intimate involvement in supporting private economic development, particularly real estate growth. In the late twentieth century, as postsocialist regimes formally shifted land from public to private property, in practice they preserved many of the tenets of public

property, and thus produced something new, what sociologist David Stark (1996) tagged “recombinant property.” (Also see Verdery, 2003). In similar ways, private property in previously colonized places actually looks much more public than the formal name of private indicates (J. Comaroff & J. L. Comaroff, 2006; Merry, 2000). Thus, in many cases, private property retains elements of public property during its emergence.

The hybridity of public and private in so-called private property is also found well beyond the early instantiations of private property. In the late twentieth and early twenty-first century United States, the global standard bearer for private property, new forms of public–private cooperation in property elude this easy classification. In the 1980s and 1990s, municipal governments developed innovative “public–private partnerships” to foment the development of shopping malls, convention centers, sports arenas, and gambling centers—on formally public and private land. In these and other partnerships, governments contribute land, infrastructure improvements, and tax and regulatory relief to projects constructed and largely controlled by private entities. For services needed outside of such large-scale developments, governments have also created new forms of public–private coordination to sustain property. Federal and local governments are instituting contracts, vouchers, and subsidies for privately owned and operated schooling, housing, and prisons. In addition, new public/private entities have emerged with legal powers to control properties. Business improvement districts that can tax small neighborhoods for their services, land trusts that purchase property interests for community initiatives such as preservation, and cooperative housing associations are becoming more common and legally complex (Geisler, 2000; Leavitt & Saegert, 1990).

Indeed, social theorists have long understood that property is not the ownership of a thing or a set of individual rights, but a set of social agreements about what ownership entails. Instead of liberal entitlements, rights are any claims that a community endorses as justified (Coleman, 1990). The history of private property in particular involves complicated, ever-changing notions about what exactly government is responsible for.

GOVERNMENTS ACTIVELY AFFECTING PROPERTY’S VALUE

CREATING VALUE

Recently, citizens demand that governments make and maintain properties’ value. Take the case of the most traditional form of property—real property (property in land and buildings). Throughout the twentieth century United States, it has become clearer that property is meaningful to its owners for financial value, as much as for control or use of a thing. Thorstein Veblen

(1945 [1923]) noticed in the early twentieth century United States that property in cities was becoming a source of rent, rather than of shelter for owners. After the mid-twentieth century, as homeownership greatly expanded and housing prices rose steadily, owning (and potentially selling a home) became the single greatest source of wealth for the average American family.

In the late twentieth and early twenty-first centuries, constituents have expected governments to protect the value in their properties, not just their control over the resources. Rather than simply protect their control over land, owners expect governments to protect the value of their real estate (Becher, 2014). Governments create and insure the value of their properties, and have unabashedly enacted growth policies to meet those demands. This shift in government policy over private property coincided with broader changes in governments' economic policies. In the aftermath of World War II, the emergence of Keynesian economics, and the wake of industrial decline, governments have taken responsibility for economic growth (Habermas, 1975 [1973]), including policies that increase the value of real estate (Bourdieu, 2005).

In the United States, some of local governments' most important powers are over real property (property in land and buildings) (Frug & Barron, 2008; Valverde, 2012), and those powers have expanded to allow them to protect properties' value. In the early twentieth century, the US Supreme Court gave local governments wide leeway to use their police (regulatory) and eminent domain powers over real property. In *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), the court sanctioned local governments' zoning controls. By the 1950s and 1960s, zoning was practically taken for granted across the country, and its most important intended and realized consequence has been the stabilization and growth of residential real estate prices. To the extent that zoning and environmental regulations have drawn protests, the opposition has been inspired by worries that instead of raising property values, government was hurting them. For instance, a large debate over "regulatory takings" concerns arguments about whether by taking property value away, government in effect "takes" property. Thus, these protestors too sanctioned the meaning of property as value, value government is responsible for protecting. In addition, when governments were unabashedly taking property titles, the justification has been a protection of value. In *Berman v. Parker*, 348 U.S. 26 (1954), the court allowed a city agency to take properties in a wide area to eliminate "blight," although individual properties in good condition were sacrificed in the process. Local governments took advantage of federal funding for slum clearance and urban renewal from 1949 to 1974 to acquire and demolish tens of thousands of properties in the hopes of rebuilding and protecting neighboring properties from deteriorating.

Faced with fierce protests against the displacement of largely poor and African-American residents and failures to rebuild clear areas and replace low-cost housing units there or elsewhere, governments largely shelved their eminent domain powers until the turn of the millennium. Governments seemed to have renewed their use of eminent domain for urban redevelopment when the issue hit the news after the court handed down a ruling in *Kelo v. City of New London*, 545 U.S. 469 (2005), which permitted a local agency to take of over a hundred properties in the service of “economic development.”

Local politicians have become fiercely determined to enact policies that increase real estate prices. They join real estate developers in “growth machines” that perpetuate such policies (Molotch, 1976). Constituents sanction this policy direction, for they generally evaluate politicians by their promises to provide growth and their success in doing so. Even those who contest such policies as serving the rich and middle class expect government to protect property’s value: they demand the protection of a different kind of value—use value. The poor who cannot access financial capital to grow expect governments to secure the value of shelter, community, and sentiment in the land, buildings, and neighborhoods in which they have property interests (Logan and Molotch, 1987). For example, in the wake of *Kelo*, debates arose about US local governments’ use of eminent domain to transfer properties from one private owner to another. Conflicts often pitted those who demanded government to protect the use-values of property for the poor against others who saw the need for government to create exchange values, that is, to secure property prices. In other cases, where conflict did not erupt, constituents supported eminent domain for new private ownership, when doing so protected property value; by taking a property of little value to its current owner and transferring it, government could create a positive impact on neighbors’ use and exchange value (Becher, 2014).

In some of the instances of hybrids between public and private property discussed previously, government’s contribution is value. Katherine Verdery (2003) found that when formerly socialist Transylvania newly instituted private property in land in the 1990s, constituents forced the government to make property economically valuable, not simply to protect control over title. In the public–private partnerships US governments created to support urban development, they contribute tax relief, infrastructure, and other forms of in-kind and financial value to make projects happen. In part, these commitments of value give governments a crucial role in planning and a lasting stake in projects, even when they are technically built on private land (Fainstein, 1995; Sagalyn, 2001; Zukin, 2010).

DISTRIBUTING VALUE

Property rules involve government intimately not only in creating value but also in determining who deserves which valuable resources. The clearest debate about the just or unjust desserts of private property has been between promoters of free-market ideals and critics of private property. Libertarians from Adam Smith to Friedrich Hayek argued that by protecting private control over resources, government allows the deserving to accumulate wealth to do so. Critics from Karl Marx to Karl Polanyi countered that government simply uses private property as a veil to make its coerced transfers of wealth from the deserving to the undeserving seem justified. These critics draw attention to the original, and violent, establishment of property rights, before government protects the more civil transfers of property through market transactions.

In practice, governments make decisions about the distribution of property protections by establishing various and complicated legal doctrines and executive policies about the origination of property rights. Rules about how one establishes rightful claims over a property title provide one example. Some of these government decisions are evident in the proffering of original titles under existing governments. When the nineteenth century US government handed out its first titles, claims were made based on settlement and homesteading, in other words by getting there first and staying and using a property.

Present-day judicial doctrine provides significant guidance in how governments should adjudicate competing claims about the just distribution of property. In the area of privately owned minerals, the legal “right of capture” leads governments to recognize the claims of the first arriver as justified, and still plays an important role in evaluating property claims. Accordingly, owners of mineral rights to some extent establish claims that will be backed up by courts by being the first among their neighbors to extract the mineral (hard mineral deposit, oil, or gas) from underground. Today’s “adverse possession” laws allow courts to transfer titles from owners who have abandoned their properties to whomever arrived and used them for some period of years. These laws demonstrate responsiveness to claims to property based on the productive use of that property, rather than simply the shuffling of some paper. These are just two of the many legal doctrines proclaiming exactly how governments should make, and then enforce, distributional decisions.

Other laws involve government in adjudicating who gets what in nonmarket transfers of property. Of course marriage and divorce laws largely determine rightful ownership and have changed drastically over time. Inheritance laws guide government determinations of rightful ownership when those

with close ties to the deceased claim entitlements. What those laws say about the distribution of property—what counts as a justified demand and who can make it—vary significantly over time (Hartog, 2012) and cross-nationally (Beckert, 2007).

Even the creation of infrastructure and other economic growth policies, activities in which government often fails to make distributional decisions explicit, create very significant distributional consequences. Indeed, governments' various policies that create value, discussed in the section previously, necessarily involve distributional choices, for governments must decide where, when, and how many resources to dedicate for growth and infrastructure. As mentioned earlier, critics point out that seemingly universal growth policies actually lead governments to spend money on infrastructure, services, and development in neighborhoods that will help middle-class and wealthy owners and private developers, and take valuable resources away from renters and owners of properties in low-priced neighborhoods.

There is an important similarity in all of government's distributional activities mentioned thus far. None of them focus on market transfer, the ideal distributional action that private property makes possible and that seems by definition to exclude government from involvement. It is often assumed that market transfers are unbiased or fair in terms of distributional consequences because the state is not making the distributional decisions when they happen; instead, the state is protecting markets. In the aforementioned examples, government involvement in distribution is fairly exposed because government is doing something other than protecting a market transfer. Recent scholarship undermines that assumption, suggesting that we need to look critically at governments' distributional decisions not only in nonmarket transfers but perhaps especially in market transfers. Some of the most provocative research on property transfers today is being completed by critics of government support for market transfers of property as unjustified. This scholarship is most promising in its progress toward reimagining possibilities for property rules. These critiques imagine regimes of property with new (although largely based on traditional and indigenous value systems) justifications for property claims (Tsing, 2005). In recent years, charges of "global land grabs" have been made against multinational companies for acquiring massive amounts of property in the global south for natural resource extraction. In a critique of contemporary policy that harkens back to Marx's admonishment of the establishment of private property in land, today's scholars and activists lambast national governments and international agencies for their support of these transfers. They hope that governments and international agencies will institute recognition of property rights based on prior uses such as foraging or species preservation

over market purchases (Borras *et al.*, 2011; Wolford, Borras, Hall, Scoones, & White, 2013).

Researchers must uncover the complicated ways in which modern private property serves public goods or interests. One of the simplest and enduring questions is about how private property distributes resources. The question “Who owns what?” can be one of the most challenging to answer, but online records about land may change that. We also need to know how publics (governments, social movements, and citizens) get owners what they have. How do governments control property distribution through rules and policies on contracts, privatization, inheritance, marriage and divorce, regulation, and reparations or damage compensation? How do changing laws restrict or expand private property rights—for instance, by demarcating new forms of intellectual property or expanding governments’ civil forfeiture powers? How are social movements fomenting these changes? Social scientists should track the strategies, successes, failures and unintended consequences of movements targeting the state on the right and the left. We should describe libertarian and neoliberal activism in the name of liberal property rights as well as left-leaning anti-land grab and squatters’ movements promoting alternative notions of resource governance. Indeed, researchers should look even beyond government and activists to citizens as publics: to research what property means in people’s everyday lives, and how those understandings are contested. This research into property-as-interpretation must attend to how people treat property as value, including but not limited to market price. And some of the most promising research will uncover bottom-up innovations in which everyday understandings of property as public and private become realized legally in new forms of tenure. We need to know about community land trusts and cooperatives—entities that *own* increasing amounts of real property—and about business improvement districts and land banks—entities that *govern* increasing amounts of property. In these ways, researchers can expose how emerging forms of interpretation and governance of property blend public with private interests.

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