1 LIBERAL PROPERTY

A long tradition in Western political thought connects property and liberalism. John Locke is probably the most familiar liberal theorist to give property a place of honor in his account of the state. But Locke, whose property theory is fraught with difficulties,¹ is certainly not the only one. The right to property is often understood as one of the necessary implications of the status of individual natural persons as free and equal, which may explain its inclusion in the Universal Declaration of Human Rights.²

But what do we mean when we invoke liberalism’s core commitments to freedom and equality as property’s normative premise, and how do these underpinnings impact property law? This introductory chapter provides a short (and necessarily partial and sketchy) synopsis of my answer to this question, which the following chapters elaborate, refine, and defend.

FROM AUTONOMY TO PROPERTY

The core claim of this book is that an analysis of property needs to start from the mainstream liberal tradition of the past century, that is, with a concern for individual autonomy, self-determination, and self-authorship, ensuring to all of us as free and equal individuals the possibility of writing and rewriting our own life stories. This deep and widely shared commitment to people’s most fundamental right to self-determination appropriately dominates the central political, legal, and philosophical debates. In more recent times, however, this tradition has, surprisingly, almost disappeared from works on private law generally and on property law specifically.³
Property is not the most crucial precondition of personal self-determination; health, education, and means of subsistence are surely more basic. Nonetheless, property does play a distinctive and irreducible role in empowering people. It provides them some temporally extended control over tangible and intangible resources, which they need in order to carry out their projects and advance their plans. The authority that property confers on owners facilitates their ability to determine and pursue their own goals.

Appreciation of property’s contribution to autonomy highlights the most fundamental failure of the prevalent view that property is a means for the maximization of welfare. If the private authority of owners serves as a significant self-determination resource, property law cannot be solely dependent on its contribution to the social good. Some sphere of private ownership is imperative in a liberal law even if – say, due to technological advances – eliminating ownership would be welfare-maximizing.

Property’s contribution to self-determination is also vital for an understanding of law’s requirement that others respect an owner’s authority, which is by no means obvious. Quite the contrary. Without suitable justification, law’s demand (or even expectation) that non-owners – whose right to self-determination is equally important – defer to owners’ authority regarding what to do with an object seems arbitrary and unjust.

The class of nonowners, like that of owners, encompasses everyone: After all, everyone is an owner of something. But this truism does not imply that property is always justified or that all property systems are equally justified. Rather, the privileged authority invested in owners through property – the normative power they have over others – implies that property law needs to be answerable to these others – the subjects of this authority. The interpersonal vulnerability generated by property suggests that this justificatory standard is quite onerous. While not everyone needs to accept every individual claim to every particular resource, showing that everyone should accept some abstract idea of property is not enough either. For a property system to be justified, its animating principles must be acceptable.4

Because the private authority of owners plays a key role in ensuring individual autonomy, property can be justified if property law not only

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relies upon but is also guided by our foundational duty to respect each other’s self-determination. Thus, while property writ large is private authority simpliciter, liberal property conceives of that authority as a means of self-determination. In other words, whereas property systems assign private authority over resources in numerous ways, property law can face its formidable justificatory challenge only if it carefully follows property’s autonomy-enhancing function. Accordingly, liberal property conceptualizes property as an empowering device in the service of people’s self-determination. It understands this contribution to self-determination as property’s telos.

Property systems vary widely in the way they allocate normative powers to people and cannot be expected to perform uniformly concerning human empowerment. Some of these differences reflect varying environmental, economic, social, cultural, and technological circumstances. But the justifiability of any particular property system is still a function of its performance in light of these circumstances vis-à-vis property’s telos, namely, its support for people’s autonomy. In this book, I unpack this proposition and study its implications, but one essential clarification is required at the outset: Performing this function, though necessary, may not be sufficient.

Property cannot be adequately justified simply by reference to the benefits by definition common to all, which derive from the potential of being an owner in a property system that, as a whole, is autonomy-enhancing. Instead, in a liberal polity, people have a right to the effective realization of property’s autonomy-enhancing potential. This requirement implies that property must rely on a robust background regime that guarantees the material, social, and intellectual preconditions of self-authorship to everyone, together with the authority typical of full private ownership.

Specifying the details of such a background regime exceeds the scope of this book – a theory of liberal property is neither a blueprint nor a full-blown theory of justice. The significance of a liberal theory of property, however, goes beyond the intricacies of property law. Property is a keystone of our economic, social, and political system, and the impact of how we shape it and understand it is therefore far-reaching, as my discussion of markets, especially labor markets, will clearly show.
Consequently, the commitment to individual autonomy in a liberal polity dominates not only the justification of property but also its constitution and thus its most fundamental legal features. Private authority cannot possibly exhaust the idea of liberal property because a genuinely liberal property law proactively expands people’s opportunities for both individual and collective self-determination, while carefully restricting their opportunities for interpersonal domination.

A liberal property system thus needs more than one form of property, offering prospective owners (and other property right holders) a choice of options for both individual and communal self-determination, while constantly remaining attentive to the concerns of nonowners. These concerns are intrinsic to property because the instantiation or expansion of property necessarily limits nonowners’ liberty. Hence, liberal law should ensure both that no private authority can be claimed in excess of what is required for owners’ self-determination, and that such authority is consistent with the self-determination of others.

In a genuinely liberal polity, then, law must be made to rest on the three pillars of the autonomy-enhancing conception of property:

1. Circumscription of owners’ private authority to ensure that it follows property’s contribution to self-determination
2. Creation of a structurally pluralistic inventory of property types offering people real choice
3. Compliance of owners’ powers with relational justice to verify that property does not offend the principle of reciprocal respect for self-determination substantiating its legitimacy

A liberal theory of property highlights its autonomy-enhancing telos and studies its implications in order to push property law toward the fulfillment of this implicit promise. I have made that my mission in this book.

**CAREFULLY DELINEATED PRIVATE AUTHORITY**

Self-determination involves planning. Although people can obviously change their plans and autonomous persons should be entitled to
Carefully Delineated Private Authority

do so, planning is intrinsic to the right to self-determination. In turn, the ability to plan requires some horizon of action, which is facilitated by the temporally extended private authority over resources that property typifies. Thus, property is conducive to people’s ability to pursue meaningful projects and goals, be it on their own or with the cooperation of others.

Insofar as property’s private authority advances the autonomy of owners along these lines, they can justifiably expect others to respect it and the law rightly vindicates this expectation. Property’s private authority – the interpersonal power it generates – is thus justified by reference to its potential contribution to the owners’ self-determination. The private authority established by any given type of property, therefore, needs to be adjusted to this contribution. Carefully delineated private authority is the first pillar of liberal property.

Certain types of property contribute to self-determination only indirectly, and a liberal property law needs to structure these types to prevent them from involving an exacting private authority. Circumscribing the private authority that these property types instantiate, then, does not rely on public requirements from owners to support state responsibilities but follows directly from the liberal justification of property. Property’s private authority should be delineated so that owners’ interpersonal power is indeed necessary for their self-determination.

The paramount outcome of this principle is that the private authority attached to commercial property types – notably to ownership of means of production – must be narrowly circumscribed. A liberal theory of property should not belittle the instrumental role of these resources’ ownership as a means for satisfying people’s preferences and promoting their welfare, but cannot ignore that private authority over these resources has no freestanding value either. Hence, given that private authority equals interpersonal power, an autonomy-enhancing property law must be particularly vigilant in circumscribing this power. This conclusion dramatically affects the scope of managerial authority, and thus of workers’ rights, shaping the liberal idea of a just labor market.

Finally, the combination of property’s immanent justificatory challenge and the truisms of changing circumstances and new needs and
opportunities implies that liberal property must pay careful attention to
the requirement of dynamic changes in the configuration and distribu-
tion of property rights. As a result, liberal property needs to be closely
aware of property transitions that will invariably upset owners’ plans.
The temporal dimension of property’s autonomy-enhancing telos and
its ability to face up to its burdensome justificatory challenge is, as
I show toward the end of this book, vitally significant to the liberal
“property pact” underlying a liberal regime of property transitions.

STRUCTURAL PLURALISM

Property manifests itself in law in a nuanced, contextualized, and
multifaceted fashion. The profound heterogeneity of property types
causes difficulties for monistic theories that look for the structural core
of property. From an autonomy-based standpoint, however, this multi-
plicity is a virtue rather than a concern since it ensures an inventory of
alternatives from which people can choose. Structural pluralism is thus
a constitutive feature of a liberal property law, the second pillar of a
liberal conception of property.

Property law should be heterogeneous because there are many ways
in which property can support our self-determination, either on our
own or – quite often – with others. The internal life of property is
accordingly structured through sophisticated governance mechanisms
that facilitate various forms of interpersonal relationships, which would
not be possible without an enabling legal infrastructure. Think of
condos, co-ops, common-interest communities, joint tenancies, lease-
holds, and trusts as examples of the existing inventory of land-
ownership.

Awareness of property’s contribution to autonomy, then, implies
celebrating the pluralistic architecture of property law and its many
options. Instead of overemphasizing the common denominator of these
diverse types or marginalizing certain types as peripheral exceptions to
some stipulated core – say, the right to exclude – property is better
understood as an umbrella for a limited set of types. These types serve
as default frameworks of interpersonal interaction regarding various
resources. They thus need to be properly standardized and their
interpretation and evaluation should, by and large, look to their specific “local” animating principles.

At its best, this plurality of types enables property law to offer varying balances between the different (intrinsic and instrumental) values that property can serve – independence, personhood, community, and utility – in diverse social settings and respecting a variety of resources. Each of these property types constitutes a distinctive framework of private authority; each offers its own recipe for some temporally extended control that people can have over a resource, either as individuals or as members of a community of owners. When the law’s menu of property types is sufficiently rich for each major sphere of human action, it offers people a range of meaningful choices for resource governance and co-governance that supports self-determination.

The obligation of the liberal state to facilitate meaningful choices in important spheres of life implies enabling people’s autonomy by ensuring this intra-sphere multiplicity, namely, by actively shaping distinct property types that function as partial functional substitutes. This obligation is not a matter of strict demand-driven analysis, as an efficiency-based account would have prescribed. Rather, property plays a crucial role in delivering on the liberal promise of self-determination. The state can betray this mission not only by having bad or too much property law. The absence of law, or an attempt to limit property’s heterogeneity, will have the same effect. The law’s architects, then, are required to develop more types of property, especially in the contexts of housing and the workplace.

RELATIONAL JUSTICE

If property is indeed premised on our foundational duty of mutual respect for self-determination, this duty must apply not only to nonowners but also to owners. Law needs to be attuned to property’s effect on self-determination in various contexts of people’s interactions as nonowners. The impact of interpersonal contacts on self-determination affirms and vindicates the claims of people – owners
and nonowners alike – to mutual respect for self-determination, that is, to relational justice, the third pillar of liberal property.

Relational justice is a conception of interpersonal rather than distributive justice that is notably different from corrective justice, which stands for reciprocal respect for independence. Relational justice focuses on the self-determination of nonowners, but need not, should not, and indeed does not, override the self-determination of owners, an outcome that would have been self-defeating. Relational justice does not undermine the autonomy-enhancing private authority that property creates. Homeowners, for example, are rightly shielded from legal scrutiny of their invitation policy.

By contrast, systemically hierarchical property regimes – such as feudalism, where even tenants under so-called free tenures are obliged to perform services for their lords – represent clear violations of relational justice. Condemning feudalism and similarly repressive property regimes is of course not very controversial and few property theories would celebrate them. But grounding the objection to these regimes on relational justice hints at the breadth and depth of the critical implications ensuing from liberal property’s earnest commitment to it. Relational justice limits owners’ authority and, at times, also entails burdens and obligations.

Thus, the owners’ power of refusal to sell or lease, or to prevent nonowners from entering their land or using their resources, must be – and indeed is – constrained. Common-interest communities law, landlord–tenant law, and the law of public accommodations, all recognize nonowners’ claims to access and, more broadly, to respect. Instances of discriminatory exclusion deny nonowners an equal right to self-determination and should thus be viewed (at least prima facie) as ultra vires, abusing the institution of property for a purpose that contravenes its telos.

Similarly, the commitment of property law to relational justice also explains and justifies some responsibilities incumbent on property rights holders, such as specific burdens of mitigating accidental mistakes by nonowners. Neither the anti-discrimination prescription nor these affirmative obligations depend on any kind of aggregate cost–benefit analysis or on the balance between the right to property and any other conflicting right. Relational justice is not a regulatory or
constitutional imposition and its prescriptions immediately follow from the meaning of liberal property itself.

AGAINST THE CURRENT

These propositions, which I attempt to establish in these pages, challenge some conventional views about the nature of property and its liberal foundation. After the bundle-of-sticks picture of property endorsed in the Restatement of Property had for decades been regarded as the conventional wisdom,⁹ Blackstone’s conception of property as “sole and despotic dominion”¹⁰ has been resurrected as the regulative idea of private property.¹¹ To be sure, no one seriously thinks any longer that property always entails unqualified dominion. (Blackstone himself did not think so either,¹² even though this view of property is by now intimately connected with his name.) Some theorists, however, again argue that the right to exclude (or its cognates) is the most defining feature of property. The Blackstonian conception seems to be ingrained in the narrative of property,¹³ almost inviting the claim that “the differentiating feature of a system of property [is] the right of the owner to act as the exclusive gatekeeper of the owned thing.”¹⁴

This dominion conception of property is closely related to the Kantian understanding of property’s normative task. Property, in this view, constrains others because it comprises the external means that a person uses in setting and pursuing purposes, which implies that “if someone interferes with your property, he thereby interferes with your purposiveness.”¹⁵ In other words, if people are to be allowed “to exercise their freedom by controlling external objects of choice,” the objects are to be subjected to the sole discretion of the choosing party so that all others are bound by the owner’s will.¹⁶

As the preceding preview indicates and the following chapters flesh out, this (renewed) orthodoxy of property as a stronghold of interpersonal independence fails both descriptively and normatively. Descriptively, the dominion understanding of property unduly disregards property’s structural pluralism and property’s compliance with relational justice. These features of property are particularly conspicuous
in contemporary society, where people live more closely together, especially in urban environments. But they are also constitutive of liberal property. The dominion conception of property obscures these features as well as the inherent limitations of private authority in its liberal rendition. Therefore, it is normatively disappointing as well.

Only by grounding property in liberalism’s fundamental commitment to individual autonomy can we secure its legitimacy. Property can, should, and in many respects already does enhance our autonomy, namely, the freedom to determine our own life in the context of living with others. A liberal conception of property both justifies and refines the (carefully delineated) private authority property instantiates. Moreover, for liberal property, structural pluralism and relational justice are neither discretionary additions to the private authority of property nor external limitations to it. By founding property on people’s right to self-determination, a genuinely liberal law insists on property resting on the three pillars of carefully delineated private authority, structural pluralism, and relational justice.

A BRIEF ROADMAP

A liberal theory of property shows how a foundational commitment to autonomy justifies and shapes property law in a liberal polity, offering (1) a legal theory for (2) property law in (3) a liberal polity. Chapter 2 refines this mission by elaborating on these three components. Having done so, I turn in the next three chapters to my main task: exploring the three pillars of a genuinely liberal property law – carefully delineated private authority, structural pluralism, and relational justice. Some readers may find that following this sequence is helpful, while others may prefer turning to Chapter 2 only after reading Chapters 3–5.

Chapter 3 conceptualizes property as an empowering device crucial to people’s self-determination. Property is a power-conferring institution that can only be legitimate if and insofar as the authority it confers, which enables the instantiation of its intrinsic and instrumental values, empowers us in our ultimate right to self-determination. Chapter 3 refines this formidable justificatory challenge and its important implications for the architecture of property and for the background