

PROPERTY THEORY

Property, or property rights, remains one of the most central elements in moral, legal and political thought. It figures centrally in the work of figures as various as Grotius, Locke, Hume, Smith, Hegel and Kant. This collection of essays brings fresh perspective on property theory, from both legal and political theoretical perspectives, and is essential reading for anyone interested in the nature of property. Edited by two of the world's leading theorists of property, James Penner and Michael Otsuka, this volume brings together essays that consider, amongst other topics, property and public law, the importance of legal forms in property theory, whether use or exclusion are most essential to our understanding of property, distributive justice, Lockean and Grotian theories, the common ownership of the earth and Confucian ideas of property.

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Cambridge University Press
978-1-108-42242-0 — Property Theory
Edited by James Penner , Michael Otsuka
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Legal and Political Perspectives

Edited by

JAMES PENNER

National University of Singapore

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UNIVERSITY PRESS

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CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
 79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
 Information on this title: www.cambridge.org/9781108422420
 DOI: 10.1017/9781108500043

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First published 2018

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Penner, J. E. (James E.), editor. | Otsuka, Michael, editor.
 Title: Property theory : legal and political perspectives / edited by James Penner, National University of Singapore [and] Michael Otsuka, London School of Economics.

Description: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University Press, 2018.

Identifiers: LCCN 2018011057 | ISBN 9781108422420 (hardback) | ISBN 9781108436687 (paperback)

Subjects: LCSH: Right of property. | BISAC: LAW / Property.
 Classification: LCC K721.5 .P795 2018 | DDC 346.04/32—dc23

LC record available at <https://lccn.loc.gov/2018011057>

ISBN 978-1-108-42242-0 Hardback
 ISBN 978-1-108-43668-7 Paperback

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PREFACE

The theoretical consideration of property, and associated concepts such as possession and first acquisition, have long featured in legal and political philosophy, from the voluminous right- and left-libertarian literature which takes 'self-ownership' to be central, to the foundational positioning of property rights in the political theories of figures as diverse as Grotius, Locke, Hume, Smith, Hegel and Kant. The essays collected here show the continuing vigor of scholarship in this area.

On the legal theoretical side of the ledger, our first four essays bring pressure to bear on several popular ideas which have tended to shape the discourse in this area. Lisa Austin's essay challenges the notion that property is, for the most part, shaped by private law considerations, pointing out the way private law doctrine is shot through with public law considerations. Larissa Katz's essay reveals the relevance of property 'forms', like the trust, arguing that any Hohfeldian analysis which discounts the importance of such forms undermines our ability to reason about interpersonal relations that property law promotes and protects. For their parts, both James Stern and Christopher Newman interrogate in different ways the recent emphasis many scholars have placed on the right to exclude as the hallmark of the right to private property. Stern chips away at this thought by examining what the right to exclude does and does not achieve in explaining various elements of legal doctrine. Relatedly, but from a different angle, Newman argues that the use of property, or the right to use property, stands as a better essential or defining element of property rights than does the right to exclude.

Turning to political perspectives on property theory, the chapter by Nicholas Sage considers the justice of the original acquisition of property rights and contends that theorists have overcomplicated this issue, proffering accounts of acquisition that overlook a more parsimonious and illuminating account focused on respect for choice. The next three essays, by Michael Otsuka, James Penner and Norman Ho, each explore a different dimension of John Locke's continuing grip on our understanding of

property and the considerations that make property a just institution, if it is. Otsuka defends an egalitarian version of the Lockean ‘enough and as good’ proviso and argues that recent attempts to downplay its contemporary relevance fail to succeed. Penner, by contrast, focuses on Locke’s spoilation proviso and attributes a theory of justice in exchange to Locke to argue that scarcity in land does not lead, necessarily, to distributive injustice. Ho examines two Confucian writers, each of whom considered the nature of property rights, to show parallels with, but also distinctions between, their thought and Locke’s. Our final chapter, by Johan Olsthoorn, explores Grotius’s conception of property and questions the uses to which it can be put in the modern era, taking long-standing questions about the idea of ‘the common ownership’ of the earth as its focus.

We commend these essays to our readers and trust they will find them as intellectually stimulating as we have throughout the process of our editorship.

The editors and contributors would like to acknowledge the support of the National University of Singapore Centre for Legal Theory for hosting the workshop at which these chapters were first presented, and the generous financial support provided by the Singapore Ministry of Education in the form of Academic Research Fund (Tier 1) Research Grant No. R-241-000-141-112. We are also exceptionally grateful to Kim Hughes, Gemma Smith, Laura Blake and Geetha Williams at Cambridge University Press, and to Li Zhongsheng for editorial assistance.

James Penner and Michael Otsuka