Introduction

In 1913, American legal scholar Wesley Newcomb Hohfeld published an article entitled "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning."[1] The purpose of that work, as well as of its 1917 sequel, bearing a similar name, "Fundamental Legal Conceptions as Applied in Judicial Reasoning,"[2] was quite straightforward. Hohfeld sought to dispel the tendency to blend non-legal and legal conceptions. He viewed property as a striking example, a term that both lawyers and laymen use with "no definite or stable connotation," employing it at times to indicate the physical object to which various legal rights relate, and at other times to denote the legal interest itself.[3] Hohfeld thus endeavored to identify the distinct traits of legal conceptions in general, and property in particular.

Hohfeld focused attention on the long-standing division between *in rem* and *in personam* relations, a taxonomy that had traditionally separated property rights from obligatory, typically contractual ones. He viewed the common conception of *in rem* rights as rights "against a thing," which follows up on the literal meaning of the Latin phrase, as "intimated, crude, and fallacious," one that only serves as a "stumbling-block to clear thinking and exact expression."[4]

To illustrate this fallacy, Hohfeld defined different attributes of *in personam* legal interests by delineating dyads of "jural opposites" and "jural correlatives" that govern legal relations between persons. He then argued that the same sets of legal relations apply to *in rem* rights – save for the large, indefinite number of persons who may be bound by these

[1] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16.
[2] Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 *Yale Law Journal* 710.
[3] Hohfeld, "Some Fundamental Legal Conceptions," 20–5.
[4] Hohfeld, "Fundamental Legal Conceptions," 720–1.

interpersonal legal relations.[5] The traditional dichotomy between property and personal obligations was thus largely artificial.

The rest is history. Over the past one hundred years, the concept of property has been shaken and rattled by numerous theoretical schools, each trying to claim superiority in extracting a new core meaning for property or in showing rather that property is in fact an empty concept. This influx of academic debate has also been due to the enormous interest in property by various academic disciplines besides law, including philosophy, economics, sociology, political theory, and psychology, each applying its own methodological and theoretical tools to explore this issue.

From legal realism to social theory and critical legal studies, economic analysis of law, new institutional economics, experimental psychology, contemporary moral theories, and up to the current school of new essentialism in legal theory, numerous attempts have been made to disintegrate or reintegrate the idea of property. The result has often been one of an increasing conceptual gap not only among different academic disciplines, but also within legal theory. This disparity points to the ever-present tension between property's broad appeal and the difficulty to devise a conceptual common ground, one that would serve as a basis for a multidisciplinary discourse about the underlying values and ideals that the institution of property should promote.

My theory of property seeks to create such a common ground. It is built on two foundational principles that are intertwined throughout the book and that explain together how the legal institution of property is constructed and developed over time. In so doing, the analysis unravels the process through which moral ideals, social values, and other extra-legal insights about the proper allocation of society's scarce resources could be transformed into a set of legal property interests that are promulgated and then enforced by society's decision-making institutions.

The first foundational principle, presented in Part I (Chapters 1–2), asserts that the legal construct of property possesses certain structural and institutional traits, but that no such inherent essence exists with respect to the substantive content of property norms. This principle thus rejects those versions of the "bundle of rights" model by which property is an inherently empty legal concept, while also challenging essentialist theories according to which property must have an inherent

[5] *Ibid.*, 718–19.

substantive core – typically, the right to exclude – if it is to count as property at all.

Under this principle, the structural and institutional features of property do not dictate a uniform body of substantive norms or a single set of underlying values. It is up to society's institutions to decide whether they would seek to promote values and goals such as just distribution, equality, efficiency, or autonomy through the legal institution of property. Insights from other disciplines such as philosophy, social theory, or economics could play a central role in shaping such goals. But there are certain structural and institutional mechanisms that are essential in transforming such ideals from moral and social concepts into legal ones.

Chapter 1 focuses on the three structural traits of property: the *in rem* nature of property legal interests, the practical constraints on opting out for private ordering in property relations, and the complex public/private interface in property. Chapter 2 articulates the unique institutional features that typify the process of property norm-making in light of its structural features. It studies the relations among different top-down institutions, particularly the legislature and the court, in establishing property's legal framework, while also giving attention to the role that bottom-up institutions such as professional organizations could play in designing property norms. It pays particular attention to the institutional features of employing "legal standards," initially vague legislative provisions filled with content over time by courts or bottom-up bodies.

The second foundational principle, developed in Parts II–IV (Chapters 3–8), suggests that in order to have a clear understanding of the legal construct of property, we must move beyond the paradigms that have led much of the analysis in current theory, typically that of an asset such as land that is privately owned by a single proprietor and governed exclusively by the laws of a national system. While not entirely dismissing the value of what I dub "the Blackacre Paradigm" as a starting point for analyzing the concept of property, I argue that such a paradigm settles for a partial, and often distorted, viewpoint of the way legal property is constructed.

Pursuant to this principle, Part II (Chapter 3) studies the spectrum of property regimes, including private, common, and public property, alongside innovative forms of property hybrids. Part III (Chapters 4–6) investigates the protagonists of property beyond the individual and the state, identifying the key role that intermediate bodies such as

community organizations and business corporations play for both the private and public aspects of property. Part IV (Chapters 7–8) addresses property's greatest challenge ever: moving from a largely domestic legal construct into one that accommodates the increasing social and economic forces of globalization. I argue that the study of the spectrum of property regimes, protagonists of property, and challenges of globalization not only serves to explore new frontiers in property – it is also necessary for understanding the core features of property as a legal construct.

These two foundational principles are closely interrelated throughout the book. To start with, the identification of property's structural and institutional foundations creates a general framework for analyzing property regimes, protagonists, and cross-border challenges. For example, the argument that the structure of property does not mandate a certain substantive content is illustrated in Chapters 3 and 4, in which I show that both the US-style private residential community and the Israeli Renewing Kibbutz have a quite similar structure of property interests and institutional decision-making processes, although these derive from very different ideological backgrounds. The substantive norms shaped by each one of these structurally-similar organizations are thus quite different, reflecting their diverging agendas.

The structural and institutional foundations of property also frame the analysis of the globalization of property, discussed in Chapters 7 and 8. The fact that property legal interests have certain structural traits, including an *in rem* feature, creates a special challenge for a world typified by imperfect globalization and fragmented decision-making powers, a challenge that is qualitatively different from that of moving toward supranational contractual frameworks that apply mostly to the contracting parties and allow greater freedom in private ordering. Moreover, the heterogeneity of property protagonists across different societies also impacts the way in which bottom-up or top-down institutions, such as arbitration tribunals deciding bilateral investment disputes, could resort to legal standards to order property relations across borders.

At the same time, the study of property regimes, protagonists, and global challenges is instrumental in identifying the structural and institutional features of property. For example, Chapter 5 conceptualizes the business corporation as a "property microcosm." I show that the publicly-traded business corporation regularly has a large number of shareholders, who may be divided further into certain classes, including

majority shareholders, non-controlling institutional investors, and dispersed minority shareholders. Beyond this, the set of legal interests regarding the corporation's assets may also implicate creditors, suppliers, workers, and the shareholders' personal creditors, who otherwise do not have contractual privity among them and must therefore be governed by *in rem* legal powers and priorities. I argue that property theory's general disregard for the business corporation may result from the alleged incongruence of the business corporation with the Blackacre Paradigm. Ownership in the business corporation is separated from control, at least to some extent, and it does not seem to boil down to a single substantive core of a right to exclude. But this is exactly one of the chief insights offered in this book. The structure of property does not follow a single normative blueprint. The business corporation, as a key protagonist of property, demonstrates that the set of legal powers and priorities may take other forms, while preserving property's general structure.

This point is demonstrated further in Chapter 6, which shows how the corporation could be utilized as an institutional mechanism to resolve long-standing property problems that have been traditionally viewed as requiring either pure private action or full-scale public preemption.

The two foundational principles presented above point also to the ways in which much of current theory is both over-inclusive and under-inclusive in conceptualizing legal property. Thus, for example, the new essentialism school, studied in Chapter 1, seeks to extract the core meaning of property by a two-stage methodological move: (a) focusing on ownership as the fundamental property right, and (b) identifying substantive incidents which are the *sine qua non* of ownership, and thus of property in general. This essence has been identified as the right to exclude, or rather, as the right to exclusive decision-making about the uses of the asset.

However, the legal institution of property goes well beyond ownership to include other types of rights such as the lease, mortgage, lien, or servitude, and some of these rights simply do not conform to the core substantive essence that has been attributed to ownership. The essence of the mortgage or the lien is not about the right to exclude or an exclusive power to determine the uses of the asset. It lies, rather, in serving as a security for a debt. The servitude secures or limits a certain use of the asset, but does not grant exclusivity in favor of its holder.

Of course, this does not undermine the role of ownership as a key legal institution, one that often allows for the creation of a solid sense of order,

both formally and practically, in setting up legal powers and priorities with regard to resources. Yet once we understand that ownership is always entangled in a broader set of legal powers and priorities, we also realize that it may make sense to introduce different versions of ownership, while preserving the overall structure of property. It is clear enough that ownership in land or a patent is not equal to ownership of a share in a corporation, and that ownership of a controlling share is not equal to that of a minority share. This means that the attempt to extract the core meaning of property by looking only to ownership undermines the entire set of property interests, while advocating a single substantive core of a right to exclude casts too broad a net to catch the entire field of property norm-making.

The problem of over- and under-inclusiveness also typifies other current property theories, including those that have embraced a highly contextual approach to property to ensure a closer congruence with underlying values, such as the school of "property as interpersonal relations" presented in Chapter 1. While the search for context in devising property powers and priorities is appealing and often can be justified, I argue in the book that it, too, is constrained by property's structural and institutional features, which limit the extent to which underlying values or normative goals, important as these may be, could freely float within property doctrine.

My theory of property seeks to recalibrate the levels of the analysis by trying to toe the fine line between abstract principles and context, richness in the scope of inquiry and a unified theoretical framework, and structural-institutional essence versus prospective normative content. In so doing, this theory features descriptive, analytical, and normative components.

On the descriptive level, the book analyzes a broad variety of real-life property regimes and configurations within the sub-national, national and supranational contexts, from grassroots forms of group order in urban neighborhoods up to international conventions on intellectual property. On the analytical level, the book extracts the structural and institutional core of property and their interplay with substantive norms, conceptualizes the variety of property regimes and protagonists of property, and identifies the key challenges involved with the cross-border legal design of property, building on methodologies from various disciplines.

On the normative level, the book advocates certain substantive blueprints that could promote social goals such as efficiency or fairness better

than is the case under current doctrine. This is done, for example, in Chapter 3, in which I suggest validating informal patterns of local groups' investment in publicly-owned open spaces as a new form of public-common property. Another blueprint is promoted in Chapter 6, which calls to design a special-purpose development corporation that would offer stockownership to condemnees of land taken for development as an alternative to "fair market value" compensation, promoting both efficiency and just distribution.

However, pursuant to the two foundational principles of my theory of property, I do not suggest that such normative strategies define the core of property or otherwise serve as a single criterion for constructing the institution of property. These tentative blueprints merely serve as illustrations of how the structural and institutional features of property can accommodate various normative agendas, and exemplify the process by which such goals could be attained.

The book runs as follows. Part I, 'Structural and institutional foundations,' starts with an inquiry in Chapter 1 into the extensive preoccupation of various academic disciplines with the concept of property, focusing on moral philosophy, social theory, and economics, and the substantial influence that these fields have had on contemporary legal theory, particularly the "law and society" and "law and economics" schools. Seeking to dispel the confusion that often results from this multidisciplinary study, Chapter 1 explicates on the ways in which property is transformed from a moral and social concept into a legal construct. It does so by focusing on the right/value distinction in jurisprudence as a basis for understanding the different focal points of various disciplines, and then by introducing the structural traits of property as a legal construct: the third party (*in rem*) applicability, constraints on opting out, and the unique private/public interface in property. It then moves to show why property structure does not impose content. In articulating how property could accommodate various normative choices, the chapter explains why property cannot be reduced only to the right of ownership or to private property, and why clarity and predictability need not be associated only with a substantive blueprint such as the right to exclude. At the same time, the chapter clarifies why contextualism in property has its limits, and suggests that an effective typology that allows for differentiation while maintaining property's structure could be based on the types of assets that are the objects of property rights.

Chapter 2 completes the picture by identifying the institutional features of property, studying the unique allocation of power among society's top-down institutions, i.e. constitution-makers, legislators, administrative agencies, and courts in designing property norms, while also considering the role played by bottom-up institutions such as professional organizations or private communities. The chapter focuses on the institutional implications of choosing among clear-cut rules and initially vague legal standards in designing statutory norms, viewing the latter as an institutional mechanism that delegates authority to courts or bottom-up institutions in creating thicker content in property norms. Studying legal standards covering both the private and public aspects of property, such as "custom," "reasonableness," "abuse of rights," or "public use," the chapter establishes how such dynamism could be made to fit the structure of property.

Part II of the book, entitled 'The spectrum of property regimes,' studies in Chapter 3 recent developments in private, common, and public property, and observes the real-life proliferation of property hybrids. The latter include forms of Public-Private Partnerships such as the British Private Finance Initiative; private-common mixtures from residential community associations in the United States to the Israeli Renewing Kibbutz; public-common forms of local group investment in publicly-owned open spaces, and tri-layered regimes of community land trusts for affordable housing. Notwithstanding the variations among these property configurations, the chapter identifies a consolidated theoretical basis for mixed property regimes, and articulates the legal design and normative advantages that such hybrids may have over conventional "pure" property regimes.

Part III, 'Protagonists of property: beyond individual and state,' investigates the key position that intermediate bodies such as communities or business corporations hold in property. Chapter 4 focuses on residential communities, studying the intricate relations between community and property. Offering a taxonomy of "intentional," "planned," and "spontaneous" communities, the chapter identifies the details of these different types of communities and assesses the role that property law could play for each one of them, providing either "tailwind," "zero-wind," or "headwind" for these property protagonists.

Chapter 5 conceptualizes the business corporation as a "property microcosm" and identifies its significance in illuminating the structural and institutional traits of property. In their 1932 *The Modern*

Corporation & Private Property,[6] Adolf Berle and Gradiner Means called for a reconsideration of the fundamentals of property law in view of the ever-increasing dominance of productive property and collective capitalism in firms. Eight decades later, I study the tension between property theory's general disregard for the corporation and corporate theory's gradual move from a "nexus of contracts" model to a proprietary view of the firm. The chapter argues that the separation of ownership from control, vertical hierarchy alongside horizontal arrangements, and the tradeoff between majority power and fiduciary duties in the firm can perfectly fit property jurisprudence, once we make the shift toward a structural and institutional theory of property.

Chapter 6, which closes Part III, studies how the business corporation, as a multi-stakeholder legal entity, could play a key role in other property settings that have hitherto been considered to implicate either individual action or full public control. It revisits the long-standing dilemma of devising the optimal strategy for assembling lands from numerous private owners for for-profit development projects, in view of the over-fragmentation of property rights on the one hand, and the fear of under-compensation and abuse of government power on the other. The chapter calls for a harnessing of the business corporation's property features and financial mechanisms to establish a special-purpose development corporation. This corporation would acquire unified ownership in the land, granting condemnees a choice between receiving pre-project "fair market value" and pro rata shares in the corporation that could reflect the land's post-project value.

Part IV, 'The global challenges of property,' addresses property's challenge in transitioning from a domestic legal institution to one that accommodates globalization. Chapter 7 focuses on land as a key source of tension between globalism and localism in property. Land law is traditionally seen as a national construct embedded in principles of territorial control and socio-political structure. But the world is currently witnessing an unprecedented volume of cross-border activities in real estate development and infrastructure projects. This chapter studies current cross-border institutions and legal instruments, such as the property clause in the European Convention for the Protection of Human Rights and Fundamental Freedoms, or investment protection provisions in supranational legal instruments. But it also points to the

[6] Adolf A. Berle and Gardiner C. Means, *The Modern Corporation & Private Property*, revised edn. (New Jersey: Transaction Publishing, 1991 [1932]).

limits of such mechanisms in transforming land into a global commodity, due to problems of institutional incompleteness, normative over-fragmentation, and the complex mixture of law, politics, and culture in constructing land law.

Chapter 8 broadens the scope of inquiry to the entire spectrum of resources, focusing on what is probably the most prominent institutional mechanism currently employed to deal with cross-border property rights: the nearly 3,000 bilateral investment treaties across the globe. Analyzing the extent to which these mechanisms aid in facilitating cross-border economic activity, the chapter cautions, however, against an over-simplistic approach to bridging over non-parities among national property systems. The chapter points to heterogeneity as a central notion that complicates the switching of property from a locally-based institution to a universal concept. It identifies five different types of heterogeneity: (1) cultural heterogeneity among societies in their basic view of property; (2) actor heterogeneity; (3) asset heterogeneity; (4) vertical heterogeneity, i.e. fragmentation of property norms at supranational vis-à-vis domestic levels; and (5) horizontal heterogeneity of overlapping property norms.

The notion of heterogeneity underscores the current tension between property's structural and institutional features and the substantive content of property norms. The fact that different societies have distinctive normative agendas, historical trajectories, and cultural attributes leads to a starting point in which the contents of domestic property doctrines diverge highly from one another. National systems are not likely to simply converge over time through a bottom-up process of local reforms. The prospects of globalization thus depend not only on a general willingness on the part of countries to subject some of their sovereignty in favor of supranational norms or universally agreed-upon values. For the project of global property ordering to succeed, the process of change has to look to the structural and institutional essence of property. It must realize the ways in which the *in rem* applicability, constraints on opting out, and the public-private interface play a key role in identifying the types of resources and property regimes that may be more appropriate for broad applicability across borders. It must also facilitate a much more elaborate institutional coordination among bottom-up and top-down bodies on the national and supranational levels. This is a formidable challenge. Property law has its work cut out for it in the century to come.