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 such 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.

JAMES PENNER is Kwa Geok Choo Professor of Property Law and Vice Dean for Research in the Faculty of Law, National University of Singapore, and a barrister of Lincoln’s Inn. Professor Penner has written extensively on the law of trusts, private law more generally, and the philosophy of law, with special interests in the philosophical foundations of the common law, legal reasoning and property theory. He is the author of The Idea of Property in Law, which won the SPTL first prize for outstanding legal scholarship (now renamed the SLS Birks Prize). He edited (with Henry S. Smith) The Philosophical Foundations of Property Law (2013) and is author of Property Rights: A Re-examination (forthcoming).

MICHAEL OTSKA is a professor in the Department of Philosophy, Logic and Scientific Method at the London School of Economics. His research interests encompass political philosophy, political economy and normative ethics. He is the author of Libertarianism without Inequality (2003), in which he explores the relations among self-ownership, world-ownership and equality from a Lockean left-libertarian perspective.
PROPERTY THEORY

Legal and Political Perspectives

Edited by

JAMES PENNER
National University of Singapore

MICHAEL OTSUKA
London School of Economics
CONTENTS

List of Contributors vii
Preface ix

1 The Public Nature of Private Property 1
LISA M. AUSTIN

2 Legal Forms in Property Law Theory 23
LARISSA KATZ

3 What Is the Right to Exclude and Why Does It Matter? 38
JAMES Y. STERN

4 Using Things, Defining Property 69
CHRISTOPHER M. NEWMAN

5 Is Original Acquisition Problematic? 99
NICHOLAS SAGE

6 Appropriating Lockean Appropriation on Behalf of Equality 121
MICHAEL OTSUKA

7 Rights, Distributed and Undistributed: On the Distributive Justice Implications of Lockean Property Rights, Especially in Land 138
JAMES PENNER

8 Lockean Property Theory in Confucian Thought: Property in the Thought of Wang Fuzhi (1619–1692) and Huang Zongxi (1610–1695) 161
NORMAN P. HO
9 Two Ways of Theorising ‘Collective Ownership of the Earth’  187

Johan Olsthoorn

References  215
Index  231
CONTRIBUTORS

LISA M. AUSTIN Professor of Law at the University of Toronto

NORMAN P. HO Associate Professor of Law at the School of Transnational Law, Peking University

LARISSA KATZ Associate Professor and Canada Research Chair in Private Law Theory at the Faculty of Law, University of Toronto

CHRISTOPHER M. NEWMAN Associate Professor of Law at the Scalia Law School, George Mason University

JOHAN OLSTHOORN Assistant Professor in the Department of Political Science, University of Amsterdam and Postdoctoral Fellow of the Research Foundation Flanders (FWO) KU Leuven

MICHAEL OTSUKA Professor of Philosophy at the London School of Economics

JAMES PENNER Kwa Geok Choo Professor of Property Law at the National University of Singapore

NICHOLAS SAGE Assistant Professor of Law at the London School of Economics

JAMES Y. STERN Associate Professor of Law at William & Mary Law School
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, offering 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 spoilage 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